

HISTORY

This matter arises on an appeal by David F. Lawson (Petitioner) of the denial by the Bureau of Compliance, Investigation and Licensing, Department of Banking (Department) of his application for a license as a mortgage originator¹ in the Commonwealth. By letter dated March 3, 2009, the Department denied Petitioner's application for a license as a mortgage originator based on § 6133(d)(1) of the Mortgage Loan Industry Licensing and Consumer Protection Law, Act of July 8, 2008, P.L. 796, No. 56 (Mortgage Act), 7 Pa. C.S. § 6101 *et seq.*, which authorizes the Department to deny a license if the applicant has been convicted of a crime of moral turpitude or a felony. More specifically, the Department's denial letter cited Petitioner's 2005 guilty pleas to possession of controlled substance with the intent to deliver and aggravated assault by vehicle while driving under the influence, both felonies. The Department's denial letter cited Petitioner's guilty pleas to a number of misdemeanor and summary offenses as well.

The Department's letter indicated that if Petitioner desired to contest the denial of his license application, he should file a petition and request a hearing. Petitioner thereafter submitted a timely Appeal of Denial of Loan Originator's License, and the Department filed an Answer on March 18, 2009. By letter dated April 20, 2009, Steven Kaplan, Secretary of Banking, designated Ruth Dunnewold to act as adjudicator in this matter.

A Notice of Hearing set the hearing for June 11, 2009. On June 9, 2009, Petitioner contacted Linnea Freeberg, Docket Clerk for the Department of Banking. He indicated that he did not know the hearing date and had not received the Notice of Hearing because he had moved. Ms. Freeberg notified him of the hearing date and obtained Petitioner's email address. On the

¹ The license for which Petitioner applied is referred to in testimony, in Mr. Lawson's Petition Notice and in the Department's Answer as a "loan originators license." The Mortgage Act does not utilize that actual term, but uses "mortgage originator" instead. See 7 Pa. C.S.A. §§ 6102 and 6111. For the purpose of clarity in the context of the applicable statutory provisions, the term "mortgage originator" will be used throughout this adjudication.

afternoon of June 9, 2009, the undersigned hearing examiner emailed a copy of the Notice of Hearing to Petitioner, with a copy to Assistant Counsel Linda Carroll, and explained that if Petitioner could not attend the scheduled hearing, he should request a continuance in writing. Petitioner received that email; an electronic receipt, indicating he had read it, was returned to the hearing examiner.

Petitioner did not request a continuance, so the hearing convened on June 9, 2009. Linda Carroll, Esquire, appeared on behalf of the Department. Petitioner did not appear. Because of Petitioner's absence and the fact that Petitioner bears the burden of proof in this matter, the hearing was adjourned at that point. A Memorandum Order then was filed on June 12, 2009, dismissing the matter without prejudice and requiring Petitioner, if he desired to pursue his appeal, to file a written request to reinstate his appeal within thirty (30) days of the date of the Order.

By letter filed June 18, 2009, Petitioner asked for a new hearing date and provided his current address. Thereafter, the Memorandum Order was vacated and the record was reopened by Order dated June 19, 2009. A Notice of Rescheduled Hearing established a new hearing date of July 7, 2009, and hearing occurred on that date. Petitioner appeared and proceeded *pro se*, and the Department was again represented by Ms. Carroll. At the conclusion of the hearing, the Department indicated its desire to file a post-hearing brief, while Petitioner indicated that he did not intend to do so. The transcript was filed July 20, 2009, and by Order Establishing Briefing Schedule dated July 22, 2009, the parties were directed to file their post-hearing briefs in accordance with its terms. The Department filed its brief on July 30, 2009, and Petitioner was to file his within 10 days of that date. Petitioner filed no post-hearing brief within the specified time frame, so he is considered to have waived that opportunity, and the record is now closed.

