

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

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IN RE: : CASE NO. M2007-391
: :
PAUL N. CRAWFORD : DEBORAH K. TONGREN
: HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued October 29, 2007

I. FINDINGS OF FACT

A. Background.

This matter came before Deborah K. Tongren, 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 Procedure Act, Ohio Revised Code ("R.C.") Chapter 119. A hearing was held on October 3, 2007 at 10:00 a.m. The hearing was held to consider the allegations in the Division's Notice of Intent to Deny Loan Officer License and Notice of Opportunity for a Hearing ("NOH").

In the NOH, the Division asserted that Respondent was not eligible for renewal of his loan officer license pursuant to the Ohio Mortgage Broker Act, R.C. Chapter 1322, as amended by Senate Bill 185 ("S.B. 185"), effective January 1, 2007. The Division's assertion was based solely on Respondent's conviction of petit theft in 1976.

James Evans, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. Stephen DeFrank, Esq. testified on behalf of the Division. Neither Respondent, nor his counsel made an appearance. At the hearing, the State introduced Exhibits 1-15. Exhibits 3, 11, 13, 14 and 15 were proffered into the record. The remaining exhibits were admitted into evidence.

B. Jurisdiction and Procedural Matters.

The Division issued the NOH to Respondent on July 20, 2007. Respondent received the NOH by certified mail return receipt requested and was properly served on all subsequent continuances. Mr. Crawford timely requested a hearing in the matter. The hearing was to commence on August 9, 2007 and continued by the Division on its own motion to August 16, 2007.

On August 15, 2007, David W. Pryor, Esq. entered an appearance on behalf of Respondent, Mr. Crawford. Mr. Pryor indicated that he was in trial the entire week of August 13, 2007 and requested a continuance. Division did not oppose a continuance and the hearing was re-scheduled for October 3, 2007 at 9:30 a.m.

A hearing was held on October 3, 2007, beginning at 10:00 a.m. at 77 South High Street, Columbus, Ohio to consider the allegations set forth in the Division's NOH.

C. Respondent's Loan Officer Application and Criminal Conviction.

1. Respondent is an individual who has conducted business in Ohio as a mortgage loan officer since at January, 2006. The Division is the agency charged with licensing mortgage loan officers.
2. This is the second time that Respondent has been asked by the Division to address the issue of Respondent's petty theft conviction from 1976.
3. The first challenge occurred during 2005 when Respondent applied to the Division for a loan officer license, pursuant to R.C. Section 1322.02.
4. On August 10, 2005 issued a Notice of Intent to Deny Respondent's 2005 Loan Officer Application and informing him of his Right to Request a Hearing. (the "2005 NOH") The denial was based solely upon Mr. Crawford's 1976 conviction for petty theft.
5. Mr. Crawford timely requested a hearing on the 2005 NOH which was scheduled, but never held.
6. Between August 10, 2005 and January 19, 2006, the Division and Respondent negotiated a Settlement Agreement (the "Agreement") with respect to the issuance of Respondent's loan officer license. Pursuant to the Agreement, Division issued the Respondent a loan officer license. Section F in the Agreement states that "Respondent has *submitted evidence to the Division which shows by a preponderance of the evidence that his employment record and activities since his petty theft conviction show that he is honest, truthful, and of good reputation and that there is no*

basis in fact for believing that he will commit another theft offense."
State's Exhibit 4. (Emphasis Added).

7. In January, 2006, the Division issued a loan officer license to Mr. Crawford.
8. A loan officer must renew his license annually on or before the thirtieth day of April. R.C. Section 1322.04(B).
9. On or before April 30, 2007, Respondent timely filed his application for renewal of his loan officer license.
10. On July 20, 2007, Division issued a Notice of Intent to Deny Loan Officer License Renewal and Notice of Opportunity for Hearing. (the "2007 NOH"). The Basis for the Proposed Action was:

In or around 1976, in the Franklin County, Ohio, Municipal Court, Respondent was convicted of Petit Theft. As a result of the finding listed above, the Division has determined that the Respondent has been convicted of a theft offense as described in R.C. 1322.031(A)((2), and that, as a result, the Division is not authorized to renew Respondent's loan officer license pursuant to R.C. 1322.041(A)(3) & (B)(3).

State's Exhibit 1.

11. The Respondent timely requested a hearing on the 2007 NOH and a date of August 9, 2007 was set, and continued by Division on its own motion to August 16, 2007. State's Exhibit 6. A continuance was granted to Respondent to October 3, 2007 at 9:30 a.m. State's Exhibit 10. That date was confirmed by the Hearing Examiner with counsel for the Respondent, David Pryor, Esq. and counsel for the Division, Laura Meechan, Esq.
12. During September, 2007, counsel discussed settlement options. They reached an impasse, however, when counsel for the Division, Laura Meechan, Esq., informed Respondent's counsel that Respondent's prior theft offense was an automatic bar to renewal. As a result, Mr. Pryor informed the Hearing Examiner and the Division that neither he, nor his client would attend the October 3, 2007 hearing and further, that he would be commencing an action in Common Pleas Court.
13. Sometime prior to the October 3, 2007 hearing, James M. Evans, Esq. replaced Ms. Meechan as counsel for the Division. It is not known whether Mr. Evans was privy to any discussions between Respondent's counsel, Ms. Meechan and the Division regarding settlement discussions and Respondent's the position.

