

01MAR20 11:37

**STATE OF OHIO
DEPARTMENT OF COMMERCE**

IN THE MATTER OF:

DAVID A. SAMPLES

:
:
:
:
:
:
:

DIVISION OF FINANCIAL
INSTITUTIONS

CASE NO. M2006-9992884

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

Issued March 14, 2007

I. FINDINGS OF FACT

After having heard the testimony, considered the evidence, observed and weighed the demeanor and credibility of the witnesses, the following factual findings are made:

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 2:00 PM on September 29, 2006, at 77 South High Street, 23rd Floor, West Conference Room, Columbus, Ohio.

The hearing was held at the request of Respondent David A. Samples, of Grafton, 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 alleged that:

- On or around January 22, 2003, Respondent attested in a sworn statement that information provided about his criminal background was complete and truthful when it was not;

- On or around January 23, 2003, Respondent provided incomplete or untruthful information about his criminal background;
- On or around October 7, 2004, Respondent attested in a sworn statement that information provided about his criminal background was complete and truthful when it was not;
- On or around October 13, 2004, Respondent provided incomplete or untruthful information about his criminal background;
- On or around May 18, 2006, Respondent attested in a sworn statement that information provided about his previous application was complete and truthful when it was not;
- On or around May 25, 2006, Respondent provided incomplete or untruthful information about the previous denial of his application on a new application;

and Respondent 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 Ted L. Klecker. Respondent appeared *pro se*.

At the hearing, State's Exhibits A through G were admitted into the record, as discussed in the transcript (hereinafter "Tr."). State's Exhibit H was introduced but then withdrawn. Respondent's Exhibit 1, comprised of the prior Hearing Officer's Report and Recommendation issued September 15, 2005, was admitted into the record. One witness appeared for the Division, in addition to calling Respondent as on cross, and Respondent was his only witness.

The record was kept open until October 10, 2006, at 5:00 PM in order to receive a notarized document from Respondent, as described in Tr. pp. 160-166. That document was not received until October 13, 2006, and, thus, was not received into the record as an Exhibit and was not considered. Because that document was not admitted as an Exhibit, the written objection, in the form of a Memorandum, by the Division was also not admitted. However, for clarification purposes, those documents are attached to the record, but not made a part thereof. Because Respondent's affidavit was untimely, as set forth clearly in the record, it is not considered proffered, as also discussed in Tr. pp. 160-166.

B. JURISDICTION

The Division issued and mailed the NOH against Respondent on August 1, 2006. Service was perfected August 6, 2006. Respondent requested a hearing, which was received by the Division on August 17, 2006. On August 18, 2007, the Division scheduled the hearing for August 28, but continued the hearing to September 13, 2006, on its own motion. At Respondent's request, the hearing was continued to September 29, 2006 at which time the hearing went forward. The Hearing was originally scheduled for 10:00 AM, but, due to

Respondent's belief that an afternoon time had been agreed upon, the hearing was moved to 2:00 PM that day.

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.
2. Respondent is an individual who wishes to conduct business in Ohio as a Mortgage Loan Officer. (Exhibit D.)
3. On January 23, 2003, the Division received from someone on Respondent's behalf a Loan Officer Application for Respondent (hereinafter the "2003 Application"). (Exhibit G; Tr. pp. 61-62.)
4. Someone signed Respondent's name and a notary public attested to the signature on the 2003 Application, which signature attested to the responses, on January 22, 2003. (Exhibit G; Tr. 48-50.)
5. Within the 2003 Application, Question number 5 asked: "Have you ... ever been convicted of any criminal offense? Exclude minor misdemeanor traffic and parking offenses. (DUIs and DWIs are criminal offenses.)" (emphasis in original). (Exhibit G.)
6. The person signing the form answered "No" to Question 5 in the 2003 Application. (Exhibit G.)
7. On March 6, 2003, the Division sent a request for additional information to Respondent, requesting information regarding a May 11, 2001, charge of one count of domestic abuse in Lorain County. (Exhibit G.)
8. Respondent never responded to the request for additional information and, as a result, the 2003 Application was withdrawn by virtue of section 1322.031(D), O.R.C., on August 8, 2003. (Exhibit G.)
9. On October 13, 2004, the Division received from Respondent a Loan Officer Application (hereinafter the "2004 Application"). (Exhibit F.)
10. Respondent signed the 2004 Application, attesting to his responses, on October 7, 2004. (Exhibit F.)

