

STATE OF OHIO  
DEPARTMENT OF COMMERCE

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CASE NO. 05-0105-LOD

IN THE MATTER OF:      TIMOTHY W. HERRON

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 September 29, 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 to Timothy W. Herron, an individual, because Mr. Herron made substantial misrepresentations on his license application, made false or misleading statements of material fact, and engaged in conduct that constitutes improper, fraudulent, or dishonest dealing, and that Mr. Herron'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 Timothy Loughry. Timothy W. Herron ("Respondent") appeared in person and represented himself *pro se*.

B.      Jurisdiction and Procedural Matters

1. The Division issued a Notice of Intent to Deny Loan Officer License Application and Notice of Opportunity for Hearing to Respondent on June 2, 2005, and served it upon Respondent by certified mail. Respondent signed the certified mail receipt form on July 14, 2005. (State's Exhibit #1)
2. Respondent's signed and submitted a hearing request form, asking that an administrative hearing be held concerning the Division's intention to deny Respondent a license. This request was received by the Division on August 5, 2005. (State's Exhibit #1)

3. By letter of August 17, 2005, the Division notified Respondent that the requested hearing was to be held on September 29, 2005. (State's Exhibit #1)
4. Respondent attended the hearing and represented himself pro se, after stating for the record that he understood that he had a right to counsel, but that he wished to proceed without counsel on his behalf. (Tr. p. 5)

**C. Respondent's Loan Officer Application and Criminal Convictions**

1. On or about September 8, 2004, the Division received the loan officer license application of Respondent. (State's Exhibit #2)
2. In completing the application, Respondent indicated by answering "No" on question #5, that he had not ever been convicted of any criminal offense. (State's Exhibit #2)
3. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031 (B)
4. In response to the Division's request, Respondent submitted obtained documentation from the Chardon Municipal Court providing the Division with the details concerning a September 30, 1999 conviction for criminal trespass arising from a domestic dispute concerning visitation rights with his child, and a written explanation of the circumstances surrounding his conviction. (State's Exhibit #3)
5. Notwithstanding Respondent's letter of explanation for the circumstances of his conviction, nothing in the Division records indicate an explanation for answering Question #5 of the application, concerning criminal convictions, in the negative. (Tr. p. 18)
6. When asked about his answer to Question #5 at hearing, Respondent testified that when he completed his application he asked the clerical staff with his proposed mortgage broker and was advised that, since his conviction was a misdemeanor, he should answer Question #5 in the negative. (Tr. p. 53, 61, 67-68)
7. Respondent testified that Premier Mortgage, the broker he was applying for licensure through, was aware of his criminal conviction at the time he made application (Tr. p. 69)

## II. Conclusions of Law

### A. Jurisdictional and Procedural Matters

1. Ohio Revised Code Section 119.07 requires the Division to notify Respondent of her 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 she 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 argument in seeking to deny Respondent a loan officer's license rests on R.C. Sections 1322.07, which states in pertinent 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:

- i. Obtain a certificate of registration or licensure through false or fraudulent representation of a material fact or any omission of a material fact required by state law, or make any substantial misrepresentation in any registration or license application;

- ii. 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;
  - iii. Engage in conduct that constitutes improper, fraudulent, or dishonest dealings;
- 7. The Division has proved that Respondent answered question #5 incorrectly by checking the box marked "No", when the criminal background check proved that Respondent had been convicted of a criminal offenses.
- 8. Though a conviction has been proved, Respondent has not been convicted of a criminal offense outlined in R.C. 1322.031 (A)(2) such that he bears the burden of showing that he is honest, truthful, and of good reputation, and that his actions since his conviction demonstrate that he is not likely to commit another criminal offense.
- 9. The standard for review of the issue of answering Question #5 incorrectly cannot be one of strict liability. The Ohio Supreme Court has held that it is not negligence *per se* to violate an administrative code provision. See *Chambers, et al. v. St. Mary's School* (1998) 82 Ohio St. 3d. Given that holding, it is must be true that a mere application, which does not have the force and effect of an administrative rule, cannot be reviewed from a strict liability standard. For that reason, it is necessary to consider evidence that seeks to explain the answer given by Respondent to Question #5.
- 10. With respect to the answer to Question #5, concerning criminal convictions, it is incumbent upon Respondent to offer some explanation for the obviously incorrect answer provided in his application.
- 11. Respondent testified convincingly that he sought some guidance from personnel of his future mortgage broker, who advised him incorrectly that he should answer "No" to Question #5 if his conviction was for a misdemeanor. This is a plausible explanation, and must be considered in light of the nature of his conviction, which is completely unrelated to the duties of a mortgage loan originator. I am convinced that the answer provided, while incorrect, was an innocent mistake. To deny licensure to an otherwise qualified individual would be patently unfair.
- 12. I find that the Respondent's character and fitness command the respect of the public and that the Superintendent should have every confidence that Respondent will conduct his business affairs honestly, fairly, and in compliance with Revised Code Chapter 1322.

11. The Division has failed to meet its burden of proof of showing that Respondent is not entitled to a license.
12. Respondent has presented evidence sufficient 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 Timothy W. Herron be found to have met the prerequisites set forth in Revised Code Section 1322.041, and that the Superintendent of Financial Institutions grant Mr. Herron's application for a Loan Officers License.

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William R. Damschroder, Esq.  
Hearing Officer

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Date

3/10/06