

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KENDAL PIERRE COBB,

Petitioner,

vs.

Case No. 15-6028

DEPARTMENT OF FINANCIAL
SERVICES,

Respondent.

_____ /

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014),^{1/} on January 11 and 12, 2016, in Orlando, Florida.

APPEARANCES

For Petitioner: Kendal Pierre Cobb, pro se
2711 Tally Ho Avenue
Orlando, Florida 32826

For Respondent: Stephanie A. Gray, Esquire
Merribeth Bohanan, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Petitioner, Kendal Pierre Cobb, should be issued a license by Respondent, Department of Financial Services, as a resident customer representative insurance agent.

PRELIMINARY STATEMENT

On May 6, 2015, Petitioner filed an application for licensure as a resident customer representative insurance agent with Respondent, Department of Financial Services (the "Department").

On September 25, 2015, the Department issued a Notice of Denial to Petitioner notifying Petitioner that it intended to deny his application. The Department based its denial on its determination that Petitioner lacked the fitness or trustworthiness to engage in the business of insurance. Specifically, the Department obtained information of a criminal proceeding in Orange County Circuit Court wherein Petitioner was convicted of committing a lewd act upon a child. Petitioner's conviction was subsequently overturned by the Fifth District Court of Appeal. However, the Department determined that the alleged conduct was sufficiently substantiated for it to conclude that Petitioner should not be granted a customer representative license.

On October 13, 2015, Petitioner timely filed a request for a formal administrative hearing before the Division of Administrative Hearings ("DOAH"). On October 26, 2015, the Department transmitted Petitioner's request for hearing to DOAH for assignment to an Administrative Law Judge ("ALJ") to conduct an evidentiary hearing.

The Department subsequently issued an Amended Notice of Denial (the "Notice") to Petitioner on December 31, 2015. The Notice did not revise the factual grounds upon which the Department based its determination. The Department simply referenced an additional statutory provision as a basis for its denial. On January 6, 2016, the undersigned entered an Order Granting the Department's Motion to Amend Denial Letter.

The final hearing was held on January 11 and 12, 2016, in Orlando, Florida. At the final hearing, the Department presented the testimony of Brandie Silvia, a Child Protective Team interviewer; Rick A. Salcedo, a detective with the Orlando Police Department; Amelia Spears with the Department; Sue Gorton with the Department; Carol Foo with Conway Learning Center; and Beatriz Fuentes with the Department. Department Exhibits 1 through 32 were admitted into evidence. The ALJ granted the Department leave to supplement the record on March 4, 2016.^{2/} Petitioner testified on his own behalf and presented the testimony of Maria Antonia Ortiz. Petitioner Exhibits 1 through 9 were admitted into evidence.

A four-volume Transcript of the final hearing was filed with DOAH on March 15, 2016. At the close of the hearing, the parties were advised of the ten-day timeframe following DOAH's receipt of the hearing transcript to file post-hearing

submittals. Both parties filed proposed recommended orders which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. In May 2015, Petitioner applied to the Department for a license as a resident customer representative insurance agent. A customer representative is an individual appointed by a general lines insurance agent or agency to assist in transacting the business of insurance. In his capacity as a customer representative, Petitioner would directly interact with customers in the agency or agent's office who have been solicited as part of the agent's insurance business. See §§ 626.015(4) and 626.7354(2), Fla. Stat. A customer representative routinely handles customer payments and is only allowed to work in an office setting under the general agent's supervision.

2. The Department has jurisdiction over licensing procedures for customer representatives. See § 626.016(1), Fla. Stat. Pursuant to this statutory responsibility, after receiving Petitioner's application for licensure, the Department issued a Notice of Denial on September 25, 2015, notifying Petitioner of its intent to deny his application.

3. The Department denied Petitioner's application based on its determination that he lacked the fitness or trustworthiness to engage in the business of insurance. The specific basis for

the Department's denial was information the Department received that Petitioner had allegedly committed inappropriate sexual contact with a child.

