

STATE OF OHIO
DEPARTMENT OF COMMERCE

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CASE NO. 05-0127-LOD

IN THE MATTER OF: DENNIS E. SMITH

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 regarding Dennis E. Smith, an individual, because Dennis E. Smith has 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. Conrad'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. The Division did not present any witnesses. Dennis E. Smith ("Respondent") did appear in person and represented himself *pro se*. Also testifying in Respondent's behalf was Michael Kossoff.

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 July 20, 2005, and served it upon Respondent by certified mail. Respondent signed the certified mail receipt form on July 23, 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)
2. By letter of August 17, 2005, the Division notified Respondent that the requested hearing was to be held on August 18, 2005. In the same letter the Division, by its

own motion notified Respondent that the matter was continued, and the rescheduled hearing was to be held on September 29, 2005. (State's Exhibit #1)

3. Respondent attended the hearing and represented himself pro se. (Tr. p. 5)

C. Respondent's Loan Officer Application and Criminal Convictions

1. On or about November 17, 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 obtained documentation from the Franklin County Municipal Court providing the Division with the details concerning a 1989 conviction for Domestic Violence and a 1979 conviction for Soliciting. Respondent also included a written explanation of the facts surrounding his convictions. (State's Exhibit #4)
5. Respondent testified that he knew he was going to be subjected to a criminal background check but did not give his convictions any thought because they were misdemeanors. (Tr. pp. 19, 27)
6. Respondent testified repeatedly that he answered Question #5 negatively because he thought the only thing the application was concerned with was disclosure of felony convictions. (Tr. pp. 18, 21, 23, 24, 25)
7. Respondent testified that he did not focus on the question enough, or read it carefully, and that he readily admitted he was mistaken in answering "No" to Question #5. (Tr. p. 18)
8. Respondent testified that did not mean to mislead the state with his answer and apologized for his mistake (Tr. p. 18)
9. Respondent testified that he has had no criminal convictions since 1989. (Tr. p. 21)

10. Michael Kossoff testified on Respondent's behalf, stating that he has known Respondent professionally for ten months, and that he felt Respondent has a high degree of professional integrity. (Tr. pp.33-34)
11. Mr. Kossoff testified that Respondent was forthright and honest in explaining his past legal difficulties. (Tr. p. 35)

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 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.

- (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.

4. The Division's sole 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:

- (A) 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;
- (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;

5. 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 two criminal offenses. \
6. Respondent demonstrated that his response of "No" to Question #5 was based upon his belief that the question pertained only to felony convictions. This belief was obviously incorrect, but, just as obviously, resulted from a mistaken interpretation of the question, and not from any intentional deception. Absent proof of intent, there can and should be no finding that Respondent's behavior rose to the level of misrepresentation, false or misleading, or fraud. See Webb v. State Med Bd., 146 Ohio App. 3d 621, 628 (Ohio Ct. App. 10th Dist., 2001). The incorrect answer by Respondent to the question was an unfortunate mistake on Respondent's part, but not enough to support denial of a Loan Officer's License.
7. Respondent testified persuasively that his incorrect answer to question # 5 was an inadvertent mistake, and not an attempt at concealment or cover-up of his past convictions. The Division presented no evidence of such a pattern. Since it was clear to Respondent that his convictions would be revealed to the Division through his criminal background check, I do not find that his admittedly incorrect answer to question #5 constitutes a substantial misrepresentation in his license application. Given Respondent's testimonial admission of an incorrect answer and the lack of any evidence showing that it was anything other than an innocent mistake, I do not find that Respondent's conduct constituted improper, fraudulent

or dishonest dealings, or was an intentional misleading statement of material fact.

8. It is also impossible not to consider the relatively minor nature of the infractions and the substantial passage of time since their commission. The offenses were admitted to, explained, and must be placed in the context of an entire lifetime. Since these minor legal difficulties, Respondent has been a law-abiding, productive citizen, who is recognized by others as having a high degree of professional integrity, which is exactly the type of licensee the Division seeks. Minor crimes committed long ago should not disqualify such a person.
9. Respondent presented evidence attesting to his professionalism, reliability, honesty and integrity, none of which was refuted by the Division. Based upon the testimonial and documentary evidence presented the Superintendent has every to believe that Respondent is honest, truthful and of good reputation, and that his character and fitness command the confidence of the public. The Superintendent should have every reason to believe that Respondent will conduct his business affairs honestly and in compliance with all statutory requirements. For this reason, Respondent clearly meets the requirements for licensure, as set forth in R.C. 1322.041.
10. The Division has not met its burden of proof of showing that Respondent is not entitled to a license.
11. Respondent has presented 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 Dennis E. Smith be found to have met the prerequisites set forth in Revised Code Section 1322.041, and that the Superintendent of Financial Institutions approve Mr. Smith's application for a Loan Officers License.

William R. Damschroder, Esq.
Hearing Officer

Date

3/14/06