Bob Taft
Governor

Lt. Governor Jennette Bradley
Director

STATE OF OHIO
DEPARTMENT OF COMMERCE
Division of Financial Institutions
Consumer Finance

In the matter of:	)	Case No. 04-0192-LOD
	)	
HAROLD F. TENNIHILL	)	**DIVISION ORDER**
380 East Central Avenue	)	
Delaware, Ohio 43015	)	**Denial of Loan Officer License Application**
	)	

On or about June 4, 2002, Harold F. Tennihill ("Respondent") submitted a loan officer license application to the Division of Financial Institutions ("Division"). On January 22, 2004, the Division issued Respondent a notice of the Division's intent to deny Respondent's application, and notified Respondent of his right to a hearing on the matter. Respondent requested a hearing, and pursuant thereto, an administrative hearing was held in accordance with Ohio Revised Code Chapter 119. on June 2, 2004.

The Hearing Officer filed her written Report and Recommendation with the Division on October 5, 2004, recommending "[t]he Respondent has not established the licensing prerequisites set forth in Ohio Revised Code Section 1322.041(A)(2), (3), and (5). However, because the Division has not complied with R.C. 119.04 as required for license denial in accordance with R.C. 1322.10(A), I recommend that no adverse action be taken on Respondent's Application for a loan officer license." A copy of the Report and Recommendation and a letter explaining Respondent's right to submit written objections to the report was mailed to Respondent via certified mail on October 6, 2004. A copy of the Report and Recommendation is attached hereto and incorporated herein. Respondent received the previously mentioned Report and Recommendation and letter, and he has not filed any objections.

Upon consideration of the hearing officer's Report and Recommendation and all evidence admitted at the hearing, the Division hereby modifies and/or rejects certain paragraphs in the Hearing Officer's Report and Recommendation as follows. Paragraphs of the Report and Recommendation not specifically addressed below are approved.

- The Division modifies paragraph II(A)(1), on page 11, to clarify the definition of jurisdiction.

  The Division's authority and jurisdiction over the subject matter only exits as authorized by law. There are two types of jurisdiction, subject matter and personal. Subject matter jurisdiction is the jurisdiction of a court (generally) over the subject, type, or cause of action of a case that allows the court to issue a binding judgment. Personal jurisdiction is the jurisdiction granted a court (generally) over the parties before it that allows it to issue a binding judgment.

Chapter 1322. of the Ohio Revised Code regulates loan officers in the State of Ohio. R.C. 1322.02(B) states that no person shall act as a loan officer without first having obtained a license from the Superintendent of Financial Institutions (which, pursuant to R.C. 1322.01(K), includes the Deputy Superintendent for Consumer Finance). The Superintendent investigates all applicants for a loan officer license. *See* R.C. 1322.031(B). The Superintendent must grant a loan officer license if an applicant meets statutory requirements. *See* R.C. 1322.041(A). After notice and opportunity for a hearing conducted in accordance with Chapter 119. of the Revised Code, the Superintendent may refuse to issue a loan officer license if he finds either (A) a violation of or failure to comply with any provision of sections 1322.01 to 1322.12 of the Revised Code or (B) a conviction of or guilty plea 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. *See* R.C. 1322.10(A). Therefore, the Division has subject matter jurisdiction to refuse to issue (deny) a loan officer license.

The Division obtains jurisdiction over an applicant once a NOH is served upon the individual. However, as discussed below, an applicant can waive service of the NOH, actual receipt of a NOH, and even their right to a hearing. This can be done either explicitly or implicitly.

- The Division approves the first three (3) sentences in paragraph II(A)(5), on page 12. The Division disapproves the last sentence for the reasons set forth below.

- The Division disapproves paragraphs II(A)(6) and II(A)(7), on page 12.

The Hearing Officer cites to no case law to support her position that "R.C. 1322.10(A)(1), 119.06 and 119.07 mandate" that a Respondent can waive the requirement that a notice of opportunity for a hearing be mailed and received by certified mail. A review of case law does not support the Hearing Officer's position.

The Division finds both *Jefferson Cty. Child Support Agency v. Harris* (7th Dist. 2003), 2003 Ohio 496, and *Fogt v. Ohio State Racing Commission* (2nd Dist. 1965), 3 Ohio App.2d 423, to be persuasive, and adopts these courts' rationale that R.C. 119.07 refers to a method of service relevant to obtaining personal jurisdiction.

