

**BEFORE THE REAL ESTATE COMMISSION
OF THE STATE OF IOWA**

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| IN THE MATTER OF: |) | CASE NO. 05-146 |
| |) | DIA NO. 06DOCRE001 |
| NICHOLAS O SMITH |) | |
| 1108 8TH STREET |) | |
| WEST DES MOINES IA 50266 |) | FINDINGS OF FACT, |
| Respondent. |) | CONCLUSIONS OF LAW, |
| |) | DECISION AND ORDER |

On November 4, 2005 the Iowa Real Estate Commission (Commission) voted to deny Nicholas O. Smith, the Respondent, his application for a salesperson license. The Respondent filed a timely appeal of the denial and requested an administrative hearing. On January 19, 2006 the Commission issued a Notice of Hearing setting the matter for hearing on March 2, 2006 at 10:00 a.m.

At the time set for the hearing the Respondent, Nicholas O. Smith, appeared and was self-represented. Assistant Attorney General Pam Griebel represented the state of Iowa. The following Commission members presided at hearing: James Hughes, Broker, Chairperson; Laurie Dawley, Public Member, Vice-Chair; Don Marple, Broker; Dan Berry, Broker; and James O'Neill, public member. Administrative Law Judge John M. Priester assisted in conducting the hearing. A certified court reporter recorded the proceedings. The state requested the hearing be closed to the public pursuant to Iowa Code sections 543B.52(1) and 21.5(1)"a" (2005). The Respondent did not object, the Administrative Law Judge agreed, and the hearing was closed to the public.

After hearing the testimony and examining the exhibits, the Commission convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f)(2005), to deliberate its decision. The Commission instructed the administrative law judge to draft Findings of Fact, Conclusions of Law, Decision and Order, in conformance with their deliberations.

THE RECORD

The record includes the state's Pre-hearing Conference Report; testimony of the witnesses; and the following exhibits:

State Exhibit 1: Notice of Hearing and Service;

State Exhibit 2: Waiver for Completing Criminal History Background Checks;
State Exhibit 3: Application for Individual License;
State Exhibit 4: Batts Summary, Criminal History;
State Exhibit 5: Request for explanation and response;
State Exhibit 6: Denial letter and request for hearing;
State Exhibit 7: Order regarding forgery by credit card and theft;
State Exhibit 8: Criminal background information on credit card/theft convictions;
State Exhibit 9: Iowa Code section 543B.15;
State Exhibit 10: Sticky Note memorializing phone conversation between the Respondent and David Batts.

FINDINGS OF FACT

1. Respondent wants to be a licensed real estate salesperson. To accomplish this he has taken the required pre-license education course on-line, filled out a Waiver for Completing Criminal History Background Checks on August 23, 2005 and filled out an Application for Individual License with the Commission on September 29, 2005. (Testimony of Respondent; State Exhibits 2, 3)

2. On the Waiver for Completing Criminal History Background Checks the Respondent answered question 1, "Have you ever been convicted of a felony or misdemeanor criminal offense," in the affirmative. The Respondent also provided an attachment that was a printout from the Iowa Courts website listing all of the civil and criminal cases the Respondent was ever involved in. The Respondent then provided an explanation of the printout. The Respondent indicated that item number 10 involved a charge for unauthorized use of a credit card, considered theft in the 4th degree, in February of 2003. The Respondent indicated that he was 90% through paying off the obligations associated with this offense. The list also indicated an Operating While Intoxicated conviction in January of 2002. He indicated that he was 75% through with the payments for this offense. The list also indicated a theft in the 5th degree for writing a bad check in February of 2004. He is about 50% through with the payments on this charge. (Testimony of Respondent; State Exhibits 2, 3)

3. On the Respondent's Application for Individual License, in response to question 10a, "Have you ever been convicted of a felony or misdemeanor criminal offense?," the Respondent answered "No." The Commission compliance officer sent the Respondent a letter on August 25, 2005, asking for an

explanation for his answering "No" to question 10a. The Respondent responded by letter, and testified at the hearing, that when filling out this form broker Joe Kirk informed him that if the offense was not a felony then answer "No." The Respondent said that he did not in fact check the box, but "Laurie," a clerical employee of Mr. Kirk, filled out the form. The Respondent admitted that he falsified this answer in that he had numerous misdemeanor convictions on his record. (Testimony of Respondent; State Exhibit 3, 5)

4. The Commission denied the Respondent's application on November 4, 2005, based on his failure to completely disclose his past criminal history. The Respondent filed a timely appeal of this determination. (State Exhibit 6)

