

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

2010 DEC 16 AM 11:31

IN RE: : CASE NO. M2009-571
:
KEVIN J. GAINER, : DEBORAH K. TONGREN
RESPONDENT : HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued December 16, 2009

I. FINDINGS OF FACT

A. Background.

1. This matter came before Deborah K. Tongren, 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 Division held the hearing on July 23, 2009, at 77 South High Street, Columbus, Ohio at the request of Kevin J. Gainer, ("*Respondent*") to consider the allegations in the Division's Notice of Intent to Deny Loan Officer Renewal Application, Impose a Fine, and Notice of Opportunity for a Hearing ("*NOH*").
2. In its NOH, the Division alleged that Respondent lacked the character and fitness to remain a loan officer in Ohio because he failed to timely inform a borrower of material changes in a mortgage loan, in violation of R.C. §1322.64; committed an unconscionable act or practice, in violation of R.C. §1345.031 and Ohio Administrative Code ("*O.A.C.*") §§109:4-3-27(A) and (C); and, failed to cooperate with the Division's compliance examination, in violation of R.C. §1322.072. The Division concluded that Respondent lacked the character and fitness to remain a loan officer, and seeks to deny Respondent's 2009 application to renew his loan officer license and to impose a fine of \$5,000.00.

3. 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. Jacqueline S. Mallett, Esq., an attorney examiner, and Kenneth Haynie, a consumer finance examiner, testified on behalf of the Division. Respondent testified on his own behalf.
4. The Division introduced State's Exhibits A through S and State's Exhibit U and Respondent introduced Respondent's Exhibits 1 and 2. The Hearing Officer admitted the exhibits into evidence at the hearing. The Division did not introduce an Exhibit T.
5. The Hearing Officer closed the record at the end of the day on July 23, 2009.

B. The Division's NOH.

6. On May 26, 2009, the Division sent a cover letter and the NOH to Respondent at his home address 1317 Deepwood Drive, Macedonia, Ohio, 44056, by certified mail, return receipt requested. The NOH specified the basis for the Division's proposed action and offered Respondent the opportunity to request a hearing on the matter. The Division perfected service on May 28, 2009. *State's Exhibit A; Testimony of Respondent, Tr. at pg. 15.*
7. On June 8, 2009, the Division received a Hearing Request form from Respondent, and on June 9, 2009 the Division sent a letter to Respondent scheduling a hearing for July 23, 2009. *State's Exhibit B.*
8. On July 16, 2009, the Division sent an Amended NOH to Respondent, by certified mail, return receipt requested. The Division perfected service on July 18, 2009. *State's Exhibit C.*
9. The Division held the hearing on July 23, 2009 with both parties in attendance. Respondent appeared at the hearing *pro se*, and waived his right to counsel. *Tr. at pg. 7.*

C. Respondent's Background.

10. On February 9, 2004, the Division licensed Respondent as a loan officer with Triton Financial Group, L.L.C. ("*Triton*"). *State's Exhibit D.*

11. Triton held a mortgage broker certificate of registration, number MB.803160.000. *State's Exhibit E*. Triton's address was 2000 Auburn Drive, Suite 200, Beachwood, Ohio, 44122. *Testimony of Respondent, Tr. at pg. 16.*
12. On March 28, 2008, Respondent signed an application with the Division to become the operations manager for Triton. *State's Exhibit F; Testimony of Respondent, Tr. at pg. 19.* Respondent was aware that, as the operations manager, he would be responsible for the day-to-day operations of Triton, and was familiar with the statutes, rules, and regulations applicable to the mortgage broker business. *Testimony of Respondent, Tr. at pg. 159.*
13. Respondent accepted the duties as operations manager of Triton, because he believed it was the only way to keep his job. Respondent expected Triton to provide him on-the-job training in order to fulfill his duties. *Testimony of Respondent, Tr. at pg. 159.*
14. Jacqueline S. Mallett is an attorney examiner with the Division and reviewed Respondent's application. *Testimony of Ms. Mallett, Tr. at pg. 79-80.*
15. On May 1, 2008, the Division renewed Respondent's loan officer license. *Testimony of Ms. Mallett, State's Exhibit D.*
16. On July 18, 2008, the Division approved Respondent's application as Triton's operations manager. *State's Exhibit E; Testimony of Ms. Mallett, Tr. at pg. 84.*
17. Although Respondent was approved as Triton's operations manager, he did not receive the on-the-job training that he had expected. *Testimony of Respondent, Tr. at pg. 21.*
18. Triton ceased operating as a mortgage brokerage in September or October of 2008. *Testimony of Respondent, Tr. at pg. 17.*
19. On April 13, 2009, the Division revoked Triton's mortgage broker certificate of registration. The witness did not disclose the reason for Triton's revocation. *Testimony of Ms. Mallett, Tr. at pg. 102-103.*