11. Within the 2004 Application, Question number 5 asked: "Have you ... ever been convicted of any criminal offense? Exclude minor misdemeanor traffic and parking offenses. (DUIs and DWIs are criminal offenses.)" (Emphasis in original). (Exhibit F.)
12. Respondent answered "No" to Question 5 in the 2004 Application. (Exhibit F; Tr. pp. 46-47.)
13. After an administrative hearing on May 12, 2005, the Division issued an Order on February 24, 2006, in Case No. 05-0084-LOD, disapproving, in part, the Report and Recommendation issued September 15, 2005, and denying Respondent's 2004 Application. (Exhibits E, Respondent's 1.)
14. The Order of February 24, 2006, denying Respondent's 2004 Application was the only Order on that 2004 Application the Division sent. (Tr. p. 109.)
15. On May 25, 2006, the Division received from Respondent a Loan Officer Application (hereinafter the "2006 Application"). (Exhibit D.)
16. Respondent signed the 2006 Application before a notary public, attesting to his responses, on May 18, 2006. (Exhibit D.)
17. The comparable question on the 2006 Application to the Question 5 on the 2004 Application was bifurcated and is found in Questions 5 and 6. Question 6, which asks specifically whether the applicant has been arrested, convicted or pleaded guilty now asks about specific offenses, i.e.: theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities, mirroring the language in section 1322.031(A)(2), O.R.C. (Exhibit D.)
18. Respondent answered "No" to Question 6. (Exhibit D.)
19. Question 4 of the 2006 Application asks: "Have you ever had any type of approval or application to conduct business (such as a license or certificate of authority) denied, revoked, suspended, or refused to be renewed or ..." (Exhibit D; Tr. pp. 59-60.)
20. Respondent answered "No" to Question 4 on the 2006 Application. (Exhibit D; Tr. pp. 59-60.)

21. On, or about, August 30, 2001, Respondent pleaded No Contest to, and was convicted of, one count of Disorderly Conduct, a fourth degree misdemeanor, in Elyria Municipal Court. (Tr. pp. 51-56.)
22. Respondent's explanation of the Disorderly Conduct was that he was originally charged with Domestic Violence stemming from a heated divorce situation. Respondent states that he had no knowledge that he had a criminal conviction until the Division sent him a letter to that effect. Respondent's divorce attorney told him that the charges were dismissed, but Respondent indicates that he did pay a \$250 fine and appeared in court. (Exhibit B; Tr. pp. 67, 70-71.)
23. Respondent's testimony that he believed that the list of offenses in Question 5, in the 2004 Application, pertained to applicants who were officers or directors or owners of a business demonstrated some confusion over the reading of the question. (Tr. pp. 46-47.)
24. Respondent adamantly denies that he signed or submitted the 2003 Application. (Tr. pp. 49-50, 61-62.)
25. Respondent stated that the previous denial was based on allegations not in evidence at the hearing in 2005. Specifically that a DUI conviction was relied upon for the denial. (Tr. p. 46.)
26. The Division Order of 2006 denying the 2004 Application did not contain an allegation relating to a DUI. (Exhibit E.)
27. Respondent demonstrated confusion regarding the issuance of the Division Final Order on his 2004 Application. (Tr. pp. 45-46.)
28. Loan documents are no less difficult to read and understand than the loan officer applications.
29. Respondent's only evidence was his own testimony and a copy of the last hearing's Report and Recommendation.

II. CONCLUSIONS OF LAW

A. JURISDICTIONAL ISSUE

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

B. LICENSE APPLICATION

2. Respondent has been proven to have been convicted of a criminal offense. The offense is not an offense specifically cited in sections 1322.041(A)(3) and (4), O.R.C.
3. The offense is not in the category which automatically requires the 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." Section 1322.041(A)(3), O.R.C.
4. By virtue of the allegations in the NOH, the Division made issues of the former two Applications and the specific charges that arose therefrom. Although it was not necessary to the present allegation that Respondent failed to disclose that he had been denied the 2004 Application, because the Division alleged in the present NOH and brought forth evidence to substantiate the earlier actions, Respondent was entitled to then argue that earlier denial was not justified, thus, in the Division's words, re-litigating the 2005 NOH.
5. The only evidence that Respondent signed and submitted the 2003 Application was that the document was notarized. However much society expects to be able to rely upon the notarization of a signature, too many loan officer hearings have elicited testimony that the applicant was not present when the notary affixed their seal. Because Respondent denies that he submitted the 2003 Application and because his testimony suggests an alternative explanation – that his manager filled it out and submitted it independently of Respondent – and because that alternative explanation was bolstered by the later withdrawal of the 2003 Application, it has not been demonstrated that the 2003 Application was signed or submitted by Respondent.
6. No hearing was held, or final determination ever made, on the 2003 Application. No evidence was presented that demonstrates that any determination was ever made that Respondent completed and signed the 2003 Application. Because the 2003 Application was withdrawn by statutory action, there were no "findings" made. Consequently, because Respondent disavows signing or submitting the document, it is as if the 2003 Application never existed, either for the benefit to, or disadvantage of, Respondent.

