

STATE OF OHIO
DEPARTMENT OF COMMERCE

2004 OCT 26 AM 9: 02

IN THE MATTER OF:

DIVISION OF FINANCIAL
INSTITUTIONS

DONALD W. ROBERTS

CASE NO. 04-0194-LOD

REPORT AND RECOMMENDATION
ADMINISTRATIVE HEARING OFFICER D. MICHAEL QUINN

Issued October 25, 2004

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 11:00 AM on June 14, 2004, at 77 South High Street, room 1918, Columbus, Ohio.

The hearing was held at the request of Respondent Donald W. Roberts, of Mentor, 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 passing bad checks and felonious assault 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 Martine Jean. Respondent did not appear but had requested a hearing.

At the hearing, State's Exhibits 1 through 5, 6A and 6B were admitted into the record (Transcript (hereinafter "Tr.") p. 27).

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 5, 2004, all within the requirements of Chapter 119, O.R.C. The Division continued the original date of the hearing to May 27, 2004. The hearing was continued, again, to June 14, 2004, at the request of Respondent, on which date the hearing went forward. (Exhibit 1.)

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 continue to conduct, business in Ohio as a mortgage loan officer. (Exhibits 1, 2, 4.)
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 2, 2002, the Division received from Respondent a Loan Officer Application (hereinafter the "Application") which was signed, under oath, by Respondent on, or about, April 29, 2004. (Exhibit 2.)
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 ... passing bad checks ..." (Exhibit 2.)
6. On October 16, 1995, Respondent was found guilty of a misdemeanor on Respondent's guilty plea. However, the certified court record introduced by the Division does not indicate the charge

for which Respondent was convicted. The record indicates that the offense charged at arrest was Passing a Bad Check, but the record only shows as a final disposition that the original charge was reduced to a misdemeanor. Because Passing a Bad Check could refer to either a felony or a misdemeanor, or the conviction could relate to a lesser included charge, no reading of this record can establish the dispositive conviction. (Exhibit 6A.)

7. The letter Respondent sent to the Division, some time before he sent in the court records, indicates that he was originally in court on a charge relating to checks written on an account with insufficient funds. The offense for which Respondent was convicted is not clear from his letter. (Exhibit 4.)
8. Respondent's written explanation of the facts leading to the arrest on Passing Bad Checks was as follows: At age 22, while he was living on his own, his car ceased to function. When he returned to pay for the repairs he learned that the engine had been rebuilt and the charges exceeded the estimate. Respondent paid with post-dated checks and then became unemployed. He made restitution after his court appearance. (Exhibit 4.)
9. On, or about, May 26, 1998, Respondent was found guilty of one count of Felonious Assault, a felony, on Respondent's guilty plea. (Exhibit 6B.)
10. Respondent's written explanation of the facts leading to the conviction on Felonious Assault was as follows: In attempting to disrupt a confrontation between a friend of Respondent's and a third person, Respondent became involved in the confrontation. It is unclear if anyone else was charged in the incident. (Exhibit 4.)
11. The guilty pleas were entered four years and seven years prior to the Application and the Application was two years prior to the hearing. (Exhibits 4, 6A, 6B.)
12. Respondent did not submit any evidence into the hearing record. However, the letter received from Respondent by the Division as part of the investigation, introduced by the Division as part of the Application, was treated as Respondent's written statement. That letter cannot replace sworn testimony and was not given significant weight. (Exhibit 4.)

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 1995 Respondent was arrested for passing bad checks and later pleaded guilty to a misdemeanor offense, but no evidence presented at the hearing shows the nature of the conviction other than it was a misdemeanor.
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, 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. One such listed offense is passing bad checks.
4. Because it is unknown if the 1995 conviction was for passing bad checks, the burden to prove by a preponderance has not shifted to Respondent by virtue of the above-cited section. However, the burden of going forward, once evidence has been presented by the Division, has shifted to Respondent.
5. The Division has proven that the 1995 misdemeanor conviction was not disclosed on the Application by Respondent.
6. The Division has proven that Respondent pleaded guilty to Felonious Assault in 1998, an offense not listed in O.R.C. section 1322.041(A)(3), but an offense not disclosed on the Application.
7. By virtue of the two convictions, 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 offenses were quite some years ago, the Division's allegation must prevail.
8. 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 29, 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.

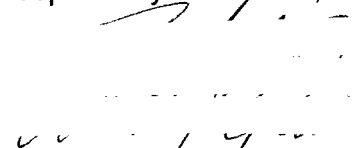
9. The Respondent did not present evidence of his honesty, truthfulness or good reputation.
10. Because the Application submitted by Respondent contained a false response, the Division was able to demonstrate that Respondent’s activities, since the offenses show that the Respondent has not been honest or truthful. Respondent knew, or should have known, that he had been convicted of a crime.
11. 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.
12. 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.
13. Even accepting at face value Respondent’s explanation of his response to Question 5, as it appears in the letter Respondent submitted as part of his Application (Exhibit 4), it 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.
14. 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.
15. 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).

16. 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."
17. 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.

III. RECOMMENDATION

The Division has proven the Respondent has a criminal 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. Consequently, the recommendation to the Superintendent of Financial Institutions is to **DENY A MORTGAGE LOAN OFFICER'S LICENSE TO DONALD W. ROBERTS.**

Respectfully submitted,


D. Michael Quinn
Hearing Officer
October 25, 2004
Docket No. 04-DFI-055