14. A hearing was held on October 3, 2007. Division was represented by James M. Evans, Esq., an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office. Stephen DeFrank, Esq. testified on behalf of the Division. Neither Respondent nor his counsel made an appearance.

II. CONCLUSIONS OF LAW

A. Jurisdiction and Procedural Matters.

The Division procedurally complied with R.C. Chapter 119 and jurisdiction over this matter has been established.

B. Loan Officer License Application.

1. The Division is the state agency responsible for the licensing and regulation of mortgage loan officers pursuant to the Ohio Mortgage Broker Act, R.C. Chapter 1322. S.B.185 amended certain provisions of the Ohio Mortgage Broker Act, which amendments became effective January 1, 2007. The term "S.B. 185" will be used to reference the amendments in the Ohio Mortgage Broker Act, effective January 1, 2007.
2. The application form for a loan officer license, whether an initial application or a renewal, requires an applicant to include a statement as to whether he 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. R. C. Section 1322.031(A)(2). This requirement was not changed by S. B. 185. The term "theft" was not defined in either the Ohio Mortgage Broker Act or in S.B. 185.
3. The Ohio Mortgage Broker Act, R.C. Section 1322.041(A), provided that a loan officer license shall be issued if the Superintendent of Financial Institutions finds that certain conditions are met, including:

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

(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.

R.C. 1322.041(A)(2) and (3).

4. S.B. 185 revised portions of the Ohio Mortgage Broker Act, specifically, section 1322.041(A) which now provides that a loan officer license shall be issued if the Superintendent of Financial Institutions finds that certain conditions are met, including:

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

(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 and the applicant has not pleaded guilty or been convicted of a violation of an existing or former law of this state, any other state, or the United States that substantially is equivalent to a criminal offense described in that division. However, if the applicant has been convicted of or pleaded guilty to **any such offense other than theft**, the superintendent shall not consider the offense if 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.

R.C. 1322.041(A)(2) and (3). (Underlining and boldface type indicate statutory changes under S.B. 185)

5. Prior to the enactment of S. B. 185, an applicant who pleaded guilty to or was convicted of a crime enumerated in R.C. 1322.031(A)(2), which included theft, could receive a loan officer license if he showed, by a preponderance of the evidence that his activities and employment record since the conviction indicate *"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"*. R.C. 1322.041(A)(3). (Emphasis Added)
6. Pursuant S.B. 185, the burden of proof under R.C. 1322.041(A)(3) remains the same for any enumerated offense *other than theft*. Thus, an applicant, who has been convicted of *embezzlement, forgery, money laundering or drug trafficking, for example, has an opportunity to show the Division that he is honest, truthful and of good reputation and to be granted a loan officer license*. (Emphasis Added) R.C. Sections

1322.031(A)(2) and 1322.041(A)(2) as amended by S.B. 185. An applicant, however, who has pleaded guilty to or has been convicted of theft, irrespective of when that offense occurred, irrespective of his fitness, irrespective of how long he has been working in that industry, is apparently forever barred from becoming or remaining a loan officer.

7. When the Respondent applied for his loan officer license in 2005, the law provided for a shifting of the burden of proof for a theft offense. Thus, even an applicant who had a prior theft offense, had the opportunity to prove to the Division, by a preponderance of the evidence, that his "activities and employment record since the conviction show that {he} is honest, truthful, and of good reputation, and there is no basis in fact for believing that {he} will commit such an offense again". If the applicant was able to sustain that burden of proof, the Division was permitted to grant a license. R.C. Section 1322.041(A)(3).
8. That statute was sound and founded on the principle that loan officers have access to confidential personal and financial information and play a critical role in the real estate financing process. The statute, and its implementation by the Division, provided a balance between the public interest and the issues of due process. There is no doubt that it was and still is essential to protect the public interest and to maintain the integrity of the Division's licensure process for loan officers and brokers.
9. S.B. 185, however, seeks to remove the shifting burden of proof for a theft offense and any discretion on behalf of the Division to consider such an applicant or renewal applicant's fitness. Under S.B.185, any loan officer who has had a theft conviction *anywhere* in his past, even if previously licensed by the Division, is subject to licensure denial upon application, yearly renewal application or upon application to transfer brokerages. One must question whether this elimination of this provision and the resulting inability of an applicant, previously convicted of a theft offense, to show that he is honest, truthful and of good reputation, retains the sound balance established under the previous law and reflects the intent of the Legislature.
10. Provisions of S.B. 185 divest the ability of an already licensed, working loan officer to continue to engage in his livelihood. Enforcement of R.C. Section 1322.04, as amended by S.B. 185, and applied retroactively to already licensed loan officers is harsh and unconscionable.
11. The public has a long distrust of retroactive laws and retrospective application of laws. *AFSCME Loc. 11, AFL-CIO v. Ohio School Facilities Comm.* 2007-Ohio-297.

