

Bob Taft
Governor

STATE OF OHIO
DEPARTMENT OF COMMERCE
Division of Financial Institutions
Consumer Finance

Doug White
Director

In the matter of:)	Case No. 03-LO-D-21-22
)	
EDWARD T. FARMER)	<u>DIVISION ORDER</u>
1458 Wilderness Drive)	Denial of loan officer license application
Maumee, Ohio 43537)	&
)	Notice of Appellate Rights

Respondent, Edward T. Farmer, submitted a loan officer license application to the Division of Financial Institutions ("Division") on May 1, 2002. On April 30, 2003, the Division notified Farmer that it intended to deny his loan officer license application because: (1) he had been convicted of petty theft in 1990; (2) he violated R.C. § 1322.07(A) by failing to disclose his conviction on his loan officer license application; (3) he violated R.C. § 1322.07(B) by making a false statement of a material fact or by omitting a statement required by state law on the licensing application; and (4) because his character and general fitness did not command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purposes of R.C. §§ 1322.01 to 1322.12—the Ohio Mortgage Broker Act.

Farmer requested a hearing and an administrative hearing was held on June 24, 2003. A Report and Recommendation was filed with the Division on August 11, 2003, recommending that the Division approve Farmer's application and grant him a loan officer license. (Attached). Farmer did not object to the report and/or recommendation.

In accordance with R.C. §119.09, the Division has considered the Report and Recommendation, applicable laws, the transcript of testimony and the exhibits. As a result, the Division modifies and/or disapproves the findings and/or conclusions listed below. Any finding and/or conclusion not specifically addressed below is approved, adopted, and incorporated herein. (The Hearing Examiner's Report and Recommendation is attached hereto as Exhibit A.)

The introduction on page 1 of the Report and Recommendation states that the hearing was held on June 27, 2003. The hearing was held on June 24, 2004. (Transcript, p. 4.) The introduction on page 1 of the Report and Recommendation is modified accordingly.

Paragraph 2 on page 1 of the Report and Recommendation states that Farmer applied for his license on April 29, 2002. Farmer applied for his loan officer license the day he submitted

his application to the Division, which is May 1, 2002. (Exhibit 1.) Paragraph 2 on page 1 of the Report and Recommendation is modified to reflect the change.

The Division modifies the second sentence of paragraph 4 on page 2 to the Recommendation to reflect the specific alleged violations of R.C. § 1322.07. The Division alleged in its Notice that Farmer had violated R.C. § 1322.07(A) which prohibits an applicant for a loan officer license from “[o]btaining a *** license through any false or fraudulent representation of a material fact or any omission of a material fact required by state law, or [from] making any substantial misrepresentation in any *** license application[.]” The Division further alleged a violation of R.C. § 1322.07(B) which prohibits an applicant for a loan officer license from “[m]ak[ing] false or misleading statements of a material fact, omissions of statements required by state law[.]” (Exhibit 3.) In accordance with foregoing, the second sentence of paragraph 4 on page 2 of the Report and Recommendation is modified.

The Division modifies the first sentence of paragraph 16 on page 5 of the Recommendation. Farmer testified that he has been a loan officer since 1999, not 1995. (Transcript, p. 16).

The Division modifies and disapproves the last sentence of paragraph 27 on page 7 of the Report and Recommendation and disapproves paragraph 30 on page 7 of the Report and Recommendation and paragraph 34 on page 8 of the Report and Recommendation. In cases where records have been sealed, R.C. § 2953.32(C)(1)(e)(2) does state “the proceedings in the case shall be considered not to have occurred[.]” However, R.C. § 2953.33 allows the Division to inquire about convictions that have been sealed if “the question bears a direct and substantial relationship to the position for which the person is being considered.” The Ohio Mortgage Broker Act makes it clear that crimes involving theft have a direct and substantial relationship to the loan officer profession. (See R.C. §§ 1322.031(A)(2) and 1322.041(A)(3).) Therefore, the Division cannot agree with the conclusion that Farmer’s interpretation of question 5 was “not altogether unreasonable.”

