Bob Taft
Governor

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

Doug White
Director

In the matter of:	)	Case No. 02-0124-LOD
	)	
EDWARD J. BENKO	)	**DIVISION ORDER**
9029 E. Mississippi Avenue, Suite M303	)	**Denial of Loan Officer License Application**
Denver, Colorado 80247	)	&
	)	**Notice of Appellate Rights**

On or about March 14, 2002, Edward J. Benko ("Respondent") submitted a loan officer license application to the Division of Financial Institutions ("Division"). On January 22, 2004, the Division issued Respondent a notice of the Division's intent to deny Respondent's application, and notified Respondent of his right to a hearing on the matter. Respondent requested a hearing, and pursuant thereto, an administrative hearing was held in accordance with Ohio Revised Code Chapter 119 on May 5, 2004.

The Hearing Officer filed her written Report and Recommendation with the Division on July 7, 2004, recommending "the Division provide proper notice to the Respondent of his right to a hearing in the matter statutorily required by R.C. 119.07 and establish compliance with the jurisdictional prerequisites set forth in R.C. Chapter 119." A copy of the Report and Recommendation and a letter explaining Respondent's right to submit written objections to the report was mailed to Respondent via certified mail on July 8, 2004, and received by the Respondent on July 12, 2004. Respondent did not file any objections. A copy of the Report and Recommendation is attached hereto and incorporated herein.

Subsequently, the Division issued a Remand Order to the Hearing Officer, instructing the Hearing Officer on points of law relative to jurisdiction, and requesting the Hearing Officer to issue a new Report and Recommendation consistent with the Order. Despite the Division's Remand Order, no action was taken by the Hearing Officer to correct the Report and Recommendation. Due to the extraordinary amount of time which has passed, the Division hereby issues the following Division Order.

The Division hereby modifies and/or rejects certain paragraphs in the Hearing Officer's Report and Recommendation as follows. Paragraphs of the Report and Recommendation not specifically addressed below are approved.

1) The Division MODIFIES paragraph I(B)(7), on page 3, to read as follows: Respondent participated in the hearing that was held on May 5, 2004. Respondent made an opening statement (Transcript at p. 15). Respondent testified in the narrative (Tr. at pp. 17-18), responded to the questions of the Hearing Officer (Tr. at pp. 18-32), and produced Respondent's Exhibits A and B.

   Despite not receiving certified mail service of the NOH, the Respondent testified that he wanted the matter to be resolved. He stated that he did not want to waive any rights that he

had and did not expressly waive his right to certified mail service of the NOH. Despite this declaration, he participated at the hearing and admitted evidence. When the issue of the NOH arose towards the end of the hearing, Respondent acknowledged the following:

a) That he appeared at the hearing voluntarily;
b) That he waived his right to counsel at the beginning of the hearing;
c) That Attorney Blumenthal most likely forwarded a copy of the NOH to him;
d) That he himself had requested the hearing through State's Exhibit 10;
e) That the reason he requested a hearing was because he knew that there was a denial of his loan officer application issued;
f) That he had no problem having the Hearing Officer deciding the case;
g) That towards the end of the hearing he started to "second guess" his earlier decision to waive counsel. (Tr. at pp. 74-77)

2) The Division MODIFIES paragraph I(B)(9), on page 3, to read as follows: Originally, the record was to be kept open until May 19, 2004, for the limited purpose of the Respondent providing signed copies of Respondent's Exhibits A and B, and until June 2, 2004, for the Division to object to Respondent's Exhibits A and B. However, the Hearing Officer later determined that the Respondent and the Division would have until June 2, 2004, to provide legal briefs on the issue raised *sua sponte* by the Hearing Officer: whether the lack of certified mail service of the NOH precluded the Hearing Officer from having jurisdiction over the case. Respondent indicated that he had difficulty understanding this legal issue and the Hearing Officer attempted to explain processes and procedures, which are addressed in the Transcript at pages 78 through 82. The Hearing Officer added that the record would be kept open until June 2, 2004, "for submission of additional documents and briefs" and "anything additional for the record." (Tr. at pp. 78-79)

3) The Division MODIFIES paragraph I(B)(11), on page 3, to read as follows: The Respondent did not file a brief regarding the jurisdictional issue and did not indicate that he wished to have additional evidence considered or add legal representation to the process. The Hearing Officer finds that the Respondent was notified of his right to counsel in the NOH and at the outset of the hearing.

4) The Division MODIFIES paragraph II(A)(3), on page 4, to read as follows: R.C. 119.06 states "No adjudication order of an agency shall be valid unless the agency is specifically authorized by law to make such order." It also states "No adjudication shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code."

5) The Division MODIFIES paragraph II(A)(4), on page 4, to read as follows: An "adjudication" is defined by R.C. 119.01(D) as "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature."

6) The Division REJECTS paragraph II(A)(5), on page 4, as it is now repetitive of the modified paragraph II(A)(3), as stated above.

7) The Division MODIFIES paragraph II(A)(6), on page 4, to clarify the definition of jurisdiction: The Division's authority and jurisdiction over the subject matter only exits as authorized by law. There are two types of jurisdiction, subject matter and personal. Subject matter jurisdiction is the jurisdiction of a court (generally) over the subject, type, or cause of action of a case that allows the court to issue a binding judgment. Personal jurisdiction is the jurisdiction granted a court (generally) over the parties before it that allows it to issue a binding judgment.

