

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

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IN RE: : CASE NO. 04-0235-LOD
: :
JAMES K. WHARTON : JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued October 29, 2004

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 August 2, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent James K. Wharton ("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 petty theft in 1991. 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 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
2. Respondent's character and general fitness do not command the confidence of the public and warrant the belief that his 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).

Anthony Siciliano, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. LeeAnn Massucci represented the Respondent at the hearing. At the hearing, State's Exhibits 1 through 13 and Respondent's Exhibits A through C were admitted into the record. The record was left open for the Respondent to submit information regarding an expungement application. After the hearing, the expungement application was submitted, marked as Respondent's Exhibit D by the Hearing Officer, and admitted into the record without objection.

B. Jurisdiction and Procedural Matters.

The Division issued the NOH to Respondent on January 23, 2004. Respondent's hearing request was received by the Division on February 20, 2004. The Division scheduled the hearing for March 5, 2004, and continued it indefinitely on its own motion. The hearing was then scheduled for June 16, 2004. Respondent's request for a continuance was granted and the hearing was continued until August 2, 2004. The Respondent received the NOH by certified mail and received written notice of the date, time, and location of hearing.

C. Respondent's Loan Officer Application and Criminal Conviction.

1. Respondent is an individual who wants to conduct business in Ohio as a mortgage loan officer. Respondent resides at 6479 Riversedge Drive, Lewis Center, Ohio 43035. (State's Exhibit 1; Hearing Transcript at 14.) (References to pages of the Hearing Transcript will be abbreviated as "TR at {page(s)}".)
2. 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).
3. The Division received Respondent's Loan Officer Application ("Application") on April 12, 2002. (State's Exhibit 1.)
4. Question 5 on the Application 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 1.)

5. Respondent answered "Yes" to Question 5 and explained that he had had a 1991 misdemeanor petty theft conviction. (State's Exhibit 1.)
6. The theft conviction was the result of events that occurred when Respondent was 18 and a student at Ohio State University's Newark branch. One night he and some friends were walking home and spotted an unlocked car. One of Respondent's friends opened the car and stole some tapes and a purse from it. Respondent was present but did not go into the car or take any items from it. The friend who took the items and another person took them back to where they lived. Respondent did not reside with them. The two who took the items later felt badly about taking the driver's license and other personal items and returned them to the car. Their rent receipt was accidentally included with the items and police easily tracked them down the next day. Respondent was not one of the people charged by the police but turned himself in since he was there. He did not think it was fair for only those two to be charged and believed he was responsible because he did nothing to stop the incident. Respondent was convicted of petty theft. He spent three days in jail and performed community service as part of his sentence. (State's Exhibit 4; TR at 18-22; 26-28.)
7. Respondent, now 32, has no other criminal convictions except for possibly traffic violations. (TR at 15, 22.)

D. Respondent's Reputation and Character.

8. Respondent is married and has a newborn child. He worked in the food service industry for eight years and then began working in the mortgage industry. While in the food service industry he worked as a server, trainer, head trainer, and a bartender. He handled cash and credit card information without incident. He started working as a loan officer in 2000. He started at Mortgage One and went with Cardinal Mortgage when it split out from Mortgage One. Cardinal Mortgage is now Midwest Funding Group. Respondent is now an Assistant Manager with Midwest Funding. He has closed over 150 loans without incident. (TR at 15-17, 29-34.)
9. Phillip Hammond, Respondent's supervisor at Mortgage One, testified about his experiences with Respondent. He testified that Respondent is a quick learner, always on time, and a top loan officer. He also stated that Respondent is professional, knowledgeable about the industry, trustworthy, and reliable. He was aware of the 1991 incident and believes that it does not reflect Respondent's current character. (Respondent's Exhibit B; TR at 36-42.)
10. Kevin Goodrich, the executive Vice President of Midwest Funding, has known Respondent since 1995. He worked with Respondent in the food service industry and brought him into the mortgage industry. Respondent's work is of high quality and there have been no problems with his loan files. He stated that Respondent is professional, honest, and trustworthy. He believes that the 1991

incident does not fit Respondent's character today. (Respondent's Exhibit C; TR at 44-57.)

11. Steven Szasz is the owner and President of Midwest Funding. Respondent has worked for him since 2000. He stated that Respondent is honest, truthful, and reliable. Respondent's work is good and there have been no concerns with his loans. He reviewed the 1991 incident when he hired Respondent and it is not of concern today. (Respondent's Exhibit A; TR at 59-64.)
12. Respondent's Application to have the 1991 conviction expunged is pending. (Respondent's Exhibit D.)
13. The Hearing Officer found Respondent to be honest and truthful at the hearing. He has learned from his mistake and improved his life greatly since 1991. He was professional and courteous at the hearing. He is not likely to commit the theft offense of which he was convicted again.
14. The evidence establishes that Respondent is honest, truthful, and of good reputation, and that there is no basis in fact for believing that he will commit any criminal offense again. Respondent is of good character and his character and general fitness command the confidence of the public. The evidence also establishes that he will operate his business as a loan officer honestly and fairly and in compliance with the purposes of the Ohio Mortgage Broker Act.

II. CONCLUSIONS OF LAW

A. Jurisdiction and Procedural Matters.

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

B. Loan Officer License Application.

1. 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.
2. 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.

3. 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:

(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.

(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)(3) and (5).

4. Respondent was convicted of theft, a criminal offense specifically referred to in R.C. 1322.031(A)(2), in 1991.
5. 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 conviction 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).
6. Respondent was honest about the theft conviction on his Application and at the hearing. He learned from his mistake and has had no problems since 1991. He is not likely to commit any criminal offense in the future. He has good experience in the mortgage industry and there have been no problems with his loans. The record contains sufficient evidence of Respondent's good character in his own testimony and the testimony of others to meet his burden of proof under R.C. 1322.041(A)(3).
7. For the reasons stated above, Respondent has established that his character and general fitness command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purposes of Ohio's Mortgage Broker Act as required by R.C. 1322.041(A)(5).

III. RECOMMENDATION

The Respondent has established the licensing prerequisites set forth in Ohio Revised Code Section 1322.041(A)(3) and (5). Therefore, I respectfully recommend that the Superintendent of the Division of Financial Institutions issue Respondent a loan officer license pursuant to R.C. 1322.041.

Respectfully submitted,

Jane Stempel Arata
Administrative Hearing Officer
October 29, 2004