

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of

THE COMMISSIONER OF BUSINESS
OVERSIGHT,

Complainant,

v.

HOWARD MARK GERBER

Respondent.

Case No. 18-03

OAH No. 2017120269

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated April 4, 2018, is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter with technical and minor changes on the attached Errata Sheet pursuant to Government Code section 11517(c)(2)(C).

This Decision shall become effective on August 9, 2018.
IT IS SO ORDERED this 10th day of July, 2018.

COMMISSIONER OF BUSINESS OVERSIGHT


Jan Lynn Owen

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

HOWARD MARK GERBER,

Respondent.

Case No. 694065

OAH No. 2017120269

PROPOSED DECISION

Administrative Law Judge Kirk E. Miller, State of California, Office of Administrative Hearings, heard this matter on February 15, 2018, in Oakland, California.

Alex M. Calero, Senior Corporations Counsel, and Jeremy F. Koo, Counsel, represented Complainant Jan Lynn Owen, Commissioner of the Department of Business Oversight.

Howard Mark Gerber, Respondent, was self-represented and present throughout the administrative hearing.

The record was left open until February 26, 2018, to permit Respondent to submit character references and until March 2, 2018, for Complainant to respond. The references and Complainant's response were timely received. The references were collectively marked for identification as Exhibit "B," and admitted as administrative hearsay.

The record closed and the matter was submitted on March 2, 2018.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in her official capacity as Commissioner of Business Oversight for the Department of Business Oversight (DBO) on February 1, 2018.¹

2. On July 11, 2017, Reverse Mortgage Funding LLC (Reverse Funding), filed on behalf of Respondent a Nationwide Mortgage Licensing System Individual Filing form

¹ The Statement of Issues was signed on Complainant's behalf by Jeremy F. Koo. A First Supplemental Statement of Issues was filed on February 15, 2018.

MU4, certified by Respondent.² An MU4 must be filed when an individual seeks a license to become a mortgage loan originator (MLO). An MLO is a person who for compensation takes applications for home loans and negotiates the terms of such loans.

3. On November 1, 2017, after reviewing the MU4, the Commissioner advised Respondent that she intended to issue an order denying the application. Respondent filed a notice of defense and this hearing followed.

Bases for the Commissioner's Denial of an MLO License

1997 REAL ESTATE BROKER LICENSE REVOCATION

4. On March 4, 1997, the Bureau of Real Estate (BRE) (formerly the Department of Real Estate), revoked Respondent's real estate broker license.

The BRE's decision found that Respondent had: (1) employed four unlicensed persons to perform acts requiring a real estate license in violation of Business and Professions Code section 10137; (2) committed trust fund violations and collected advanced fees without using approved materials in violation of Business and Professions Code section 10226, 10145, and 10146, as well as California Code of Regulations, title 10, sections 2382.1, 2970, subdivisions (a) and (b), and 2972; (3) failed to provide borrowers with mortgage loan disclosure statements in violation of Business and Professions Code section 10240 and California Code of Regulations, title 10, section 2840; (4) failed to notify the BRE that certain individuals were no longer employed by Respondent's company in violation of Business and Professions Code section 10161.8; and (5) failed to exercise reasonable supervision of the activities of his business which required a real estate license in violation of Business and Professions Code sections 10159.2 and 10177, subdivision (h).

5. Respondent did not appear at the hearing, which was held on October 2, 1996, and at which time evidence was received on each of the matters described in Finding 4 and on which the BRE's decision was based. Respondent testified that he did not appear because he had sold the company in 1992 or 1993, and had moved into management jobs with large banks. At the time of the hearing, he had started a new job as a regional vice president at Countrywide Financial. Respondent testified that his attorney advised him that appearing at the hearing would require at least two weeks of his time, and he believed that spending this amount of time at the hearing would have resulted in him losing his job at Countrywide Financial. Respondent stated his attorney advised him to surrender his license rather than go to hearing. Respondent no longer needed the license and he testified that he believed the license had been surrendered.