4. In July 2012, Petitioner was arrested for lewd or lascivious conduct involving his (then) five-year-old daughter. In October 2013, Petitioner was tried for the crime in Orange County Circuit Court in Case No. 2012-CF-010041-A-0. Petitioner was charged with three crimes including Lewd or Lascivious Molestation in violation of section 800.04(5)(b) and section 775.082(3)(a)(4), Florida Statutes (2012) (Count I); Lewd Act Upon a Child in violation of section 800.04(1) (Count II); and Lewd or Lascivious Conduct in violation of section 800.04(6)(b) (Count III). A jury found Petitioner not guilty on Count I--Lewd or Lascivious Molestation. (Petitioner's defense counsel successfully moved for judgment of acquittal on Count III during the criminal trial.) But, the jury did find Petitioner guilty of Count II--Lewd Act Upon a Child.^{3/} Count II, according to the Information, specifically alleged that Petitioner:

Between June 1st 2012 and June 3rd 2012,
. . . did, in violation of Florida Statute
800.04(1), with his penis make contact with
the body of a child under the age of sixteen
(16) years in a lewd, luscious or indecent
manner, and in furtherance thereof
[PETITIONER] did rub his erect penis on
[A.C.]^[4/]

Petitioner was sentenced to 51.15 months in prison followed by ten years' sex offender probation.

5. Petitioner appealed his conviction. In January 2015, the Fifth District Court of Appeal overturned the conviction in Cobb v. State, 156 So. 3d 581 (Fla. 5th DCA 2015). The court ruled that the criminal charging document contained a fundamental error in that "the information neither referenced a statute that establishes a criminal offense nor set forth the essential elements of any substantive crime." Id. In other words, Petitioner's conviction under section 800.04(1) was "based on a non-existent crime." Id.

6. Since Petitioner's criminal conviction was overturned, Petitioner has not been found guilty of or convicted of any crime based on the alleged lewd act upon a child.^{5/} At the time of the final hearing, Petitioner was facing no further criminal charges in this matter. No information or testimony was provided at the final hearing identifying an alternate or more appropriate crime that Petitioner allegedly committed involving the incident with his daughter.

7. The Department, in its Notice to Petitioner, states that the factual basis for its denial of Petitioner's application was his "inappropriate sexual contact with a child." To support its determination, the Department cites to Petitioner's criminal case stating:

[Y]ou were criminally charged in Orange County Circuit Court Case No. 2012-CF-010041-A-O with committing a lewd act upon a child. You were found guilty of the charge in a jury trial. The Department is aware your criminal conviction was reversed by Cobb v. State, 156 So. 3d 581 (Fla. 5th DCA 2015), because of a technical deficiency in the criminal charging document.

While the Department acknowledged that Petitioner's conviction was reversed, the Department maintains that the circumstances surrounding the incident demonstrate that Petitioner lacks the required fitness or trustworthiness to be issued a customer representative license.^{6/} Consequently, the Department denied Petitioner's application for licensure. This administrative proceeding followed.

The Incident Involving Petitioner's Daughter

8. Certain facts regarding the incident are undisputed. The child involved is Petitioner's daughter, A.C.^{7/} A.C. was five years old at the time of the encounter. Petitioner is married to, but estranged from, A.C.'s mother, H.L.

9. Over the weekend of June 1, 2012, A.C. was visiting Petitioner at his residence. On Saturday evening, June 2, 2012, Petitioner and A.C. were watching television in the room where A.C. slept during her visits. A.C. was wearing pajamas, and Petitioner was wearing short pants.

10. Petitioner and A.C. were sitting or lying on the bed. At some point, the two were engaged in some sort of (non-

violent) physical activity, e.g., hugging or light horseplay. The activity ended when Petitioner ejaculated, and A.C. felt the "wet" on the bed, her clothes, and her thighs.

11. A little over a week later, on June 11 or 12, 2012, A.C. told her mother, H.L., that Petitioner had "peed" on her during her visit. On June 14, 2012, H.L. contacted the Florida Department of Children and Families ("DCF") to report A.C.'s complaints about her encounter with her father.

12. Both DCF and the Orlando Police Department investigated the matter. This investigation eventually led to the criminal charges levied against Petitioner.

13. The principal factual dispute in this matter is how and what caused Petitioner to ejaculate in the presence of and on A.C.

A.C.'s Version of the Incident

14. A.C. did not testify at the final hearing. Her story was conveyed through a videotaped interview with a Child Protective Team ("CPT") interviewer, as well as a transcript of her sworn testimony at Petitioner's criminal trial.^{8/}

15. After receiving H.L.'s report of suspected abuse, on or about June 14, 2012, A.C. was interviewed by investigators for DCF and the Orlando Police Department. During these interviews, A.C. stated that Petitioner had "peed" on her and had "humped" her. A.C. also used a teddy bear to physically

demonstrate what happened between her and her father. She placed the teddy bear (in place of herself) on her lap between her legs and rocking her legs up and down.

16. On or about June 26, 2012, the Orlando police coordinated with Arnold Palmer Hospital to have A.C. participate in a forensic interview with the CPT. CPT provides assessments to DCF and the police department regarding suspected child abuse or neglect. Brandi Silvia, a senior case coordinator with CPT, interviewed A.C. A video recording of Ms. Silvia's interview with A.C. was played at the final hearing.

