

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

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IN RE: : CASE NO. 04-0010-LOD
DUANE L. HILL : JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued October 27, 2004

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 July 14, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Duane L. Hill ("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 passing bad checks in 1987 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).

James Evans, 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 Exhibit A were admitted into the record. The record was left open for the Division to submit a copy of Respondent's request for a hearing indicating when it was received by the Division. The Division submitted that document and it was added to the record as the last page of State's Exhibit 7.

The record in this case was reopened and left open until October 22, 2004, for the parties to submit additional information regarding the alleged conviction. As of October 27, 2004, no such information was received by the Hearing Officer except for an email sent to the Hearing Officer by counsel for the Division. After receipt of that email on October 20, 2004, the Hearing Officer held a conference call with the Division's counsel and Mr. Hill. The Division's counsel indicated that a copy of the email was being sent to Respondent. The Hearing Officer considered the email as a legal pleading and not as evidence.

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 11, 2004. The Division's February 19, 2004 letter to Respondent set the hearing for February 23, 2004, and continued it until March 30, 2004. Respondent's motion for a continuance was granted and the hearing continued until July 14, 2004. The Respondent received the NOH by certified mail and received written notice of the date, time, and location of the hearing.

C. Respondent's Loan Officer Application and Passing Bad Checks Charge.

1. Respondent is an individual who seeks to conduct business in Ohio as a mortgage loan officer. (State's Exhibit 1; TR at 40.) (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 12, 2003, Respondent signed a Loan Officer Application ("Application") which was then submitted to the Division. The Division received the Application on May 19, 2003. (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). A computerized criminal history record is generated by National Background Check, Inc. based upon fingerprints. The resulting document appears to be a compilation of information taken from a computer database that relies upon information submitted by others. It states, in relevant part, "Where dispositions are not shown -or- further explanation of a disposition or charge is desired, please contact the arresting agency. This data ... is only to be used for employment purposes by your agency or as defined in the Ohio Revised Code 109.57." (State's Exhibit 2.)
7. Respondent's computerized criminal history record ("background check") states that he was charged with passing bad checks in 1988. It refers to a violation of Ohio Revised Code 2913.11 and indicates an arrest date of November 23, 1988 and a disposition date of November 25, 1988. Two case numbers are referenced in the relevant part of that document - 24059-88 and 24059-87. Number 24059-88 is referenced in the description of the charge and 24059-87 is referenced in the portion describing the final court disposition, which indicates a conviction. This document is dated May 15, 2003. (State's Exhibit 2.)

8. The Division sent a letter dated June 3, 2003 to Respondent, which stated:

The Division is unable to make a decision as to whether to issue you an Ohio loan officer license at this time because we have insufficient evidence upon which to base a decision. The results of your background check indicate that:

1. On November 23, 1988, you were charged by the Columbus Police with one count of passing bad checks....

(State's Exhibit 3.)

9. The Division's June 3, 2003 letter requested that Respondent submit an explanation of the charge and a "certified copy of a journal entry evidencing the disposition of the charge or case (*i.e.* was the result a dismissal or a conviction?)." In response to the Division's inquiry, the Respondent submitted the document he was able to obtain from the Franklin County Municipal Court about the charge and a written explanation of the charge. (State's Exhibits 3 and 4.)
10. The Franklin County Municipal Court document stated "Duane L. Hill" on the subject line and "The following in reference to the above named individual in response to request for information concerning a charge from **1987**" followed by:

<u>CASE #</u>	<u>CHARGE</u>	<u>CODE</u>	<u>DISPOSITION</u>
87/24059	Passing Bad Checks	2305.08	7/7/87-Guilty,Sentence;\$100 fine + costs

The letter did not contain any identifying information such as a social security number or an address for the person referenced. The letter went on to state that: "No paper records are currently available for reproduction for the year **1987** in the Franklin County Municipal Court, as records are maintained in accordance to Ohio's Record Retention Schedule. Copies are available for criminal cases dated **1992** and later" (Boldface type in the original.) The case number on the letter matches one case number from the background check but not the number matching the charge. The disposition date in the letter, July 7, 1987, does not match any date on the background check. The copy of the letter submitted is not a certified record. (State's Exhibit 4.)

11. Respondent knew he was charged with passing bad checks in 1988 but had no indication that a conviction might exist until he received the NOH from the Division. The charge was based upon a \$12 check and he paid the merchant \$19 to purchase it back. That amount covered the check and the store's charge for a bad check. The problem arose because his wife did not record the amounts of checks in the ledger for their joint account. (TR at 16-22.)

12. Respondent explained the charge in a letter he sent to the Division prior to the issuance of the NOH as follows:

On November 23, 1988, the Columbus Police with one count of passing bad checks charged me. The check in question was a check that I wrote to a local convenience store. The owner of the store called my place of residence at that time about the check in question and I drove to the store and paid the amount in full that evening. The storeowner and I exchanged cash for the check. I only learned [of] this charge after I was stopped by the Columbus Police. I was never sent a NSF notice about the check due to the fact I went to the store and paid the storeowner for the check. I spent only about 3-4 hours being detained while I was bailed out of jail. My plead of not guilty was enter on my behalf. I'm shocked to see a guilty sentence on the document sent to me. I paid court cost only on this matter.

(State's Exhibit 4.)

