

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

2009 JUN 24 AM 11:45

IN RE: : CASE NO. M2008-772
: :
MARIAN B. HOLMES, : DELORES EVANS
RESPONDENT : HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued June 24, 2009

I. FINDINGS OF FACT

A. Background

This matter came before Delores Evans, an attorney licensed to practice law in Ohio, and duly appointed by the Ohio Division of Financial Institutions ("Division") to serve as the Hearing Officer for this hearing in accordance with the Ohio Administrative Code ("O.A.C.") and Ohio Revised Code ("O.R.C.") Chapter 119. The hearing was held on May 19, 2009, at 77 South High Street, Room 1936, in Columbus, Ohio.

The Division held the hearing to consider the allegation that Marian B. Holmes ("Respondent") violated O.R.C. §1322.07(C) and (G). The Division contends that Respondent knowingly attempted to instruct, induce, coerce, or intimidate an appraiser for the purpose of corrupting or improperly influencing the independent judgment of the appraiser with respect to a dwelling offered as security for repayment of a mortgage loan. The Division intends to revoke Respondent's loan officer license and impose a fine against Respondent in the amount of \$1,000.00.

Dennis P. Smith, Jr., Esq., an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. Stephen DeFrank, Esq., testified on behalf of the Division. Neither Respondent nor any representative appeared at the hearing on Respondent's behalf. As permitted by O.R.C. §119.07, Respondent presented her position in writing, which was received, marked, and admitted as Respondent's Exhibit 1. State's Exhibits A through G were introduced and admitted into the record. The record was closed at the end of the day on May 19, 2009.

B. Jurisdiction and Procedural Matters

1. On December 17, 2008, the Division issued a Notice of Intent to Revoke Loan Officer License, Impose Fine & Notice of Opportunity for a Hearing ("NOH"). The

NOH informed Respondent of the Division's allegation. Respondent had 30 days to request a hearing. The Division sent the NOH to Respondent via certified mail, return receipt requested. Service was perfected on December 19, 2008. *State's Exhibit A*

2. On January 7, 2009, the Division received Respondent's hearing request. *State's Exhibit B*
3. On January 13, 2009, the Division sent a hearing notice to Respondent. The Division scheduled the hearing for April 28, 2009. *State's Exhibit B*
4. On April 28, 2009, upon Respondent's request, the Hearing Officer continued the hearing until May 19, 2009. *State's Exhibit B*
5. On April 29, 2009, the Division sent a hearing notice to Respondent informing her of the May 19, 2009 hearing date and time. *State's Exhibit B*
6. On May 19, 2009, the hearing commenced. Respondent did not attend the hearing, but submitted her position in writing. *Respondent's Exhibit 1*

C. Respondent's Activities

7. Stephen DeFrank, an attorney examiner with the Division, reviews the files of loan officers and mortgage brokers to verify their compliance with O.R.C. and O.A.C. Mr. DeFrank reviewed Respondent's loan officer file. *Testimony of Mr. DeFrank*
8. From July 30, 2002 until April 30, 2009, Respondent held a loan officer license (# 006357). *State's Exhibit C; State's Exhibit G; Testimony of Mr. DeFrank*
9. Around November 2007, Respondent was employed by Bridge Mortgage Investments, Inc. ("Bridge Mortgage"). Bridge Mortgage was located at 5454 State Road, Parma, Ohio 44134. *State's Exhibit D; State's Exhibit C*
10. In November 2007, Bridge Mortgage requested that Ron Chervenak, an Ohio real estate appraiser (license # 2000000202), perform an appraisal of real estate located at 890 Exchange Street, Vermillion, Ohio 44089 ("Subject Property"). Mr. Chervenak was employed with Habitat Appraisal Ltd. *State's Exhibit D*
11. The Subject Property was a refurbished historic home in Vermillion that was valued "at the upper end of the market due to its overall condition." *Testimony of Mr. Chervenak*
12. On November 21, 2007, Mr. Chervenak completed an appraisal report for the Subject Property. Mr. Chervenak rendered a value conclusion of \$140,000.00 for the Subject Property. *State's Exhibit D*