17. Ms. Silvia described her interview with A.C. at the final hearing. Ms. Silvia is experienced in conducting child interviews. Ms. Silvia was trained to act as an unbiased interviewer. To accomplish this goal, she asks open-ended questions to obtain information that the child freely provides to her. Ms. Silvia began her interview by asking A.C. a series of questions to ascertain whether A.C. could differentiate between a true statement and a lie. Ms. Silvia testified that, in her opinion, A.C. knew to tell the truth.

18. Ms. Silvia then questioned A.C. to determine whether she could effectively identify all of her body parts. A.C. called her genitals her "pee pee."

19. During the interview, A.C. described the incident as "my Dad just peed on my bed." A.C. explained that her father

was sitting on the bed with his legs crossed. At some point, he took hold of A.C. and placed her in his lap. He then wrapped his arms around her and rocked his pelvis up and down against her.

20. After a brief moment, A.C. felt something wet on her thighs. A.C. believed that Petitioner had "peed" on her. A.C. expressed to Ms. Silvia that Petitioner "was humping on me. Then, he peed on me and on my bed. And, I said [for Petitioner] to go to the bathroom!" At some point during the "humping" activity, A.C. cried out for Petitioner to "stop!" A.C. further recounted that she told her father that she "didn't want him to, to do that again, never." A.C. reenacted for Ms. Silvia how her father had placed her on his lap and "humped" her.

21. During the interview, A.C. commented to Ms. Sylvia that she knew that people were not supposed to touch her "pee pee." A.C. explained that Petitioner had not touched her "pee pee." Neither did she see or touch Petitioner's "pee pee."

22. A.C. also appeared at Petitioner's criminal trial on October 7, 2013. A.C. testified that Petitioner touched the front of her body with the front of his body. A.C. stated that Petitioner "humped" her. A.C. described that Petitioner was laying down on the bed with his legs crossed at his ankles, and he moved them up and down. She then felt the bed, and it was wet with "pee."

Petitioner's Version of the Incident

23. During the course of this matter, from the initial investigation in June 2012, through his criminal trial in October 2013, and ultimately to the final hearing in January 2016, Petitioner offered an evolving explanation of what happened between him and his daughter on the night of June 2, 2012. As detailed below, Petitioner readily admitted the undisputed facts listed above. Petitioner also expressed that his understanding of how he ejaculated on his daughter develops as he continues to reflect upon the event.

24. On June 19, 2012, Petitioner voluntarily provided a videotaped statement, under oath, to Detective Rick Salcedo of the Orlando Police Department as part of its investigation. During the interview, Petitioner refuted much of his daughter's statement. Petitioner explicitly denied "humping" A.C. He also specifically denied ejaculating or "peeing" on his daughter. Petitioner confided to Detective Salcedo that he believed that his daughter had developed a fascination with peeing. He also intimated that A.C. had a habit of humping objects and even people. Petitioner further disclosed that during A.C.'s last visit to Petitioner's house, the two "had a whole conversation about pee." Petitioner, however, had no explanation for why A.C. would accuse him of "humping" her that night.

25. On July 16, 2012, in reaction to A.C.'s interview with Ms. Silvia, Petitioner provided a sworn, written statement to the Orlando Police Department. Petitioner admitted that he was not "trueful [sic] about the situation" during his first interview. In reference to the situation, Petitioner wrote that, "I've had no sexual intent toward her, but her sexual actions in this case did cause me to ejaculate. I tried my best to stop her movements and action but I lost control of my ejaculation. After pushing her off my leg repeatedly, she jumped on my legs and her knee or leg caused me to ejaculate."

26. After providing his written statement, Petitioner sat for a second audio-taped, sworn interview with Detective Salcedo. During this interview, Petitioner presented an expanded, and revised, description of what occurred between A.C. and him while they were lying on the bed. Petitioner revealed that A.C. started straddling him and trying to hump his leg. Petitioner was wearing short pants. However, her skin rubbed his skin around his crotch. During this physical contact, A.C. "hit him the wrong way," and he became aroused. He "lost control" of the situation and ejaculated. Petitioner surmised that A.C. "was straddling my leg so she probably felt something."

27. Petitioner told his story for a fourth time at his criminal trial in October 2013. During his testimony,

Petitioner denied any lewd contact with his daughter. Instead, Petitioner expressed to the court that he was lying down on the bed, and A.C. was being playful and jumping around. He dozed off and woke up with an erection. Without warning, A.C. jumped on him. Petitioner testified that then he "sat her to the side, and she had calmed down, I believe, at that moment. And, right after that - that's when I believe she had jumped on me again. And, I was sleeping, and ejaculated." During cross-examination, Petitioner explained that he was asleep experiencing a wet dream. A.C. jumped on top of him, and he ejaculated when he woke up.

