

CONFIDENTIAL  
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STATE OF OHIO  
DEPARTMENT OF COMMERCE  
DIVISION OF FINANCIAL INSTITUTIONS

IN RE: : CASE NO. 06-0168-LOD  
: :  
MARK A. KIFER, SR. : JANE S. ARATA, HEARING OFFICER

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ADMINISTRATIVE HEARING OFFICER'S  
REPORT AND RECOMMENDATION  
Issued November 9, 2006

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I. FINDINGS OF FACT

A. Background.

This matter came before Jane S. Arata, an attorney licensed to practice law in Ohio who was duly appointed by the Ohio Division of Financial Institutions ("Division") to serve as Hearing Officer for this hearing in accordance with the Ohio Administrative Procedure Act, Ohio Revised Code ("R.C.") Chapter 119. Respondent Mark A. Kifer, Sr. ("Respondent") requested the hearing on the allegations in the Division's Notice of Intent to Deny Loan Officer License and Notice of Opportunity for a Hearing ("NOH"). The hearing was held September 27, 2006, at 77 South High Street, Columbus, Ohio.

The Division alleged that Respondent, among other things, violated R.C. 1322.07(A), (B), and (C) because he did not properly complete the loan officer license application he submitted to the Division. The Division also claims that because he failed to properly complete his loan officer license application, his character and general fitness do not command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act as required by R.C. 1322.041(A)(5).

Mindy Worly, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. Respondent appeared *pro se* and testified at the hearing. At the hearing, State's Exhibits 1 through 9 and Respondent's Exhibits A through G were admitted into the record.

**B. Jurisdiction and Procedural Matters.**

1. The Division issued the NOH to Respondent on March 8, 2006, and served it upon him by certified mail. (State's Exhibit 6.)
2. The Division received Respondent's request for a hearing within thirty days of the date the NOH was sent to him by certified mail. (State's Exhibits 6 and 7.)
3. The Division initially scheduled the hearing for a date more than seven and less than fifteen days after the date it received the hearing request. The hearing continued twice and was then set for September 27, 2006. Respondent was notified in writing of the date, time, and place for each scheduled hearing in this matter. (State's Exhibits 7, 8, and 9.)
4. Respondent received the NOH by certified mail and notice of the date, time, and location for each scheduled hearing date.

**C. Respondent's Loan Officer Application.**

5. Respondent is an Ohio resident who wants to conduct business in Ohio as a mortgage loan officer. (State's Exhibit 1.)
6. On May 2, 2002, amendments to Ohio's Mortgage Broker Act became effective that required mortgage loan officers to be licensed by the Division. R.C. 1322.02(B). Ohio mortgage loan officers were not required to be licensed prior to May 2, 2002.
7. Respondent signed his Loan Officer Application ("Application") June 28, 2005, and submitted it to the Division. The Division received the Application on June 29, 2005. (State's Exhibit 1.)
8. Respondent believed that he did not have any criminal convictions on his record when he signed and submitted his Application. He marked "No" to Question 5 on the Application, which asked:

Have you or has any company for which you have been an officer, or more than 5% owner or director, ever been convicted of **any criminal offense**? Exclude minor misdemeanor traffic and parking offenses. (DUIs and DWI's are criminal offenses.) Yes ☐ No ☐

If yes, submit a detailed explanation of the facts and circumstances, which gave rise to each charge and a certified copy of the journal entry evidencing the disposition of each charge.

(Application, State's Exhibit 1, emphasis and boldface type in original.)

