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STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

REPORT AND RECOMMENDATION OF HEARING OFFICER

IN THE MATTER OF Calixto Fonseca

**Ohio Department of Commerce, Division of Financial Institutions
Case Number: 04-0069-LOD**

FINDINGS OF FACT

1. On or about May 1, 2002, Calixto Fonseca ("Respondent" herein) submitted an application and related materials (together with materials subsequently submitted by Respondent and accepted by the Ohio Department of Commerce, Division of Financial Institutions, collectively the "Application") to the Ohio Department of Commerce, Division of Financial Institutions (the "Division" herein) for licensing as a Loan officer as defined in Chapter 1322 of the Ohio Revised Code. A copy of the Application is attached and incorporated as Exhibit A.
2. On or about January 22, 2004, the Division notified Respondent that it intended to deny the Application, and, by Division Order, provided Respondent with timely notice of opportunity for a hearing in accordance with the Ohio Administrative Procedure Act, Chapter 119, Ohio Revised Code (the "Notice"). A copy of the Notice is attached and incorporated as Exhibit B herein. The Division Order charged that Respondent failed to meet the certain designated requirements for licensing contained in Sections 1322.041 and 1322.10 of the Ohio Revised Code, and cited the circumstances as described in the Notice.
3. In response to the Notice, Respondent requested a hearing and, in response to that request, a hearing was held (the "Hearing" herein) at the offices of the Ohio Division of Financial Institutions on March 3, 2004. At the Hearing, the Respondent appeared *pro se*, and the Division was represented by Assistant Attorney General John A. Izzo, Esq.
4. Respondent did not contest that, for the purposes of the Hearing and this administrative proceeding, the allegations of fact set forth in the Notice were true. (Tr. Page 16)
5. As of the date of the Application, Respondent was employed as a loan officer by CMS Home Loans.

CONCLUSIONS OF LAW

1. That the conduct of the Respondent established a statutory rationale for denying the Application of the Respondent based on the provisions of Sections 1322.041 and 1322.10 of the Ohio Revised Code.
2. That the documentation presented by the Division established a sufficient and reasonable basis for the Division to deny Respondent's Application for licensing as a loan officer.
3. That the information and documentation available to the Division prior to the hearing established a statutory rationale under Sections 1322.041 and 1322.10 of the Ohio Revised Code for the denial of Respondent's Application, and the record of the Hearing supports that denial.

DISCUSSION

At the Hearing, Respondent and the Superintendent stipulated to the Superintendent's evidence relating to the various criminal convictions of Respondent as described in the Notice. (Tr. Page 16) Respondent testified that he failed to disclose the referenced criminal convictions in the Application based upon his belief that the question did not pertain to the type of convictions in issue (Tr. Pages 26, 27, 28, 29, 30, 35), and had "...no idea that that was even going to come up on my record...". (Tr. Page 26) when asked whether he was aware of the convictions listed in the Notice. Respondent further acknowledged that there could be other unspecified convictions in addition to those listed in the Notice, although not identified by Respondent (Tr. Pages 30, 31, 34, 35). Other than his own testimony regarding his purported misunderstanding of the requirements of question 5 of the Application, Respondent did not present any other evidence or testimony to explain why he failed to disclose his criminal convictions in response to the referenced question in the Application.

Respondent and Respondent's "boss" (Tr. Page 20), Michael Sebastiano, were the only witnesses on behalf of Respondent in the Hearing. Mr. Sebastiano did not testify as to why Respondent failed to disclose his criminal convictions in the Application, but did testify with respect to Respondent's personal character and certain business dealings, as well as Respondent's personal attributes. (Tr. Pages 22, 23, 24)

Section 1322.041(A)(5) of the Ohio Revised Code states that the Superintendent shall issue a loan officer license if the Superintendent finds that 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 stated provisions of Ohio law.

The Act provides that the Superintendent is charged with regulation and oversight of mortgage brokers and loan officers in the State of Ohio, and part of the Superintendent's consideration in that regard relates to the character and general fitness of the Respondent and the ability of the Respondent to command the confidence of the public as set forth in subsection 1322.041(A)(5) of the Ohio Revised Code. That provision requires that the Superintendent issue a loan officer license if, among things, Respondent's character and general fitness (1) command the confidence of the public and (2) warrant the belief that the business will be operated honestly and fairly in compliance with applicable law. These standards require subjective analysis, and the General Assembly has decided that it is appropriate that the Superintendent undertake a determination,

based on industry and regulatory experience, as to whether an applicant's character and fitness enable the applicant to meet the referenced requirements. See *Leon v. Ohio Bd. Of Psychology*, 63 Ohio St. 3d 683, 1992 Ohio 105, 590 N.E. 2d 1223 (1992). See also *Lorain City Bd. Of Edn. v. State Emp. Relations Bd.*, 40 Ohio St. 3d 257, 533 N.E. 2d 264 (1988).

Under Ohio Revised Code sections 1322.031(A)(2) and 1322.041(A)(3), Respondent's theft conviction, admitted by Respondent, causes the burden of proof to shift to the Respondent to prove, by a preponderance of the evidence, that Respondent's activities and employment record since the conviction show that the Respondent is honest, truthful, and of good reputation, and there is not basis in fact to believe that the Respondent will commit such an offense again.

The only evidence presented by Respondent relating to Respondent's character and fitness consisted of his own testimony and that of his supervisor, Mr. Sebastiano, along with various unsubstantiated testimonial letters from authors which were not available for cross-examination by the Division. Beyond that, Respondent presented no objective evidence of his character and fitness in support of his contention that the Superintendent's findings under Ohio Revised Code section 1322.041, as set forth in the Notice are inappropriate and incorrect.

Further, upon inquiry Respondent testified that there could be other and further criminal convictions to which he was subject, but was unable to identify those convictions. Respondent provided no explanatory testimony with respect to the convictions listed in the Notice, and upon inquiry by the Division no information whatsoever with respect to other convictions involving Respondent which were not listed in the Notice and not otherwise disclosed. Unfortunately, Respondent failed to disclose the criminal convictions as required by question 5 of the Application, and the relevant provisions of Ohio law do not provide an excuse by mistake, misunderstanding, or misreading of the question at issue. Therefore, there is support for the Division's assertion that Respondent violated subsections (A), (B), and (C) of Ohio Revised Code Section 1322.07 in failing to disclose the criminal violations

In light of Respondent's failure to provide sufficient objective testimony contradicting the Superintendent's assertions under Ohio Revised Code section 1322.041, and Respondent's failure to disclose the convictions as required by the Application, Respondent has failed to provide evidence sufficient to overcome the Superintendent's determinations under Ohio Revised Code sections 1322.031, 1322.041, and 1322.07.

RECOMMENDATIONS

For the reasons set forth herein, the referenced Application of the Respondent should be denied.

~~Respondent~~

Jeffery E. Smith, Hearing Examiner

Date