

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS
CONSUMER FINANCE

DIVISION OF FINANCIAL
INSTITUTIONS

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In re: Caroline Ann Hutchinson-Smith

Case No. 04-0158-LOD

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF
THE HEARING OFFICER

1. The Ohio Department of Commerce, Division of Financial Institutions ("Division"), proposes that the Loan Officer License Application of Caroline Ann Hutchinson-Smith not be granted. The Division conducted an investigation and found:

- a. In or around 1979, in the Dayton Municipal Court, Montgomery County, Ohio, Ms. Hutchinson-Smith was convicted of petty theft;
- b. On or about 1983, Ms. Hutchinson-Smith admitted she shot her husband and a felonious assault charge was subsequently dropped at her husband's request; and
- c. On or around April 16, 2002, Ms. Hutchinson-Smith attested in a sworn statement that the information she provided on a licensing application was truthful, knowing that the information she provided was false; and
- d. On or around April 17, 2002, Ms. Hutchinson-Smith provided untruthful information to the Division.

2. As a result, the Division determined:

- a. Ms. Hutchinson-Smith has not proven that she is honest, truthful and of good reputation and that there is no basis in fact for believing that she will commit another criminal offense involving theft or any criminal offense involving money or securities as set forth in Revised Code Sections 1322.031(A)(2) and 1322.041(A)(3);
- b. Ms. Hutchinson-Smith'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 as set forth in Revised Code Section 1322.041(A)(5);
- c. Ms. Hutchinson-Smith violated Revised Code Section 1322.07(A), which prohibits a loan officer applicant from "mak[ing] any substantial misrepresentation in any registration or license application";
- d. Ms. Hutchinson-Smith violated Revised Code Section 1322.07(B), which prohibits a loan officer applicant from "[m]ak[ing] false or misleading

statements of a material fact, [or] omissions of statements required by state law"; and

- e. Ms. Hutchinson-Smith violated Revised Code Section 1322.07(C), which prohibits a loan officer applicant from "[e]ngag[ing] in conduct that constitutes improper, fraudulent, or dishonest dealings.

3. Ms. Hutchinson-Smith's address for service is 4935 Blueberry Avenue, Dayton, Ohio 45406. She is hereinafter referred to as the "Respondent." The Respondent is employed by First National Mortgage Banc, 6500 Poe Avenue, Dayton, Ohio 45414.

4. This matter was initiated by the Superintendent of the Division by the issuance on January 22, 2004 of a Notice of Intent to Deny Loan Officer Application & Notice of Opportunity for a Hearing, together with a covering letter (Exhibit 1A).

5. The member of the Respondent's family signed a certified mail receipt for that document. (*Id.*).

6. On February 10, 2004, the Division received a Hearing Request Form from the Respondent (Exhibit 1B).

7. On February 12, 2004, the Respondent wrote to R. Mark Henry, Counsel for the Respondent, indicating that the Hearing was scheduled for 9:00 a.m. on February 20, 2004, would be continued until March 11, 2004 at 10:30 a.m. in Room 1918 of the Vern Riffe Center, 77 South High Street, Columbus, Ohio (Exhibit 1C).

8. The hearing was held beginning at 10:33 a.m. on Thursday, March 11, 2004 and attending were Martine Jean, Assistant Attorney General of Ohio in the Executive Agency Section, R. Mark Henry, Esq. on behalf of the Respondent, the Respondent, and Mark L. Rhea, Staff Attorney for the Division.

9. The hearing was conducted pursuant to Section 119 of the Ohio Revised Code. The Division is deemed to have jurisdiction to conduct the proceedings.

FINDINGS OF FACT

1. On April 16, 2002, the Respondent signed a Loan Officer Application (the "Application") under the provisions of the Ohio Mortgage Broker Act, Ohio Revised Code Section 1322. (Exhibit 2).

2. Question 5 of the Application provides:

Have you, or has any company for which you have been an officer, or more than 5% owner or director ever been convicted of any criminal offense including, but not limited to, theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities? If the answer is "Yes", furnish details. (Exhibit 2).

