

**DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
DIVISION OF FINANCE AND CORPORATE SECURITIES**

IN THE MATTER OF:)
) **FINAL ORDER**
CALVIN COMFORT KYLES)
) OAH Case No.: 1002085
Respondent) Agency Case No.: M-10-0041

HISTORY OF THE CASE

On or about August 2, 2010, the Department of Consumer and Business Services, Division of Finance and Corporate Securities (Division) issued an Order Denying Mortgage Loan Originator License and Notice of Right to a Hearing to Calvin Comfort Kyles (Respondent). Respondent filed a timely request for hearing on or about August 13, 2010.

On or about November 30, 2010, the Division issued an Amended Order Denying Mortgage Loan Originator License and Notice of Right to a Hearing to Respondent.

The Division referred the matter to the Office of Administrative Hearings (OAH) on December 2, 2010. The case was assigned to Senior Administrative Law Judge (ALJ) Ken L. Betterton.

A telephone pre-hearing conference was held on February 24, 2011. Assistant Attorney General Joanna L. Tucker Davis represented the Division. Respondent appeared *pro se*. A hearing was scheduled for June 29, 2011.

On March 16, 2011, the Division filed a Motion for Summary Determination. Respondent did not file a response to the Motion for Summary Determination. On June 1, 2011, ALJ Betterton issued his decision on the Motion for Summary Determination and Proposed Order. Respondent did not file exceptions. In accordance with ORS 183.650(2) and -(3), and OAR 137-003-0665(3) and -(4), an agency must identify and explains those modifications to proposed findings of historical fact that change the outcome or basis for this Final Order from those in the proposed order. The Division has not made any changes that substantially modify the ALJ's proposed findings of historical fact or change the ALJ's recommended outcome. The Division has made changes to correct spelling, grammar, and textual placement and, where noted, has not adopted certain aspects of the ALJ's reasoning.

DOCUMENTS CONSIDERED FOR THE RULINGS

The Division's Exhibits A1 through A7 were made a part of the record.

ISSUES

(1) Whether Respondent’s convictions for burglary disqualify him under ORS 86A.212(1)(c)(B) from obtaining a mortgage loan originator’s license.

(2) Whether Respondent’s convictions for robbery disqualify him under ORS 86A.212(1)(c)(B) from obtaining a mortgage loan originator’s license.

(3) Whether Respondent has demonstrated financial responsibility to satisfy the requirements of ORS 86A.212(1)(d).

FACTS

(1) On May 28, 2010, Respondent filed an application for a mortgage loan originator license with the Division. (Ex. A4.) The application included a question, “Have you ever been convicted of or pled guilty or nolo contendere (“no contest”) in a domestic, foreign or military court to any felony?” (*Id.* at 12.) Respondent answered “yes.” (*Id.*)

(2) On April 6, 1981, Respondent was convicted upon his guilty pleas in Multnomah County Circuit Court of robbery in the second degree and burglary in the first degree. (Ex. A1 at 1.) The convictions resulted from a district attorney information that charged Respondent on or about December 21, 1980 as follows:

Count I—Robbery in the Second Degree: The said defendant * * * did unlawfully and knowingly threatened the immediate use of physical force upon [victim’s name] and did represent by word and conduct that he * * * was armed with a deadly or dangerous weapon, to-wit: a handgun, while in the course of committing theft of property, to-wit: lawful currency of the United States of America, a watch, and rings, with the intent of preventing and overcoming resistance to the said defendant’s taking and retention immediately after the taking of the said property,

Count II—Burglary in the First Degree: * * * [t]he said defendant did unlawfully and knowingly enter and remain in a building, to-wit: a dwelling, located at [address] with the intent to commit the crime of theft therein, * * *.

(*Id.* at 9.)

(3) On December 17, 1982, Respondent was convicted upon his guilty pleas in Multnomah County Circuit Court of one count of burglary in the first degree and two counts of robbery in the first degree. (Ex. A2 at 1-2.) The convictions resulted from an indictment that charged Respondent on or about July 26, 1982 as follows:

Count I—Burglary in the First Degree: The said defendant * * * did unlawfully and knowingly enter and remain in a building, to-wit: a dwelling located at [address] with the intent to commit the crime of theft therein * * *.

Count II—Robbery in the First Degree: The said defendant * * * did unlawfully and knowingly use and threaten the immediate use of physical force upon [victim], and did use a dangerous weapon, to-wit: a knife, while in the course of committing theft of property, to-wit: jewelry, with the intent of preventing and overcoming resistance to the said defendant's taking of the said property, * * *.

Count III—Robbery in the First Degree: The said defendant * * * did unlawfully and knowingly use and threaten the immediate use of physical force upon [victim's name], and did use a dangerous weapon, to-wit: a knife, while in the course of committing theft of property, to-wit: a wedding ring, with the intent of compelling [victim's name] to deliver the said property to the said defendant, * * *.