Further, the Division does not find that Farmer’s explanation mitigates the effect of the non-disclosure of his theft conviction to the Division, nor can the Division find that Farmer’s failure to disclose the conviction is a “reasonable mistake.” Farmer acknowledged his theft conviction. (Transcript, pp. 11-12.). The record is void of any documentation indicating that his

petty theft conviction had in fact been sealed. Absent any documentation showing that Farmer's conviction had been sealed prior to the filing of his loan officer license application, the Division cannot find that his explanation mitigates the effect of the non-disclosure of his theft conviction to the Division.

The Division modifies paragraph 32 on page 8 of the Report and Recommendation to reflect that more than the circumstances surrounding a criminal conviction are examined when a person's character and general fitness is being judged pursuant to R.C. § 1322.041(A)(5). When judging a person's character and general fitness, the Division must find that the person's business will be operated in compliance with the Ohio Mortgage Broker Act. Any violations of the Ohio Mortgage Broker Act committed by an applicant would cast serious doubt on that person's character and general fitness.

The Division disapproves paragraph 36 on page 8 of the Report and Recommendation.

The Division, by law, is charged with investigating the criminal backgrounds of all loan officer license applicants. (See R.C. § 1322.031.) The Division specifically inquired about Farmer's criminal background on his application in question 5 where it asks whether he "[has]***ever been convicted of ***any criminal offense[?]" (Exhibit 1.) Therefore, an applicant's criminal history is a "material fact" under R.C. §§ 1322.07(A) and (B). If an applicant has failed to disclose a criminal conviction to the Division, they have failed to disclose a material fact and have violated both R.C. §§ 1322.07(A) and (B). Under no circumstances does an applicant determine what facts are material or immaterial.

The Division disapproves of paragraph 38, 39, 40, and 41 on page 9 of Report and Recommendation.

The "fairest reading" of both R.C. §§ 1322.07(A) and (B) is a plain reading of the statute. The hearing officer correctly points out in paragraph 37 of the Report and Recommendation that the statute does not require a mens rea. Mens rea, or intent, is not a part of the statute.¹ Further, as intent is not required for violations of R.C. §§ 1322.07 (A) and (B), the Division does not find the case of *Webb v. State Medical Board of Ohio* (2001), 146 Ohio App.3d 621, or the hearing officer's conclusions based upon *Webb*, contained in paragraphs 40 and 41 of the Report and Recommendation, applicable with respect to violations of R.C. 1322.07(A) and (B).

¹ In R.C. §§ 1322.07(E) and (F), both sections contain language of intent by using the term "knowingly." R.C. §§ 1322.07(A), (B), and (C) do not.

The Ohio Mortgage Broker Act does not necessarily make a violation of any provision of R.C. § 1322.07 an automatic denial, however the Act does give the Division the power to refuse to issue a license on the basis that an applicant violates “any provision of sections 1322.01 to 1322.12 of the Revised Code[.]” See R.C. 1322.10(A)(1)(a.) Hence, any violation of R.C. §§ 1322.07(A) and (B) would be sufficient grounds for the denial of a loan officer license application.

The Division disapproves paragraphs 43 and 44 on page 10 of the Report and Recommendation.

Farmer answered “no” to question 5. (Exhibit 1.) Farmer was convicted of theft. (Exhibit 2.) As such, when Farmer failed to disclose his theft conviction to the Division, he violated R.C. § 1322.07(A) which prohibits an applicant for a loan officer license from “[o]btaining a *** license through any false or fraudulent representation of a material fact or any omission of a material fact required by state law, or [from] making any substantial misrepresentation in any *** license application[.]” Further, that non-disclosure of his criminal conviction is a violation of R.C. § 1322.07(B) which prohibits an applicant for a loan officer license from “[m]ak[ing] false or misleading statements of a material fact, omissions of statements required by state law[.]”

The loan officer application submitted by Farmer specifically asked him in question 5 whether he “[has]***ever been convicted of ***any criminal offense[?]” (Exhibit 1.) Farmer answered “no.” (Id.) In answering question 5 on his loan officer application, Farmer stated that he had never been convicted of any criminal offense. He signed the loan officer license application under oath before a notary public, swearing that he had completed it “fully and frankly[, and that] the answers were complete and true” when they were not. (Id.)

