

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

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IN RE: : CASE NO. 04-0038-LOD
: :
MCKINLEY TATE, III : JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued January 24, 2005

I. FINDINGS OF FACT

A. Background.

This matter came before Jane S. Arata, an attorney licensed to practice law in Ohio, and 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. The hearing was held on October 7, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent McKinley Tate, III ("Respondent") to consider the allegations in the Division's Notice of Intent to Deny Loan Officer License and Notice of Opportunity for a Hearing ("NOH").

The Division alleged that Respondent was convicted of petty theft in 1995 and violated R.C. 1322.07(A), (B) and (C) by failing to disclose that conviction on his loan officer license application. Therefore, the Division asserted that Respondent is not eligible for a loan officer license pursuant to the Ohio Mortgage Broker Act, R.C. Chapter 1322, for the following reasons:

1. Respondent violated R.C. 1322.07(A), (B) and (C) by failing to disclose the conviction on his application;
2. Respondent has not proven that he is honest, truthful and of good reputation, and that there is no basis in fact to believe that he would not commit such an offense again as required by R.C. 1322.041(A)(3); and
3. 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).

Emily Smith, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. Robert Davis represented the Respondent at the hearing. At the hearing, State's Exhibits 1 through 15 and Respondent's Exhibits A through G were admitted into the record. The Division is to redact any Social Security Numbers from those exhibits. Social Security Numbers are not relevant to any issues in this proceeding and the protection of them is key to the prevention of identity theft.

B. Jurisdiction and Procedural Matters.

The Division issued the NOH to Respondent on January 22, 2004. Respondent's hearing request was received by the Division on February 6, 2004. The Division's February 10, 2004 letter to Respondent set the hearing for February 17, 2004, and continued it to March 16, 2004. The hearing was continued three other times and then reset for October 7, 2004. Two of those continuances were requested by the Division and one by Respondent. The Respondent received the NOH by certified mail and received written notice of the date, time, and location for each hearing date.

C. Respondent's Loan Officer Application and Now Expunged Conviction.

1. Respondent is an individual who seeks to conduct business in Ohio as a mortgage loan officer. (State's Exhibit 1.) (References to pages of the Hearing Transcript will be abbreviated as "TR at {page(s)}".)
2. 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).
3. On May 7, 2002, Respondent signed a Loan Officer Application ("Application") which was then submitted to the Division. The Division received the Application on May 13, 2002. (State's Exhibit 1.)
4. Respondent answered "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 or pleaded guilty to any criminal offense including, but not limited to, theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities.

(Application, State's Exhibit 1.)

5. Respondent's signature on the Application is notarized. Directly above the applicant signature line, the Application states: "Being first duly cautioned, I hereby swear or affirm that I have completed the foregoing Loan Officer Application fully and frankly. The answers are complete and true of my own knowledge." (State's Exhibit 1.)
6. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031(B).
7. Respondent's background check revealed a possible conviction for petty theft in 1995. In response to the Division's inquiry, the Respondent submitted a certified copy of a Maple Heights Mayor's Court record confirming the conviction. (State's Exhibits 2 and 3.)
8. Respondent explained the underlying events in a letter he sent to the Division prior to the issuance of the NOH. Respondent explained in that letter that:

Sometime in the year 1992, I rented some movies from a video rental store. I have rented videos on a regular basis from several sources. I certainly do not remember the exact dates of this particular rental but considerable time went by before I received a summons to appear in court on a charge of petty theft. To the best of my knowledge I had returned the movies and if they were not returned, I certainly did not intend to keep them. I appeared in court as requested, paid the fine, and went on with life. There was certainly no intent to break the law over something as minor as two video movies.

(State's Exhibit 3.)

9. Respondent was in the difficult position of having to prove that he returned videotapes to a store. It is customary in this country for video rentals to be returned to a store without any return receipt being provided to the customer involved.
10. Respondent, now 34 years old, has no other criminal convictions. (State's Exhibit 1; TR at 18, 38.)
11. On June 15, 2004, the conviction was expunged and the records sealed. (Respondent's Exhibit G.)