13. Respondent's testimony at the hearing about the passing bad checks charge was consistent with the letter he sent the Division before the NOH was issued. Respondent believed that he paid court costs and the matter was resolved. This belief was reasonable since he had already paid the merchant for the check. He did not admit that he had been convicted of passing bad checks. Instead, he stated that others told him he had a conviction after he submitted his Application. His testimony about what others told him does not prove that a criminal conviction exists. (TR at 16-22, 50-51; State's Exhibit 4.)
14. The background check information does not match up with the court letter. The background check references the appropriate code section, R.C. 2913.11, but the record includes no information indicating that the computer database printout from that check has independent evidentiary value. The background check appears to be a compilation of information taken from a computer database that relies upon information submitted by others in some form. It states that it is to be used for limited purposes and that any questions should be directed to the arresting agency. This indicates that it is to be used in an information gathering process as a tool but not as proof of a conviction. The Division's June 3, 2003 letter indicates that it used the document in just this way, as evidence of a criminal charge to be investigated, not as evidence of a criminal conviction. (State's Exhibits 3 and 4.)

15. The court letter summarizes information from another source. It is not certified. It references 1987 not 1988 as the year involved. The Code Section cited in the letter, 2305.08, is most likely from the Ohio Revised Code. That section is, and was in 1987, a civil provision. These inconsistencies raise serious doubt as to the accuracy of information inserted into the court letter. The court letter is not sufficient evidence to establish that Respondent has a criminal conviction. Therefore, the Division has not established by the preponderance of the evidence that Respondent has a criminal conviction for passing bad checks. (State's Exhibit 4.)
16. Proof of a criminal conviction in this case presents further concerns due to Respondent's common last name. A computer search of the Franklin County Municipal Court website database pulled up cases with three individuals named "Duane Hill" since 1993 as evidenced by the different birthdates. (The search results are attached as Attachment A.) The potential for human error or confusion when inserting information from one record into a letter or a database is evident.

D. Respondent's Alleged Failure to Disclose a Criminal Conviction on Application.

17. The Respondent's Application did not state that he had any criminal convictions Application. (State's Exhibit 1.)
18. Respondent was not aware that he might have a criminal conviction until after he filed his Application with the Division. A person cannot disclose what he does not know.
19. Respondent was charged with passing bad checks in 1988. The record does not contain sufficient evidence to establish that Respondent has any criminal conviction on his record.
20. Respondent did not try to hide any criminal 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. The lack of proof of a conviction precludes the Division from proving that Respondent improperly failed to disclose or omitted a criminal conviction from his Application.

E. Respondent's Reputation and Character.

21. Respondent has worked in the mortgage loan industry as a loan officer and a lender representative for the past five years without incident. He testified about the importance of complying with the laws that govern the industry and the value of referrals. He stated that he has a good reputation and is known in his community as a person who can get things done. Other than the 1988 bad

check charge, Respondent has not been accused of any financial crimes or financial wrongdoing. (TR at 19, 22, 41-44.)

22. Respondent worked in the automobile industry as a finance and insurance manager for fourteen years before he became a loan officer. He was responsible for handling funds and had no problems. He described in detail the work he did to help one of his employers catch another employee who was stealing vehicle down payments. Respondent was moved to a location where he would be able to observe this person and investigate the situation. Respondent uncovered the improper scheme thereby allowing his employer to stop the thefts. His involvement in this process evidences his integrity and good character. He was trusted to help investigate financial crimes and did a good job of doing so. (TR at 23-32.)
23. Respondent submitted a letter from Gary L. Smith, a former co-worker who has known Respondent for seven years. Mr. Smith provided information about Respondent's character and work as a loan officer. He describes Respondent as hardworking, committed, loyal, honest, sensitive, considerate, and good at communicating with others. (July 8, 2004 Letter from Gary L. Smith, Respondent's Exhibit A; TR at 44-46.)
24. Respondent identified Mr. Smith's letter at the hearing. Mr. Smith was not present at the hearing and, therefore, not available for cross-examination by the Division. Thus, even in this proceeding to which the Rules of Evidence do not strictly apply, Respondent's Exhibit A was considered but afforded less weight than it would have been if Mr. Smith had testified and been available for cross examination.

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 1322.031(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.

3. 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).

4. Respondent was charged with passing bad checks in 1988. The record does not contain sufficient evidence to establish that Respondent has any criminal conviction on his record.
5. Ohio Revised Code Section 1322.07(A) prohibits a loan officer license applicant from making any substantial misrepresentation in any license application. The lack of proof of a criminal conviction precludes the Division from proving that Respondent violated this provision by failing to disclose a criminal conviction on his Application.
6. 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 lack of proof of a criminal conviction precludes the Division proving that Respondent violated this provision by failing to disclose a criminal conviction on his Application.

7. Ohio Revised Code Section 1322.07(C) prohibits a loan officer license applicant from engaging in "improper, fraudulent, or dishonest dealings." The lack of proof of a criminal conviction precludes the Division proving that Respondent violated this provision by failing to disclose a criminal conviction on his Application.
8. There is no basis for establishing any violation 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 a conviction for passing bad checks is proven by the Division, the Respondent has 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). The lack of proof of a criminal conviction precludes the burden of proof from shifting to Respondent under this provision. Therefore, the Respondent does not have to prove 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.
11. Respondent's testimony and Mr. Smith's letter establish 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 in the future. Sixteen years have passed without any similar incident. That alone indicates that the 1988 charge reflects behavior not likely to occur again.
12. One 1988 charge of passing a bad check does not prove that the Respondent is not fit to work in an industry that he has worked in for the past five years. Therefore, the record only supports a conclusion 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 as required by R.C. 1322.041(A)(5). It is the Division's burden to prove otherwise and it has not done so.

III. RECOMMENDATION

The record only supports a conclusion that 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,

Jan~~e~~/Stempel Arata
Administrative Hearing Officer
October 27, 2004