² To become licensed by the Commissioner as an MLO, an individual must submit a uniform application form, known as the MU2 or MU4 form, through the Nationwide Mortgage Licensing System & Registry (NLMS). The NLMS contains a detailed set of instructions for filing license applications, including a checklist of items to be completed by the applicant, who is responsible for fulfilling the requirements of the license.

Respondent felt that the audit findings that were the basis for the revocation were “inappropriate” and made as a result of his having “ruffled the auditor’s feathers.” With respect to the trust fund violations, Respondent acknowledged he was responsible for them, but he was not aware of the violations because he had hired someone who specialized in trust funds to oversee the fund. Respondent denied he ever hired an unlicensed person. Respondent felt he was found “guilty by not appearing” and that the allegations were unproven.

6. Respondent’s testimony regarding the 1997 license revocation proceeding lacked credibility. The Notice of Hearing stated that the matter was scheduled for only one day, October 2, 1996, not for two weeks. Respondent provided no evidence that his license was surrendered and he otherwise failed to take responsibility for the BRE’s findings.

7. In 2003, Respondent petitioned the BRE for reinstatement of his real estate broker license; and on January 7, 2005, the BRE denied reinstatement. However, it offered Respondent a restricted license if he successfully passed the real estate broker license examination, submitted an application, and submitted evidence of completing the continuing education requirements of the Real Estate law. The license was not reinstated, which indicates these conditions were not fulfilled.

THE 2015 MLO DENIAL

8. On June 20, 2014, Respondent filed his first application with the Commissioner for an MLO license.³ Subsequent applications were filed on August 1, 2014, and August 25, 2014. The application dated June 20, 2014, contains the following question: “Has any state or federal regulatory agency or foreign financial authority or self-regulatory organization (SRO) ever . . . revoked your registration or license?” Respondent answered the question “No.”

9. The DBO determined as part of the license application review process that Respondent’s real estate license was revoked on March 4, 1997, and it instructed Respondent to provide an explanation and supporting documentation. (Finding 4.) Respondent then provided additional information. However, the DBO denied the MLO license finding: (1) Respondent knowingly made an untrue statement to the Commissioner that no regulatory organization had ever revoked a license he held; and (2) Respondent had failed to demonstrate such financial responsibility, character and general fitness as required for the DBO to issue him a MLO. Respondent did not appeal the decision and it became final on April 29, 2015.

10. Respondent denied that he intentionally mislead the DBO regarding the revocation of his real estate license. Respondent stated that at the time he submitted the 2015 Application, it was still his understanding that he had surrendered his real estate license, and he only subsequently learned that it had been revoked. As part of his application,

³ The Statement of Issues refers to this document as the “2015 Application.”

Respondent also provided a detailed defense of his prior business practices, and in particular his use of Spanish speaking loan processors in the early 1990's, in order to better serve the Hispanic population in Los Angeles. Respondent believes these individuals may have unintentionally provided information to customers that they should not have provided without a license. Respondent stated that he believed the disclosures made to clients satisfied any BRE disclosure requirements.

THE 2017 APPLICATION

11. On July 7, 2017, Respondent filed a second application with the Commissioner for an MLO license, by submitting a Form MU4, through the NMLS (2017 Application).

12. On his 2017 Application, Respondent answered "Yes" to Form MU4 Regulatory Action Disclosure Questions K(1), (5), and (6), which ask:

- (K) Has any State or federal regulatory agency or foreign financial regulatory authority or self-regulatory organization (SRO) ever:
 - (1) found you to have made a false statement or omission or been dishonest, unfair or unethical?
 - (5) revoked your registration or license?
 - (6) denied or suspended your registration or license or application for licensure, disciplined you, or otherwise by order, prevented you from associating with a financial services-related business or restricted your activities?

The 2017 Application required Respondent to explain all "Yes" answers.

13. Respondent provided the DBO with a letter explaining the DRE's 1997 revocation action, but he did not disclose the Commissioner's denial of the 2015 application. The failure to disclose the denial of the 2015 Application is a material misstatement.

