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STATE OF OHIO  
DEPARTMENT OF COMMERCE  
DIVISION OF FINANCIAL INSTITUTIONS

IN RE: : CASE NO. 04-0192-LOD  
: :  
HAROLD F. TENNIHILL : JANE S. ARATA, HEARING OFFICER

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ADMINISTRATIVE HEARING OFFICER'S  
REPORT AND RECOMMENDATION  
Issued OCTOBER 5, 2004

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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 June 2, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Harold F. Tennihill ("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 1978 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).

Emily Smith, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. The Respondent appeared *pro se* and testified at the hearing. At the hearing, State's Exhibits A, B, C1, C2, D, E1, E2, F through J, and Respondent's Exhibits 1 and 2 were admitted into the record.

**B. Jurisdiction and Procedural Matters.**

1. The Division issued the NOH to Respondent on January 22, 2004. (State's Exhibit E1.) (References to pages of the Hearing Transcript will be abbreviated as "TR at {page(s)}".)
2. Respondent's hearing request was received by the Division on February 18, 2004. (State's Exhibit F; TR at 27-28.)
3. The Division's February 19, 2004 letter to Respondent set the hearing for March 1, 2004, and continued it to March 31, 2004. (State's Exhibit G; TR at 28.)
4. The hearing was continued until June 2, 2004. (State's Exhibit I.)
5. The Respondent received the NOH and received written notice of the date, time, and location of hearing. (State's Exhibits G and I; TR at 22, 23, 28, 30.)
6. The Division did not obtain certified or registered mail service of the NOH on the Respondent. From the record, it appears that he got the NOH from his employer. The Division usually sends the NOH to the Respondent and the Respondent's employer. (State's Exhibit E1; TR at 38-40.)
7. The record contains no evidence to establish personal service of the NOH on Respondent or any publication of his right to request a hearing on the allegations contained in the NOH.
8. At the hearing, Respondent testified that he wanted waive the certified mail service requirement for the NOH and proceed with the hearing. (TR at 41.)

**C. Respondent's Loan Officer Application and Conviction for Theft.**

9. Respondent is an individual who seeks to conduct business in Ohio as a mortgage loan officer. (State's Exhibit A; TR at 14.)
10. 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).

11. On June 4, 2002, Respondent signed a Loan Officer Application ("Application") which was then submitted to the Division. The Division received the Application on June 17, 2002. (State's Exhibit A.)
12. 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 A.)
13. 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 A.)
14. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031(B).
15. Respondent's background check revealed a theft charge in 1978. In response to the Division's inquiry, the Respondent submitted a certified copy of a Delaware County Court Journal Entry establishing his conviction for misdemeanor theft in 1978. (State's Exhibits B, C1 and C2.)
16. The events that led to the theft conviction occurred almost 26 years ago when Respondent was 18 years old. One of Respondent's friends sold tires to someone who had not paid for them. Respondent and his friend attempted to take the tires back from the other person's vehicle and were arrested. Respondent pled guilty and was convicted of theft. (State's Exhibits C1 and C2; TR at 55-56.)

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

17. The Respondent did not disclose the 1978 theft conviction on his Application. (State's Exhibit A; TR at 14-15.)
18. Respondent explained that he did not disclose the theft conviction on his application for several different reasons. Because the issue of disclosure is critical, it is important to look closely at how the Respondent testified about this issue.

19. Initially, Respondent claimed he did not disclose the conviction because he thought only felonies or convictions within the past ten years needed to be disclosed.

Q. When you marked "no" to answer this question, was that the correct answer?

A. I was induced to answer that correctly.

Q. I'm sorry. You were induced to answer that correctly so that was correct?

A. I was advised over ten years it wouldn't be an issue. Anything over in the last ten years, any felony, receiving stolen property, money, was that anything in my future, told them I disclosed to the mortgage company that it was 24 years ago at that time, and they asked what was the claim? I assisted in an illegal repossession. It was judged petty theft.

