

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

IN RE: : CASE NO. 04-0222-LOD
: :
JAMES E. WERLING, II : JANE S. ARATA, HEARING OFFICER

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DIVISION OF FINANCIAL INSTITUTIONS

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued April 23, 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 March 16, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent James E. Werling ("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 theft in 1974 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).

Daniel Jones, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. Stanley Claybon represented Respondent at the hearing. Respondent, Norman Leary, Jeff Wheatley, Lois Werling, and Mr. Claybon testified on behalf of the Respondent. At the hearing, State's Exhibits 1 through 11 and Respondent's Exhibit A were admitted into the record.

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 19, 2004. The Division scheduled the hearing for March 4, 2004, and continued it until March 16, 2004. The Respondent received the NOH by certified mail and received written notice of the date, time, and location of hearing.

C. Respondent's Loan Officer Application and Conviction for Felonious Assault.

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 March 11, 2002, Respondent signed a Loan Officer Application ("Application") which was then submitted to the Division. The Division received the Application on March 14, 2002. (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).
7. Respondent's background check revealed a possible conviction for theft in 1974. In response to the Division's inquiry, the Respondent submitted a certified copy of a Hamilton County Court of Common Pleas record confirming the conviction. (State's Exhibits 2 through 5.)
8. Respondent admitted that he was convicted of theft in 1974. Respondent explained the conviction in a letter he sent to the Division prior to the issuance of the NOH. Respondent explained in that letter, and later at the hearing, that:

The crime that I was charged with was unlawful use of a motorboat (actually it was a very small dinghy). I was on leave from the Navy and hanging out with a friend of mine that had a boat docked at one of the local marinas. It had a sleeper cabin so we spent the night on the boat. My brother and another friend were also with us.

We had been drinking all night and my friend that owned the boat and my brother went to sleep about 4 or 5 a.m. My other friend and I were sitting up on the deck and noticed the dinghy in the slip next to us. We decided to take it for a cruise around the marina and check the place out. We returned the dinghy to its slip and went to sleep in my friends boat. We were awakened a short time later by the Cincinnati Police. They wanted to know if we had been on the dinghy in the slip next to us and I stated that I had. After questioning me as to whether or not anyone had given permission to do so, they arrested me, as I told them I had not received permission to use the dinghy.

The owner of the dinghy did not want to prosecute me since no damage was done to the boat and it had been returned to its location just as he had left it. The City of Cincinnati decided to prosecute the case anyway. The owner of the boat, a dentist, was kind enough to come to my trial and explain to the judge that he wanted no further action taken against me. This testimony did not sway the judge any and he found me guilty. I didn't have to serve any jail time and only had to pay a \$200.00 fine + court cost. Unfortunately this incident is still haunting me now 28 years later.

(State's Exhibit 4; TR at 16-19.)

9. Respondent, now 47 years old, has no other criminal convictions. (TR at 38.)

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

10. The Respondent did not disclose the 1974 theft conviction on his Application. (State's Exhibit 1; TR at 39-40.)
11. He explained that his cousin acted as his attorney and explained to him that, he could plead guilty, pay a fine, and as "long as {I} did not get in any more trouble, it will be like this never happened and you can just go on with your life and don't worry {about} it." (TR at 20.) Thus, he believed that it was as if the incident had not occurred and he had no criminal conviction. He has applied for other jobs with criminal background checks and it has not shown up. Therefore, he thought he had nothing to disclose on the Application. (TR at 39-40, 51-52.)
12. The Hearing Officer finds that the 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 the application. He simply believed what his counsel told him - that it was as if the incident had not occurred.
13. The Hearing Officer also finds that the Respondent is in this position because he was honest when questioned by the police in 1974. He admitted that he had been on the boat and did not try to obscure the facts.

E. Respondent's Reputation and Character.

14. During the past thirty years, Respondent has been employed as an electricians' mate in the Navy, a lab technician, a car salesperson, a cab driver, a gardener, and a medical laser representative. (TR at 21-34.) He has also worked for two mortgage brokers and seeks a license to continue as a loan officer with Cardinal Banc. (TR at 34-38.) He testified about people in difficult situations that he has helped obtain loans. (TR at 41-46.) His work history is solid and there is no indication that he is not trustworthy.
15. Norman Leary, who has known Respondent for the past twelve years, testified about his reputation in the community. He testified that Respondent is very trustworthy and a loyal friend. Respondent did an excellent job refinancing Mr. Leary's mortgage. He recommended Respondent to his daughter and son-in-law who were pleased with Respondent's work. (TR at 56-59.)

16. Jeff Wheatley, part owner of Cardinal Banc, testified about his experiences with the Respondent in the mortgage industry in the past two years. Respondent has been an excellent loan officer and does a very good job of disclosing all of the information to his clients. Mr. Wheatley has received very positive feedback from the title company that works with Respondent's loans. Mr. Wheatley has always found Respondent to be truthful and honest. He has no qualms or questions about what Respondent does. (TR at 61-65.)
17. Respondent's wife testified that he is and has been a wonderful spouse, father and stepfather. He took excellent care of her when she needed his help before and after major hip replacement surgery last year and has helped with her mother who has also has medical problems. Respondent is held in high regard by his family and within his community. (TR at 67-72.)
18. Respondent's attorney, who has known Respondent for the past twelve years, also testified on his behalf. He holds Respondent in high regard and has referred three clients with difficult situations to Respondent for help with financing. Respondent was able to help in each situation and worked extremely hard to find financing for the individuals involved. (TR at 72-78.)

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 theft in 1974.
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 he did not have a criminal conviction for theft and answered truthfully based upon his understanding of the 1974 incident. More importantly, the failure to disclose this 1974 conviction for theft based upon the unauthorized use of a small boat is not a substantial misrepresentation for the purposes of this licensing process twenty-eight 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 believed that he did not have a criminal conviction for theft and answered truthfully based upon his understanding of the 1974 incident. The failure to disclose this 1974 conviction for theft based upon the unauthorized use of a small boat is not a material fact for the purposes of this licensing process twenty-eight 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 requires a theft conviction to be disclosed on an application for a loan officer license. Respondent believed that he did not have a criminal conviction for theft and answered truthfully based upon his understanding of the 1974 incident. Therefore, the Respondent did not violate Ohio Revised Code Section 1322.07(B) by omitting a statement required by state law from his application. He simply did not know that he had a criminal


conviction for theft and answered truthfully based upon his understanding of the 1974 incident. Moreover, the application as the time it was acted upon by the Division included the information subsequently provided by the Respondent regarding the conviction.

7. Ohio Revised Code Section 1322.07(C) prohibits a loan officer license applicant from engaging in "improper, fraudulent, or dishonest dealings." Respondent believed that he did not have a criminal conviction for theft and answered truthfully based upon his understanding of the 1974 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 theft conviction 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 convictions 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 as well as the testimony from others who know him socially, as clients, and at work in the mortgage industry, 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. Thirty years have passed without incident. That alone indicates that this was simply a youthful transgression.
11. An antiquated conviction and the mistaken belief that it did not exist, do not prove that the Respondent is not fit to work in an industry that he has worked in for the past three years. The evidence submitted clearly 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 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,


Jane Stempel Arata
Administrative Hearing Officer
April 23, 2004