

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

2005 MAY 25 PM 1:30

IN THE MATTER OF: : CASE NO. 05-0052-LOD
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: :
Scott A. Bresler : James J. Lawrence, Hearing Officer

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
May 24, 2005

I. FINDINGS OF FACT

A. Background

This matter came before James J. Lawrence, an attorney licensed to practice law in the state of Ohio and duly appointed by the Ohio Division of Financial Institutions (Division) to serve as Hearing Officer for this hearing in accordance with Ohio Revised Code (R.C.) Chapter 119, the Administrative Procedure Act. The hearing was held at 2:30 p.m. on April 1, 2005, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Scott A. Bresler (Respondent) to consider the allegations in the Division's Notice of Intent to Deny Loan Officer License Application and Notice of Opportunity for Hearing (NOH).

The Division alleges that Respondent was convicted of burglary in 1990 and he failed to disclose that conviction on his loan officer application filed in September of 2003. Therefore, the Division asserts 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. The 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 commit such an offense again as required by R.C. 1322.041 (A) (3);
2. The Respondent's conviction for burglary and his failure to disclose the conviction on his loan officer application shows that his 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);

3. Respondent violated R.C. 1322.07 (A), (B) and (C) by failing to disclose a criminal conviction on his loan officer application.

Emily A. Smith, Assistant Attorney General, from the Executive Agencies Section of the Office of the Attorney General, represented the Division at the hearing. The Respondent appeared without counsel. At the hearing, State's Exhibits A through F and Respondent's Exhibit 1 were admitted into the record.

B. Jurisdiction and Procedural Matters

The Division issued the NOH to Respondent on February 10, 2005 by certified mail, return receipt requested. (Exhibit D.) Respondent's hearing request was received by the Division on March 3, 2005. (Exhibit E.) The Division scheduled the hearing for March 14, 2005 but, on its own motion, continued the hearing to April 1, 2005. The Division sent notice of the hearings by ordinary mail to the same address to which it mailed the NOH. (Exhibit F.)

C. Respondent's Loan Officer Application

1. The Respondent filed a loan officer application on September 12, 2003. (Exhibit A.)
2. Question 5 of that application asked the following question:
 5. 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. (Emphasis in original.)
3. In response to Question 5, the Respondent answered "No." (Exhibit A; TR at 12.)
4. Respondent signed the application on August 22, 2003 before a notary public. Directly above the applicant signature line, the 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." (Exhibit A.)
5. As part of the application process and pursuant to R.C. 1322.031 (B), the Division conducted a criminal background check which apparently discovered that the Respondent had been charged with burglary in 1989. (Exhibit B.) By letter dated August 10, 2004, the Division required the Respondent to submit a detailed explanation of the facts and circumstances which gave rise to the charge and a certified copy of the journal entry evidencing the disposition of the case. (Exhibit B.)
6. The Respondent submitted a Judgment Entry from the Hancock County Common Pleas Court for case number 89-9518-CR. The Entry shows that on October 10, 1990 the Court found the Respondent guilty of burglary in violation of R.C. 2911.12, a second degree felony. (Exhibit C.) The Court

ordered the Respondent to pay a small fine and placed him on probation for two years. (TR at 18, 21, 24.)