(*Id.* at 3-4.)

(4) Respondent was also convicted on December 17, 1982 upon his guilty pleas in Multnomah County Circuit Court of one count of burglary in the first degree and one count of robbery in the first degree. (Ex. A3 at 1-2.) The convictions resulted from an indictment that charged Respondent on or about July 20, 1982 as follows:

Count I—Robbery in the First Degree: The said defendant * * * did unlawfully and knowingly use and threaten the immediate use of physical force upon [victim's name], and did use a dangerous weapon, to-wit: a knife, while in the course of committing theft of property, to-wit: jewelry and lawful currency of the United States of America with the intent of preventing and overcoming resistance to the said defendant's taking and retention immediately after the taking of the said property * * *.

Count II—Burglary in the First Degree: The said defendant * * * did unlawfully and knowingly enter and remain in a building, to-wit: a dwelling located at [address], with the intent to commit the crime of theft therein, * * *.

(*Id.* at 5-6.)

(5) The application included a question, "Do you have any unsatisfied judgments or liens against you?" (Ex. A4 at 12.) Respondent answered "yes." (*Id.*)

(6) On June 28, 2010, the Division asked Respondent to provide a detailed explanation of the circumstances and any applicable legal documentation relating to his

answer to the question about unsatisfied judgments or liens. (Ex. A5.) Respondent never provided any response to the inquiry. (Ex. A6.)

BASES FOR THE MOTION FOR SUMMARY DETERMINATION

The Division sought a ruling that as a matter of law Respondent's application for a mortgage loan originator's license should be denied under ORS 86A.212(1)(c)(B) because he has felony convictions for robbery and burglary and an element of the felonies was an act of fraud, dishonesty, a breach of trust or laundering a monetary instrument. As will be further discussed below, ALJ Betterton denied this aspect of the Motion for Summary Determination for the Burglary conviction but granted to the Motion as to the Robbery conviction.

The Division also sought a ruling that as a matter of law Respondent's application for a mortgage loan originator's license should be denied under ORS 86A.212(1)(d) because Respondent has failed to demonstrate financial responsibility. As will be further discussed below, ALJ Betterton found in favor of the Division on this aspect of the Motion for Summary Determination.

CONCLUSIONS OF LAW

ALJ Betterton made the following conclusion of law, which are adopted by the Division:

- (1) Respondent's convictions for burglary do not disqualify him under ORS 86A.212(1)(c)(B) from obtaining a mortgage loan originator's license.
- (2) Respondent's convictions for robbery disqualify him under ORS 86A.212(1)(c)(B) from obtaining a mortgage loan originator's license.
- (3) There is a genuine issue of material fact as to whether Respondent can demonstrate financial responsibility to satisfy the requirements of ORS 86A.212(1)(d).

OPINION

(1) Respondent's convictions for burglary.

The United States Congress in 2008 enacted the "Secure and Fair Enforcement for Mortgage Licensing of 2008" (SAFE Act), 12 USCA §§ 5101 through 5116. The purpose of the SAFE Act is to increase uniformity, reduce regulatory burden, enhance consumer protection and reduce fraud in the mortgage lending industry. 12 USCA § 5101. The SAFE Act requires that states put in place a SAFE Act compliant system. 12 USCA § 5107. Section 5107 of the SAFE Act provides that if a state does not create a licensing system that complies with the SAFE Act's requirements, the Secretary of

Housing and Urban Development (HUD) is authorized to make that determination and set up a separate, federal licensing system for loan originators in that state.

Section 5104 of the SAFE Act provides, in relevant part, that an applicant may qualify for a mortgage loan originator's license if:

(2) The applicant has not been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court

(A) During the 7-year period preceding the date of the application for licensing and registration; or (B) at any time preceding such date of application, if such felony involved an act of fraud, dishonesty, or a breach of trust, or money laundering.

The Oregon legislature passed House Bill (HB) 2189 in 2009 in response to the SAFE Act. ORS 86A.212(1) was enacted as part of HB 2189. ORS 86A.212(1) provides, in relevant part:

The Director of the Department of Consumer and Business Services may not issue a mortgage loan originator's license to an applicant unless the director finds, at a minimum, that the applicant:

* * * * *

(c) Has not been convicted of or pleaded guilty or no contest in a state, federal, foreign or military court to a felony or to a misdemeanor if an essential element of the misdemeanor involved false statements or dishonesty:

(A) During a period of seven years before the date the applicant submits an application * * *; or

(B) At any time before the date the applicant submits an application under ORS 86A.206, if the conviction or plea involved a felony and an element of the felony was an act of fraud, dishonesty, a breach of trust or laundering a monetary instrument. * * *.