Q. When you answered this question, you knew that you had been convicted of theft; is that correct?

A. I understood that I had a misdemeanor petty theft, correct.

Q. Did you understand when the Division is asking that you disclose any convictions including but not limited to theft, why didn't you answer "yes"?

A. The relative history of the offense was advised that that was not -- would not be on my record.

(TR at 15-16.)

20. Respondent had concerns about how to respond to Question 5 and sought advice from his former employer and Hondros College. He did not contact the Division or an attorney for advice on this issue. (TR at 16-18.)
21. Respondent explained that he did not understand Question 5 and did not disclose the conviction because he thought only felonies or convictions within the past ten years needed to be disclosed.

Q. Now, I believe you testified to question no. 5, but I want to go back to this question, the second page, you have got it. Just to be clear, when you read this question, did you understand it?

A. No.

Q. What did you think that it meant?

A. Any felonies or any offense within ten years or felonies throughout my life.

(TR at 44.)

22. The Respondent next explained that he did not think it needed to be disclosed because the issue had been reviewed by the Ohio Department of Insurance prior to his being issued an insurance license. That Department advised him to get the conviction expunged.

Q. I think you're referring to the second application that you talked about. When you filled out this application, what did you think that this question meant? Before you asked anyone else about it, did you read it clearly and understand it?

A. As I've said, and I will repeat for you is that I did not completely understand the question.

Q. Why not? What part in the question is unclear?

A. Reasonable and considerable knowledge was to say that a 24-year-old petty theft when I was 18 did not confer with my previous employment, with my continued employment with my current data of what I was doing. I had been through an Ohio insurance license. I've had that reviewed, cut up, just as you're doing now, and I had been through and they excused it. When they excused it, of course, they said "Look, here is what you can do. Get it expunged."

(TR at 45-46.)

23. He then explained that he could not get the conviction expunged, knew it was on his record, and thought it was not "pertinent."

Q. Did you get it expunged?

A. I went to have it expunged, and had a traffic violation since, which would disallow that.

Q. So it was not expunged?

A. It was not.

Q. So when you filled out this question, you understand that your theft conviction had not been expunged? Please answer "yes" or "no".

A. No, I did not understand.

Q. At the time that you filled out this application, you thought that it had been expunged?

A. No, I did not. I did not think that was expunged. I did not understand the value of that question at that time.

Q. My question was about expungement. When you -- Just make sure when you filled out this question, you knew that your conviction was still on your record; is that correct?

A. I did notice that was still on my record but was not pertinent.

(TR at 46.)

24. Respondent then claimed that the question was confusing because it did not specify that minor misdemeanors and involvement in a petty theft needed to be disclosed.

Q. I will ask you "yes" or "no" questions. Please give me "yes" or "no" answers. Again, when you filled out this question, were you under the belief that the petty theft conviction remained on your record, yes or no?

A. But the interjection is pertinent. No, I did not understand it was there. Yes, I understood it was on my record.

Q. You understood it was on your record?

A. Yes.

Q. Thank you. What part of this question --now, this is not a "yes" or "no" answer. You can go ahead and explain to me what part of this question was confusing to you. Let me back up. Was there any part of this question that limited your conviction in terms of time? For example, was there anything in this question that led you to believe that since your conviction was however -- how old was it?

A. 24 years.

Q. 24 years, was there anything in this question that led you to believe since your conviction was 24 years old, that you did not have to disclose it?

A. Actually, it didn't ask for minor misdemeanors. It asked for criminal offenses. I was a party to a theft. I was charged with petty theft for being involved with a theft. It didn't ask specifically. I didn't involve -- it didn't ask me, offer the question of petty theft, or was I involved in a theft.

Q. You were confused as to the words, not as to the time limitations?

A. To the value of the question, that is correct.

(TR at 47-48.)

25. Respondent had a private background check run that did not turn up the conviction.

A. I had had a background check, originally ran through a private organization. I did pass that background check and the misdemeanor did not come up.

THE EXAMINER: The concern was not have you had a background check where it showed up. The question is the language that's on 5 and what your understanding of that was.

