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STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

IN RE: : CASE NO. 04-0275-LOD
: :
GARY M. LUSTER : JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued September 8, 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 May 20, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Gary M. Luster ("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 failed to disclose criminal background information 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 a criminal conviction on his application, and
2. 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).

Monica Rausch, 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 A through F were admitted into the record. Due to an inadvertent copying error, a page from Exhibit B containing the certified mail service receipt for the NOH

was left off that Exhibit by the Division. The record was briefly reopened by the Hearing Officer to permit that page to be submitted. It is now the last page attached to Exhibit B.

B. Jurisdiction and Procedural Matters.

The Division issued the NOH to Respondent on March 5, 2004. Respondent's hearing request was received by the Division on March 24, 2004. The Division scheduled the hearing for April 5, 2004, and continued it until May 20, 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 Unlawful Discharge of a Weapon 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 January 5, 2004, Respondent signed a Loan Officer Application ("Application") which was then submitted to the Division. The Division received the Application on January 16, 2004. (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; TR at 12-13.)

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 misdemeanor unlawful discharge of a firearm in 1993. In response to the Division's inquiry, the Respondent submitted a certified copy of a court record confirming the conviction. (State's Exhibit B.)
8. Respondent admitted that he had been convicted of unlawful discharge of a firearm in 1993. (TR at 20.) Respondent explained the conviction in a letter he sent to the Division prior to the issuance of the NOH, as follows:

On July 4th 1993 while celebrating the Fourth I discharged a firearm safely into the air over Lake Erie. No alcohol or accidents were involved. After receiving a ticket for the incident I plead guilty to the fourth degree minor misdemeanor and received a \$100 fine.

(State's Exhibit B; TR at 20.)

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

9. The Respondent did not disclose the 1993 unlawful discharge of a firearm conviction on his Application. (State's Exhibit 1.)
10. He consistently and credibly explained that he read: "[e]xclude minor misdemeanor traffic and parking offenses" in Question 5 as excluding minor misdemeanors from being disclosed. He read it as if there was a comma after the word "misdemeanors" and before the word "traffic." Therefore, he thought he had nothing to disclose on the Application. (TR at 12-13.)
11. The Hearing Officer finds that the "[e]xclude minor misdemeanor traffic and parking offenses" language in Question 5 could be confusing. The Respondent read the language in Question 5 as he testified, and, based upon his understanding of the question, 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 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. Respondent currently works for Statewide Home Mortgage processing loan paperwork and dealing directly with the lender. He has worked in this position since January of 2004. There have been no problems with his work in the mortgage industry. (TR at 15, 26-27.)

13. Prior to 2004, he worked as a corrections officer for several years. He also was a car salesman. In that position, he handled money, checks, credit reports, credit applications, and confidential information on a daily basis without any problems. He served in the military as a gunner. Respondent has been a member of the Armed Forces Reserves since he left active duty. He is currently a gunner's mate second class. (TR at 16-17, 22-23.)
14. Respondent has a good reputation in his community where he has coached sports teams, played sports, and participated in American Legion events. He also volunteers at an animal hospital. He gets along well with everyone in his community. (TR at 23-25.)
15. Respondent has had no other criminal convictions since the 1993 conviction for unlawful discharge of a firearm. He has not celebrated the Fourth of July this way since 1993 and now sticks to the grill on that holiday. (TR at 20-21.)

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.

(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) and (5).


3. Respondent was convicted of unlawful discharge of a firearm, a minor misdemeanor, in 1993.
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 misread it and answered truthfully based upon his understanding of the question. More importantly, the failure to disclose a 1993 misdemeanor conviction for unlawful discharge of a firearm is not a substantial misrepresentation for the purposes of this licensing process eleven years later.
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 misread it and answered truthfully based upon his understanding of the question. The existence of a 1993 misdemeanor conviction for unlawful discharge of a firearm is not a material fact for the purposes of this licensing process eleven years later.
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 does not require a conviction for unlawful discharge of a firearm to be disclosed on an application for a loan officer license. 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 misread a confusing question and answered truthfully based upon that misreading of the question. 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. The Respondent admitted that he made a mistake while reading the application. One old misdemeanor conviction and the fact that the Respondent misread a confusing question do not prove that the Respondent is not fit to work in an industry that he is currently working in today. He made a mistake and has owned up to that. The Respondent's testimony establishes that his 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) 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
September 8, 2004