

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS
CONSUMER FINANCE

1006000000
MAY-5 AM 9:42

In re: Shane Michael Nalepa

Case No. 04-0182-LOD

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF
THE HEARING OFFICER

1. The Ohio Department of Commerce, Division of Financial Institutions ("Division"), proposes that the Loan Officer License Application of Shane Michael Nalepa not be granted. The Division conducted an investigation and found:

- a. In or around 1998, in the Massillon Municipal Court, Stark County, Ohio, Mr. Nalepa was convicted of the offense of theft, a first-degree misdemeanor;
- b. On or about August 15, 2002, Mr. Nalepa attested in a sworn statement that information he provided on a licensing application was truthful, knowing that the information he provided was false; and
- c. On or around August 19, 2002, Mr. Nalepa provided untruthful information to the Division.

2. As a result, the Division determined:

- a. Mr. Nalepa has not proven that he is honest, truthful and of good reputation and that there is no basis in fact for believing that he will commit another criminal offense involving theft or any criminal offense involving money or securities as set forth in Revised Code Sections 1322.031(A)(2) and 1322.041(A)(3);
- b. Mr. Nalepa'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 set forth in Revised Code Section 1322.041(A)(5);
- c. Mr. Nalepa violated Revised Code Section 1322.07(A), which prohibits a loan officer applicant from "mak[ing] any substantial misrepresentation in any registration or license application";
- d. Mr. Nalepa violated Revised Code Section 1322.07(B), which prohibits a loan officer applicant from "[m]ak[ing] false or misleading statements of a material fact, [or] omissions of statements required by state law"; and

- e. Mr. Nalepa violated Revised Code Section 1322.07(C), which prohibits a loan officer applicant from "[e]ngag[ing] in conduct that constitutes improper, fraudulent, or dishonest dealings.

3. Mr. Nalepa's address for service is 1065 Merriman Road, Akron, Ohio 44303. He is hereinafter referred to as the "Respondent." The Respondent is employed by Equity Consultants, 4816 Brecksville Road, Suite 8, Richfield, Ohio 44286.

4. This matter was initiated by the Superintendent of the Division by the issuance on January 22, 2004 of a Notice of Intent to Deny Loan Officer Application & Notice of Opportunity for a Hearing, together with a covering letter (Exhibit 6).

5. The Respondent signed a certified mail receipt for that document. (Exhibit 6).

6. On February 3, 2004, the Division received a Hearing Request Form from the Respondent (Exhibit 7).

7. On February 3, 2004, the Division wrote to the Respondent acknowledging receipt of the Request for a Hearing and scheduling the hearing for 9:00 a.m. on February 13, 2004. (Exhibit 8). The hearing was simultaneously continued on the Motion of the Division until March 4, 2004 at 10:30 a.m. in Room 1918 of the Vern Riffe Center, 77 South High Street, Columbus, Ohio (*Id.*). The hearing was held beginning at 10:30 a.m. on March 4, 2004 and was attended by Martine Jean, an Assistant Attorney General of Ohio in the Executive Agency Section, Thomas A. Barni, Esq. on behalf of the Respondent, and the Respondent. Also attending was Mark Rhea, a staff attorney for the Division.

8. The hearing was conducted pursuant to Section 119 of the Ohio Revised Code. The Division is deemed to have jurisdiction to conduct the proceedings.

FINDINGS OF FACT

1. On August 15, 2002, the Respondent signed a Loan Officer Application (the "Application") under the provisions of the Ohio Mortgage Broker Act, Ohio Revised Code Section 1322. (Exhibit 1).

2. Question 5 of the Application provides:

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 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? Exclude minor traffic and parking offenses. (DUIs and DWI's are criminal offenses.)

Yes ☐ No ☐

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

3. In response to Question 5, the Respondent answered "No".
4. As part of the Application, the Respondent signed a National Background Check consent. (Exhibit 1).
5. Following the submission of the Application, the Division received the report of the National Background Check which disclosed a 1998 arrest in Massillon, Ohio for shoplifting. (Exhibit 2).
6. Following submission of the Application, the Division contacted the Respondent by letter seeking an explanation for information disclosed on the Background Check. (Exhibit 3).
7. In response to that letter, the Respondent submitted a written explanation as follows:

