STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWARD DANIEL WINTON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-4070
	)	
OFFICE OF FINANCIAL REGULATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on January 18, 2006, in Tampa, Florida.

APPEARANCES

For Petitioner: Mark Neumaier, Esquire
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For Respondent: Robert Vandiver, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the Office of Financial Regulation should approve Petitioner's application for licensure as a mortgage broker.

PRELIMINARY STATEMENT

By letter dated November 3, 2004, the Office of Financial Regulation (Office) informed Petitioner that his application for licensure as a mortgage broker was denied. On or about December 8, 2004, Petitioner requested a hearing on the denial of his application.

The case was originally set for hearing before the Office pursuant to Section 120.57(2), Florida Statutes, but after disputed facts were identified, the case was referred to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct a hearing pursuant to Section 120.57(1), Florida Statutes. See Fla. Admin. Code R. 28-106.305(2). The case was received by DOAH on November 7, 2005.

By Order dated December 7, 2005, the Office was granted leave to amend its letter denying Petitioner's license application based upon new facts that came to light during discovery. The Office filed an Amended Notice of Denial of Application on December 16, 2005.

At the final hearing, Petitioner testified in his own behalf and also presented the testimony of Traci Leigh Romkey, Franz Gessner, Andrew Madkins, Heather Fisher, and Desiree Washington. Petitioner's Exhibits A through D were received into evidence. The Office presented the testimony of Sherrie

Connelly and William Sims. The Office's Exhibits 1 through 5, 6-A, 6-B, 8 through 10, and 15, were received into evidence.

Official recognition was taken of the Judgment entered in State of Florida v. Edward D. Winton, No. CRC 96-20078 CFANO-I, on October 21, 1997, by the Circuit Court, Sixth Judicial Circuit, in and for Pinellas County, Florida, and the Warrant issued on October 25, 2005, in Docket No. CRC 96-20078 CFANO-I. Those documents were also received into evidence as the Office's Exhibits 5 and 9, respectively.

The two-volume Transcript (Tr.) of the final hearing was filed on January 30, 2006. The parties requested and were given 30 days from that date to file their proposed recommended orders (PROs). The Office timely filed its PRO on March 1, 2006. Petitioner did not file a PRO. The Office's PRO has been given due consideration.

FINDINGS OF FACT

1. Petitioner is 42 years old. He served 10 years in the United States Air Force and is a veteran of the first Gulf War.

2. Petitioner is a partner in a small business that offers executive recruiting services, Internet-based real estate advertising services, and mortgage brokerage services. Petitioner's role in the business is "more on the IT side" and involves "a lot of phone work" as well as "the website, data base management [and] things like that."

3. On October 14, 2003, Petitioner submitted to the Office an application for licensure as a mortgage broker.

4. Question No. 5 on the application asks whether the applicant has "pleaded nolo contendere, been convicted, or found guilty, regardless of adjudication, of a crime involving fraud, dishonest dealing, or any other act of moral turpitude."

5. Petitioner answered "no" to Question No. 5.

6. Petitioner's negative answer to Question No. 5 was based upon his understanding that the question was referring only to financial crimes, such as stealing money or extortion, and crimes involving drugs.

7. Petitioner was not attempting to conceal his criminal history from the Office through his negative answer to Question No. 5. Indeed, at the time he submitted the application, Petitioner knew that the Office would conduct a background screening and learn of his criminal history because he was required to, and did, submit a set of fingerprints with his application.

8. Petitioner's understanding regarding the scope of Question No. 5 was not reasonable in light of the following definition of "moral turpitude," which appeared immediately below the question on the application form:

> "Moral turpitude involves duties owed by persons to society as well as acts contrary to justice, honesty, principle or good

> morals." This includes, but is not limited to theft, extortion, use of mail to obtain property under false pretenses, tax evasion, and the sale of (or intent to sell) controlled substances.

9. Petitioner did not contact the Office prior to submitting his application to get clarification regarding the scope of Question No. 5, nor did he discuss the issue with legal counsel.

10. Petitioner's negative answer to Question No. 5 was a material misstatement of his criminal history.

11. On October 21, 1997, Petitioner pled nolo contendere and was adjudicated guilty of one count of lewd and lascivious conduct for "handling and fondling a child under the age of sixteen years" (a second degree felony), one count of false imprisonment (a third degree felony), one count of aggravated assault (a third degree felony), and three counts of misdemeanor battery.

