

STATE OF OHIO
DEPARTMENT OF COMMERCE

CASE NO. 05-0141-LOD

IN THE MATTER OF: DONALD F. LAMUTIS

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 19, 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 Donald F. Lamutis, an individual, because Donald F. Lamutis 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 involving theft or any criminal offense involving money or securities, and that Mr. Lamutis' 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 James M. Evans. Donald F. Lamutis ("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 9, 2005, and served it upon Respondent by certified mail. Respondent's wife signed a certified mail receipt on August 16, 2005, which was received by the Division on August 18, 2005. Respondent also requested a hearing using the hearing request form sent to him along with the Notice. (State's Exhibit #2, #3)
2. Respondent's hearing request was received by the Division on August 29, 2005. (State's Exhibit #4)
3. By letter of August 31, 2005, the Division notified Respondent that the requested hearing was to be held on September 8, 2005, but in the same letter rescheduled the hearing to October 19, 2005. (State's Exhibit #4)

C. Respondent's Loan Officer Application and Criminal Convictions

1. On or about November 19, 2004, the Division received the loan officer license application of Respondent. (State's Exhibit #1)
2. Respondent admitted on his application that he had a criminal conviction for petit larceny. (State's Exhibit #1)
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 from Respondent proving that Respondent had been convicted of petit larceny on or about April 25, 2000. Respondent was sentenced to one year conditional discharge and ordered to make restitution of \$67,500. Respondent, at the time a licensed attorney in the State of New York, explained that his conviction arose from his handling of a client's real estate transaction, during which he issued a check from his trust account without sufficient funds to cover the check. (State's Exhibit #1)
5. As a result of his legal difficulties, Respondent ultimately resigned from the practice of law in the State of New York. Respondent also testified that, though he had previously been admitted to practice law in Pennsylvania, he was not currently licensed in that state. (State's Exhibit #6, Tr. p. 46)
6. Respondent testified that he wanted to withdraw his application, and that he had no intention of acting as a loan officer. The Division chose not to accept the withdrawal of the application and to proceed with the hearing. (Tr. pp. 10-11, 35, 48)
7. Respondent testified that, since moving to Ohio in 2001, he has held a number of jobs with large employers and has had no legal issues. He also testified that he fully disclosed his criminal conviction when applying for each of those positions. (Tr. pp. 52-55)
8. Respondent testified that, even though he no longer wishes to act as a loan officer and is willing to withdraw his application, he wants a finding that he has proved that, since his conviction, he is honest, truthful and of good reputation, and that his character and general fitness command the respect of the public, since the criminal offense was a single aberration in an otherwise blemish-free career. (Tr. pp.51-52)

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. 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.

- (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. R.C. Section 1322.031(A)(2) requires that an applicant provide to the Superintendent, among other things, "[a] statement as to whether the applicant 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[.]"
7. The Division has proved that Respondent has been convicted of a criminal offenses related to theft. This places a burden on Respondent to 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.

8. Respondent does not deny his culpability for her criminal conduct, or try to excuse it in any way. He points out that his professional record was unblemished prior to his conviction, and points out that he has had no legal difficulties since. Respondent claims to be fighting the Division's intent to deny a license only as a method to defend his reputation from the charge that he is not honest and truthful, and that his character and general fitness do not command the respect of the public. Respondent did not, however, choose to submit evidence beyond his testimonial assertions attesting to his good reputation and honesty. Perhaps Respondent made this choice because, as he admitted, he has no intention of acting as a licensed loan officer. Whatever his reasons, given the nature of his conviction for a theft offense and its direct relation to the type of service provided by a loan officer, the Division is justified in needing more than an assertion from Respondent to meet his burden. Without any additional evidentiary showing, I cannot hold that Respondent has proved that he is honest, truthful and of good reputation and not likely to commit another criminal offense, or that Respondent's character and general fitness command the respect of the public and support the belief that he would operate his business in compliance with the Ohio Mortgage Brokers Act.
9. The Division has not met its burden of proof to deny a license to Respondent.
10. Respondent did present evidence of sufficient weight to meet his burden of proof that he is entitled to a license.

II. **Recommendation**

In careful consideration of the testimony and exhibits at the hearing, it is hereby recommended that Donald F. Lamutis 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.

William R. Damschroder, Esq.
Hearing Officer

Date

5/2/06