THE WITNESS: My understanding is the petty theft was no longer there.

BY MS. SMITH:

Q. Was no longer where?

A. Showing up on my history.

(TR at 50.)

26. Respondent hedged when asked if Question 5 limited disclosure to felonies.

Q. Is there anything that says that this question is limited to felonies, and that you do not have to disclose misdemeanors?

A. The question is very foggy.

Q. "Yes" or "no"?

A. The question again?

Q. Is there anything in this question that limits the response to felonies but not misdemeanors? In other words, is there anything in this question that would lead you to believe that you had to only disclose the conviction if it were a felony as opposed to a misdemeanor?

A. I'm sorry, I want to do "yes" or "no" answer correctly. At that time, I believe that it did eliminate.

Q. It's the same question that you read that you filled out?

A. When I read it in third grade, it's this. In 12th grade, it's that. I didn't understand the question and misinterpreted the question.

Q. I'm asking you, generally speaking, does the question -- is the question limited to felonies?

A. Are you talking about my knowledge today or then?

Q. I'm asking you to look at the question right now, and tell me if it is limited to felonies.

A. As of my knowledge today, it is not limited to anything. My knowledge at that time was different.

(TR at 54-55.)

27. Respondent finally admitted that he just did not think the conviction was relevant and questioned whether he was guilty of a crime.

A. I was guilty by association to a petty theft 24 years ago.

Q. So is it your -- I mean, do you not actually think that you were really guilty of a crime?

A. I didn't feel that had relevant value to my career.

Q. You did not think you were guilty of a crime?

A. I didn't think that had value to my career.

Q. This would be a "yes" or "no" question. Did you think you were really guilty of a crime at that time?

A. At that time, no.

Q. Do you think, now, that you were really guilty of a crime?

A. I still would argue it in court. If I knew now -- if I knew then what I now know now, I could have got away from that. That would not be a conviction.

Q. But you were convicted?

A. I pled guilty at the hearing. "Was you involved? Yes, sir."

(TR at 56-57.)



28. Respondent next claimed that he did not know that his answers on the Application would be used for licensing by the Division.

Q. Did you understand your answers to these questions on the application would provide the Division with a basis to reject or approve your application?

A. I understood that by prior licensing through my insurance.

Q. "Yes" or "no"? I asked a "yes" or "no" question. I'm asking: Did you understand that the questions that you filled out, answered in the application, did you understand your answers to those questions would be a basis for the Division to either deny or approve your loan officer license application?

A. No, I didn't.

Q. You did not understand that?

A. I said no.

(TR at 58-59.)

29. Respondent then testified that he did understand the laws that govern the mortgage broker industry differ from the laws that govern the insurance industry.

Q. Did you understand that the Ohio Mortgage Broker Act is different from the laws that govern the insurance industry?

A. I believe that's only for the value of the hearing itself, the dollar. That has nothing to do with my personality or ability from continuing from that point to this day.

Q. Did you understand that the laws that govern mortgage brokers are different than the laws that govern insurance people?

A. I understood they are enforced by the State of Ohio.

Q. Did you understand that the laws that govern the mortgage broker industry are different from the laws that govern the insurance industry?

A. No.

Q. You did not understand that?

A. I don't understand that at all.

Q. Then why did you then -- why did you sign the fourth page in State's Exhibit A?

A. Why did I submit that? I have already been through a review. I noted that I'm a licensed life insurance agent, that I have an insurance license that would show that I already had to go through this at one point, and I was cleared.

Q. What the Division is particularly concerned with, Mr. Tennihill, is not the fact that you have a conviction, but the fact that you did not disclose it; that you did not contact the Division in order to inquire if you were confused by the question, that you contacted an attorney, that you did not take a number of steps to fully understand what the Division was requiring of you, and so that's what we are trying to establish is why.

