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STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

IN RE: : CASE NO. M2008-513
: :
KELLY J. FLYNN, : DELORES EVANS
RESPONDENT : HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued February 13, 2009

I. FINDINGS OF FACT

A. Background

This matter came before Delores Evans, 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 Code ("O.A.C."), Ohio Revised Code ("O.R.C.") Chapter 119. The hearing was held on December 16, 2008, at 77 South High Street, Room 1910, Columbus, Ohio.

The Division held the hearing to consider the allegation that Kelly J. Flynn ("Respondent") failed to disclose to the Division on her 2008 loan officer license renewal application that she was convicted of Passing Bad Checks in April 2008. The Division intends to deny Respondent's 2008 loan officer license renewal application ("2008 Renewal Application").

Theodore L. Klecker, Esq., Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. Lori Massey, Esq., an attorney examiner with the Division, attended the hearing on behalf of the Division. Respondent appeared at the hearing *pro se*. State's Exhibits 1 through 9 were stipulated to by the parties and were admitted into the record. The Hearing Officer held the record open for two weeks in order to allow Respondent and the Division ample time to submit additional documents.

After the hearing on December 16, 2008, Respondent submitted a letter and receipt, which has been marked and admitted into the record as Respondent's Exhibit A. On December 29, 2008, Respondent submitted a police report, which has been marked and admitted into the record as Respondent's Exhibit B. The Record consists of the Exhibits, properly marked and admitted, the Amended NOH, and the transcript from the hearing. The record was closed at the end of the day on December 30, 2008.

B. Jurisdiction and Procedural Matters

1. On October 29, 2008, the Division issued a Notice of Intent to Deny Loan Officer License Renewal Application & Notice of Opportunity for a Hearing ("NOH"). The Division intended to deny Respondent's 2008 Renewal Application pursuant to O.R.C. 1322.10(A)(1)(a). Respondent had 30 days to request a hearing. The Division sent the NOH to Respondent via certified mail, return receipt requested. Service was perfected on November 1, 2008. *State's Exhibit 5*
2. On November 5, 2008, the Division received Respondent's hearing request. *State's Exhibit 4*
3. On November 7, 2008, the Division sent a hearing notice to Respondent. The Division scheduled the hearing for December 5, 2008. *State's Exhibit 3*
4. On November 14, 2008, the Division issued an Amended Notice of Intent to Deny Loan Officer License Renewal Application and Notice of Opportunity for a Hearing ("Amended NOH"). The Amended NOH stated that the Division intends to deny Respondent's 2008 Renewal Application, pursuant to O.R.C. 1322.10(A)(1)(a), because of the Passing Bad Check conviction and Respondent's untruthful answer on the application for renewal. The Amended NOH also indicated that Respondent was further ineligible because Respondent has not shown that she was of good moral character since her conviction. *State's Exhibit 1*
5. The Amended NOH indicated that the matter was set for hearing on December 5, 2008. The Division sent the Amended NOH to Respondent by certified mail, return receipt requested. The Amended NOH and the certified mail envelope were returned to the Division marked "unclaimed, unable to forward." *State's Exhibit 1*
6. O.R.C. 119.07 provides that when any notice sent by certified mail is returned because the party failed to claim the notice, the agency shall send the notice by ordinary mail to the party's last known address and shall obtain a certificate of mailing. Service by ordinary mail is complete when the certificate of mailing is obtained, unless the notice is returned for failure of delivery. On December 12, 2008, in accordance with O.R.C. 119.07, the Division perfected service when it re-sent the Amended NOH to Respondent by ordinary mail and obtained a certificate of mailing. *State's Exhibit 1*
7. On December 5, 2008, at Respondent's request, the Hearing Officer continued the hearing to December 16, 2008. *State's Exhibit 2*
8. At the outset of the December 16, 2008 hearing, the Division moved to strike paragraphs B, D, E, 5, and "(A)(3)" of paragraph 6 of the Amended NOH. The Division, in doing so, acknowledged its previous error of asserting that

Respondent had been convicted of Passing Bad Checks, when in fact Respondent had only been charged with Passing Bad Checks. Respondent raised no objection to the Division amending the Amended NOH. The Hearing Officer granted the Division's motion to amend the Amended NOH and the hearing proceeded accordingly.