20. On April 29, 2009, Respondent submitted an on-line loan officer license renewal application to the Division. *State's Exhibit G.*
21. Respondent is seeking a renewal of his loan officer's license in order to work for Harper Financial Group. He is currently unemployed. *Testimony of Respondent, Tr. at pg. 16.*

D. Division's Compliance Examination.

22. Kenneth E. Haynie is a Consumer Finance Examiner with the Division, and conducted a compliance examination of Triton. Examiner Haynie reviewed loan files for borrowers Dr. Malcolm Walters and Jill Sands. *Testimony of Examiner Haynie, Tr. at pgs. 63 and 65. .*

1. *Dr. Walter's Mortgage Loan*

23. On November 14, 2006, Dr. Malcolm Walters, Jr. made a mortgage loan application by telephone with Triton for a first mortgage loan on the property located at 1890 Woodbrook Lane, Cleveland, Ohio 44124 ("*November 2006 application*" and "*Cleveland Property*"). *State's Exhibit K; Respondent's Exhibit R-2; Testimony of Respondent, Tr. at pgs. 22-25, and 152; Testimony of Mr. Haynie, Tr. at pg. 75.*
24. The Cleveland Property was to be Dr. Walters' primary residence. *Testimony of Respondent, Tr. at pgs. 30 and 155.*
25. The November 2006 application showed that Dr. Walters had applied for a 30-year, fixed-rate first mortgage loan for the Cleveland Property in the amount of \$1,350,000.00. The document also showed that Dr. Walters had reported a monthly gross income of \$37,500.00. *State's Exhibit K.*
26. The November 2006 Truth-in-Lending Statement showed a variable annual percentage rate of 0.149%, and 360 monthly payments of \$3,750, each for Dr. Walters Cleveland Property loan. *State's Exhibit N; Testimony of Respondent, Tr. at pgs. 41-42.*
27. The November 2006 Good Faith Estimate showed a 1% mortgage broker fee in the amount of \$13,500.00, and a loan origination fee of \$13,500.00, for a total amount of \$27,000.00 to be paid to Triton at closing. It also showed that Dr. Walters' total monthly payments, including principal and

interest, insurance, and real property taxes, would total \$4,350.00. *State's Exhibit Q; Testimony of Respondent, Tr. at pgs. 51-52.*

28. Respondent was not the loan officer for Dr. Walters' November 2006 mortgage loan application. *State's Exhibit K; Testimony of Respondent, Tr. at pg. 31.*
29. Respondent did not complete any of the November 2006 loan documents for Dr. Walters' mortgage loan application. *Testimony of Respondent, Tr. at pg. 152.*
30. On or about December 28, 2006, Respondent became Dr. Walters' mortgage loan officer. *Respondent's Exhibit 2, at pgs. 8 and 9.*
31. Respondent was familiar with the mortgage broker laws, but relied on his operations manager for assistance. *Testimony of Respondent, Tr. at pg. 21.* Respondent would not become Triton's operations manager until March 28, 2008, when he filed his application with the Division. *State's Exhibit F.*
32. After he became Dr. Walters' mortgage loan officer, Respondent assisted Dr. Walters' in completing a set of new mortgage documents, including applications for first and second mortgage loans for the Cleveland Property (collectively "January mortgage loan documents"). *Testimony of Respondent, Tr. at pgs. 29 and 43.*
33. The January mortgage documents were dated January 23, 2007, the date of the closing. *Testimony of Ms. Mallett, Tr. at pg. 115.*
34. The January mortgage loan documents included a first mortgage loan application in the amount of \$880,000.00 (*State's Exhibit L*), and a second mortgage loan application in the amount of \$220,000.00 (*State's Exhibit M*) for the Cleveland Property. *Testimony of Respondent, Tr. at pgs. 28-30.*
35. The January first mortgage loan application had a 7.25% adjustable rate of interest. *State's Exhibit L; Testimony of Respondent, Tr. at pg. 28.*
36. The January second mortgage loan application had an 11% fixed rate of interest. *State's Exhibit M; Testimony of Respondent, Tr. at pg. 29.*