   Chapter 1322 of the Ohio Revised Code regulates loan officers in the State of Ohio. R.C. 1322.02(B) states that no person shall act as a loan officer without first having obtained a license from the Superintendent of Financial Institutions (which, pursuant to R.C. 1322.01(K), includes the Deputy Superintendent for Consumer Finance). The Superintendent investigates all applicants for a loan officer license. *See* R.C. 1322.031(B). The Superintendent must grant a loan officer license if an applicant meets statutory requirements. *See* R.C. 1322.041(A). After notice and opportunity for a hearing conducted in accordance with Chapter 119 of the Revised Code, the Superintendent may refuse to issue a loan officer license if he finds either (A) a violation of or failure to comply with any provision of sections 1322.01 to 1322.12 of the Revised Code or (B) a conviction of or guilty plea 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. *See* R.C. 1322.10(A). Therefore, the Division has subject matter jurisdiction to refuse to issue (deny) a loan officer license.

   The Division obtains jurisdiction over an applicant once a NOH is served upon the individual. However, as discussed below, an applicant can waive service of the NOH, actual receipt of a NOH, and even their right to a hearing. This can be done either explicitly or implicitly.

8) The Division REJECTS paragraph II(A)(7), on page 5. R.C. 119.07 states in part "the agency shall give notice to the party informing him of his right to a hearing. Notice shall be given by registered mail, return receipt requested...A copy of the notice shall be mailed to attorneys or other representatives of record representing the party...When any notice sent by registered mail, as required by Sections 119.01 to 119.13 of the Revised Code, is returned because of failure of delivery, the agency either shall make personal delivery of the notice by an employee of the agency or shall cause the notice to be published once a week for three consecutive weeks in a newspaper of general circulation in the county where the last known place of residence or business of the party is located..." Respondent is the "party" entitled to receive the notice of the right to a hearing by certified mail, as his interests are the subject of an adjudication by an agency. *See* R.C. 119.01(G).

9) The Division REJECTS paragraph II(A)(9), on page 5. R.C. 119.07 states in part: "[t]he failure of an agency to give the notices for any hearing required by section 119.01 to 119.13 of the Revised Code in the manner provided in this section shall invalidate any order entered

pursuant to the hearing." However, the Hearing Officer is incorrect in relying upon *Columbus v. Silker* (10th Dist. 1986), 30 Ohio App.3d 74, and applying it to the case before her.

In *Silker*, the Registrar of the Bureau of Motor Vehicles notified Silker, via certified mail, that his privilege to drive a motor vehicle in Ohio had been cancelled. The certified letter was returned a "not deliverable as addressed, unable to forward," and no other steps were taken to contact Silker. *Id.* at 75. The Appellate Court found that "The failure of the Registrar of the Bureau of Motor Vehicles to comply with the requirements of R.C. 119.06 and 119.07 invalidates the bureau's order canceling defendant's Ohio driver's license." *Id.* at 76.

The *Silker* case differs because the document in question was an "adjudication order" and not a "notice of intent to deny loan officer application." The Division's NOH is not an adjudication as defined in paragraph II(A)(4), above. Further, the Court noted in the *Silker* case "There is no indication in the Bureau of Motor Vehicles file that notice of a right to a hearing was given to defendant, or that the notice was published in a newspaper after the certified mail was returned undelivered." *Id.* The *Silker* court's decision focused on the fact that an order was issued against Silker without his knowledge, and that he was not given an opportunity to be heard. This is not the case before the Hearing Officer, as the Division had not issued an adjudication order in Respondent's case. Unlike in *Silker*, the Division's file does indicate that Respondent was notified of his right to a hearing—in fact, State's Exhibit 10, Respondent's appearance at the hearing on May 5, 2004, and Respondent's testimony at the hearing indicates that Respondent was notified of his right to a hearing.

The *Silker* case does not control in Respondent's case, because Silker was never provided notice of allegations before him and an opportunity to be heard. As evidenced above, Respondent was provided a notice of the Division's intent to deny him a loan officer license, and he took advantage of his opportunity to be heard.

10) The Division REJECTS paragraph II(A)(10), on page 5. A valid adjudication order cannot be issued unless a party is provided notice of the charges and an opportunity to be heard on those charges. The Hearing Officer's application of *Slone v. Ohio Bd. Of Embalmers & Funeral Directors* (8th Dist. 1995), 107 Ohio App.3d 628, is misplaced. She is correct that a challenge to subject matter jurisdiction can be raised at any time. *Id.* at 630. However, there is no similarity between *Slone* and the Respondent's case.

The claim in *Slone* was that "the Board failed to personally serve appellant with notice of its revocation order as required by R.C. 119.09..." Although the Board mailed the adjudication order to Slone's counsel by certified mail, along with a notice of Slone's right to appeal pursuant to R.C. 119.12, the Board did not mail a similar notice to Slone. The Appellate Court found "[t]he failure of [the Board] to serve [Slone] notice of the decision was a violation of due process and deprived appellant of this right to an effective appeal." (citations omitted) *Id.* at 632. This was based upon R.C. 119.09, which states in part "After such [adjudication] order is entered on its journal, the agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a

statement of the time and method by which an appeal may be perfected. A copy of such order shall be mailed to the attorneys or other representatives of record representing the party."

First and foremost, *Slone* differs from Respondent's case in that it deals with an adjudication order and not a NOH. Further, its decision is based upon R.C. 119.09 and not R.C. 119.07. The language in the two statutes may be similar, but each statute serves a different purpose. The Hearing Officer confused the purpose of R.C. 119.09, as stated in the *Slone* Court, and the purpose of R.C. 119.07. In *Beckside v. Ohio Liquor Control Commission* (10th Dist. 2004), 2004 Ohio 1009, the Appellate Court stated "[t]he purpose of R.C. 119.07 is to give sufficient notice such that the defending party can adequately prepare a defense." *Id.* at Paragraph 20. Respondent knew what the allegations against him were, and presented a defense. His defense was presented at the hearing, which he requested.

