

STATE OF OHIO
DEPARTMENT OF COMMERCE

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IN THE MATTER OF:

DIVISION OF FINANCIAL
INSTITUTIONS

STEVEN L. JONES

CASE NO. 04-0025-LOD

REPORT AND RECOMMENDATION
ADMINISTRATIVE HEARING OFFICER D. MICHAEL QUINN

Issued July 28, 2004

I. FINDINGS OF FACT

A. BACKGROUND

This 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 3:00 PM on March 16, 2004, at 77 South High Street, 19th Floor, room 1910, Columbus, Ohio.

The hearing was held at the request of Respondent Steven L. Jones, of Cincinnati, 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 pleaded guilty in 2001, in Hamilton County, Ohio, to Disorderly Conduct, and, also, that Respondent failed to disclose the past criminal offenses on the Loan Officer License Application, 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 Martine Jean. Respondent appeared pro se.

At the hearing, State's Exhibits 1 through 7B were admitted into the record by stipulation. No witnesses appeared on behalf of the Division, although Respondent was cross-examined. Respondent did not introduce evidence other than his sworn testimony, as noted in the transcript (hereinafter "Tr.").

B. JURISDICTION

The Division issued the NOH against Respondent on January 22, 2004. Respondent requested a hearing, which was received by the Division at an unknown date on a Division Hearing Request Form that was not dated. On February 25, 2004, the Division scheduled the hearing for March 2, 2004, but continued the hearing, on its own motion, to March 16, 2004, at 3:00 PM, 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 4.)
2. Respondent is an individual who has conducted, and wishes to be able to conduct, business in Ohio as a Mortgage Loan Officer. (Exhibit 4.)
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 October 27, 2003, the Division received from Respondent a Loan Officer Application (hereinafter the "Application"). (Exhibit 1.)
5. On or about October 3, 2003, Respondent signed the Application and the signature was notarized. (Exhibit 4.)
6. Within the Application Respondent answered "No" to Question number 5, which asked: "Have you ... ever been convicted of any criminal offense? Exclude minor misdemeanor traffic and parking offenses ..." (Emphasis in original.) (Exhibit 4; Tr. pp. 16-17.)
7. As part of the application process, the Division conducted a background check and determined that Respondent had been

convicted on February 20, 2001, of disorderly conduct. (Exhibits 5, 6, 7B; Tr. pp. 19-25.)

8. Respondent knew he was being fingerprinted for a background check. (Tr. p. 47.)
9. Respondent's explanation of the 2001 disorderly conduct conviction was that the offense occurred during an incident at the time he and his ex-wife were separated in preparation of obtaining a divorce. He resided in their former apartment. When he returned to that apartment he found his wife attempting to retrieve possessions, in his absence, which he felt were his. The police came to their apartment after a call and arrested both spouses for domestic violence. Respondent, and his wife, each pleaded guilty to a charge of disorderly conduct and paid a small fine. (Exhibit 7A; Tr. pp. 23-30.)
10. At the time of the 2001 arrest, Respondent was handcuffed, put into the police cruiser, taken to the police station and spent the night in jail. (Exhibit 7A; Tr. pp. 28-29.)
11. 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. (Exhibit 4.)
12. Respondent's explanation of why he answered Question 5 on the Application as "no" when he knew that he had a conviction on his record was that he read the question to require that he report felony criminal offenses and exclude misdemeanor and traffic offenses. (Exhibit 4; Tr. pp. 16-18, 37.)
13. Respondent did not put forth any evidence other than his own sworn testimony, which is found to be a truthful representation of the events and of his understanding of the language of Question 5.
14. Respondent's unrefuted testimony was that he is an honest person. (Tr. pp. 47, 50.)
15. There is no evidence showing when the request for a hearing was received by the Division. Nothing on the face of the Hearing Request form indicates when it was received. (Exhibit 2.)

II. CONCLUSIONS OF LAW

A. JURISDICTIONAL ISSUE

1. Because nothing in the record indicates when the Division received the request for a hearing, it can not be determined if the Division set the hearing for within seven to fifteen days after the request for a hearing. Consequently, it cannot be determined if the Division procedurally complied with O.R.C. Chapter 119.

B. LICENSE APPLICATION

2. In 2001 Respondent pleaded guilty to a misdemeanor charge of disorderly conduct.
3. Disorderly conduct is not one of the offenses listed in Section 1322.041(A)(3), O.R.C., the conviction for which requires a respondent to 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."
4. 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 October 3, 2003, Respondent signed the Application under oath and filed that Application with a state agency – the Division – to obtain a license to engage in an occupation and that Application contained the "No" response to Question 5 when, in fact, Respondent had been convicted of a misdemeanor.
5. The Division had the burden of proving that Respondent's past criminal conviction disqualifies Respondent from receiving a license, or, in the alternative, that Respondent's response to Question 5 disqualifies Respondent from receiving a license.
6. The 2001 conviction cited is removed in substance but not in time. The conviction occurred at a time when Respondent was involved in a trying personal situation, unrelated to business or money and not involving moral turpitude. Respondent's explanation and demeanor during the hearing is sufficient to demonstrate that the conviction does not cause a finding that Respondent's character and general fitness do not command the confidence of the public

and does not negate the belief that the business will be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act.

