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STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

IN RE: : CASE NO. 05-0037-LOD
: :
SHAWN A. BLUM : JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued October 20, 2005

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 31, 2005, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Shawn A. Blum ("Respondent" or "Mr. Blum") to consider the allegations in the Division's April 22, 2005 Notice of Intent to Deny Loan Officer License and Notice of Opportunity for a Hearing ("2005 NOH").

The Division claims that Mr. Blum's 2004 license application ("2004 Application") should be denied based upon the Division's March 23, 2004 Final Order ("2004 Final Order") denying Respondent's 2002 loan officer license application ("2002 Application"). In that default Order, the Division found Respondent violated R.C. 1322.07(A), (B) and (C) by failing to disclose a 1995 obstructing justice conviction on his 2002 Application. The Division's 2004 Final Order also concluded that the Respondent's character and general fitness do not 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 the Ohio Mortgage Broker Act as required by R.C. 1322.041(A)(5). The Division's proposed denial of Mr. Blum's 2004 Application is based solely upon its findings in the 2004 Final Order.

Martine Jean, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. Jihad Smaili represented Respondent at the hearing. At the hearing, State's Exhibits 1A through 7B, and Respondent's Exhibits A through F were admitted into the record.

B. Jurisdiction and Procedural Matters.

The Division issued the 2005 NOH to Respondent on April 22, 2005. Respondent's hearing request was received by the Division on May 11, 2005. The Division scheduled the hearing for May 23, 2005, and continued it until June 16, 2005, and then to August 31, 2005. The Respondent received the 2005 NOH by certified mail. He was also sent notice of the date, time, and location for each scheduled hearing in this case. The Division also sent Mr. Blum's counsel a letter with the date, time and location for the actual hearing date. That letter indicates that a copy was also sent to Mr. Blum.

C. The 2002 Application and the Division's 2004 Final Order.

1. Respondent is an individual who seeks to conduct business in Ohio as a mortgage loan officer. (State's Exhibits 2 and 7A; TR at 33 and 63.) (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. Respondent first applied for a loan officer license in 2002. He answered "No" to Question 5 on the 2002 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 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.

(2002 Application, State's Exhibit 2.)

4. Respondent's signature on the 2002 Application is notarized. Directly above the applicant signature line, the 2002 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." (State's Exhibit 2.)

5. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031(B).
6. The background check for Mr. Blum revealed a possible tampering with evidence charge. The Division asked him to provide more information on this charge. In response to the Division's inquiry, Mr. Blum's counsel sent a letter to the Division stating that he represented Mr. Blum in matters pertaining to the "decision as to whether to issue him an Ohio mortgage loan officer license." The Division received this letter on October 21, 2002. Mr. Blum's counsel also submitted a copy of a Cuyahoga County Court of Common Pleas journal entry evidencing the disposition of the tampering with evidence charge. Mr. Blum pleaded guilty to a reduced charge of obstructing justice. (State's Exhibits 4A and 4B.)
7. Mr. Blum's counsel also explained the events that resulted in the 1995 obstructing justice conviction in his October 22, 2002 letter. Mr. Blum, then 20, was drinking underage in a bar. He allegedly tossed a beer bottle into the trash. As a result, he was charged with tampering with evidence. (State's Exhibits 4A and 4B.)
8. On January 22, 2004, the Division issued a Notice of Intent to Deny Loan Officer Application and Notice of Opportunity for a Hearing ("2004 NOH") to Mr. Blum. The 2004 NOH was received by certified mail at the address Mr. Blum listed on his 2002 Application. The record contains no evidence indicating that the Division mailed a copy of the 2004 NOH to Mr. Blum's counsel of record in that matter. (State's Exhibits 2, 5A, and 5B.)
9. On March 24, 2004, the Division issued the 2004 Final Order denying Mr. Blum's 2002 Application. That Order states that it was issued after "Respondent failed to request a hearing by the statutory deadline and failed to defend against the Division's allegations." No hearing was held in that matter. The 2004 Final Order was received by certified mail at the address Mr. Blum listed on his 2002 Application. The record contains no evidence indicating that a copy of the 2004 Final Order was sent or provided by any means to Mr. Blum's counsel of record in that matter. (State's Exhibits 2, 6A, 6B, and 6C.)
10. The 2004 Final Order states that the 2004 NOH "was mailed to Respondent, via certified mail, and service was perfected." It contains no statement indicating that a copy of the 2004 NOH was sent or provided by any means to Mr. Blum's counsel. (State's Exhibits 2, 6A, 6B, and 6C.)
11. The Division did not mail a copy of the 2004 NOH to Mr. Blum's counsel. The record also contains no evidence establishing that the Division mailed a copy of the 2004 Final Order to Mr. Blum's counsel of record in that matter.