11) The Division REJECTS paragraph II(A)(11), on page 6. The Hearing Officer's reliance upon *Franklin County Bd. Of Comm'rs. v. SERB* (10th Dist. 1989), 64 Ohio App.3d 113, (hereinafter "SERB") is misplaced. This case, too, deals with a decision (adjudication order) that was not served by certified mail in accordance with R.C. 119.09. *Id.* at 114. The Appellate Court found

> The notice required by R.C. 119.09 does more than inform an affected party of its appeal rights, it is the required notification of the agency's decision and in absence of such statutory notice the affected party is not bound by such order. As noted by the Ohio Supreme Court in *Sun Refining & Marketing Co. v. Brennan* (1987), 31 Ohio St.3d 306, 309, failure to comply with R.C. 119.09 results in a violation of due process. To conclude otherwise would, in many instances, deprive a party of an effective appeal while at the same time require compliance with an agency's order.

Id. at 117-118. The *SERB* case is not applicable, as it does not deal with a NOH—it deals with the failure to send a party an adjudication order by certified mail, and how it affects the party's right to appeal. There is no case law found by the Division which indicates that the language in R.C. 119.07 and R.C. 119.09 are to be read *in pari materia*, nor that the failure to issue a NOH by certified mail denies the Division jurisdiction to hear the subject matter of a loan officer application denial.

12) The Division REJECTS paragraph II(A)(12), on page 6. A hearing officer cannot rule on the constitutionality of a statute or rule. Similarly, the Hearing Officer in this case exceeded her authority, as she cannot act as a court of higher authority and decide that two separate Courts of Appeal decisions "suffer from the same fatal defect—they assume that R.C. 119.07 only refers to a method of service relevant to obtaining personal jurisdiction and it does not." The Superintendent is not "misguided" in relying upon both *Jefferson Cty. Child Support Agency v. Harris* (7th Dist. 2003), 2003 Ohio 496, and *Fogt v. Ohio State Racing Commission* (2nd Dist. 1965), 3 Ohio App.2d 423. *Harris* and *Fogt* are persuasive, and the Division adopts these courts' rationale that R.C. 119.07 refers to a method of service relevant to obtaining personal jurisdiction.

In *Fogt*, the Racing Commission appealed the trial court's determination to invalidate the Racing Commission's order because "the notice issued in the present case was defective in that it did not meet the requirements of Section 119.07, Revised Code, and the record amply supports the trial court's conclusion that the notice of hearing was defective." *Id.* at 424. The Second District Court of Appeals reversed the trial court decision because

> It is equally clear from the record that the appellee appeared in person before the Racing Commission; that he expressly indicated he wanted to proceed without a lawyer; that he specifically waived any defects in the notice of the alleged violation of Rule 259.01; and that he specifically consented to an amendment of the original citation to include an alleged violation of Rule 264.
>
> After agreeing to proceed with the hearing, the appellee was estopped from thereafter denying the validity of the commission's order on the ground that the notice issued to him was defective.

Id. at 424-425. The Second District Court of Appeals determined that R.C. 119.07 dealt with personal jurisdiction, and a respondent's notice of allegations against him. The Court restated the familiar premise that

> Although parties to an action may not agree or consent to jurisdiction of the subject matter, it is fundamental that jurisdiction over the person may be waived...It has frequently been said that knowledge is not notice, but knowledge, coupled with facts showing an express waiver and consent, precludes any subsequent objection to the form of the notice. Indeed, the absurd consequences of any alternative conclusion are manifest in view of the sole purpose of the required notice.

Id. at 425. In addition, the Tenth District Court of Appeals has adopted this rationale, that procedural requirements concerning notices deal with personal jurisdiction. *See Hoge v. Liquor Control Comm.* (10th Dist. 1969), 18 Ohio App.2d 255, 257.

In *Harris*, the Appellant argued "the trial court erred when it refused to adopt the administrative order because of a violation of procedural due process...due to the fact that the CSEA sent Harris notice of the hearing via regular mail instead of registered mail." *Harris*, *supra*, at Paragraph 10. The Court overruled the trial court, and stated:

> Pursuant to R.C. 119.07, the CSEA should have sent notice of the hearing via registered mail, return receipt requested. "The failure of an agency to give the notices for any hearing * * * in the manner provided in this section shall invalidate any order entered pursuant to the hearing." R.C. 119.07. The purpose of this notice is to give the parties involved adequate notice to enable them to prepare for the hearing. *Sohi v. Ohio State Dental Bd.* (1998), 130 Ohio App.3d 414, 422, 720 N.E.2d 187. However, Ohio courts have consistently held that administrative orders following a hearing may be valid even though notice of the

> hearing did not comply with R.C. 119.07. See *Fogt v. Ohio State Racing Commission* (1965), 3 Ohio App.2d 423, 32 O.O.2d 546, 210 N.E.2d 730; *Shearer v. State Medical Bd.* (1950), 91 Ohio App. 277, 280, 44 O.O. 480, 97 N.E.2d 688; *Prinz v. State Counselor and Social Worker Bd.* (Jan. 21, 2000), 1st Dist. No. C-990200 [2000 Ohio App. LEXIS 116]; *Kenney v. South Range Local School District* (Mar. 23, 1983), 7th Dist. No. 82 CA 35 [1983 Ohio App. LEXIS 14170].
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> In order for an administrative order to be valid without proper notice under R.C. 119.07, the record must demonstrate that the defendant had actual notice of the proceedings against him. *Prinz* at 5. Once a defendant has received actual notice of the proceedings, he may waive asserting the lack of notice as a defense, as any objection to jurisdiction over the person may be waived. *Fogt* at 425, citing 1 Ohio Jurisprudence 2d 489, Section 89.
>
> We recognize that in *Prinz*, *Fogt*, and *Fenney*, the defendant appeared at the hearing and that appearance demonstrated he received actual notice of the proceedings against him while in this case Harris did not appear at the hearing. However, this case does not hinge on whether Harris did or did not appear at the hearing. The testimony at the hearing demonstrates that he actually received notice of the hearing. Before the hearing, Harris contacted the CSEA by telephone to inform it of his inability to attend and talked to the CSEA about the possible consequences of the hearing. Furthermore, Harris never objected to the form of service at any stage in the proceedings. Given these facts, we conclude Harris has waived any objection to the form of notice and, therefore, that the form of notice does not provide a basis for invalidating the administrative order. The CSEA's first assignment of error is meritorious.

