

STATE OF OHIO  
DEPARTMENT OF COMMERCE 2005 FEB -2 AM 12: 01  
DIVISION OF FINANCIAL INSTITUTIONS

REPORT AND RECOMMENDATION OF HEARING OFFICER

IN THE MATTER OF Joseph R. Kennedy

Ohio Department of Commerce, Division of Financial Institutions  
Case Number: 04-0377-LOD

FINDINGS OF FACT

1. On or about December 4, 2003, Joseph R. Kennedy ("Respondent" herein) submitted an application (the "Application" herein) to the Ohio Department of Commerce, Division of Financial Institutions (the "Division" herein) for licensing as a loan officer as defined in Chapter 1322 of the Ohio Revised Code. A copy of the Application is attached and incorporated as Exhibits A.
2. On or about May 14, 2004, the Division notified Respondent that it intended to deny the Application, and, by Division Order, provided Respondent with timely notice of opportunity for a hearing in accordance with the Ohio Administrative Procedure Act, Chapter 119, Ohio Revised Code (the "Notice"). A copy of the Notice is attached and incorporated as Exhibit B herein. The Division Order charged that Respondent failed to meet the certain designated requirements for licensing contained in Sections 1322.041 and 1322.10 of the Ohio Revised Code, and cited the circumstances as described in the Notice.
3. In response to the Notice, Respondent requested a hearing and, in response to that request, a hearing was held (the "Hearing" herein) at the Vern Riffe Center for Government and the Arts on September 21, 2004. At the Hearing, the Division was represented by Assistant Attorney General Emily A. Smith, Esq., and Respondent appeared *pro se*.
4. Respondent did not contest that, for the purposes of the Hearing and this administrative proceeding, the allegations of fact set forth in the Notice were true, through stipulation with respect to admission of the Notice. (Tr. Page 29)
5. As of the date of the Application, Respondent was employed as a loan officer by Avalanche Funding Group.

## **CONCLUSIONS OF LAW**

1. That the conduct of the Respondent established a statutory rationale for denying the Application of the Respondent based on the provisions of Sections 1322.041 and 1322.10 of the Ohio Revised Code.
2. That the documentation presented by the Division established a sufficient and reasonable basis for the Division to deny Respondent's Application for licensing as a loan officer.
3. That the information and documentation available to the Division prior to the hearing established a statutory rationale under Sections 1322.041 and 1322.10 of the Ohio Revised Code for the denial of Respondent's Application, and the record of the Hearing supports that denial.

## **DISCUSSION**

At the Hearing, Respondent and the Division stipulated to the evidence relating to Respondent's criminal record as described in the Notice. (Tr. Page 29)

Section 1322.041(A)(3) of the Ohio Revised Code states that the Superintendent shall issue a loan officer license if the Superintendent finds that the applicant has not been convicted of, or pleaded guilty to, certain enumerated offenses. If the applicant has in fact been convicted of or pleaded guilty to such offenses, the Superintendent shall issue the loan officer license if the applicant proves 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 truthful, and of good reputation, and there is no basis in fact for believing that the applicant will commit such an offense again.

Respondent's extensive criminal record includes convictions of a variety of crimes including crimes which, unfortunately, reflect the very kind of criminal offenses the legislature found to be an antithesis to the mortgage broker industry, and specifically enumerated in Ohio Revised Code Section 1322.031(A)(2).

The legislature also recognized, in Ohio Revised Code Section 1322.041(A)(3), that circumstances may arise when that criminal record may not reflect real changes in an individual, which have occurred since the facts that gave rise to the criminal record. As noted previously, Ohio Revised Code Section 1322.041(A)(3) provides that, despite such a criminal record, an applicant may prove to the Superintendent, by a preponderance of the evidence, that the applicant's activities and employment record since the conviction(s) show that the applicant is honest, truthful, and of good reputation, and that there is no basis in fact for believing that the applicant will commit such an offense again.

This statutory ability to, in essence, look past and overcome a criminal history represents a difficult and serious consideration for the Superintendent, who is charged with protecting the public from unscrupulous practitioners in the mortgage broker industry at a time when the industry suffers publicly from a number of "bad players" whose activities have resulted in reputation damage and expanded regulatory oversight for the mortgage industry.

