

STATE OF OHIO  
DEPARTMENT OF COMMERCE

CASE NO. 05-0133-LOD

IN THE MATTER OF:     JASON KUHN

REPORT AND RECOMMENDATION OF THE HEARING OFFICER  
William R. Damschroder

I.     **Findings of Fact**

A.     **Background**

This matter came before this Hearing Officer, who is an attorney licensed to practice law in Ohio and duly appointed by the Division of Financial Institutions ("the Division"), Department of Commerce to serve as Hearing Officer. The hearing in this matter was held on October 11, 2005, in accordance with the procedures of Ohio Revised Code ("ORC") Chapter 119.

The hearing was held to consider whether an **Order to Deny the Application for a Loan Officer License** should be issued by the Division regarding Jason Kuhn, an individual, because Jason Kuhn has not proven that he is honest, truthful and of good reputation, and that there is no basis in fact for believing that he will not commit another criminal offense, and that Mr. Kuhn's character and general fitness do not command the confidence of the public and warrant the belief that he would operate his business honestly and fairly, in compliance with the purposes of the Ohio Mortgage Broker Act. The Division appeared and was represented by Assistant Attorney General Matthew J. Lampke. Jason Kuhn ("Respondent") appeared in person and represented himself *pro se*.

B.     **Jurisdiction and Procedural Matters**

1.     The Division issued a Notice of Opportunity for Hearing to Respondent on August 24, 2005, and served it upon Respondent by certified mail. Respondent's wife signed a certified mail receipt on August 27, 2005. (State's Exhibits #A)
2.     Respondent's hearing request was received by the Division on August 30, 2005. (State's Exhibit #B)
3.     By letter of August 31, 2005, the Division notified Respondent that the requested hearing was to be held on August 29, 2005, but in the same letter rescheduled the hearing to October 11, 2005. (State's Exhibit #B)

**C. Respondent's Loan Officer Application**

1. On or about June 24, 2005, the Division received the loan officer license application of Respondent. (State's Exhibit #C)
2. Respondent admitted on his application that he had a criminal conviction. (State's Exhibit #C)
3. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031 (B)
4. The Division obtained documentation proving that Respondent had been convicted of Theft, a misdemeanor of the first degree, on or about June 6, 2002. Respondent was sentenced to one hundred eighty days of incarceration, with all of the days suspended, two years probation and he was ordered to pay a fine of one thousand dollars (\$1000). The Respondent was also ordered to stay away from Kroger's, his employer at the time of his conviction. (State's Exhibit #C)
5. Respondent testified that his legal problem arose from a misunderstanding while at work. Respondent testified that, while nearing the end of his shift, he did a favor for a regular customer by taking the customer's "Coinstar" slips and agreeing to convert them to cash and take the proceeds to the customer at another location within the store. Respondent admitted that such an act was not in accordance with store procedures. Respondent testified that as soon as he converted the Coinstar slips to cash he placed the money in his pocket and began to leave the office area, at which point Kroger security personnel stopped him and took him to a private area, where he was accused of theft. Respondent subsequently was found guilty of theft, a first degree misdemeanor. (State's Exhibit # C, Tr. pp. 16-31)
6. Respondent testified that he was told that the Coinstar slips were stolen, but that he had nothing to do with any such theft of slips. (Tr. p. 22)
7. Respondent testified that he cashed the Coinstar slips for a particular customer that he had gotten to know very well, and that there was nothing fraudulent or funny about him.<sup>16</sup> He also testified, however, that he did not know where the customer was in the store when he converted the Coinstar slips to cash, and that he has no idea what this customers name was. (Tr. pp. 16, 21, 42)
8. Respondent submitted evidence that, subsequent to making application for licensure with the Division, he sought an was granted an order to seal the record of his criminal conviction. The Entry granting the sealing of the record was signed by Judge Liston and dated August 12, 2005. The Entry orders that all official records pertaining to the case be sealed, and further orders that no officer or employee of the state shall knowingly disseminate or make available for any purpose involving employment, bonding or licensing in connection with

any business, trade or profession any information or data concerning the sealed conviction. (Respondent's Exhibit #1)

## II. Conclusions of Law

### A. Jurisdictional and Procedural Matters

1. Ohio Revised Code Section 119.07 requires the Division to notify Respondent of his right to request a hearing. The Division's notice to respondent was sent by certified mail, signed for by Respondent, and Respondent returned a request for hearing form to the Division.
2. The Division complied with notification of hearing requirements by sending Respondent a stating the date, time and location of the hearing in this matter
3. Respondent received proper notice of the hearing and therefore, it was appropriate for the hearing to proceed in his absence. *Reed v. State Med. Bd.* (1988) 40 Ohio App. 3d 124, 125-126.
4. The Division has procedurally complied with R.C. Chapter 119, and jurisdiction over this matter is established.