12. Despite this distrust, both the Ohio Constitution and Ohio law clearly permit statutes to be applied retroactively. That, however, is not blanket permission. Ohio has adopted safeguards against retroactive legislation. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, at 105 522 N.E.2d 489. R.C. Section 1.48
13. In *Van Fossen*, the court set forth an analysis to determine if those safeguards are met. Step one requires an initial determination of legislative intent. *Id.*
14. Intent is determined by construing, and then applying, R.C. Section 1.48 which provides, "A statute is presumed to be prospective in its operation unless expressly made retrospective." Absent a clear pronouncement by the General Assembly that a statute is to be applied retrospectively, a statute may be applied prospectively only. *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009 quoting *Van Fossen*.
15. "In drafting prior legislative enactments and amendments, the General Assembly certainly has demonstrated its ability to include retrospective language when it so desires." For instance, the statute at issue in *Van Fossen*, stated by its very terms that it applied "*to cases pending on the effective date of the statute, which includes causes of action which arose prior to the statute's effective date.*" *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009. (Emphasis Added).
16. A close review of the statutory language in S.B. 185 reveals that it is neither retroactive on its face, nor is there indication that the General Assembly intended it to apply retrospectively. The General Assembly provided no language in S.B. 185 remotely similar to that in the statute considered in *LaSalle*. Thus, the inquiry should end here.
17. Assuming arguendo, however, that the General Assembly did intend the amendments with respect to theft offenses in S.B. 185 to apply retroactively, Ohio courts determine that the next inquiry is whether the statute is substantive or merely remedial in nature. A statute that applies retroactively and is substantive is unconstitutional. *Bielat v. Bielat*, (2000) 87 Ohio St.3d 350 at 354. "A statute is substantive if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations or liabilities as to a past transgression." *Franklin Cty. Prosecuting Atty. V. Walker* 2007-Ohio-5095 quoting *Bielat*.
18. In this instance, the provisions of S.B. 185 clearly impose new burdens on Mr. Crawford as to a past transgression. His transgression, a misdemeanor which took place some 31 years ago, when Respondent was only 20 years old, is now being used as burden or a tool to divest Respondent of his loan officer license. Thus, such provisions of S.B. 185

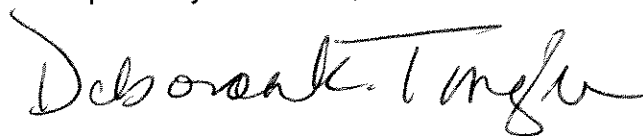
are substantive in nature and are unconstitutional if applied retrospectively.

19. Prior approval of Mr. Crawford's loan officer application and his ability to practice his livelihood and to provide a living for himself and his family also accrued a vested right. Those provisions of S.B. 185 which affect Mr. Crawford's vested rights, may not be applied.
20. Mr. Crawford has held a loan officer license since January, 2006. When he was granted that license, he informed the Division of his conviction for petty theft in 1976. At the time of that conviction, he was 20 years old, working in a department store, forgot to bring his tie to work and borrowed a tie from the store to wear for the day. He mistakenly left the store still wearing the tie. He plead guilty to a misdemeanor, paid \$25.00 and received a sentence of one year probation.
21. In 2005, when the Division first considered Mr. Crawford's application for a loan officer license, the Division found him to be honest, truthful, of good reputation and fit to hold a loan officer license, despite the Division's knowledge of his 1976 conviction. Specifically, the Division found that there was "no basis in fact for believing that he will commit another theft offense." There are no complaints against Mr. Crawford or any disciplinary actions against him in evidence. In fact, nothing has changed during the passage of time to affect Mr. Crawford's fitness to hold a loan officer license other than the enactment of S.B.185.
22. The public distrust of retroactive laws is justified for the very reasons set forth in this case. Mr. Crawford, and indeed all currently licensed loan officers, who have already proven to the Division that they are honest, truthful and of good business reputes and are not likely to repeat any prior theft offenses, and have had no changes in their "criminal" status since their original licensing, cannot not be denied their ability to practice their livelihood nor their ability to renew their loan officer licenses nor their ability to change brokerage houses.

III. RECOMMENDATION

It is the recommendation of this Hearing Officer that the Superintendent of the Division of Financial Institutions renew the loan officer license of Respondent Paul N. Crawford. Mr. Crawford sustained the burden of proof and established the licensing prerequisites in his 2005 application. Nothing has changed since that application to affect his fitness as a loan officer in Ohio, other than the enactment of S.B. 185. It being clearly shown that the General Assembly did not intend S.B. 185 be applied retroactively, it is found that Mr. Crawford must be granted his 2007 renewal as well as the approval of any request(s) for change in brokerages.

Respectfully submitted,

A handwritten signature in black ink, reading "Deborah K. Tongren". The signature is written in a cursive style with a large, sweeping initial "D".

Deborah K. Tongren
Administrative Hearing Officer
October 29, 2007