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DIVISION OF FINANCIAL
INSTITUTIONS

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

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In the Matter of:

Daniel V. Tobin
4400 Marion Edison Road
Marion, OH 43302

:
: Case No. 04-0191-LOD
:
: Terrence O'Donnell, Hearing Examiner
:

HEARING EXAMINER'S
REPORT AND RECOMMENDATION

A. REPORT

I. Introduction

This case came to be heard on May 5, 2005. Appearing was Respondent Mr. Daniel V. Tobin, accompanied by his character witnesses, Ms. Barbara J. Tobin, Mr. Clifton S. May, Ms. Terri A. Tobin, and Mr. Michael A. Tarpoff. Messrs. Robert C. Webb and Kevin Shook represented Mr. Tobin.

Deputy Attorney General Paula L. Paoletti represented the Department of Commerce's Division of Financial Institutions ("the Division").

After due consideration of the evidence, the Hearing Examiner makes the following findings.

II. Findings of Fact

a. Background

1. Pursuant to the Ohio Mortgage Broker Act, O.R.C 1322.01 to O.R.C. 1322.12, the Division is charged with the responsibility to accept applications for Loan Officer licenses and determine whether applicants meet the statutory requirements.
2. On April 26, 2002, Mr. Tobin, employed by Allied Mortgage Capital Corp., 407 W. Main

Street, Cardington, Ohio, 43315, applied for a license to be a Loan Officer. See Loan Officer Application, State's Exhibit 1.

3. On January 22, 2004, the Division issued a Notice of Intent to Deny a Loan Officer's License to Mr. Tobin. See Notice, State's Exhibit 11.
4. The Division stated in its Notice of Intent to Deny Loan Officer's License that in or around 1978, Mr. Tobin was convicted of "trafficking in marijuana," and in or around 1979, Mr. Tobin was convicted of "fleeing and eluding." See Notice, State's Exhibit 11.
5. Mr. Tobin did not disclose these convictions on his Loan Officer Application. As a result, the Division also alleges that he knowingly provided false information in a sworn statement and that he provided "untruthful" information to the State. See Notice, State's Exhibit 11.
6. The Division stated that in its Notice of Intent to Deny Loan Officer License that Mr. Tobin has not proven he is honest, truthful, and of good reputation; that there is no basis in fact to believe he will not commit another criminal offense involving drug trafficking or any criminal offense involving money or securities; that his 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 purpose of the Ohio Mortgage Broker Act; that he made a substantial misrepresentation in a license application in violation of law; that he made a false or misleading statement of a material fact required by state law; and that he engaged in conduct that constitutes improper, fraudulent, or dishonest dealings. See Notice, State's Exhibit 11.
7. Mr. Tobin requested a hearing to appeal the Division's determination. See Hearing Request Form, State's Exhibit 8.

b. Conviction for Trafficking in Marijuana (1978)

8. At the hearing, the State offered into evidence documentation indicating Mr. Tobin was convicted of trafficking in marijuana on August 14, 1978. See Journal Entry Sentence, State's Exhibit 4, Respondent's Exhibit A. Mr. Tobin acknowledged the conviction. See Transcript, p. 48.
9. Mr. Tobin testified that the conviction stems from an incident in which he agreed to give a friend a ride to an individual's home so the friend could purchase marijuana. See Transcript, p. 71. Upon his return to the friend's house, police officers were waiting for them, as it turned out the individual who sold the marijuana was an undercover police officer. See Transcript, p. 72.
10. For his crime, he was sentenced to two years probation. See Journal Entry Sentence, Respondent's Exhibit A.

c. Conviction for Fleeing and Eluding (1978)

11. At the hearing, the State offered into evidence documentation indicating that Mr. Tobin was convicted of fleeing and eluding the police on July 3, 1979. See Judgment Entry, Mount Vernon Municipal Court, State's Exhibit 5. Mr. Tobin acknowledged the conviction. See Transcript, p. 75.
12. Mr. Tobin testified that the conviction stems from an incident in which a police officer noticed he was speeding and made an attempt to pull him over. Instead of complying with the officer, he accelerated in order to avoid arrest. See Transcript, pp. 75-76.

d. Failure to Disclose Convictions on Loan Officer Application

13. In response to Question 5 on his Loan Officer Application, asking:

“[h]ave you or has any company for which you have been an officer, or more than 5% owner or director, ever been convicted of or plead 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,”

Mr. Tobin checked the box indicating “no.” See Application, State’s Exhibit 1.