Farmer’s failure to disclose his criminal conviction to the Division and his resulting violations of R.C. §§ 1322.07(A) and (B) show that Farmer’s character and general fitness do not command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act.

Further, as Farmer was convicted of a theft offense, he had the burden to show, by a preponderance of evidence, that his employment record and activities since his theft conviction show that he is honest, truthful, and of good reputation, and there is no basis in fact for believing

that he will commit an offense involving theft again. (See R.C. §§ 1322.031(A)(2) and 1322.041(A)(3).) Other than his own self-serving testimony, the only other evidence put into the record was a copy of an honorable discharge from the Navy. (Exhibit A.) The honorable discharge, while related to his employment since his conviction, is generic in language and does little to show anything specific regarding Farmer's honesty, truthfulness, or good reputation. The hearing officer even noted that Farmer did not present any "character witnesses or letters of recommendation." (R & R, paragraph 24, p. 6.)

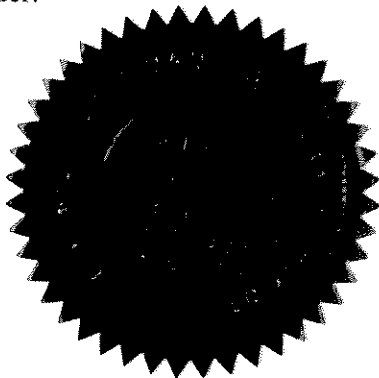
After a thorough review of the evidence, the Division concludes that Farmer has not proven, by a preponderance of the evidence, that his activities and employment history since his conviction show that he is honest, truthful, and of good reputation and that there is no basis in fact for believing that he will not commit another theft type offense. The record further establishes as result of Farmer's non-disclosure of his theft conviction and resulting violations of R.C. §§ 1322.07(A) and (B) he does not have the character and general fitness to command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act.

In accordance with the findings and conclusions of this Order, the Division hereby denies Farmer's loan officer license application.

It is so ordered.

NOTICE OF APPELLATE RIGHTS

Respondent is hereby notified that pursuant to R.C. 119.12, this Order may be appealed by filing a notice of appeal with the Ohio Division of Financial Institutions setting forth the Order appealed from and the grounds for the appeal. A copy of such notice of appeal, pursuant to R.C. 119.12, must also be filed with the court of common pleas of the county in which the place of business of the Respondent is located, or the county in which the Respondent is a resident. A notice of appeal must be filed within fifteen (15) days after the date of mailing of this Order.



Signed and sealed this 12th day of January 2006.

ROBERT M. GRIESER

Deputy Superintendent for Consumer Finance
Division of Financial Institutions
Ohio Department of Commerce

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

RECEIVED
DIVISION OF FINANCIAL
INSTITUTIONS

03 AUG 11 AM 9:35

In the Matter of:

Edward T. Farmer
1458 Wilderness Drive
Maumee, Ohio 43537

:
: Case No. 03-LO-D-21-22
:
: Terrence O'Donnell, Hearing Examiner
:

HEARING EXAMINER'S
REPORT AND RECOMMENDATION

I. Introduction

This case came to be heard on June 27, 2003. Appearing were Respondent Mr. Edward Thomas Farmer and Deputy Attorney General Paula Paoletti representing the Department of Commerce's Division of Financial Institutions. Ms. Amanda Axtell from the Division was present for part of the hearing.

After due consideration of the evidence, the Hearing Examiner makes the following findings.

II. Findings of Fact

A. Background

1. Pursuant to the Ohio Mortgage Broker Act, O.R.C. 1322.01 to O.R.C. 1322.12, the Department of Commerce is charged with the responsibility to accept applications for loan officer licenses and determine whether applicants meet the statutory requirements.
2. On April 29, 2002, Mr. Farmer, employed by Acc-u-Rate Mortgage Company, LTD., 4303 Talmadge Road, Suite 206, Toledo, Ohio, 43623, applied for a license to be a loan officer. See Loan Officer Application, State's Exhibit 1.

