

STATE OF OHIO
DEPARTMENT OF COMMERCE

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INSTITUTIONS

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IN THE MATTER OF:

DIVISION OF FINANCIAL
INSTITUTIONS

DAVID R. GORBY, JR.

CASE NO. 04-0267-LOD

REPORT AND RECOMMENDATION
ADMINISTRATIVE HEARING OFFICER D. MICHAEL QUINN

Issued March 1, 2005

I. FINDINGS OF FACT

A. BACKGROUND

The above matter came before this Hearing Officer, an attorney licensed to practice law in Ohio, and duly appointed by the Ohio Division of Financial Institutions (hereinafter the "Division") to serve as Hearing Officer for an adjudicative hearing in accordance with the Administrative Procedures Act, Chapter 119, Ohio Revised Code (hereinafter "O.R.C."). Said hearing was held 10:30 AM on May 20, 2004, at 77 South High Street, 31st Floor, Room East B, Columbus, Ohio.

The hearing was held at the request of Respondent David R. Gorby, Jr., of North Canton, Ohio (hereinafter the "Respondent") to consider the Division's Notice of Intent to Deny Loan Officer License Application, Notice of Opportunity for a Hearing (hereinafter "NOH"). Said NOH was based upon an allegation that Respondent committed crimes involving Driving Under the Influence and Drug Abuse (1997), Fleeing and Eluding and Assault (1998), and Driving Under the Influence (2002) and is thereby ineligible to hold a license as a mortgage loan officer. The Division appeared and was represented by the Ohio Attorney General's Office, Assistant Attorney General Martine Jean. Although

Respondent had requested the hearing and the commencement of the hearing was postponed 35 minutes, Respondent did not appear.

At the hearing, State's Exhibits 1, 2A, 2B, 2C, 2D, 2E, 3 and 4 were admitted into the record (Transcript (hereinafter "Tr.") p. 19). One witness appeared, and gave sworn testimony, on behalf of the Division. No exhibits or witnesses were presented by, or for, Respondent, although Exhibit 4 may constitute a statement in writing.

B. JURISDICTION

The Division issued the NOH against Respondent on February 13, 2004. Respondent timely requested a hearing on February 25, 2004, that the Division, by letter dated March 2, scheduled for March 5, 2004, all within the requirements of Chapter 119, O.R.C. The Division continued the original date of the hearing to May 20, 2004, on which date the hearing went forward. (Exhibit 1.)

C. PROPOSED ISSUANCE OF ORDER TO DENY LICENSE APPLICATION

1. The Division is the state agency responsible for the licensing and regulation of mortgage loan officers pursuant to O.R.C. Chapter 1322. (Exhibit 1.)
2. Respondent is an individual who wishes to conduct business in Ohio as a mortgage loan officer. (Exhibit 2A.)
3. A statutory requirement became effective on May 2, 2002, which mandated, for the first time, that mortgage loan officers become licensed. (Senate Bill 76, 2001.)
4. On or about December 11, 2003, the Division received from Respondent a Loan Officer Application (hereinafter the "Application") which was signed, under oath, by Respondent on December 8, 2003, wherein Respondent sought a Loan Officer License. (Exhibit 2A.)
5. Within the Application Respondent answered "Yes" to Question number 5, which asked: "Have you ... ever been convicted of any criminal offense? ***" (Emphasis in original.) (Exhibit 2A.)
6. On January 17, 1997, Respondent was found guilty of Driving Under the Influence and Drug Abuse, in the Massillon Municipal Court. (Exhibit 2B.)

7. Respondent's written explanation of the facts leading to the arrest on October 18, 1996, leading to the 1997 conviction, was that shortly after his 21st birthday he was arrested for DUI and met all the sentencing requirements. (Exhibit 4.)
8. On, or about, October 19, 1998, Respondent was found guilty of one count of Assault and one count of Fleeing and Eluding, in the Massillon Municipal Court. (Exhibits 2C, 2D.)
9. Respondent's written explanation of the facts leading to the conviction on Assault and Fleeing and Eluding was as follows: About two years after the first arrest Respondent was ordered to pull over and, instead, he drove to his residence where he was arrested. The assault was charged because the officers could have injured themselves in the pursuit. (Exhibit 4.)
10. On, or about, February 27, 2002, Respondent was found guilty of one count of Driving While Intoxicated, in the Barberton Municipal Court. (Exhibits 2C, 2D.)
11. Respondent's written explanation of the facts leading to the arrest on February 1, 2002, and the subsequent DWI conviction was that he was charged after refusing to take a breathalyzer test and, again, met all requirements of his sentence. (Exhibit 4.)
12. The guilty pleas were entered seven years, five years and less than two years prior to the Application and the Application was one and one-half years prior to the hearing. (Exhibits 4, 6A, 6B.)
13. Respondent did not submit any evidence into the hearing record, even though the convictions were not related to financial matters and were committed during his youth. However, the letter received from Respondent by the Division as part of the investigation, introduced by the Division as part of the Application, was treated as Respondent's written statement. That letter was a sworn statement, but cannot replace sworn testimony and was thus given reduced weight. (Exhibit 4.)

II. CONCLUSIONS OF LAW

A. JURISDICTIONAL ISSUE

1. The Division procedurally complied with O.R.C. Chapter 119.

B. LICENSE APPLICATION

2. The Division has proven that in 1997 and 1998 and 2002 Respondent was convicted of four criminal offenses for charges primarily dealing with substance abuse and DWI. The convictions are not offenses specifically cited in sections 1322.041(A)(3) or (4), O.R.C., or on the Application..
3. The proven offenses are not in the category which automatically requires the Respondent to prove, by a preponderance of the evidence, that the Respondent'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." Sections 1322.041(A)(3) and (4), O.R.C.
4. The Division charged that Respondent's character and general fitness do not 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 the Ohio Mortgage Broker Act.
5. The Division brought into question Respondent's character and general fitness to 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 the Ohio Mortgage Broker Act by bringing forth evidence of both Respondent's pattern of convictions and the substance abuse nature of the convictions.
6. A pattern of criminal convictions, without further explanation, tend to demonstrate a lack of compliance with the law. Untreated substance abuse tends to not command the public's confidence.
7. After the Division presented its case in chief the burden to go forward was shifted to Respondent who did not present evidence. Because Respondent has not submitted any evidence into the record it cannot be concluded that Respondent has refuted the Division's assertions that Respondent's character and general fitness do not command the confidence of the public nor warrant the belief that the business will be operated honestly and fairly in compliance with the purposes of sections 1322.01 to 1322.12, O.R.C. Section 1322.041(A)(5).
8. The evidence shows Respondent was honest and truthful in the filing of the Application by disclosing past convictions.

III. RECOMMENDATION

The Division has proven the Respondent has a criminal conviction. Respondent did not submit any evidence to prove that Respondent'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 the Ohio Mortgage Broker Act. Consequently, the recommendation to the Superintendent of Financial Institutions is to **DENY A MORTGAGE LOAN OFFICER'S LICENSE TO DAVID R. GORBY, JR.**

Respectfully submitted,

D. Michael Quinn
Hearing Officer
March 1, 2005
Docket No. 04-DFI-052