

**STATE OF OHIO
DEPARTMENT OF COMMERCE**

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OHIO DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

IN THE MATTER OF:

DIVISION OF FINANCIAL
INSTITUTIONS

ARTHUR W. SUMMERS, III

CASE NO. 04-0410-LOD

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

Issued January 26, 2005

I. FINDINGS OF FACT

A. BACKGROUND

The above 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 10:30 AM on July 13, 2004, at 77 South High Street, 19th Floor, room 1918, Columbus, Ohio.

The hearing was held at the request of Respondent Arthur W. Summers, III, of Cleveland, 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 failed to disclose that Respondent pleaded guilty in 1990, in Cuyahoga County, Ohio, to Attempted Drug Abuse, 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 James Evans. Respondent appeared pro se.

At the hearing, State's Exhibits 1 through 9 were admitted into the record by stipulation and Division's Exhibit 10 was admitted, over Respondent's objections, subject to the weight deemed appropriate to afford it, as discussed in the transcript (hereinafter "Tr.") pages 39-46. Respondent requested the record remain open to receive what would be later marked as Exhibit A, over the Division's objections, subject to the weight deemed appropriate to afford the document. The record was kept open until 5:00 PM on Tuesday, July 20, 2004 (Tr. pp. 70-72). The one and only document, a letter of two pages, was received on July 19, 2004, and marked Exhibit A. The letter was not notarized although such was discussed with Respondent during the hearing (Tr. pp. 64-66.).

B. JURISDICTION

The Division issued the NOH against Respondent on March 1, 2004. Respondent requested a hearing, which was received by the Division on March 4, 2004. On March 5, 2004, the Division scheduled the hearing for March 15, 2004, but continued the hearing on its own motion to a date to be determined later. On April 29, 2004, the Division sent Respondent a letter scheduling the hearing for July 13, 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 6.)
2. Respondent is an individual who desires to conduct business in Ohio as a Mortgage Loan Officer. (Exhibits 1, 2.)
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 September 3, 2003, the Division received from Respondent a Loan Officer Application (hereinafter "the First Application"). (Exhibit 1.)
5. Respondent's signature was not properly notarized on the First Application. (Exhibit 1.)
6. Within the First Application Respondent answered "No" to Question number 5, which asked: "Have you or has any company for which you have been an officer, or more than 5% owner or director, ever been convicted of or pleaded guilty to any criminal offense

including, but not limited to, theft, ... forgery, ... or ... any criminal offense involving money..." (Exhibit 1; Tr. pp. 56-60.)

7. On or about November 5, 2003, the Division sent a letter to Respondent indicating that the First Application had not been properly notarized and a new application needed to be submitted. (Exhibit 1)
8. On or about November 19, 2003, the Division received from Respondent a Loan Officer Application (hereinafter "the Second Application"). (Exhibit 2.)
9. Respondent signed the Second Application on or about November 18, 2003, the date Respondent's signature was notarized. (Exhibit 2; Tr. p. 27.)
10. Within the Second Application Respondent answered "No" to Question number 5, which asked: "Have you or has any company for which you have been an officer, or more than 5% owner or director, ever been convicted of any criminal offense? ..." (emphasis in original). (Exhibit 2; Tr. p. 27.)
11. With both the First and the Second Applications the Division sent an instruction sheet which, inter alia, instructed Respondent that if he was not sure if he should report an offense, to report it on the Application because "[a]ny omission ... may result in your being denied ... a Mortgage Loan Officer License ...". (Exhibits 1, 2; Tr. pp. 27-30.)
12. In 1990, 13 years prior to the submission of the Second Application, Respondent was found guilty of one count of Drug Abuse. (Exhibit 3; Tr. pp. 30-31.)
13. Respondent's explanation of the 1990 conviction was as follows: While waiting at a friend's house for a ride home, the police entered searching for drugs. Respondent was unaware that his friend's mother was a drug addict. Although Respondent had no drugs, he was arrested on Possession of Cocaine. One other person in the house was arrested, but not all the people in the house. Respondent stated that the police told him that he was arrested because he didn't live in the neighborhood, placing him in a category of suspicious people. Respondent stated he pleaded guilty to the lesser charge of drug abuse on advice of counsel because otherwise he would have had to wait a number of days in jail until the judge returned from vacation. (Exhibit 5; Tr. pp. 48-55.)