14. At the hearing, Mr. Tobin testified credibly that at the time he made his application with the Division, he understood his marijuana offense to actually be a mere possession charge, not criminal in nature. He also testified credibly that with respect to both offenses, in his recent experience, Allied Mortgage conducted two separate background checks (one at time of hire, another at time of promotion) that did not reveal any criminal offenses. See Transcript, p. 87, 175.
15. He acknowledged that the failure to disclose was a mistake in retrospect, but that his lawyers told him at the time that when his probation period ended, his record was in effect clean. The two employer-mandated background checks confirmed this in his mind.

e. Personal Testimony

16. Mr. Tobin has greatly matured since the time of his convictions, which took place in his youth, approximately 25 years ago. He has since been married and, more recently, worked as a Loan Officer since 1998. See Transcript, p. 24.
17. In that time, he has helped close approximately 600 loans without incident. See Transcript, pp. 107, 109. Mr. Tobin testified that he takes care to see that his clients understand their business transactions and that unlike most in the industry, he personally attends every closing. See Transcript, p. 111.

f. Character Witnesses

18. Ms. Barbara J. Tobin, in addition to being the respondent’s mother, is also his manager. She has worked in the lending business since 1969, including time spent working for the

federal government. See Transcript, p. 123. She and Mr. Tobin began their business together, and she oversees his work on a regular basis. She recommends him for a license. See Transcript, pp. 126-128.

19. Mr. Clifton S. May, of the Marion Title Agency, has worked as an escrow officer for ten years. See Transcript, p. 130. He estimates that he has closed 200 loans with Mr. Tobin in five years, and that Mr. Tobin often assists clients with poor credit. See Transcript, pp. 132-133. He recommends Mr. Tobin for a license without reservation. On cross-examination, he indicated he was aware of Mr. Tobin's marijuana charge, but unaware of his conviction for fleeing and eluding. See Transcript, p. 136.
20. Ms. Terri A. Tobin, Mr. Tobin's wife, testified that he often will adjust his personal schedule to meet with customers in the evening for their convenience. See Transcript, p. 140. She also testified to the recent investment the family has made in their mortgage company:

“We bought a house to set up the business over in Cardington and redid the whole inside, made big offices, put up walls, carpet, renovated the whole thing for this business...[This license is] very important. Life important. ” See Transcript, p. 143.

21. Mr. Michael A. Tarpoff, the Co-state and Co-branch Manager at Allied Mortgage, testified that Allied is the largest residential broker in the country, with 261 loan officers in Ohio. See Transcript, p. 146.
22. As such, he testified that he is in regular contact with the Division concerning various regulatory matters, and that he believes he understands what the State requires of its loan officers. See Transcript, p. 147. He testified that in Mr. Tobin's case:

“[w]e're too large a company to risk putting our neck out for any one individual, so for me to come forward today, you know, I have a special feeling for Dan Tobin...Because in all the dealings I've had with Dan Tobin,

and I feel that he's honest. I've never had a complaint out of his office, no customers, no lenders. If I had to go out and search for a loan officer of his caliber, I couldn't find one." See Transcript, pp. 158-159.