C. Respondent's Activities

9. Respondent held a loan officer license (# 006071) until April 30, 2008. *State's Exhibit 1; State's Exhibit 6.* Respondent is currently employed as a loan officer with Allstate Home Mortgage. *Testimony of Respondent*
10. On or about February 24, 2008, Respondent purchased cigarettes and beer from Lucky's Beverage. Respondent wrote a check to Lucky's Beverage in the amount of \$68.75 for the items. The check did not clear Respondent's bank because the account had been closed. *Respondent's Exhibit A*
11. On April 19, 2008, Respondent made restitution in the amount of \$98.75 (\$68.75 plus an additional \$30.00 for the return check fee) to Lucky's Beverage. *Respondent's Exhibit A*
12. On or about April 23, 2008, Respondent was charged with Passing Bad Checks. *State's Exhibit 8*
13. On April 29, 2008, Judge Cicconetti of the Painesville Municipal Court, Lake County, Ohio, with Respondent present, dismissed the Passing Bad Checks charge against Respondent because Respondent, prior to the charges having been filed, made restitution to Lucky's Beverage. *State's Exhibit 7; State's Exhibit 8*
14. On or around May 28, 2008, the Division received Respondent's 2008 Renewal Application. *State's Exhibit 6*
15. In response to renewal questionnaire # 2 on the application, Respondent answered "No." Renewal questionnaire # 2 reads "Have you been charged with, convicted of or pleaded guilty to any state or federal criminal offense including but not limited to theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, drug trafficking, or any criminal offense involving money or securities (excluding minor traffic violations)?" *State's Exhibit 6*
16. The Division determined that Respondent's answer to renewal questionnaire #2 was incorrect. The Division asked Respondent to provide further explanation of her answer.

17. On or around October 13, 2008, Respondent submitted a letter to the Division explaining the circumstances surrounding the Passing Bad Checks charge. Respondent had switched banks and during that process the Lucky's Beverage check, which she had written on her old account, was submitted for payment. The bank declined to honor the check because the account had been closed just prior to presentment. Respondent further noted that she was going through a difficult personal situation during that time. *State's Exhibit 9; Testimony of Respondent*
18. Respondent admitted at the hearing that she misunderstood the question and that in hindsight she should have disclosed on her 2008 Renewal Application that she had been charged with Passing Bad Checks. Respondent did not believe that she had been "charged" with the crime of Passing Bad Checks because she had not been convicted of the crime. She had resolved the matter prior to the court hearing and was not required to take any further action. Respondent requested the opportunity to retain her loan officer license. *Testimony of Respondent*
19. Mary Margaret Berardinelli, office manager at Allstate Home Mortgage, sent a letter to the Division indicating that Respondent is "hardworking, honest and conducts herself in a professional manner." *State's Exhibit 9*
20. Anmarie Britton, a friend of Respondent, sent a letter to the Division asserting that she has known Respondent for 30 years and that she has always known Respondent "to be an honest, hard-working individual with high moral standards...the incident with the check was an oversight on her part due to a stressful personal situation." *State's Exhibit 9*

II. CONCLUSIONS OF LAW

21. The Division has procedurally complied with O.R.C. Chapter 119 and jurisdiction over this matter has been established.
22. The Division is responsible for the licensing, regulation, and enforcement of the Ohio Mortgage Broker Act, O.R.C. Chapter 1322.
23. At all times relevant to this matter, Respondent was an Ohio-licensed loan officer and was subject to the laws in O.R.C. Chapter 1322 and the rules promulgated pursuant to that Chapter.
24. O.R.C. 1322.07(A), (B), and (C) state:

No mortgage broker, registrant, licensee, or applicant for a certificate of 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 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.

25. According to O.A.C. 1301:8-7-10(G), each question on the license application is material to the licensing process. If an applicant submits false, incomplete information, or omits information in connection with a license application, such is grounds for denying or revoking the license.
26. Ohio's Mortgage Broker Act charges the Division with the protection of the public from harm by denying, suspending or revoking a loan officer license if the evidence establishes that licensing standards have not been met. O.R.C. 1322.041(A) and 1322.10(A). A home is generally the most valuable asset owned by an individual. Mortgage lenders have access to an individual's confidential personal and financial information and they play a critical role in the financing process. Thus, the Division is charged with protecting the integrity of the licensing process and preserving the public interest and confidence in the mortgage industry. It is for this reason that only the Division has the authority to issue a mortgage broker loan officer license in Ohio.
27. Respondent made restitution on April 19, 2008 and was charged with Passing Bad Checks on or about April 23, 2008. The charge was dismissed on April 29, 2008 because she made prior restitution.
28. Respondent did not disclose to the Division on her 2008 Renewal Application that she had been charged with Passing Bad Checks on April 23, 2008.
29. The issue to address is whether Respondent, when she filed her 2008 Renewal Application, made a false, misleading, or substantial misrepresentation concerning the April 2008 Passing Bad Checks charge.
30. Loan officers are required to file annual renewal applications with the Division. The renewal application provides updated information to the Division regarding a loan officer's qualifications to serve. This necessary exercise is similar to an individual applying for employment.