D. Respondent's Failure to Disclose Conviction on Application.

12. The Respondent did not disclose the 1995 petty theft conviction on his Application. (State's Exhibit 1.)
13. He explained that he did not give the conviction any thought when he was filling out his Application. As far as he knew, his record was clean. The Hearing Officer finds that the Respondent did not realize that he had a criminal conviction for petty theft until after he filed his Application with the Division. He admitted that he made a mistake and credibly testified that he was not trying to provide false information or mislead the Division. (TR at 16-21, 43-44.)
14. Under the circumstances, it is reasonable for a person not in the legal profession to think that a proceeding in a Mayor's Court that resulted in a fine was not a criminal proceeding. This is particularly true in a case involving unreturned video rentals.
15. The Hearing Officer finds that the Respondent made a mistake but he did not try to hide the conviction from the Division or make any statement that he thought or knew was false on the application. The Respondent did not omit any information that he thought or knew he should disclose from his Application.

E. Respondent's Reputation and Character.

16. Respondent is raising four children, aged 6, 7, 10 and 13. He provides for them with income from his employment as a loan officer. Respondent has been a loan officer for the past six years. He is currently a loan officer with Synergy Mortgage Services, Inc. He has closed over one hundred loans. Ninety percent of his business is from referrals. As far as he knows, the Division has not received any complaints against him. Only one loan he worked on was rescinded after he advised the applicant to do that in order to get a better deal. He loves being a loan officer and helping others through his work. Respondent mentors young people from Yo Cleveland through an intern program at his company. In that capacity, he teaches them work skills and about being a loan officer. He is active in the Rights to Passage Organization, which supports the African Center, church, and music in his community. Respondent testified that in his community, he is considered to be an honest, hardworking, dedicated individual with a good heart. (TR at 30-38, 57-59, 46, 61, 69-70.)

17. Mr. F.T. Bradshaw, the Operations Manager for Synergy Mortgage Services, Inc., provided a letter describing his experiences working with Respondent in the mortgage loan industry since 2000. He is Respondent's boss and mentor. Mr. Bradshaw describes Respondent as responsible and trustworthy. Respondent has a solid work ethic and is genuine. (Respondent's Exhibit E; TR at 52-55.)
18. Respondent provided letters from three lenders he has worked with in the mortgage loan industry. David Ulm's letter compliments Respondent's work on a particular closing. Mr. Ulm describes Respondent as knowledgeable and efficient. William Roberts, who has done business with Respondent for over two years, describes him as honest and trustworthy. He stated that the deals Respondent submitted to him were good shape and described Respondent as "an asset to this business." Thomas Levinstein states that Respondent is conscientious and has an honest work ethic. All of these lenders were in the position to review Respondent's loan files. (State's Exhibit 5, attached letters; TR at 62-64.)
19. Deborah Wilson, from Mountaineer Title Agency, Inc., provided a letter describing her experiences with Respondent in the mortgage loan industry. She has closed the majority of Respondent's loans. Ms. Wilson described Respondent as "highly competent, forthright and honest." She also stated that he is conscientious, timely and professional. (State's Exhibit 5, attached letter; TR at 66-67.)
20. Christine Kerr, from LandAmerica / Lawyers Title, provided a letter describing her experiences with Respondent in the mortgage loan industry. She has known Respondent for a couple of years. Ms. Kerr described Respondent as professional, courteous, sincere and honest. (State's Exhibit 5, attached letter; TR at 68-69.)
21. Crystal Williams, an appraiser from Expertise Appraisal Services, provided a letter describing her experiences with Respondent in the mortgage loan industry. Ms. Williams described Respondent as responsible, reputable, honest and highly organized. (State's Exhibit 5, attached letter; TR at 68.)
22. Respondent also provided references from two clients who have known him for two to three years. Both had good experiences with him and consider him to be professional and of good character. (Respondent's Exhibit F; TR at 55-56.)
23. Joseph T. Jones provided a letter on Respondent's behalf. He has known Respondent for over fifteen years. Mr. Jones states that Respondent is "a dependable, trustworthy and reputable individual." He further states that Respondent is "an asset not only to the mortgage business, but also to society as a whole." (State's Exhibit 5, attached letter; TR at 64.)

