

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

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DIVISION OF FINANCIAL
INSTITUTIONS

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IN RE: : Case No: 03-LO-D-11-12
: :
DANIEL B. GALLAGHER :
6853 Chadbourne :
North Olmsted, Ohio 44070 :

REPORT AND RECOMMENDATION

Pursuant to R.C. Chapter 1322, the Ohio Department of Commerce, Division of Financial Institutions, proposed that Daniel B. Gallagher's application for a mortgage loan officer license be denied. Mr. Gallagher is hereinafter referred to as the "Respondent" and the Ohio Department of Commerce, Division of Financial Institutions, is referred to as the "Division."

The Division provided Respondent with timely notice of the proposed action, the basis of the proposed action, and an opportunity for a hearing in accordance with the Ohio Administrative Procedures Act, R.C. Chapter 119. Respondent subsequently requested a hearing, which was held in Columbus, Ohio, on June 27, 2003. The Division was represented by Assistant Attorney General John A. Izzo, Esq., and Respondent was represented by Michael E. Reardon, Esq.

The hearing was conducted in accordance with the requirements of R.C. Chapter 119. This report is hereby filed with the Superintendent of Financial Institutions for distribution to the parties.

I. FINDINGS OF FACT

A. On February 5, 2003, Respondent applied for a mortgage loan officer license. As part of the application process, Respondent submitted a loan officer application to the Division. The application included the following question:

Have you or has any company for which you have been an officer, or more than 5% owner or director, ever been convicted of or pleaded guilty to any criminal offense, including, but not limited to, theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities.

In response to this question, which is designated as Question #5 on the application, Respondent denied that he had ever been convicted of or pleaded guilty to any criminal offense.

B. A subsequent background check revealed that Respondent had been convicted of attempted possession of drugs, a misdemeanor of the first degree, in 1997.

C. Because Respondent failed to disclose this conviction on his application, the Division found that he violated R.C. 1322.07(A) and 1322.07(B). As a result, the Division determined that Respondent's character and general fitness did not command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act, R.C. Chapter 1322.

D. The evidence presented at the hearing showed that Respondent had been convicted on July 15, 1997 of attempted possession of drugs, a violation of R.C. 2923.02, and a misdemeanor of the first degree. Respondent did not disclose this conviction on his loan officer application.

E. The conviction resulted from Respondent's possession of mushrooms and marijuana. He was nineteen years old at the time he committed the offense and twenty years old when he was convicted. Respondent has not been convicted of any criminal offenses since 1997. After applying for his loan officer license, Respondent had the conviction expunged.

F. At the hearing, Respondent denied that he intentionally falsified his application. Instead, Respondent claimed that he misunderstood Question #5. Specifically, Respondent testified that he thought the question asked whether he had ever been convicted of any of the

offenses listed in the question itself, e.g., theft, receiving stolen property, embezzlement, forgery, etc. Because he had been convicted of attempted possession of drugs, an offense not listed in the question, Respondent thought the answer to the question was "no."

G. As written on the application, Question #5 is at least arguably confusing and difficult to read.

H. The credibility of a witness is ordinarily to be determined by the trier of fact. To determine the credibility of a witness, the trier of fact should use the tests of truthfulness used in daily life. 1 Ohio Jury Instructions (2003) 119, Section 5.30(2). These tests include the appearance of the witness; his manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see, hear, and know the things concerning which he testified; the accuracy of his memory; frankness or lack of it; intelligence, interest, and bias, if any; together with all the facts and circumstances surrounding the witnesses testimony. Id. at 119-120, Section 5.30(3). Based on the foregoing, this Hearing Examiner finds Respondent to be a credible witness.

I. Based on the totality of the evidence presented at the hearing, Respondent's testimony that he misunderstood Question #5 is credible. Accordingly, Respondent did not intend to falsify his application or violate R.C. 1322.07(A) and 1322.07(B).

J. Respondent is employed as mortgage specialist at Axis Financial Group ("Axis Financial") in Middleburg Heights, Ohio. He has been employed at Axis Financial since January 2003.

K. Respondent was previously employed by a sun tan supply business and various restaurants. He appears to have been trying to earn money to pay for school.

L. Respondent graduated from Cuyahoga Community College in 2000. He also earned a degree from Tiffin University, but has not yet received the actual degree because he owes the University money. He has been paying the University over time and owed \$250 at the time of the hearing.

M. Respondent ran for North Olmsted City Council in 2001. His conviction was reported in the paper and, thus, a matter of public knowledge. It does not appear from the record in this case that Respondent made any attempt to hide the existence of this conviction during the election.

II. CONCLUSIONS OF LAW

A. R.C. 1322.041(A) provides in pertinent part:

(A) Upon conclusion of the investigation required under division (B) of section 1322.031 of the Revised Code, the superintendent of financial institutions shall issue a loan officer license to the applicant if the superintendent finds that the following conditions are met:

(2) The applicant complies with sections 1322.01 to 1322.12 of the Revised Code.

(5) The applicant's character and general fitness command the confidence of the public and warrant the belief that the business will be operated honestly and fairly in compliance with the purposes of sections 1322.01 to 1322.12 of the Revised Code.

B. R.C. 1322.07(A) prohibits an applicant for a loan officer license from "obtaining a license through any false or fraudulent representation of a material fact or any omission of a material fact required by state law, or [from] making any substantial misrepresentation in any *** license application." Additionally, R.C. 1322.07(B), prohibits an applicant for a loan officer

license from "[m]ak[ing] false or misleading statements of a material fact [or] omissions of material fact ***."

C. Respondent has the burden to show that he is entitled to the license. See *St. Augustine Catholic Church v. Atty. Gen.* (1981), 67 Ohio St.2d 133, 138. Because this action is a civil proceeding, Respondent must demonstrate by a preponderance of the evidence that he is entitled to the license. See, e.g., *Sanders v. Fleckner* (App. 1951), 59 Ohio Law Abs. 135, 98 N.E.2d 60, 61-62.

D. A preponderance of the evidence is the greater weight of the evidence; that is, evidence that the trier of fact believes because it outweighs or overbalances the evidence opposed to it. Phrased another way, a preponderance of the evidence means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may or may not be identical with quantity or the greater number of witnesses. 1 Ohio Jury Instructions (2003) 112-113, Section 3.50(1).

E. Although Respondent did not disclose his conviction on the application, the evidence introduced at the hearing demonstrated, by a preponderance of the evidence, that Respondent did not intend to mislead or conceal his conviction from the Division. Instead, Respondent demonstrated that he misunderstood Question #5 on the application.

F. At the hearing, Respondent also established by a preponderance of the evidence that his character and general fitness command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purposes of sections 1322.01 to 1322.12 of the Revised Code.

G. The underlying offense occurred when Respondent was only nineteen years old and the conviction occurred when Respondent was twenty years old. Respondent has not been

convicted of any criminal offenses since 1997. In addition, Respondent has since graduated from Cuyahoga Community College and earned a degree from Tiffin University. He even ran for North Olmsted City Council in 2001. As a result, Respondent established by a preponderance of the evidence that his character and general fitness command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purposes of R.C. Chapter 1322.

H. Accordingly, the record of the hearing held on June 27, 2003 does not support the denial of Respondent's license.

IV. RECOMMENDATION

Respondent's application for a Mortgage Loan Officer license should be granted.

Respectfully submitted,

Robert J. Cochran
Hearing Examiner

7/29/03
Date