



State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

IN THE MATTER OF INVESTIGATING
The Loan Originator License Application
under the Mortgage Broker Practices Act of
Washington by:

THOMAS ANDREW HESTMARK,
Respondent.

OAH Docket No. 2007-DFI-00631

No. C-07-192-08-FO01

FINAL DECISION & ORDER
CONFIRMING GRANT OF SUMMARY
JUDGMENT BY ADMINISTRATIVE
LAW JUDGE

THIS MATTER has come before the Director ("hereinafter, "Director") of the Department of Financial Institutions (hereinafter, "Department") in the above-enumerated administrative action pursuant to Initial Decision and Order on Summary Judgment (hereinafter, collectively, "Initial Order") based upon an Amended Statement of Charges and Notice of Intention to Enter an Order to Deny License Application and Prohibit from Industry (hereinafter, "Amended Statement of Charges") issued by the Division of Consumer Services (hereinafter, "Division") on or about October 10, 2007, under the authority of the Mortgage Broker Practices Act, Ch. 19.146 RCW (hereinafter, "MBPA").

The Respondent, THOMAS ANDREW HESTMARK (hereinafter, "Respondent") timely requested an Administrative Hearing to contest the Statement of Charges, and this matter was assigned to the Office of Administrative Hearings (hereinafter, "OAH"), which designated Administrative Law Judge Gina L. Hale (hereinafter, "Administrative Law Judge") to hear the case. The Division made a Motion for Summary Judgment (hereinafter, "Summary Judgment Motion"), by and through its counsel, Assistant Attorney General, Charles Clark (hereinafter, "Division Counsel"). Respondent filed a Defendant's Motion to Oppose Grant of Summary Judgment (hereinafter, "Summary Judgment Response") by and through his legal

1 representative, Alexander Hamalian (hereinafter, "Respondent's Counsel"). Then, on June 5,
2 2008, the Administrative Law Judge issued an Initial Order granting the Summary Judgment
3 Order. The Initial Order contained Findings of Fact (hereinafter, "FOF") and Conclusions of
4 Law (hereinafter, "COL").

5 More than twenty (20) days has elapsed since the entry and service of the Initial Order.
6 Respondent has not filed any petition for review of the Initial Order.

7 On or about October 8, 2008, the Division presented this matter to the Director for entry
8 of a final decision and order. However, the proposed final decision and order were in the
9 nature of a *default or uncontested* final order – i.e., in a form and style that is properly reserved
10 for those cases which are either (1) uncontested from inception or (2) come before the Director
11 as a result of an applicant's default.

12 This case *was* contested by Respondent. Respondent *did* respond to the Summary
13 Judgment Motion. Respondent *did not* default. Respondent simply did not file a petition for
14 review of the Initial Order. Division's proposed final decision and order are inappropriate in
15 form and substance, because they do not convey to the parties or to a superior court (in the
16 event of judicial review) the Director's required deliberation, even in circumstances such as
17 these, of the sufficiency and propriety of the Administrative Law Judge's grant of summary
18 judgment.
19

20 Accordingly, the Director subsequently received and has now considered the entire
21 OAH Record. This Final Decision and Order are based upon a consideration of the entire OAH
22 Record, including, without limitation, the following:
23

- 24 1. License application dated December 19, 2006 (hereinafter, "Application");
- 25 2. Amended Statement of Charges;
- 26 3. Application for Adjudicative Hearing;
- 27 4. Summary Judgment Motion of Division Counsel;
- 28 5. Declaration of Robert E. Jones (hereinafter, "Jones Declaration");
- 29 6. Summary Judgment Response of Respondent's Counsel; and
- 30 7. The Initial Order.

31 This record is hereinafter referred to collectively as "Record on Review."
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1
2 1.0 Summary of the Case

3 This case concerns whether Respondent is automatically disqualified from obtaining a
4 Loan Originator License (hereinafter, "License") and prohibited from participation in the
5 affairs of a mortgage broker until August 1, 2017, by reason of: (1) Failure to demonstrate the
6 character and general fitness required to be licensed; (2) having been convicted of a gross
7 misdemeanor involving dishonesty or financial misconduct within 7 years of the date of
8 Application; and (3) having failed to provide accurate information in his Application. A
9 prospective licensee is automatically disqualified from obtaining a License if convicted of any
10 type of felony or a gross misdemeanor involving dishonesty or financial misconduct within 7
11 years of the date of application for a loan originator license.¹ In addition, the MBPA also
12 authorizes the Division to seek a License ban of additional years (in this case until December
13 28, 2013) for either making false statements or willfully omitting information in a License
14 application in violation of RCW 19.146.0201(8).²

15
16 2.0 Preliminary Considerations

17 2.1 Standards for Summary Judgment in Administrative Actions. The Director
18 takes note preliminarily of the following standards which are to be applied to motions for
19 summary judgment in an administrative action under the Administrative Procedures Act,
20 Chapter 34.05 RCW (hereinafter, "APA") :