5. The Respondent testified that he made serious mistakes in 2003 when he stole a credit card and charged items for his girlfriend for Valentine's Day. His father paid restitution and he is making payments to his father. He is also making \$50 per month payments to the Johnson County Court for his OWI conviction. The Respondent is only six credit hours shy of receiving his Finance Degree. The Respondent was employed at Dewey Ford, and then with a law firm in Des Moines, but he has not been employed for over a year. He testified that his unemployment benefits are more than he could earn at a job paying \$9 per hour. The Respondent has spent the past year preparing for his career in real estate. He testified that he hopes to return to the University of Iowa to receive his degree and to accomplish this he needs money. He also needs a second chance. (Testimony Respondent)

CONCLUSIONS OF LAW

Iowa Code chapter 543B (2005) provides, in relevant part:

543B.15 Qualifications.

3. An applicant for a real estate broker's or salesperson's license who has been convicted of forgery, embezzlement, obtaining money under false pretenses, theft, extortion, conspiracy to defraud, or other similar offense, or of any crime involving moral turpitude in a court of competent jurisdiction in this state, or in any other state, territory, or district of the United States, or in any foreign jurisdiction, may be denied a license by the commission, on the grounds of the conviction. . . .

5. A person who makes a false statement of material fact on an application for a real estate broker or salesperson's license, or who causes to be submitted, or has been a party to preparing or submitting any false application for such license, may be denied a license by the commission on the grounds of the false statement or submission. . . .

7. The commission, when considering the denial or revocation of a license pursuant to this section, shall consider the nature of the offense; any aggravating or extenuating circumstances which are documented; the time lapse since the revocation, conduct, or conviction; the rehabilitation, treatment, or restitution performed by the applicant or licensee; and any other factors the commission deems relevant. Character references may be required but shall not be obtained from licensed real estate brokers or salespersons.

The preponderance of the evidence established that the Respondent made a false statement of material fact, or caused a false statement of material fact to be submitted, when he filed his application for a real estate salesperson's license with the Commission in violation of Iowa Code section 543B.15(5). The Respondent failed to fully disclose his past criminal history. His criminal history included an OWI in 2002, Fraudulent Use of a Credit Card/Theft Fourth Degree in 2003 and Theft in the Fifth Degree in 2004.

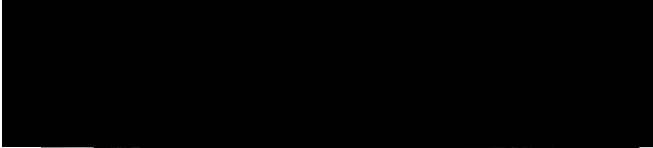
The Respondent's testimony is not found to be convincing concerning his rehabilitation since the offenses occurred. For the past year the Respondent has been unemployed and he has not fully paid off all of the fines and restitution from his convictions. The nature of the Respondent's offenses is also an aggravating factor that weighs against licensing at this time. The Respondent stole a credit card from a purse and used it to make purchases. He was also charged with Theft in the Fifth Degree in connect with an insufficient funds check. The Theft and Fraudulent Use of a Credit Card convictions go to the truth and veracity of the Respondent's character. Just two years have passed since the Respondent's conviction for Theft in the Fifth Degree.

ORDER

IT IS THEREFORE ORDERED that the Respondent's application for a real estate salesperson's license is hereby **DENIED**. The Respondent shall not be eligible to reapply for a period of one year as provided by Iowa Code section 543B.15(1)(2005). At that time the Respondent shall be required to submit the following documentation to the commission in addition to all other requirements for licensing:

1. Documentation that he has obtained and kept gainful employment for one year;
2. Documentation that he has fully and completely paid all outstanding fines, court costs and restitution for all of his criminal offenses. This shall include restitution to both the Courts and to his father;
3. The Respondent shall not incur any new criminal charges;
4. A letter from the Broker who intends to employ the Respondent indicating that the Broker is fully aware of the Respondent's entire criminal record and that the Broker intends to employ and supervise the Respondent;
5. At least one written character reference from someone, other than a real estate broker or salesperson, who has knowledge of the Respondent's character and can speak to his actions and integrity covering at a minimum the year prior to making application.

Dated this 13th day of APRIL, 2006.


James E. Hughes, Chairperson
Iowa Real Estate Commission

cc: NICHOLAS O SMITH
1108 8TH STREET
WEST DES MOINES IA 50266

(CERTIFIED)

PAM GRIEBEL
Assistant Attorney General

Hoover State Office Building (LOCAL)

Judicial review of the commission's action may be sought in accordance with the Iowa administrative procedure act, from and after the date of the commission's order. If a party does not file a timely application for rehearing, a judicial review petition must be filed with the district court within 30 days after the issuance of the commission's final decision. 193 IAC 7.37.