

07 JAN -8 AM 8:12

STATE OF OHIO
DEPARTMENT OF COMMERCE

IN THE MATTER OF:

DIVISION OF FINANCIAL
INSTITUTIONS

SHAWN M. HOLSTEIN

CASE NO. M2005-9991114

LANDI JACKSON-FORBES
HEARING OFFICER

REPORT AND RECOMMENDATION

Issued January 5, 2006

I. FINDINGS OF FACT

After having heard the testimony, considered the evidence, observed the demeanor of the witnesses, and weighed their credibility, the Hearing Officer finds the following to be fact:

A. Jurisdiction and Procedural History

This matter came before Landi Jackson-Forbes, an attorney licensed to practice law in Ohio, and duly appointed by the Ohio Division of Financial Institutions (hereinafter the "Division") to serve as Hearing Officer for the above captioned matter in accordance with the Administrative Procedures Act, Chapter 119, Ohio Revised Code (hereinafter "Revised Code").

The hearing was scheduled by the Division at the request of Respondent Shawn M. Holstein, of Strongsville, Ohio (hereinafter "Respondent") to consider the Division's Amended Notice of Intent to Deny Loan Officer License Application, Notice of Opportunity for a Hearing (hereinafter "NOH"), that was issued to Respondent on or about May 25, 2006. The Division issued the NOH to Respondent on the basis that Respondent has a 1985 Petty Theft conviction, which she failed to disclose on her loan officer license application. The NOH alleges that Respondent has not proven that she is honest, truthful, and of good reputation, and that there is no basis in fact for believing that Respondent will not commit another criminal offense involving theft or any criminal offense involving money or securities. The NOH also alleges that Respondent's conviction, her failure to disclose the conviction, and her attempt to obtain a license using untruthful information about her criminal background shows that her 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. The Division further alleges that Respondent's failure to disclose her conviction on the loan officer application constitutes violations of Revised Code §1322.07(A)(B) and (C).

The Division scheduled the hearing for June 5, 2006, and upon its own motion, continued the hearing to August 16, 2006 at 9:30. Respondent's request for a continuance was granted and the hearing was held at 2:00 p.m. on August 22, 2006, at 77 South High Street, 19th Floor, Room 1908, Columbus, Ohio. The Division, represented by Assistant Attorney General Todd A. Nist, appeared at the hearing. Respondent appeared *pro se* and testified at the hearing. At the hearing, State's Exhibits A through F were admitted into the record without objection and Respondent's Exhibit 1 through 3 was admitted into the record as discussed in the transcript (hereinafter "Tr."). At the end of the hearing the record in this case was left opened until August 25, 2006 to permit Respondent to submit evidence to support her testimony. No additional evidence was received from Respondent.

B. Loan Officer License Application

1. The Division is the state agency responsible for the licensing and regulation of Mortgage Loan Officers pursuant to R.C. Chapter 1322. (State Ex. A)
2. Respondent applied for an Ohio Mortgage Loan Officer License by submitting to the Division a Loan Officer Application ("Application") and fingerprint card on or about December 21, 2005. Advantage One Mortgage Group is listed as the sponsoring Mortgage Broker. (State Ex. B)
3. Respondent checked the "no" box to Question 5 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?" (State Ex. B)
4. Respondent swore to or affirmed that the answers she gave in the Application are complete and true of her own knowledge. (State Ex. B)
5. Pursuant to Revised Code §1322.03 (B), the Division conducted a criminal records background check based on Respondent's fingerprints as part of the application process. The criminal records background check revealed a 1985 Petty Theft conviction, a first degree misdemeanor, in the Maple heights, Ohio, Mayor's Court. (State Ex. D & E)
6. Respondent plead no contest to the charge of Petty Theft and was found guilty. Respondent was sentenced to a three day suspended jail term and ordered to pay fines and courts costs totally \$523.00. (State Ex. E)
7. Respondent offered as an explanation for her conviction that she was shopping with a friend who put merchandise in her bag without her knowledge or consent and did not come forward when Respondent was arrested and charged with Petty Theft. Respondent says she pled no contest on the advice of her attorney because it was too costly to defend against the charge. (State Ex. E; Tr. at 30-31)

8. Respondent testified that it was not a mistake when she answered Question 5 "no" because she had forgotten about the entire incident and did not remember that she was convicted until she received the letter from the Division requesting an explanation and journal entry. (Tr. at 28-29 & 32)
9. Respondent testified that she still could not remember some of the facts from the day that she was arrested such as how she got to jail. She further stated that; "I don't know who bailed me out". Respondent also indicated that she did not remember being in court, nor the attorney that represented her. Respondent offered cover letters dated March 29, 1996 and April 3, 1996 as evidence to show that she did not remember the 1985 conviction. Respondent stated in the letters that she had a clean record. (Respondent Ex. 1; Tr. at 16 & 32-34)
10. In the January 3, 2006 letter Respondent submitted to the Division explaining the circumstances of her arrest and conviction, Respondent indicated that her sister bailed her out of jail and provided words that her attorney said to her after the court date. Respondent also indicated in the letter that an officer put her in the car and took her to the station. (State Ex. E)
11. Respondent owned and managed rental property for approximately nine years. In this capacity, she entered into lease agreements which allowed her access to the tenants' social security numbers, credit history, depository account numbers and their items inside the rented apartments. (Respondent Ex. 2 & 3; Tr. at 16 & 34-35)
12. Respondent has had no other criminal conviction since 1985.
13. Respondent testified that she had the 1985 conviction expunged but did not offer any evidence into the record to support her testimony. (Tr. at 45)
14. At the close of the hearing the record remained open for three days to allow Respondent the opportunity to submit additional evidence to support her testimony. No additional evidence was received in this case. (Tr. at 54)

II. CONCLUSIONS OF LAW

A. Jurisdiction

The Division procedurally complied with Revised Code Chapter 119 in mailing the NOH, in demonstrating delivery of the NOH, and in scheduling the hearing that had been requested by Respondent within the time parameters established in Revised Code §119.07, §119.08 and §119.09. The Division has jurisdiction in this matter.