12. On that same date, Petitioner was sentenced to two years of community control followed by eight years of probation for the lewd and lascivious conduct count, two years of community control followed by three years of probation for the false imprisonment and aggravated battery counts, and one year of community control for the battery counts. The sentences ran concurrently.

13. Petitioner is still on probation for the lewd and lascivious conduct count and, as a result of his conviction on that count, he is a registered sex offender.

14. Petitioner's probation for the lewd and lascivious conduct count runs through October 2007.

15. The Office first learned of Petitioner's criminal history after it received the results of the background screening conducted by the Florida Department of Law Enforcement based upon the fingerprints submitted by Petitioner with his application. Thereafter, consistent with its standard practice, the Office requested an explanation from Petitioner regarding his criminal history.

16. In May 2004, Petitioner provided a "Statement of Facts" to the Office in which he described the circumstances of his criminal offenses as follows:

> In October on a Saturday night [I] went into my stepdaughter bedroom and touch [sic] her private areas. I still think about standing at the door and knowing what I was about to do was wrong but I did it anyway.
>
> [My wife] and I were having problems and that was the last straw. I had been sleeping in our room and the tension was very high. [My wife] confronted me about what I had done and I of course denied it. The argument escalated and I lost control of my temper and threatened her if she did not shut up. I went to the bedroom and she followed me this is when I struck her the first time and told her to leave me alone.

> [My stepson] tried to defend his mother and I spanked him and grab [sic] him by his arms and carries [sic] him to his room. Likewise with [my stepdaughter]. I grabbed the keys to the car to leave and [my wife] told me if I took the car she would call the police and tell them that I had stolen it. I then threw the keys at her and grabbed her and threw her to the ground and told her that she would not want to get the police involved.
>
> She picked up her keys and tried to get her and the children out of the house and I would not let them leave. She pleaded with me to calm down and that I take care of the problems that I had created. I brought up the many things that she had done that had led up to that night. She told the kids to go back to their room and prepare for school the next day and that everything would be okay.
>
> I told her to go to our room and not say another word and she complied with my request. I eventually calmed down and we went to bed. The next day she took me to work as was the normal routine. Later on that day I was arrested and taken to jail.

17. Petitioner expressed remorse for these offenses, both in the Statement of Facts and in his testimony at the final hearing. His remorse appeared to be sincere.

18. Petitioner's offenses were not acts of youthful indiscretion. He was 33 years old at the time and, as reflected in the Statement of Facts and as reaffirmed in his testimony at the hearing, Petitioner fully understood at the time that what he was doing was wrong.

19. Petitioner’s offenses were extremely serious and are morally and socially reprehensible. Petitioner's stepdaughter, whose “private areas” he touched, was only 11 years old at the time, and his stepson, who he spanked and grabbed for trying to defend his mother from Petitioner, was only nine years old at the time.

20. As Petitioner acknowledged in his testimony at the final hearing (Tr. 108, 119), the relationship between a stepfather and stepdaughter involves a special amount of trust and sexual contact between an adult and an 11-year-old child -- which is the essence of his lewd and lascivious conduct offense -- is contrary to good morals.

21. Petitioner’s original Order of Probation, entered on October 21, 1997, required him to participate in and successfully complete domestic violence counseling and sex offender counseling. Petitioner testified that he successfully completed those counseling programs.

22. Petitioner has not undertaken any volunteer work or other community service since his offenses. He testified that his status as a sex offender on probation makes it difficult for him to do so.

23. Petitioner remained out of trouble with the law from the time that he was placed on probation in October 1997 through

October 2005, when he was arrested for an alleged probation violation.

24. A circuit court proceeding involving the alleged probation violation was still pending at the time of the final hearing.

25. The alleged probation violation was based upon an affidavit of Desiree Washington, who was Petitioner's probation officer in October 2005. The affidavit stated in pertinent part:

> [O]n 10-20-04, [Petitioner] was instructed not to have any contact with any child under the age of sixteen unless approved by this officer or the sentencing court and [Petitioner] did fail to carry out this instruction by having contact with four of Heather Fisher [sic] children, as told to this officer on 10-4-05 by Sherri [sic] Connelly of DCF.

26. Petitioner testified that he was never given the instructions referenced in Ms. Washington's affidavit, and it is questionable whether those oral instructions, if given, are consistent with the written conditions of Petitioner's probation imposed by the court.[1] Those issues are being litigated as part of Petitioner's probation violation proceeding.