FINDINGS OF FACT

1. Petitioner's address is 13044 Kelvin Avenue, Philadelphia, PA 19116. Docket No. 090043 (Petitioner's letter addressed to Linnea Freeerg [sic] filed June 18, 2009); Notes of Testimony (NT) at 13.
2. Petitioner has been in the mortgage industry for 13 years. NT at 9.
3. Petitioner is registered as a mortgage solicitor in the state of New Jersey. Exhibit A-1; NT at 9.
4. Petitioner is not soliciting mortgage products in the Commonwealth. NT at 9.
5. On or about January 27, 2005, in the Court of Common Pleas of Bucks County at criminal docket no. CP-09-CR-0007853-2004 ("Bucks County criminal matter"), Petitioner pled guilty to one count of possession of a controlled substance with intent to deliver, a felony in violation of 35 P.S. § 780-113(a)(30)... Exhibits PDB 7, PDB 9, PDB 10, PDB 15; NT at 51.
6. In the Bucks County criminal matter, on or about January 27, 2005, Petitioner was sentenced to county probation for 24 months, to pay costs, to undergo a drug and alcohol evaluation, and to 100 hours of community service. Exhibits PDB 7, PDB 9, PDB 10, PDB 12, PDB 14, PDB 15.
7. On or about April 7, 2005, in the Court of Common Pleas of Montgomery County at criminal docket no. CP-46-CR-0007358-2004 ("Montgomery County criminal matter"), Petitioner pled guilty to one count of aggravated assault by vehicle while DUI, a felony in violation of 75 P.S. § 3735.1(a). Exhibits PDB 8, PDB 9, PDB 10, PDB 15; NT at 52.
8. In the Montgomery County criminal matter, on or about June 30, 2005, Petitioner was sentenced to 10 to 23 months in the county prison in the work release program. Exhibits PDB 8, PDB 10, PDB 12, PDB 14, PDB 15.

9. The Mortgage Act, which was signed into Pennsylvania law on July 8, 2008 and became effective November 5, 2008, requires anyone engaged in the mortgage loan business in the Commonwealth to be licensed as a mortgage broker, mortgage lender, mortgage loan correspondent or mortgage originator. 7 Pa. C.S.A. § 6111(a); NT at 21.

10. The Mortgage Act defines a mortgage originator as follows:

An individual not licensed as a mortgage lender, mortgage broker or loan correspondent under this chapter who solicits, accepts or offers to accept mortgage loan applications, or negotiates mortgage loan terms, in other than a clerical or ministerial capacity and who is personally in direct contact, in writing, including electronic messaging, or by voice communication, with consumers with regard to the solicitations, acceptances, offers or negotiations. The term does not include directors, partners or ultimate equitable owners of 10% or more of a licensee.

7 Pa. C.S.A. § 6102.

11. The federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E. Act) was signed into law on July 30, 2008. 12 U.S.C. § 5101 *et seq.*; NT at 22.

12. On or about December 18, 2008, Petitioner submitted an application for a mortgage originator license (application). Exhibit PDB 4; NT at 26 – 27.

13. On his application, in response to Disclosure Question 8(D)(1), which asked if the applicant had ever “been convicted of or pled guilty or nolo contendere (“no contest”) in a domestic, foreign, or military court to any felony,” Petitioner answered “No.” Exhibit PDB 4; NT at 45 – 46.

14. On his application, in response to Disclosure Question 8(D)(2), which asked if the applicant had ever “been charges with any felony,” Petitioner answered “Yes.” Exhibit PDB 4.

15. Petitioner did not understand what Disclosure Question 8(D)(1) was asking and for that reason, he inadvertently selected the wrong answer. Exhibits PDB 2, PDB 12; NT at 15

– 16.

16. Despite his "no" response to Disclosure Question 8(D)(1), Petitioner fully disclosed his criminal history on his New Application Checklist of Jurisdiction-Specific Requirements, which he sent to the Department outside the computerized mortgage license application system. Exhibit PDB 5; NT at 28.

17. Petitioner also fully disclosed his convictions when asked to provide information explaining his responses to Disclosure Questions (8)(D)(1) and (2). Exhibits PDB 2, PDB 12, PDB 14, PDB 15; NT at 16.

