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STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

IN RE:	:	CASE NO. 05-0084-LOD
	:	
DAVID A. SAMPLES	:	JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued September 15, 2005

I. FINDINGS OF FACT

A. Background.

This matter came before Terrence O'Donnell, 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 May 12, 2005, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent David Samples ("Respondent" or "Mr. Samples") to consider the allegations in the Division's Notice of Intent to Deny Loan Officer License and Notice of Opportunity for a Hearing ("NOH"). On August 8, 2005, this case was reassigned to Jane S. Arata for the drafting of this Report and Recommendation.

The Division alleged that Mr. Samples violated R.C. 1322.07(A), (B) and (C) by various acts and/or omissions related to the completion and submission of two loan officer license applications. The Division further asserted that, due to those alleged acts and/or omissions, 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).

Martine Jean, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. Respondent appeared *pro se* and testified at the hearing. At the hearing, State's Exhibits 1A through 1E, 2A through 2C, 3, 4, 5A through 5C, and Respondent's Exhibits A through F were admitted into the record.

B. Respondent's 2004 Loan Officer Application.

1. Mr. Samples is an individual who seeks to conduct business in Ohio as a mortgage loan officer.
2. On October 7, 2004, Respondent signed a Loan Officer Application ("2004 Application") which was then submitted to the Division. The Division received the 2004 Application on October 13, 2004. (State's Exhibit 3; Hearing Transcript at 42.) (References to pages of the Hearing Transcript will be abbreviated as "TR at {page(s)} ".)
3. Respondent answered "No" to Question 5 on the 2004 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 **any criminal offense**? Exclude minor misdemeanor traffic and parking offenses. (DUIs and DWI's are criminal offenses.)

(2004 Application, State's Exhibit 3, emphasis and boldface type in original; TR at 43-44.)

4. Respondent's signature in the Attestation on the 2004 Application is notarized. Directly above that signature, the 2004 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." (2004 Application, State's Exhibit 3.)
5. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031(B).
6. Sometime after Mr. Samples filed his 2004 Application, he received a letter from the Division. That letter, dated December 7, 2004, stated, in part, that:

In compliance with the Division's investigation and in order to further review your application, you are required to submit the following with respect to your 2001 domestic violence charge, Elyria, Ohio:

1. A detailed explanation of the facts and circumstances which gave rise to the charge; and
2. A certified copy of the judgment entry which evidences your plea and the court's finding.

Be sure to refer to the enclosed sheet entitled "Answers to Frequently Asked Questions" before compiling your answer. Pay particular attention to the answer to the question "What is a 'journal entry,'" as a copy of a clerk's docket sheet may not be acceptable.

(State's Exhibit 4; TR at 44.)

7. Respondent responded to the Division's request by sending a letter, dated January 1, 2005, which explained:

I was Charge with domestic violence back on 5/11/2001 from my ex wife. The charge was false. I should never have been charge that. I never and my life ever raised my hand to any women or never let them think that I would. I am not that kind of person. Instead of taking it to the jury, I was advised by my attorney to take a disorderly conduct, which to this day I am not happy with....

(State's Exhibit 5B; TR at 44-46.)

8. Respondent also sent the Division a certified copy of the Elyria Municipal Court Criminal/Traffic Docket Sheet pertaining to the domestic violence charge. This document is not a certified judgment entry. Instead, it is only certified to contain information taken from computerized records on file in the Clerk of Elyria Municipal Court's Office. It does not indicate that the information reflects information from any actual judgment entry or official court records. Therefore, it is not reliable evidence that the matters stated therein are true and was not given any weight by this Hearing Officer. (State's Exhibit 5B; TR at 45.)
9. Respondent admitted that he has a 2001 criminal conviction for disorderly conduct. Respondent's January 1, 2005 letter makes it clear that he knew that he took a disorderly conduct conviction instead of defending himself on the domestic violence charge. Regardless of whether the initial charge was fair, Respondent had that conviction and knew so when he prepared his January 1, 2005 letter. (State's Exhibit 5B; TR at 44.)
10. This Hearing Officer finds that it is more likely than not that Respondent also knew about the disorderly conduct conviction when he signed his 2004 Application less than three months earlier in October of 2004. (State's Exhibits 3 and 5B; TR at 44-46.)
11. Respondent explained the circumstances that led to the 2001 domestic violence charge in his letter and when testifying. He stated that the domestic violence charge made by his then wife was false. According to him, his then wife made the charges to gain an advantage in divorce proceedings she filed shortly thereafter. (State's Exhibit 5B; TR at 44-46.)

C. The Division's Notice of Opportunity for Hearing.

12. The Division issued the NOH to Respondent on March 18, 2005. The NOH was received by certified mail at the address Respondent listed as his on the 2004 Application. (State's Exhibits 1A, 1B, 1C, and 3.)
13. The Hearing Request Form provided with the NOH stated that a request for a hearing would need to be received by the Division by April 18, 2005. (State's Exhibits 1A and 1D.)
14. Respondent's hearing request was received by the Division on April 18, 2005. (State's Exhibit 1D.)
15. The Division scheduled the hearing for April 28, 2005, and continued it until May 12, 2005. (State's Exhibit 1E.)
16. The NOH was received at Respondent's address by certified mail and Respondent received written notice of the date, time, and location of the hearing.
17. The NOH alleges that Respondent's 2004 Application should be denied because Respondent provided untruthful information about his criminal background to the Division in that application and in an earlier application filed in 2003. The NOH also alleges that Respondent attested on both applications that the information about his criminal background was complete and truthful when it was not. (State's Exhibit 1B.)