31. In the employment context, a federal court has held that an employer cannot ask an applicant about his arrest record. The court found that such a practice creates disparate treatment or impact upon members of a protected class. The court found no correlation between arrests and work performance. The fact that an applicant has been arrested is not conclusive as to any wrongdoing and may have chilling effect on certain applicants that tend to be arrested for crimes more so than others similarly situated. *Gregory v. Litton Systems*, (1970), 316 F. Supp. 401.
32. For these reasons and based upon the evidence presented, I find that the Division has not established any correlation between an individual's indictment history or charge record and their ability to serve as a loan officer.
33. This Hearing Officer does find that there may be some correlation between a person's fitness to obtain a license from the Division if a criminal charge is pending at the time of application, and therefore, the Division may properly inquire into that status. In this case, the question was not worded as such on the 2008 Renewal Application. Therefore, the question as to whether charges "have been" filed against the applicant is, by itself, an improper question.
34. In addition, I find that the Division's inquiry concerning Respondent's arrest and indictment record to be confusing. An ordinarily reasonable person could have interpreted the question to be an inquiry as to whether the charges were presently pending at the time of the application. Hence, the question itself should not be a disqualifying factor in reviewing Respondent's 2008 Renewal Application.
35. Even if Respondent had provided an untrue answer, and if the question could be considered proper, there is no evidence that Respondent intended to make a false, misleading or other statement containing a substantial misrepresentation on the 2008 Renewal Application in order to gain an advantage. The Division's assertion that a mere response that turned out to be untrue constitutes a false statement that automatically disqualifies an applicant belies the protocol that requires the Division to review each application on its own merits. Particularly when the Division relies upon its determinations of character and fitness, discretionary standards in their own right, to determine whether to grant an application, such discretion is better exercised when balanced in favor of an effective reconciliation of the competing issues.
36. In this case, Respondent: (1) made full restitution prior to any charges ever being filed; (2) provided a reasonable explanation of the circumstances surrounding the bad check; and (3) made no demonstrable attempts to avoid responsibility on the check.

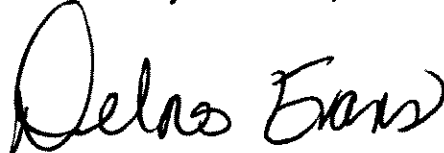
37. I do not find that Respondent made a false, misleading, or substantial misrepresentation when she filed her May 2008 Renewal Application because the Passing Bad Checks charge was no longer pending against Respondent when she filed the application.
38. In light of the circumstances surrounding this case, I find that Respondent did not violate O.R.C. O.R.C. 1322.07(A), (B), and (C) as alleged by the Division. I also find that Respondent's character commands the confidence of the public to warrant the belief that her business will be conducted honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act. O.R.C. 1322.041(A)(10)
39. Therefore, the Division does not have a sufficient basis for denying Respondent's 2008 Renewal Application.
40. The Hearing Officer notes that the Division amended the Amended NOH at the hearing, changing the charge from an allegation that Respondent improperly failed to disclose a conviction, to an allegation that Respondent failed to properly disclose that she had been charged with Passing Bad Checks, even though the charge had been dismissed. The Hearing Officer further notes that, had there been a conviction, that fact, or the failure to disclose the same, may have required a different analysis in this case¹.

¹ The Hearing Officer notes that the allegations submitted in the NOH were substantially different than those at the hearing itself, by virtue of the amendment at the hearing. Although Respondent was advised of her right to counsel, and waived the same, that waiver occurred prior to the Division's effort to amend the charge at the hearing. The substantially different charge, in hindsight, suggests that a better procedural result might have been employed had the Division provided formal notice of the amendment, and had a new NOH been issued, with a new hearing date set for the amended charge.

III. RECOMMENDATION

Based upon the evidence submitted into the record for this case, the Division has failed to establish a sufficient evidentiary basis for denying Respondent's 2008 Renewal Application pursuant to O.R.C. 1322.10(A)(1)(a). Therefore, the Hearing Officer respectfully recommends that the Division approve Respondent's 2008 Renewal Application.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Delores Evans". The signature is fluid and cursive, with the first name "Delores" written in a larger, more prominent script than the last name "Evans".

Delores Evans
Hearing Officer
February 13, 2009