### B. Loan Officer License Application

1. The Division is the state agency responsible for the licensing and regulation of mortgage loan officers pursuant to R.C. Chapter 1322.
2. The Franklin County Court of Common Pleas in *Chiero v. Bureau of Motor Vehicles*, 55 Ohio Misc. 22, 9 Ohio Op. 3d 429, 381 N.E. 2d 219 (1977), in referring to the decision in *Goodyear Synthetic Rubber Corp. v. Department of Industrial Relations*, 76 Ohio Law Abs. 146, 1222 N.E. 2d 503 (C.P. Franklin Co. 1954), stated that "(i)t is a fundamental concept of administrative law and procedure that the party asserting the affirmative of an issue bears the burden of proof." Thus, the Division bears the burden of proof in this case.
3. The Supreme Court of Ohio, in *St. Augustine Church v. Attorney General of Ohio, Charitable Foundations Section*, 67 Ohio St. 2d 133, 21 Ohio Op. 3d 84, 423 N.E. 2d 180 (1981) stated that an applicant for a license has the burden to show it is entitled to a license. Thus, the Respondent must show he is entitled to a license.

4. The Supreme Court of the United States, in Dent v. West Virginia, 129 U.S. 114 (1889), said of state-imposed conditions on practicing a profession:

(t)he power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud...If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

5. R. C. Section 1322.041 (A) provides that a loan officer license shall be issued if the Superintendent of Financial Institutions finds that certain conditions are met, including:

- (2) The applicant complies with sections 1322.01 to 1322.12 of the Revised Code.
- (3) The applicant has not been convicted of or pleaded 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 or pleaded guilty to such an offense, the applicant has proven to the superintendent, by a preponderance of evidence, that the applicant's activities and employment record 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.

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- (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 sections 1322.01 to 1322.12 of the Revised Code.

6. The Division's alleged bases for license denial cannot be established without consideration of the now sealed conviction. Therefore, the ability to do so in light of the Order to Seal Record of Conviction provided after the hearing must be determined at the outset.

7. The Order to Seal Record of Conviction sealing the arrest and conviction records was issued in response to a motion filed pursuant to R.C. 2953.32. Therefore, the "proceedings in the case shall be considered not to have occurred" unless there is some provision permitting inspection and consideration of the conviction such as a subsequent criminal conviction. R.C. 2953.32(C) and (D).
8. Ohio Revised Code Section 2953.33 provides that, in general, "an order to seal the record of a person's conviction restores the person who is the subject of the order to all rights and privileges not otherwise restored by termination of the sentence or community control sanction or by final release on parole or post-release control." R.C. 2953.33(A). A license applicant can, however, be questioned about a conviction that has been sealed but only if the "question bears a direct and substantial relationship to the position for which the person is being considered." R.C. 2953.33(B).
9. Even though the conviction was not sealed when the Application was filed, further inquiry into it as part of this licensing process is permissible if it bears a direct and substantial relationship to being licensed as a loan officer. Ohio State Bd. of Pharmacy v. Friendly Drugs (1985), 27 Ohio App.3d 32, 33-35.
10. A license applicant may be questioned about sealed convictions and the underlying facts when the sealed conviction has a nexus to the license sought due to the nature of the underlying activities and the statutory requirements for licensure. In re Application of Davis (1980), 61 Ohio St.2d 371 (Ohio Supreme Court Board of Commissioners on Character and Fitness' consideration of law license applicant's expunged felony conviction); In re Forster (2005), 161 Ohio App.3d 627 (County Sheriff's consideration of concealed handgun license applicant's expunged receiving stolen property conviction); Szep v. Ohio State Bd. of Pharmacy (1995), 106 Ohio App.3d 621, discretionary appeal not allowed, (1996), 75 Ohio St.3d 1484 (Ohio State Pharmacy Board's consideration of intern license applicant's undisclosed expunged felony conviction); In re Niehaus (1989), 62 Ohio App.3d 89 (Ohio Medical Board's consideration of physician's expunged misdemeanor attempted illegal processing of a drug document conviction based upon acts committed in the course of his practice); Ohio State Bd. of Pharmacy v. Friendly Drugs (1985), 27 Ohio App.3d 32 (Ohio State Board of Pharmacy's consideration of expunged drug convictions of applicants for terminal distributor of dangerous drugs licenses); and Schmitt v. Counselor and Social Worker Bd., 11 Dist. No. 2001-L-234, 2003-Ohio-3496 (Ohio Counselor and Social Worker Board's consideration of professional counselor license applicant's expunged menacing by stalking conviction). In this case, the nexus between the conviction and the license sought is clear to see.
11. Ohio Revised Code Section 1322.031(A)(2) requires a loan officer license applicant to include in his or her application a statement as to whether he or she has been convicted of 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.