A. I do believe, and I do understand that to be a fair question. Again, in hindsight, terrible misjudgment, again because I do think that my operations manager should have maybe informed me a little deeper. Maybe the State of Ohio should have said this will be on your record again and again. We are going to bring this up even though we cleared you. We go through the same thing. Do we go through the same approval process that is, in fact, because I do understand this was a painful long gotta go get ahold of the guy that called this guy back. Yeah, this was screwed up. Yeah, I should have done something different, but I will recommend that he get it expunged. I was cleared with that once, and I thought that would be on record that that was waived, and that shouldn't have been a repeat in my approval through the State of Ohio because at this point, I deal with annuities and life insurance.

(TR at 59-61.)

30. Respondent's testimony about why he did not disclose the conviction was inconsistent and evasive. His testimony on this issue was less than forthcoming and of great concern.
31. Regardless of Respondent's belief about whether disclosure was relevant, it is clear that he understood that he had a criminal conviction for theft.
32. Respondent's response to Question 5 indicating that he had no criminal convictions when in fact he had a theft conviction was false and misleading. He knew he had a theft conviction and failed to disclose it.

33. The Hearing Officer finds that the Respondent knew that he had a theft conviction that should have been disclosed on the Application. His explanation for not doing so indicates that he simply did not want the Division to consider this conviction. His inconsistent responses to questions coupled with his evasive responses raise doubts about the truthfulness of his testimony and his ability to understand the laws that regulate the mortgage broker industry.

**E. Respondent's Reputation and Character.**

34. The Respondent is currently employed by Common Sense Mortgage Services where he is a loan officer and a production manager. (TR at 74-75.) Respondent has worked as a loan officer since 2000. Prior being a loan officer, he worked as a plumber and a builder. He has been a licensed insurance agent since 2000. (Respondent's Exhibit 2; TR at 70-76, 81-82.)
35. David Columber, the owner of Common Sense Mortgage Services, testified about his experience with the Respondent in the mortgage broker industry. He has known the Respondent for two years. He trusts Respondent and has seen no sign of impropriety. He has reviewed Respondent's loan files and has found no problems. Respondent's paperwork is impeccable and he is knowledgeable about the industry. (TR at 87-94.)
36. Mike Caruso, who has known the Respondent for several years, provided a letter on Respondent's behalf. Mr. Caruso is a Reynoldsburg police officer and one of Respondent's customers. In his opinion, Respondent is very professional, honest and trustworthy. Respondent has not always told him what he wanted to hear but has been honest with him. (Respondent's Exhibit 1; TR at 77-80.)
37. Respondent identified Mr. Caruso's letter at the hearing. Mr. Caruso was not present and did not testify at the hearing. Thus, even in this proceeding to which the Rules of Evidence do not strictly apply, his letter was considered but afforded less weight than it would have been if the Mr. Caruso had been available for cross-examination.

**II. CONCLUSIONS OF LAW**

**A. Jurisdiction and Procedural Matters.**

1. The Division's authority and jurisdiction over this subject matter only exist as authorized by law. The jurisdiction to refuse to issue a license is authorized by R.C. 1322.10(A)(1) and only exists "{a}fter notice and opportunity for a hearing conducted in accordance with Chapter 119. of the Revised Code" have been established.

2. Ohio Revised Code Section 119.07 requires the Division to notify Respondent of his right to request a hearing. An agency required to afford an opportunity for a hearing prior to the issuance of an order "shall give notice to the party informing him of his right to a hearing. Notice shall be given by registered mail, return receipt requested...." R.C. 119.07 (emphasis added). Respondent is the "party" entitled to receive the notice of the right to a hearing by certified mail since he is the "person whose interests are the subject of an adjudication by an agency." R.C. 119.01(G). For this purpose, "'registered mail' includes certified mail and 'certified mail' includes registered mail." R.C. 1.02 (General Provisions). If the notice of the right to a hearing is sent by certified mail and returned due to failure of delivery, personal delivery or publication of that notice pursuant to R.C. 119.07 is required. R.C. 119.07.
3. The Division's NOH properly notified the Respondent that he was entitled to request a hearing but the NOH was not served upon him by certified mail.
4. Ohio Revised Code Section 119.07 explicitly states that:

The failure of an agency to give the notices for any hearing required by sections 119.01 to 119.13 of the Revised Code in the manner provided in this section shall invalidate any order entered pursuant to the hearing.

