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STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

IN RE: : CASE NO. 05-0106-LOD
: :
PIERRE BOSWELL : JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued December 19, 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 6, 2005, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Pierre Boswell ("Respondent" or "Mr. Boswell") 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 unauthorized use of a motor vehicle in 1986 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. Elizabeth Thomarios represented Respondent at the hearing. At the hearing, State's Exhibits 1, 3 through 11, 13, 14 and Respondent's Exhibits A and B were admitted into the record. (Exhibits marked as State's Exhibit 2 and State's Exhibit 12 were not used in this hearing.)

B. Jurisdiction and Procedural Matters.

The Division issued the NOH to Respondent on June 2, 2005. Respondent's hearing request was received by the Division on June 14, 2005. The Division scheduled the hearing for June 27, 2005. The hearing continued twice and was eventually set for October 6, 2005. The Respondent received the NOH by certified mail and received written notice of the date, time, and location for each scheduled hearing date.

C. Respondent's Loan Officer Application and Conviction.

1. Respondent is an individual who seeks to conduct business in Ohio as a mortgage loan officer. (State's Exhibit 1; Hearing Transcript at 11.) (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 March 17, 2005, Respondent signed a Loan Officer Application ("Application") which was then submitted to the Division. (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 **any criminal offense**? Exclude minor misdemeanor traffic and parking offenses. (DUIs and DWI's are criminal offenses.)

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

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 unauthorized use of a motor vehicle in 1986. In response to the Division's inquiry, the Respondent submitted certified copies of Elyria Municipal Court records confirming the conviction. (State's Exhibits 3 and 4.)
8. Respondent admitted that he was convicted of unauthorized use of a motor vehicle in 1986. Respondent explained the conviction in a letter he sent to the Division prior to the issuance of the NOH and again at the hearing. The incident involved a car owned by Respondent's brother Andre and titled only in Andre's name. Andre feared that he was about to be put in jail and wanted to prevent his wife from selling the car to buy drugs. Therefore, he gave Respondent the title to his car. Respondent took the car title to his brother's house and showed it to Andre's wife. She gave him the keys to Andre's car so he could keep it until Andre was released from jail. Respondent took the car to his home. Shortly thereafter Andre's wife reported the car stolen. Respondent was arrested and charged with a felony. He was held in jail for several days before he saw a judge and was unable to post bail. Respondent was working as a security guard at that time. He pleaded guilty to a reduced charge to avoid a felony conviction that could jeopardize his security guard license. Respondent's sister-in-law admitted that she reported the car stolen because she was mad at Andre. (State's Exhibit 4; TR at 58-62.)
9. Respondent, who will be 44 years old on December 22, 2005, has no other criminal convictions with the exception of possibly minor traffic convictions. He does not have any convictions for driving under the influence or driving while intoxicated. (State's Exhibit 1; TR at 43-44.)

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

10. The Respondent did not disclose the unauthorized use of a motor vehicle conviction on his Application. He misread Question 5 as only requiring the disclosure of felony convictions. He read the phrase, "[e]xclude minor misdemeanor traffic and parking offenses" as if there was a comma after "misdemeanor" and believed that his misdemeanor conviction did not need to be disclosed. Therefore, he thought he had nothing to disclose on the Application. (State's Exhibit 1, TR at 18-23.)
11. The Respondent, based upon his understanding of Question 5, answered it truthfully. He 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 his Application. The answer was "complete and true of [his] own knowledge" when he signed 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.

12. During the past nineteen years, Respondent has worked in the retail industry, the recording industry, and the fashion industry. He has also been a security guard licensed by the State of Ohio. He is currently a fashion consultant for K & G Fashion Superstore where he has worked for over two years. He is actively involved in church activities and is the President of the School Commission for the school related to his church. He has been trusted to handle funds and is currently an usher at his church. His work history is solid and there is no indication that he is not trustworthy. (Respondent's Exhibits A and B; TR at 37-39, 63-75.)
13. Respondent provided character letters from two individuals familiar with his reputation in the community and his work. Dr. Walter Marcis, the Pastor at Respondent's church, has known Respondent since 1995. His letter speaks highly of Respondent's participation in church activities and reputation. He is aware of Respondent's 1986 conviction. (Respondent's Exhibit A.)
14. Jason Cordon, the General Manager at K & G Fashion Superstore, has known Respondent since July of 2003. His letter details Respondent's integrity and trustworthiness as follows:

To achieve the level of success that our company has, we must employ non-traditional practices to accommodate many of our customers. These include but are not limited to: the personal delivery of merchandise to customers, maintaining and presenting store merchandise during fashions shows and outside sales presentations, and securing and appropriating funds from customers in a non-controlled environment. Mr. Boswell has demonstrated the highest moral aptitude in his successful completion of these and other related tasks and has developed a reputation within our Company as an individual of high integrity.

Mr. Boswell has also had access to Company funds and property during his tenure with us and has never demonstrated any type of behavior that has caused any concern regarding his level of access. Pierre has been able to help identify Loss Prevention issues within the company, drawing from his extensive knowledge and experience in this area from previous positions. I would personally recommend Mr. Boswell to any employer in the future.

(Respondent's Exhibit B; TR at 76, 78-79.)

15. Both letters were identified by the Respondent at the hearing. The authors were not present at the hearing. Thus, even in this proceeding to which the Rules of Evidence do not strictly apply, Respondent's Exhibits A and B were considered but afforded less weight than they would have been if the respective authors had been available for cross examination.
16. The Hearing Officer finds that Respondent's activities and employment record since the 1986 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 any theft offense again.
17. 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.

(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 unauthorized use of a motor vehicle in 1986.
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 believed that his 1986 unauthorized use of a motor vehicle conviction did not need to be disclosed. He 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 his Application. The answer was "complete and true of [his] own knowledge" when he signed 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. The Respondent, based upon his understanding of Question 5, answered it truthfully. He 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 his Application. The answer was "complete and true of [his] own knowledge" when he signed the Application. The 1986 conviction under the circumstances described in this case is not a material fact for the purposes of this licensing process over nineteen years later.
6. Ohio Revised Code Section 1322.07(B) prohibits a loan officer license applicant from omitting statements required by state law. 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 an unauthorized use of a motor vehicle to be disclosed because it is a theft offense. R.C. 2913.01(K); 2913.03. 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 R.C. 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 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 his Application. The answer was "complete and true of [his] own knowledge" when he signed the Application. The Respondent did not omit any information that he thought or knew he should disclose from his Application. He answered Question 5 truthfully based upon his understanding of Question 5 and the events surrounding the 1986 incident. These activities alone do 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 unauthorized use of a motor vehicle 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). Respondent's testimony and the letters submitted 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. Nineteen years have passed without incident. That alone indicates that he is unlikely to commit any similar offense in the future. Respondent has established the licensing prerequisites set forth in R.C. 1322.041(A)(3).
11. An antiquated conviction and the mistaken belief that it did not need to be disclosed do not prove that the Respondent is not fit to work as a loan officer. 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).

III. RECOMMENDATION

The Respondent has established the licensing prerequisites 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
December 19, 2005