The question is whether Respondent's convictions for burglary in the first degree are disqualifying convictions under ORS 86A.212(1)(c)(B).

Burglary is a felony. ORS 164.215;¹ ORS 164.225.² The Division argued that Respondent's burglary convictions "involved" the crime of theft (*i.e.*, dishonesty), and hence are disqualifying convictions under ORS 86A.212(1)(c)(B). ALJ Betterton found that, under the language of the Oregon statute, the Division had to prove that fraud or dishonesty were elements of the crime, and did not do so. ALJ Betterton's Ruling included the following reasoning:

¹Burglary in the second degree is a Class C felony. ORS 164.215(2).

² Burglary in the first degree is a Class A felony. ORS 164.225(2).

A person is not guilty of an offense unless the person acts with a culpable mental state with respect to each material element of the offense. ORS 161.095(2). See also *State v. Rainoldi*, 236 Or 129 (2010); *State v. Reynolds*, 183 Or App 245, 249 (2002) (If an allegation is truly an “element” of a crime, by definition, it is “material.” * * *. A “material element” is one that the state must prove to establish the crime charged.”); *State v. Mills*, 77 Or App 125, 129 (1985) (The “material elements” of a crime are those elements that must be proven to sustain a conviction.)

The elements of burglary are set forth in ORS 164.215 and ORS 164.225. The elements from ORS 164.215 are (1) a person enters or remains unlawfully in a building with (2) the intent to commit a crime therein. ORS 164.225 adds an additional element that the building must be a dwelling.

Burglary requires proof of *intent* to commit a crime. It is not necessary to prove that an intended crime was committed.³ Theft is not a lesser included offense of the crime of burglary. *State v. Washington*, 273 Or 829, 838 (1975).

I agree with Respondent that fraud or dishonesty are not elements of burglary. A person who enters or remains unlawfully in a dwelling with the intent to sell marijuana is guilty of burglary in the first degree. *State v. Chatelain*, 347 Or 278 (2009). A person who enters or remains unlawfully in a dwelling with the intent to cause physical injury to any person is guilty of burglary in the first degree. ORS 164.225(1)(b); *Ross v. Hill*, 235 Or App 340 (2010). A person who enters or remains unlawfully in a dwelling who uses or threatens to use a dangerous weapon is guilty of burglary in the first degree. ORS 164.225(1)(c).

ORS 86A.212(1)(c)(B) requires that an element of the felony was an act of fraud or dishonesty. Burglary does not satisfy that requirement.

³See *State v. Sanders*, 280 Or 685, 689 (1977), where the court cited with approval *Commonwealth v. Ronchetti*, 333 Mass 78, 81-82, 128 N.E.2d 334 (1955), and stated:

If the defendant is charged with an illegal entry with the intent to commit theft, and there is evidence to support that charge, the jury can convict of burglary although the defendant committed an assault after entry and testified he entered with the intent to commit assault, not theft. Likewise, if the defendant was charged with an illegal entry with intent to commit theft, and there was evidence to support this charge, but he committed no crime after entry and he testified he intended to commit no crime, the jury can convict for burglary.

ALJ Betterton also found that the current language of the Oregon Statute does not contradict the federal language. The Division does not adopt that aspect of the ALJ's reasoning, but notes that ALJ Betterton also found that "if the legislature has enacted a statute that is contrary to the SAFE Act, the responsibility to correct the error rests with the legislature. The error cannot be corrected in a contested case hearing before the OAH under the Administrative Procedures Act."

The Division, therefore, adopts the ALJ's finding that "Respondent's convictions for burglary in the first degree do not disqualify him from a mortgage loan originator's license under ORS 86A.212(1)(c)(B)."

(2) *Respondent's robbery convictions.*

Robbery in the third degree is defined in ORS 164.395 as follows:

(1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft * * * the person uses or threatens the immediate use of physical force upon another person with the intent of:

- (a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or
- (b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft * * *.

Robbery in the third degree is a Class C felony. ORS 164.395(2).

A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and additional elements are established, such as the person representing that he/she is armed, or is aided by another person present. ORS 164.405. Robbery in the second degree is a Class B felony. ORS 164.405(2).

A person commits the crime of robbery in the first degree if the person violates ORS 164.395 and additional elements are established, such as the person is armed with a deadly weapon, uses or attempts to use a dangerous weapon, or causes or attempts to cause serious physical injury to any person. ORS 164.415. Robbery in the first degree is a Class A felony. ORS 164.415(2).

The gravamen of robbery is the threat of harm to persons during the commission of a theft or an attempted theft. *State v. Dillman*, 34 Or App 937 (1978). Unlike burglary, where an element requires proof of intent to commit a crime, robbery requires proof of a theft or an attempted theft. Theft or attempted theft is an element of robbery. *See State v. Boucher*, 13 Or App 339 (1973), where the court held it was error not to give a jury instruction on the lesser included offense of theft by receiving in a robbery prosecution.