14. Respondent was arrested, spent time in jail, appeared before a judge, and given a sentence of one year probation and community service. (Exhibit 5; Tr. pp. 48-55.)
15. Respondent acknowledges his conviction of the drug offense but maintains that he did not have possession of any illegal drugs and did not use such drugs. (Tr. pp. 48-55.)
16. Respondent testified that he discussed with his supervisor whether he should report the 13 year old drug conviction on the Application and his supervisor said he wouldn't have to report it. (Tr. pp. 27, 57, 59, 63-64.)
17. No witnesses appeared on Respondent's behalf, nor did Respondent otherwise offered evidence, other than his own testimony, except for the unnotarized letter submitted after the hearing. As discussed with Respondent, such a document would be of limited value unless it was notarized. As it was not, little weight could be given to the letter. In addition, it is noted that the date of the letter is one day after the hearing date. (Tr. p. 64-72.)
18. Respondent's explanation of why he answered Question 5 on the Application as "no" when he knew that he had a felony conviction on his record was that he and his supervisor both thought that the question on the Application asked about convictions involving when Respondent was an officer, director or 5% shareholder and he never was in any of those capacities. Also, he and his supervisor both thought that after 13 years it conviction wouldn't show up on Respondent's record and, even if it did, it did not pertain to his license. (Exhibit 5; Tr. pp. 21-26.)
19. The Application does not limit the response sought on Question 5 to crimes involving money, 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. (Exhibits 1, 2.)
20. Respondent testified that he reported the past conviction on the background check he had done for the employer but offered no other proof. (Tr. pp. 23-24.)
21. The Division offered a document that reportedly listed Respondent's driving record and it was admitted into the record. (Exhibit 10.)

II. CONCLUSIONS OF LAW

A. JURISDICTIONAL ISSUE

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

B. LICENSE APPLICATION

2. In 1990, Respondent was found guilty of a drug abuse, an offense not specifically cited in section 1322.041(A)(3), O.R.C., but asked about on the Application. Consequently, the burden does not shift to Respondent automatically 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."
3. The 1990 conviction cited was of a type and far enough removed in time, with no other charges cited, that, in itself, it would not be considered sufficient to deny Respondent's application.
4. The Division must still make an affirmative finding that Respondent's "character and general fitness 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 sections 1322.01 to 1322.12 of the Revised Code."
5. In eliciting evidence whether Respondent's activities prove that the Respondent's character and general fitness command the confidence of the public and warrant the belief that the business will be operated honestly and fairly, the Division demonstrated that, on or about August 21, 2003, and, again, on or about November 18, 2003, Respondent signed an application, the Second Application being under oath, and filed those applications with a state agency – the Division – to obtain a license to engage in an occupation and those applications contained false information, to wit: the "No" response to Question 5.
6. Even accepting at face value Respondent's explanation of his response to Question 5, it demonstrates a lack of attention to detail and an inability to carefully read instructions, both important traits for a loan officer. The Application specifically asks for any criminal convictions and does not limit the response to recent acts or charges relating to a loan officer's license or activities.

7. It is possible that Respondent could have presented sufficient proof that he justifiably relied on another's advice regarding Question 5, but that is not the record of this hearing. Given the inherent bias in Respondent's testimony, the described conversation with his supervisor cannot be accepted without corroborating evidence, which, since the Exhibit A could not be afforded any significant weight, was not offered.
8. 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.
9. Respondent failed to provide sufficient evidence to overcome the Division's argument that Respondent's response to Question 5 demonstrates the business will not be operated honestly and fairly.
10. The Respondent did not present evidence to substantiate his good reputation.
11. 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."
12. The proof the Division provided requires a finding that Respondent's response to Question 5 was a misrepresentation of a material fact required by law on the license application, even though there was no evidence of intent. The mens rea standard must be one of negligence – knew or should have known – in Respondent's answering the questions on the license application. Respondent knew the 1990 conviction occurred in his past and it was incumbent on him to determine if the event was in the category of activities of which he was required to report. While Respondent's testimony suggests that there may have been justifiable reliance on his supervisor's advice, there was not additional evidence sufficient to overcome the Division's proof.
13. The Division proved a violation of the Ohio Mortgage Broker Act section 1322.07(A) (making any substantial misrepresentation in any registration or license application), but the same conduct may not be found to have violated the other two provisions of that

section since there are no separate or distinct elements differentiating the different sections.

14. Exhibit 10, the printout on Respondent's driving record was not properly noticed in the NOH and, therefore, due process would prevent its use as a basis of denial of his license. The driving record could appropriately be used for impeachment purposes, but, in this case, the document did not impeach any testimony Respondent provided. As such the document's relevancy is suspect. Because the document was not identified by anyone under oath, its value in any event would be minimal. For the forgoing reasons, although Exhibit 10 is accepted to be what it purports to be, no weight was given the Exhibit and its information was not used in reaching a conclusion or recommendation.

C. DISCUSSION

Three factors weighed in Respondent's favor: a) the facts underlying the conviction were not egregious and not in the financial area; b) the conviction was 13 years prior to the Application and there have been no further convictions; and, c) his demeanor during the hearing generally conveyed truthfulness. However, Respondent did not provide sufficient evidence to overcome the questions raised by the Division as to his response to Question 5 on the Application.

III. RECOMMENDATION

The Division has proven the false statement on the Application. Based on the record available, it must be concluded that Respondent did not present sufficient evidence to prove his character and general fitness command the confidence of the public and warrant the belief that the business will be operated honestly and fairly 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 ARTHUR W. SUMMERS III.**

Respectfully submitted,

D. Michael Quinn
Hearing Officer
January 26, 2005
Docket No. 04-DFI-092