3. On April 30, 2003, the Department of Commerce issued a Notice of Intent to Deny a Loan Officer's License to Mr. Farmer. See Notice, State's Exhibit 3.
4. The Department of Commerce stated in its Notice of Intent to Deny Loan Officer's License as its basis for the intent to deny the license that in or around 1990, Mr. Farmer was convicted of "petty theft." In addition, the Department alleged that Mr. Farmer failed to disclose this criminal offense on his application, in violation of ORC 1322.07, prohibiting an applicant from obtaining a license through the omission of a material fact required by state law. See Notice, State's Exhibit 3.
5. The Department of Commerce stated that in its Notice of Intent to Deny Loan Officer License that Respondent has not proven he is honest, truthful, and of good reputation; that Respondent has not proven there is no basis in fact to believe he will not commit another 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; nor that his character and general fitness command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purpose of the Ohio Mortgage Broker Act. See Notice, State's Exhibit 3.
6. Mr. Farmer requested a hearing to appeal the Department of Commerce's determination. See Letter, State's Exhibit 4.

B. Conviction for Petty Theft (1990)

7. At the hearing, the State offered into evidence documentation indicating Mr. Farmer was convicted of petty theft on October 3, 1990. See Docket Sheet, State's Exhibit 2. Mr. Farmer acknowledged this conviction in a letter to the Department of Commerce. See

Letter, State's Exhibit 2. He also acknowledged the conviction at the hearing. See Transcript, pp. 10-11, 19.

8. Mr. Farmer explained in his letter to the Department that his conviction stemmed from an incident in which he and a friend used a stolen credit card to make several purchases at a shopping mall. Though he was originally charged with receiving stolen property, the authorities reduced his charge to petty theft. See Letter, State's Exhibit 2.
9. The Court sentenced Mr. Farmer to a period of probation for the offense. See Docket Sheet, State's Exhibit 2.
10. Mr. Farmer testified that he was 18 years old at the time of his conviction, which he acknowledged was "immature." He also stated that he is now 30 years old, a husband and father, and a veteran of the Gulf War. He stated that he has not committed a crime in the past approximately 13 years since his conviction. See Transcript, p. 17, and Honorable Discharge, Department of the Navy, Respondent's Exhibit A.

C. Failure to Disclose Conviction on Loan Officer Application

11. Question 5 on the Loan Officer Application, asks:

"[h]ave you or has any company for which you have been an officer, or more than 5% owner or director, ever been convicted of or plead guilty to 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."

In response, Mr. Farmer indicated, "no." See Application, State's Exhibit 1.

12. At the hearing, Mr. Farmer testified that he did not disclose his conviction because he thought the conviction had been expunged from his record, and that Question 5 did not require disclosure of expunged convictions. He stated:

"I was under the impression per my attorney that when I was honorably discharged from the U.S. military in 1993, both my mother and I sent a letter to the attorney that handled this case back in 1990 ... to have this charge expunged. Now, I was under the impression when you have a charge expunged, the only people who can reference that charge, meaning, for it to come up on a background check, would be federal. Not local; not state. Now come (*sic*) to find out through this situation that indeed it had not been expunged." See Transcript, pp. 15-16.

13. He also testified that his mistaken belief about the expungement had been ratified by the State of Ohio in 1994 when he applied for a license to sell automobiles. He testified that as part of that process, he also submitted to a background check and similarly did not disclose the conviction he thought had been expunged. The conviction never came to light and he received the license. In addition, he testified, he completed this process again when that license was renewed in 1996. See Transcript, p. 16.
14. In addition, he testified that he has submitted to a background check each of the last three years in order to coach girls soccer in his community, and that his petty theft conviction never surfaced, again leading him to believe it had been expunged. See Transcript, p. 35.
15. On the effect of the wrongfully-assumed expungement in this case, the Deputy Attorney General argued that even if an applicant has had a conviction expunged, the licensing agency may nonetheless consider the conviction if it has a substantial relationship to the profession for which the license is sought. In addition, she stated,

"[i]n this particular matter, I believe that Mr. Farmer's testimony regarding whether he was aware of the expungement, the—let's call it detrimental reliance on his previous licensing information, that would go to credibility and how the Hearing Examiner and ultimately the Division of Financial Institutions choose to deal with that testimony. One of the things I believe the Division of Financial Institutions would take into effect is when it was—the expungement was attempted and the motive following it or the motive behind getting the expungement." See Transcript, pp. 30-31.