7. The Respondent explained that the conviction occurred in the summer of 1989, less than one month after his eighteenth birthday. (TR at 26.) He and two friends visited the home of his girl friend. While he and his girlfriend were in the basement, his friends were upstairs and stole some of her parents' jewelry. (Exhibit B; TR at 20.) The Respondent claims that he was not aware that his friends took the jewelry until a few days later. (TR at 20.) Nevertheless, he was charged with burglary and pleaded guilty in return for a sentence of two years of probation. (TR at 21.)
8. The Respondent testified that he answered "no" to Question 5 because he believed that the record of the conviction had been expunged. At the time that he entered into the plea agreement, he was told that the conviction would be off of his record after seven years. (TR at 21.) He had paid his attorney \$1,500.00 for the expungement and assumed that it had been done. (TR at 21 - 23.) His belief that the record has been expunged was supported by the fact that no one brought up the conviction in the fourteen years since the conviction until he applied for a loan officer license. (TR at 21.)
9. The Respondent enrolled in the University of Toledo in the fall of 1989 and graduated in 1994 with a dual degree in administration services and law enforcement. (TR at 29.) He married and has children. (TR at 33, 47.) He has been employed by life insurance, consumer finance and mortgage companies until 2003 when one of his daughters was diagnosed with Gillian Barré disease. (TR at 30 - 33.) These positions have involved increasing levels of responsibility. His employers have authorized him to make decisions regarding when to write off debt and when to foreclose. (TR at 59.) He has been employed as a loan officer and assisted hundreds of consumers in managing their mortgage debt. He has never had a complaint. (TR at 26 - 27, 60.)
10. David M. McNeal appeared at the hearing and testified on the Respondent's behalf. Mr. McNeal is currently the President of HomeChoice Mortgage L.L.C. He has known the Respondent both professionally and personally for over ten years. He worked with the Respondent at Ford Consumer Finance, Associates Home Equity Services, City Financial Mortgage Company, and Mortgage IT. He testified that the Respondent has helped thousands of consumers manage their mortgage debts. The Respondent has supervised many employees and helped them become better at what they do and how they live. The Respondent has been extremely influential in the advancement of several of these employees. He described the Respondent as a role model for many in the industry and said that he is viewed favorably by senior management. (Exhibit 1; TR at 38 - 39.) Mr. McNeal also testified that he never received a complaint about the Respondent's work. (TR at 41 - 42.)

II. CONCLUSIONS OF LAW

A. Jurisdictional and Procedural Matters.

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

B. Loan Officer Application.

1. The Division is the state agency responsible for the licensing and regulation of loan officers pursuant to R.C. Chapter 1322.
2. R.C. 1322.041 (A) provides that the Superintendent of Financial Institutions (Superintendent) shall issue a loan officer license if the Superintendent finds that the following conditions are met:

(1) The application is accompanied by the application fee.

(2) The applicant complies with R.C. 1322.01 to 1322.12.

(3) The applicant has not been convicted of or pleaded guilty to any criminal offense described in R.C. 1322.031(A)(2), 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.

(4) The applicant has not been subject to an adverse judgment for conversion, embezzlement, misappropriation of funds, fraud, misfeasance or malfeasance, or breach of fiduciary duty, or, if the applicant has been subject to such a judgment, the applicant has proven to the superintendent, by a preponderance of the evidence, that the applicant's activities and employment record since the judgment show that the applicant is honest, truthful, and of good reputation, and there is no basis in fact for believing that the applicant will be subject to such a judgment 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 R.C. 1322.01 to 1322.12.

The NOH states the Division intends to deny the Respondent's loan officer application because the Respondent has not met three of these conditions.

3. The NOH states that the Respondent has not shown that he is honest, truthful, and of good reputation, and that there is no basis in fact for believing that he will commit such an offense again, as required by R.C. 1322.041(A) (3). R.C. 1322.041 (A) (3) requires that if the applicant has been convicted of or pleaded guilty to an offense described in R.C.

1322.031 (A) (2), the applicant must prove 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. R.C. 1322.031 (A) (2) describes the following criminal offenses: any 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. Since the Respondent was convicted of burglary in 1990,¹ the burden is on the Respondent to prove by the 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.

