

STATE OF OHIO
DEPARTMENT OF COMMERCE

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IN THE MATTER OF:

DAVID G. CASTO

DIVISION OF FINANCIAL
INSTITUTIONS

CASE NO. 04-0084-LOD

REPORT AND RECOMMENDATION
ADMINISTRATIVE HEARING OFFICER D. MICHAEL QUINN

Issued March 29, 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 1:00 PM on May 13, 2004, at 77 South High Street, 19th Floor, room 1936, Columbus, Ohio.

The hearing was held at the request of Respondent David G. Casto, of Canton, 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 1991, in Stark County, Ohio, to two counts of sexual battery, and, also, that Respondent failed to disclose the past criminal offenses, and is thereby ineligible to obtain a license as a Mortgage Loan Officer. The Division appeared and was represented by the Ohio Attorney General's Office, Assistant Attorney General Martine Jean. Respondent appeared pro se.

At the hearing, State's Exhibits 1, 2, 3, 4A, 4B, 5, 6A, 6B, 6C and 6D were admitted into the record. Respondent's Exhibits A was admitted into the record over objection and Respondent's Exhibit B was proffered into the record, after the Division's successful objection to its admission, all subject to the limited weight afforded the documents, as discussed in the transcript (hereinafter "Tr."). The only witness for either party was Respondent.

B. JURISDICTION

Respondent filed a Loan Officer Application with the Division on May 3, 2002. The Division issued the NOH against Respondent on January 22, 2004. Respondent requested a hearing, which was received by the Division on February 20, 2004. On February 23, the Division scheduled the hearing for March 1, 2004, but continued the hearing to April 1, 2004 on its own motion. The Division's request for a continuance was granted, changing the hearing date to May 13, 2004, 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 1.)
2. Respondent is an individual who has conducted, and wishes 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 May 3, 2002, the Division received from Respondent a Loan Officer Application (hereinafter the "Application"). (Exhibit 2.)
5. Respondent signed the Application on May 1, 2002, which he had filled out on, or about, the same day. (Exhibit 2; Tr. pp. 38-39.)
6. On May 22, 1991, 11 years prior to the submission of the Application, Respondent pleaded guilty of two counts of Sexual Battery against a woman to whom he has been married for the last nine years. (Exhibits 6A, 6B, 6C and 6D; Tr. pp. 29-36.)
7. Respondent's explanation of the 1991 conviction demonstrated remorse and regret. (Exhibit 6A; Tr. pp. 29-36, 50.)

8. Respondent was incarcerated for approximately 16 months. (Exhibits 6B, 6C and 6D; Tr. pp. 33-34.)
9. 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, ... or any criminal offense involving money..." (Exhibit 2; Tr. pp. 17-18.)
10. Respondent acknowledges his commission of the offenses. (Tr. pp. 18, 29-36, 50.)
11. The Application does not limit the response sought on Question 5 to economic crimes 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.)
12. 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 during the training and seminars he attended, prior to the new licensing law taking effect, he understood that the statutes and, therefore the Division, were focused on economic crimes and his conviction was not within the enumerated offenses in the statute. Consequently, Respondent expected to only have to answer questions dealing with economic crimes and when he saw the list contained in Question 5 on the Application he did not read it carefully enough to realize that it asked for information about any criminal convictions. Respondent speculates that he read the list contained in Question 5 and, when he saw primarily economic crimes, he subconsciously wanted to not see the further all-inclusive nature of the question because he was embarrassed about his offense. (Exhibits 2, 6A, A; Tr. pp. 23-28, 53, 63-67.)
13. Respondent believes his reputation within his business community to be good and that his activities for the past 11 years demonstrate that he will operate the business honestly and fairly in compliance with the law. (Tr. pp. 49-50, 51-53.)
14. During the hearing, Respondent presented himself as well educated and articulate. Respondent was an accountant for three years, an independent insurance agent for 16 years and has worked in the mortgage loan industry for the last 11 years. (Tr. pp 47-48, 51.)
15. Respondent did not present any evidence other than his own testimony.