Id. at Paragraphs 11, 12, and 13. The *Fogt* case differs somewhat from the Respondent's case. The *Fogt* case deals with the form of the notice, not the delivery of the notice. However, as the Hearing Officer correctly indicated, the *Fogt* case determined that R.C. 119.09 dealt with personal jurisdiction and not subject matter jurisdiction. Just as someone can waive notice of the allegations against them, one can also waive service, or the type of service, of the NOH.

The *Harris* case is similar to the Respondent's case; neither Harris nor the Respondent was served by certified mail. The *Harris* case cited to appellate decisions in several other districts, all of which asserted "administrative orders following a hearing may be valid even though notice of the hearing did not comply with R.C. 119.07." (citations omitted) *Harris* at Paragraph 11.

The record here clearly indicates that the Division attempted to serve Respondent by certified mail at his address of record, and that the mail was returned as "Unclaimed." The record also indicates, through State's Exhibit 8, dated December 5, 2002, that Attorney Michael R. Blumenthal acted in a representative capacity for Respondent. Accordingly, the Division

mailed him as well as Respondent a copy of the NOH. It is clear that the Division attempted to comply with R.C. 119.07.

If Respondent did not request a hearing, the Division could not have proceeded with an adjudicatory order because it did not have personal jurisdiction over Respondent, as there would be no indication that he had notice of the allegations against him, nor an opportunity to be heard. However, Respondent requested a hearing. *See* State's Exhibit 10. Respondent attended the hearing he requested. Respondent participated in the hearing that he requested. By doing so, he waived the certified mail service requirement of R.C. 119.07.

13) The Division REJECTS paragraph II(A)(13), on page 7, for the reasons stated above and below, that R.C. 119.07 does not pertain to subject matter jurisdiction.

14) The Division REJECTS paragraph II(A)(14), on page 7, for the reasons stated above and below, that R.C. 119.07 does not pertain to subject matter jurisdiction. As to the Hearing Officer's concerns about due process, the Superintendent refers to *Goldman v. The State Medical Board of Ohio* (10th Dist. 1998), unreported, Case No. 98AP-238, 1998 Ohio App. LEXIS 4918:

> The fundamental requirement of procedural due process is notice and the *opportunity* to be heard. *Korn v. Ohio State Medical Board* (1988), 61 Ohio App. 3d 677, 684, 573 N.E.2d 1100, citing *Luff v. State* (1927), 117 Ohio St. 102, 157 N.E. 388. Such opportunity is subject to waiver. *Boddie v. Connecticut* (1971), 401 U.S. 371, 378-379, 28 L. Ed. 2d 113, 91 S. Ct. 780.

(Emphasis in original) *Id.* There is no doubt that Respondent received notice—he admitted so in his testimony. Respondent not only received an opportunity to be heard, but also requested a hearing and participated in the hearing. Respondent's due process rights were not violated.

15) The Division REJECTS paragraph II(A)(15), on page 7. As mentioned above, the *Slone* case dealt with service of an adjudication order pursuant to R.C. 119.09, and not service of a NOH pursuant to R.C. 119.07.

Further, regardless of Respondent's contentions to the contrary (Tr. at pp. 40-41), the record indicates that Mr. Blumenthal was legal counsel for Respondent until April 1, 2004. On December 5, 2002, Mr. Blumenthal clearly acted in a representative capacity for Respondent by responding to a letter the Division sent to Respondent. Mr. Blumenthal did not notify the Division until April 1, 2004, nearly sixteen months later, that he was not representing the Respondent. *See* State's Exhibit 14. In fact, Mr. Blumenthal received three mailings from the Division (State's Exhibits 12 and 13, and Tr. at p. 75 discussion about State's Exhibit 9) during that sixteen-month period. In addition, State's Exhibit 11 indicates that Respondent was told that the Division's records indicated Mr. Blumenthal was his attorney, and Respondent did not state otherwise until May 5, 2004, at the hearing he requested.

16) The Division REJECTS paragraph II(A)(16), on page 7. As mentioned above, the case cited by the Hearing Officer, *Silker*, dealt with an individual who had an adjudication order issued

against him without an opportunity to be heard. That fact pattern is not similar to Respondent's case.

R.C. 119.06 does indicate that no adjudication order of an agency shall be valid unless an opportunity for a hearing is afforded. However, not only did Respondent receive an opportunity to be heard, but also he specifically requested a hearing and participated in the hearing he requested.

