

STATE OF OHIO
DEPARTMENT OF COMMERCE

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DIVISION OF FINANCIAL
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DIVISION OF FINANCIAL
INSTITUTIONS

Bernard John Gardier

Case No. 04-0143-LOD

REPORT AND RECOMMENDATION
ADMINISTRATIVE HEARING OFFICER JULIE M. LYNCH

Issued September 8, 2004

I. FINDINGS OF FACTS

A. BACKGROUND

This 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 at 10:30 A.M. on July 26, 2004 at 77 South High Street, 19th Floor, Columbus, Ohio.

The hearing was held at the request of Respondent Bernard John Gardier (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 investigation conducted by the Division which found that in or around 1996, Respondent was convicted of Attempted Drug Trafficking, a misdemeanor of the first degree 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 Emily Smith. Respondent did not appear.

At the hearing, State's Exhibits A through H were admitted into the record.

B. JURISDICTION

The Division issued the NOH against Respondent on April 12, 2004. The Respondent requested a hearing on May 10, 2004. The Division scheduled the hearing for May 22, 2004. The Division, upon its own motion continued the hearing to July 26, 2004 at which date the hearing was held.

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. (Ex. E).
2. Respondent is an individual who has applied for a Loan Officer Application with the Ohio Department of Commerce, Division of Financial Institutions. (Tr. p.6; Ex.A).
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 October 21, 2003, the Division received from Respondent a Loan Officer Application (hereinafter the "Application"). (Ex. A).
5. Respondent filled out and signed the Application on or about, October 20, 2003. (Ex. A).
6. Within the Application Respondent answered "yes" to Question number 5, which asked: "Have you...ever been convicted of any criminal offense." (Ex. A).
7. In 1996, eight years prior to the submission of the Application Respondent was charged and convicted of one count of Attempted Drug Trafficking, a misdemeanor of the first degree. (Ex's B,D; Tr. p.6)
8. Respondent did not appear.
9. Hearing Officer gave Respondent 30 minutes to appear. (See Tr. cover page).
10. The State presented Mark Rhea as a witness (Tr. pp. 5-11).

II. CONCLUSIONS OF LAW

A. JURISDICITONAL ISSUE

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

B. LICENSE APPLICATION

2. Ohio Revised Code Section 1322.031(A)(2) requires that in an application for a license as a loan officer, an applicant must submit a statement as to whether the applicant has been convicted of or pleaded guilty to any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking or any criminal offense involving money or securities.
3. Ohio Revised Section 1322.041 provides the Superintendent of the Division shall issue a Loan Officer License if the Superintendent finds that certain conditions are met including:

(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. Ohio Revised Code Section 1322.07(A) and (B) provide:

No mortgage broker, registrant, licensee, or applicant for certificate of registration or license under Sections 1322.01 to 1322.07 of the Revised Code shall do any of the following:

(A) Obtain a certificate of registration or license through any 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 any false or misleading statements of a material fact or any omission or 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;

5. Because the Respondent answered "yes" to Question 5 of the Application, and, in fact, did have a criminal background, the burden of proof shifted to the Respondent to show by a preponderance of the evidence that his character and fitness command the confidence of the public to warrant the belief that the business will be operated honestly and fairly in compliance with the purpose of the Mortgage Broker act.
6. Respondent did not appear at the Hearing that Respondent had requested.

DISCUSSION

1. The State presented Mark Rhea, attorney for the Division of Financial Institutions as its witness. (Tr.pp. 5-11). Mr. Rhea verified the authenticity of each document that the State presented in its case against Respondent (Tr. pp.5 -11; Ex.'s A-H).
2. The Respondent submitted an Application to be a Loan Officer (Tr.p.6; Ex. A).
3. The Respondent answered "yes" to Question 5 on the Application where it asks "Have you . . . ever been convicted of any criminal offense." (Ex.A).
4. In fact, Respondent had a criminal charge and conviction in his past. In 1996 Respondent was found guilty of Attempted Drug Trafficking, a misdemeanor of the first degree. (Tr. p.8; Ex's. D,E).
5. Respondent had the burden of proof to show by a preponderance of the evidence that his character and fitness command the confidence of the public to warrant the belief that the business will be operated honestly and fairly in compliance with the purpose of the Mortgage Broker Act.
6. Respondent did not appear at the Hearing that Respondent requested.
7. The Hearing Officer waited for Respondent to appear for 30 minutes before beginning hearing. (See Transcript cover page).
8. Emily Smith argued on behalf of the State that Mr. Gardier was not present and did not present any evidence refuting or establishing a burden of proof that would, in fact, state that he is not likely to commit that offense again. The information provided by Respondent, did not overcome Respondent's burden to prove by a preponderance of the evidence that he has the character and honesty to command the trust of the public. (Tr. p. 11).

9. Based upon the State's witness, and the Respondent's lack of appearance at the Hearing the Respondent requested, his character and general fitness do not command the confidence of the public to warrant the belief that the business will be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act, as set forth in section 1322.041(A)(5).

RECOMMENDATION

Based on the above-findings of fact, conclusion of law and discussion thereof, it is the recommendation of the Hearing Officer that the Superintendent of the Division deny a Loan Officer License to the Respondent.

Respectfully submitted,

Julie M. Lynch
Hearing Officer
September 7, 2004