

DIVISION OF FINANCIAL INSTITUTIONS
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**STATE OF OHIO
DEPARTMENT OF COMMERCE**

IN THE MATTER OF:

DIVISION OF FINANCIAL
INSTITUTIONS

JACK RAY CALDWELL

CASE NO. 04-0082-LOD

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

Issued July 12, 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 8:30 AM on February 26, 2004, at 77 South High Street, 19th Floor, room 1918, Columbus, Ohio.

The hearing was held at the request of Respondent Jack Ray Caldwell, of Westerville, 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 1975, in Franklin County, Ohio, to Receiving Stolen Property and pleaded guilty in 1989, in Franklin County, Ohio, to Disorderly Conduct, 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 Anthony D. Siciliano. Respondent appeared pro se.

At the hearing, State's Exhibits 1 through 6 were admitted into the record by stipulation. Respondent's Exhibits A and C were admitted into the record without objection and Respondent's Exhibit B was admitted into the record, over the Division's objection on hearsay grounds, all subject to the limited weight afforded the documents, as discussed in the transcript (hereinafter "Tr."). Respondent requested to keep the record open to receive what would have been Exhibit D. The record was kept open until 5:00 PM on Monday, March 1, 2004 (Tr. pp. 28-29, 35-36), however, the document was never received and the record closed without the Exhibit.

B. JURISDICTION

The Division issued the NOH against Respondent on January 22, 2004. Respondent requested a hearing, which was received by the Division on January 28, 2004. On January 30, the Division scheduled the hearing for February 9, 2004, but continued the hearing to February 26, 2004 on its own motion, 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 continues to conduct, business in Ohio as a Mortgage Loan Officer. (Exhibit 1; Tr. pp. 27.)
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 2, 2002, the Division received from Respondent a Loan Officer Application (hereinafter the "Application"). (Exhibit 1.)
5. Respondent signed the Application on September 18, 2002, which he had filled out on, or about, the same day. (Exhibit 1; Tr. p. 41.)
6. 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, ...forgery, ... , or any criminal offense involving money..." (Exhibit 1; Tr. pp. 23-24, 41.)

7. In 1975, 27 years prior to the submission of the Application, Respondent was found guilty of one count of Receiving Stolen Property. (Exhibit 3; Tr. pp. 23-24.)
8. Respondent's explanation of the 1975 conviction was that the offense involved a high school classmate who offered to sell Respondent a tape deck for Respondent's van, when Respondent was 17 years old. After the police caught the classmate the property was traced to Respondent who indicated he was unaware it was stolen. Respondent stated that his father handled the matter on Respondent's behalf due to Respondent's age. (Exhibit 3; Tr. pp. 23, 37-39.)
9. In 1989, 13 years prior to the submission of the Application, Respondent was found guilty of one count of Disorderly Conduct. (Exhibit 3; Tr. p. 24.)
10. Respondent's explanation of the 1989 conviction was that, in trying to recover his money from a ticket scalper who had sold Respondent an invalid OSU football ticket, a fight ensued. Respondent was apprehended; all charges were dropped relating to the fight but Respondent convicted of disorderly conduct resulting from his running from the scene when officers arrived. (Exhibit 3; Tr. pp. 40, 44-46.)
11. Respondent was brought into court on both occasions, entered a plea on both occasions, and fined on both occasions. (Exhibit 3; Tr. pp. 37-38.)
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. (Exhibit 1.)
14. Respondent's explanation of why he answered Question 5 on the Application as "no" when he knew that he had felony convictions on his record was that, as to the 1975 guilty plea, he didn't realize that what he had done as a juvenile would be on his record as an adult and just forgot about it; and as to the 1989 guilty plea, he didn't

understand that his disorderly conduct conviction was a criminal offense. (Exhibits 1, 3; Tr. pp. 42-46.)

15. The Division has not set forth any evidence indicating that the incorrect response to Question 5 was a fraudulent act, denoting deliberative intent.
16. Witnesses residing in Respondents community believe Respondent to have a good reputation. (Tr. pp. 51-52, 66-67.)

II. CONCLUSIONS OF LAW

A. JURISDICTIONAL ISSUE

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

B. LICENSE APPLICATION

2. In 1975, Respondent was found guilty of a "criminal offense involving ...receiving stolen property...", an offense specifically cited in section 1322.041(A)(3), O.R.C., and on the Application.
3. The receiving stolen property 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 Exhibits B and C are letters from Respondent's past and present employers who were not in attendance at the hearing. Because an administrative hearing is designed to permit a respondent an opportunity to offer an explanation without the formalities or expense of a trial, Exhibits B and C were admitted into the record and considered. Because the State could not cross examine the letter writers to test the authenticity, accuracy or details of the documents, and Exhibit C did not offer specificity for the general statements made within it, Exhibits B and C have been afforded limited weight.

5. Respondent's Exhibit A is accepted to be what it purports to be, although only a limited foundation was offered.
6. Because the decision in this case rests on a matter other than Respondent's reputation the weight given to Exhibits A, B and C was not determinative of the outcome.
7. The 1975 and 1989 convictions cited are far enough removed in time, one occurring at a time when Respondent was still immature, that, with Respondent's explanations and his demeanor during the hearing, in combination with the testimony of witnesses, the evidence would be sufficient to meet Respondent's burden to show there is no basis in fact for believing that he will commit such offenses again.
8. 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 September 18, 2002, 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 false information, to wit: the "No" response to Question 5.
9. Respondent's omission on the Application of a 27-year-old conviction, occurring at a time when he was still a minor, which the testimony indicated was dealt with by his father, without Respondent's participation in the plea, is understandable and should not be the grounds for a denial. However, the omission of the disorderly conviction does not lend itself to the same leniency since Respondent was an adult, hired a lawyer and paid a fine.
10. Even accepting at face value Respondent's explanation of his response to Question 5, as it relates to the 1989 conviction, it demonstrates a lack of attention to detail. The Application specifically asks for any criminal convictions and does not limit the response to recent acts or felonies. The very wording of the question must temper an inclination toward leniency for the nature and age of the 1989 conviction.
11. 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. Respondent knew, or should have known, that he had been convicted of a crime.

12. The Respondent did present evidence to substantiate his good reputation.
13. 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.
14. 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.
15. 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.
16. 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.
17. 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.
18. 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.
19. 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."
20. 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 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 not only could have learned the true nature of the facts to which he was attesting but he should have learned those facts, if he was not already in possession of that knowledge. Respondent knew the 1989 disorderly 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 indicates that the omission of his 1975 conviction was not intentional or negligent, the omission of the 1989 conviction information had to have been intentional or negligent.

III. RECOMMENDATION

Three factors weighed in Respondent's favor: a) the facts underlying the convictions were not egregious; b) the convictions occurred 27 and 13 years prior to the Application; and, c) his demeanor during the hearing generally conveyed truthfulness. Respondent's quite old convictions – even one involving an offense of stolen property – should not, in itself, cause his license to be denied. But although Respondent generally provided convincing, credible testimony, the one exception was his explanation for answering Question 5 incorrectly as it relates to the 1989 conviction. One would expect that traumatic and unique events in his life would be remembered, or that paying a fine would reinforce that he was found guilty of a criminal offense.

The Division has proven the prior criminal convictions. 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 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 JACK RAY CALDWELL.**

Respectfully submitted,

D. Michael Quinn
Hearing Officer
July 12, 2004
Docket No. 04-DFI-004