

HISTORY

This matter arises on an appeal by Vincenzo A. Simonetta (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 2, 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 or moral turpitude or a felony. More specifically, the Department's denial letter cited Petitioner's felony conviction of Theft by Deception in the Allegheny County Court of Common Pleas as the basis for denying Petitioner's application for a license.

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. 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 16, 2009, and the hearing occurred as scheduled on that date. Petitioner was represented by Joel M. Dresbold, Esquire. Linda Carroll, Esquire, appeared on behalf of the Department. The transcript was filed July 6, 2009. Petitioner presented a brief at the time of hearing, the Department filed a post-hearing responsive brief, and Petitioner filed a supplemental brief on or about August 6, 2009, closing the record.

¹ The license for which Petitioner applied is referred to in testimony, in Petitioner's Appeal of Denial of Loan Originator's License, in the Department's correspondence and in various other documents as a "loan originator 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.

FINDINGS OF FACT

1. Petitioner's address is 305 Howard Street, East Pittsburgh, Pennsylvania. Notes of Testimony (NT) at 15.

2. Petitioner had a very deep-rooted gambling problem which came to a head in 1998. Exhibits PDB 5, 14; NT at 17.

3. In order to cover his gambling debts, Petitioner transferred money from one account to another over the course of about two months in 1998. *Id.*

4. As a consequence, on or about January 5, 2000, Petitioner was charged in the Allegheny County Court of Common Pleas, at Criminal Action No. CC 200002616 (Allegheny County criminal matter), with one count of theft by deception, a third degree felony in violation of the Pennsylvania Crimes Code at 18 Pa. C.S. § 3922(a)(1), and 17 counts of passing bad checks, misdemeanors in violation of the Pennsylvania Crimes Code at 18 Pa. C.S. § 4105(a)(1). Exhibit PDB 15.

5. Count one of the Allegheny County criminal matter charged that Petitioner intentionally obtained or withheld United States currency in the amount of approximately \$8798.23, belonging to National City Bank, by creating or reinforcing a false impression, namely, that he deposited and split-deposited 17 checks from checking accounts which he knew to be closed. *Id.*

6. Counts two through seventeen of the Allegheny County criminal matter charged that Petitioner issued or passed checks, for the payment of money, with knowledge that said checks would not be honored by the drawee, PNC Bank. *Id.*

7. On or about May 22, 2001, after a summary trial, Petitioner was found guilty of all counts in the Allegheny County criminal matter. Exhibit PDB 15; NT at 35 – 36.

8. Petitioner was sentenced in the Allegheny County criminal matter to two years of probation, the terms of which included payment of restitution to the bank, fines, and court costs, and the requirement that Petitioner attend Gamblers Anonymous (GA). Exhibits PDB 7, 9, 14; NT at 17 – 18.

9. In March 1999, Petitioner began working as a mortgage originator for Priority Mortgage in Pittsburgh. NT at 15 – 16.

10. On October 1, 2003, Petitioner started to work as a mortgage originator for Ideal Financial Resources, Inc. (Ideal), which is owned by Thomas Chrise. NT at 15, 39.

11. The Mortgage Act,² 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 65.

12. 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. § 6102.²

13. 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.*²

14. Because under the Mortgage Act, Petitioner needed a mortgage originator license

² The parties agreed at the hearing that the hearing examiner could take official notice of the Mortgage Act as well as the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E. Act), 12 U.S.C. § 5101 *et seq.* NT at 87.

to continued working in the same capacity at Ideal, and he did not yet have one, he began working as a loan processor for Ideal in December 2008 even though Ideal already had a loan processor. NT at 15 – 16, 44.

15. On or about January 9, 2009, Petitioner submitted to the Department an application for a mortgage originator license (application). Petitioner's Exhibit A; Exhibits PDB 3, 4 and 10.

16. By letter dated March 2, 2009 (denial letter), Jamie Robenseifner, the Chief of Licensing in the Department's Bureau of Compliance, Investigation and Licensing, denied Petitioner's application. Petitioner's Exhibit A; Exhibit PDB 3; NT at 63, 78 – 79.

17. The denial letter notified Petitioner that the denial of his application was based on Petitioner's felony conviction of theft by deception in the Allegheny County Court of Common Pleas. *Id.*

18. 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.*

19. 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. *Id.*

20. 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.*

21. On or about March 9, 2009, Petitioner timely filed his Appeal of Denial of Loan Originator's License (appeal). Exhibit PDB 1.

22. The Mortgage Act was amended to implement the S.A.F.E. Act on August 5, 2009, effective immediately. Act 31 of 2009.²

23. 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.

24. Petitioner appeared at the hearing in this matter and was represented by counsel.

NT at 5 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 11 – 15, 21.

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 16 – 21.

3. Petitioner's conviction of theft by deception, a third degree felony which involved an act of fraud, dishonesty, breach of trust or money laundering, 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 22, 23.