At the Hearing Respondent presented only his own testimony in support of Respondent's general contention that Respondent is truthful and of good reputation; that there is no basis in fact for believing that Respondent will commit such offenses again; and that Respondent's character and general fitness command the confidence of the public and warrant the belief that the business will be operated honestly and fairly.

Applicable law, as set forth in the referenced provisions of the Ohio Revised Code, requires the Respondent in this instance to prove, by a "preponderance of the evidence", that he meets the statutory criteria necessary to overcome the "automatic disqualifier" provisions set forth in Ohio Revised Code section 1322.041(A)(3), and reserves to the Superintendent appropriate discretion in the licensing decision.

Section 1322.041(A)(5) of the Ohio Revised Code states that the Superintendent shall issue a loan officer license if the Superintendent finds that 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 stated provisions of Ohio law.

The Act provides that the Superintendent is charged with regulation and oversight of mortgage brokers and loan officers in the State of Ohio, and part of the Superintendent's consideration in that regard relates to the character and general fitness of the Respondent and the ability of the Respondent to command the confidence of the public as set forth in subsection 1322.041(A)(5) of the Ohio Revised Code. That provision requires that the Superintendent issue a loan officer license if, among things, Respondent's character and general fitness (1) command the confidence of the public and (2) warrant the belief that the business will be operated honestly and fairly in compliance with applicable law. These standards require subjective analysis, and the General Assembly has decided that it is appropriate that the Superintendent undertake a determination, based on industry and regulatory experience, as to whether an applicant's character and fitness enable the applicant to meet the referenced requirements. See *Leon v. Ohio Bd. Of Psychology*, 63 Ohio St. 3d 683, 1992 Ohio 105, 590 N.E. 2d 1223 (1992). See also *Lorain City Bd. Of Edn. v. State Emp. Relations Bd.*, 40 Ohio St. 3d 257, 533 N.E. 2d 264 (1988).

The criminal convictions reflected in the Notice span a period beginning in 1996 and ending in 2003. The convictions appear to evidence a course of conduct which may give cause for concern that Respondent would commit similar offenses in the future, which is exacerbated by the recent conviction for the crime of assault in 2003. While Respondent answered question five of the Application in the affirmative, the limited nature of the response is troubling in that the response was incomplete. (State's Exhibit A)

While Respondent testified that the incomplete disclosure under question five was not an attempt to deceive the Division (Tr. Page 34), intent is not a determining factor or a defense to failure to provide complete disclosure of Respondent's criminal record. In addition, while Respondent provided explanations and information regarding the various criminal convictions, this Hearing is not the forum to re-examine those convictions and whether they were appropriate in light of the circumstances.

Other than his own testimony, Respondent did not present any other evidence or testimony to explain his incomplete response to the referenced question in the Application, the circumstances

surrounding the criminal convictions, or the factors set forth in Revised Code sections 1322.031 and 1322.041 otherwise required to meet the "preponderance of the evidence" tests set forth therein.

There is therefore support for the Division's assertion that Respondent fails to meet the basic statutory criteria required by Ohio Revised Code sections 1322.031 and 1322.041.

In addition, Respondent's limited response to question five of the Application, and in the materials submitted to the Division in conjunction with processing the Application, may be construed as false, misleading, and dishonest with respect to Respondent's required disclosures. There is therefore support for the Division's assertion that Respondent violated subsections (A), (B), and (C) of Ohio Revised Code Section 1322.07 in failing to adequately disclose the criminal convictions, and in providing information which could be construed as false, misleading, and dishonest in conjunction with the Application. Again, the relevant statutory provision does not provide for a defense or excuse of intent.

In light of the underlying nature and frequency of the criminal convictions; the lack of objective evidence or testimony by Respondent to meet Respondent's statutory "preponderance of evidence" and "character and general fitness" tests; and the failure to adequately disclose the convictions; Respondent has failed to provide evidence sufficient to overcome the Superintendent's findings under Ohio Revised Code sections 1322.07, 1322.031, and 1322.041.

### **RECOMMENDATIONS**

For the reasons set forth herein, it is hereby recommended that the referenced Application be denied.

Respectfully submitted,

  
Jeffery E. Smith, Hearing Examiner

  
Date