

**STATE OF OHIO
DEPARTMENT OF COMMERCE**

**RECEIVED
DIVISION OF FINANCIAL
INSTITUTIONS
05 APR 11 AM 9:44**

IN THE MATTER OF:

DIVISION OF FINANCIAL
INSTITUTIONS

WILLIAM ARNOLD SCOTT

CASE NO. 04-0032-LOD

**REPORT AND RECOMMENDATION
ADMINISTRATIVE HEARING OFFICER D. MICHAEL QUINN**

Issued April 7, 2005

I. FINDINGS OF FACT

A. BACKGROUND

The above-captioned matter came before this Hearing Officer, an attorney licensed to practice law in Ohio, and duly appointed by the Ohio Division of Financial Institutions (hereinafter the "Division") to serve as Hearing Officer for an adjudicative hearing in accordance with the Administrative Procedures Act, Chapter 119, Ohio Revised Code (hereinafter "O.R.C."). Said hearing was held at 1:00 PM on July 20, 2004, at 77 South High Street, 19th Floor, room 1924, Columbus, Ohio.

Initially, Jane Arata, Esq., was appointed as Hearing Officer and opened the hearing. However, due to a perceived potential conflict discovered during testimony, Ms. Arata recused herself and the undersigned was appointed to act as Hearing Officer. (See Transcript page 30.)

The hearing was held at the request of Respondent William Arnold Scott, formerly of Mentor, Ohio, presently residing in Euclid, Ohio (hereinafter the

"Respondent") to consider the Division's Notice of Intent to Deny Loan Officer License Application, Notice of Opportunity for a Hearing (hereinafter "NOH"). Said NOH was based upon an allegation that Respondent was found guilty in 1993, in Hamilton County Municipal Court, Ohio, of a misdemeanor theft and a misdemeanor resisting arrest, and, also, that Respondent failed to disclose the past criminal offenses, and is thereby ineligible to hold a license as a Mortgage Loan Officer. The Division appeared and was represented by the Ohio Attorney General's Office, Assistant Attorney General Emily A. Smith. Respondent appeared pro se.

At the hearing, State's Exhibits A through H were admitted into the record. Respondent's Exhibit 1 was admitted into the record without objection, as discussed in the transcript (hereinafter "Tr."). Neither Respondent nor the Division offered any witnesses other than Respondent.

B. JURISDICTION

Respondent filed his Loan Officer License Application with the Division on March 28, 2002. The Division issued the NOH against Respondent on January 23, 2004. Respondent requested a hearing, which, due to problems with service of the NOH after Respondent changed addresses, was received by the Division on April 8, 2004, but within 30 days from the mailing of the NOH to Respondent's new address. On April 9, 2004, the Division scheduled the hearing for April 19, 2004, but continued the hearing, on its own motion, to an undetermined date. On May 10, 2004, the Division scheduled the hearing to July 20, 2004, at which time the hearing went forward.

C. PROPOSED ISSUANCE OF ORDER TO DENY LICENSE APPLICATION

1. The Division is the state agency responsible for the licensing and regulation of Mortgage Loan Officers pursuant to O.R.C. Chapter 1322. (Exhibit E.)
2. Respondent is an individual who desires to conduct, business in Ohio as a Mortgage Loan Officer. (Exhibit A; Tr. p. 14.)
3. A statutory requirement became effective on May 2, 2002, which mandated, for the first time, that Mortgage Loan Officers become licensed. (Senate Bill 76, 2001.)
4. On or about March 28, 2002, the Division received from Respondent a Loan Officer Application (hereinafter the "Application"). (Exhibit A.)