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 in determining 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 a felony, theft by deception, in the Allegheny County Court of Common Pleas. 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.

There was considerable argument during the hearing and, to a lesser extent, in the hearing briefs, about whether the minimum standard set forth in the S.A.F.E. Act should be applied 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. Kamiem*, 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. Rhodes*, 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, there can be no further argument about whether the Department has the discretion to deny Petitioner a mortgage originator license. The amendment makes the denial imperative if Petitioner's conviction meets the statutory criteria.

Petitioner appealed the initial denial of his application, arguing that applying the S.A.F.E. Act's minimum standards, especially the standards pertaining to crime convictions that require an absolute denial of a license, would be an abuse of discretion because those minimum standards were not actually in effect in the Commonwealth, and applying them would mean the Department abdicates its discretion to look at each conviction and each convicted applicant individually. In light of the amendment, that is no longer a valid argument, and it cannot support Petitioner's appeal.

Petitioner also cited *Ake v. Bur. of Prof'l and Occupational Affairs, State Board of Accountancy*, 974 A.2d 514 (Pa. Cmwlth. 2009), asserting that denying him a license is disproportionate to his criminal conviction from 2001. He made a similar argument with regard to *Secretary of Revenue v. John's Vending Corp.*, 453 Pa. 488, 309 A.2d 358 (1971), asserting that the Department cannot deny him the right to work based on a conviction that dates to 2001. In light of the new amendments to the Mortgage Act, this is another moot argument. However, even if it were not moot, these cases would not apply to Petitioner, because both *Ake* and *John's Vending* involved individuals who already possessed licenses which were either active (*Ake*) or were subject to revival (*John's Vending*). A license susceptible of being revived is not the same thing as a license which no longer exists because it has been completely extinguished. *Brown, supra*, 566 A.2d at 915. Unlike Petitioner, the persons in *Ake* and *John's Vending* had extant licenses which were subject to disciplinary proceedings based on past criminal convictions, and because of that, they were entitled to full procedural due process because they possessed constitutionally protected property interests in those licenses.

But Petitioner's situation as an applicant is different. Pennsylvania law has been clear for quite some time in recognizing that, unless an individual holds an unrevoked license to practice a

profession or occupation, the individual holds no constitutionally protected property interest and is entitled to no procedural due process guarantees as to his application for a license. *See Keeley, supra*, at 1157 – 1158, *citing Counts v. Pennsylvania Board of Probation and Parole*, 487 A.2d 450 (Pa. Cmwlth. 1985) (revocation of parole stripped parolee of constitutionally protected liberty interest in parole, allowing Parole Board to deny reparole without a due process hearing); *see also Pittenger v. Dept. of State, BPOA*, 596 A.2d 1227, 1230 (Pa. Cmwlth. 1991) (once a license has been revoked, the individual is stripped of whatever property interest he possessed in the license); *Brown v. Com., State Board of Pharmacy*, 566 A.2d 913, 915 (Pa. Cmwlth. 1989) (once a license has been revoked, the individual is stripped of whatever property interest he possessed in the license); *Brady v. Com., State Board of Chiropractic Examiners*, 471 A.2d 572, 575 (Pa. Cmwlth. 1984) (no property right exists when the right to practice the occupation or profession has not yet been acquired and is still only an “inchoate prospect of licensure”). Based on *Keeley, Brown, Brady, and Pittenger, supra*, Petitioner possesses no such property right in licensure because he has never held a license, and for that reason, *Ake and John’s Vending* would be inapplicable to this application proceeding even if the law had not been changed to make denial based on a felony imperative.

The only other possible argument in Petitioner’s favor would be that his felony conviction is not the kind of felony conviction contemplated by the Mortgage Act’s amendatory language, thus permitting the Department to license him. To constitute a complete and permanent bar, the felony at issue must be one that involved an act of fraud, dishonesty, breach of trust or money laundering. In this case, Petitioner’s felony conviction was for theft by deception, under the Pennsylvania Crimes Code at 18 Pa. C.S. § 3922(a)(1), which reads as follows:

§ 3922. **Theft by deception**

(a) **Offense defined.**--A person is guilty of theft if he intentionally obtains or withholds property of another by deception. A person deceives if he intentionally:

(1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;

* * *

“Deception” is defined as, among other things, “something that deceives, as an illusion, or is meant to deceive, as a fraud.” WEBSTER’S NEW WORLD DICTIONARY 357 (3d ed. 1994). It may also be defined as “dishonesty, fraudulent conduct, false statements made knowing them to be untrue...” *Law.com Dictionary* (visited August 13, 2009) <<http://dictionary.law.com/Default.aspx?selected=439>>. Petitioner’s felony conviction for theft by deception contained elements of fraud and dishonesty, therefore, and clearly falls within those types of felony convictions that prohibit him from being licensed as a mortgage originator.

Based on the foregoing, Petitioner is not eligible for licensure as a mortgage originator under the Mortgage Act. Accordingly, the following order shall issue:

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:

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