

**STATE OF OHIO
DEPARTMENT OF COMMERCE**

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INSTITUTIONS
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IN THE MATTER OF:

JOSHUA R. RILEY

DIVISION OF FINANCIAL
INSTITUTIONS

CASE NO. 05-0083-LOD

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

Issued July 27, 2005

I. FINDINGS OF FACT

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 9:00 AM on April 21, 2005, at 77 South High Street, Room 1918, Columbus, Ohio. As discussed below, the record was held open until April 28, 2005.

The hearing was held at the request of Respondent Joshua R. Riley, of Galloway, 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 convicted of assault in 1997, and failed to make timely restitution, 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 appeared and was represented by Damon Wetterauer, Jr., Esq., Westerville, Ohio.

At the hearing, State's Exhibits A through E were admitted into the record. No witnesses appeared to testify other than Respondent. The record was kept open until 5:00 PM on April 28, 2005, to afford Respondent an opportunity to submit additional Exhibits (See Transcript (hereinafter "Tr.") pp. 36-40). (Note that the transcript refers to a date of April 27; however, one week from the hearing was April 28 and it was the intention to allow one week.) As a result, Respondent's Exhibits 1 through 6 were admitted into the record on April 28, 2005, over the State's objections as to hearsay and extension of time, all subject to the weight deemed appropriate to afford the documents. A letter from Respondent was not admitted into the record, nor marked as an Exhibit, as it was repetitive of his sworn testimony. It has, however, been included with the Exhibits received from Respondent's counsel as though it was proffered into the record by Respondent, in accordance with section 119.09, O.R.C.

B. JURISDICTION

The Division issued the NOH against Respondent on March 17, 2005. Respondent requested a hearing, which was received by the Division on March 23, 2005. On March 29, 2005, the Division scheduled the hearing for April 4, 2005, but continued the hearing to April 21, 2005 on its own motion, at which time the hearing went forward. The record was kept open until 5:00 PM on April 28, 2005, as noted above.

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 C.)
2. Respondent is an individual who wishes to be licensed to conduct business in Ohio as a Mortgage Loan Officer. (Exhibit A; Tr. p. 28.)
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 February 22, 2005, the Division received from Respondent a Loan Officer Application (hereinafter the "Application"). (Exhibit A.)
5. Respondent signed the Application on, or about, February 21, 2005. (Exhibit A.)

6. Within the Application Respondent answered "Yes" to Question number 5, which asked: "Have you ... ever been convicted of any criminal offense ...?" (Exhibit A; Tr. pp. 15, 29-30.)
7. In conjunction with Respondent's submission of the Application, he sent all of Exhibit B to provide a full explanation of the conviction which caused him to respond "Yes" to Question 5. (Exhibit B; Tr. p. 15.)
8. On, or about, August 22, 1997, Respondent was convicted of Aggravated Assault without a harm specification, a felony of the fourth degree, in Franklin County Court of Common Pleas. (Exhibit B; Tr. pp. 15-19.)
9. Respondent's explanation of the facts leading to the assault conviction was: he was 20 years old and near Ohio State University campus with his brother late one night. Respondent's brother had angry words with five individuals who followed Respondent and his brother to a local store and met them when Respondent and his brother left the store. Respondent's brother responded in kind to further angry words and, shortly, a fight broke out. Respondent went to the aid of his brother who was younger and for whom Respondent felt responsibility. After the fight broke up, to the detriment of the five individuals, the five individuals contacted nearby police and accused Respondent and his brother as being the instigators. (Tr. pp. 15-19, 23-24.)
10. Respondent was placed on probation for three years and restitution was ordered. Respondent has never understood why he was ordered to pay the restitution. After occasionally paying the amounts due, Respondent was unable to make a \$50 payment because he was unemployed and did not have the needed funds and probation was extended one year. As of February 4, 2004, Respondent was found to have fully complied with the probation terms and was released from probation. (Exhibit B; Tr. pp. 19-23.)
11. Respondent acknowledges his commission of the offense and takes responsibility for his past actions. (Tr. pp. 32-33.)
12. Respondent testified that his lifestyle has changed since he was 20 years old and he is not living a nighttime lifestyle that would cause such an offense to be repeated. Respondent was, and is, emotionally close to his brother and, also, felt protective as the older sibling. (Tr. pp. 15, 23-28, 31-33.)

