

**STATE OF OHIO  
DEPARTMENT OF COMMERCE**

IN THE MATTER OF:

**ERIC C. GAUER**

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DIVISION OF FINANCIAL  
INSTITUTIONS

CASE NO. 04-0273-LOD

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**REPORT AND RECOMMENDATION  
ADMINISTRATIVE HEARING OFFICER James N. Turner**

**Issued December 30, 2005**

**I. FINDINGS OF FACT**

**A. BACKGROUND**

This matter came before Jane Arata, an attorney licensed to practice law in Ohio and duly appointed by the Ohio Division of Financial Institutions (the "Division") to serve as Hearing Officer for an adjudication hearing in accordance with the Ohio Administrative Procedures Act, Chapter 119, Ohio Revised Code (the "R.C."). The hearing in this matter was held at 2:30 PM on June 10, 2004, at 77 South High Street, Room 1910, Columbus, Ohio. Subsequent to the hearing and consequent to a perceived conflict that was cured by the recusal of the Hearing Officer originally appointed, the undersigned, also an attorney licensed to practice law in Ohio, was appointed as Hearing Officer for the preparation of this Report and Recommendation.

The hearing was held at the request of Respondent Eric C. Gauer of Sylvania, Ohio, (the "Respondent") to consider the Division's Notice of Opportunity for a Hearing (the "NOH") on its intent to deny the Loan Officer License Application submitted by the Respondent pursuant to R.C. Chapter 1322. The NOH alleged that the Respondent was convicted in 1988 of Petit Theft, a Misdemeanor of the First Degree, and that Respondent had failed to disclose that past criminal offense on his application to the Division with the result that he is ineligible to hold a license as a Mortgage Loan Officer in the State of Ohio. The Division appeared and was represented by the Ohio Attorney General's Office, Assistant Attorney General Martine Jean. The Respondent did not appear for the hearing.

At the hearing, State's Exhibits 1, 2, 3 and 4A were introduced into the record as discussed in the transcript (the "Tr.") at pages 9 through 27, both inclusive. The documents were admitted into the record by the hearing officer. The State presented but withdrew a final Exhibit, Number 4B, which was described by a witness from the Division as being a written explanation for the 1988 criminal conviction for Petit Theft set forth in Exhibit 4A. See also: Tr. at pages 15 through 20, both inclusive.

B. JURISDICTION

1. The Division issued its NOH against Respondent on March 5, 2004. (Exhibit 1, pages 1-3)
2. The Respondent received the NOH on March 11, 2004. (Exhibit 1, page 4)
3. The Respondent requested a hearing, which was received by the Division on March 15, 2004. (Exhibit 1, page 5)
4. By letter dated March 16, 2004, the Division scheduled the hearing for March 25, 2004 and thereafter on its own motion continued the hearing to an indefinite date (Exhibit 1, page 6) that was later identified in a letter dated April 22, 2004 to be June 10, 2004. (Exhibit 1, page 7)
5. The hearing was held on June 10, 2004. The Respondent failed to appear for the scheduled hearing. (Tr. page 4)
6. During the course of the hearing a piece of documentary evidence, namely Exhibit 4(B), was referred to on the record but was withdrawn by the Division without being admitted into evidence. (Tr. page 15). The Hearing Officer, by Order dated September 29, 2004, held the record for this case open until October 13, 2004 so that the Division could have an opportunity to admit Exhibit 4(B), or the Respondent could submit positions, arguments or contentions in writing. No additional evidence was submitted by either party.

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, page 2)
2. Respondent is an individual who wishes to conduct business in Ohio as a Mortgage Loan Officer. (Exhibit 1, page 2)

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 30, 2003, the Division received from Respondent a Loan Officer Application (herein the "Application"). (Exhibit 2; Tr. page 13)
5. Respondent filled out and signed the Application on December 29, 2003. (Exhibit 2, pages 1, 3-4)
6. Within the Application Respondent answered "No" to Question number 5, which asked: "Have you ... ever been convicted of or pleaded guilty to any criminal offense ..." (Exhibit 2, page 3; Tr. pages 5-7, 11)
7. On, or about, February 29, 1988, 15 years prior to the submission of the Application, Respondent pleaded guilty to a charge of Petit Theft, a misdemeanor of the first degree in the First District Court for Montgomery County, Ohio, for the City of Trotwood, Ohio. (Exhibit 4(A); Tr. pages 6-7, 10-11, 14-15)
8. The record shows that the Respondent submitted a document relating to the 15 year old Petit Theft conviction that had been marked as Exhibit 4(B), but that such documentation was withdrawn by Counsel to the Division without introducing it onto evidence. Hearsay testimony was produced from Witness Mark Rhea as custodian of the administrative file with regard to the content of the submission that the offense was committed when the Respondent was an eighteen year old college student and involved shoplifting an unspecified number of cassette tapes. (Tr. pages 16-20, 24-25)
9. The Application does not limit the response sought on Question 5 to felonies, or to a particular period of time, or to those offenses for which there is a record, but asks if the applicant has ever been convicted of or pleaded guilty to any criminal offense, including, but not limited to, certain named offenses. (Section 1322.041, O.R.C.; Exhibit 2, page 3)
10. The Loan Officer Application contained inaccurate information at the time that Respondent signed it, to wit: In responding "No" to Question number 5 when Respondent had been convicted of a criminal offense. (Exhibit 2)
11. Respondent knew, or should have known, that the Division would obtain a criminal background check because part of the Application was to submit fingerprints for the stated purpose of conducting a background check. (Exhibit 2, page 1)

## II. CONCLUSIONS OF LAW

### A. JURISDICTION

1. The Division procedurally complied with O.R.C. Chapter 119 in mailing notice of its intent to deny licensure, in demonstrating delivery of that notice, and in scheduling the hearing that had been requested by the Respondent within the time parameters established in R.C. Sections 119.07, 119.08 and 119.09. The Division has jurisdiction.

