

**STATE OF OHIO
DEPARTMENT OF COMMERCE**

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IN THE MATTER OF:

DUSTIN SWIGART

DIVISION OF FINANCIAL
INSTITUTIONS

CASE NO. 05-0051-LOD

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

Issued August 12, 2005

I. FINDINGS OF FACT

A. BACKGROUND

This matter came before Terrence O'Donnell, 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."). The hearing in this matter was held at 2:30 PM on March 7, 2005, at 77 South High Street, Room 1918, Columbus, Ohio. Subsequent to the hearing, the undersigned was appointed as hearing officer and prepare this Report and Recommendation.

The hearing was held at the request of Respondent Dustin Swigart of Hamilton, Ohio, (hereinafter the "Respondent") to consider the Division's Notice of Intent to Deny Loan Officer License Application, Notice of Opportunity for a Hearing (herein "NOH"). Said NOH was based upon an allegation that Respondent was convicted in 1999 of Driving Under the Influence, and, also, that Respondent failed to disclose the past criminal offense on the 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, Deputy

Attorney General Timothy C. Loughry. Respondent appeared and was represented by Ulmer Berne LLP, Mr. Matthew J. Morelli, of Cleveland, Ohio.

At the hearing, State's Exhibits A, B, C, E, F and G were introduced into the record as discussed in the transcript (herein "Tr.") pages 11, 13, 17, 18. Respondent offered an affidavit into the record which was never marked (Tr. pp. 29-30). The documents were treated as being admitted into the record by the hearing officer.

B. JURISDICTION

The Division issued the NOH against Respondent on January 31, 2005. The Respondent requested a hearing, which was received by the Division on February 9, 2005. By letter dated February 11, 2004, the Division scheduled the hearing for February 21, 2005. The Division continued the hearing to March 7, 2005, on its own motion, at which date the hearing was held.

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 E.)
2. Respondent is an individual who wishes to conduct business in Ohio as a Mortgage Loan Officer. (Exhibit A; Tr. p. 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 September 17, 2004, the Division received from Respondent a Loan Officer Application (herein the "Application"). (Exhibit A.)
5. Respondent filled out and signed the Application on, or about, September 14, 2004. (Exhibit A; Tr. pp. 11-12.)
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 ..." (Exhibit A; Tr. p. 12.)

7. On, or about, September 13, 1999, at age 19, 4 years prior to the submission of the Application, Respondent pleaded guilty to DUI. (Exhibit C; Tr. p. 16.)
8. Respondent's explanation of the DUI conviction was that he had been in Kentucky, consumed alcohol and, on the drive home, was pulled over. (Tr. p. 16.)
9. The Application does not limit the response sought on Question 5 to felonies, or to a particular period of time, or to those offenses for which there is 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. (Section 1322.041, O.R.C.; Exhibit A.)
10. The Application specifically states that "DUIs and DWI's are criminal offenses" (sic) in parenthetical language at the end of Question 5. (Exhibit A.)
11. Respondent's explanation of why he answered Question 5 on the Application as "No" when he knew he had a conviction on his record was that he was in a rush when he filled out the Application, and, although he had discussions with the owners of the business he was seeking to work for about the DUI, he must have not read the question completely. He had been told by the owners that the DUI was not the type of conviction which would keep him from becoming licensed. He acknowledged that his answer to Question 5 was a mistake but maintained that it was unintentional. (Tr. pp. 25-26, 28-29.)
12. The Loan Officer Application contained inaccurate information at the time that Respondent signed it, to wit: In responding "No" to Question number 5 when Respondent had been convicted of a criminal offense.
13. Respondent disclosed his past DUI conviction to his present employer at the time he was hired. (Respondent's Exhibit; Tr. pp. 23-24.)
14. Respondent's present employer believes Respondent to be honest and hard-working and his behavior warrants the belief that the business will be operated honestly and fairly in compliance with the purposes of the law. (Respondent's Exhibit.)
15. Respondent knew the Division would obtain a criminal background check because part of the Application was to submit fingerprints for

the stated purpose of conducting the background check. (Exhibit A; Tr. pp. 25-26.)

16. Respondent's explanation of his submission of the Application with incorrect information was credible and not overcome by evidence presented by the Division.

II. CONCLUSIONS OF LAW

A. JURISDICTIONAL ISSUE

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

B. LICENSE APPLICATION

2. In 1999, Respondent pleaded guilty to DUI, a type of offense not specifically cited in section 1322.041(A)(3), O.R.C., but inquired about on Question 5 of the Application.
3. To issue a license, the Division must make a finding that, inter alia, 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 sections 1322.01 to 1322.12 of the Revised Code. Section 1322.041(A)(5), O.R.C.
4. 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 DUI conviction.
5. The Division also 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 inaccurate response to Question 5.
6. The DUI conviction cited is not far removed in time but is non-financial in nature and there is no evidence of a pattern of alcohol

abuse so that the conviction itself does not give rise to a recommendation that the application for a license should be denied.

7. Even though Respondent's explanation of his response to Question 5 is accepted for lack of contrary evidence, it demonstrates an inability to carefully read an important document prior to his own attestation of the document's truthfulness, which shows Respondent's general fitness would not command the confidence of the public due to a concern that the loan documents might not be accurately completed.
8. Filing an inaccurate Application is negatively demonstrative of an applicant's character and general fitness as related to the lack of attention to detail.
9. Respondent failed to provide sufficient evidence to overcome the Division's evidence questioning his character and general fitness to command the confidence of the public.
10. 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."
11. Respondent demonstrated that his incorrect response to Question 5 was the result of mistake rather than misrepresentation, false or misleading statements or fraud. Intent is required for a finding of any of the three provisions and the Division has not proven such intent. The court in Webb v. State Med. Bd., 146 Ohio App. 3d 621, 628 (Ohio Ct. App. 10th Dist., 2001) noted that intent is required for a finding of fraud, misrepresentation, or deception when it observed "The trial court properly concluded that the Ohio medical board committed error when it adopted a conclusion of law that indicated that appellant's intent was irrelevant." See also Powell v. Administrator, 1984 Ohio App. LEXIS 10467 (Ohio Ct. App. 6th District, 1984), wherein the court stated that

A careful examination of the record fails to disclose substantial, credible evidence going to the specific intent to improperly secure unemployment benefits required to be proven under the definitions of false misrepresentation provided by the appellees. Rather, the evidence adduced below suggests that the appellant honestly believed that an

individual was not self-employed unless he was receiving remuneration from such self-employment. *** Both of the definitions adopted by the appellees, supra, require "knowledge" of the falsity on the part of the claimant. Once again, appellant's actions subsequent to receiving a profit from his arcade business negate any knowledge on his part that he was in fact self-employed.

12. Respondent demonstrated that his failure to respond to Question 5 accurately was a mistake and, therefore, not an intentional act. Consequently Respondent has not violated sections 1322.07(A), (B) or (C), O.R.C.

C. DISCUSSION

Because Respondent incorrectly answered Question 5 on the Application, he cannot show that his character and general fitness command the confidence of the public. The loan officer licensing statutes serve to protect the public in the public's financial dealings with licensees, not just from dishonest conduct but also from errors committed from lack of attention to detail of material issues.

III. RECOMMENDATION

The Division has proven Respondent did not disclose the prior criminal conviction on the Application. Respondent did not present sufficient evidence to prove 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 sections 1322.01 to 1322.12 of the Revised Code. 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 DUSTIN SWIGART.**

Respectfully submitted,

D. Michael Quinn /
Hearing Officer
August 10, 2005
Docket No. 05-DFI-117