In *Fogt*, the Racing Commission appealed the trial court's determination to invalidate the Racing Commission's order because "the notice issued in the present case was defective in that it did not meet the requirements of Section 119.07, Revised Code, and the record amply supports the trial court's conclusion that the notice of hearing was defective." *Id.* at 424. The Seventh District Court of Appeals reversed the trial court decision because it is equally

clear from the record that the appellee appeared in person before the Racing Commission; that he expressly indicated he wanted to proceed without a lawyer; that he specifically waived any defects in the notice of the alleged violation of Rule 259.01; and that he specifically consented to an amendment of the original citation to include an alleged violation of Rule 264.

After agreeing to proceed with the hearing, the appellee was estopped from thereafter denying the validity of the commission's order on the ground that the notice issued to him was defective.

Id. at 424-425. The Seventh District Court of Appeals determined that R.C. 119.07 dealt with personal jurisdiction, and a respondent's notice of allegations against him. The Court restated the familiar premise that

> Although parties to an action may not agree or consent to jurisdiction of the subject matter, it is fundamental that jurisdiction over the person may be waived…It has frequently been said that knowledge is not notice, but knowledge, coupled with facts showing an express waiver and consent, precludes any subsequent objection to the form of the notice. Indeed, the absurd consequences of any alternative conclusion are manifest in view of the sole purpose of the required notice.

Id. at 425.

In addition, the Tenth District Court of Appeals has adopted this rationale, that procedural requirements concerning notices deal with personal jurisdiction. *See Hoge v. Liquor Control Comm.* (10th Dist. 1969), 18 Ohio App.2d 255, 257.

In *Harris*, the Appellant argued "the trial court erred when it refused to adopt the administrative order because of a violation of procedural due process…due to the fact that the CSEA sent Harris notice of the hearing via regular mail instead of registered mail." *Harris*, *supra*, at Paragraph 10. The Second District Court of Appeals overruled the trial court, and stated

> Pursuant to R.C. 119.07, the CSEA should have sent notice of the hearing via registered mail, return receipt requested. "The failure of an agency to give the notices for any hearing * * * in the manner provided in this section shall invalidate any order entered pursuant to the hearing." R.C. 119.07. The purpose of this notice is to give the parties involved adequate notice to enable them to prepare for the hearing. *Sohi v. Ohio State Dental Bd.* (1998), 130 Ohio App.3d 414, 422, 720 N.E.2d 187. However, Ohio courts

> have consistently held that administrative orders following a hearing may be valid even though notice of the hearing did not comply with R.C. 119.07. See *Fogt v. Ohio State Racing Commission* (1965), 3 Ohio App.2d 423, 32 O.O.2d 546, 210 N.E.2d 730; *Shearer v. State Medical Bd.* (1950), 91 Ohio App. 277, 280, 44 O.O. 480, 97 N.E.2d 688; *Prinz v. State Counselor and Social Worker Bd.* (Jan. 21, 2000), 1st Dist. No. C-990200 [2000 Ohio App. LEXIS 116]; *Kenney v. South Range Local School District* (Mar. 23, 1983), 7th Dist. No. 82 CA 35 [1983 Ohio App. LEXIS 14170].
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> In order for an administrative order to be valid without proper notice under R.C. 119.07, the record must demonstrate that the defendant had actual notice of the proceedings against him. *Prinz* at 5. Once a defendant has received actual notice of the proceedings, he may waive asserting the lack of notice as a defense, as any objection to jurisdiction over the person may be waived. *Fogt* at 425, citing 1 Ohio Jurisprudence 2d 489, Section 89.
>
> We recognize that in *Prinz*, *Fogt*, and *Fenney*, the defendant appeared at the hearing and that appearance demonstrated he received actual notice of the proceedings against him while in this case Harris did not appear at the hearing. However, this case does not hinge on whether Harris did or did not appear at the hearing. The testimony at the hearing demonstrates that he actually received notice of the hearing. Before the hearing, Harris contacted the CSEA by telephone to inform it of his inability to attend and talked to the CSEA about the possible consequences of the hearing. Furthermore, Harris never objected to the form of service at any stage in the proceedings. Given these facts, we conclude Harris has waived any objection to the form of notice and, therefore, that the form of notice does not provide a basis for invalidating the administrative order. The CSEA's first assignment of error is meritorious.

Id. at Paragraphs 11, 12, and 13.

The *Fogt* case differs somewhat from the Respondent's case. The *Fogt* case deals with the form of the notice, not the delivery of the notice. However, the *Fogt* Court determined that R.C. 119.09 dealt with personal jurisdiction and not subject matter jurisdiction. Just as someone can waive notice of the allegations against them, one can also waive service, or the type of service, of the NOH.