D. The 2004 Application.

12. Respondent filed a second application for a loan officer license on December 6, 2004. (State's Exhibits 7A and 7B.)
13. He answered "yes" to the version of 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 7A, emphasis and boldface type in original.)

14. Mr. Blum disclosed the 1995 obstructing justice conviction on his 2004 Application. (State's Exhibits 7A and 7B.)
15. The Division's proposed denial of Mr. Blum's 2004 Application is based solely upon its findings in the 2004 Final Order. (State's Exhibit 1A.)
16. Mr. Blum testified on his behalf at the hearing on the 2004 Application. His testimony was credible. He explained that the initial charge of underage drinking and open container was increased to tampering with evidence when he refused to plead guilty. (TR at 51-54.)
17. Mr. Blum did not disclose the 1995 obstructing justice conviction on his 2002 Application. (State's Exhibit 2.)
18. He consistently and credibly explained that he read "any crime 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" in the version of Question 5 on the 2002 Application as requiring the listed offenses, not other types of criminal offenses, to be disclosed. Therefore, he had thought he had nothing to disclose on the Application. (TR at 38-39, 82-84.)
19. The Hearing Officer finds that the language in the version of Question 5 on the 2002 Application could be confusing. The Respondent read that language as he testified and, based upon his understanding of the question, 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 2002 Application. The answer was "complete and true of [his] own knowledge" when he signed the 2002 Application. (TR at 40, 83-84.)

E. Respondent's Reputation and Character.

20. Respondent has been a loan processor in the mortgage industry since 2001. Before that, he worked in the nursing field caring for physically and mentally challenged patients. (TR at 29-32.)
21. The record contains no evidence that Mr. Blum, now 31, has any other criminal convictions.

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. The Division claims that Mr. Blum's 2004 Application should be denied based its 2004 Final Order denying Respondent's 2002 Application. That Order was issued by default after no hearing was requested. No hearing was held before the Division issued the 2004 Final Order. The Division found Respondent violated R.C. 1322.07(A), (B) and (C) by failing to disclose a 1995 obstructing justice conviction on his 2002 Application. The Division's 2004 Final Order also concluded that the Respondent's character and general fitness did not 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 the Ohio Mortgage Broker Act as required by R.C. 1322.041(A)(5). Because the Division's proposed denial of Mr. Blum's 2004 Application is based solely upon its findings in the 2004 Final Order, it is necessary to determine the validity of that Order.

4. Ohio Revised Code Section 1322.10(A)(1) provides that the superintendent of the division of financial institutions may refuse to issue a license under certain circumstances "{a}fter notice and opportunity for a hearing conducted in accordance with Chapter 119. of the Revised Code."
5. The Division's authority to refuse to issue a loan officer license is described R.C. 1322.10(A)(1) and only exists "{a}fter notice and opportunity for a hearing conducted in accordance with Chapter 119. of the Revised Code" have been provided.
6. Notice and an opportunity for a hearing pursuant to Ohio's Administrative Procedure Act can only be established if the requirements of 119.07 have been met. An agency required to afford an opportunity for a hearing prior to the issuance of an order "shall give notice to the party informing him of his right to a hearing. Notice shall be given by registered mail, return receipt requested...." R.C. 119.07 (emphasis added). For this purpose, "registered mail" includes certified mail and 'certified mail' includes registered mail." R.C. 1.02 (General Provisions). Ohio Revised Code Section 119.07 requires the Division to notify Mr. Blum of his right to request a hearing by certified mail. The Division's 2004 NOH notified Mr. Blum that he was entitled to request a hearing. The Division sent the 2004 NOH by certified mail to the address that Mr. Blum provided to the Division in his 2002 Application and it was received by someone at that address. This might suffice if Mr. Blum was not represented by counsel when the 2004 NOH was issued.
7. That, in fact is not the case here. Mr. Blum's counsel notified the Division in his November 22, 2002 letter that he represented Mr. Blum in matters pertaining to the "decision as to whether to issue him an Ohio mortgage loan officer license." Therefore, when the 2004 NOH was issued in January of 2004, the Division had notice that Mr. Blum was represented by counsel of record in that matter.
8. Ohio Revised Code Section 119.07 also states, "{a} copy of the notice {of opportunity for a hearing} shall be mailed to attorneys or other representatives of record representing the party." R.C. 119.07. This requirement is in addition to, as opposed to in lieu of, sending a notice to the Respondent informing him of his right to a hearing by registered or certified mail with a return receipt requested. R.C. 119.07. Slone v. Ohio Bd. of Embalmers & Funeral Directors (1995), 107 Ohio App.3d 628, 631 (8th Dist.)(construing similar language set forth in R.C. 119.09.)