18. By letter dated March 3, 2009 (denial letter), Jamie Robenseifner, the Chief of Licensing in the Department's Bureau of Compliance, Investigation and Licensing, denied Petitioner's application based on the fact that he had been convicted of a felony within the past seven years. Exhibit PDB 1; NT at 33.

19. The denial letter notified Petitioner that the denial of his application was based on Petitioner's guilty pleas to a felony charge of possession of a controlled substance with intent to deliver and a felony charge of aggravated assault, and it also referenced his guilty pleas to four misdemeanor and two summary offenses. Exhibit PDB 1; NT at 34.

20. The denial letter cited § 6133(d)(1) of the Mortgage Act, 7 Pa. C.S. § 6133(d)(1), as the provision of law authorizing the denial of Petitioner's application. *Id.*

21. The denial letter also notified Petitioner that the Department would be seeking amendments to the Mortgage Act in order to implement the federal S.A.F.E. Act, and referred to 12 U.S.C. § 5104(b)(2)(B), which prohibits states from licensing mortgage originators who have been convicted of a felony during the 7-year period preceding the date of the application for licensing or at any time preceding the date of the application if the felony involved an act of fraud, dishonesty, a breach of trust, or money laundering. Exhibit PDB 1.

22. The denial letter included a Notice of Right to Appeal and Hearing which, among other things, notified Petitioner of his right to appeal the denial of his application and indicated that any appeal must be received within 10 days of the date of the denial. *Id.*

23. On or about March 13, 2009, Petitioner timely filed his Appeal of Denial of Loan Originator's License (appeal). Exhibit PDB 2.

24. The Mortgage Act was amended to implement the S.A.F.E. Act on August 5, 2009, effective immediately. Act 31 of 2009.

25. Section 6133(d)(1) of the Mortgage Act now contains the following language, which was effective immediately upon passage of the amendments:

The department shall deny a mortgage originator license if the applicant has been convicted of any felony during the seven-year period preceding the date of the license application or at any time preceding the date of application, if the felony involved an act of fraud, dishonesty, breach of trust or money laundering, unless the applicant has been pardoned for the conviction.

Id.

26. Petitioner appeared at the hearing in this matter and proceeded *pro se*. NT at 7 and *passim*.

CONCLUSIONS OF LAW

1. The Secretary of Banking has jurisdiction in this appeal. Mortgage Act at § 6138(b), 7 Pa. C.S.A. § 6138(b); Findings of Fact 12, 18 – 23.

2. Petitioner had adequate notice of the statutory basis for the Department's denial of his application for a license as a mortgage originator and was given an opportunity to be heard in accordance with the Administrative Agency Law, 2 Pa. C.S. § 504. Findings of Fact 12 – 23, 26.

3. Petitioner's conviction of two felonies within the seven-year period preceding the date of his license application requires the denial of his application for licensure as a mortgage originator in the Commonwealth under the Mortgage Act at 7 Pa. C.S. § 6133(d)(1), *as amended* by Act 31 of 2009, effective August 5, 2009. Findings of Fact 9 – 11, 24 – 25.

DISCUSSION

The Department's original denial of Petitioner's application for a license was rooted in § 6133(d) of the Mortgage Act, which at the time of the denial provided, in relevant part, as follows:

§ 6133. Issuance of license

* * *

(d) Denial of license due to conviction.—

(1) The department may deny a license if it finds that the applicant or a director, officer, partner, employee, agent or ultimate equitable owner of 10% or more of the applicant has been convicted of a crime of moral turpitude or felony in any jurisdiction or of a crime which, if committed in this Commonwealth, would constitute a crime of moral turpitude or felony. For the purposes of this subsection, a person shall be deemed to have been convicted of a crime if the person:

(i) pleads guilty or nolo contendere to a criminal charge before a court or Federal magistrate; or

(ii) is found guilty by the decision or judgment of a court or Federal magistrate or by the verdict of a jury, irrespective of the pronouncement of sentence or the suspension thereof, unless the plea of guilty or nolo contendere or the decision, judgment or verdict is set aside, vacated, reversed or otherwise abrogated by lawful judicial process.