9. After the Division received the Respondent's Application, it requested additional information from the Respondent on a 1983 Ohio criminal conviction. The Respondent promptly provided the Division with information regarding the conviction. (State's Exhibits 3 and 4.)
10. Respondent had a 1983 Ohio criminal conviction for a misdemeanor criminal offense not enumerated in 1322.031(A)(2). Respondent was shocked to learn that this was on his record when the Division asked about this after it received his Application. His attorney in that matter and the court told him that the conviction would be expunged on or before the end of 1986. (State's Exhibits 1 and 4; TR at 12-14, 18-21, 63-64, 66-67, 158, 166.)
11. On December 7, 2005, the 1983 conviction was expunged and the relevant records sealed. The Hearing Officer, after observing the Respondent's demeanor and testimony at the hearing and reviewing the record in this matter as it pertains to the licensing standards set forth in Ohio's Mortgage Broker Act, finds and concludes that the now sealed 1983 conviction does not bear a direct and substantial relationship to being a licensed loan officer. It reflects acts of a depressed young man over 23 years ago and does not reflect or indicate anything about his character and fitness to be a loan officer today. (State's Exhibits 1, 4, and 5; Respondent's Exhibit G.)
12. Respondent did not disclose the 1983 Ohio conviction on his Application because he thought it was expunged long ago. Therefore, he thought it no longer existed and did not need to be disclosed. The information he provided to the Division, his hearing testimony, and Mr. Baird's testimony, are consistent and confirm this explanation. (State's Exhibits 1 and 4; TR at 12-14, 18-21, 63-64, 66-67, 158, 166.)
13. The NOH alleges that Respondent's Application should be denied because Respondent provided untruthful information about his criminal background to the Division in that application. The NOH also alleges that Respondent attested on the Application that the information about his criminal background was complete and truthful when it was not. The Division does not claim that the conviction itself is of concern, just the fact that Respondent did not disclose it on his Application. (State's Exhibit 6.)
14. The Division's current loan officer license application ("Current Application") only requires an Ohio resident applicant to disclose whether he or she has been "convicted of or pleaded guilty to any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities," "a defendant in a criminal action in the Federal court system," or "convicted of or pleaded guilty to any criminal offense in a state other than the state where you currently reside." The Current Application would not require an

Ohio resident applicant to disclose the 1983 Ohio conviction at issue. Ohio Loan Officer Application, Revised 12-27-2005, Questions 6, 7, and 8; <http://www.com.state.oh.us/dfi/>. The Hearing Officer takes administrative notice, the equivalent of judicial notice, of the Current Application, on the website maintained by the Ohio Division of Financial Institutions and available to the public. (Copy of Current Application attached.)

15. The Respondent mistakenly believed that his 1983 criminal conviction had been expunged or sealed long before he signed or submitted his Application to the Division. Therefore, he believed that it did not need to be disclosed on the Application. He made a mistake but did not intentionally provide false or misleading information to the Division.
16. The information Respondent provided to the Division in response to Application Question 5 was "complete and true of [his] own knowledge" when he signed and submitted his Application. The Respondent did not omit any information that he thought or knew he should disclose to the Division in response to Application Question 5 when he signed and submitted the Application. He did not try to hide any information from the Division or make any statement that he thought or knew was false when he submitted his Application to the Division.

**D. Respondent's Reputation and Character.**

17. Respondent is a retired minister who served six churches over a period of 23 years. He has a degree in Christian Counseling and is a licensed Christian counselor. He is also a notary public. He helps close residential loans for Improve-It Closing Services and seeks to be a loan officer there. He has worked in the mortgage industry for almost two years and has twenty years of experience in the title industry. He also taught real estate continuing education courses. He has been active in the PTA in his community and helped get an \$84,000,000 levy passed. He received two community service awards for these activities. (Respondent's Exhibits B, C, D, E, F; TR at 22-31, 54-55, 73-78, 96-99, 102.)
18. Respondent submitted affidavits from fourteen individuals who have known him during the past few years through work in the mortgage lending industry and socially. They are favorably impressed with his character and honesty. Some of these individuals testified at the hearing and confirmed that they believe Respondent is honest and of good character. Several individuals testified favorably about the accuracy of his work and his ability to explain issues to customers. (Respondent's Exhibit A; TR at 81-88, 115-154.)
19. The authors of many of the affidavits were not present at the hearing. Thus, even in this proceeding to which the Rules of Evidence do not strictly apply, those affidavits in Respondent's Exhibit A were considered but afforded less weight than they would have been if their authors had testified and been available for cross examination. (Respondent's Exhibit A.)

20. The Hearing Officer finds that Respondent's character and general fitness command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purposes of Ohio's Mortgage Broker Act.

## **II. CONCLUSIONS OF LAW**

### **A. Jurisdiction and Procedural Matters.**

The Division procedurally complied with R.C. Chapter 119 and jurisdiction over this matter has been established.

### **B. Loan Officer License Application.**

1. The Division is the state agency responsible for the licensing and regulation of mortgage loan officers pursuant to the Ohio Mortgage Broker Act, R.C. Chapter 1322.
2. Ohio Revised Code Section 1322.041(A) provides that a loan officer license shall be issued if the Superintendent of Financial Institutions finds that certain conditions are met, including:

(2) The applicant complies with sections 1322.01 to 1322.12 of the Revised Code.

