

STATE OF OHIO  
DEPARTMENT OF COMMERCE

CASE NO. 05-0118-LOD

IN THE MATTER OF:      GERALD SANABRIA

REPORT AND RECOMMENDATION OF THE HEARING OFFICER  
William R. Damschroder

I.      Findings of Fact

A.      Background

This matter came before this Hearing Officer, who is an attorney licensed to practice law in Ohio and duly appointed by the Division of Financial Institutions ("the Division"), Department of Commerce to serve as Hearing Officer. The hearing in this matter was held on October 19, 2005, in accordance with the procedures of Ohio Revised Code ("ORC") Chapter 119.

The hearing was held to consider whether an **Order to Deny the Application for a Loan Officer License** should be issued by the Division to Gerald Sanabria, an individual, because Mr. Sanabria made substantial misrepresentations on his license application, made false or misleading statements of material fact, and engaged in conduct that constitutes improper, fraudulent, or dishonest dealing, that Mr. Sanabria has not proved that since his convictions that he is honest, truthful and of good reputation, and that Mr. Sanabria's character and general fitness do not command the confidence of the public and warrant the belief that the he would operate his business honestly and fairly, in compliance with the purposes of the Ohio Mortgage Broker Act. The Division appeared and was represented by Assistant Attorney General James Evans. Gerald Sanabria ("Respondent") appeared in person and was represented by David W. Pryor, Esq.

B.      Jurisdiction and Procedural Matters

1.      The Division issued a Notice of Intent to Deny Loan Officer License Application and Notice of Opportunity for Hearing to Respondent on June 30, 2005, and served it upon Respondent by certified mail. Respondent signed the certified mail receipt form, which was received by the Division on August 1, 2005. (State's Exhibit #9)
2.      Respondent's signed and submitted a hearing request form, asking that an administrative hearing be held concerning the Division's intention to deny Respondent a license. This request was received by the Division on August 25, 2005. (State's Exhibit #10)

3. By letter of August 30, 2005, the Division notified Respondent that the requested hearing was to be held on September 6, 2005, but upon its own motion continued the hearing to October 19, 2005. (State's Exhibit #11)
4. Respondent attended the hearing and was represented by counsel

**C. Respondent's Loan Officer Application and Criminal Convictions**

1. On or about October 28, 2004, the Division received the loan officer license application of Respondent. (State's Exhibit #1)
2. In completing the application, Respondent by answered "Yes" on question #5, indicating that he had been convicted of a number of criminal offenses. He specifically enumerated a conviction for driving under the influence, a conviction for drug abuse, and a conviction for soliciting. Respondent also noted that he may have omitted some information because he could not remember all of the dates in question. (State's Exhibit #1)
3. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031 (B)
4. In response to the Division's request, Respondent obtained and submitted documentation from the Sheffield Lake Mayor's Court concerning a 1981 conviction for shoplifting, from Franklin County Municipal Court concerning a 1993 conviction for soliciting, from the Gallia County Court of Common Pleas concerning a 1990 conviction for attempted drug abuse, and the Harris County, Texas District Court concerning a 1982 conviction for forgery. Respondent also provided a written description of his offenses and an explanation for his actions. Respondent attributed his actions to a wild youth and poor judgment, but emphasized that none of his legal violations caused physical harm or injury to anyone. Respondent also explained that his Harris County =, Texas conviction also lead to a probation violation, due to his leaving the state of Texas and failing to report to his probation officer for a period of years. All aspects of his legal difficulties have been resolved at time of application review. (State's Exhibits #5, #6, #7)
5. Respondent testified that he did not provide complete information about all of his convictions at the time he made application because he was still gathering everything for submission, and because he knew it was going to be fully disclosed as part of the criminal background check. (Tr. pp. 36-38, 97-98)
6. Respondent testified that has worked in the mortgage business from the ground up and wishes to be licensed because he believes he can help people and

provide a living for himself and any future family he may have. He testified that he has been employed by Gordon Lending since February of 2004 and intends to remain employed with that company. Respondent noted that the charges forming the basis of the Notice of Intent to Deny a License occurred in 1981 and 1983, and he has had no legal difficulties of any kind in over thirteen years. Respondent testified that he has not been fired from any jobs, and has worked in positions that required trust and honesty. (Tr. pp. 60-67)

7. Respondent submitted affidavits from both the Licensing and Compliance Manager and the Operations Manager at Gordon Lending, attesting to Respondent's character and general fitness, and stating that Respondent has performed jobs that require integrity and honesty. (Respondent's Exhibits #A, #B)
8. Respondent testified that when submitting his application for licensure he gave information that was as complete as possible at the time, but that he could not recollect everything relating to the dates of the offenses. He testified that he corresponded with the division in an effort to provide all of the information requested, and that he had no reason to believe that he was not properly accommodating the Division's request for information. (Tr. pp. 63-66)

## **II. Conclusions of Law**

### **A. Jurisdictional and Procedural Matters**

1. Ohio Revised Code Section 119.07 requires the Division to notify Respondent of her right to request a hearing. The Division's notice to respondent was sent by certified mail, signed for by Respondent, and Respondent returned a request for hearing form to the Division.
2. The Division complied with notification of hearing requirements by sending Respondent a stating the date, time and location of the hearing in this matter
3. The Division has procedurally complied with R.C. Chapter 119, and jurisdiction over this matter is established.

