

STATE OF OHIO
DEPARTMENT OF COMMERCE

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DIVISION OF FINANCIAL
INSTITUTIONS

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IN THE MATTER OF:

DIVISION OF FINANCIAL
INSTITUTIONS

Harold B. Burgess, Jr.

CASE NO. 05-0006-LOD

REPORT AND RECOMMENDATION
ADMINISTRATIVE HEARING OFFICER JAMES N. TURNER

Issued August 17, 2005

I. FINDINGS OF FACT

A. BACKGROUND

This matter first came before Hearing Officer Terrence O'Donnell, 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 adjudicative hearing in accordance with the Administrative Procedures Act, Chapter 119, Ohio Revised Code (the "R.C."). Said hearing was held 3:25 PM on March 29, 2005, at 77 South High Street, Room 1936, Columbus, Ohio. Following the hearing it was determined that as a result of another client relationship held by the law firm of Bricker & Eckler, with which Mr. O'Donnell is employed as an Associate Attorney, Mr. O'Donnell had been placed in a situation involving a potential conflict of interest. As a result, James N. Turner, Chief Legal Counsel for the Ohio Department of Commerce, an attorney licensed to practice law in Ohio assumed the responsibility to serve as Hearing Officer for the purpose of preparing a Report and Recommendation based on the evidence received at hearing and concluding the proceedings in this case in accordance with the Administrative Procedures Act, R.C. Chapter 119.

The hearing was held at the request of Respondent Harold B. Burgess, Jr., of Akron, Ohio (the "Respondent") to consider the Division's Notice of Intent to Deny Mr. Burgess's Loan Officer License Application and Notice of Opportunity for a Hearing (the "NOH"). The NOH was based upon the allegation that Respondent committed a crime involving theft, that he had not proven that he is honest, truthful, and of good reputation, that there is no factual basis to believe that he will not commit another criminal offense involving theft, that his character and general fitness do not command the confidence of the public or warrant the belief that his business will be operated honestly, fairly and in compliance with the Ohio Mortgage Broker Act, and that as a result the Respondent is 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 but had requested a hearing. At the hearing, State's Exhibits "A" through "E" were admitted into the record (Transcript "T" p.13).

B. JURISDICTION

The Division issued the NOH against Respondent on January 22, 2004. Respondent timely requested a hearing on February 23, 2004, that the Division scheduled for March 5, 2004, all within the requirements of Chapter 119, R.C. The Division continued the original date of the hearing to May 27, 2004. The hearing was continued, again, to June 14, 2004, at the request of Respondent, 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 R.C. Chapter 1322.
2. Respondent is an individual who wishes to conduct business in Ohio as a mortgage loan officer. (Exhibit "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 April 8, 2005, the Division received from Respondent a Loan Officer Application (the "Application") which was signed under oath by the Respondent on August 23, 2004. (Exhibit "A")
5. Within the Application Respondent answered "Yes. Aug 1986 convicted of steeling [sic] a set of golf clubs. *see letter of explanation*" to Question number 5, which asked: "Have you ... ever been convicted of or pleaded guilty to any criminal offense including, but not limited to, theft, ..." (Exhibit "A")
6. On June 30, 1986, Respondent was found guilty of Theft, a felony of the 4th degree, on his plea of guilty. (Exhibit "B")
7. The Respondent sent to the Division as part of his application a written explanation of the facts surrounding his criminal conviction, including the facts that he completed probation and was led to believe that his record had been expunged. The Respondent's letter also stated that he had been a finance manager to an auto dealer for the five years preceding his application to the Division. (Exhibit "A")
8. The guilty plea was entered nineteen years prior to the Application and twenty years prior to the hearing. (Exhibits "A" and "B") The Division did not present

evidence of any criminal misconduct of any kind that post-dated the 1986 conviction.

9. Respondent did not submit any evidence into the hearing record. However, the letter received from Respondent providing his explanation of the record was introduced by the Division as part of the Application and was treated as Respondent's written statement. (Exhibit "A")

II. CONCLUSIONS OF LAW

A. JURISDICTIONAL ISSUE

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


B. LICENSE APPLICATION


1. The Division has proven that in 1986 Respondent was arrested for theft and later pleaded guilty to a fourth degree felony offense.
2. R.C. Section 1322.041(A)(3) states, among other matters, that if Respondent has been convicted of any criminal offense involving certain named offenses, Respondent must prove by a preponderance of the evidence that Respondent's activities and employment record since the conviction show that Respondent is honest, truthful, and of good reputation, and there is no basis in fact for believing that Respondent will commit such an offense again. One such offense is theft.
3. Because the nature of the 1986 conviction is known, both the burden of proof and of going forward shifted to Respondent by virtue of the above-cited section once evidence was presented by the Division.
4. The 1986 felony conviction was disclosed on the Application by Respondent.
5. By virtue of the felony conviction, the Division has raised the issue of Respondent's honesty, truthfulness and reputation being such that a license may not be issued.
6. The Respondent did present evidence of his honesty, truthfulness or good reputation in the form of both his voluntary and accurate disclosure of his criminal record from 1986 as well as a statement that he had been employed as a Finance Manager for the five years preceding his submission of the Application. Because that explanatory note was not made under oath or submitted to cross-examination, it cannot be concluded that Respondent has successfully 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 Sections 1322.041(A)(5).

7. The Division also 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.
8. The Division sought to bring into question Respondent's general fitness to command the confidence of the public and the belief that the business will be operated honestly and fairly, by presenting evidence of Respondent's 1986 felony theft conviction.
9. The Respondent did present some evidence of his general fitness to command public confidence and to warrant the belief that the business will be operated honestly, fairly in compliance with the Mortgage Broker Act in the form of a statement that he had been employed as a Finance Manager for the five years preceding his submission of the Application. Because that explanatory note was not made under oath or submitted to cross-examination, it cannot be concluded that Respondent has successfully 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).

III. RECOMMENDATION

The Division proved that the Respondent has a criminal conviction dating from 1986 that involves felony theft. The Division also proved that the Respondent has not had any criminal convictions since that time. The Respondent's statement attached to Exhibit "A" does show that his activities and employment record for *at least the past five years* demonstrate that Respondent is honest, truthful, and of good reputation, that Respondent will not commit such an offense again and 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. However, the Respondent did not appear for hearing and his written submission does not fully answer such questions for the full period of time since his criminal conviction. The recommendation to the Superintendent of Financial Institutions is to **DENY A MORTGAGE LOAN OFFICER'S LICENSE TO HAROLD B. BURGESS, JR.**

Respectfully submitted, 

 James N. Turner
Hearing Officer
August 17, 2005
Docket No. 04-DFI-055