

STATE OF OHIO
DEPARTMENT OF COMMERCE
Division of Financial Institutions
Consumer Finance

In the matter of:)	Case No. 04-0275-LOD
)	
GARY M. LUSTER)	<u>DIVISION ORDER</u>
24995 Lakeshore #3)	Denial of Loan Officer License Application
Euclid, Ohio 44123)	&
_____)	Notice of Appellate Rights

Respondent, Gary M. Luster, submitted a loan officer license application (“Application”) to the Division of Financial Institutions (“Division”) on January 16, 2004. On March 5, 2004, the Division notified Respondent that it intended to deny his Application because: (1) he attested in a sworn statement that the information he provided about his criminal background on his loan officer license application was complete and truthful when it was not; (2) he submitted untruthful information about his criminal background to the Division; (3) he violated R.C. 1322.07(A), by failing to disclose his conviction on his Application; (4) he violated R.C. 1322.07(B), by making a false statement of a material fact or by omitting a statement required on the licensing application; (5) he violated R.C. 1322.07(C), by engaging in conduct which constitutes improper, fraudulent or dishonest dealings; and (6) because his character and general fitness did 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 R.C. 1322.01 to 1322.12 – the Ohio Mortgage Broker Act.

Respondent requested an administrative hearing which was held on May 20, 2004. A Report and Recommendation (“Report”) was filed with the Division on September 8, 2004, recommending that the Division approve Respondent’s Application. No objections were filed.

In accordance with R.C. 119.09, the Division has considered the record, consisting of the Report, the transcript of testimony and exhibits as well as all applicable laws. As a result, the Division makes the following findings and conclusions. Any finding and/or conclusion not specifically addressed below is approved, adopted, and incorporated herein. (The Hearing Examiner’s Report and Recommendation is attached hereto.)

The Division disapproves paragraph 11, and the first sentence of paragraph 10, on page 3 of the Report and Recommendation.

The hearing officer concluded that the language in question 5 of the loan officer application could be confusing, and that Respondent had read “[e]xclude minor misdemeanor traffic and parking offenses” in the disjunctive, as having a comma after the word “misdemeanor,” and thus believed that he did not have to disclose his prior conviction. The Division disagrees with the hearing officer and the Respondent on these points, and further takes issue with the additional finding that Respondent testified “credibly” on this issue, since the Division finds that Respondent’s claimed interpretation of the wording of question 5, even if true, was not a reasonable interpretation of the plain language of the question.

Question 5 of the Loan Officer Application form asked the Respondent whether he had “ever been convicted of **any criminal offense**. Exclude minor misdemeanor traffic and parking offenses.” (Emphasis in original.) (*See*, Exhibit A.) Respondent was convicted of unlawful discharge of a firearm in 1993. (Tr. at p. 13.) When Respondent marked his answer to question 5 on the Loan Officer Application, he answered “no.” (*See*, Exhibit A.)

The inability to understand a direct question evidences a lack of the requisite fitness needed of a loan officer. On a daily basis loan originators deal with consumers’ personal financial information and counsel them on what is most often their largest financial investment. Being able to comprehend and evaluate complicated mortgage documents is a vital part of the job, and reading a comma where no comma exists can have far-reaching consequences for the loan officer’s customer. The application form is an important document for any prospective loan officer, and question number 5 is an important question for any applicant with a criminal record. Taken within its proper context, Respondent’s inability to understand and truthfully respond to an important question demonstrates to the Division that Respondent does not hold the requisite fitness needed to be a loan officer.

Furthermore, the hearing officer has oversimplified the Respondent’s testimony on this issue. Respondent testified that “I didn’t fully understand or possibly did not fully read the entire question.” (Tr. at p. 12.) Moreover, Respondent testified that he “construed” the question to permit nondisclosure of all misdemeanors, not just minor misdemeanors; i.e., all misdemeanors are minor. (Tr. at pp. 12-13.) One would expect an applicant with a background in law enforcement, like Respondent, to understand the distinction. Furthermore, one would expect an applicant with a criminal record to exercise more diligence in reading and answering any question asking for information related to his criminal record.

The Division disapproves paragraph 4 on page 5 of the Report and Recommendation.

The hearing officer concluded that Respondent did not make a substantial misrepresentation for purposes of obtaining a license, within the meaning of R.C. 1322.07(A), due to the Respondent's misreading of question 5.

The Division finds that Respondent's answer to question 5 was a substantial misrepresentation under R.C. 1322.07(A), and that R.C. 1322.07(A) does not require that an applicant commit a violation of that section knowingly.¹ Question 5 asked whether Respondent had "ever been convicted of **any criminal offense**." (Emphasis in original.) (See, Exhibit A.) Respondent had been convicted of unlawful discharge of a firearm in 1993. Accordingly, the Division finds that Respondent's negative response to question 5 was a substantial misrepresentation under R.C. 1322.07(A).