7. The fact that the language of Question 5 has changed in the years since Respondent first submitted the 2004 application does not, in itself, demonstrate that the language was so confusing that it required changing. While it may be true that the language is less confusing in the current version, no testimony proves that is the reason it was reworked.
8. Respondent answered Question 6 on the 2006 Application in the affirmative and correctly. If the Division seeks to hold against him that he responded incorrectly on the 2004 Application, then his positive response on the 2006 Application should be recognized. While it is true that Respondent would have learned the first time through the process that the incorrect response will not result in a license, Respondent's answer to the question was correct.
9. The Division's denial of Respondent's 2004 Application does not, of itself, provide direction how the 2006 Application should be treated.
10. Respondent was quite animated in his denial that he knew that he had a conviction in the domestic action prior to the time the Division brought it to his attention. He was equally adamant that he misunderstood Question 5 on the 2004 Application and thought that the question only applied to those persons who had an ownership or officer position in a company. However, in addition to these answers being somewhat in opposition – if he thought the question only applied to owners and officers why would he claim he didn't report the conviction because he wasn't aware of it – Respondent is applying for a license for an occupation which requires him to read and understand complex legal documents. If he has trouble with Question 5 on the 2004 Application, can he successfully administer the lending forms?
11. Respondent is held to have failed to report his conviction on the 2004 Application.
12. Respondent is charged with failing to report to the Division, on his 2006 Application, the denial of his 2004 Application by the Division. This seems an unnecessary, technical, bureaucratic trap. However, the question in the Application is clear and, while undoubtedly not the intention of Respondent to intentionally answer the question incorrectly, nevertheless, Respondent did answer the question incorrectly.
13. Respondent signed the 2006 Application, attesting to the accuracy of the information when it was not accurate and submitted it to the Division with the inaccurate information.

14. The Division 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. The Division seeks to bring into question Respondent's character and general fitness to 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 by bringing forth evidence that the Division made a finding that Respondent submitted an inaccurate response on the 2003 Application and on the 2004 Application and on the 2006 Application.
16. The 2003 Application was withdrawn and will not be considered.
17. There is nothing noted in Chapter 1322, O.R.C., which suggests Respondent should be held accountable indefinitely for any mistake made on an earlier Application. Since section 1322.041 indicates an applicant can receive a license, despite past criminal convictions, if he can demonstrate that he has paid his debt to society and redeemed himself, the logical conclusion is that the incorrect response to Question 5 on the 2002 Application should not be a permanent bar to obtaining a license.
18. Respondent provided insufficient evidence to overcome the Division's evidence questioning his general fitness to command the confidence of the public and the belief that the business will 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 2004 Application "No", and failing to report to the Division the 2006 denial by the Division.
20. The Division, while proving the answers to Question 5 (2004 Application) and Question 4 (2006 Application) were incorrect, presented no evidence that Respondent committed a deliberate act. Respondent's confusing testimony was the only evidence offered by the Division and, while it may not assist Respondent, it is insufficient evidence, alone, for the Division to meet its burden. The Division has

the burden of proof. Since definitions found in statute, case law and Black's Dictionary indicate that "false," "misleading" and "misrepresentation" require a deliberate act, the Division has not met its burden.

21. The Division only put on evidence that the answer on the Application was incorrect, not that it was a substantial misrepresentation or a false or misleading material statement. The Division did not prove violations of 1322.07.

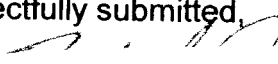
C. DISCUSSION

At times, Respondent's testimony was so disjointed that it was impossible to follow. The testimony was sufficiently inarticulate to demonstrate that Respondent would have been better served to use legal counsel. Respondent had difficulty comprehending some of the questions at the hearing, so it is understandable he had the same difficulty comprehending the questions on the Applications. However, there is a certain level of intellectual agility required of Loan Officers in order to insure the public is receiving the correct information from a knowledgeable expert.

III. RECOMMENDATION

The Division has proven the prior conviction and the prior denial and the 2004 and 2006 omissions. Respondent did not present sufficient evidence to prove 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 DAVID A. SAMPLES.**

Respectfully submitted,


D. Michael Quinn
Hearing Officer
March 14, 2007
Docket No. 06-DFI-175