The day of July 20th, 1998. I was working in receiving dept. At Kaufmans where I unloaded trucks. During the day, I was working by myself, I decided to take a few articles of clothing out the back door to my car, then returned to my normal work duties. Later in the day my co-worker shows up to help for the last 3 hrs. as he always does to help w/trash & etc. ... Well as we finish w/emptying the trash we are one of the last to leave the store besides security. Well when the co-worker left he went out the back door for the night. This is not allowed, you have to leave out the main entrance. My last job of the night is to take a box of important internal material out to the safe out back. Then come back to exit out the main. Well, when I went out back to the safe my co-worker had pulled his car up & was walking towards me. He tells me he had a bag of [] on the side & to throw it to him. So I grab the bag, well security was waiting for him since he did not come back in earlier. Well they see me grab the bag to arrest me as well. He tells them I not involved, but since I grabbed the bag, I am. Well from there the police come put us in the cop car. Next they proceed to tow my car. This is when they find the clothes I took earlier. So I went to the station where I spent the night. In court, I was sentenced to 80 hrs. of community service & a fine. This charge was to be expunged in a year. Well, I didn't know you had to physically do it. I was wrong & learned from it! (Exhibit 4A)

8. The Respondent also submitted a copy of the Journal Entry of the Massillon Municipal Court showing a plea to the charge of theft, a misdemeanor of the first degree. (Exhibit 4B, Exhibit 4C).

9. Also received from the Court was a receipt for an Expungement Application dated October 1, 2002 (Exhibit 4D).
10. On March 17, 2003, the Division issued to the Respondent a Warning of Disqualification. (Exhibit 5).

CONCLUSIONS OF LAW

1. Ohio Revised Code Section 1322.031(A)(2) requires that in an application for a license as a loan officer, an applicant must submit a statement as to whether the applicant has been convicted 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.

2. Ohio Revised Code Section 1322.041(A) provides that the Superintendent of the Division shall issue a Loan Officer License if the Superintendent finds that certain conditions are met including:

- (3) The applicant has not been convicted or plead 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 offenses, the applicant has proven to the superintendent by a preponderance of the evidence, that the applicant's activities and employment records 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 Section 1322.01 to 1322.12 of the Revised Code. —

3. Ohio Revised Code Section 1322.07 provides in relevant part:

No Mortgage broker, registrant, licensee or applicant for a certificate of registration or license under Sections 1322.01 to 1322.12 of the Revised Code shall do any of the following:

- (A) Obtain a certificate of registration or license through any false or fraudulent representation of a material fact or any omission of a material fact required by state law, or make any substantial misrepresentations in any registration or license application;

- (B) Make false or misleading statements of a material fact, omissions of statements required by state law, or false promises regarding a material fact, through advertising or other means, or engage in a continued course of misrepresentations;
- (C) Engage in conduct that constitutes improper, fraudulent or dishonest dealings[.]

....

4. Because the Respondent has been convicted of a theft offense, the burden of proof shifted to the Respondent to show by a preponderance of the evidence that his activities and employment record since his conviction show that he is honest, truthful and of good reputation and that there is no basis for believing he will commit such an offense again. The Division has the burden to show that the Respondent's character and fitness do not command the confidence of the public and warrant the belief that the business will be operated fairly in compliance with the purposes of the Ohio Mortgage Broker Act as well as the burden of showing the violations of Section 1322.07(A), (B) and (C).

DISCUSSION

1. The Respondent at the time of the hearing in this matter was 29 years old. (Tr. 13). He is employed as a consultant with Equity Consultants. (Tr. 13). He has been employed with Equity Consultants since the summer of 2002 (*Id.*). Prior to that, he worked for Telecom Management Group in sales. (*Id.*).

2. The Respondent is a graduate of Malone College in Canton with a degree in physical education. (*Id.*).

3. The Respondent does not deny that he was convicted of a misdemeanor theft offense in 1988 but asserts that he believed at the time of the signing the Application that his criminal conviction had been expunged. (Tr. 15) Briefly stated, the criminal conviction arose out of the Respondent's employment at a department store. While working on the loading dock, he stole some merchandise. (*See* Tr. 15-16)

4. The Respondent did not take any steps to have his misdemeanor criminal conviction expunged. (Tr. 18) Respondent claims that he believed that his was "automatically expunged." He thought that after one year the conviction would automatically fall off his record. (*Id.*). At the time of the filling out of the Application, the Respondent had nothing from the court indicating that his conviction had been expunged. (*Id.*). Likewise, he had nothing from his attorney telling him that his criminal record had been expunged. (Tr. 19)

5. Exhibit 4D is a Receipt from the Massillon Municipal Court for expungement of the Respondent's criminal record that was filed after the Application was signed and tendered to the Division. (Tr. 19-20)

6. The Respondent submitted numerous exhibits in support of his Application. Respondent's Exhibit A is a duplicate copy of the Application. Respondent's Exhibit B is a series of documents from September, 2002, from the Wadsworth Municipal Court dealing with a charge of Driving Under the Influence. Those charges are not issue in the Hearing.