* * *

Because this provision states that the Department "may deny" a license if it finds that the applicant has been convicted of a crime of moral turpitude or a felony, rather than using the mandatory "shall" or "will," the Department had discretion to determine whether denial of a license is appropriate in any given case.

Citing this provision, the Department denied Petitioner's mortgage originator license application based on Petitioner's conviction of two felonies, one in the Bucks County Court of Common Pleas in January 2005, and a second in the Montgomery County Court of Common

Pleas in June 2005. Additionally, although the Department did not state that its denial of Petitioner's mortgage originator license application was based on the minimum standards set forth in the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E. Act), 12 U.S.C. § 5101 – § 5109, the denial letter referred to those standards. The denial letter thus put Petitioner on notice that the Department would be seeking to amend Pennsylvania law to implement the S.A.F.E. Act, including the provision at 12 U.S.C. § 5104(b)(2)(B), which prohibits states from licensing mortgage originators who have been convicted of a felony during the 7-year period preceding the date of the application for licensing, or at any time preceding the date of the application if the felony involved an act of fraud, dishonesty, a breach of trust, or money laundering.

The Department also cited, in its denial letter, Petitioner's negative response to question 8(D)(1) on the application, which asked if he had been convicted of a felony in a domestic, foreign or military court, and the denial letter referenced Petitioner's guilty pleas to four misdemeanor and two summary offenses in the Bucks County Court of Common Pleas in 2007. However, as found above, Petitioner's negative response to question 8(D)(1) was inadvertent on his part, because he did not understand the question, and given all of the information he submitted with the jurisdiction-specific portion of his application, which fully disclosed his criminal background, he clearly did not intend to mislead the Department by his erroneous response to that question. Therefore, that response should not serve as a contributing factor in determining whether or not he may be licensed as a mortgage originator. Nor should his misdemeanor and summary convictions from the Bucks County Court of Common Pleas in 2007 serve that purpose. They would have to be crimes of moral turpitude in order to potentially bar Petitioner's licensure under the Mortgage Act. In light of the fact that the Commonwealth did

not argue that those offenses were crimes of moral turpitude (indeed, the Commonwealth did not address those offenses at all during the proceeding), that argument has been waived here.

The remaining issue, then, is whether Petitioner's felony convictions, which occurred in 2005, bar his licensure as a mortgage originator. There was some argument during the hearing and, to a lesser extent, in the Commonwealth's brief, about whether the minimum standard set forth in the S.A.F.E. Act should be applied in an exercise of the Department's discretion in Petitioner's case. In the meantime, however, the Mortgage Act has been amended to implement the S.A.F.E. Act. Effective August 5, 2009, Act 31 of 2009 amended the Mortgage Act. The amendments included the addition of a sentence to § 6133(d)(1), so that it now reads as follows:

§ 6133. Issuance of license.

* * *

(d) Denial of license due to conviction.—

(1) The department may deny a license if it finds that the applicant or a director, officer, partner, employee, agent or ultimate equitable owner of 10% or more of the applicant has been convicted of a crime of moral turpitude or felony in any jurisdiction or of a crime which, if committed in this Commonwealth, would constitute a crime of moral turpitude or felony. *The department shall deny a mortgage originator license if the applicant has been convicted of any felony during the seven-year period preceding the date of the license application or at any time preceding the date of application, if the felony involved an act of fraud, dishonesty, breach of trust or money laundering, unless the applicant has been pardoned for the conviction. For the purposes of this subsection, a person shall be deemed to have been convicted of a crime if the person:*

(i) pleads guilty or nolo contendere to a criminal charge before a domestic, foreign or military court or Federal magistrate; or

(ii) is found guilty by the decision or judgment of a domestic, foreign or military court or Federal magistrate or by the verdict of a jury, irrespective of the pronouncement of sentence or the suspension thereof, unless the plea of guilty or nolo contendere or the decision, judgment or verdict is set aside, vacated, reversed or otherwise abrogated by lawful judicial process.