37. On both the November 2006 mortgage loan application, and on the January mortgage loan applications, Dr. Walters reported monthly gross income of \$37,500.00. However, on the January mortgage loan applications, he included additional income of \$3,000.00 per month, as rental income. *State's Exhibits L and M.*
38. Respondent and Dr. Walters completed new Truth-in-Lending Disclosure Statements (*State's Exhibits O and P*), and new Good Faith Estimates (*State's Exhibits R and S*) for the January first and second mortgage loans for the Cleveland Property.
39. Respondent did not attend the January 23, 2007 closing. *Testimony of Respondent, Tr. at pg. 154.*
40. The January mortgage loan documents contained substantial differences from the November 2006 mortgage loan documents.
41. The January Truth-in-Lending Statement for Dr. Walters' first mortgage loan showed a variable annual percentage rate of 7.5%, with 359 monthly payments of \$5,318.87, plus a final balloon payment of \$185,318.87. *State's Exhibit O.*
42. The January Truth-in-Lending Statement for Dr. Walters' second mortgage loan was inconsistent with his application. The Truth-in-Lending Statement for the second mortgage loan had an 11% variable annual percentage rate of interest, instead of the 11% fixed rate of interest reflected on Dr. Walters' January application. The document also showed that Dr. Walters would have monthly payments of \$2,016.87, plus a final balloon payment of \$222,010.87. *State's Exhibit P; Testimony of Respondent, Tr. at pgs. 44-45.*
43. Dr. Walters' total anticipated monthly payments for the Cleveland Property changed from \$3,750.00 per month for one loan in November 2006, to approximately \$7,335.74 per month in the two January mortgage loan documents. *State's Exhibits N, O, and P.*
44. In the November 2006 mortgage loan, Dr. Walters' annual percentage rate was a variable rate of 0.149%. In the January mortgage loan documents, his annual percentage rate changed to a variable rate of 7.5% on the first

mortgage loan, and 11% on the second mortgage loan. *State's Exhibits N, O, and P; Testimony of Respondent, Tr. at pg. 54.*

45. The January Good Faith Estimates showed a mortgage broker fee to Triton in the amount of \$33,500.00. *State's Exhibit R.*
46. In the January mortgage loan documents, the mortgage broker fees due to Triton at closing increased by \$20,000.00. *State's Exhibit Q and R.*
47. Newly enacted Senate Bill 185 ("S.B. 185"), effective January 1, 2007, required that loan officers were to notify a borrower of material changes in the terms of a mortgage loan. Material changes included alterations in the rate of interest, increases of more than 5% in monthly payments, and differences in the amount of the fees paid to a mortgage broker. *Testimony of Ms. Mallett, Tr. at pgs. 91-92.*
48. Prior to the January 21, 2007 closing for the January mortgage loans, Respondent informed Dr. Walters, of some of the changes in the terms of the mortgage loans by providing Dr. Walters with a form entitled "Notice of Escrow of Taxes & Regular Monthly Payment (Mandatory disclosure, if applicable)." *Respondent's Exhibit 2, at pg. 7; Testimony of Respondent, Tr. at pg. 142.*
49. The Notice of Escrow of Taxes & Regular Monthly Payment form disclosed the amount of principal and interest, property taxes, insurance, and "other." There was no explanation as to what the term "other" included. The notice did not disclose the change in the annual percentage rate, a balloon payment, or a change in the amount of fees due to Triton at closing. *Respondent's Exhibit 2, at pg. 7; Testimony of Respondent, Tr. at pg. 143.*
50. The Division did not find any documentation in Dr. Walters' loan file to evidence that Respondent had disclosed changes in the annual percentage rate, monthly payments, or changes in the amount of the fees paid to Triton. *Testimony of Mr. Haynie, Tr. at pgs. 66-67.*
51. Respondent conducted most of his interactions with Dr. Walters in person, and maintained that he had notified Dr. Walters orally of the changes in the terms of Dr. Walters' mortgage loans. *Testimony of Respondent, Tr. at pgs. 37 and 142.*