Yes ☐ No ☐

3. In response to Question 5, the Respondent answered "No".
4. As part of the Application, the Respondent signed a National Background Check consent. (Exhibit 2A).
5. Following the submission of the Application, the Division received the report of the National Background Check which disclosed a petty theft arrest in August, 1979, an August, 1982 arrest for trafficking in marijuana and abuse of a schedule IV drug and July, 1983 arrest for felonious assault. (Exhibit 3).
6. On April 23, 2003, the Division sent to the Respondent a Warning of Disqualification indicating that the Respondent's background check showed criminal offenses that would automatically disqualify the Respondent from receiving a license unless the Respondent could prove to the Division, by a preponderance of the evidence, that the Respondent's activities and employment records since the conviction show that the Respondent is honest, truthful and of good reputation, and that there is no basis in fact for believing that the Respondent would commit such an offense again (Exhibit 4).
7. On May 7, 2002, the Division wrote to the Respondent indicating that it was unable to determine whether to issue a license because of insufficient evidence. The Division noted in the letter the three arrests that were disclosed in the background check. (Exhibit 5).
8. On May 22, 2003, the Respondent wrote to the Division as follows:

I Caroline Hutchinson-Smith mailed to you back in December of 2002 the journal entrees regarding the charges that were in my background check. When I received the automatic disqualification notice, I looked through my paperwork and realized that I had inadvertently mailed you two copies of the same journal entry instead of one of each. I am sending you the third entry that is the original document dated in December. Please accept this as an oversight on my part and reconsider issuing me a loan officer's license. Enclosed is a copy of the updated background check, which indicates there is no record.

I have truly come a long way since my young foolish days. I have come off of public assistance, I am married, I have nine children and seven grandchildren. I have an Associates degree in Electronic Engineering Technology, I was gainfully employed at Behr Chrysler for five and a half years until the end of March 2003, and two years at First National Mortgage Banc. The only direction for me to continue to go is up. And with your assistance I will. Please hear me from your heart. (Exhibit 6)

9. The Respondent also submitted:

- a. A report from the Dayton Department of Police showing arrests for petty theft, a left turn traffic violation, trafficking in marijuana, felonious assault, petty theft, passing bad checks, and a speed limit violation. (Exhibit 7A The Respondent's handwriting at the bottom of that Exhibit indicates that these were arrests, but not convictions;
- b. A report from the Dayton Municipal Court for the 1979 conviction for petty theft. (Exhibit 7B). See, a report from a law enforcement agency describing the 1983 arrest of the Respondent for felonious assault in connection with the shooting of her husband. (Exhibit 7B);
- c. A report from the Dayton Municipal Court in connection with the 1983 charge of discharging a firearm in the city. (Exhibit 7C);
- d. A copy of the Dismissal Entry in the Montgomery County Court of Common Pleas in connection with the 1982 charge of felonious assault (Exhibit 7D).

CONCLUSIONS OF LAW

1. Ohio Revised Code Section 1322.031(A)(2) requires that in an application for a license as a loan officer, an applicant must submit a statement as to whether the applicant has been convicted or pleaded guilty to any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities.

2. Ohio Revised Code Section 1322.041(A) provides that the Superintendent of the Division shall issue a Loan Officer License if the Superintendent finds that certain conditions are met including:

- (3) The applicant has not been convicted or plead guilty to any criminal offense described in Division (A)(2) of Section 1322.031 of the Revised Code, or if the applicant has been convicted of or pleaded guilty to such offenses, the applicant has proven to the superintendent by a preponderance of the evidence, that the applicant's activities and employment records 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.
- (5) The applicant'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 Section 1322.01 to 1322.12 of the Revised Code.

3. Ohio Revised Code Section 1322.07 provides in relevant part:

No Mortgage broker, registrant, licensee or applicant for a certificate of registration or license under Sections 1322.01 to 1322.12 of the Revised Code shall do any of the following:

- (A) Obtain a certificate of registration or license through any false or fraudulent representation of a material fact or any omission of a material fact required by state law, or make any substantial misrepresentations in any registration or license application;
- (B) Make false or misleading statements of a material fact, omissions of statements required by state law, or false promises regarding a material fact, through advertising or other means, or engage in a continued course of misrepresentations;
- (C) Engage in conduct that constitutes improper, fraudulent or dishonest dealings[.]

