

STATE OF OHIO
DEPARTMENT OF COMMERCE

2005 AUG 30 AM 11: 25

CASE NO. 05-0072-LOD

IN THE MATTER OF: KEITH K. KNIESLY, II

REPORT AND RECOMMENDATION OF THE HEARING OFFICER
William R. Damschroder

I. Findings of Fact

A. Background

This matter came before Terrence O'Donnell, 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 April 19, 2005, in accordance with the Administrative Procedures Act, found in Ohio Revised Code ("ORC") Chapter 119. Subsequent to the hearing, the undersigned was appointed as hearing officer for purposes of preparing this Report and Recommendation based upon the hearing transcript and all exhibits admitted into the record at hearing.

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 Keith K. Kniesly, II, an individual, because Mr. Kniesly 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, because of this action, his 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 Evans. The Division did not present any witnesses. Keith K. Kniesly ("Respondent") did appear in person and was not represented by counsel at the hearing.

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 March 3, 2005, and served it upon Respondent by certified mail. Respondent's brother signed the certified mail receipt form on Respondent's behalf on March 11, 2005. (State's Exhibit #6, Tr. pp. 23-24)
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 form was received by the Division on March 16, 2005 (State's Exhibit #7)

3. By letter of March 17, 2005, the Division notified Respondent that the requested hearing was to be held on March 28, 2005. At that time, however, the Division continued the hearing on its own motion to April 19, 2005 at 3:00 p.m. (State's Exhibit #8)
4. Respondent attended the hearing and represented herself *pro se*. (Tr. p. 7)

C. Respondent's Loan Officer Application and Criminal Conviction

1. On or about May 25, 2005, the Division received the loan officer license application of Respondent. (State's Exhibit #1)
2. Respondent answered "No" to question #5 of the Loan Officer Application, which asked whether the applicant had any criminal convictions. The exact language of Question #5 states:

"Have you or has any company for which you have been an officer, or more than 5% owner or director, ever been convicted of or pleaded 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." (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 proving that on March 25, 2003, Respondent was convicted of Disorderly Conduct, a misdemeanor of the fourth. Respondent was sentenced to serve thirty (30) days in jail and fined \$250. Both the jail sentence and the fine were suspended by the court. (State's Exhibit #3)
5. Respondent submitted a written statement explaining his conviction as resulting from him being "... in the wrong place at (the) wrong time and the police misinterpreted horseplay." No other explanation or testimony was offered to describe what happened that caused Respondent to be charged with a crime and convicted. (State's Exhibit #5)

6. Respondent testified, with respect to Question #5, that when he completed the question he asked his office manager to make sure that his disorderly conduct conviction would not be a problem. He further testified that his office manager pressured him to check the "No" box on the application and submit it for processing. The Division made a hearsay objection to this testimony but was overruled by the hearing officer. (Tr. pp. 12-14)
7. Respondent later testified that "had a feeling that (he) should not have checked" the "No" box on Question #5 but that he "went ahead and did it." (Tr. pp. 15-16)
8. Respondent testified that, because his handwriting is, in his words, "atrocious", he was concerned about having to furnish additional details about his conviction, as called for by the application. Respondent admits that he took the easy way out of having to provide details by checking the "No" box on Question #5. (Tr. pp. 20-21)
9. Respondent testified in his closing comments at hearing that "at the time I knew checking the box was the wrong thing to do." (Tr. p. 31)

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 on behalf of the 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. Another of 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. Respondent testified that his response of "No" to Question #5 was based upon his desire to avoid having to explain his conduct in detail. Any supposed instruction from an office manager about answering the question must be discounted, both because the assertion about the officer manager's instructions cannot be verified, and because of Respondent's own testimony admitting that he knew he was doing the wrong thing when he answered no to Question #5. This testimony clearly demonstrates an intent to conceal his criminal background. This proof of intent must lead to a finding that Respondent's behavior rose to the level of misrepresentation, false or misleading statements, 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, though regretted by Respondent, was intentional and supports denial of a Loan Officer's License.

8. Accordingly, I find that Respondent has not proved that he is honest, truthful, and of good reputation, and not a threat to offend again. In addition, I find that Respondent's character and fitness do not command the respect of the public

and warrant a belief that Respondent will conduct his business in compliance with statutory requirements.

9. The Division has met its burden of proof to show that Respondent has been convicted of criminal offenses.
10. Respondent has not 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 Keith K. Kniesly be found to have **not 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

8/30/05