

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

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DIVISION OF FINANCIAL
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IN RE: : CASE NO. 04-0016-MBR

DAVID J. ZOELLNER

WILLIAM R. DAMSCHRODER,
HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION

Issued March 8, 2005

I. FINDINGS OF FACT

A. Background.

This matter came before William R. Damschroder, 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 April 20, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent David J. Zoellner ("Respondent") to consider the allegations in the Division's Notice of Intent to Revoke Mortgage Broker Certificate of Registration License and Notice of Opportunity for a Hearing ("NOH"). The Division alleged that Respondent violated provisions of Chapter 1322. of the Ohio Revised Code by failing to a respond to a demand from the Division for answers to concerns arising from an examination of Respondent's business. Accordingly, the Division seeks to revoke Respondent's license on the grounds that he knowingly failed to cooperate with a directive of the Division, in violation of R.C. 1322.072.

Martine Jean and Anthony Siciliano, Assistant Attorneys General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. Richard Keck, Chief Examiner for Consumer Finance, attended the hearing as the Division's representative and testified at the hearing. Amanda Axtell, an attorney for Consumer Finance also attended the hearing. The Respondent represented himself *pro se*. At the hearing, State's Exhibits 1 through 6 and Respondent's Exhibit A through C were admitted into the record.

B. Jurisdiction and Procedural Matters.

1. The Division issued the NOH to Respondent on February 10, 2004, but placed no evidence in the record that the NOH was served upon him by certified mail. (State's Exhibit 3.) It is clear that the Respondent received the NOH because he sent the Division the hearing request form sent to him with the NOH. (State's Exhibits 4.)

2. Respondent's hearing request was received by the Division on March 8, 2004. (State's Exhibit 4.)

3. The Division scheduled the hearing for March 24, 2004, and continued it until April 20, 2004. On March 17, 2004, the Division sent a letter to Respondent notifying him of the date, time, and location of the hearing. (State's Exhibit 5.)

C. Examination of Respondent's Place of Business.

4. The Division conducted an investigation of Respondent's place of business on February 27 and 28th, 2003. (State's Exhibit 1.)

5. On July 31, 2003, the Division sent Respondent a letter outlining issues impacting Respondent's compliance with provisions of Chapter 1322. of the Revised Code, with a request that Respondent reply to the Division's concerns within thirty days. (State's Exhibit 1.)

6. Richard Keck, testifying for the Division indicated that he received no response to the letter dated July 31, 2003 (Tr. pp. 20-21)
7. Respondent testified that he was under the impression that he did not need to respond to any written request for information from the Division because he had addressed the concerns of the examiner, and informed the examiner verbally that all necessary corrective action had been taken. (Respondent's Exhibit A., Tr. p. 92)
8. In a letter dated November 5, 2003, the Division referenced the examination conducted at Respondent's place of business in February 2003 and, again, asked Respondent to respond in writing with an explanation concerning the compliance issues raised in the examination. The letter also informed Respondent that failure to respond would cause the Division to institute Administrative proceedings against Respondent. This letter was sent via certified mail and received and signed-for by a person working in Respondent's building. (State's Exhibit 2, Tr. p. 63)
9. Respondent, in a letter dated November 18, 2003, noted the letter of November 5th, and proceeded to answer the issues as outlined in the Division's examination report. Respondent testified that the letter was sent to the Division by regular mail. (Respondent's Exhibit A, Tr. p.63)
10. Richard Keck testified that he received no response from Respondent to the letter sent November 5, 2004, and had no recollection of seeing the letter drafted by Respondent, dated November 18, 2004, prior to seeing it at the hearing. (Tr. pp. 22, 28)
11. Respondent's letter and testimony indicated that he did not feel he was required to respond to the Division's letter of July 31, 2003, since, in his mind, all of the issues raised in the Examination were addressed and corrected while the examination was taking place. (Respondent's Exhibit A, Tr. p. 78)

II. Conclusions of Law

A. Jurisdiction and Procedural Matters.

1. Ohio Revised Code Section 119.07 requires the Division to notify Respondent of his right to request a hearing. The Division's NOH properly notified the Respondent that he was entitled to request a hearing, but no evidence was presented proving that the notice was served upon him by certified mail. The Respondent, however, clearly received the notice, as his request for hearing was promptly returned to the Division so that a hearing could be scheduled. While doing so only marginally, the Division has complied with the requirements set forth in R.C. 119.07 for notifying Respondent of his right to request a hearing.

2. Ohio Revised Code Section 119.07 also requires an agency to notify a party of the time, date, and place of the hearing once a date is set. The Division's February 10, 2004 letter included a Hearing Request Form along with the Notice of Opportunity for Hearing and Notice of Intent to Revoke. Respondent completed and returned the Hearing Request Form, and a hearing date and time was subsequently assigned, and Respondent notified by mail of the hearing date.

3. The Division procedurally complied with R.C. Chapter 119 and jurisdiction over this matter has been established.

B. Mortgage Broker Certificate of Registration

4. 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.

5. Ohio Revised Code Section 1322.10 provides that the Superintendent of Financial Institutions may suspend or revoke a mortgage broker certificate, or impose a monetary fine against a certificate holder, for violating any provision of R.C. 1322.01 to 1322.012.

6. R.C. 1322.072 states that "[n]o person, in connection with any examination or investigation conducted by the superintendent of financial institutions under sections 1322.01 to 1322.12 of the Revised Code shall knowingly *** [c]ircumvent, interfere with, obstruct, or fail to cooperate[.]

7. The Division has met its burden of showing that Respondent is in violation of R.C. 1322.072, given the fact that Respondent failed to respond to the Division's demand for response to the issues raised in the February 2003 examination. While Respondent's explanation for not responding initially has some merit, he clearly understood the gravity of the situation based upon the Division's letter of November 5, 2003. Indeed, Respondent's primary defense to the charge filed is his letter of November 18, 2003, in which he responds to the issues as outlined by the Division. Unfortunately for Respondent, the Division has no record of receiving this letter, and, since the letter was sent by regular mail, Respondent has no proof of having sent it, such as a certified mail receipt. Though it is a close question, I am persuaded that Respondent's failure to respond promptly constitutes failure to cooperate with the Division, for which administrative discipline is appropriate.

8. With that said, the scope and type of discipline imposed must fit the violation. No evidence was presented that Respondent had any history of violating the Mortgage Brokers Act, and the violation in question in this case is, by any measure, minor. The Division's pursuit of revocation in this matter is disproportionate; the administrative equivalent of capital punishment for jaywalking. Since the Division has an array of penalty options short of revocation, I do not find that the circumstances of this case warrant imposition of the revocation penalty.

9. R.C. 1322.10 (A)(2) provides that the superintendent of financial institutions may impose a monetary fine against a certificate holder, base upon the seriousness of the violation

and the certificate holder's efforts to prevent the violation, and the certificate holder's history of compliance with Division regulations.

10. Given all of the circumstances in the present case; the minor nature of the infraction, Respondent's imperfect efforts to reply to the Division, and the lack of evidence of any previous problems, I find that a fine of one hundred dollars (\$100) to be an appropriate penalty to impose against Respondent.

III. RECOMMENDATION

The Respondent has violated Ohio Revised Code Section 1322.072 (A). Therefore, I respectfully recommend that the Superintendent of the Division of Financial Institutions fine Respondent in the amount of One Hundred Dollars (\$100).

Respectfully submitted,



William R. Damschroder
Administrative Hearing Officer
March 8, 2005