14. As part of the 2017 Application, Respondent provided a detailed response to Question K. In particular, Respondent stated that he did not respond to the DBO denial letter of his MLO license in 2015, because he had moved and the letter was sent to his prior address, and because he no longer needed the license. Respondent also explained, in connection with the 2015 Application, why he felt the charges contained in the BRE's 1997 accusation were unfair, and again stated that until recently he believed his license had been surrendered, not revoked. Moreover, Respondent was faced with a personal crisis during the time frame when he submitted the 2015 Application: Respondent was very depressed because his daughter was terminally ill, and the depression prevented him from functioning normally. Respondent did not otherwise address his omission of the DBO's denial in his 2015 Application.

FAILURE OF EMPLOYMENT REQUIREMENTS

15. To become licensed by the Commissioner as an MLO, an applicant must be employed by and subject to the supervision of a residential mortgage lender or services provider that has obtained a license from the Commissioner pursuant to the California Residential Mortgage Lending Act (CRMLA) (Fin. Code, § 50000 et seq.).

16. Between July 10, 2016, and November 6, 2017, Respondent was employed by a qualifying organization, Reverse Mortgage Funding LLC, which is licensed under the CRMLA. However, on November 6, 2017, Respondent's employment with this organization ended and he is not currently employed by and subject to the supervision of any organization that is licensed under the CRMLA.

17. Respondent testified that he is able to return to Reverse Mortgage Funding LLC and that he has other offers of employment. No corroborating evidence of such offers was provided.

Respondent's Character Evidence

18. Respondent has worked in the real estate field for at least 30 years and stated that during that time no consumer complaints have been filed against him. He is proud of the work he has done, considers himself a role model for others in the industry, denies that he ever intentionally committed any wrongdoing, and believes that the allegations against him are "false or embellished." His peers previously chose him to be president of the Los Angeles County Mortgage Brokers Association.

19. Respondent has worked for several large mortgage lenders, including Country Wide, Chase, Wells Fargo and Bank of America, in senior lending positions. Respondent retired in 2014, but returned to work as a trainee in July 2017 with Reverse Mortgage Funding. He was training with Reverse Mortgage Funding while his MLO application was pending, but was terminated when he did not receive an MLO license.

20. Respondent submitted 16 character letters from clients and from other mortgage professionals with whom he has worked. Many of those who provided a reference have known Respondent for 20 or more years, and all of them speak highly to his character for honesty, integrity, and service.

21. Job L. Church was a relationship banker with J.P. Morgan Chase, and worked with respondent between 2010 and 2013. In this capacity, Church "witnessed [Respondent's] professionalism, candor, honesty, and commitment to 'doing the right thing.'" Church writes further:

[I]n an industry which is designed to make mortgage specialists interchangeable, [Respondent] routinely had his clients extend themselves to ensure they had the opportunity to work with him

over anyone else. I can recall many instances during my time as a Relationship Banker where clients filed complaints against a colleague in which they claim certain details had been misrepresented or withheld. Never once did one of these involve [respondent]. Over time, I grew reluctant to stake my reputation and relationship with my clients by recommending they work with some of these colleagues. This was never an issue when introducing them to [Respondent]. There were many instances where, after reviewing their overall situation, [respondent] would advise my clients against either pursuing or renegotiating the mortgage, often at his own expense. Clients remarked that his willingness to place their interest above his own inspired their trust in him and [Respondent] earned the reputation as someone with unimpeachable integrity.

22. Berto Zepeda worked at Respondent's company, American Family Financial, and is aware of these proceedings. Zepeda wrote in part:

Let me first start by telling you that I find this whole situation unbelievable. I've been in the mortgage business for nearly 30 years and can honestly say that no individual or company has ever been so committed to compliance as [Respondent] and American Family Financial. [Respondent] was so fastidious about compliance that it was humorous at times. We had many loan officers but no loans made it into processing until it was approved by [Respondent] himself, despite the competent staff that could perform the same task.

¶. . .

I can also attest to [Respondent's] contribution to the Hispanic community who were so frequently being taken advantage of by "other" lenders that provided loans often not in the borrower's best interests. [Respondent] opened the Hispanic relations department to combat that widespread thievery and hired a bilingual underwriter with a Master's degree in finance as well as my mother, a mortgage veteran who was fluently bilingual, to be the sales manager and mentor to so many loan officers spreading the word of fairness. Being a company so committed to compliance while helping the under-served allowed us to grow in size and reputation.