7. Respondent's Exhibit C is a Motion of the Municipal Prosecutor to Amend the 1998 theft charge from a felony to a misdemeanor, copy of the same Journal Entry and a copy of the same Receipt for Expungement.

8. Respondent's Exhibit D is a copy of the Respondent's resume showing his education and employment record.

9. Respondent's Exhibit E is a copy of a Certificate of Attendance at a Mortgage Broker Continuing Education Course as well as a Certificate of Completion for a 6-hour course in Mortgage Loan Programs.

10. Respondent's Exhibit F is a series of four letters in support of the Respondent. The first is from Steven Saulnier, of Geneva College, the second is from Goran Marich, the President/CEO of Equity Consultants and the third is from Tim Whitney, Branch Partner of Decision One Mortgage, and the fourth is from Michael Orbovich who was the Respondent's supervisor at Telecom Management.

11. Exhibit G is a letter in support of the Respondent from John Skipper of Camp Quality USA, Inc.

12. Respondent's Exhibit H is a letter dated March 19, 2004 from Goran Marich, the President of Equity Consultants, LLC.

13. The theft of merchandise from the loading dock in 1998 for which the Respondent was convicted involved clothing and did not involve money, checks, securities or similar items. Tr. 26

14. The Respondent was a founder (and initial winner) of a Golf Tournament in Support of Camp Quality, a summer program for kids with cancer and their siblings. (See Tr. 35).

15. The Division takes the position that a criminal conviction involving a small dollar amount will not be characterized as "de minimus". The Ohio General Assembly has stated that "any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering ... drug trafficking or any criminal offense involving money or securities" is significant and will have a bearing on the licensing of mortgage loan officers, regardless of whether the offense constituted a misdemeanor or felony.

16. Likewise, the Division applies Ohio Revised Code Section 1322.07(A), (B) and (C) strictly. The failure to disclose a conviction on the Application is, in the eyes of the Division, a violation of Section 1322.07(A), (B) and (C). The failure to disclose a conviction on the Application, in the eyes of the Division, is recent history of dishonesty, which constitutes evidence that the Respondent does not possess the character and general fitness to 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.

17. These are strictly interpreted standards on the part of the Division. According to the Division, the failure to disclose is not affected either by the relative seriousness of the offense (neither a felony or misdemeanor) nor by the amount of time that has passed since the conviction.

18. In this instance, there is unanimity that the Respondent failed to disclose his misdemeanor criminal conviction on the Application. As a result of that theft conviction, the Respondent must establish that his activities and employment record since the conviction show that he is honest, truthful and of good reputation and that there is no basis to believe that he will commit such an offense again.

19. The Respondent has shown through his employment record and activities, particularly in regard to his involvement with volunteer programs for children, as well as through the many letters of support show that he is honest, truthful and of good reputation. The theft occurrence that took place in 1998, in the opinion of the Hearing Officer, is unlikely to ever be repeated again. However, the Respondent was not truthful with regard to the disclosure of the misdemeanor criminal conviction on his Application. Accordingly, the Hearing Officer cannot conclude that the Applicant has met his burden of proof with respect to the requirements to show that he is honest and truthful.

20. Likewise, the unchallenged violations of Section 1322.07(A), (B) and (C) as well as the claimed violation of Section 1322.04(A)(5) are influenced by the failure to disclose the criminal conviction. That failure to disclose, and its recent evidence of dishonesty, indicate to the Hearing Officer that the Respondent does not command the confidence of the public and warrants the belief that the business will be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act.

21. Accordingly, the Hearing Officer determines that the Applicant has not met his burden here to show that his activities and employment record since the conviction show that he is honest, truthful and of good reputation and that there is no basis in fact for believing that the Applicant will commit such an offense again, according to the standards established by the Division. Likewise, the Hearing Officer finds that the Division has established 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.

RECOMMENDATION

Based on the findings of fact, conclusions of law, and discussion set forth herein, it is the recommendation of the Hearing Officer that the Superintendent of the Division not grant a Loan Officer License to the Respondent.

Respectfully submitted,

Kenneth R. Cookson
Hearing Officer
May 3, 2004