52. The Division did not interview Dr. Walters, and provided no evidence to rebut Respondent's contention that he had orally informed Dr. Walters of the changes in the terms of his mortgage loans prior to the closing. *Testimony of Ms. Mallett, Tr. at pg. 119.*
53. The Division maintained that because Dr. Walters' loans closed after January 1, 2007, Respondent was required to make written disclosure to Dr. Walters of the changes in the terms of Dr. Walters' mortgage loan(s). The Division also maintained that Respondent should have retained his documentation for two years following the transaction. *Testimony of Ms. Mallett, Tr. at pgs. 114-116 and 131.*
54. Ms. Mallett acknowledged, however, that S.B. 185 did not specify that the disclosures were to be in writing, or that they were to be on a particular form. *Testimony of Ms. Mallett, Tr. at pg. 114.*
55. Dr. Walters' mortgage loans were "stated loans." *Testimony of Respondent, Tr. at pg.*
56. A stated loan is one in which the loan officer does not verify the income that the borrower states on the application, unless requested to do so by the lender. *Testimony of Respondent, Tr. at pg. 61; Testimony of Examiner Haynie, Tr. at pg. 69.*
57. Prior to January 7, 2007, stated loans were permitted in Ohio. *Testimony of Ms. Mallett, Tr. at pg. 111.*
58. As a result of S.B. 185, effective January 7, 2007, stated loans were no longer permitted. Loan officers were required to verify a borrower's ability to his re-pay mortgage loan, and retain copies of that verification for a period of two years. *Testimony of Ms. Mallett, Tr. at pgs. 92-93, 111, and 130.*
59. Examiner Haynie did not find tax returns or other documents that would have confirmed Dr. Walters' stated income on the mortgage loan applications, or that Respondent verified Dr. Walters stated income. *Testimony of Examiner Haynie, Tr. at pgs. 67.*

60. Respondent provided copies of a letter from Dr. Walters' accountant, two letters from GMAC Mortgage, and a Verification of Deposit from Dr. Walters' financial institution to evidence that he had verified Dr. Walters' income and assets. *Respondent's Exhibit 2, at pgs. 8-11; Testimony of Respondent, Tr. at pg. 141.*
61. The documents provided by Respondent confirmed that Dr. Walters was self-employed in his own dental practice, showed a history of Dr. Walters' timely payments on a mortgage loan with GMAC, and showed the balance on his accounts with his depository institution. *Respondent's Exhibit 2, at pgs. 8-11.*
62. None of the documents verified the income listed on Dr. Walters' mortgage loan application.

2. Ms. Sands' Mortgage Loan

63. On February 5, 2007, Respondent conducted a telephone interview of borrower Jill Sands, and completed a Uniform Residential Loan Application for property located at 2574 Fairwood Drive, Pepper Pike, Ohio 44124 ("*Pepper Pike Property*"). On her application, Ms. Sands stated that her monthly income was \$20,000.00. *State's Exhibit U, pg. 2; Testimony of Respondent, Tr. at pg. 57.*
64. Ms. Sands' mortgage loan was also a "stated loan." *Testimony of Respondent, Tr. at pg. 38, and 57-58.*
65. Examiner Haynie did not find tax returns or other documents that would have confirmed Ms. Sands' stated income on her mortgage loan application. *Testimony of Examiner Haynie, Tr. at pgs. 67.*
66. Respondent verified Ms. Sands' employment and income by telephoning her employer, but did not retain documentation of the telephone call in Ms. Sands' file. Respondent did not request that Ms. Sands provide him with a copy of her income tax returns or a copy of her W-2. *Testimony of Respondent, Tr. at pgs. 59-60, 137, 141.*