D. Personal Character Testimony

16. Mr. Farmer testified that he has been a loan officer since 1995, and that he has never had a complaint against him. See Transcript, p. 16. In addition, he said that much of his business comes from referrals by satisfied customers, see Transcript, p. 29, and that he trains others in his office to take the loan officer exam required by the State. See Transcript, p. 27. He added that since 1990, he has matured, is a veteran, a husband and father, and now makes better decisions. See Transcript, p. 19.

III. Conclusions of Law

17. The Ohio Revised Code sets out the criteria by which the Superintendent of Financial Institutions shall license loan officers. It states in part:

“...the superintendent of financial institutions shall issue a loan officer’s license to the applicant if the applicant has not been convicted of or plead guilty to any criminal offense described in Division (A)(2) of Section 1322.031 of the Revised Code.” O.R.C. 1322.041.

18. The criminal offenses incorporated by reference are:

“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.” O.R.C 1322.031 (A)(2). Emphasis added.

19. Based on the documentation offered by the State (State’s Exhibit 2), and Mr. Farmer’s admission at the hearing, the Hearing Examiner finds that he was convicted of petty theft on October 3, 1990.
20. Once the conviction is established, the statute shifts the burden of proof to Mr. Farmer to show by a preponderance of the evidence that despite his conviction, he otherwise should receive a loan officer’s license.

21. The statute sets out a number of criteria the applicant must meet, three parts of which are relevant to this analysis. The first part reads:

“The superintendent shall issue a loan officer license to the applicant if the superintendent finds the following conditions are met:

(3) ...the applicant has proven to the superintendent, by a preponderance of the 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.” O.R.C. 1322.041 (A)(3).

22. The Respondent’s conviction occurred in 1990, approximately 13 years ago. The statute requires a determination of whether, since then, his activities and employment record show he is honest, truthful, and of good reputation, and that there is no basis in fact to believe he will commit such an offense again.

23. Mr. Farmer has demonstrated a clean record in the 13 years since his conviction. This is strong evidence that there is no basis in fact to believe he will engage in similar criminal conduct again. This significant length of time bolsters Mr. Farmer’s testimony that the incident was an aberration.

24. But he carries the burden of proof to demonstrate honesty, truthfulness, and a good reputation. In this regard, the record is positive, but not voluminous. Though he offered no character witnesses or letters of recommendation, his testimony concerning his own honesty and his business ethics was very credible.

25. As to his “activities” since the conviction in 1999, the analysis is broader than simply his work record. In answering Question 5 on his application, which calls for disclosure of “any criminal offense,” including but not limited to “any criminal offense involving theft,” Mr. Farmer did not disclose his conviction for petty theft.

26. His explanation for the omission was that he did not interpret the question to require disclosure of offenses that a Court has expunged.

27. Caselaw indicates that the State may require disclosure of expunged offenses in making licensure determinations.¹ But by statute², the effect of expungement is that “the proceedings in the case shall be considered not to have occurred.” This renders Mr. Farmer’s interpretation of Question 5, and his reason for not disclosing the conviction, not altogether unreasonable.

28. Further, Mr. Farmer testified credibly that his previous applications to a state licensing agency, in which his background check did not yield his petty theft offense, confirmed in his mind that 1) his conviction was expunged from his record, and 2) the expungement in essence erased the fact of his conviction for purposes of his Loan Officer Application.

29. Mr. Farmer was wrong on the facts and wrong on the law. His conviction was not expunged, and expungement does not mean the State must ignore the fact of his conviction in deciding whether or not to grant him a license.