13. Respondent made numerous telephone calls to Mr. Chervenak and sent him emails requesting that he make changes to his November 21, 2007 appraisal report. *Testimony of Mr. Chervenak*
14. The Division did not present any of the referenced emails at the hearing.
15. On November 30, 2007, Respondent sent a facsimile coversheet with comments to Mr. Chervenak requesting that he make changes in his November 21, 2007 appraisal report of the Subject Property. Respondent requested that Mr. Chervenak: (1) review a prospective lease agreement for the Subject Property and add such information as a addendum to the appraisal report and (2) include a comparable that was sold within six months of the appraisal report instead of a comparable that sold within 12 months of the appraisal report. Respondent attached a copy of the lease agreement for the Subject Property to the facsimile. *State's Exhibit E*
16. Tim Debronsky, owner of the Subject Property, and Eric Anthos, prospective tenant, entered into a rental agreement for the Subject Property on or about November 26, 2007. The lease term was to begin on December 15, 2007 and end on December 31, 2008. *State's Exhibit E*
17. Mr. Chervenak did not alter his November 21, 2007 appraisal report. *Testimony of Mr. Chervenak*
18. On December 17, 2008, the Division issued the NOH. *State's Exhibit A; Testimony of Mr. DeFrank*
19. The Deputy Superintendent proposes a \$1,000.00 fine after considering the factors listed in O.R.C. §1322.10(A)(2). The Division considers a violation of O.R.C. §1322.07(G) to be a serious offense that carries a fifth degree felony penalty. *Testimony of Mr. DeFrank*
20. Respondent contacted the Division and indicated that she was unable to attend the hearing, but wished to present her position in writing. *Respondent's Exhibit A; Testimony of Mr. DeFrank*
21. On May 19, 2009, the Division received Respondent's position statement. Respondent stated that "In this instance the appraiser is stating I tried to get him to change something on the appraisal. I disagree. What I was requesting from the appraiser to my knowledge was the request the underwriter information needed to get the loan clear to close *** I know the whole Ohio area is in a declining market *** I did not indicate to him *** to remove that statement from the appraisal. The appraiser never responded back to me regarding the underwriters request *** I was only requesting what the lender/underwriter needed." *Respondent's Exhibit 1*

22. Respondent also indicated that a new appraisal of the Subject Property was performed by a different appraiser and that the loan was approved, closed, and funded under the same terms and conditions. *Respondent's Exhibit 1*
23. Mr. Chervanek admitted that Respondent never requested that he change his appraisal report to reflect a different value conclusion amount. *Testimony of Mr. Chervenak*
24. Respondent was not seeking to change Mr. Chervenak's value conclusion of the Subject Property, but was attempting to have Mr. Chervenak provide additional information in the appraisal report to support for his value conclusion of \$140,000.00. *Respondent's Exhibit 1*
25. There was no evidence presented that Respondent had any prior violations on her record.

II. CONCLUSIONS OF LAW

26. The Division has procedurally complied with O.R.C. Chapter 119 and jurisdiction over this matter has been established.
27. The Division is responsible for the licensing, regulation, and enforcement of the Ohio Mortgage Broker Act, O.R.C. Chapter 1322.
28. At all times relevant, Respondent held an Ohio loan officer license and hence was subject to the laws in O.R.C. Chapter 1322 and the rules promulgated pursuant to that Chapter.
29. The burden of proof lies with the Division and that burden is based on a preponderance of the evidence standard. *Sanders v. Fleckner (1950), 59 Ohio L. Abs. 135, 98 N.E. 2d 60.*
30. Administrative agencies have a duty to base their conclusions on competent evidence. *State ex rel. Chrysler Plastic Products Corp. v. Industrial Comm. (1987), 39 Ohio App.3d 15*
31. Pursuant to O.R.C. §119.12, in an administrative appeal, the trial court reviews administrative orders to determine whether such orders are supported by reliable, probative, and substantial evidence and are in accordance with law. *Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St. 3d 83, 87.*
32. Reliable evidence is dependable and trustworthy. Probative evidence tends to prove the issue in question. Substantial evidence has weight, importance, and value. *Our Place Inc. v. Ohio Liquor Control Comm. (1992), 63 Ohio St.3d 570, 571*

33. The Division alleges in the first charge that Respondent knowingly attempted to instruct, induce, coerce, or intimidate an appraiser for the purpose of corrupting or improperly influencing the independent judgment of the appraiser with respect to a dwelling offered as security for repayment of a mortgage loan.