### B. LICENSE APPLICATION

2. In 1988, Respondent pleaded guilty to Petit Theft, a type of offense specifically cited in section 1322.041(A)(3), O.R.C., and inquired about on Question 5 of the Application.
3. To issue a license, the Division must make a finding that, among other matters, 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 sections 1322.01 to 1322.12 of the Revised Code. Section 1322.041(A)(5), O.R.C.
4. While the Petit Theft conviction cited is far removed in time, it is included by reference to "theft" offenses so that the conviction may provide a basis for recommending that Respondent's application for a license be denied under R.C. Section 1322.041 as the same incorporates the terms of R.C. Section 1322.031(A)(2).
5. Administrative agencies must accept and include all relevant evidence presented by the parties. Ray v. Ohio Unemployment Compensation Bd. (Ross Cty., App., 1993) 85 Ohio App.3d 103. By withdrawing Exhibit 4(B) and declining to submit the document to the original Hearing Officer pursuant to the Order of September 29, 2004, both the original Hearing Officer and the author of this Report were prevented by the Division from reviewing the "best" evidence involved, that being the original document received from the Respondent. As a result, both the original Hearing Officer and the author of this Report were unable to consider anything other than testimonial evidence that is potentially incomplete and may be tainted by bias. Fairness and due process in this situation supports allowing examination of a document capable of speaking for itself as contemplated by the terms of R.C. Section 119.07 which requires that an agency specifically advise a Respondent that they have the right to "... present his position, arguments, or contentions in writing ...". By

withdrawing Exhibit 4(B) the Division deprived both the original Hearing Officer and the author of this Report of the ability to make an informed recommendation to the Superintendent of Financial Institutions with regard to the possible exercise of the Superintendent's statutory discretion to grant a license under the terms of R.C. Section 1322.04(A)(7) and 1322.041(A)(3) which provide that the Superintendent may approve a license, notwithstanding a prior conviction for any criminal offense, if the Respondent is able to show by the preponderant evidence that their activities and employment record since the conviction show that they are honest, truthful, and of good character and that there is no basis in fact for believing that they will commit such an offense again.

6. There is no evidence of a pattern of continued shoplifting or other theft offenses in the fifteen years that have passed between the conviction and the date of this Report.
7. The Respondent's response to Question 5 demonstrates an inability to carefully read an important document prior to the attestation of its truthfulness, which possibly shows that the Respondent's general fitness might not command the confidence of the public due to a concern that the loan documents might not be accurately completed.
8. Filing an inaccurate Application reflects negatively on an applicant's character and general fitness as it relates to inattention to detail.
9. Respondent provided some evidence concerning his prior conviction that *may* also have been relevant to his character and general fitness to command the confidence of the public, but the reliability, substantiality and probative value of that evidence and whether it included material relevant to the exercise of the Superintendent's discretion cannot be determined since the documentary "best" evidence submitted was withdrawn by the Division and supplanted by hearsay testimony that was not subject to appropriate cross examination as allowed by R.C. Section 119.07.
10. The Division charged additional violations of the Ohio Mortgage Broker Act, Sections 1322.07(A) (making any substantial misrepresentation in any registration or license application), (B) (making false or misleading statements of a material fact or omissions of statement required by state law) and (C) (engaging in conduct that constitutes improper, fraudulent, or dishonest dealings) all resulting from Respondent answering Question 5 on the Application "No." Intent is required for a conclusion that Sections 1322.07 (A),(B), and (C) have been violated. The Division has indicated such intent only by inference, and further withdrew the best documentary evidence that may contain reliable, probative and substantial evidence as to the Respondent's intent. The court in Webb v. State Med. Bd., 146

Ohio App. 3d 621, 628 (Ohio Ct. App. 10<sup>th</sup> Dist., 2001) noted that intent is required for a finding of fraud, misrepresentation, or deception.

### III. RECOMMENDATION

The Division has proven Respondent did not disclose the prior criminal conviction on the Application. The Respondent, by virtue of the withdrawal of the "best" evidence relative to putative Exhibit 4(B) was prevented from presenting reliable evidence to prove that his 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 and that a license should be issued. The Hearing Officers, by virtue of the withdrawal of the "best" evidence relative to Exhibit 4(B), were prevented from drawing informed and appropriate conclusions of law concerning the possible exercise of the Superintendent's discretionary authority under R.C. Chapter 1322.

Consequently, the recommendation to the Superintendent of Financial Institutions is that **the record in the matter of the Appeal of Eric C. Gauer be re-opened and that Exhibit 4(B) be entered into evidence so that the record may reflect the best evidence available on all the issues in the matter, including those potentially showing mitigation that might otherwise justify the Superintendent in exercising his discretion to approve the license notwithstanding the prior conviction as is contemplated by the Respondent's statutory right to present any position, arguments or contentions in writing.**

Respectfully submitted,

James N. Turner  
Hearing Officer  
December 30, 2005  
Case No. 04-0273-LOD