27. The information that Ms. Washington was "told . . . by Sherri [sic] Connelly of DCF" is summarized in a letter from Ms. Connelly to Ms. Washington dated October 4, 2005, which states in pertinent part:

> In April 2005, I advised [Ms. Fisher] that the children were not to be unsupervised with [Petitioner]. At that time they did admit that he did spend time with the children but always supervised by the mother who knows of his offense. On 9/27/05 I received a new report on the children. All four [sic] the children stated that [Petitioner] does watch them sometimes when their mother goes to work. The boys all reported that he is mean and had hit them with his hand, belt, and paddle. [D.F.] and [J.F.] also reported that he slapped and slammed [J.F.]'s head in to the ground. [J.F.] reported that [Petitioner] is at their house every night when they go to bed but not in the morning.

28. Those allegations were based upon Ms. Connelly's interviews with Ms. Fisher's children, who are ages 10, seven, five, and four. Petitioner disputes the allegations in the letter, except for the first and second sentences.

29. Petitioner's testified that he has never had unsupervised contact with Ms. Fisher's children and that he has never disciplined or struck the children. That testimony was corroborated by Ms. Fisher's testimony, and there is no credible evidence to the contrary in the record because the children did not testify at the final hearing and Ms. Connelly's testimony regarding their statements was uncorroborated hearsay.[2]

30. The allegations in Ms. Connelly's letter, which resulted in Ms. Fisher's children being removed from her custody, are being litigated in circuit court as part of a

dependency proceeding involving Ms. Fisher, her children, and the Department of Children and Families.

31. The allegations in Ms. Connelly's letter regarding the alleged abuse of Ms. Fisher's children by Petitioner are not material to the pending probation violation proceeding because Ms. Washington unequivocally testified (Tr. 180-81, 190) that Petitioner was "violated" solely for having contact with the children, and not for the alleged abuse.

32. Petitioner had not been charged with child abuse or any other crime based upon the allegations in Ms. Connelly's letter as of the date of the final hearing, and it is unknown whether such charges are forthcoming from the local State Attorney.

33. There is no credible evidence that Petitioner's arrest for the probation violation and/or the removal of Ms. Fisher's children were in any way connected with the Office's review of Petitioner's license application. There was not, as Petitioner implied in his testimony at the hearing, a conspiracy between the Office, his probation officer, and/or the Department of Children and Families against him and/or Ms. Fisher.

34. Petitioner has accepted full responsibility for his criminal offenses, and he appears to be sincere in his efforts to turn his life around. By all accounts, he has been forthcoming with his friends and employers regarding his

criminal history, and he goes out of his way to comply with the conditions of his probation. Petitioner's friends testified that they would trust him with their money.

CONCLUSIONS OF LAW

35. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 120.60(3), Florida Statutes (2005).[3]

36. Petitioner has the burden to prove by a preponderance of the evidence that he satisfies the criteria for licensure as a mortgage broker. See Dept. of Banking & Finance v. Osborne, Stern & Co., 670 So. 2d 932, 934 (Fla. 1996); Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

37. The Office has broad discretion in determining the fitness of applicants for licensure. See Osborne, Stern & Co., 670 So. 2d 934; Astral Liquors, Inc. v. Dept. of Business Regulation, 463 So. 2d 1130, 1132 (Fla. 1985).

38. Section 494.0041(1)(f), Florida Statutes, authorizes the Office to deny an application for licensure as a mortgage broker if it finds that the applicant committed an act specified in subsection (2) of that statute, including:

> (a) Pleading nolo contendere to, or having been convicted or found guilty of, regardless of whether adjudication was withheld, a crime involving fraud, dishonest dealing, or any act of moral turpitude.

* * *

> (c) A material misstatement of fact on an initial or renewal application.

§ 494.0041(2)(a), (c), Fla. Stat.

39. Consistent with the definition contained on the application form, the Office's rules define "moral turpitude" as follows:

> "Moral turpitude involves duties owed by persons to society as well as acts contrary to justice, honesty, principle or good morals." This includes, but is not limited to, theft, extortion, use of the mail to obtain property under false pretenses, tax evasion, and the sale of (or intent to sell) controlled substances.

Fla. Admin. Code R. 69V-40.001(11).