3. The Division's Compliance Examination and Notification to Respondent.

67. On February 21 and 22, 2008, the Division conducted a compliance examination of Triton. *State's Exhibit H; Testimony of Examiner Haynie, Tr. at pg. 65.*
68. The Division sent two letters addressed to Respondent, as the Operations Manager at Triton, from Richard F. Keck, Chief Examiner for the Consumer Finance Section of the Division, informing Respondent that Examiner Haynie's February compliance examination had raised issues with respect to how Triton made payments to its loan officers. Neither letter mentioned mortgage loans to Dr. Walters or the mortgage loan to Ms. Sands. *State's Exhibits H and I.*
69. The Division sent the first letter on May 14, 2008, by ordinary mail, and requested that Respondent respond to the letter within 30 days. *State's Exhibit H; Testimony of Ms. Mallett, Tr. at pg. 87.*
70. The Division did not receive a response to its May 14, 2008 letter. *Testimony of Ms. Mallett, Tr. at pg. 88.* The letter was not returned undelivered to the Division. *Testimony of Ms. Mallett, Tr. at pg. 100.*
71. The Division sent the second letter on August 20, 2008, by certified mail, return receipt requested, and perfected service on August 22, 2008. *State's Exhibit I, Testimony of Ms. Mallett, Tr. at pg. 101.* This letter indicated that the Division had not received a response to its May 14, 2008 letter, and requested that Respondent reply, in writing, by September 3, 2008. *State's Exhibit I; Testimony of Testimony of Ms. Mallett, Tr. at pg. 89.*
72. The Division did not receive a response to its August 20, 2008 letter. *Testimony of Ms. Mallett, Tr. at pg. 90.*
73. Respondent admitted that he had received both the May and the August, 2008 letters from the Division. *Testimony of Respondent, Tr. at pg. 151.*
74. Respondent maintained that he responded to the Division's May 14, 2008 letter, and claimed that he sent a response, by ordinary mail, on May 22, 2008. *Testimony of Respondent, Tr. at pg. 139 and 149-150.*

75. Respondent did not produce a copy of his May 22, 2008 letter to the Division.
76. Respondent produced a copy of a letter dated August 22, 2008, which referenced his May 22, 2008 letter of reply to the Division. *Respondent's Exhibit R-1.*
77. Respondent's August 22, 2008 letter was addressed to the "Ohio Department of Commerce, Division of Financial Institutions, 77 South High Street – 21st floor, Columbus, OH 43215-6120." *Respondent's Exhibit R-1; Testimony of Respondent, Tr. at pg. 146-147.*
78. The address on Respondent's August 22, 2008 letter showed the correct address for the Division.
79. Respondent maintained that he wrote the letter himself, sent the letter by ordinary mail because he had to pay for the postage out-of-pocket, and personally mailed the letter on August 22, 2008. *Testimony of Respondent, Tr. at pgs. 146 and 150.*
80. Respondent's August 22, 2008 letter to the Division addressed the issues raised by the Division in its May and August, 2008 letters to Respondent.

4. Respondent's Character and Fitness.

81. The Division contended that Respondent's loan officer license should not be renewed as he does not meet criteria for general character and fitness. *Testimony of Ms. Mallett, Tr. at pg. 95.* The Division based its contention on the following allegations:

(a) Respondent did not respond to the Division's May 22, 2008 and August 20, 2008 letters. *Testimony of Ms. Mallett, Tr. at pg. 90; and*

(b) Respondent did not verify Dr. Walters or Ms. Sands ability to repay their mortgage loans. *Testimony of Ms. Mallett, Tr. at pgs. 130-131; and*

(c) Respondent did not maintain written documentation of disclosure to Dr. Walters of changes in his January mortgage loans. *Testimony of Ms. Mallett, Tr. at pg. 115-116.*