Theft is a crime of dishonesty. In *State v. Jim/White*, 13 Or App 201 (1973) *rev den* 266 Or (July 3, 1973), the court noted that when the Oregon legislature adopted the Criminal Code in 1971, it consolidated in the theft statutes, ORS 164.015 to 164.135, previous crimes such as larceny, embezzlement, receiving concealing stolen property.

Robbery is a felony with an element of dishonesty. Respondent has four convictions for robbery. His convictions for robbery disqualify him from obtaining a mortgage loan originator's license. ORS 86A.212(1)(c)(B).

To the extent that Respondent argues that intervening events that have occurred since his convictions should be considered before denying him a license, neither the SAFE Act nor ORS 86A.212(1)(c)(B) contain any time limit on prior felony convictions with elements of fraud or dishonesty. The Division adopts ALJ Betterton's reasoning that Respondent's convictions for robbery disqualify him from obtaining a mortgage loan originator's license.

(3) Financial responsibility.

ORS 86A.212(1)(d) states that the Division may not issue a mortgage loan originator's license to an applicant, unless the applicant:

Has demonstrated financial responsibility sufficient to command the confidence of the community and warrant the determination that the applicant will operate honestly, fairly and efficiently within the purposes of ORS 86A.200 to 86A.239.

The criteria for determining financial responsibility are found in OAR 441-880-0210:

(1) For purposes of this rule, an applicant is not financial responsible if the applicant has shown a disregard of his or her own financial circumstances, taking into consideration the totality of the applicant's financial circumstances.

(2) Factors that the director may consider in determining whether an applicant has not demonstrated financial responsibility include, but are not limited to, the following:

- (a) Current outstanding judgments or material litigation, excluding judgments solely as a result of medical expenses;
- (b) Current outstanding tax liens or other government liens and filings;
- (c) A foreclosure within the past three years and the type of property subject to foreclosure, whether residential or commercial;
- (d) Pending or completed bankruptcy proceedings, and the nature of the proceedings, occurring within the past five years; or

(e) A pattern of seriously delinquent accounts within the past five years.

(2) (*sic*) In assessing the financial responsibility of the applicant, the director may consider extenuating or mitigating factors, including but not limited to the following:

- (a) Involuntary loss of job or income;
- (b) Involuntary medical expenses;
- (c) Divorce;
- (d) Attempting workout arrangements with creditors; or
- (e) Any other factor the director believes reflects circumstances beyond the control the applicant.

(3) (*sic*) This rule applies to mortgage loan originators licensed on or after July 31, 2010.

As an independent basis for denial, the Division denied Respondent's application because he failed to demonstrate the requisite financial responsibility by responding to a question on the application that he has unsatisfied judgments or liens against him.

The statute places the burden on the applicant to demonstrate the requisite financial responsibility. ORS 86A.212(1)(d); *Sobel v. Board of Pharmacy*, 130 Or App 374 (1994). The criteria for determining financial responsibility under ORS 86A.212(1)(d) are set forth in OAR 441-880-0210. The totality of an applicant's financial circumstances must be considered to determine if the applicant has not shown a disregard for his or her own financial circumstances. ALJ Betterton found that the issue of an applicant's financial responsibility did not lend itself to summary determination.

Although Respondent acknowledged that he has unsatisfied judgments or liens against him, and he did not provide information as requested by the Division, he may be able to establish financial responsibility considering all of the factors in OAR 441-880-0210 and ALJ Betterton found there was a genuine issue of material fact as to Respondent's financial responsibility that could have necessitated a hearing. However, the issue is moot because Respondent is disqualified from obtaining a license due to his robbery convictions.

RULINGS

In sum, ALJ Betterton's rulings on the Division's Motion for Summary Determination were as follows:

(1) The Division's Motion for Summary Determination that as a matter of law Respondent's application should be denied under ORS 86A.212(1)(c)(B) is allowed, based on his convictions for robbery, but is denied based on his convictions for burglary.

(2) The Division's Motion for Summary Determination that as a matter of law Respondent's application should be denied under ORS 86A.212(1)(d) because he has failed to demonstrate satisfactory financial responsibility is denied.

(3) Because of the ruling on the convictions for robbery, the issue of whether Respondent can demonstrate financial responsibility is moot.

As a result of the Ruling, the Division makes the following order:

ORDER

Respondent Calvin Comfort Kyles's application for a mortgage loan originator's license is denied.

DATED AND MAILED this 12 day of September, 2011.

/s/ Scott L. Harra
Scott L. Harra, Acting Director
Department of Consumer and Business Services

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this Order. Judicial review is to the Oregon Court of Appeals pursuant to the provisions of ORS 183.482.