The Hearing Officer's reliance on *Chirila v. Ohio State Chiropractic Board* (10th Dist. 2001), 145 Ohio App.3d 589, is misplaced. The *Chirila* case did not address the delivery of the notice sent to Chirila. The *Chirila* case focused on whether the Chiropractic Board's "Notice of Opportunity for Hearing was vague and ambiguous in that it merely states that a hearing must be requested within thirty days rather than indicating that a hearing request must be received within thirty days." *Id.* at 592. This case was reviewed to determine if the Chiropractic Board's notice denied Chirila any of his due process rights. The Court stated:

> the failure of an agency to provide notice in the manner specified in R.C. 119.07 invalidates any subsequent order issued by the agency. R.C. 119.07. Thus, to comport with due process requirements, R.C. Chapter 119 requires effective notice and a meaningful opportunity to be heard.

Id. at 594. The Court decided that the Chiropractic Board did not issue an effective notice to Chirila, as it failed to state that his request for a hearing needed to be received no later than thirty days after the notice was issued. The *Chirila* Court's final decision was "[b]ecause we find that appellee's notice did not comply with due process, appellee's order revoking appellant's license is void under R.C. 119.06 and 119.07." *Id.* at 596. This is in contrast to Respondent's case, where his due process rights were not violated.

Similarly, the Hearing Officer's reliance on *Bryant Health Center, Inc. v. Ohio Dept. of Job & Family Serv.* (10th Dist. 2004), 2004 Ohio 45, is misplaced. *Bryant Health Center* addressed the same issue as *Chirila*: did the NOH comply with due process? *Bryant Health Center* at Paragraph 8. As discussed above, Respondent's due process rights were not violated.

17) The Division REJECTS paragraph II(A)(17), on page 8. As mentioned above, the requirements found in R.C. 119.07 are procedural in nature. R.C. 119.07 protects an individual's due process rights. Due process requires that an individual be provided notice of the allegations against him and an opportunity to be heard regarding those allegations. Respondent acknowledged under oath that he received a copy of the NOH (Tr. at pp. 57-58, 74-75). Respondent acknowledged that he himself requested a hearing (Tr. at pp. 58, 74). Respondent participated at the hearing, and submitted documents into evidence. The Division did not violate Respondent's due process rights.

Compliance with R.C. 119.07 gives the Division personal jurisdiction over an individual. However, an individual can waive the requirements of R.C. 119.07 that are procedural in nature. This waiver can be done either explicitly or implicitly. Although Respondent was

not served by certified mail, he did receive the Division's NOH. By requesting a hearing, he waived any challenge he may have had as to how the NOH was served upon him. The Division obtained personal jurisdiction over Respondent when Respondent requested a hearing. Although Respondent stated that he would not waive "any legal right(s)" that he may have (Tr. at p. 77), his actions state otherwise.

18) The Division REJECTS paragraph II(A)(18), on page 8. The Hearing Officer's legal conclusion that the Division does not have subject matter jurisdiction is incorrect. The case law cited by the Hearing Officer does not support her contentions.

As indicated by the *Fogt* Court, it is absurd to believe that, after Respondent requests a hearing, appears at a hearing, and participates at a hearing, that the Division would lack jurisdiction to issue a decision on the matter. The Division has both subject matter jurisdiction and personal jurisdiction to determine whether or not to deny Respondent's application for a loan officer license.

19) The Division REJECTS the Hearing Officer's Recommendation on page 8. As stated above, Respondent received notice and an opportunity to be heard. By requesting a hearing, and participating at a hearing, he waived any challenge he may have had as to how the NOH was served upon him.

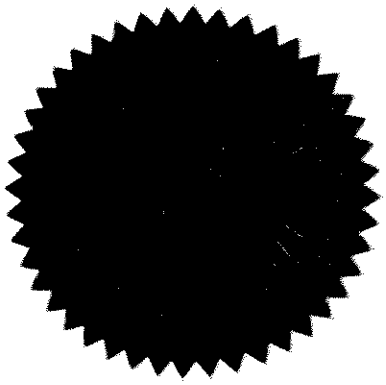
20) Accordingly, the Division FINDS that:
   a) Respondent did not disclose his criminal history when asked to on his loan officer license application form;
   b) Respondent's character and general fitness do not command the confidence and warrant the belief that the business will be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act, pursuant to R.C. 1322.041(A)(5).
   c) 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 23rd day of May 2006.

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

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

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IN RE:	:	CASE NO. 02-0124-LOD
	:	
EDWARD JON BENKO	:	JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S REPORT AND RECOMMENDATION
Issued July 7, 2004

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 May 5, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Edward Jon Benko ("Respondent") to consider the allegations in the Division's Notice of Intent to Deny Loan Officer License and Notice of Opportunity for a Hearing ("NOH").

The Division alleged that Respondent was convicted of driving under the influence and carrying a concealed weapon in 1982, possession of counterfeit controlled substance in 1983, and felony drug abuse in 1983. The Division also alleged that he violated R.C. 1322.07(A), (B) and (C) by failing to disclose those convictions on his loan officer license application. Therefore, the Division asserted 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. Respondent violated R.C. 1322.07(A), (B) and (C) by failing to disclose the conviction on his application, and

2. 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).

James Evans, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. The Respondent appeared *pro se* and testified at the hearing.

At the hearing, State's Exhibits 1 through 15 and 17 through 20 and Respondent's Exhibits A and B were admitted into the record. State's Exhibit 16 was not admitted into the record but a proffer of that exhibit was made in accordance with R.C. 119.06. The record in this case was left open until June 2, 2004 for the submission of signed copies of Respondent's Exhibits A and B and the filing of any objections thereto by the Division. Respondent's Exhibit C, which includes a cover letter from the Respondent and signed copies of Respondent's Exhibits A and B, was received into the record prior to June 2, 2004 and admitted without objection from the Division. (That Exhibit was marked as Respondent's Exhibit C by the Hearing Officer for ease of reference.)