21
22 2.1.1 Standards for Granting Summary Judgment. The Department has
23 adopted the Model Rules of Procedure, Chapter 10-08 WAC, except to the extent of any
24 conflict with the Department's Rules of Procedure.³ WAC 10-08-135 sets forth the standards
25 to be followed by the Department and the Administrative Law Judge, as its agent, when
26 considering the Summary Judgment Motion and the Summary Judgment Response, and
27 declares that "[a] motion for summary judgment may be granted and an order issued [only] if
28 the written record shows that there is no genuine issue as to any material fact and that the
29

30
31 ¹ RCW 19.146.310(1) (d and (2) and WAC 208-660-350(2)(c).

32 ² See RCW 19.146.220(5)(a).

33 ³ WAC 208-08-020(1) declares: "The department adopts the model rules of procedure as set forth in WAC 10-08-035 through 10-08-230. If
34 there is a conflict between the model rules and this chapter, the rules in this chapter shall govern. Wherever the term 'agency' appears in the
model rules it means the department of financial institutions."

1 moving party is entitled to judgment as a matter of law.” In evaluating the application of this
2 standard, the Director may rely on applicable law from sources other than WAC 10-08-135
3 itself and must be respectful of the constitutional rights of respondents.⁴ To that end, the
4 Director is required to weigh on review all pleadings, evidence and argument in a light most
5 favorable to the non-moving party.⁵ If there is any inference of a triable issue of fact, then
6 summary judgment is inappropriate.⁶ Litigants are entitled to a dispositive hearing on all issues
7 of fact and law.⁷ These principles apply equally to the Administrative Law Judge and to the
8 Director evaluating the Initial Order.⁸

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10 2.2 Proper Consideration by Director Absent Petition for Review. Respondent did
11 not file a petition for review contesting the Initial Order. However, even when a party has *not*
12 filed a petition for review, the Director still has the authority and duty, prior to entering a Final
13 Decision and Order, to consider whether any part of the Initial Order is *not* supported by the
14 record⁹ and whether confirmation of the Initial Order, without modification, would be an error
15 of law. Indeed, with regard to the COL as contained in the Initial Order, the Director is
16 obliged, in the manner of a reviewing court, to consider the statutes and implementing
17 regulations of the Division under the error of law standard, which permits the Director to
18 substitute his judgment for that of the Amended Statement of Charges and the Administrative
19 Law Judge’s Initial Order.¹⁰

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21 2.2.1 Consideration of Length of License Ban. It is apparent from the Initial
22 Order that the Administrative Law Judge considered the question of whether Respondent
23 negligently made a false statement or knowingly and willfully made an omission of material
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25 ⁴ WAC 10-08-220 declares: “Nothing in chapter 10-08 WAC is intended to diminish the constitutional rights of any person or to limit or
26 modify additional requirements imposed by statute, including the Administrative Procedure Act.”

27 ⁵ *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

28 ⁶ *Davis v. W. One Auto. Group*, 140 Wn. App. 449, 456 (2007).

29 ⁷ *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002), citing *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124
30 (2000).

31 ⁸ *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

32 ⁹ See RCW 34.05.464(4); see also *Northwest Steelhead v. Washington State Department of Fisheries*, 78 Wn. App. 778, 896 P.2d 1292 (1995);
33 see also *Towle v. Department of Fish and Wildlife*, 94 Wn.App. 196, 971 P.2d 591 (1999).

34 ¹⁰ See *Aponte v. Dep’t of Soc. & Health Servs.*, 92 Wn. App. 604, 616-17, 965 P.2d 626 (1998), *review denied*, 137 Wn.2d 1028 (1999); cited
in *Nationscapital* at p. 737.

1 fact in his application¹¹ and found that there was no evidence or inference that raised a material
2 issue of fact disputing the Division's contention in this regard. While the Director is respectful
3 of and agrees with the Administrative Law Judge's finding in this regard,¹² the Administrative
4 Law Judge lacks the authority to decide the appropriateness in length of the License ban sought
5 by the Division. If such a length of License ban is authorized by the MBPA (which it is), the
6 Administrative Law Judge may not question its imposition – provided, of course, that the
7 Respondent has committed a violation giving rise to such a ban. Only the Director, who must
8 issue a final administrative order, has the authority to modify a penalty, fine or license ban
9 properly sought by the Division.
10

11 **3.0 Director's Consideration of FOF and COL.** After due consideration of the entire record
12 on review and in a light most favorable to Respondent, the Director is of the decided view that
13 the Initial Order is appropriate in its entirety, except for what appears to be an inadvertent
14 typographical error contained in COL 6 at p. 5, of the Initial Order, as follows:

15 “Mr. Hestmark violated RCW 19.146.0201(5)(8) when he negligently or
16 intentionally withheld information about his criminal history on his application.
17 He is therefore prohibited from participating in the conduct of the affairs of any
18 licensed mortgage broker. **RCW 19.146.220 95)(a).**”

19 COL 6 at p. 5 [sic], of the Initial Order is correct and affirmed by the Director, except for the
20 incorrect citation of the statute underlined in bold above. The statute should read “RCW
21 19.146.220(5)(a).”

