

IN THE MATTER OF: : CASE NO. 04-0345-LOD
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Mark E. Szczepinski : James J. Lawrence, Hearing Officer

I. FINDINGS OF FACT

This matter came before James J. Lawrence, an attorney licensed to practice law in the state of Ohio and duly appointed by the Ohio Division of Financial Institutions (Division) to serve as Hearing Officer for this hearing in accordance with Ohio Revised Code (R.C.) Chapter 119, the Administrative Procedure Act. The hearing was held at 3:00 p.m. on July 6, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Mark E. Szczepinski (Respondent) to consider the allegations in the Division's Notice of Intent to Deny Loan Officer License Application and Notice of Opportunity for Hearing (NOH).

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Anthony D. Siciliano, Assistant Attorney General, from the Executive Agencies Section of the Office of the Attorney General, represented the Division at the hearing. The Respondent appeared without Counsel. At the hearing, State's Exhibits 1 through 8 and Respondent's Exhibit A were admitted into the record.

B. Jurisdiction and Procedural Matters

The Division issued the NOH to Respondent on April 19, 2004 by certified mail, return receipt requested. The Respondent requested a hearing on May 3, 2004. The Division scheduled the hearing for May 14, 2004 but, on its own motion, continued the hearing to a later date. The Division subsequently scheduled the hearing for July 6, 2004. Notice of the date, time and location of the hearing was sent by ordinary mail addressed to the same address as the NOH.

C. Respondent's Loan Officer Application

1. The Respondent filed a loan officer application on June 6, 2003. (Exhibit 1.)
2. As part of the application process, the Division conducted a criminal background check. R.C. 1322.031(B).
3. The background check on Respondent's application indicated that on June 14, 2002, the City of Lorain Police Department charged the Respondent with one count of security sale prohibition. (Exhibit 1.)
4. By letter dated August 18, 2003, the Division required the Respondent to submit a detailed explanation of the facts and circumstances which gave rise to the charge and a certified copy of the journal entry evidencing the disposition and sentence resulting from the charge. (Exhibit 2; TR at 10.)
5. Documents from the Lorain County Court of Common Pleas, Case No. 02CR060483, show that the Respondent was indicted by the Grand Jury for sale of an unregistered security in violation of R.C. 1707.44(C)(1) and that the Court set the case for bench trial on November 19, 2003. (Exhibit 4.) A certified copy of a Journal Entry filed by the Lorain County Court of Common Pleas on June 10, 2004 shows that this case was dismissed. (Exhibit A; TR at 17 – 20.)
6. The Department of Commerce, Division of Securities issued Cease and Desist Order No. 01-046 (Order) to the Respondent on February 21, 2001. (Exhibit 3.) The Order finds that the Respondent solicited Ohio residents to invest in a "mutual fund shares" and "fixed interest rate investments" in The

Cyprus Funds, Inc. that were not registered or exempt from the registration requirements in violation of R.C. 1707.44(C)(1). The Order also finds that:

* * *

(15) [The Respondent] misrepresented to investors the risk and suitability of investing in shares and certificates of deposit in the Cyprus Funds as investments suitable for retirement funds, and stated that it was a safe investment, however, it involved a high degree of risk not generally suitable for investing retirement funds;

* * *

(22) It was not disclosed to the above-referenced investors by [Respondent] that the Cyprus Funds shares were not exempt from the registration requirements under R.C. 1707.02, not the subject matter of an exempt transaction under R.C. 1707.03, 1707.04 or 1707.34, not register by description, coordination or qualification, or not the subject matter of a transaction that has been registered by description;

* * *

(25) In selling securities, specifically the shares in the Cyprus Funds, [the Respondent] engaged in acts and practices, as described in Paragraph (22) in violation or R.C. 1707.44(G).

7. The Respondent signed a consent agreement in which he agreed to the findings and conclusions set forth in the Order. (Exhibit 3.)
8. The Respondent explained that when he went to work for the company that sold the Cyprus Fund investments, he believed that they were running a legitimate business. Since he knew that other brokers were selling the investments, he believed that they were registered securities. Although others have been charged and convicted for their roles in selling the Cyprus Fund investments, the Respondent has not been charged with any violation of law as a result of his role in selling the investments. In fact, no law enforcement personnel have even interviewed the Respondent about his role in selling the investments. (TR at 20 – 24.)