B. Jurisdiction and Procedural Matters.

1. The Division issued the NOH to Respondent on January 22, 2004. It was sent to the Respondent's then address by certified mail and later returned to the Division marked "unclaimed." (State's Exhibits 1, 6 and 9; Hearing transcript at 57.) (References to pages of the Hearing Transcript will be abbreviated as "TR at {page(s)} ".)

2. The record contains no evidence indicating personal service of the NOH on Respondent or any publication of his right to request a hearing on the allegations contained in the NOH.

3. Attorney Michael R. Blumenthal assisted the Respondent with a portion of the Application process. Therefore, the Division sent Mr. Blumenthal a copy of the NOH by regular mail. Mr. Blumenthal forwarded a copy of the NOH to Respondent, who had moved to Denver, Colorado. The NOH contained a hearing request form that Respondent sent in to the Division. Despite the indirect transmittal of the NOH to Respondent, he received it and requested a hearing in a timely manner. (State's Exhibits 8, 9, 10; TR at 41-42, 50, 57-59, 65.)

4. Respondent's hearing request was received by the Division on February 17, 2004. The Division scheduled the hearing for March 4, 2004, and continued it until April 22, 2004. The hearing was not scheduled by the Division within 15 days after Respondent requested the hearing since 2004 is a leap year. (State's Exhibits 10, 12 and 13.)

5. On March 1, 2004, the Division sent Mr. Blumenthal a letter scheduling the hearing for March 1, 2004, and continuing it indefinitely on the Division's own motion. The record contains no evidence indicating that the March 1, 2004 letter was sent to the Respondent. On March 9, 2004, the Division sent a letter scheduling the hearing for May 5, 2004 to Mr. Blumenthal and Respondent. (State's Exhibits 12 and 13.)

6. The hearing was held on the date set forth in the March 9, 2004 letter and at the time and location stated in that letter. Respondent received notice of the date, time and location of the hearing and personally appeared at the hearing. (State's Exhibits 12 and 13, TR at 1, 75.)

7. Despite not receiving certified mail service of the NOH, the Respondent testified that he wanted the matter to be resolved. He stated that he did not want to waive any rights that he had and did not expressly waive his right to certified mail service of the NOH. When this issue arose, toward the end of the hearing, Respondent expressed reservation about continuing without counsel. (TR at 74-77.)

8. The NOH notified Respondent that he could have legal counsel appear on his behalf at the hearing. Respondent confirmed that he wished to proceed without counsel at the outset of the hearing. Specifically, Respondent answered "Yes" when the Hearing Officer asked, "I do want to make certain that you know you're entitled to have an attorney present and represent you at this hearing, Mr. Benko. You are here without counsel. Is it your choice to go forward without representation?" (State's Exhibit 9; TR at 5.)

9. The Respondent and the Division were given until June 2, 2004 to provide legal briefs on the issue of whether the lack of certified mail service of the NOH precluded the Hearing Officer from having jurisdiction over the case. Respondent indicated that he had difficulty understanding this legal issue and the Hearing Officer explained the issue and indicated that he could still have counsel look at this for him. He was also told that the record was remaining open until June 2, 2004 and that he could seek to add information to the record. (TR at 76-83.)

10. The record was also left open to allow the Respondent to provide signed copies of letters he submitted on his behalf and permit the Division an opportunity to file any objections thereto. Prior to June 2, 2004, Respondent's Exhibit C, which includes a cover letter from the Respondent and signed copies of Respondent's Exhibits A and B, was received and admitted into the record. The cover letter from the Respondent to the Hearing Officer, concluded with the following statement: "I am choosing to allow you to close this matter and leave the recommendation to your judgment."

11. The Respondent did not file a brief regarding the jurisdictional issue and did not indicate that he wished to have additional evidence considered or add legal representation to the process. The Hearing Officer finds that the Respondent was notified of his right to counsel in the NOH and at the outset of the hearing. The jurisdictional issue is a legal issue that is difficult for a layperson to understand. Respondent received an explanation of the issue at the hearing and was notified that he could still obtain legal counsel to assist him after the hearing and prior to the June 2, 2004 date that the record closed. His cover letter in

Exhibit C indicates that he does not have any objection, including the fact that he proceeded without counsel, to the case being submitted as it is.

II. CONCLUSIONS OF LAW

A. Jurisdiction and Procedural Matters.

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 1322.10(A)(1) provides that the superintendent of the division of financial institutions ("superintendent") 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." Thus, the Division, acting through the superintendent, is an "agency" for the purposes of R.C. Chapter 119. R.C. 119.01(A)(1).

3. Ohio Revised Code Chapter 119, the Ohio Administrative Procedure Act, specifies the process that must be followed for the issuance of a valid "adjudication" order by an "agency." R.C. 119.06.

4. An "adjudication" for the purposes of Chapter 119 means "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature." R.C. 119.01(D). The decision to issue or to refuse to issue a loan officer license to Respondent in light of the issues raised pertaining to the prerequisites set forth in R.C. 1322.041(A)(2) and (5) would be an "adjudication."

5. An adjudication order is not valid and effective unless the agency is specifically authorized by law to make the order and an opportunity for a hearing has been afforded in accordance with R.C. Sections 119.01 through 119.13 before the order is issued. R.C. 119.06. There are exceptions to the requirement of a prior opportunity for hearing that do not apply in this instance. Id.

6. The Division's authority and jurisdiction over this subject matter only exist as authorized by law. The jurisdiction to refuse to issue a license is authorized by 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 established.

7. 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). Respondent is the "party" entitled to receive the notice of the right to a hearing by certified mail since he is the "person whose interests are the subject of an adjudication by an agency." R.C. 119.01(G). For this purpose, "'registered mail' includes certified mail and 'certified mail' includes registered mail." R.C. 1.02 (General Provisions). If the notice of the right to a hearing is sent by certified mail and returned due to failure of delivery, personal delivery or publication of that notice pursuant to R.C. 119.07 is required.