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(5) The applicant's character and general fitness command the confidence of the public and warrant the belief that the business will be operated honestly and fairly in compliance with the purposes of sections 1322.01 to 1322.12 of the Revised Code.

R.C. 1322.041(A)(2) and (5).

3. The Division's alleged bases for license denial cannot be established without consideration of the now sealed 1983 conviction. Therefore, the ability to do so in light of the Journal Entry sealing the conviction and all official records must be determined at the outset.
4. The Journal Entry sealing the conviction and all official records appears to have been issued in response to a motion filed pursuant to R.C. 2953.32. Therefore, the "proceedings in the case shall be considered not to have occurred" unless there is some provision permitting inspection and consideration of the sealed

conviction records such as a subsequent criminal conviction. R.C. 2953.32(C) and (D).

5. Ohio Revised Code Section 2953.33 provides that, in general, "an order to seal the record of a person's conviction restores the person who is the subject of the order to all rights and privileges not otherwise restored by termination of the sentence or community control sanction or by final release on parole or post-release control." R.C. 2953.33(A). A license applicant can, however, be questioned about a conviction that has been sealed but only if the "question bears a direct and substantial relationship to the position for which the person is being considered." R.C. 2953.33(B).
6. Even though the conviction records were not sealed when the Application was filed, further inquiry into it as part of this licensing process is permissible only if it bears a direct and substantial relationship to being licensed as a loan officer. Ohio State Bd. of Pharmacy v. Friendly Drugs (1985), 27 Ohio App.3d 32, 33-35.
7. A license applicant may be questioned about a sealed conviction and the underlying facts when the sealed conviction has a nexus to the license sought due to the nature of the underlying activities and the statutory requirements for licensure. In re Application of Davis (1980), 61 Ohio St.2d 371 (Ohio Supreme Court Board of Commissioners on Character and Fitness' consideration of law license applicant's expunged felony conviction); In re Forster (2005), 161 Ohio App.3d 627 (County Sheriff's consideration of concealed handgun license applicant's expunged receiving stolen property conviction); Szep v. Ohio State Bd. of Pharmacy (1995), 106 Ohio App.3d 621, discretionary appeal not allowed, (1996), 75 Ohio St.3d 1484 (Ohio State Pharmacy Board's consideration of intern license applicant's undisclosed expunged felony conviction); In re Niehaus (1989), 62 Ohio App.3d 89 (Ohio Medical Board's consideration of physician's expunged misdemeanor attempted illegal processing of a drug document conviction based upon acts committed in the course of his practice); Ohio State Bd. of Pharmacy v. Friendly Drugs (1985), 27 Ohio App.3d 32 (Ohio State Board of Pharmacy's consideration of expunged drug convictions of applicants for terminal distributor of dangerous drugs licenses); and Schmitt v. Counselor and Social Worker Bd., 11 Dist. No. 2001-L-234, 2003-Ohio-3496 (Ohio Counselor and Social Worker Board's consideration of professional counselor license applicant's expunged menacing by stalking conviction). In this case, there is no nexus between the 1983 conviction and the license sought.
8. Ohio Revised Code Section 1322.031(A)(2) requires a loan officer license applicant to include in his or her application a statement as to whether he or she has been convicted of or pleaded guilty to any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities.