23. Melissa Wenters and Grant Crosson are homeowners who used Respondent's services, and in a letter dated February 22, 2018, write:

[Respondent] served as our mortgage broker on a few home loans through the years on two separate properties. We chose him for his high level of professionalism and honesty. He took great care communicating to us every step of the way and offered us choices to make the best decision on each loan. We felt that he was not only a very caring individual who had all of our interests at heart, but we felt that his commitment to candor and ethics put him above all other lenders we had used in the past. [Respondent] is a high integrity professional and we have no reservations recommending him to any of our friends and colleagues.

23. In an email message dated February 22, 2018, Mario A. Henriquez writes:

I have had the pleasure of knowing [Respondent] for over twenty-five years. I was in his employee for many of those years and his commitment to the loan process with paralleled honesty and ethics was one of the best learning experiences in furthering my career. His commitment to handling the loan process with the utmost integrity is an experience I will always value. I found him to be a man of exceptional professional and spiritual character.

LEGAL CONCLUSIONS

1. The Commissioner licenses and regulates mortgage loan originators, finance lenders, and brokers under the California Financing Law (CFL). (Fin. Code, § 22000 et seq.) The Commissioner also licenses and regulates mortgage loan originators, residential mortgage lenders, and residential mortgage loan services under the CRMLA.

2. The Commissioner is authorized under the CFL and the CRMLA to deny a MLO license if an applicant withholds information or makes a material misstatement in an application for a license. (Fin. Code, §§ 22172, subd. (a)(2), and 50513 subd. (a)(2).) By reason of the matters set forth in Findings 4, 8, 9 and 13, cause exists to deny Respondent's application for an MLO, because Respondent withheld information or made a material misrepresentation in his 2015 Application and his 2017 Application.

3. Pursuant to Finance Code sections 22109.1, subdivision (a)(3), and 50141, subdivision (a)(3), the Commissioner shall deny a MLO license unless the Commissioner finds that the applicant has demonstrated such financial responsibility, character and general fitness to warrant a determination that the mortgage loan originator will operate honestly, fairly and efficiently. By reason of the matters set forth in Findings 4 through 10, 13 and 14, cause exists to deny Respondent's MLO application, for lack of character and general fitness.

4. Pursuant to Financial Code section 50141, subdivision (a)(6), an applicant for a MLO license must demonstrate that that he is employed by and subject to the supervision of a residential mortgage lender or servicer that has obtained a license from the Commissioner pursuant to the CRMLA. By reason of the matters set forth in Findings 15 and 16, cause exists to deny Respondent's application because he is not employed by a finance lender or servicer that has obtained a license from the Commissioner pursuant to the CRMLA.

5. Applicant has a long career as a real estate broker and has worked for many years as a mortgage lender, and he enjoys a good reputation among his colleagues and customers. Numerous individuals provided letters in support of Respondent based on their experience working with him. Respondent's reputation in the community, as expressed by these coworkers and clients, has been considered. However, the evidence established that Respondent's real estate broker's license was revoked by the BRE in 1997, but that Respondent did not disclose the revocation to the DBO when he filed the 2015 Application for a MLO license, and Respondent's explanation for failing to disclose the revocation lacked credibility and candor. When Respondent filed the 2017 Application to become an MLO licensee, he failed to disclose that the DBO had denied his 2015 Application. Finally, Respondent does not meet the licensing requirement set forth in Financial Code section 50141, subdivision (a)(6), because he is not employed by a residential mortgage lender or servicer that has obtained a license from the Commissioner pursuant to the CRMLA. Although Respondent testified that he has "offers" to work for such mortgage lenders, he is not presently so employed, which is a licensure requirement.

ORDER

The application of Respondent Howard Mark Gerber for a mortgage loan originator license is denied.

DATED: April 4, 2018

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Kirk Miller
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KIRK E. MILLER
Administrative Law Judge
Office of Administrative Hearings