

**STATE OF OHIO
DEPARTMENT OF COMMERCE**

IN THE MATTER OF:

DONALD D. CLARK

DIVISION OF FINANCIAL
INSTITUTIONS

CASE NO. 05-0092-LOD

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

Issued February 7, 2006

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 1:30 PM on October 4, 2005, at 77 South High Street, room 1918, Columbus, Ohio.

The hearing was held at the request of Respondent Donald D. Clark, of Geneva, 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 of a crime involving theft and, also, that he submitted false information on the 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 Timothy C. Loughry. Respondent did not appear but submitted a written statement which was admitted into the record as

Exhibit A. At the hearing, State's Exhibits 1 through 3 were admitted into the record. One witness appeared and gave testimony for the Division.

At 12:20 PM on October 4, 2005, one hour and ten minutes before the hearing was to commence, Respondent contacted this hearing officer, with Assistant Attorney General Timothy C. Loughry also on the phone, and requested a continuance. Respondent's reason for the late request was that he had another job possibility offered him over the weekend (two days earlier) and he was contemplating that opportunity. When it was pointed out that he had the NOH many weeks earlier and knew many weeks ago that the hearing would be held today, he also stated that he had no transportation because his wife took the car into work. The request for a continuance was denied, but the offer was made to keep the record open until 5:00 PM, Friday, October 7, 2005, for Respondent to submit the documents he had stated he already had prepared and ready to present, provided those documents were in the hearing officer's hands by the close of the record. The opportunity to keep the record open was made over the Division's objections that the hearing should go forward, Respondent had ample time to prepare and plan, and the Division would not have the opportunity to cross examine any of the writers of letters of reference or the Respondent. The start of the hearing was delayed for 30 minutes to allow additional time for the Respondent to appear.

On October 7, 2005, originally signed documents were received from Respondent by the hearing officer. The documents were: a) a letter from Respondent, notarized on October 6, 2005, marked as Exhibit B; b) three testimonial letters from co-workers, notarized on October 6, 2005, marked as Exhibit C; and c) copies of documents from Lyndhurst Municipal Court, dated June 8, 2005, relating to the sealing of Respondent's criminal record, marked as Exhibit D.

B. JURISDICTION

The Division issued the NOH against Respondent on May 25, 2005. Respondent timely requested a hearing on June 8, 2005, that the Division scheduled for June 20, 2005, all within the requirements of Chapter 119, O.R.C. The Division continued the original date of the hearing to October 4, 2005, on which date the hearing went forward. (Exhibit 1.)

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 1.)
2. Respondent is an individual who wishes to be licensed as a mortgage loan officer in Ohio. (Exhibit 3.)

3. On December 24, 2003, the Division received from Respondent a Loan Officer Application (hereinafter the "2003 Application") which Respondent signed on November 6, 2003. (Exhibit 2.)
4. The 2003 Application was not notarized and the Division requested Respondent send a new application which was complete. (Exhibit 2.)
5. Respondent did not submit a new Application within the allotted 90 days he was given to respond and the 2003 Application was automatically withdrawn. (Exhibit 2.)
6. On December 21, 2004, the Division received from Respondent a Loan Officer Application (hereinafter the "2004 Application") which Respondent signed, under oath, on December 14, 2004. (Exhibit 3.)
7. Within the 2003 Application and the 2004 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 ..." (Exhibits 2, 3.)
8. On April 30, 2003, in Lyndhurst (Ohio) Municipal Court, Case No. 03CRB00327, Respondent was found guilty of theft on Respondent's No Contest plea. (Exhibit 4.)
9. Respondent's written statement of the facts leading to the theft conviction was as follows: While at a mall with his girlfriend at the time, they separated to go to different shops. When he rejoined her security stopped them and accused her of putting items into her baby stroller. Respondent states he had no knowledge of, or participation in, her activities. (Exhibit A.)
10. Respondent's sworn, written, explanation as to why he responded to Question 5 inaccurately was that Respondent believed that the judge in the original criminal case was going to remove the offense from Respondent's record. Respondent believed his record to have already been expunged. Because this written statement was not represented to be already in Respondent's possession, the statement was accepted into the record. (Exhibit B.)
11. Respondent did submit sworn written testimonial statements to be placed into the hearing record. 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 C would ordinarily be admitted into the record and considered, although, because the State could not cross examine the letter writers to test the authenticity,

accuracy or details of the documents, the Exhibit would have been afforded limited weight. The notarization of the letters would have generally enhanced their reliability. However, Respondent's representation that the letters were already prepared when, on October 4, he requested leave to submit them when that was obviously not the case requires that the letters not be admitted into the record. As an allowance to Respondent's right to proffer documents into the hearing record, Exhibit C is included as though proffered by Respondent. (Exhibit C.)