5. Fine.

82. Ms. Mallett explained that the Division did not fine Respondent the maximum amount in this matter; she stated that the fine could have been as much as \$8,000.00. *Testimony of Ms. Mallett, Tr. at pg. 94.*

II. CONCLUSIONS OF LAW.

A. Jurisdiction.

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

B. Proposed Denial of Respondent's Loan Officer License Renewal.

84. An operations manager is the individual responsible for the everyday operations, compliance requirements, and management of a mortgage broker business. *R.C. §1322.01(H).*

85. As the operations manager of Triton, Respondent was responsible for compliance with R.C. Chapter 1322.

86. On January 1, 2007, S.B. 185 became effective and amended certain provisions of the Ohio Mortgage Broker Act and the Ohio Sales Practices Act. Specifically, S.B. 185 amended R.C. §1322.064 to require that loan officers make timely disclosures to borrowers of all material changes in a mortgage loan, and amended R.C. §1345.031(A)(14) to require that loan officers verify a borrower's ability to re-pay a mortgage loan.

1. *Disclosure of material changes.*

87. R.C. §1322.064(A)(1) defines material change as:

(a) A change in the type of loan being offered, such as a fixed or variable rate loan or a loan with a balloon payment;

(b) A change in the term of the loan, as reflected in the number of monthly payments due before a final payment is scheduled to be made;

(c) A change in the interest rate of more than 0.15%;

(d) A change in the regular monthly payment of principal and interest of more than five per cent;

* * *

R.C. §1322.064(A)(1).

88. Changes in the interest rate, the amount of monthly payments, the amount of fees due to Triton upon closing, and a change from a first mortgage to a first and a second mortgage loan, constituted material changes in the Cleveland Property loan, which required disclosure. *R.C. §1322.064(A)(1)(a), (b), and (c).*
89. The change from a single monthly mortgage payment of \$3,750.00, to first and second monthly mortgage loan payments totaling \$7,335.74, constitutes a change in the regular monthly payments of more than five percent, and required disclosure. *R.C. §1322.064(A)(1)(d).*
90. O.A.C. §1301:8-7-15(E), effective June 1, 2007, requires that the disclosure in material changes be documented on the Division's written form, signed by the borrower.
91. O.A.C. §1301:8-7-15(E) does not apply to the Cleveland Property loan because the loan was closed in January 2007, almost six months before the rule was promulgated in June 2007.
92. Respondent orally notified Dr. Walters of the material changes in the terms of the Cleveland Property mortgage loans, in conformance with the requirements in effect at that time. *R.C. §1322.064.*
93. Consequently, the Hearing Officer finds that the Division has not demonstrated a violation of *R.C. §1322.064.*

2. Verification of Dr. Walters' and Ms. Sands ability to re-pay.

94. Effective January 1, 2007, a loan officer must confirm a borrower's ability to re-pay a loan by verifying a borrower's income and financial resources. R.C. §1345.031.
95. O.A.C. §109:4-3-27, effective January 7, 2007, requires that loan officers analyze a borrower's ability to re-pay a mortgage loan by verifying the borrower's current and expected income, current and expected cash flow, net worth and other financial resources, current financial obligations, property taxes and insurance, assessments on the property, employment status, credit history, and other relevant factors. Such documentation must be maintained for a period of at least two years from the date of closing, or as required by other applicable state or federal law, whichever time is greater. O.A.C. §109:4-3-27(B) and (E).
96. Respondent violated R.C. §1345.031 and O.A.C. §109:4-3-27 when he performed only a cursory financial check of Dr. Walters and Ms. Sands, and failed to obtain and maintain documents such as income tax returns that could have verified the borrowers' abilities to re-pay their mortgage loans.