8. Ohio Revised Code Section 119.07 explicitly states that:

> The failure of an agency to give the notices for any hearing required by sections 119.01 to 119.13 of the Revised Code in the manner provided in this section shall invalidate any order entered pursuant to the hearing.

R.C. 119.07.

9. The manner of providing the notice of the right to a hearing and what to do if certain procedures for notification are unsuccessful is 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.). To recommend deviation from the procedures mandated by R.C. 119.07, no matter how equitable it may seem, would only lead us to an illusory conclusion that no one wants – the issuance of an order that is not valid and determines nothing. Id.

10. Compliance with the notice and hearing procedures in Chapter 119 is a condition precedent to the issuance of a valid adjudication order resolving the issues alleged in the NOH. Compliance with the procedural requirements of Chapter 119 is a matter of subject matter jurisdiction that cannot be waived and can properly be raised at any time, even in the first instance on appeal. Slone v. Ohio Bd. of Embalmers & Funeral Directors (1995), 107 Ohio App.3d 628, 630 (8th Dist.)(construing similar language set forth in R.C. 119.09.)

11. Ohio Revised Code Section 119.09 contains language similar to the relevant language in R.C. 119.07. That Section requires final adjudication orders to be served upon the party by certified mail, return receipt requested, and upon counsel for the party by regular mail. R.C. 119.09. Section 119.09 states, in relevant part, that:

> After such order is entered on its journal, the agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected. A copy of such order shall be mailed to the attorneys or other representatives of record representing the party.

R.C. 119.09. This language is nearly identical to the provisions in Section 119.07 stating that:

> {T}he agency shall give notice to the party informing him of his right to a hearing. Notice shall be given by registered mail, return receipt requested .... {A} copy of the notice [of the right to a hearing] shall be mailed to attorneys or other representatives of record representing the party.

R.C. 119.07.

The Tenth District Court of Appeals has held that a final adjudication order is not valid and effective until it served upon the party by certified mail in accordance with R.C. 119.09. Franklin County Bd. of Commrs. v. SERB (1989), 64 Ohio App.3d 113, 117-18 (10th Dist.). The relevant language in 119.09 is the same today as it was when that decision was issued. Id. at 117; R.C. 119.07. The party involved had received the final order by regular mail but the Court did not find this to be determinative. Id. at 117. It explained that: "The notice required by 119.09 does more than inform an affected party of its appeal rights, it is the required notification of the agency's decision and in the absence of such statutory notice the affected party is not bound by such order." Id. This decision regarding the notice requirements in 119.09 provides the best guidance for construing the similar language in 119.07. The requirements in both provisions are mandatory and jurisdictional.

12. The Seventh District Court of Appeals recently stated that registered mail service of the notice of the right to a hearing pursuant to R.C. 119.07 was an issue of personal jurisdiction that could be waived by a party with actual notice of the hearing. Jefferson County Child Support Enforcement Agency v. Harris, (2003) 2003 WL 220415 (Ohio App. 7th Dist.)(State's Exhibit 20). Reliance on that decision and on Fogt v. Ohio State Racing Comm'n (1965), 3 Ohio App.2d 423 (2nd Dist.) and the other cases cited therein is misguided. The Court in Fogt relied upon a reference in the Second Edition of Ohio Jurisprudence regarding a defendant's ability to waive any objection to personal service once he has

appeared in a proceeding. Foqt, 3 Ohio App.2d at 425 citing 1 Ohio Jur. 2d 489, Section 89. The cases suffer from the same fatal defect – they assume that R.C. 119.07 only refers to a method of service relevant to obtaining personal jurisdiction and it does not. It sets forth procedural requirements that are prerequisites to the issuance of a valid and effective adjudication order.

13. There is a definite appeal to permitting waiver of Section 119.07's requirements for the notice of a right to hearing in a case such as this one where the party received notice, requested a hearing and appeared. However, the plain language of R.C. 1322.10(A)(1), 119.06 and 119.07 mandates otherwise. R.C. 1.42. The language in R.C. 1322.10(A)(1) is clear about when the Division can refuse to issue a license and it is only after it has established that it provided notice and opportunity for a hearing conducted in accordance with R.C. Chapter 119. Ohio Revised Code Sections 119.06 and 119.07 explicitly state the process that must be followed and clarify the mandatory nature of that process by the use of "shall" multiple times. A review of 119.06 and 119.07 in their entirety provide further evidence that compliance with the requirements for both content and delivery of the notice of the right to a hearing is mandatory.

14. The requirements in R.C. 119.07 for the notice a right to hearing pertain to subject matter jurisdiction not personal jurisdiction. The line between these types of jurisdiction blur at times because service and adequate notice, essential parts of personal jurisdiction and due process, can also be prerequisites to establishing subject matter jurisdiction as is the case with R.C. 1322.10(A)(1), 119.06 and 119.07.

15. Section 119.07 also states that "{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. The Division complied with this requirement believing that Mr. Blumenthal was legal counsel for Respondent. This was prudent, and, given what the Division knew at that time, the best of course of action to ensure compliance with R.C. Chapter 119. 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.)

16. Proper notice of the right to a hearing delivered in the manner required by R.C. 119.07 and including the required information is mandatory and jurisdictional. Without the required notice of the right to request a hearing, a valid order cannot be issued or recommended. Columbus v. Sliker (1986), 30 Ohio App.3d 74, 76 (10th Dist.)(required delivery of notice); Chirila v. Ohio State Chiropractic Bd. (2001), 145 Ohio App.3d. 589, 594 (10th Dist.) and Bryant Health Center, Inc. v. Ohio Dept. of Job & Family Services, 2004-Ohio-45, 2004 WL 23141, (Ohio App. 10th Dist.)(required content of notice)(copy attached).

