

**STATE OF OHIO  
DEPARTMENT OF COMMERCE**

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DIVISION OF FINANCIAL  
INSTITUTIONS  
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IN THE MATTER OF:

DIVISION OF FINANCIAL  
INSTITUTIONS

**KEITH D. MALCOM**

CASE NO. 04-0134-LOD

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

**Issued March 17, 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 10:30 AM on July 20, 2004, at 77 South High Street, room 1918, Columbus, Ohio.

The hearing was held at the request of Respondent Keith D. Malcom, of Bedford Heights, 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 committed crimes involving theft and possession of drugs 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 James M. Evans. Respondent did not appear but had requested a hearing. The start of the hearing was postponed for 45 minutes to provide sufficient time for Respondent to appear. No request for delay or other communication was received from Respondent.

At the hearing, State's Exhibits 1 through 15 were admitted into the record. One witness appeared and gave sworn testimony on behalf of the Division.

## B. JURISDICTION

The Division issued the NOH against Respondent on January 22, 2004. Respondent timely requested a hearing on February 23, 2004, that the Division scheduled for March 8, 2004, all within the requirements of Chapter 119, O.R.C. The Division continued the original date of the hearing to July 20, 2004, on which date the hearing went forward. (Exhibits 11-15.)

## 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 continue to conduct business in Ohio as a mortgage loan officer. (Exhibit 1.)
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 April 25, 2002, the Division received from Respondent a Loan Officer Application (hereinafter the "Application") which was signed, under oath, by Respondent on, or about, April 4, 2002. (Exhibit 1.)
5. 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 ..." (Exhibit 2.)
6. On September 16, 1982, Respondent was found guilty of petty theft. (Exhibits 3, 4, 5, 8, 9; Tr. pp. 12, 23-24, 25.)

7. Respondent's written explanation of the facts of the theft conviction was as follows: "The money, in the amount of about \$1,500, was left on the counter at the gas station where I worked. I did take that money, but paid it back to the owner." (Exhibit 5.)
8. On, or about, July 19, 2002, Respondent was found guilty of one count of Possession of Drugs, in the Court of Common Pleas, Cuyahoga County, Ohio. (Exhibits 5, 9.)
9. Respondent's written explanation of the facts leading to the conviction on Possession of Drugs was as follows: Respondent was a passenger in a car the Police stopped. A search discovered drugs in Respondent's pocket. Respondent states he didn't know how the drugs ended up in his pocket but thinks his acquaintance placed them on Respondent. Respondent stated he doesn't sell drugs. (Exhibit 5.)
10. Respondent's stated reason for responding "No" to Question 5 on the Application was that he forgot about the conviction. (Exhibit 9.)
11. The guilty pleas were entered twenty years prior to the Application and five months after the Application and the Application was 21 months prior to the hearing. (Exhibits 1, 5, 9.)
12. Respondent did not submit any evidence into the hearing record. However, the letters received from Respondent by the Division as part of the investigation, introduced by the Division, was treated as Respondent's written statement. (Exhibits 5, 9.)

## **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 1982 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. Respondent has not offered any proof so he has not proven by a preponderance of the evidence that his 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. The Division has proven that the 1982 theft conviction was not disclosed on the Application by Respondent.
6. The Division has proven that Respondent pleaded guilty to drug possession in 2002, after the Application was submitted.
7. The Division did not introduce evidence of an ongoing duty to correct or update an Application.
8. By virtue of the theft conviction, the Division has raised the issue of Respondent's honesty, truthfulness and reputation being such that a license may not issue. Because Respondent has not presented any defense, such as the argument that the offense was quite some years ago, the Division's allegation must prevail.
9. 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 April 4, 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.
10. The Respondent did not present evidence of his honesty, truthfulness or good reputation.
11. Because the Application submitted by Respondent contained a false response, the Division was able to demonstrate that Respondent's activities since the offenses show that the Respondent has not been honest or truthful. Respondent knew, or should have known, that he had been convicted of a crime.

12. 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.
13. 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.
14. Respondent offered no explanation of his response to Question 5, except he forgot (Exhibit 9). This 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.
15. 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. The public expects loan officers to be detail oriented in order to accurately navigate through the paperwork relating to a real estate loan.
16. Because Respondent has not submitted any 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).
17. 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."
18. The Division proved by a preponderance of the evidence 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 was responsible

for knowing the true nature of the facts to which he was attesting and has not presented any facts suggesting it was not a negligent act.

### C. DISCUSSION

The Division has proven the Respondent has a theft conviction which was not disclosed. Respondent did not submit any evidence to prove 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 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.

### III. RECOMMENDATION

Consequently, the recommendation to the Superintendent of Financial Institutions is to **DENY A MORTGAGE LOAN OFFICER'S LICENSE TO KEITH D. MALCOM.**

Respectfully submitted,

D. Michael Quinn  
Hearing Officer  
March 17, 2005  
Docket No. 04-DFI-093