D. Respondent's Reputation and Character.

1. The Respondent did not present evidence in support of his reputation and character.
2. No witnesses appeared at the hearing to testify in support the Respondent's reputation and character.

II. CONCLUSIONS OF LAW

A. Jurisdictional and Procedural Matters.

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

B. Loan Officer Application.

1. R.C. 1322.041(A) provides that a loan officer license shall be issued if the Superintendent finds that certain conditions are met, including, among other requirements not relevant here:

* * *

(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.

2. R.C. 1707.44 (C) provides that no person shall knowingly sell, cause to be sold, offer for sale, or cause to be offered for sale, any security which comes under, among other things, the following description:

(1) Is not exempt under section 1707.02 of the Revised Code, nor the subject matter of one of the transactions exempted in section 1707.03, 1707.04, or 1707.34 of the Revised Code, has not been registered by coordination or qualification, and is not the subject matter of a transaction that has been registered by description;

* * *

3. R.C. 1707.44 (G) provides that no person in purchasing or selling securities shall knowingly engage in any act or practice that is, in this chapter, declared illegal, defined as fraudulent, or prohibited.

C. DISCUSSION

1. The Division determined that the Respondent's loan officer application should be denied because the Respondent's character and general fitness do not 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 the Ohio Mortgage Broker Act as required by R.C. 1322.041(A)(5). The Division based this determination on 1) findings in the Order that the Respondent sold unregistered securities; knowingly misrepresented to investors the risks and suitability of investing in certain unregistered securities; engaged in fraudulent and illegal acts; and violated Ohio securities laws and 2) the indictment of the Respondent for violating R.C. 1707.44(C)(1) in the Lorain County Court of Common Pleas.
2. The Respondent admits that he sold the Cyprus Fund investments and that they were not registered with or exempt from registration with the Division of Securities. However, he asserts that he had reason to believe that the investments were registered. Thus, he asserts, he did not knowingly misrepresent the risks and suitability of investing in the Cyprus Funds investments and he never engaged in fraudulent and illegal acts. The Respondent's assertion is supported at least in part by the Order. The Order does not say that Respondent knew that the investments were unregistered. It simply says that he did not disclose that they were unregistered. Nor does the Order say that he knowingly misrepresented the risks and suitability of the investments. It simply says that he misrepresented the risks and suitability of the investments. Moreover, it does not explain how the Respondent misrepresented the risk and suitability of the investments. The Respondent did in the consent agreement agree to the findings and conclusions in the Order including the finding in Paragraph (25) that he violated R.C. 1707.44(G) when he failed to disclose to the investors that the investments were not registered. Since R.C. 1707.44(G) prohibits knowing violations of the securities law, it could be concluded that when he agreed that he violated R.C. 1707.44(G), he also agreed that he knew that the investments were unregistered when he sold them. However, such a conclusion, by itself without any finding in the Order that the Respondent knew that the securities were unregistered and knowingly misrepresented the risks and suitability of the investments, is too speculative to support the Division's determination regarding the Respondent's character and general fitness.
3. With respect to the Division's finding that the indictment in the Lorain County Court of Common Pleas for selling unregistered securities supports the determination that the Respondent's character and general fitness do not 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 the Ohio Mortgage Broker Act, the Respondent has shown that the Court dismissed this charge. In light of the dismissal and in the absence of other information about the facts that gave rise to the indictment and the subsequent dismissal, the bare indictment alone does not support the Division's determination regarding the Respondent's character and general fitness.

4. The record in this case does not include any other evidence that reflects negatively on the Respondent's character and general fitness. In the absence of such evidence, the record does not support the finding that the Respondent's character and general fitness do not 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 the Ohio Mortgage Broker Act.

III. RECOMMENDATION

The Respondent has met all of the prerequisites for receiving a loan officer license set forth in R.C. 1322.041. Therefore, I respectfully recommend that the Superintendent of Financial Institutions grant the Respondent's loan officer license pursuant to R.C. 1322.041.

Respectfully Submitted,


James J. Lawrence
Hearing Officer
September 2, 2004