7. Respondent's testimony that the wording of Question 5 confused him raises an issue. To resolve that issue it would appear that a two-prong test must be applied: was the Respondent confused by the language and, if so, is that confusion reasonable?
8. Respondent testified credibly that the wording of Question 5 was read by him to exclude misdemeanors. His offense was a misdemeanor and unrelated to activities associated with the loan officer business. Although he testified the, after re-reading the question with the assistance of the charges in the NOH and the comments made by Division's counsel, he understood his mistake, at the time he completed the Application the confusion existed.
9. The language of Question 5 asks if the Applicant has "ever been convicted of **any criminal offense?**" (Underlining and bold letters as they appear in the original.) However, then the question goes on to state: "Exclude minor misdemeanor traffic and parking offenses." Respondent read the language as being phrased as "minor misdemeanor offenses" and "traffic and parking offenses." The use of "minor" was understood to mean small, insignificant or unrelated, rather than the degree of the offense.
10. An Applicant for a loan officer license should not be required to hold a law degree, or have sufficient command of legal language so that such legal phrases, as "minor misdemeanor," are understood as a term of art.
11. It is not unreasonable for an applicant for a loan officer's license, who has a single, unrelated, misdemeanor conviction, to understand that the Division does not wish to bother itself with misdemeanors when reviewing an application. Minor, in this instance, could be read by an applicant to mean something unrelated to the business of being a loan officer.
12. The Division brought into question Respondent's honesty and truthfulness in his activities since the offense by bringing forth evidence of Respondent's inaccurate response to Question 5 on the Application.
13. The Division brought 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.

14. 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.
15. Respondent proved that his response to Question 5 was due to the confusing language.
16. The confusion Respondent experienced with Question 5 was not unreasonable given the facts present.
17. Any confusion in the language of Question 5 must be read in Respondent's favor since the form was the creation of the Division.
18. An applicant for a license should not be forced to guess what a question is asking.
19. Filing an inaccurate Application is ordinarily 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. However, Respondent proved that the wording of Question 5 was flawed so that a person of ordinary intelligence would find the language confusing.
20. The Division failed to provide sufficient evidence to prove Respondent's lack of general fitness to command the confidence of the public and the belief that the business will be operated honestly and fairly.
21. 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."
22. The Division failed to demonstrate that Respondent's response to Question 5 was a substantial misrepresentation and a false statement of a material fact required by law on the license application. It was not demonstrated that Respondent should have known what the Division intended in the language of Question 5. It

was not shown that Respondent would not have reported the conviction if the language was intelligible.

23. No evidence was presented indicating that the incorrect response to Question 5 was a fraudulent act, denoting deliberative intent.
24. The Division did not present sufficient proof that any of the conditions contained within 1322.041, O.R.C., were not met.

III. RECOMMENDATION

Pursuant to 119.07, O.R.C., the hearing must be set within seven to fifteen days after the agency receives the request for a hearing. (Geroc v. Ohio Veterinary Medical Bd., 37 OApp3d 192 (1987).) The record herein does not indicate whether that was done. Jurisdiction cannot be determined and, pursuant to Section 119.07, O.R.C., no final order may be issued adverse to Respondent. The record could be reopened, but, for other reasons, that is unnecessary.

Respondent's criminal conviction does not fall within the offenses listed in sections 1322.041(A)(3) or (4), O.R.C., whereby the burden shifts to the Respondent. Respondent demonstrated that the wording of this particular Question 5 was confusing to this Respondent with these specific facts. It was not argued that Respondent didn't recall the incident, but that the language of Question 5 excluded the reporting of an unrelated misdemeanor. While that is evidently not what the Division intended, a person of ordinary intelligence should not be required to know the Division's intent if the wording is confusing.

The Division has proven the prior criminal conviction but failed to prove that the conviction or Respondent's failure to report the conviction should cause a denial of Respondent's license. Respondent did present testamentary evidence that he has been honest and truthful and that a license should be issued. Consequently, the recommendation to the Superintendent of Financial Institutions is to **GRANT A MORTGAGE LOAN OFFICER'S LICENSE TO STEVEN L. JONES.**

Respectfully submitted,

D. Michael Quinn
Hearing Officer
July 28, 2004
Docket No. 04-DFI-044