5. Respondent signed the Application on March 8, 2002, which he had filled out on, or about, the same day. (Exhibit A; Tr. pp. 63-66.)
6. The notary signed the Application on, or about, March 26, 2002. Based on Respondent's description, it does not appear the document was properly notarized, but no conclusion can be drawn from the limited evidence. (Exhibit A; Tr. pp. 63-68.)
7. Within the Application Respondent answered "No" to Question number 5, which asked: "Have you ... ever been convicted of or pleaded guilty to any criminal offense including, but not limited to, theft, ... or any criminal offense involving money..." (Exhibit A; Tr. pp. 14-15, 37.)
8. On, or about, May 17, 1993, 9 years prior to the submission of the Application and 11 years prior to the hearing, Respondent was found guilty, in Hamilton County Municipal Court, Ohio, of one misdemeanor count of theft and one misdemeanor count of resisting arrest. (Exhibit C; Tr. pp. 37-39.)
9. Respondent spent one and one-half days in jail, entered a plea and was sentenced to 80 hours of community service. (Exhibit C; Tr. pp. 10-11.)
10. Respondent's explanation of the 1993 conviction was that the offenses involved a group of college friends who had been drinking. Respondent and his friends attempted to steal small items from Kroger's – in Respondent's case it was a magazine and a candy bar – and Respondent was apprehended after running away from an off-duty police officer. (Exhibit 1; Tr. pp. 10-11, 37-39.)
11. Respondent was 21 years old at the time of the commission of, and conviction for, the offenses. (Exhibits A, C.)
12. Respondent acknowledges his commission of both offenses. (Tr. pp. 37-38.)
13. The Application does not limit the response sought on Question 5 to felonies, or to a particular period of time, or for those offenses for which there exists a record, but asks if the applicant has ever been convicted of or pleaded guilty to any criminal offense, including, but not limited to, certain named offenses, including theft. (Exhibit A.)
14. Respondent's explanation of why he answered Question 5 on the Application as "No" was that, while he knew that he had been convicted, he was under the impression, from what he recalled the

judge telling him at sentencing, the record would be automatically expunged after one year. (Tr. pp. 11, 15-16, 37, 38-39, 57-58.)

15. Respondent testified that he only learned that the convictions were not expunged when the Division sent him a letter indicating that their background check had disclosed the convictions after Respondent did not disclose them. (Exhibit B; Tr. p. 11.)
16. Respondent believes that prior employment background checks did not disclose his past convictions. (Tr. pp. 28, 53.)
17. Respondent did not seek advice of legal counsel when completing the Application. (Tr. p. 39.)
18. The Division did not present evidence of any other convictions.
19. The Division presented evidence that the incorrect response to Question 5 was a deliberate act, based, in part, upon a lack of understanding of the legal process and, in part, on ignorance that the assumed expungement would allow him to never report the convictions. (Tr. pp. 39, 51-52)
20. Respondent believes he has a good reputation and is known as honest. Respondent stated that he is a different person now than he was in college 11 years ago and that such an act would never happen again. (Tr. pp. 49-50, 55, 70.)
21. Respondent did not present any testimony other than his own and no documentary evidence other than his own letter to the Division. (Tr. p. 44.)

II. CONCLUSIONS OF LAW

A. JURISDICTIONAL ISSUE

1. The Division procedurally complied with O.R.C. Chapter 119.

B. LICENSE APPLICATION

2. In 1993, Respondent was found guilty of a “criminal offense involving theft...”, an offense specifically cited in section 1322.041(A)(3), O.R.C., and on the Application.
3. The theft offense being proven by the Division, in order to obtain a license the Respondent must now prove, by a preponderance of the evidence, that the Respondent’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.” Section 1322.041(A)(3), O.R.C.
4. Respondent’s Exhibit 1 is his own letter to the Division. Because an administrative hearing is designed to permit a respondent an opportunity to offer an explanation without the formalities or expense of a trial, Exhibit 1 was admitted into the record and considered, even though it is hearsay and cumulative testimony.
5. The 1993 convictions cited are far enough removed in time, at a time when Respondent was still somewhat immature, that, if any independent evidence had been presented, it might have been possible for Respondent to meet his burden of proof to demonstrate that the two misdemeanor convictions should not, of themselves, prohibit him from obtaining a license. This was not done. Respondent has not shown by a preponderance of the evidence, that the Respondent’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.
6. In eliciting evidence whether Respondent’s activities since the offenses prove that the Respondent is honest and truthful, the Division demonstrated that, on or about April 8, 2002, Respondent signed an application and filed that application with a state agency – the Division – to obtain a license to engage in an occupation and that application contained false information, to wit: the “No” response to Question 5.
7. Respondent’s omission on the Application of a 9-year-old conviction, due to a mistaken belief that the record was expunged and, therefore, need not be revealed, is understandable but not excusable. Even if the record had been expunged, which it hadn’t, Respondent is still required to provide information about the convictions under certain circumstances and applying for a loan

officer's license was one such circumstance. The legislature stated in the statute that theft bears such a relationship to the licensing process that, even if the convictions had been expunged, the Division still has the authority to review the conviction record and make a determination based on the convictions. (See: sections 2953.33, 1322.041(A) O.R.C.; In Re: Niehaus (1989, 10th Dist.) 62 Ohio App.3d 89.)