R.C. 119.07.
5. The Division has not established that it has complied with R.C. 119.07 by providing Respondent with the statutorily required notice of his right to a hearing. This notice was not provided to the Respondent by registered or certified mail, return receipt requested. Personal delivery or publication of the notice in accordance with the procedures set forth in 119.07 was also not established. Therefore, jurisdiction to consider the substantive issues in this matter was not established by the Division.
6. There is a definite appeal to permitting waiver of Section 119.07's requirements for the notice of a right to hearing in a case such as this one where the party received notice, requested a hearing, appeared, and waived the requirement. However, R.C. 1322.10(A)(1), 119.06 and 119.07 mandate otherwise.
7. The Division has not procedurally complied with R.C. Chapter 119 and jurisdiction over this matter has not been established.
8. The conclusions of law and analyses set forth below in Paragraphs 9 through 25 are advisory but are provided to address issues that may need to be resolved if the Division maintains that it has jurisdiction despite its failure to comply with R.C. 119.07.

**B. Loan Officer License Application.**

9. 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.
10. 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.
11. 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.

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(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).

12. Respondent was convicted of theft in 1978.
13. Ohio Revised Code Section 1322.07(A) prohibits a loan officer license applicant from making any substantial misrepresentation in any license application.
14. 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.
15. Respondent's response to Question 5 of the Application indicating that he had no criminal convictions was a substantial misrepresentation of his criminal record on his Application that violated R.C. 1322.07(A). This response was also a false statement of a material fact, that he did not have any criminal convictions, in violation of R.C. 1322.07(B).
16. Respondent violated R.C. 1322.07(B) by omitting the statement regarding his theft conviction required to be in an application by R.C. 1322.031(A)(2).
17. Ohio Revised Code Section 1322.07(C) prohibits a loan officer license applicant from engaging in "improper, fraudulent, or dishonest dealings."
18. Respondent engaged in improper, fraudulent and dishonest dealings in violation of R.C. 1322.07(C) by falsely indicating that he had no criminal convictions when in fact he had a theft conviction, on his loan officer license application.
19. Respondent's violations of R.C. 1322.07(A), (B), and (C) preclude him from being in compliance with R.C. 1322.01 through 1322.12 of the Revised Code, a condition required for licensure by 1322.041(A)(2).
20. 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).
21. Instead, the evidence established that he failed to disclose the theft conviction on his Application. Question 5 of the Application explicitly mandates disclosure of all criminal convictions including theft convictions. Respondent's testimony on this issue was inconsistent and evasive. He knew he had a conviction and just did not want to disclose it. Respondent's failure to disclose the conviction and his testimony at the hearing preclude him from establishing that he is honest, truthful, and of good reputation.

22. The Respondent did not provide enough evidence for the Hearing Officer to conclude that there is no basis in fact for believing that he will commit a theft offense in the future.
23. If it is required, the Respondent did not provide enough evidence for the Hearing Officer to conclude that there is no basis in fact for believing that he will commit an offense involving money or securities in the future.
24. Respondent has not established the licensing prerequisites set forth in R.C. 1322.041(A)(3).
25. Respondent's failure to disclose the theft conviction on his Application and his testimony about that at the hearing raise concerns about his character and general fitness to be a mortgage loan officer. Additionally, his testimony indicating that he did not realize that the laws governing mortgage loan officers differ from those that govern insurance agents raises concerns about his general fitness to be a loan officer and operate in compliance with the appropriate laws. Given the evidence in the record, 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 Ohio's Mortgage Broker Act. Therefore, Respondent has not established the licensing prerequisites set forth in R.C. 1322.041(A)(5).

### **III. RECOMMENDATION**

The 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. 119.07 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.

Respectfully submitted,

J  
Jane Stempel Arata  
Administrative Hearing Officer  
October 5, 2004