3. Improper dealings and unconscionable acts.

97. R.C. §§1345.031(A) and (B) provide:

(A) No supplier shall commit an unconscionable act or practice concerning a consumer transaction in connection with a residential mortgage. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

(B) For purposes of division (A) of this section, the following acts or practices of a supplier in connection with such a transaction are unconscionable:

* * *

(14) Entering into the consumer transaction knowing there was no reasonable probability

of payment of the obligation by the consumer;

98. Mortgage loan officers and mortgage brokers are "suppliers" as that term is defined in R.C. §1345.01(C).
99. Therefore, Respondent, as an Ohio licensed mortgage loan officer, is a supplier for the purposes of R.C. Chapter 1345.031.
100. Respondent's limited and cursory confirmation of Dr. Walters' and Ms. Sand's stated incomes afforded no basis on which to reasonably determine that either borrower had the ability to re-pay their residential mortgage loans.
101. R.C. §1345.031(B) provides that a mortgage loan officer who enters into a consumer transaction without reasonable probability of re-payment by the consumer has committed an unconscionable act.
102. Respondent's actions, in entering into two mortgage loans transactions with Dr. Walters and one mortgage loan transaction with Ms. Sands, without confirmation of reasonable probability of re-payment, constitutes three unconscionable acts, in violation of R.C. §§1345.031(A) and (B)(14).
103. R.C. §1322.07(C) prohibits a loan officer from engaging in conduct that constitutes improper, fraudulent, or dishonest dealings.
104. Respondent's failure to comply with the provisions of R.C. §1345.031 and O.A.C. §109:4-3-27, constitutes three acts of improper conduct, in violation of R.C. §1322.07(C).

4. Response to the Division's compliance examination letters.

105. R.C. §1322.06(A) states that: "As often as the superintendent of financial institutions considers it necessary, the superintendent may examine the registrant's records pertaining to business transacted pursuant to sections 1322.01 to 1322.12 of the Revised Code."
106. R.C. §1322.072(A) states that "[n]o person, in connection with any examination or investigation conducted by the superintendent of the Division under R.C. §§1322.01 to 1322.12, shall knowingly circumvent, interfere with, obstruct, or fail to cooperate, including making a false or

misleading statement, failing to produce records, or intimidating or suborning any witness."

107. O.A.C. §1301:8-7-13(F) states:

As part or in furtherance of any examination pursuant to division (A) of section 1322.06 of the Revised Code, or any investigation in accordance with division (B) of section 1322.10 of the Revised Code, if the superintendent or his authorized representatives requests a written response, or the submission of books, records, documentation, or other information, the applicant, registrant, licensee, or person shall deliver a written response and any requested information within the time period specified in the request. If no time period is specified, the written response and any required submissions shall be delivered to the superintendent not later than thirty days after the date of such request, as indicated in the upper right hand corner of the request.

108. The Division did not dispute or contradict Respondent's testimony that he sent two letters to the Division in reply to its compliance letters; it only maintained that it never received those letters. However, the Hearing Officer finds that because the Division intends to deny Respondent's loan officer application, in part, on the basis that he did not respond to the compliance examination letters, the dispute as to the mailing of the response is a factual issue that goes to the heart of the Division's allegations. Therefore, the Hearing Officer is empowered to decide the relative weight of that evidence.
109. There can be a presumption of service or receipt of a letter when a letter is sent through the U.S. mail, but not received, if the letter: 1) was properly addressed, 2) had sufficient postage, and 3) was properly deposited in the mail. *Blackburn Security, Inc. v. Ohio Department of Commerce*, (May 24, 1993), Montgomery App. No. 13660.
110. Although Respondent's August, 2008 letter was properly addressed, and Respondent insisted that he stamped the letter, and deposited it in the mail, there was no evidence that the letter had sufficient postage. With respect to the May 22, 2008 letter, Respondent failed to present evidence to

demonstrate the letter was properly addressed, stamped, or deposited in the mail.

111. Consequently, the Hearing Officer finds that neither a presumption of service nor of receipt of Respondent's correspondence applies to Respondent's May 2008 and August 2008 letters.
112. The Division has, therefore, demonstrated two violations of R.C. §1322.072(A) and O.A.C. §1301:8-7-13(F) because Respondent failed to establish that he replied to the Division's May 2008 and August 2008 compliance examination letters.