12. The court records dealing with the sealing of Respondent's record are ruled to not be relevant as they were sought after the Application was submitted to the Division and even after the NOH was issued. However, as with the testimonial letters which are contained in Exhibit C, these court records are being attached to the record in this case as though proffered by Respondent. (Exhibit D.)

II. CONCLUSIONS OF LAW

A. JURISDICTIONAL ISSUE

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

B. LICENSE APPLICATION

2. The Division has proven that in 2003 Respondent was convicted of a theft offense.
3. O.R.C. section 1322.041(A)(3) states, inter alia, that, if Respondent has been convicted of any criminal offense involving certain named offenses, including theft, Respondent must prove by a preponderance of the evidence that Respondent's activities and employment record since the conviction show that Respondent is honest, truthful, and of good reputation, and there is no basis in fact for believing that Respondent will commit such an offense again.
4. Because Respondent has not submitted evidence into the record other than his unsworn statement in Exhibit A and his sworn statement in Exhibit B, it cannot be concluded that Respondent proved by a preponderance of the evidence that Respondent's activities and employment record since the conviction show that Respondent is

honest, truthful, and of good reputation, and there is no basis in fact for believing that Respondent will commit such an offense again.

5. In presenting evidence whether Respondent's activities since the offenses prove that the Respondent is honest and truthful, the Division demonstrated that, on or about November 6, 2003, 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 inaccurate information, to wit: the “No” response to Question 5.
6. In presenting evidence whether Respondent's activities since the offenses prove that the Respondent is honest and truthful, the Division demonstrated that, on or about December 14, 2004, Respondent signed an 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 inaccurate information, to wit: the “No” response to Question 5.
7. Because the Applications submitted by Respondent contained an inaccurate response, the Division was able to demonstrate that Respondent's activities since the offenses show that the Respondent has not been honest or truthful. The rebuttable presumption is that Respondent knew, or should have known, that he had been convicted of a crime, particularly one which occurred only a few months prior to the Applications.
8. 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.
9. 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 theft conviction and his inaccurate responses to Question 5.
10. A recent theft conviction 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, and Respondent presented little evidence to refute the Division's contention. His letter, sent in response to the Division's request and contained in Exhibit 4 and as Exhibit A, and treated as a written statement of his position and arguments, provides his description of the events but does not explain

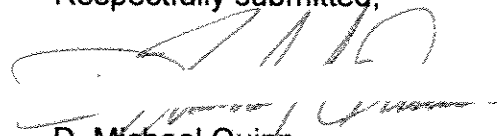
why a judge would find him guilty. His explanation why he answered "No" to Question 5, contained in Exhibit B, is unsubstantiated.

11. 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 or an apparent attempt to hide the conviction from the Division.
12. Because Respondent has only submitted limited evidence into the record it cannot be concluded that Respondent has refuted the Division's assertions that Respondent's character and general fitness do not command the confidence of the public nor warrant the belief that the business will be operated honestly and fairly in compliance with the purposes of sections 1322.01 to 1322.12, O.R.C. Section 1322.041(A)(5).
13. 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."
14. Intent is required for a finding of any of the three provisions but intent can be proven by the surrounding circumstances. Herein, Respondent submitted the 2003 Application only six months after his conviction and submitted the 2004 Application one year later, 18 months after the conviction. According to Respondent's letter (Exhibits 4, B) it was the only conviction he ever received. Consequently, he would have been fully cognizant of the conviction at the time he filled out the two Applications. Either he did not treat the Applications seriously and did not read the Application questions or he deliberately tried to hide the conviction from the licensing body. Because the only evidence on the record is that he signed the Applications and, in 2004, attested under oath to his truthful responses, it must be presumed that he did read and understand the questions.
15. Because the conduct of Respondent can be construed to constitute any and all three of the allied offenses of similar import of 1322.07(A), (B), or (C), Respondent may only be found to have violated one of them. It is determined that Respondent violated section 1322.07(A) as the provision most representative of the facts in this matter.

III. RECOMMENDATION

The Division has proven the Respondent has a theft conviction which was not disclosed. Respondent did not submit sufficient evidence to prove that Respondent's activities and employment record since the conviction show that Respondent is honest, truthful, and of good reputation, or to prove there is no basis in fact for believing that Respondent will commit such an offense again or 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 the Ohio Mortgage Broker Act. Consequently, the recommendation to the Superintendent of Financial Institutions is to **DENY A MORTGAGE LOAN OFFICER'S LICENSE TO DONALD D. CLARK.**

Respectfully submitted,



D. Michael Quinn
Administrative Hearing Officer
February 7, 2006
Docket No. 05-DFI-094