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 sexual offense in 1991, which is not an offense specifically cited in sections 1322.041(A)(3) or (4), O.R.C., or on the Application.
3. The proven 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." Sections 1322.041(A)(3) and (4), O.R.C.
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 13 year old convictions.
6. 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.
7. Respondent's Exhibit A is simply a written statement from Respondent which contains no information in addition to Respondent's testimony. Because an administrative hearing is designed to permit a respondent an opportunity to offer an explanation without the formalities or expense of a trial, Exhibit A

was admitted into the record and considered. However, as it was cumulative testimony, little weight was afforded Exhibit A.

8. The 1991 conviction cited is far enough removed in time, with no subsequent convictions, so that Respondent's explanation and demeanor during the hearing would be sufficient to show there is no basis in fact for believing that he will commit such offenses again and that the surrounding and subsequent circumstances demonstrate the offenses should not prohibit Respondent from receiving a loan officer's license.
9. Factors which are considered in Respondent's favor and that overcome the Division's contention that, based upon his prior conviction, 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, are the particular circumstances during the time of the commission of the offense, as described by Respondent; that the woman involved has been his wife for the last nine years; and that Respondent has no other offense of any nature on his record 13 years after the conviction.
10. Respondent did not present any evidence to substantiate his own sworn testimony of Respondent's current reputation and employment record, although his testimony was credible.
11. 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 May 3, 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 inaccurate information, to wit: the "No" response to Question 5.
12. 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.
13. Regardless of the level of psychological trauma associated with the underlying event and subsequent punishment, answering the question incorrectly demonstrates a lack of attention to detail. The Application specifically asks for any criminal convictions and does not limit the response to economic crimes.

14. Being given misleading or inaccurate information during training for the implementation of the new law might be adequate reason to respond incorrectly to Question 5, but insufficient evidence was presented.
15. Respondent failed to provide sufficient evidence to overcome the Division's evidence – specifically relating to his response to Question 5 – questioning his general fitness to command the confidence of the public and the belief that the business will be operated honestly and fairly.
16. Because the Application contained a false response, Respondent was not able to demonstrate that his activities show that he is honest and truthful. Respondent knew or should have known that he had been convicted of a crime.
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 demonstrated that Respondent's response to Question 5 was a substantial misrepresentation of a material fact required 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 knew those events occurred in his past and it was incumbent on him to determine if those events were in the categories of activities of which he was required to report.

C. DISCUSSION

Four factors weighed in Respondent's favor: a) Respondent demonstrated that he was remorseful over the events leading up to the conviction; b) the convictions occurred 11 years prior to the Application and 13 years prior to the hearing; c) the offense, while socially unacceptable, was not economic in nature and, also, the relationship in question transcended the offense; and, d) his demeanor during the hearing generally conveyed truthfulness. Thus, Respondent's conviction should not, in itself, cause his license to be denied. However, Respondent's answer to Question 5 is troubling.

The fundamental issue in this case comes down to whether Respondent's answer to Question 5 is sufficient to prohibit him from becoming licensed as a loan officer. The legal question is whether 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. Respondent presents as his case his own assessment of his character and his own explanation of the seminar training, a reading of the statutes involved and the psychological trauma his behavior and the events inflicted upon him. However reasonable those statements may be, Respondent does not present anything other than his own testimony. The Division has sufficiently raised the issue of his character and general fitness and, thus, the burden moves to Respondent to overcome the Division's evidence. Respondent must have more than his own testimony supporting his position that the training and seminars lead him to believe that the Division was only seeking information about economic crimes and that his character warrants the belief that the business will be operated fairly to overcome the Division's proof that he answered falsely on the Application.

Based on the record available, it must be concluded that the Division did demonstrate that Respondent's general fitness does not command the confidence of the public and there is not the belief that the business will be operated honestly and fairly because Respondent did not answer Question 5 on the Application accurately.

III. RECOMMENDATION

Consequently, the recommendation to the Superintendent of Financial Institutions is to **DENY A MORTGAGE LOAN OFFICER'S LICENSE TO DAVID G. CASTO.**

Respectfully submitted, _____

D. Michael Quinn
Hearing Officer
March 29, 2005
Docket No. 04-DFI-090