34. O.R.C. §1322.07(G) states:

No mortgage broker, registrant, licensee, or applicant for a certificate of registration or license under sections 1322.01 to 1322.12 of the Revised Code shall do any of the following:

* * *

(G) Knowingly compensate, instruct, induce, coerce, or intimidate, or attempt to compensate, instruct, induce, coerce, or intimidate, a person licensed or certified under Chapter 4763 of the Revised Code for the purpose of corrupting or improperly influencing the independent judgment of the person with respect to the value of the dwelling offered as security for repayment of a mortgage loan;

35. This Hearing Officer finds that Respondent's conduct does not demonstrate that she knowingly attempted to instruct, induce, coerce, or intimidate Mr. Chervenak to change his appraisal report for the purpose of improperly influencing him with respect to the value of the Subject Property in violation of O.R.C. § 1322.07(G).

36. This Hearing Officer finds no violation of O.R.C. §1322.07(G).

37. The Division alleges in the second charge that Respondent engaged in improper, fraudulent, or dishonest dealings with respect to the November 21, 2007 appraisal of the Subject Property in violation of O.R.C. §1322.07(C)

38. O.R.C. §1322.07(C) states:

No mortgage broker, registrant, licensee, or applicant for a certificate of or license under sections 1322.01 to 1322.12 of the Revised Code shall do any of the following:

* * *

(C) Engage in conduct that constitutes improper, fraudulent, or dishonest dealings.


39. Respondent did not engage in improper, fraudulent, or dishonest dealings with respect to the November 21, 2007 appraisal of the Subject Property in violation of O.R.C. §1322.07(C).
40. This Hearing Officer finds no violation of O.R.C. §1322.07(C).
41. The Division intends to impose a \$1,000.00 fine against Respondent pursuant to O.R.C. §1322.10(A)(2)
42. O.R.C. §1322.10(A)(2) states:
- (A) After notice and opportunity for a hearing conducted in accordance with Chapter 119 of the Revised Code, the superintendent of financial institutions may do the following:
 - (2) Impose a fine of not more than one thousand dollars, for each day a violation of a law or rule is committed, repeated, or continued. If the registrant or licensee engages in a pattern of repeated violations of a law or rule, the superintendent may impose a fine of not more than two thousand dollars for each day the violation is committed, repeated, or continued. All fines collected pursuant to this division shall be paid to the treasurer of state to the credit of the consumer finance fund created in section 1321.21 of the Revised Code. In determining the amount of a fine to be imposed pursuant to this division, the superintendent shall consider all of the following:
 - (a) The seriousness of the violation;
 - (b) The registrant's or licensee's good faith efforts to prevent the violation;
 - (c) The registrant's or licensee's history regarding violations and compliance with division orders;
 - (d) The registrant's or licensee's financial resources;
 - (e) Any other matters the superintendent considers appropriate in enforcing sections 1322.01 to 1322.12 of the Revised Code.
43. O.R.C. §1322.10(A)(1)(a) authorizes the Division to revoke a loan officer license for lack of compliance with any provision of O.R.C. §1322.01 through 1322.12.

44. The Division proposes to revoke Respondent's loan officer license and impose a \$1,000.00 fine against Respondent based upon the charges contained in the NOH.
45. The Division has not established that Respondent failed to comply with any of the provisions of O.R.C. Chapter 1322 that are referenced in the NOH.
46. Therefore, the Division has not met its burden of proof for revoking Respondent's loan officer license and imposing a fine.

III. RECOMMENDATION

Based upon the evidence submitted into the record for this case, the Division has not established that Respondent violated O.R.C. Chapter 1322. Therefore, I respectfully recommend that Respondent's mortgage loan officer license not be revoked and a fine not be imposed.

Respectfully submitted,


Delores Evans
Hearing Officer
June 24, 2009