Furthermore, the hearing officer found that the misrepresentation was not "substantial" within the meaning of R.C. 1322.07(A), due to the age and nature of the offense. The Division believes that the age and nature of the underlying offense is immaterial. It is true that Respondent's conviction was not for an enumerated offense under R.C. 1322.031 which would by itself preclude the Respondent from becoming a loan officer. Thus, the conviction itself does not reflect negatively upon the Respondent when making a Loan Officer Application. Rather, it is the untruthful nature of the response to question 5 in 2004, not 1993, which reflects negatively upon the Respondent's present character and fitness to become a loan officer. The Division finds that Respondent's unqualified denial of any prior convictions was a substantial misrepresentation in violation of R.C. 1322.07(A).

Similarly, the Division disapproves paragraph 5 on page 5 of the Report and Recommendation.

The hearing officer concluded that Respondent's denial of any prior convictions did not qualify as either a false or misleading statement of material fact, within the meaning of R.C. 1322.07(B). This paragraph follows much the same reasoning as paragraph 4, above; namely, that Respondent's answer to question 5 was not false based on his misreading of the question, and that the conviction was not a material fact, within the meaning of R.C. 1322.07(B), due to the age and nature of the offense.

¹ In R.C. 1322.07(E) and (F), both sections contain language of intent by using the term "knowingly." R.C. 1322.07(A), (B), and (C) do not.

The Respondent's answer to question 5 was false under R.C. 1322.07(B), and R.C. 1322.07(B) does not require that an applicant commit a violation of that section knowingly.² Moreover, Respondent's prior conviction for unlawful discharge of a firearm was a material fact, because it was directly responsive to the question of whether Respondent had "ever been convicted of any criminal offense." (Emphasis in original.) (See, Exhibit A.) Unfortunately, Respondent answered "no." Thus, the Division finds that Respondent's answer to question 5 was a false or misleading statement of material fact, under R.C. 1322.07(B).

The Division disapproves paragraph 6 on page 5 of the Report and Recommendation.

The hearing officer concluded that Respondent's prior conviction did not need to be disclosed because the underlying offense involved was not one of the specifically enumerated offenses in R.C. 1322.031(A)(2); and, as a result, the hearing officer concluded it was not a statement required by law within the meaning of R.C. 1322.07(B). This finding ignores the attestation made by the Respondent in his Loan Officer Application, that "the answers are complete and true of my own knowledge." (See, Exhibit A.)

Notwithstanding the Respondent's attestation, the hearing officer overlooks the additional provision contained in R.C. 1322.031(A)(4), that the Division may require an applicant to disclose "[a]ny further information that the superintendent requires," beyond the specifically enumerated offenses set forth in R.C. 1322.031(A)(2) and (3). This provision allows the Division to collect information to verify compliance with its overriding criteria for approval of a loan officer application: that "[t]he 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..." R.C. 1322.041(A)(5). Whether an applicant has provided false information in response to a question regarding the applicant's criminal record is relevant to an inquiry of this nature.

The Division disapproves paragraph 7 on page 5 of the Report and Recommendation.

The hearing officer concluded that because Respondent had answered truthfully based on a misreading of question 5, the Respondent had not engaged in "improper, fraudulent or dishonest dealings," within the meaning of R.C. 1322.07(C). Falsification of an applicant's response to a question asking for information about his criminal record, in a manner which

² In R.C. 1322.07(E) and (F), both sections contain language of intent by using the term "knowingly." R.C. 1322.07(A), (B), and (C) do not.

would otherwise result in approval of the application but for the discovery of the untruthful response, constitutes “improper, fraudulent or dishonest dealings” within the meaning of R.C. 1322.07(C).

The Division disapproves paragraphs 8 and 9 on page 5, and the last sentence of paragraph 10 on page 6 of the Report and Recommendation.

As the above discussion demonstrates, there is ample evidence to show that Respondent violated R.C. 1322.07(A), (B) and (C). In accordance with the foregoing, the Division concludes that Respondent’s loan officer license application should be denied.

It is so ordered.

NOTICE OF APPELLATE RIGHTS

Respondent is hereby notified that pursuant to R.C. 119.12, this order may be appealed by filing a notice of appeal with the Ohio Division of Financial Institutions setting forth the order appealed from and the grounds for the appeal. A copy of such notice of appeal must, pursuant to R.C. 119.12, must also be filed with the court of common pleas of the county in which the place of business of the Respondent is located, or the county in which the Respondent is a resident. A notice of appeal must be filed within fifteen (15) days after the date of mailing of this order.

Signed and sealed this 17th day of May 2006.

ROBERT M. GRIESER
Deputy Superintendent for Consumer Finance
Division of Financial Institutions
Ohio Department of Commerce