24. Respondent also provided other letters from individuals who have known him for several years and speak highly of his reputation in the community. It is clear that he is well regarded and considered to be a man of integrity in his community. (State's Exhibit 5, attached letter; TR at 65, 68.)
25. The Hearing Officer found Respondent to be honest and truthful at the hearing. He was professional and courteous at the hearing. He is not likely to commit the petty theft offense of which he was convicted again.
26. The evidence establishes that Respondent is honest, truthful, and of good reputation, and that there is no basis in fact for believing that he will commit any criminal offense again. Respondent is of good character and his character and general fitness command the confidence of the public. The evidence also establishes that he will operate his business as a loan officer honestly and fairly and in compliance with the purposes of the Ohio 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.

(3) The applicant has not been convicted of or pleaded guilty to any criminal offense described in division (A)(2) of section 1322.031 of the Revised Code, or, if the applicant has been convicted of or pleaded guilty to such an offense, the applicant has proven to the superintendent, by a preponderance of the evidence, that the applicant's activities and employment record since the conviction show that the applicant is honest, truthful, and of good reputation, and there is no basis in fact for believing that the applicant will commit such an offense again.

(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), (3) and (5).

3. Respondent was convicted of petty theft in 1995.
4. 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 when he responded to Question 5 on the Application. He did not give the 1995 conviction any thought when he was filling out his Application. As far as he knew, his record was clean. He made an understandable mistake. He did not try to hide the conviction from the Division or make any statement that he thought or knew was false, on the Application.
5. Ohio Revised Code Section 1322.07(B) prohibits a loan officer license applicant from making false or misleading statements of a material fact or omissions of statements required by state law. The Respondent did not make a false or misleading statement of a material fact when he responded to Question 5 on the Application. He did not give the 1995 conviction any thought when he was filling out his Application. As far as he knew, his record was clean. He made an understandable mistake. He did not try to hide the conviction from the Division or make any statement that he thought or knew was false on the Application.
6. 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 requires a theft conviction to be disclosed on an application for a loan officer license. Respondent did not give the 1995 conviction any thought when he was filling out his Application. As far as he knew, his record was clean. He made an understandable mistake. To "omit" one must on some conscious level be aware of information and decide not to

include it. The Respondent did not omit any information that he thought or knew he should disclose from his Application. Therefore, the Respondent did not violate Ohio Revised Code Section 1322.07(B) by omitting a statement required by state law from his application.

7. Ohio Revised Code Section 1322.07(C) prohibits a loan officer license applicant from engaging in "improper, fraudulent, or dishonest dealings." Respondent did not give the 1995 conviction any thought when he was filling out his Application. As far as he knew, his record was clean. He made an understandable mistake. This alone does not amount to engaging in "improper, fraudulent, or dishonest dealings" for the purposes of R.C.1322.07(C).
8. There is no basis for establishing any violations of R.C. 1322.07(A), (B) or (C) by the Respondent.
9. 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).
10. Once the petty theft conviction was proven by the Division, the Respondent had the burden to prove, by a preponderance of the evidence, that his "activities and employment record since the conviction show that {he} is honest, truthful, and of good reputation, and there is no basis in fact for believing that {he} will commit such an offense again" in order to obtain a license. R.C. 1322.041(A)(3).
11. Respondent's testimony, the letters he provided from others in the mortgage lending and real estate industries, letter from his clients and the letters from those in his community, establish that he is honest, truthful, and of good reputation and that there is no basis in fact for believing that he will commit such an offense again. Over ten years have passed since the underlying events without incident. That alone indicates that Respondent is not likely to commit any crime in the future.
12. One petty theft conviction and a mistake on an application do not prove that the Respondent is not fit to work in an industry that he has worked in for the past six years. The evidence submitted clearly 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).

III. RECOMMENDATION

The Respondent has met the conditions set forth in Ohio Revised Code Section 1322.041(A)(2), (3), 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,

Jane Stempel Arata
Administrative Hearing Officer
January 24, 2004