9. Question 5 on the Application requests information on "any criminal conviction" and seeks disclosure of criminal convictions, like the 1983 one at issue, not required to be disclosed on a loan officer license application by R.C. 1322.031(A)(2). The Division may consider convictions not enumerated in that section as a part of its determination of an applicant's "character and general fitness." R.C. 1322.041(A)(5). Extending that consideration to look at the nondisclosure of a conviction not statutorily required to be disclosed on an application and no longer required to be disclosed by Ohio residents on the Current Application in this licensing process is problematic. Although the 1983 conviction records had not been sealed when the Application was filed, they were sealed before the NOH was issued and before the hearing in this matter. Thus, the issue is whether the Division's interest in pursuing a claim that the nondisclosure of an irrelevant conviction precludes licensure merits review of sealed conviction records. This is not a case in which a conviction that bears a direct and substantial relationship to the license sought was sealed after the application was filed. Instead, the conviction at issue is not even one that itself concerns the Division.
10. Given the nature of the conviction and the circumstances surrounding it, questions about the 1983 conviction do not bear a direct and substantial relationship to being a loan officer. Consideration of the sealed conviction at issue in this case conflicts with Ohio's statutory provisions intended to give first time offenders a clean slate once a court makes specific findings about rehabilitation unless the question bears a direct and substantial relationship to the license sought. R.C. 2953.32 and 2953.33. Questions posed to applicants must be consistent with all parts of the Ohio Revised Code, including those governing sealed criminal records. The authority to seek information from license applicants does not permit the Division to go on a fishing expedition seeking information about convictions, sealed or not, that have no bearing on whether someone will make a competent loan officer. The fact that an Ohio resident applicant applying today would not have to disclose the 1983 conviction evidences that failing to disclose such a conviction does not bear a direct and substantial relationship to being a loan officer.
11. The Journal Entry pertains to a conviction that does not bear a direct and substantial relationship to being a loan officer. The record contains no information regarding any other basis for the sealed conviction to be considered by this Hearing Officer.
12. Therefore, this case must be viewed as if the conviction did not exist. Without the conviction, none of the Division's allegations based upon it can be proven.
13. Furthermore, providing incorrect information on an application about a now sealed criminal conviction that does not bear a direct and substantial relationship to being a loan officer is not a sufficient basis for denying a loan officer license under any of the legal authorities cited by the Division.

14. Ohio Revised Code Section 1322.07(A) prohibits a loan officer license applicant from making any substantial misrepresentation in any license application. The Respondent did not make a substantial misrepresentation by signing and submitting his Application to the Division. He answered Question 5 truthfully based upon his understanding of the underlying events. The answer was "complete and true of [his] own knowledge" when he signed and submitted the Application. More importantly, the failure to disclose a conviction that the Current Application no longer requires an Ohio resident applicant to disclose is not a substantial misrepresentation for the purposes of this licensing process.
15. Ohio Revised Code Section 1322.07(B) prohibits a loan officer license applicant from making false or misleading statements of a material fact. The Respondent, based upon his understanding of Question 5 and his belief that the 1983 conviction had been sealed, answered it truthfully. He made a mistake but he did not try to hide any conviction from the Division or make any statement that he thought or knew was false or misleading when he submitted the Application to the Division. The answer was "complete and true of [his] own knowledge" at that point in time. More importantly, failing to disclose a conviction that the Current Application no longer requires an Ohio resident applicant to disclose is not making false or misleading statements of a material fact for the purposes of this licensing process.
16. Ohio Revised Code Section 1322.07(B) prohibits a loan officer license applicant from omitting statements required by state law from his or her application. Ohio Revised Code Section 1322.031(A)(2) requires a loan officer license applicant to include in his or her application a statement as to whether he or she has been convicted of or pleaded guilty to any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities. That Section does not require the 1983 conviction to be disclosed on the Application. Therefore, the Respondent did not violate R.C. 1322.07(B) by omitting a statement required by state law from any application submitted to the Division.
17. Ohio Revised Code Section 1322.07(C) prohibits a loan officer license applicant from engaging in "improper, fraudulent, or dishonest dealings." Respondent made a mistake but he did not try to hide the 1983 conviction from the Division or make any statement that he thought or knew was false on his application. His answer was "complete and true of [his] own knowledge" when he submitted the Application to the Division. The Respondent did not omit any information that he thought or knew he should disclose from his application. He submitted a truthful response to Question 5 based upon his understanding of that question and his belief that the 1983 conviction had been sealed. These activities alone do not amount to engaging in "improper, fraudulent, or dishonest dealings" for the purposes of R.C. 1322.07(C).



18. There is no basis for establishing any violations of R.C. 1322.07(A), (B), or (C) by the Respondent.
19. The Division, having failed to establish any violation of R.C. 1322.07(A), (B), or (C), has likewise not established any lack of compliance with R.C. 1322.01 through 1322.12 of the Revised Code. Therefore, the record only supports a conclusion that Respondent complies with R.C. 1322.01 through 1322.12 and meets that condition required for licensure by 1322.041(A)(2).
20. The evidence submitted establishes that Respondent's character and general fitness command the confidence of the public and warrant the belief that the business will be operated honestly and fairly in compliance with the purposes of Ohio's Mortgage Broker Act as required by R.C. 1322.041(A)(5).