4. Because the Respondent has been convicted of a theft offense, the burden of proof shifted to the Respondent to show by a preponderance of the evidence that her activities and employment record since her conviction show that she is honest, truthful and of good reputation and that there is no basis for believing she will commit such an offense again. The Division has the burden to show that the Respondent's character and fitness do not command the confidence of the public and warrant the belief that the business will be operated fairly in compliance with the purposes of the Ohio Mortgage Broker Act as well as the burden of showing the violations of Section 1322.07(A), (B) and (C).

DISCUSSION

1. At the time of the hearing in the matter the Respondent was 42 years of age. (Tr. 14). She is employed as a mortgage loan officer with First National Mortgage Banc in Dayton. (*Id.*). The Respondent has an associate's degree in electronics engineering technology. (Tr. 15). She has been in her current employment position for three years. (*Id.*).

2. In addressing whether Question 5 had been answered correctly, the Respondent, at the time of filling out the Application, believed that "No" was the correct answer because she thought she had completed a diversion program from the Court and that the conviction had been erased from her record. (Tr. 18).

3. The Respondent could remember whether she pled guilty to the petty theft charge. (Tr. 19). She could only remember that she was arrested in the store and was forced to spend a night in jail. (*Id.*).

4. The petty theft conviction arose from a shoplifting incident which is described in the Transcript beginning on page 23.

5. With regard to the drug trafficking and marijuana drug abuse charges, the Respondent stated she was living in public housing with her boyfriend and the police came to conduct a search. (Tr. 26). They found some valium (without a prescription in the name of the Respondent) and some marijuana. (Tr. 26). The Respondent denies having had any substance abuse problems at that time. (*Id.*).

6. The felonious assault charge arises out of a domestic dispute between the Respondent and her husband. The Respondent was beaten by her husband during the course of a violent argument. A gun appeared, a shot was fired, and the Respondent's husband was taken to the hospital. (Tr. 27-29). He subsequently recovered and the charges were dismissed. (Tr. 30). At the time of that incident, the Respondent had been around age 22. (Tr. 31).

7. The Respondent has also been charged with passing bad checks. (Tr. 32). When the NSF check was made good, the charges were dismissed. (Tr. 32).

8. The Respondent is now married to Sean Smith, Sr. and together they live at the Blueberry Avenue address. (Tr. 40). The Respondent and Mr. Smith have been married for nearly seventeen years. (*Id.*). Respondent has nine children, of whom four still reside at home. (Tr. 41). The Respondent attended ITP Technical Institute and received her Associate's Degree in Electronic Engineering Technology. (Tr. 41). She was graduated in 1994. (Tr. 42).

9. After her graduation, the Respondent began work at Monarch Marketing Systems and worked there for "a couple of years". (Tr. 42). After a failed attempt to start her own computer business, she then began work for Chrysler Corporation in 1997. (Tr. 42). In 2001, she changed careers and began work at her current employer in the mortgage industry. (Tr. 42-43). It should be noted that the Respondent left high school because of her pregnancies but ultimately received her GED and began her post-secondary education at Sinclair Community College. (Tr. 44).

10. The disabling offense of petty theft occurred twenty-five years ago. (Tr. 45). The Respondent was convinced in her own mind that she had received diversion and that upon completion of that diversion, the criminal conviction would be automatically expunged. (*See* Tr. 46-47).

11. The Respondent submitted letters of recommendation from Pastor Harold Beavers, Sr. of the Salem Missionary Baptist Church (Respondent's Exhibit A) and Corrie A. Watts, Executive Director of the Dayton View Community Development Corporation (Respondent's Exhibit B). Both letter spoke favorably of the Respondent and her activities in the community as well as her honesty in dealing with the church's finances. The Respondent also submitted a letter of recommendation from Kimberly Beisel, Operations Manager of First National Mortgage Banc, Inc. (Respondent's Exhibit D). Respondent also submitted a letter

from Terisa R. O'Neal, of Dayton, Ohio, a residential mortgage customer of the Respondent. (Respondent's Exhibit E). Finally, the Respondent submitted a document from the Ohio Bureau of Criminal Identification and Investigation indicating that no arrest record had been found for the Respondent. (Respondent's Exhibit F).