17. The Division has not established that it has complied with R.C. 119.07 by providing Respondent with the statutorily required notice of his right to a hearing. This notice was not provided to the Respondent by registered or certified mail, return receipt requested. The certified mailing of the NOH was returned to the Division marked "unclaimed." Personal delivery or publication of the notice in accordance with the procedures set forth in 119.07 was also not established. Therefore, jurisdiction to consider the substantive issues in this matter was not established by the Division.

18. Although this requires a bit more work, ultimately no one is served by the issuance of an invalid order. Providing proper notice to the Respondent of his right to a hearing in the manner statutorily required by R.C. 119.07 is necessary to vest the hearing officer with jurisdiction to consider the matters at issue and the ability to recommend the issuance of a valid final order. Without such notice, a valid order cannot be issued or recommended.

III. RECOMMENDATION

It is recommended that the Division provide proper notice to the Respondent of his right to a hearing in the manner statutorily required by R.C. 119.07 and establish compliance with the jurisdictional prerequisites set forth in R.C. Chapter 119. The Division, having failed to establish compliance with the jurisdictional prerequisites set forth in R.C. Chapter 119, leaves this hearing officer with no jurisdiction to proceed further.

Respectfully submitted,

Jane S. Arata

Jane S. Arata
Administrative Hearing Officer
July 7, 2004

[Cite as *Bryant Health Center, Inc. v. Ohio Dept. of Job & Family Serv.*, 2004-Ohio-545.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bryant Health Center, Inc.,	:	
Appellant-Appellant,	:	
v.	:	No. 03AP-482 (C.P.C. No. 02CVF12-13854)
Ohio Department of Job & Family Services,	:	(REGULAR CALENDAR)
Appellee-Appellee Cross-Appellant.	:	
	:	
Bryant Health Center, Inc.,	:	
Appellant-Appellee,	:	No. 03AP-510 and
v.	:	No. 03AP-511 (C.P.C. No. 02CVF12-13854)
Ohio Department of Job & Family Services,	:	(REGULAR CALENDAR)
Appellee-Appellant.	:	

D E C I S I O N

Rendered on February 3, 2004

Geoffrey E. Webster and *J. Randall Richards*, for Bryant Health Center, Inc.

{¶4} On May 21, 2003, Bryant filed a notice of appeal to this court in case No. 03AP-482. According to the file stamp, one hour later, the trial court journalized an order vacating its April 7, 2003 judgment. In response to Bryant's notice of appeal, the Department filed a cross-appeal in case No. 03AP-482, and also filed a notice of appeal from the common pleas court's order of May 21, 2003, vacating its April 7, 2003 decision (case No. 03AP-510), and a notice of appeal from the court's unjournalized decision of April 24, 2003 (case No. 03AP-511).

{¶5} Bryant has assigned two errors:

> ASSIGNMENT OF ERROR NO. I
>
> THE LOWER COURT ERRED AS A MATTER OF LAW (IN ITS FIRST DECISION) IN FINDING THAT BRYANT FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.
>
> ASSIGNMENT OF ERROR NO. II
>
> THE LOWER COURT HAD JURISDICTION AND AUTHORITY TO RECONSIDER AND VACATE ITS FIRST DECISION SUA SPONTE.

{¶6} On cross-appeal, the Department has assigned one conditional assignment of error:

> To The Extent That This Court Determines That The Lower Court Erred By "Dismissing" The Appeal On [The Department]'s Motion Instead Of Entering Judgment On The Briefs, [The Department] Should Still Prevail. The Lower Court Had The Briefs At The Time Of Dismissal, The Same Arguments Were Presented, And The Lower Court Correctly Denied Bryant Judicial Relief Based On Failure To Exhaust Administrative Remedies.

{¶7} The Department's additional assignments of error are:

> First Assignment of Error

effective, the notice must expressly indicate that the request for a hearing must be received within the 30 days. We thus held that the order revoking Chirila's license was void under R.C. 119.06 and 119.07. Id. at 596.

{¶11} In the case at bar, the notices sent to Bryant provided:

> You are entitled to a hearing on this matter, in accordance with sections 119.09 and 5111.06 of the Ohio Revised Code, provided you request the same within thirty (30) days of mailing of this letter. * * *

{¶12} The Department argues that, because Bryant never even attempted to meet the 30-day deadline, only sending a request some 146 days after the mailing of the Department's notice, Bryant is not eligible to invoke the holding in *Chirila* in support of its position that it had not failed to exhaust its administrative remedies. However, in *Chirila*, we specifically stated that "the failure to timely request a hearing does not preclude a court's consideration of whether an agency's procedures comply with due process." Id. at 595-596. Contrary to the Department's argument, this court's holding in *Chirila* was not premised on the fact that the doctor attempted to comply with the notice by mailing a request for a hearing within 30 days that was received by the board on the 31st day but was based on the constitutionally defective nature of the notice itself. In this case, the Department's notice was substantially identical to the notice found deficient in *Chirila* and, therefore, was constitutionally defective and any order issued pursuant to that notice is void. Thus, we sustain Bryant's first assignment of error.

{¶13} All four of the remaining assignments of error of both parties address the significance and effect of the common pleas court's decision of April 24, 2003, and the court's order of May 21, 2003. First, we note that, regardless of whether the common pleas court had authority to reconsider and/or vacate its April 7, 2003 decision,

LAZARUS, P.J., and SADLER, J., concur.