**C. Records, Information, and Data Pertaining to Sealed Conviction.**

21. Furthermore, the Division's official records, the transcript, this Report and Recommendation, and the exhibits in the record, as well as copies in the hands of counsel and others must be maintained and handled in a manner consistent with R.C.2953.35(A), which, in relevant part, provides:

(A) Except as authorized by divisions (D), (E), and (F) of section 2953.32 of the Revised Code or by Chapter 2950. of the Revised Code, any officer or employee of the state, or a political subdivision of the state, who releases or otherwise disseminates or makes available for any purpose involving employment, bonding, or licensing in connection with any business, trade, or profession to any person, or to any department, agency, or other instrumentality of the state, or any political subdivision of the state, any information or other data concerning any arrest, complaint, indictment, trial, hearing, adjudication, conviction, or correctional supervision the records with respect to which the officer or employee had knowledge of were sealed by an existing order issued pursuant to sections 2953.31 to 2953.36 of the Revised Code, or were expunged by an order issued pursuant to section 2953.42 of the Revised Code as it existed prior to the effective date of this amendment, is guilty of divulging confidential information, a misdemeanor of the fourth degree.

R.C. 2953.35(A).

22. Pursuant to R.C. 2953.35(A), the Division must carefully evaluate the Journal Entry sealing the conviction and all official records to see if it specifically orders the sealing of the pertinent official records of that administrative agency. If it encompasses the Division's records specifically, the Division must the seal its official records and the portions of the record in this case, including this Report and Recommendation, dealing with Respondent's sealed conviction and only release, disseminate, or make available those records, and information or other data concerning the sealed conviction in a manner consistent with R.C. 2953.35(A) and Ohio Revised Code Chapter 2953. If the Journal Entry does not specifically order the sealing of the pertinent official records of Division, the Division may the seal its official records and the portions of the record in this case, including this Report and Recommendation, dealing with Respondent's sealed conviction. Even if sealing of those records is discretionary, R.C. 2953.35(A) requires the Division to only release, disseminate, or make available those records and information or other data concerning the sealed conviction in a manner consistent with R.C. 2953.35(A) and Ohio Revised Code Chapter 2953. In either situation, the materials must be maintained separate from the Division's public files. Counsel representing the Division in this case and the Ohio Attorney General's Office now have knowledge of the sealed conviction and fall within the purview of R.C. 2953.35(A). They should also evaluate the documents, data, information, and the materials in their possession, including this Report and Recommendation, dealing with Respondent's sealed conviction and only release, disseminate, or make available those records and information or other data concerning the sealed conviction in a manner consistent with R.C. 2953.35(A) and Ohio Revised Code Chapter 2953. 1993 Ohio Op. Att'y Gen. No. 93-38 [also cited as Opinion No. 1993-038] (Syllabus at Paragraphs 1, 2, 3, and 4.)
23. Even if the Journal Entry sealing the conviction and all official records does not specifically order the sealing of the Division's pertinent official records, the Hearing Officer strongly recommends that the Division seal its official records and maintain the portions of the record in this case, including this Report and Recommendation, dealing with Respondent's sealed conviction, under seal. Regardless of whether the pertinent records are sealed by the Division, they should at a minimum be segregated from public files and only released, disseminated or made available in accordance with R.C. 2953.35(A) and Ohio Revised Code Chapter 2953. 1993 Ohio Op. Att'y Gen. No. 93-38 [also cited as Opinion No. 1993-038] (Syllabus at Paragraphs 1 and 4.) If the Division does not believe that the records can be sealed without a separate court order, it should obtain such a court order to avoid violating R.C. 2953.35(A) and Ohio Revised Code Chapter 2953. *In re T.F.K.*, 136 Ohio Misc.2d 9, 2005-Ohio-7143.

### III. RECOMMENDATION

Initially, I recommend that the Division seal its official records and maintain under seal the portions of the record in this case, including this Report and Recommendation, dealing with Respondent's sealed conviction and only release, disseminate, or make available those records, and information or other data concerning the sealed conviction in a manner consistent with R.C. 2953.35(A) and Ohio Revised Code Chapter 2953. The Respondent has established the licensing prerequisites set forth in Ohio Revised Code Section 1322.041(A)(2) and (5). Therefore, I respectfully recommend that the Superintendent of the Division of Financial Institutions issue Respondent a loan officer license pursuant to R.C. 1322.041.

Respectfully submitted,

Jané Stempel Arata  
Administrative Hearing Officer  
November 9, 2006