The *Harris* case is similar to the Respondent's case; neither Harris nor the Respondent was served by certified mail. The *Harris* case cited to appellate decisions in several other districts, all of which asserted "administrative orders following a hearing may be valid even though notice of the hearing did not comply with R.C. 119.07." (citations omitted) *Harris* at Paragraph 11. After all, "[t]he purpose of R.C. 119.07 is to give sufficient notice such that the defending party can adequately prepare a defense." *See Beckside v. Ohio Liquor Control Commission* (10th Dist. 2004), 2004 Ohio 1009, at Paragraph 20.

The record here clearly indicates that the Division attempted to serve Respondent by certified mail at his address of record. If the Respondent did not receive the NOH, clearly the Division could not issue an order. If the Respondent appeared at the hearing and asserted that he did not properly receive the NOH and that he was not prepared to go forward, then, too, the Division could not issue an order. However, in the case at hand, we do not have either of these fact patterns.

Compliance with R.C. 119.07 gives the Division personal jurisdiction over an individual. However, an individual can waive the requirements of R.C. 119.07 that are procedural in nature. This waiver can be done either explicitly or implicitly. Although Respondent was not served by certified mail, he did receive the Division's NOH. By requesting a hearing, he waived any challenge he may have had as to how the NOH was served upon him. The Division obtained personal jurisdiction over Respondent when Respondent requested a hearing.

Further, Respondent fully participated in the hearing; he made an opening statement, presented evidence (Respondent's Exhibits 1 and 2), and called a witness to testify (See Hearing Transcript at page 86-100). By his participation in the hearing, Respondent implicitly waived any challenge he may have due to service defects. When asked by the Hearing Officer

> THE EXAMINER: Okay. Mr. Tennihill, I think the question pending is if you would like the service perfected, and going back and doing certified mail service, that can be done. If you would like to indicate you're here and proceed and waive that requirement, we can proceed in this case.
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> MR. TENNIHILL: Forward to the court that I do understand that I was under intent to deny and I did receive a letter with an intent to deny.
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> * * *

> THE EXAMINER: My question is, and assuming it's permissible and gives me jurisdiction, are you willing to waive the requirement of service in a particular manner which means service on you by certified mail for State's Exhibit E1, this particular document?
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> MR. TENNIHILL: For this particular document I will, yes, ma'am.

Hearing Transcript at pages 40-41. Respondent explicitly waived service of the NOH by certified mail.

The Hearing Officer's legal conclusion that the Division does not have subject matter jurisdiction is incorrect. As indicated by the *Fogt* Court, *supra*, it is absurd to believe that, after Respondent requests a hearing, appears at a hearing, and participates at a hearing, that the Division would lack jurisdiction to issue a decision on the matter. The Division has both subject matter jurisdiction and personal jurisdiction to determine whether or not to deny Respondent's application for a loan officer license.

- The Division modifies the Hearing Officer's Recommendation, found on page 15. Specifically, the Division disapproves of the sentence that reads "However, because the Division has not complied with R.C. 119.07 as required for license denial in accordance with R.C. 1322.10(A), I recommend that no adverse action be taken on respondent's Application for a loan officer license." As mentioned above, Respondent received notice and an opportunity to be heard. He explicitly waived service of the NOH. Further, by requesting a hearing, and participating at a hearing, he waived any challenge he may have had as to how the NOH was served upon him.

  Therefore, as the Hearing Officer found that "Respondent has not established the licensing prerequisites set forth in Ohio Revised Code Section 1322.041(A)(2), (3), and (5)," the Division denies Respondent's application for a loan officer license.

Upon consideration of the hearing officer's report and recommendation, the Division modifies the Recommendation as indicated above. Accordingly, Respondent's application for a loan officer license is hereby denied.

NOTICE OF RIGHT TO APPEAL

Respondent is hereby notified that pursuant to R.C. 119.12, this order may be appealed by filing a notice of appeal with the Ohio Division of Financial Institutions setting forth the order appealed from and the grounds for the appeal. A copy of such notice of appeal must, pursuant to R.C. 119.12, must also be filed with the court of common pleas of the county in which the place of business of the Respondent is located, or the county in which the Respondent is a resident. A notice of appeal must be filed within fifteen (15) days after the date of mailing of this order.

Signed and sealed this 16th day of November, 2004.

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ROBERT M. GRIESER
Deputy Superintendent for Consumer Finance
Division of Financial Institutions
Ohio Department of Commerce