

**STATE OF OHIO
DEPARTMENT OF COMMERCE**

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IN THE MATTER OF:

ROBERTO GERENA

DIVISION OF FINANCIAL
INSTITUTIONS

CASE NO. 05-0159-LOD

**REPORT AND RECOMMENDATION
ADMINISTRATIVE HEARING OFFICER D. MICHAEL QUINN**

Issued March 30, 2006

I. FINDINGS OF FACT

A. BACKGROUND

The above-captioned 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 3:00 PM on December 1, 2005, at 77 South High Street, room 1936, Columbus, Ohio.

The hearing was held at the request of Respondent Roberto Gerena, of Cleveland, 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 was convicted of Possession of Drugs in 1998, convicted of Criminal Damaging, Criminal Endangering and Disorderly Conduct in 2002 and that Respondent failed to disclose the 2002 criminal offenses on his sworn Application 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. Respondent appeared pro se.

At the hearing, State's Exhibits 1, 2, 3A, 3B, 3C, 3D, 4, 5 and 6 were admitted into the record. Respondent's Exhibit A was admitted into the record over the Division's hearsay objections, subject to the weight deemed to be appropriate to be afforded the document, as discussed in the transcript (hereinafter "Tr."). Respondent appeared as a witness and one additional witness appeared on Respondent's behalf.

B. JURISDICTION

The Division issued the NOH against Respondent on August 25, 2005. On September 28, 2005, the Division was successful in its third attempt to serve Respondent by certified mail, return receipt requested. Respondent requested a hearing, which was received by the Division on October 26, 2005. By letter of October 31, 2005, the Division scheduled the hearing for November 6, 2005, but continued the hearing to December 1, 2005, on its own motion, at which time the hearing went forward.

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.
2. Respondent is an individual who wishes to conduct business in Ohio as a Mortgage Loan Officer. (Exhibit 1.)
3. On or about December 15, 2004, the Division received from Respondent a Loan Officer Application (hereinafter the "Application"). (Exhibit 1.)
4. Respondent signed the Application under oath on December 13, 2004. (Exhibit 1.)
5. Within the Application Respondent answered "Yes" to Question number 5, which asked: "Have you ... ever been convicted of any criminal offense? Exclude minor misdemeanor traffic and parking offenses. ... If yes, submit a detailed explanation of the fact and circumstances ... and a certified copy of the journal entry..." (Emphasis in original) (Exhibit 1; Tr. p. 25.)
6. In the two lines provided on the form for a "detailed explanation" Respondent wrote "Possission, Drug" [sic]. Respondent did not include any further information, or journal entry, regarding that, or any other, conviction. (Exhibit 1.)

7. On, or about, September 17, 1998, Respondent was convicted of possession of drugs, in the Court of Common Pleas, Cuyahoga County, Ohio. Respondent was 23 years old at the time of the conviction. (Exhibit 3C.)
8. On, or about, May 1, 2002, Respondent was convicted of disorderly conduct and criminal damaging, in the Berea Municipal Court, Ohio. Respondent was 27 at the time of the conviction. (Exhibit 3D.)
9. Respondent's explanation of the 1998 drug possession conviction was that he and some friends stopped at a bar on their way to another location. Immediately after they entered the bar the police conducted a raid. When asked, during the raid, if anyone was in possession of drugs, Respondent stated he was and he was taken into custody. Respondent was convicted and sentenced to 10 months in prison, but states he was released after about three months. (Exhibits 3A, 3C; Tr. pp. 27-29.)
10. Respondent's explanation of the 2002 disorderly conduct and criminal damaging convictions was that he and his girlfriend at the time got into a heated argument and she retaliated by calling the police. (Exhibits 3B, 3C; Tr. pp. 33-43.)
11. Respondent's explanation why he only reported the drug conviction and not the charges arising from his fight with his girlfriend in 2002 was very confusing. At one point it appeared that Respondent did not understand the difference between minor misdemeanor and misdemeanor. At another point in his testimony it appeared he thought the Division was not interested in the 2002 convictions either because they were misdemeanors or because they didn't involve incarceration. Respondent appeared to be stating that, because he was not jailed after the 2002 convictions, that the convictions were dismissed. Later Respondent indicated he did not read the question carefully enough. (Tr. pp. 25-26, 43-55, 64.)
12. Respondent was brought into court on all occasions. (Exhibit 3C; Tr. pp. 27-43.)
13. Respondent acknowledges his commission of the offenses. (Exhibits 3A, 3B; Tr. 27-43.)
14. Respondent testified that there was no treatment for substance abuse but there was a requirement to attend an anger management counseling program. There was no continuing counseling. (Tr. pp. 41-42.)

15. The Application does not limit the response sought on Question 5 to felonies, or to a particular type of conviction, or for those offenses for which there exists a record, but asks, albeit in a somewhat complicated style, if the applicant has ever been convicted of or pleaded guilty to any criminal offense, including, but not limited to, certain named offenses. (Exhibit 1.)
16. Respondent's Exhibit A is a letter from Respondent's current employer who was not in attendance at the hearing. Because an administrative hearing is designed to permit a respondent an opportunity to offer an explanation without the formalities or expense of a trial, Respondent's Exhibit was admitted into the record and considered. Because the State could not cross examine the letter writer to test the authenticity, accuracy or details of the document, Respondent's Exhibit has been afforded reduced weight.

II. CONCLUSIONS OF LAW

A. JURISDICTIONAL ISSUE

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

B. LICENSE APPLICATION

2. Respondent has been proven to have been convicted of a criminal offense involving drugs and also of Criminal Damaging, Criminal Endangering and Disorderly Conduct. The offenses are not offenses specifically cited in sections 1322.041(A)(3) or (4), O.R.C.
3. 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.
4. 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 Respondent's inaccurate response to Question 5. Respondent's response was inaccurate because it was incomplete.

5. Filing an inaccurate Application, as Respondent did, is negatively demonstrative of an applicant'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, including the lack of attention to detail. The Application and does not limit the response to felonies.
6. The Division proved Respondent's character and general fitness does 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 – specifically relating to his response to Question 5.
7. Respondent's testimony was unclear, at best, why he answered Question 5 as he did, and, therefore, he did not overcome the Division's evidence 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. Respondent failed to provide sufficient evidence to overcome the Division's evidence questioning his general fitness to command the confidence of the public and the belief that the business will be operated honestly and fairly.
9. The Division also charged 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."
10. The Division, while proving the answer to Question 5 was incorrect, presented no evidence that Respondent committed a deliberate act. Respondent's confusing testimony was the only evidence offered by the Division and, while it may not assist Respondent, it is insufficient evidence, alone, for the Division to meet its burden. The Division has the burden of proof. Since definitions found in statute, case law and Black's Dictionary indicate that "false," "misleading" and "misrepresentation" require a deliberate act, the Division has not met its burden.
11. The Division did not prove violations of 1322.07.

C. DISCUSSION

The Division sought to deny Respondent's license application because Respondent did not answer Question 5 on the Application accurately. Because the Application contained a material mistake, Respondent cannot show that he has been honest and truthful, that his character and general fitness do 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.

III. RECOMMENDATION

The recommendation to the Superintendent of Financial Institutions is to **DENY A MORTGAGE LOAN OFFICER'S LICENSE TO ROBERTO GERENA.**

Respectfully submitted,

D. Michael Quinn
Hearing Officer
March 30, 2006
Docket No. 05-DFI-176