12. The Division has proved that Respondent has been convicted of a criminal offenses related to theft. This is directly related to the license he seeks, indeed it goes to the heart of the integrity needed to adequately and fairly represent the interests of mortgage clients. For this reason, Respondent's conviction must be considered when reviewing his application for licensure. Accordingly, Respondent must show that, since his conviction, he is honest, truthful and of good reputation, and that the Superintendent has no basis for believing that Respondent will commit another criminal offense.
13. Respondent's explanation for his conduct is, at best confusing, and, at worst, disingenuous. He claims that he was "doing a favor" for a valued customer but cannot name the person, and the customer never came forward to verify Respondent's version of events. Respondent's explanation is just too convenient to be believed, especially in light of the fact that Respondent plead no contest, for whatever reason, and was found guilty of a crime, theft, that goes to the heart of the license being sought.
14. The Division has met its burden of proof to deny a license to Respondent.
15. Respondent did not present evidence of sufficient weight to meet his burden of proof that he is entitled to a license.

**C. Records, Information, and Data Pertaining to Sealed Conviction.**

1. The Division's official records, the transcript, this Report and Recommendation, and the exhibits in the record, as well as copies in the hands of counsel and others must be maintained and handled in a manner consistent with R.C.2953.35(A), which, in relevant part, provides:

(A) Except as authorized by divisions (D), (E), and (F) of section 2953.32 of the Revised Code or by Chapter 2950. of the Revised Code, any officer or employee of the state, or a political subdivision of the state, who releases or otherwise disseminates or makes available for any purpose involving employment, bonding, or licensing in connection with any business, trade, or profession to any person, or to any department, agency, or other instrumentality of the state, or any political subdivision of the state, any information or other data concerning any arrest, complaint, indictment, trial, hearing, adjudication, conviction, or correctional supervision the records with respect to which the officer or employee had knowledge of were sealed by an existing order issued pursuant to sections 2953.31 to 2953.36 of the Revised Code, or were expunged by an order issued pursuant to section 2953.42 of the Revised Code as it existed prior to the effective date of this amendment, is guilty of divulging confidential information, a misdemeanor of the fourth degree.

2. Pursuant to R.C. 2953.35(A), the Division must carefully evaluate the Entry of the court Sealing the Record of Conviction to see if it specifically orders the sealing of the pertinent official records of that administrative agency. If it encompasses the Division's records specifically, the Division must the seal its official records and the portions of the record in this case, including this Report and Recommendation, dealing with Respondent's sealed conviction and only release, disseminate, or make available those records, and information or other data concerning the sealed conviction in a manner consistent with R.C. 2953.35(A) and Ohio Revised Code Chapter 2953. If the Order does not specifically order the sealing of the pertinent official records of Division, the Division may the seal its official records and the portions of the record in this case, including this Report and Recommendation, dealing with Respondent's sealed conviction. Even if sealing of those records is discretionary, R.C. 2953.35(A) requires the Division to only release, disseminate, or make available those records and information or other data concerning the sealed conviction in a manner consistent with R.C. 2953.35(A) and Ohio Revised Code Chapter 2953. In either situation, the materials must be maintained separate from the Division's public files. Counsel representing the Division in this case and the Ohio Attorney General's Office now have knowledge of the sealed conviction and fall within the purview of R.C. 2953.35(A). They should also evaluate the documents, data, information, and the materials in their possession, including this Report and Recommendation, dealing with Respondent's sealed conviction and only release, disseminate, or make available those records and information or other data concerning the sealed conviction in a manner consistent with R.C. 2953.35(A) and Ohio Revised Code Chapter 2953. 1993 Ohio Op. Att'y Gen. No. 93-38 (Syllabus at Paragraphs 1, 2, 3, and 4.)
3. It is the opinion of this Hearing Officer that the Order does specifically order the sealing of the Division's pertinent official records, and further orders all state employees to refrain from disseminating any information relating to this conviction. The Division has the authority to seal its official records and the portions of the record in this case, including this Report and Recommendation, dealing with Respondent's sealed conviction. Thus, the Hearing Officer strongly recommends that the Division seal its official records and the portions of the record in this case, including this Report and Recommendation, dealing with Respondent's sealed conviction. Regardless of whether the pertinent records are sealed, they should at a minimum be segregated from public files and only released, disseminated or made available in accordance with R.C. 2953.35(A) and Ohio Revised Code Chapter 2953. 1993 Ohio Op. Att'y Gen. No. 93-38 (Syllabus at Paragraphs 1 and 4.) If the Division does not believe that the records can be sealed without a separate court order, it should obtain such a court order to avoid violating R.C. 2953.35(A) and Ohio Revised Code Chapter 2953.

III. Recommendation

In careful consideration of the testimony and exhibits at the hearing, it is hereby recommended that Jason Kuhn be found to not have met the prerequisites set forth in Revised Code Section 1322.041, and that the Superintendent of Financial Institutions **deny** Respondent's application for a Loan Officers License.

Furthermore, it is recommended that the Division take all measures necessary to insure that the record in this matter remain sealed, and that no information in that record is disseminated in a manner other than that authorized by R.C. Chapter 2953.

  
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William R. Damschroder, Esq.  
Hearing Officer

4/11/06  
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Date