12. Testifying in support of the Respondent was David C. Tore. (Tr. 63, et seq.). Mr. Tore is the President and majority owner of First National Mortgage Banc. (Tr. 64). Mr. Tore recounted the Application for Employment that was completed by the Respondent. (Respondent Exhibit C). First National Mortgage Banc is an approved HUD lender and is one of the major lenders in Dayton. (Tr. 67). It is a member of several Chambers of Commerce as well as the Greater Dayton Real Estate Investor's Association and the Greater Dayton Apartment Association. (Tr. 67). Mr. Tore indicated that he tolerates no fraud. (Tr. 68). Mr. Tore is very familiar with the work of the Respondent. (Tr. 68). Mr. Tore noted that he has not had one customer complaint about the work of the Respondent and that she is celebrating her three year anniversary with his company. (Tr. 69). Mr. Tore noted that the Respondent always has her documentation correct and in order. (Tr. 73-74). Mr. Tore was not concerned about a shoplifting episode that occurred more than twenty-two years ago. (Tr. 78).

13. It is the burden of the Respondent to show by a preponderance of the evidence that her activities and employment records since the conviction show that she is honest, truthful and of good reputation and that there is no basis in fact for believing that she will commit such an offense again. The Hearing Officer, through the opportunity to review the documents in this case as well as to observe the Respondent in person at the Hearing, concludes that the Respondent has met her burden by a preponderance of the evidence. The underlying conviction for petty theft in this matter occurred some twenty-two years ago. The Division takes the position that criminal conviction involving any dollar amount is significant and that it will have a bearing on the licensing of a mortgage loan officer, regardless of whether the offense constituted a misdemeanor or felony. In this instance, the misdemeanor conviction that occurred twenty-two years ago arose from an isolated shoplifting event when the Respondent was quite young.

14. Since that time, the Respondent has had other arrests, but none of them have resulted in a criminal conviction. Those matters involved in specific matters, one of which related to a dismissal of drug charges when the police were searching for the Respondent's boyfriend, and the other involved a felonious assault charge that was dismissed upon full disclosure of the facts surrounding that incident. Both of those episodes occurred more than 20 years ago. There is adequate evident in the record to show that it is very unlikely that this Respondent will be involved in another theft offense or another "disabling offense" now or at anytime in the future. The Respondent has led an exemplary life over the past several years and has highlighted her educational development and work development in the record.

15. The Division is required to show that the 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 Section 1322.01 to 1322.12 of the Revised Code.

16. The Respondent has been engaged in the mortgage business for three years with First National Mortgage Banc. She has received the praise of the owner of that company as well

customers. She is actively involved in her church and community. Her criminal arrest involvement occurred more than twenty years ago. The Hearing Officer cannot conclude that the Division has met its burden of proof in this matter. The Respondent's evidence in this matter shows that she indeed has the 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 law. A twenty year record of hard work, educational advancement, a long-term marriage, involvement in the community and the accolades of her co-workers and customers, in this case, overcome a twenty-plus year old criminal involvement.

17. The most difficult issue before the Hearing Officer in this matter is the failure of the Respondent to disclose her criminal involvement for petty theft in answering question 5 of the Application. The failure to disclose a conviction on the Application is a violation of Section 1322.07(A), (B), and (C). Failure to disclose, in the eyes of the Division, is recent history of dishonesty which constitutes evidence that the Respondent does not possess the 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. Nondisclosure is indeed evidence of dishonesty but not necessarily dispositive evidence. That evidence of recent dishonesty must be taken in context with the rest of the record taken as a whole.

18. The Division has a reasonable expectation that convictions will be fully disclosed on the Application. The level of transparency in the application process should be every bit as much as the level of transparency in the loan processing industry. In this case, the Respondent's failure to disclose is a violation of Sections 1322.07(A), (B), and (C). The Respondent's assertion that she was involved in a diversion program, without more, is not sustainable in the record. There is inadequate evidence in the record to show that she was involved in any diversion program. Indeed, the record shows clearly and unequivocally that she was convicted of petty theft. For that reason, this Application should be denied. In a subsequent application, assuming full disclosure of the criminal conviction for petty theft, this Hearing Officer finds that the Respondent will have satisfied the requirements of Section 1322.031(A)(2), Section 1322.041(A)(3) and Section 1322.041(A)(5).

RECOMMENDATION

Based on the findings of fact, conclusions of law, and discussion set forth herein, it is the recommendation of the Hearing Officer that the Superintendent of the Division not grant a Loan Officer License to the Respondent.

Respectfully submitted,

Kenneth R. Cookson
Hearing Officer
May 7, 2004