13. The Exhibits supplied by Respondent are unsworn statements from his present and past wives and other persons who generally indicate knowing Respondent over a number of years.
14. Two persons submitted unsworn statements indicating that they were familiar with Respondent through past employment and that Respondent is hard-working, disciplined and trustworthy. (Exhibits 3, 5.)
15. In recent years, Respondent has been regularly employed in order to provide for his family. (Exhibit 6; Tr. pp. 25-28.)
16. The statement from Respondent's ex-wife indicates that Respondent has regularly paid child-support payments. (Exhibit 2.)
17. Respondent's repentant, candid, straight-forward responses and attitude throughout the hearing gave significant weight to the credibility of his testimony.
18. Respondent's demeanor, including concern for others whose lives were impacted as a result of his actions, was far more mature than his conviction would suggest.

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 an assault offense, in 1997, which is not an offense specifically cited in sections 1322.041(A)(3) or (4), O.R.C., or on the Application
3. Arising from the same assault conviction, the Division demonstrated that Respondent's probation was extended as a result of his failure to make one of the restitution payments.
4. 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.

5. The Division brought 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 of Respondent's single assault conviction and his failure to complete his payment of restitution within the initial probationary period.
6. Respondent's Exhibits 1 through 6 were submitted by persons 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, Respondent's Exhibits were admitted into the record and considered. Because the letters were unsworn and because the State could not cross examine the letter writers to test the authenticity, accuracy or details of the documents, Respondent's Exhibits have been afforded reduced weight.
7. Coming to the defense of another, even if not in a legal sense, does not prove qualities demonstrating that his character and general fitness do not command the confidence of the public nor warrant the belief that the business will not be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act. Under the description of events as testified to by Respondent, such a defense would command greater confidence by the public.
8. Respondent's employment efforts, his age at the time of the assault and how long ago the conviction occurred, his demeanor during the hearing, the written statements he supplied and the absence of any evidence of any other offense on his record support his contention that he has the general fitness to command the confidence of the public and gives rise to a belief that the business will be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act.
9. While the failure to make timely restitution payments does involve money, the Division's argument that such an act falls within the provisions of section 1322.041(A)(3), O.R.C., is incorrect. The statute specifically speaks about a "conviction" and of a "criminal offense involving" money. Such are not the facts in this case and, while the Division may test the question of Respondent's general fitness based upon his failure to make the restitution payment

timely, it may not argue that the action falls within section 1322.041(A)(3), O.R.C.

10. Respondent provided sufficient evidence that he has dealt with financial matters better of late than when he was unemployed and unable to make the restitution payment. His ex-wife states he is current on child support and he has maintained employment since becoming a father.
11. In eliciting evidence whether Respondent's character is honest, the Division demonstrated that, on or about February 21, 2005, 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 truthful information, to wit: the “Yes” response to Question 5 and, also, that Respondent supplied sufficient documentation to fully show the conviction, demonstrating that he was not attempting to hide the conviction from the Division.
12. Filing an accurate Application is demonstrative of an applicant's good character and general fitness and that the business will be operated honestly and fairly in compliance with law.
13. The Division did not put forth sufficient evidence to demonstrate 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 law.
14. Respondent did provide sufficient evidence to overcome the Division's evidence questioning his character and general fitness to command the confidence of the public and to warrant the belief that the business will be operated honestly and fairly.

C. DISCUSSION

In addition to Respondent's age at the time of the crime, a tendency toward leniency for the non-financial nature of the crime would be appropriate. As to the failure to pay restitution, the Division has only shown Respondent did not have sufficient funds to make the required payment and Respondent has shown that he is currently more financially responsible. Respondent did answer Question 5 on the Application honestly, even including the court records to provide the Division with specific information regarding the conviction, and shows that he is taking responsibility for his past actions and demonstrates honesty and truthfulness, and that his 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. Even though the Division did not meet its burden in proving its basis for the proposed license denial, Respondent has proven, by a preponderance of the evidence, that Respondent's character and general fitness do 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

Respondent did present sufficient evidence to prove that a license should be issued. Consequently, the recommendation to the Superintendent of Financial Institutions is to **GRANT A MORTGAGE LOAN OFFICER'S LICENSE TO JOSHUA R. RILEY.**

Respectfully submitted,

D. Michael Quinn
Hearing Officer
July 27, 2005
Docket No. 05-DFI 033