4. The Respondent has met this burden. Since his conviction in 1990, the Respondent graduated from college, married and had children. He has worked in a variety of positions in the financial services industry. His employers have assigned him increasing and high levels of responsibility in these positions. The testimony of both the Respondent and Mr. McNeal establish that he performed his duties with out any complaints. The Respondent's employment history since his conviction proves by a preponderance of the evidence that he is honest, truthful and of good reputation. Moreover, there is no basis in fact for believing that he will commit such an offense again since the Respondent has not committed another offense in the fifteen years since his first offense.
5. The NOH states 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 bases this finding on the fact that the Respondent was convicted of a criminal offense and the fact that he did not disclose the conviction on his loan officer application.
6. R.C. 1322.031 (A) (2) requires that in an application for a license as a loan officer, an applicant must provide a statement as to whether the applicant 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.
7. In response to Question 5 of the application, the Respondent answered that he had not been convicted of a criminal offense even though he had been convicted of burglary. The Respondent contends that he answered this question incorrectly because he believed that the conviction had been expunged from his record. The Respondent's testimony in this regard was credible and uncontroverted. Although the Respondent now understands that his answer to Question 5 was incorrect, at the time that he filled out the application he believed that his answer was "complete and true of [his] own knowledge" as he attested. As such, the incorrect answer does not

¹ R.C. 2913.01(K) provides that theft offense includes, among other things, a violation of R.C. 2911.12.

support a finding that 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.

8. The Respondent's criminal conviction also does not support a finding 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). Although the offense committed by the Respondent was serious and of a type that shows disregard for the property of others, the Respondent committed the offense when he was young, barely eighteen years of age. This single isolated offense, which occurred many years ago, when the Respondent was young and immature, is not strong evidence of his character and general fitness today. On the other hand, the record shows that in the intervening fifteen years, the Respondent has led an exemplary life both personally and professionally. This fifteen year record is strong evidence that the Respondent's character and general fitness do command the confidence of the public and warrant the belief that he will conduct the business of a loan officer honestly and fairly and in compliance with the purposes of the Ohio Mortgage Broker Act.

9. The NOH states that the Division intends to deny the Respondent's loan officer application because the Respondent's failure to correctly answer Question 5 of the application violated R.C. 1322.07 (A), (B) and (C). R.C. 1322.041 (A) (3) provides that the Superintendent shall issue a loan officer license if the Superintendent finds the applicant complies with R.C. 1322.01 to 1322.12. R.C. 1322.07 provides:

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 any 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.

10. When the Respondent incorrectly answered Question 5 of the loan officer application by failing to disclose the conviction, he made a substantial misrepresentation in a license application and he omitted a statement required by state law. Even though the omission and misrepresentation

were unintentional, the prohibitions of R.C. 1322.07 (A) and (B) do not require that the misrepresentations or omissions be made knowingly or intentionally. The Respondent's omission and misrepresentation did violate R.C. 1322.07 (A) and (B). However, for the reasons stated in paragraph 7 above, the record does not support a finding that the Respondent engaged in improper, fraudulent or dishonest dealings with the Superintendent in violation of R.C. 1322.07 (C). By violating R.C. 1322.07 (A) and (B), the Respondent failed to comply with R.C. 1322.01 to 1322.012 as required by R.C. 1322.041 (A) (2).

11. R.C. 1322.10 provides that after notice and opportunity for a hearing conducted in accordance with R.C. Chapter 119, the Superintendent may refuse to issue a loan officer license if he finds either a violation of or failure to comply with any provision of R.C. 1322.01 to 1322.12 or a conviction of or guilty pleas to any criminal offense of involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking or any criminal offense involving money or securities. However, the statute's use of the permissive word "may" means that the Superintendent is not required to take either action and may decide to take no formal disciplinary action. In deciding which action to take, the Superintendent should consider the facts and circumstances of the particular case and take the action that best serves the purposes of the Ohio Mortgage Broker Act. In this case, the facts show that the Respondent's violation of R.C. 1322.07 was an unintentional act caused by misunderstanding of the expungement process and was not done with any attempt to deceive or mislead the Division. Moreover, the Respondent has proven by a preponderance of the evidence that his activities and employment since his conviction for unauthorized use of property 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. The purposes of the Ohio Mortgage Broker Act will be best served by issuing a loan officer license to the Respondent.

III. RECOMMENDATION

Based upon the particular facts and circumstances of this case, I respectfully recommend that the Superintendent of Financial Institutions issue a loan officer license to the Respondent pursuant to R.C. 1322.041(A) and R.C. 1322.10(A).

Respectfully Submitted,

James J. Lawrence
Hearing Officer
May 24, 2005