9. The 2004 Final Order issued based upon the 2004 NOH only mentions certified mail service of the NOH to Mr. Blum. The order by itself evidences that the Division did not mail the NOH to Mr. Blum's counsel. Therefore, the Division did not comply with the service requirements set forth in 119.07 for the 2004 NOH underlying the 2004 Final Order.
10. The Division did not mail a copy of the notice of an opportunity for hearing to Mr. Blum's attorney of record as required by R.C. 119.07 and, therefore, did not properly notify the Respondent of his right to request a hearing.
11. The manner of providing the notice of the right to a hearing, who to notify, and what to do if certain procedures for notification are unsuccessful are set forth in detail in R.C. 119.07. The statute unequivocally states what happens if these requirements are not complied with – any order issued is not valid. R.C. 119.07; Columbus v. Sliker (1986), 30 Ohio App.3d 74, 76 (10th Dist.).
12. Ohio Revised Code Section 119.07 also provides that a party has the right to be represented by counsel in the 119 hearing process. The Division's failure to mail the 2004 NOH to Mr. Blum's counsel interfered with that right. It may even have prevented Mr. Blum from exercising his right to request a hearing. A person with counsel may reasonably expect that counsel is looking out for their interests and rely on counsel to meet filing deadlines in a pending action.
13. The record indicates that the Division also did not mail a copy of the 2004 Final Order to Mr. Blum's counsel. If so, it did not comply with R.C. 119.09's requirement that it mail a copy of the Final Order to Respondent's counsel of record.
14. The 2005 NOH in this case only alleges that the findings in the 2004 Final Order are the bases for a determination that the Respondent should not be issued a license. Since that Order, due to the Division's own failure to comply with 119.07, is invalid, the Division has presented no proof to support its allegations in this matter.
15. Furthermore, the evidence presented in this record does not support the same conclusions as stated in the 2004 Final Order issued by default.
16. 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 2002 Application. He misread the question and answered truthfully based upon his understanding of the question. More importantly, the failure to disclose a 1995 obstructing justice conviction based upon the events

described in this case is not a substantial misrepresentation for the purposes of this licensing process over ten years later.


17. 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 2002 Application. He misread the question and answered truthfully based upon his understanding of the question. 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. Furthermore, the existence of a 1995 obstructing justice conviction based upon the events described in this case is not a material fact for the purposes of this licensing process over ten years later.
18. 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 conviction for obstructing justice 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 2002 Application.
19. 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 his understanding 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).
20. There is no basis for establishing any violations of R.C. 1322.07(A), (B) or (C) by the Respondent.
21. 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).
22. The Respondent admitted that he made a mistake while reading the 2002 Application. The minor incident 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 has worked in for the past four years. The

Division has not established that Respondent's character and general fitness fails to 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 Division's NOH in this case only set forth the findings in the default 2004 Final Order as a basis for denying Respondent a license. Since that Order, due to the Division's own failure to comply with 119.07, is invalid, the Division has presented no evidence to support its allegations in this matter. The record only supports a recommendation that Respondent has met the conditions set forth in Ohio Revised Code Section 1322.041(A)(2) 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 20, 2005