22 **4.0 Findings of Fact.** Now, therefore, the Director re-affirms FOF 1 through FOF 11,
23 inclusive, at pages 2-4 [sic] of the Initial Order.

24 **5.0 Conclusions of Law.** Now, therefore, the Director re-affirms: COL 1 through COL 5,
25 inclusive, at pages 4-5 [sic] of the Initial Order; COL 6 at p. 5 [sic] of the Initial Order, as
26 modified above in *Section 3.0* of this Final Decision and Order; and COL 7 at p. 5 [sic].

27 **6.0 Final Order.** Having made Findings of Fact and Conclusions of Law as set forth above,
28 **IT IS HEREBY ORDERED AS FOLLOWS:**

29 **6.1 Denial of License.** The application of Respondent, THOMAS ANDREW
30 HESTMARK, for a Loan Originator License is denied.
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33 ¹¹ See Initial Order, FOF 10 at p. 3 [sic]; COL 6 at pp. 5 [sic].

34 ¹² COL 7 at p. 5 [sic], of the Initial Order.

1 6.2 Prohibition. Respondent THOMAS ANDREW HESTMARK is prohibited from
2 participating in the conduct of the affairs of any mortgage broker subject to licensure by the
3 Director, in any manner, through December 28, 2013.

4 6.3 Reconsideration. Pursuant to RCW 34.05.470, Respondent has the right to
5 file a Petition for Reconsideration stating the specific grounds upon which relief is requested.
6 The Petition must be filed in the Office of the Director of the Department of Financial
7 Institutions by courier at 150 Israel Road SW, Tumwater, Washington 98501, or by U.S. Mail
8 at P.O. Box 41200, Olympia, Washington 98504-1200, within ten (10) days of service of this
9 Final Order upon Respondent. The Petition for Reconsideration shall not stay the effectiveness
10 of this order nor is a Petition for Reconsideration a prerequisite for seeking judicial review in
11 this matter. A timely Petition for Reconsideration is deemed denied if, within twenty (20) days
12 from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the
13 parties with a written notice specifying the date by which it will act on a petition.
14

15 6.4 Stay of Order. The Director has determined not to consider a Petition to
16 Stay the effectiveness of this order. Any such requests should be made in connection with a
17 Petition for Judicial Review made under chapter 34.05 RCW and RCW 34.05.550.

18 6.5 Judicial Review. Respondent has the right to petition the superior court for
19 judicial review of this agency action under the provisions of chapter 34.05 RCW. For the
20 requirements for filing a Petition for Judicial Review, see RCW 34.05.510 and sections following.

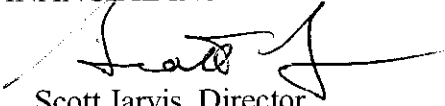
21 6.6 Service. For purposes of filing a Petition for Reconsideration or a Petition
22 for Judicial Review, service is effective upon deposit of this order in the U.S. mail, declaration of
23 service attached hereto.
24

25 6.7 Effectiveness and Enforcement of Final Order. Pursuant to the Administrative
26 Procedures Act, at RCW 34.05.473, this Final Decision and Order shall be effective
27 immediately upon deposit in the United States Mail.

28 Dated at Tumwater, Washington, on this ~~12~~th day of December, 2008.

29
30 WASHINGTON STATE DEPARTMENT
31 OF FINANCIAL INSTITUTIONS

32
33 By:


34 
Scott Jarvis, Director

1 **NOTICE TO THE PARTIES**

2 In accordance with RCW 34.05.470 and WAC 10-08-215, any Petition for
3 Reconsideration of the FINAL DECISION & ORDER CONFIRMING GRANT OF
4 SUMMARY JUDGMENT BY ADMINISTRATIVE LAW JUDGE must be filed with the
5 Director within ten (10) days of service of such FINAL DECISION & ORDER. It should be
6 noted that Petitions for Reconsideration do not stay the effectiveness of the FINAL DECISION
7 & ORDER. Judicial Review of the FINAL DECISION & ORDER is available to a party
8 according to provisions set out in the Washington Administrative Procedure Act, RCW
9 34.05.570.

10 This is to certify that the FINAL DECISION AND ORDER has been served upon the
11 following parties on December 18, 2008 by depositing a copy of
12 same in the United States mail, postage prepaid.

13 WASHINGTON STATE DEPARTMENT
14 OF FINANCIAL INSTITUTIONS

15 By: 

16 Susan Putzier

17 Executive Assistant to the Director

18 **Mailed to the following:**

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