23. He also stated that Mr. Tobin did not actually request that he serve as a character witness, but rather that he volunteered to do so "out of the blue" when Mr. Tobin was consulting with counsel. See Transcript, p.159. This testimony was credible.
24. He also testified that his company's two background checks on Mr. Tobin, which he considered "comprehensive," revealed no criminal record. See Transcript, pp. 153-155.
25. On cross-examination, he acknowledged that his company's background checks seek out only felonies committed within the past seven years. See Transcript, p. 163.

III. Conclusions of Law

a. Statutory Analysis

26. The Ohio Revised Code sets out the criteria by which the Superintendent of Financial Institutions shall license loan officers. It states in part:

"...the superintendent of financial institutions shall issue a loan officer's license to the applicant if the applicant has not been convicted of or plead guilty to any criminal offense described in Division (A)(2) of Section 1322.031 of the Revised Code." O.R.C. 1322.041.

27. The criminal offenses incorporated by reference are:

"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." O.R.C 1322.031 (A)(2). Emphasis added.

28. Based on the documentation offered by the State (State's Exhibit 5), and Mr. Tobin's admissions at the hearing and on his Loan Officer Application, the Hearing Examiner finds that Mr. Tobin was convicted of trafficking in marijuana in 1978.
29. Once the conviction is established, the statute allows for a burden-shift in which Mr. Tobin

assumes the burden of proving by a preponderance of the evidence that despite his convictions, he otherwise should receive a Loan Officer's License.

30. The statute sets out a number of criteria the applicant must meet, two parts of which are relevant to this analysis. The first part reads:

“The superintendent shall issue a loan officer license to the applicant if the superintendent finds the following conditions are met:

(3) ...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.” O.R.C. 1322.041 (A)(3).

31. The conviction for marijuana trafficking is over 25 years old. The statute requires a determination of whether, since then, his activities and employment record show he is honest, truthful, and of good reputation, and that there is no basis in fact to believe he will commit such an offense again.
32. In that regard, the record shows Mr. Tobin has not acquired another conviction since the 1970's. This significant length of time free of recidivism is strong evidence that he will not engage in such criminal conduct in the future.
33. As to his activities demonstrating honesty and truthfulness, Mr. Tobin's representations on his loan officer application are relevant. Had he made the disclosures, this decision would be made far easier.
34. Yet Mr. Tobin nonetheless makes a persuasive case, particularly by his strong record since the convictions and through the testimony of Mr. Tarpoff as to his business ethics. Mr. Tarpoff made clear that he would not risk his company's reputation in the State, and with the Division, by supporting a loan officer candidate whom he felt presented a risk. His

wholehearted endorsement carried significant weight.

35. Mr. Clifton May's testimony concerning Mr. Tobin's personal attendance at each closing also indicated that Mr. Tobin is not the sort of unscrupulous loan officer who is dishonest or untruthful. It would be odd indeed if Mr. Tobin were, for example, swindling clients or making false representations to lenders, but then making a point to personally attend each closing.
36. Furthermore, Mr. Tobin's testimony concerning his mistaken belief that his crimes need not be disclosed, was credible. The age of his crimes, combined with his reliance on two subsequent background checks, makes reasonable his belief that the incidents were not relevant to his application.
37. Mr. Tobin thus has demonstrated through his activities and employment record since the time of his convictions that he is honest, truthful, and of good reputation. He has also proven there is no basis in fact to believe he would commit a drug trafficking crime in the future.
38. The second part of the statute states:

“The superintendent shall issue a loan officer license to the applicant if the superintendent finds the following conditions are met:

(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.” O.R.C. 1322.041 (A)(5).
39. In assessing Mr. Tobin's character and general fitness to receive a license, the nature of his past crimes must be considered.
40. His conviction for drug trafficking and fleeing and eluding are not taken lightly. However, quite a significant amount of time has elapsed since Mr. Tobin's convictions. That he has

spent the last twenty-five years free of similar criminal conduct strengthens his case that he regained the public trust and has the ability and the will to inspire the public's confidence. His clean record also speaks to his character.