B. Loan Officer License Application

1. In order to issue a license Revised Code §1322.041(A) requires the Division must make a finding that inter alia:
 - (3) The applicant has not been convicted of or pleaded guilty to any criminal offense described in division (A)(2) of section 1322.031 of the Revised Code, 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.
 - (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 the sections 1322.01 to 1322.12 of the Revised Code.
2. In 1985 Respondent plead no contest to and was convicted of Petty Theft, a first degree misdemeanor, which is a criminal offense included by reference to "theft" offenses so that the conviction may provide a basis for recommending that Respondent's application for a license be denied under Revised Code §1322.041(A)(3) as the same incorporates the terms of Revised Code §1322.031(A)(2).
3. The Petty Theft conviction being proven by the Division shifts the burden to Respondent to prove by a preponderance of the evidence that Respondent's "activities and employment record since the conviction show that she is honest, truthful, and of good reputation, and there is no basis in fact for believing that Respondent will commit such an offense again." Revised Code §1322.041(A)(3)
4. Respondent's one conviction occurred twenty years ago. There is no evidence of a pattern of Petty Theft or other convictions involving theft in the twenty years that have passed between the conviction and the date of the hearing. This alone indicates that Respondent is not likely to commit another crime in the future.
5. Respondent's explanation for not disclosing the conviction on the Application and the evidence offered to demonstrate her belief was not credible or convincing. Just because Respondent indicated she had a clean record in the letters does not prove what her belief was, make it fact, and is not substantial evidence to support her testimony. In addition, Respondent's testimony that she could not recall details from her arrest and conviction conflict with her January 3, 2006 letter which provides details from her 1985 arrest and conviction.

6. Although it is not likely that the Respondent will commit another crime involving theft, money or securities again, Respondent did not prove that she is honest, truthful, and of good reputation. Respondent has not established that she meets the licensing prerequisites set forth in Ohio Revised Code Section 1322.041(A)(3).
7. For the same reasons, Respondent has failed to prove by a preponderance of the evidence that she has the character and general fitness to command the confidence of the public and warrant the belief that the business will be operated honestly and fairly in compliance with Revised Code §1322.01 to 1322.12. Respondent did not provide convincing and credible testimony in her explanation for answering Question 5 incorrectly.
8. The Division has also charged violations of the Ohio Mortgage Broker Action §1322.07(A) (making any substantial misrepresentation in any registration or license application), (B) (making false or misleading statements of material fact or omissions of statement required by law) and (C) (engaging in conduct that constitutes improper, fraudulent, or dishonest dealings) all resulting from Respondent not disclosing her 1985 criminal conviction on the Application.
9. Respondent's failure to disclose her conviction on the Application does not automatically demonstrate that she intended to make a substantial misrepresentation on her Application. Intent is required for a conclusion that Revised Code §1322.07(A), (B), and (C) have been violated. *Webb v. State Med. Bd.*, 146 Ohio App. 3d 621, 628 (Ohio Ct. App. 10th Dist., 2001).
10. Ohio Revised Code §1322.031(A)(2) requires a loan officer license applicant to include in the 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. Respondent's conviction is a "criminal offense involving theft" for the purposes of Revised Code. §1322.031(A)(2)
11. Respondent's implausible explanation for not disclosing the conviction on her Application prevents excusing the nondisclosure as a mistake. Respondent's response to Question 5 on the Application indicating that she did not have any criminal convictions when in fact she had been convicted of petty theft in 1985, was a substantial misrepresentation in that Application that violated Revised Code §1322.07(A). This response was also a false statement of a material fact, that she did not have any criminal convictions when in fact she was convicted of petty theft in 1985 in violation of R.C. §1322.07(B).
12. Respondent also violated Revised Code 1322.07(B) by omitting the statement regarding her petty theft conviction, a theft conviction required to be in an application pursuant to Revised Code §1322.031(A)(2).

13. Respondent engaged in improper, fraudulent, and dishonest dealings in violation of Revised Code §1322.07(C) by falsely indicating on the Application that she did not have any criminal convictions when in fact she was convicted of petty theft in 1985.
14. Respondent's violations of Revised Code §1322.07(A), (B), and (C) preclude her from being in compliance with Revised Code §§1322.01 through 1322.12 of the Revised Code, a condition required for licensure by §1322.041(A)(2).

III. RECOMMENDATION

In careful consideration of the record made in this matter, it is recommended that Shawn M. Holstein be found not to have presented sufficient evidence to prove, by a preponderance of the evidence, that her activities since her conviction show that she is honest, truthful, and of good reputation, and that her 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 Ohio Mortgage Broker Act, and that consequently she be denied an Ohio Loan Officer License. It is also recommended that Shawn M. Holstein be found to have violated Revised Code §1322.07(A)(B) and (C)

It is further recommended that the Division determine if Shawn Holstein's conviction has been expunged and seal the record of this proceeding accordingly.

Respectfully submitted,

Landi Jackson-Forbes
Hearing Officer
January 5, 2007
Docket No. 06-DFI-104