40. The Office's rules do not contain a list of offenses that involve moral turpitude, but that does not justify Petitioner's failure to affirmatively answer Question No. 5 because whatever else "moral turpitude" might or might not encompass, it certainly encompasses Petitioner's lewd and lascivious conduct offense, which was based upon Petitioner touching his 11-year-old stepdaughter's "private areas." See, e.g., Aplin v. Fla. Real Estate Comm'n, Case No. 90-1844, 1990 Fla. Div. Adm. Hear. LEXIS 6971, at *6 (DOAH Oct. 2, 1990) (concluding that "the commission of lewd and lascivious sexual offenses against children clearly and unequivocally involves moral turpitude").

41. Moreover, Petitioner acknowledged in his testimony that sexual contact between an adult and an 11-year-old child is contrary to good morals, which is a standard contained in the definition of "moral turpitude" on the application form and in the Office's rules. Accord State ex rel. Tullidge v. Hollingsworth, 146 So. 660, 661 (Fla. 1933) ("Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. It has also been defined as anything done contrary to justice, honesty, principle or good morals, though it often involves the question of intent as when unintentionally committed through error of judgment when wrong was not contemplated." (citations omitted)).

42. Petitioner's criminal history, which includes acts of moral turpitude, provides the Office an adequate basis to deny his license application. § 494.0041(2)(a), Fla. Stat.

43. Petitioner materially misstated his criminal history on his license application by answering "no" to Question No. 5. His intent regarding the misstatement is immaterial for purposes of Section 494.0041(2)(c), Florida Statutes, because, as explained in regard to a similar statute,

> It is impossible for the Department to know what each applicant knows or believes at the time of application for licensure. The inclusion of the phrase "material misstatement" allows the Department to avoid

> having to make impossible determinations of what was and was not known to the applicant. If the applicant misstates his or her criminal background, even unknowingly, he or she is held liable for that misstatement.

Department of Insurance v. Koniz, Case No. 01-4271PL, 2002 Fla. Div. Adm. Hear. LEXIS 684, at *8 (DOAH Apr. 23, 2002; DOI May 17, 2002) (construing Section 626.611(2), Florida Statutes, which is similar to Section 494.0041(2)(c), Florida Statutes).

44. Thus, even though the evidence establishes that Petitioner's failure to affirmatively answer Question No. 5 was based upon his misunderstanding of the scope of the question, rather than an intent to deceive the Office by concealing his criminal history, Petitioner's negative answer to Question No. 5 provides the Office an additional basis to deny his license application. § 494.0041(2)(c), Fla. Stat.

45. The Department has discretion to approve a license application even though there are statutory bases upon which it may deny the application. In determining whether to exercise its discretion in that regard, the Office considers whether the applicant has demonstrated that he or she is rehabilitated based upon the passage of time, subsequent good conduct, and other similar factors. See, e.g., Zaremba v. Dept. of Banking & Finance, Case No. 94-1229, 1994 Fla. Div. Adm. Hear. LEXIS 5741, **7-9 (DOAH Aug. 3, 1994; DBF Sept. 16, 1994) (approving application for mortgage broker license based upon applicant's

proof of rehabilitation); Matala v. Dept. of Banking & Finance, Case No. 93-5603, 1994 Fla. Div. Adm. Hear. LEXIS 5448, at *6 (DOAH Jan. 27, 1994) (recommending denial of mortgage broker license based upon applicant's failure to demonstrate rehabilitation); Tr. 227, 234, 237 (testimony of William Sims, who supervises the review of mortgage broker license applications, regarding the factors that the Office considers in evaluating whether an applicant has demonstrated rehabilitation).

46. Petitioner failed to establish that he is rehabilitated even though it has been almost nine years since his criminal offenses. First and foremost, Petitioner is still on probation, and he will continue to be on probation until October 2007, even if the pending probation violation proceeding is resolved in his favor. Second, although Petitioner has successfully completed the counseling programs required as conditions of his probation and stayed out of trouble with the law (except for the alleged probation violation that is pending) since his 1997 criminal offenses, there is no credible evidence that he has done anything above and beyond what was required of him, as is necessary to demonstrate rehabilitation.

47. In light of the foregoing conclusions, it is not necessary to determine whether the Office may also deny

Petitioner's application based upon Section 494.0033(4), Florida Statutes, which provides that:

> it is a ground for denial of licensure if the applicant . . . has pending against him or her any criminal prosecution or administrative enforcement action . . . which involves fraud, dishonest dealing, or any other act of moral turpitude.