41. His failure to disclose the convictions having been credibly attributed to reasonable mistake, they cannot be said to bear negatively on his character.
42. As to his "general fitness," it might be said that Mr. Tobin's mistake, even if reasonable, indicates an unsuitability for a profession in which filling out often complicated paperwork is a regular duty. However, in Mr. Tobin's case, the testimony of his superiors (his mother included), demonstrated that he is a competent loan officer, such that this concern is alleviated.
43. Mr. Tobin has shown 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 intent of O.R.C. 1322.01 to 1322.12.
44. Finally, O.R.C. 1322.07, also cited in the Division's Notice of Intent to Deny Mr. Tobin a license, states that:

"No mortgage broker, registrant, licensee, or applicant for a certificate of registration or license under sections 1322.01 to 1322.12 of the Revised Code shall do any of the following:

- (A) Obtain a certificate of registration or license through any false or fraudulent representation of a material fact or any omission of a material fact required by state law, or make any substantial misrepresentation in any registration or license application;
- (B) Make false or misleading statements of a material fact, omissions of statements required by state law, or false promises regarding a material fact, through advertising or other means, or engage in a continued course of misrepresentations;
- (C) Engage in conduct that constitutes improper, fraudulent, or dishonest dealings..."

45. The Hearing Examiner finds, consistent with previous interpretation, that nothing in this

statute acts to bar a candidate who has failed to make required disclosure to the Division from licensure if that nondisclosure is properly and credibly attributed to reasonable mistake.

46. As Mr. Tobin has made a credible case that his nondisclosures are due to reasonable mistake, ORC 1322.07 should not act to disqualify him. See Paragraph 36.

b. Constitutional Analysis

47. Mr. Tobin lodged several constitutional challenges during the hearing, none of which the Hearing Examiner ruled upon, but all of which shall be preserved for the record.
48. Citing the Retroactivity Clause of the United States Constitution, Mr. Tobin objects to the provision of law providing for permanent license-revocation as punishment for crimes Mr. Tobin committed prior to the provision being enacted. He raises “*ex post facto* problems.” See Transcript, pp. 30-31.
49. He also raises a constitutional objection that the statute is “overly broad” as relates to Mr, Tobin. See Transcript, p. 31.
50. He also raises a constitutional objection that those crimes enumerated in the statute, sometimes referred to as “automatic disqualifiers,” must be rationally related to the work performed by a loan officer to be valid. He argues that while most of the crimes on the list appear to bear this rational relationship (i.e. embezzlement, forgery, fraud, etc.), the crime of drug trafficking does not. See Transcript, pp. 31-32.
51. He also raises a constitutional objection to the fact that the Division’s application asks if “any offense” has been committed, whereas the statute itself is “precise” in the crimes it enumerates as automatic disqualifiers. Mr. Tobin argues that the wider scope of the question on the application therefore acts as a “*de facto* regulation,” and an “*ultra vires* type

of addition to the statutory scheme,” appropriate for the Legislature to impose but not an administrative agency. See Transcript, pp. 33-34.

52. Additionally, Mr. Tobin objected to the introduction of the evidence of his crime at the hearing, as the conviction is older than ten years. Mr. Tobin cited Ohio Rule of Evidence 609, and noted this objection “dovetails into the constitutional defects” previously cited. See Transcript, p. 42


53. Counsel for the Division noted that the agency is without jurisdiction or authority to make determinations regarding constitutionality. See Transcript, p. 36.

B. RECOMMENDATION

54. The Hearing Examiner finds that Mr. Tobin has proven by a preponderance of the evidence that 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 the applicant will commit such an offense again; and 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 intent of O.R.C. 1322.01 to 1322.12.

55. Therefore, in accordance with the above Findings of Fact and Conclusions of Law, the Hearing Examiner recommends to the Superintendent of the Division of Financial Institutions that Mr. Tobin be granted a Loan Officer’s License pursuant to Ohio Revised Code 1322.041.

12/29/04
Date


Terrence O'Donnell
Hearing Examiner