5. Respondent's Character and Fitness, and Denial of Respondent's loan officer license renewal.

113. The Division is empowered to protect the public from harm by denying, suspending, or revoking a loan officer's license when the statutory conditions for licensure have not been met. R.C. §§1322.041(A) and 1322.10(A).
114. R.C. §1322.041 sets forth the conditions which a loan officer must meet in order for the Division to grant a license. One such condition is that "[t]he 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)(6).
115. The superintendent of the Division may deny the renewal of a loan officer license if the applicant fails to meet the conditions set forth in R.C. 1322.041(A)(2) and (6). R.C. §1322.041(B)(3).
116. The superintendent of the Division also may suspend, revoke, or refuse to issue or renew a loan officer license for failure to comply with R.C. §§1322.01 through 1322.12, and may impose a fine of up to \$1,000.00 per day for each day a violation of a law or rule is committed, repeated or continued. R.C. §§1322.10(A)(1)(a) and (A)(2).
117. After notice and opportunity for a hearing, the Division may suspend or revoke a license if the Division finds a violation or failure to comply with

R.C. §§1322.01 to 1322.12 or the rules adopted under those sections. R.C. Section 1322.10(A)(1)(a).

118. This Hearing Officer finds that Respondent's failure to comply with the provisions of R.C. §§1345.031, 1322.07(C), §1322.072(A), and O.A.C. §§109:4-3-27 and 1301:8-7-13(F) creates doubt that he can operate in compliance with the law, without further training.
119. The Division has demonstrated sufficient basis to deny Respondent's renewal application for a loan officer license, under R.C. §1322.041(A).
120. This Hearing Officer, however, finds that Respondent presented mitigating factors that should be considered by the superintendent in determining the appropriate disciplinary action(s):

(a) Amendments to the applicable portions of R.C. Chapters 1322 and 1345 became effective shortly before Dr. Walters' and Ms. Sands' mortgage loan applications; and

(b) The Division did not implement its enabling rules until June of that year, subsequent to the mortgage loan applications at issue.

6. Imposition of a Fine.

121. After notice and opportunity for a hearing conducted in accordance with R.C. Chapter 119, the superintendent of the Division may:

(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. * * *

R.C. § 1322.10(A)(2).

122. In determining the amount of a fine, the Division shall consider 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; and
- (e) Any other matters the superintendent considers appropriate to enforcing R.C. Sections 1322.01 to 1322.12.

R.C. Section 1322.10(A)(2).

123. There was no evidence presented that Respondent had a history of violations or a failure to cooperate with the Division prior to the instant matter. Neither party presented any evidence concerning Respondent's financial resources, however, Respondent testified that he is currently unemployed and that he cannot obtain employment in the mortgage loan industry because his license has not been renewed by the Division.

124. The Division intends to impose a fine upon Respondent in the amount of \$5,000.00. The Hearing Officer recommends that the Division calculate its fine based on the following findings: 1) three violations for failure to verify Dr. Walters' and Ms. Sands' ability to re-pay their mortgage loans; and 2) one violation for failure to respond to the Division's May 2008 compliance examination letter.

125. The Hearing Officer finds that the Division should consider the proposed fine in conformity with the evidence, the Hearing Officer's findings, and the statutory guidelines in R.C. §1322.10(A).

III. RECOMMENDATION

Based upon the evidence submitted into the record for this case, the Division has established a sufficient evidentiary basis for imposing a fine on Respondent, pursuant to R.C. Section 1322.10(A)(2), for his violations of R.C. §§1345.031, 1322.072(A), 1322.07(C), and O.A.C. §§109:4-3-27, and 1301:8-7-13(A).

This Hearing Officer also finds that the Division has established a sufficient evidentiary basis to deny Respondent's application to renew his loan officer's license, pursuant to R.C. §1322.10(A)(1)(a). While this Hearing Officer defers to the expertise of the Superintendent of the Division in the final determination in this matter, this Hearing Officer respectfully submits that, should the Superintendent consider approval of Respondent's application to renew his loan officer license Respondent should be required to complete additional hours of continuing education to enable Respondent to better understand the requirements of the mortgage loan industry.

Respectfully submitted,

Deborah K. Tongren
Hearing Officer