48. That issue is addressed below, however, in an abundance of caution in the event that the Office (or an appellate court) rejects the conclusions above.

49. The Office did not argue that the pending probation violation proceeding is an "administrative enforcement action," and, indeed, that phrase is more likely than not intended to encompass enforcement proceedings initiated under the Administrative Procedure Act. See §§ 120.60(5), (6), 120.69, Fla. Stat.; Osborn v. Dept. of Banking & Finance, Case No. 93-6424, 1994 Fla. Div. Adm. Hear. LEXIS 5522 (DOAH Aug. 5, 1994; DBF Sept. 14, 1994) (applying Section 494.0033(4), Florida Statutes, to an applicant against whom another state agency was prosecuting an administrative complaint).

50. Petitioner's pending probation violation proceeding is not, as the Office argues in its PRO, a "criminal prosecution" for purposes of Section 494.0033(4), Florida Statutes. See generally Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) ("Probation revocation, like parole revocation, is not a stage

of a criminal prosecution . . . ."); Morrissey v. Brewer, 408 U.S. 471, 480 (1972) ("[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."). A criminal prosecution requires the filing of an indictment or information, which is not required in the case of an alleged probation violation. Compare Fla. R. Crim. P. 3.140(a) (methods of prosecution) and § 775.15(4), Fla. Stat. (describing the procedure for prosecuting criminal offenses) with Fla. R. Crim. P. 3.790(b) (revocation of probation or community control) and § 948.06, Fla. Stat. (describing the procedure for commencing a probation violation proceeding).

51. Furthermore, Petitioner's pending probation violation does not involve an act of moral turpitude because, according to Ms. Washington, the violation was based upon Petitioner's being around Ms. Fisher's children and not the incidents of child abuse alleged in Ms. Connelly's letter. Although child abuse certainly involves "moral turpitude," simply being around children, which is the act for which Petitioner's probation was "violated," does not.

52. Accordingly, Section 494.0033(4), Florida Statutes, does not provide an independent basis for the Office to deny Petitioner's license application.

53. That said, the fact that a probation violation proceeding is pending against Petitioner may be, and has been, considered in determining whether Petitioner demonstrated rehabilitation. However, little weight was given to that fact (as compared to the fact that Petitioner will still be on probation until October 2007, even if the pending probation violation proceeding is resolved in his favor) because it is questionable whether Ms. Washington's oral instructions that Petitioner purportedly violated are consistent with his written conditions of probation, which calls into doubt the validity of the oral instructions. See, e.g., Pettus v. State, 836 So. 2d 1070, 1072 (Fla 5th DCA 2003)(probation may only be revoked for violation of a condition imposed by the court, and a probation officer is without authority to impose additional conditions beyond the normal supervisory duties directly related to the court-ordered conditions); Holterhaus v. State, 417 So. 2d 291 (Fla. 2d DCA 1982) (same).

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Office of Financial Regulation issue a final order denying Petitioner's application for a mortgage broker's license.

DONE AND ENTERED this 16th day of March, 2006, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of March, 2006.

ENDNOTES

1/ Ms. Washington testified (Tr. 192) that the instructions referenced in her affidavit were her interpretation of Petitioner's written conditions of probation. However, the written conditions of probation do not state that Petitioner can have no contact whatsoever with any child under the age of 16, but rather state:

> You will have no unsupervised contact with any child under the age of 18 without another adult present, who is responsible for the child's welfare, who has been advised of the crime and who has been approved by the court, until you have successfully completed a sex offender treatment program, unless authorized by the sentencing court.

Pet. Ex. B (emphasis supplied). And cf. Watkins v. State, 666 So. 2d 207 (Fla. 2d DCA 1995) (noting that a court-ordered condition of probation that bars any contact with children under the age of 16 "is too broad because it bars any contact with children rather than barring 'unsupervised' contact").

2/ The children's statements are not admissible under the hearsay exception in Section 90.803(23), Florida Statutes, because the Office made no effort to satisfy the procedural requirements in that statute.

3/ All statutory references in this Recommended Order are to the 2005 version of the Florida Statutes. See Lavernia v. Dept. of Business and Professional Reg., 616 So. 2d 53, 54 (Fla. 1st DCA 1993); Bruner v. Board of Real Estate, 399 So. 2d 4, 5 (Fla. 5th DCA 1981).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.