

STATE OF OHIO
DEPARTMENT OF COMMERCE

2006 FEB 27 AM 8:16

CASE NO. 05-0121-LOD

IN THE MATTER OF: MICHAEL A. CARNEY

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 November 15, 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 Michael A. Carney, an individual, because Mr. Carney was convicted of receiving property obtained through a theft offense and he had not proven that since his conviction he is honest, truthful, and of good reputation, and that there was no basis in fact for believing that he would commit a similar crime, and that Mr. Carney'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 Mindy Worly. The Division did not present any witnesses. Michael A. Carney ("Respondent") did appear in person represented himself *pro se*. Respondent was the only witness testifying in his own behalf.

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 7, 2005, and served it upon Respondent by certified mail. Respondent signed the certified mail receipt form on July 13, 2005. (State's Exhibit #2)
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 July 14, 2005. (State's Exhibit #3)
2. By letter of July 15, 2005, the Division notified Respondent that the requested hearing was to be held on July 25, 2005, but, in same letter continued the

hearing indefinitely. By subsequent letter of August 2, 2005, the Division notified Respondent that the hearing was to be held on September 8, 2005. Pursuant to Respondent's request, the Division rescheduled the hearing for November 15, 2005. (State's Exhibits #4, #5, #6)

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

C. Respondent's Loan Officer Application and Criminal Convictions

1. On June 9, 2005, the Division received the loan officer license application of Respondent. (State's Exhibit #1)
2. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031 (B)
3. On Question #5 of the application, Respondent answered "yes" when asked whether he had ever been convicted of any criminal offense. He attached certified copies of entries from the Willoughby Municipal Court to evidence the disposition of the charge against him. (State's Exhibit #1)
4. Respondent testified that he also submitted a letter with his application explaining the circumstances surrounding his conviction. The Division had no such letter in its files, however, Respondent produced a copy of the letter and had it admitted into evidence. (Tr. P.10, Respondent's Exhibit #D)
5. Respondent testified that he was convicted of receiving property obtained through a theft offense in connection with a tow truck that was in Respondent's possession in furtherance of a car repossession business that Respondent had an ownership interest in. The tow truck was originally being used as a "loaner" tow truck by the repossession business while its main truck was under repair. Respondent testified that through a combination of complacency a separate business dispute with the truck repair company, the "loaner" tow truck was never returned to its rightful owner.
6. Respondent testified that he did not even know that the tow truck had been reported as stolen until he was stopped while driving it from one storage lot to another.
7. Respondent testified that while he had the tow truck in his possession it sat, for the most part, unused on his storage lot.
8. Respondent testified that he pleaded guilty to the charges because he knew that the truck did not belong to him, his former partner in the repossession

business was no longer available to verify Respondent's claim, and because he wanted to put the matter behind him with the least amount of trouble.

9. Respondent admitted that it was wrong to retain possession of the truck since it did not belong to him.
10. Respondent was convicted of his crime in June of 2001. (State's Exhibit # 1)
11. Respondent testified that he has had no legal difficulties other than speeding tickets since his conviction in 2001.

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.

6. The Division's sole argument in seeking to deny Respondent a loan officer's license rests on the proposition that Respondent, because of his conviction, has the burden of showing that he is honest, truthful and of good reputation, with no basis in fact to believe that Respondent will commit another criminal offense.
7. The only evidence presented, in the form of Respondent's testimony, indicates that Respondent's legal difficulty arose from a misunderstanding more than malice or criminal intent. While Respondent admits that he knew that the tow truck did not belong to him, he had no idea that the tow truck had been reported as stolen. Respondent also admits that he should have returned the truck sooner but that it was his own laziness that kept him from putting forth the effort to return the tow truck.
8. Respondent testified that he is no longer in the repossession business, that he is a single parent and sole provider for two children, and that he would not engage in this type of behavior again. As noted, he has had no legal difficulties since his conviction in 2001.
9. Respondent was persuasive that his behavior with respect to the tow truck was an aberration and not a pattern of behavior for him. The line of argument is strengthened by his lack of criminal difficulties after his conviction. The Respondent has a burden to convince the Superintendent, through the hearing officer, that his employment record and *activities* since his conviction show that he is not likely to re-offend. The most persuasive evidence available is the *lack* of any further legal difficulties. Respondent's clean record since 2001 meets this burden. There exists no reason to believe that Respondent is not honest truthful and of good reputation, and no reason to believe that Respondent will commit another criminal offense. For this reason, the Superintendent has reason to believe that Respondent's 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 Michael A. Carney be found to have met the prerequisites set forth in Revised Code Section 1322.041, and that the Superintendent of Financial Institutions approve Mr. Carney's application for a Loan Officers License.

William R. Damschroder, Esq.
Hearing Officer

2/27/06
Date