* * *

(Emphasis added).

The language emphasized above is the newly-added language that harmonizes the Mortgage Act with, and implements, the S.A.F.E. Act. The use of the term "shall" in conjunction with "deny" makes it imperative upon the Department to deny a license to any applicant with any felony on his record of the nature described in that new language. The word "shall" may be interpreted as either mandatory or directory, but that does not mean it is optional, to be ignored at will. *Delaware County et al. v. Com. D.P.W.*, 383 A.2d 240, 242 – 243 (Pa. Cmwlth. 1978), quoting *Kowell Motor Vehicle Registration Case*, 288 A.2d 50, 52 (Pa. Super. 1967). The term is imperative, *c.f. Kuzmen v. Kamien*, 12 A.2d 471 (Pa. Super. 1940), and when used in constitutions and statutes, leaves nothing to discretion. See *Crane's Appeal*, 344 Pa. 624, 627, 26 A.2d 457, 459 (1942) (citing *Noecker v. Woods*, 259 Pa. 160, 102 A. 507; *Lynn v. Lynn*, 256 Pa. 563, 566, 100 A. 975; *Deibert v. Rhodés*, 291 Pa. 550, 554, 140 A. 515; *People v. O'Rourke*, 124 Cal. App. 752, 13 P.2d 989; *Foley v. City of Orange*, 91 N.J.L. 554, 103 A. 743; *Baer v. Gore*, 79 W. Va. 50, 90 S.E. 530). Accordingly, in light of the recently-effected amendatory language, the Department no longer has the discretion to deny Petitioner a mortgage originator license if his felony convictions meet the statutory criteria.

Petitioner appealed the initial denial of his application, arguing that his felony convictions did not involve an act of fraud, dishonesty, or breach of trust, or money laundering, so that the S.A.F.E. Act's minimum standards should not apply. In making that argument, Petitioner overlooks the other part of the provision, which requires denial of a license if the applicant has been convicted of *any* felony during the seven-year period preceding the date of the license application. In light of the amendment of the Mortgage Act to include the S.A.F.E. Act

language, and in light of Petitioner's guilty pleas to two felonies, both in 2005, there is no support for Petitioner's appeal of the Department's denial of his application. Petitioner's felony convictions clearly occurred within 7 years prior to the date of his application, meeting the statutory criteria for mandatory denial of his application. For that reason, Petitioner is not now eligible for licensure as a mortgage originator under the Mortgage Act. Accordingly, the following order shall issue:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING

David F. Lawson,
Petitioner

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Docket No. 090043 (LIC)

v.

Bureau of Compliance, Investigation
and Licensing,
Department of Banking

ORDER

AND NOW, this 20th day of August, 2009, in accordance with the foregoing findings of fact, conclusions of law and discussion, it is **ORDERED** that the application of David F. Lawson for a license as a mortgage originator is **DENIED**.

BY ORDER:

Ruth D. Dunnewold
Hearing Examiner

For the Department:

Linda Carroll, Deputy Chief Counsel
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING
17 N. Second St., Suite 1300
Harrisburg, PA 17101-2290

For the Petitioner:

David F. Lawson
13044 Kelvin Avenue
Philadelphia, PA 19116

Date of mailing:

August 20, 2009

NOTICE

The attached Adjudication and Order represents the final agency decision in this matter. It may be appealed to the Commonwealth Court of Pennsylvania by the filing of a Petition for Review with that Court within 30 days after the entry of the order in accordance with the Pennsylvania Rules of Appellate Procedure. See Chapter 15 of the Pennsylvania Rules of Appellate Procedure entitled "Judicial Review of Governmental Determinations," PA. R.A.P. 1501 - 1561. Please note: an order is entered on the date it is mailed. If you take an appeal to the Commonwealth Court, you must serve the Department of Banking with a copy of your Petition for Review. The agency contact for receiving service of such an appeal is:

Linda Carroll, Assistant Counsel
Department of Banking
17 N. 2nd St.
Market Square Plaza, Suite 1300
Harrisburg, PA 17101