8. Respondent acted knowingly, in that he knew he had a conviction at the time he completed the Application but he chose, for whatever reason, to not disclose the conviction.
9. Because the Application submitted by Respondent contained a false response, Respondent was not able to demonstrate that his activities since the offenses show that the Respondent is honest or truthful.
10. Respondent failed to prove by a preponderance of evidence his honesty and truthfulness in his activities since the offense – specifically relating to his response to Question 5. Respondent did not present sufficient evidence to meet his burden of proof of his honesty and truthfulness.
11. The Division also charged that Respondent's character and general fitness do not 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 the Ohio Mortgage Broker Act.
12. The Division sought to bring into question Respondent's general fitness to command the confidence of the public and the belief that the business will be operated honestly and fairly, by bringing forth evidence of Respondent's inaccurate response to Question 5.
13. Filing an inaccurate Application is negatively demonstrative of an applicant's character and general fitness and of whether the business will be operated honestly and fairly in compliance with law, including the lack of attention to detail.
14. Respondent failed to provide sufficient evidence to overcome the Division's argument that Respondent's response to Question 5 demonstrates that the business will not be operated honestly and fairly.
15. The Division also charged violations of the Ohio Mortgage Broker Act sections 1322.07(A) (making any substantial misrepresentation in any registration or license application), (B) (making false or

misleading statements of a material fact or omissions of statement required by state law) and (C) (engaging in conduct that constitutes improper, fraudulent, or dishonest dealings) all resulting from Respondent answering Question 5, on the Application, "No."

16. The Division demonstrated that Respondent's response to Question 5 was a substantial misrepresentation or a false statement of a material fact required by law on the license application, even if it was from a mistaken understanding of the law. The standard must be one of negligence – knew or should have known – in Respondent's answering the questions on the license application, and Respondent knew the true nature of the facts to which he was attesting. Respondent knew the conviction occurred in his past and it was incumbent on him to determine if the event was in the category of activities which he was required to report.

C. DISCUSSION

An 11-year old petty theft, which amounted to a drunken college indiscretion, under the circumstances described by Respondent, would not be grounds for denial of the license sought if Respondent had presented sufficient evidence to meet his burden of proof. What cannot be considered insignificant is the failure to disclose the convictions on the Application. While it is understandable how Respondent may have come to believe that the convictions were automatically expunged, he knows, as he acknowledged in the hearing, that he may have heard what he wanted to hear. More importantly, while there may have been no intent to lie on the Application, Respondent, not the Division, has to bear the responsibility to disclose. Respondent knew he had the convictions and believed he could avoid disclosure simply because he thought there would be no record of the convictions. Respondent chose to not seek legal counsel to determine his responsibilities and now must bear the consequences for his actions. To make the statutory determinations required of the Division, the Application asks for any convictions. In addition, theft convictions have been determined by the legislature to be of such a relationship to the licensing process that, even if the convictions had been expunged, the Division still has the authority to review the conviction record and make a licensing determination based on the convictions. (See: section 2953.33, O.R.C.; In Re: Niehaus (1989, 10th Dist.) 62 Ohio App.3d 89.)

III. RECOMMENDATION

Based on the record available, it must be concluded that Respondent did not present sufficient evidence to prove, by a preponderance of the evidence, that his activities since the convictions show he has been honest and truthful, would not commit the offense, again, and that a license should be issued. Consequently, the recommendation to the Superintendent of Financial Institutions is to **DENY A MORTGAGE LOAN OFFICER'S LICENSE TO WILLIAM A. SCOTT.**

Respectfully submitted,

—
D. Michael Quinn
Hearing Officer
April 7, 2005
Docket No. 04-DFI-109