### **B. Loan Officer 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. The Franklin County Court of Common Pleas in Chiero v. Bureau of Motor Vehicles, 55 Ohio Misc. 22, 9 Ohio Op. 3d 429, 381 N.E. 2d 219 (1977), in

referring to the decision in Goodyear Synthetic Rubber Corp. v. Department of Industrial Relations, 76 Ohio Law Abs. 146, 1222 N.E. 2d 503 (C.P. Franklin Co. 1954), stated that "(i)t is a fundamental concept of administrative law and procedure that the party asserting the affirmative of an issue bears the burden of proof." Thus, the Division bears the burden of proof in this case.

3. The Supreme Court of Ohio, in St. Augustine Church v. Attorney General of Ohio, Charitable Foundations Section, 67 Ohio St. 2d 133, 21 Ohio Op. 3d 84, 423 N.E. 2d 180 (1981) stated that an applicant for a license has the burden to show it is entitled to a license. Thus, the Respondent must show she is entitled to a license.
4. The Supreme Court of the United States, in Dent v. West Virginia, 129 U.S. 114 (1889), said of state-imposed conditions on practicing a profession:

(t)he power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud...If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

5. R. C. Section 1322.041 (A) provides that a loan officer license shall be issued if the Superintendent of Financial Institutions finds that certain conditions are met, including:
  - (2) The applicant complies with sections 1322.01 to 1322.12 of the Revised Code.
  - (3) The applicant has not been convicted of or pleaded guilty to any criminal offense described in division (A)(2) of section 1322.031 of the Revised Code, or, if the applicant has been convicted or pleaded guilty to such an offense, the applicant has proven to the superintendent, by a preponderance of evidence, that the applicant'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.

\*\*\*

(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.

6. The Division's argument in seeking to deny Respondent a loan officer's license rests on R.C. Sections 1322.07, which states in pertinent part:

No mortgage broker, registrant, licensee or applicant for a certificate of registration or license under sections 1322.01 to 1322.12 of the Revised Code shall do any of the following:

- i. Obtain a certificate of registration or licensure through 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;
- ii. Make false or misleading statements of a material fact, omissions of 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;
- iii. Engage in conduct that constitutes improper, fraudulent, or dishonest dealings;

7. The Division has proved that Respondent answered question #5 incompletely when he did not submit all of the information regarding all of the convictions on Respondent's record. Respondent admitted as much, and his application indicates that he may have omitted some information. In addition, Respondent worked with Division personnel throughout the application process to provide all of the information requested.
8. The standard for review of the issue of answering Question #5 incorrectly cannot be one of strict liability. The Ohio Supreme Court has held that it is not negligence *per se* to violate an administrative code provision. See *Chambers, et al. v. St. Mary's School* (1998) 82 Ohio St. 3d 563. Given that holding, it must be true that a mere application, which does not have the force and effect of an administrative rule, cannot be reviewed from a strict liability standard. For that reason, it is necessary to consider evidence that seeks to explain the answer given by Respondent to Question #5.
9. With respect to the answer to Question #5, Respondent testified convincingly that he did not intend to provide false or misleading information, and that he worked to provide complete information to the satisfaction of the Division. Any deficiencies resulted from lack of information, and without any intent to deceive. Accordingly, the Division has not met its burden of proving that Respondent

made false or misleading statements of material fact, or engaged in conduct the constitutes improper, fraudulent or dishonest dealing.

10. Respondent testified convincingly that the legal difficulties that lead to the issuance of a Notice of Intent to Deny are in his distant past, and that, as required by statute, he has, since his convictions, conducted his life so that the Superintendent can be assured that Respondent is honest, truthful and of good reputation, and that there is no basis to believe that Respondent will commit another offense.
11. I find that the Respondent's character and fitness command the respect of the public and that the Superintendent should have every confidence that Respondent will conduct his business affairs honestly, fairly, and in compliance with Revised Code Chapter 1322.
12. The Division has failed to meet its burden of proof of showing that Respondent is not entitled to a license.
13. Respondent has presented evidence sufficient to meet his burden of proof that he is entitled to a license.

## **II. Recommendation**

In careful consideration of the testimony and exhibits at the hearing, it is hereby recommended that Gerald Sanabria be found to have met the prerequisites set forth in Revised Code Section 1322.041, and that the Superintendent of Financial Institutions grant Mr. Sanabria's application for a Loan Officers License.

\_\_\_\_\_  
William R. Damschroder, Esq.  
Hearing Officer

\_\_\_\_\_  
Date

5/8/06