D. Loan Officer Application Received By Division January 23, 2003.

18. Mark Rhea, an attorney employed by the Division, identified State's Exhibit 2A ("2003 Application") as pages from a loan officer license application received by the Division on January 23, 2003. Mr. Rhea, who was not employed by the Division at that time, became familiar with this document later. (State's Exhibit 2A; TR at 12-14.)
19. The 2003 Application states that it is for a loan officer license for David A. Samples. Mr. Samples testified that he did not sign or submit the 2003 Application. The Division presented no proof, other than Mr. Rhea's testimony identifying the document as being from the Division's files, to contradict this testimony. (State's Exhibit 2A; TR at 12-14, 37-40, 60.)
20. This Hearing Officer finds and concludes that there is not sufficient proof to establish that the 2003 Application was signed or submitted to the Division by the Respondent. (State's Exhibit 2A.)

21. The 2003 Application was withdrawn by the Division when it did not receive additional requested information. (State's Exhibit 2B and 2C; TR at 16-17.)

D. Respondent's Failure to Disclose Conviction on 2004 Application.

22. The Respondent did not disclose the 2001 disorderly conduct conviction on his 2004 Application. (State's Exhibit 3; TR at 43-44.)
23. He explained that he did not disclose the conviction because he did not understand Question 5. He thought the question only referred to criminal convictions of a company and not those of an individual. Therefore, he thought he had nothing to disclose on the 2004 Application. (TR at 60, 65-66.)
24. The Hearing Officer finds that the "Have you or has any company for which you have been an officer, or more than 5% owner or director, ever been convicted of **any criminal offense**" language in Question 5 on the 2004 Application could be confusing. (State's Exhibit 3, emphasis and boldface type in original.)
25. The Respondent, based upon his understanding of Question 5, answered it truthfully. He made a mistake but he did not try to hide the conviction from the Division or make any statement that he thought or knew was false on the 2004 Application. The answer was "complete and true of [his] own knowledge" when he signed the 2004 Application.

E. Respondent's Reputation and Character.

26. Respondent worked for two car dealerships from 1986 through 2003. He worked as a dealership finance manager for several years and then as a general manager. (TR at 30-34.)
27. Respondent decided to become a loan officer in 2003. He briefly worked for Lake Shore Mortgage Banc but left because he was concerned about unethical business practices. (TR at 29-30, 37.)
28. In July of 2003, he moved to Florida to work for Prime Option Financial, his current employer. (TR at 31, 33-34.)
29. Respondent provided letters from six individuals familiar with his reputation and his work in the automobile industry and the mortgage business. Those individuals describe him as being professional, honest, trustworthy, good with customers, a good leader, knowledgeable, and a person of high integrity. (Respondent's Exhibits A through F; TR at 61-65.)

30. Respondent identified each of the six letters at the hearing. The authors of the letters were not present at the hearing. Thus, even in this proceeding to which the Rules of Evidence do not strictly apply, the letters in Respondent's Exhibits A through F were considered but afforded less weight than they would have been if the respective authors had been available for cross examination.

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 1322.041(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.

(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) and (5).

3. Respondent was convicted of disorderly conduct in 2001.
4. Ohio Revised Code Section 1322.07(A) prohibits a loan officer license applicant from making any substantial misrepresentation in any license application. The Respondent did not make a substantial misrepresentation when he responded to Question 5 on the 2004 Application. He misread it and answered truthfully based upon his understanding of the question. More importantly, the failure to disclose a 2001 conviction for disorderly conduct given the circumstances described by Respondent is not a substantial misrepresentation for the purposes of this licensing process.

5. 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. The Respondent did not make a false or misleading statement of a material fact when he responded to Question 5 on the 2004 Application. He misread it and answered truthfully based upon his understanding of the question. The existence of a 2001 conviction for disorderly conduct is not a material fact for the purposes of this licensing process.
6. 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 does not require a disorderly conduct conviction to be disclosed on an application for a loan officer license. Therefore, the Respondent did not violate Ohio Revised Code Section 1322.07(B) by omitting a statement required by state law from his 2004 Application.
7. Ohio Revised Code Section 1322.07(C) prohibits a loan officer license applicant from engaging in "improper, fraudulent, or dishonest dealings." Respondent misread a confusing question and answered truthfully based upon that misreading of the question. These activities alone do not amount to engaging in "improper, fraudulent, or dishonest dealings" for the purposes of R.C. 1322.07(C).
8. Since it was not established that the Respondent signed or submitted the 2003 Application, the alleged violations of R.C. 1322.07(A), (B), or (C) based upon that document can not be proven as a matter of law.
9. There is no basis for establishing any violations of R.C. 1322.07(A), (B) or (C) by the Respondent.
10. The Division, having failed to establish any violation of R.C. 1322.07(A), (B), or (C), has likewise not established any lack of compliance with R.C. 1322.01 through 1322.12 of the Revised Code. Therefore, the record only supports a conclusion that Respondent complies with R.C. 1322.01 through 1322.12 and meets that condition required for licensure by 1322.041(A)(2).
11. The Respondent admitted that he made a mistake while reading the 2004 Application. The disorderly conduct conviction relied upon by the Division and the fact that the Respondent misread a confusing question do not prove that the Respondent is not fit to work in an industry that he is currently working in today. He made a mistake and owned up to it. The Respondent's testimony and the character letters submitted establish 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 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
September 15, 2005