30. But that his explanation was both credible and reasonable mitigates the effect the nondisclosure otherwise might have on an assessment of the truthfulness of his activities since committing the crime in 1990.

31. The second part of the statute states:

“The superintendent shall issue a loan officer license to the applicant if the superintendent finds the following conditions are met:

(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.” O.R.C. 1322.041 (A)(5).

¹ See *In re Application of Carroll*, 61 Ohio St. 3d 60 (1991).

² See ORC 2953.32 (C)(1)(e)(2).

32. In assessing Mr. Farmer's character and general fitness, it is necessary to examine the circumstances surrounding his criminal conviction.
33. While a conviction for petty theft may evidence a shortcoming in one's character, in Mr. Farmer's case, the fact that it occurred 13 years ago renders it of very little probative value. He makes a credible case that it was due to immaturity on his part, and that with his more advanced age has come more maturity. That he has shown no inclination toward recidivism bolsters his case.
34. However, Mr. Farmer's failure to disclose his conviction on his Loan Officer Application raises a question about his honesty. However, as outlined in paragraphs 25-30, his explanation for the omission satisfied the Hearing Examiner that Mr. Farmer's failure to disclose can be characterized as a reasonable mistake, and therefore is much less damaging to his character as the nondisclosure might otherwise be.
35. The third relevant provision of the Ohio Revised Code states:
- “no...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 misrepresentation in any registration or license application. ORC 1322.07.
36. On its face, Mr. Farmer's failure to disclose his conviction on his application for a loan officer's license could be interpreted to be an omission of a material fact in violation of ORC 1322.07. However, in this circumstance, Mr. Farmer testified persuasively that he believed an expungement rendered his conviction an immaterial fact, one not required to be disclosed by state law.

37. The statute does not make a *mens rea* requirement explicit. While it refers to a “fraudulent representation of a material fact,” denoting an intent to deceive, it also refers to merely “false” representations and “any” omissions.
38. The fairest reading of the statute, and the reading most compatible with the intent of the law to root out dishonest applicants, holds that reasonable mistakes as to whether disclosure is necessary, resulting in the unintentional omission of a material fact, do not necessarily disqualify an applicant under this provision. The Hearing Examiner agrees with the State’s position that Mr. Farmer’s credibility was the critical issue in this regard, and has found that credibility to be strong.
39. To hold otherwise would unduly punish applicants for honest mistakes, and theoretically render hearings meaningless in cases where an applicant failed to disclose a criminal conviction, as the outcome would never be in doubt; once the conviction itself was established, the denial would be automatic.
40. This interpretation is also consistent with Chapter 119 caselaw. The Tenth District Court of Appeals, in *Webb v. State Medical Board of Ohio*³, held it would be error for the Medical Board to withhold a certificate to practice from a doctor who mistakenly believed a question on his application did not call for disclosure of a disciplinary investigation. The Court held a determination of the applicant’s intent was necessary.
41. Though the statute at issue in that case disqualified applicants for “fraud, misrepresentation, or deception,” interpreting the statute in this case as the Court did in *Webb* leads to a consistent rule: in licensure applications, omissions based on genuine, reasonable mistake are not necessarily fatal.

³ 146 Ohio App. 3d 621 (2001).


42. In addition, the State expressed concerns about the timing of an expungement, in which applicants seek to cleanse their records just before applying for a license. This is not at issue in this instance. Mr. Farmer sought this expungement long ago, upon his discharge from the military, and not on the eve of filing his application.

43. Based on the foregoing, the Hearing Examiner finds that Mr. Farmer has proven by a preponderance of the evidence that that his activities and employment record since the conviction show that he 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; and that Mr. Farmer's character and general fitness command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the intent of O.R.C. 1322.01 to 1322.12.

IV. Recommendation

44. Therefore, in accordance with the above Findings of Fact and Conclusions of Law, the Hearing Examiner recommends to the Superintendent of the Division of Financial Institutions that Mr. Farmer be granted a Loan Officer's License pursuant to Ohio Revised Code 1322.041.

8/8/03
Date



Terrence O'Donnell
Hearing Examiner