28. At the final hearing, Petitioner admitted to ejaculating in the presence of and on his daughter. Petitioner repeated that he was asleep on the bed. He remembers that he was experiencing a wet dream. He awoke to find his daughter "humping" him. Petitioner described the incident as an "accident" and that he had no criminal or sexual intent. Petitioner denied that he physically touched A.C. in a sexual manner. Petitioner's position is aptly summarized in his Petition for an Administrative Hearing in which he states that:

As I was trying to put her to sleep, I accidentally fell asleep a couple of times without realizing . . . I believe I had a wet dream and was awoken by my daughter jumping on me and saying that I peed on her leg. I am not sure exactly how or when the

wet dream or reaction occurred because I was disoriented from waking up.

29. Petitioner conceded that he did not give the whole truth to Detective Salcedo during his first interview on June 19, 2012. Petitioner explained that, at the time of his initial interviews, he did not have a clear understanding of what had happened that night. At the final hearing, Petitioner conceded that he still remains confused by the exact turn of events. Petitioner expounded that:

When I looked back and I tried to say well what happened . . . it wasn't conclusive for me . . . I didn't really find out to give a clear understanding for myself or anybody else at the time. I just have remembered some things happened. I remembered I was awake at this point. I don't remember when I went to sleep . . . it was very, very foggy when I remember her actually saying that I had peed on her and I had - I remembered pushing her to remove her. I remember turning over. All of these things that I've mentioned. Those are the things I remembered. I think the real issue is the timeframe, and when these things happened is where I was really not sure myself. I was not sure. So, I just explained what I could.

30. At both his criminal trial and the final hearing, Petitioner explained that the incident was exacerbated by several medical conditions from which he suffers. Petitioner represented that nerve pain from a 2010 surgery for a herniated disk causes him to experience increased sensitivity in his groin area. He also has increased sensitivity in his genital region

due to a skin condition called folliculitis.^{9/} Petitioner stated that he has suffered from folliculitis outbreaks since December 2011. As a result, Petitioner experiences increased sensitivity in his groin, more frequent wet dreams, and an inability to control erections. Petitioner further testified that he was just getting over a folliculitis outbreak during the weekend of June 1, 2012.

31. At the final hearing, Petitioner did not present any medical records or a medical professional diagnosis or opinion supporting his claim that his medical conditions cause him to experience increased sensitivity to wet dreams or uncontrollable erections or ejaculation.

32. Following his victory in the Fifth District Court of Appeal, Petitioner was released from prison in November 2014. Shortly thereafter, he began working at an Allstate insurance agency as a telemarketer. He has worked at the agency without incident or consumer complaint.

33. Based on the evidence and testimony presented at the final hearing, Petitioner has not met his ultimate burden of proving, by a preponderance of the evidence, that he is entitled to a license as a resident customer representative. Based primarily on Petitioner's misrepresentations to law enforcement officials, Petitioner's actions show that he is untrustworthy.

Accordingly, Petitioner lacks the requisite fitness and trustworthiness to engage in business of insurance.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the subject matter and parties pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).

35. Petitioner applied to the Department for licensure as a resident customer representative. A customer representative is "an individual appointed by a general lines agent or agency to assist that agent or agency in transacting the business of insurance from the office of that agent or agency."

§ 626.015(4), Fla. Stat. A customer representative "may engage in transacting insurance with customers who have been solicited by any agent or customer representative in the same agency, and may engage in transacting insurance with customers who have not been so solicited to the extent and under conditions that are otherwise consistent with this part and with the insurer's contract with the agent appointing him or her." § 626.7354(2), Fla. Stat. However, a customer representative shall not engage in transacting insurance outside the office of his agent or agency. § 626.7354(4), Fla. Stat.

36. The Department is charged with the duty to enforce and administer the provisions of chapter 626, Florida Statutes. The

Department has jurisdiction over licensing procedures for customer representatives. See § 626.016(1), Fla. Stat.

37. The Department denied Petitioner's application for licensure based on his alleged inappropriate sexual contact with his minor child. Despite the fact that Petitioner was ultimately acquitted of any criminal conduct involving his child, the Department determined that, through this incident, Petitioner "demonstrated a lack of fitness or trustworthiness to engage in the business of insurance."

38. The Department's Notice refers to section 626.611(1)(a) and (g) and section 626.7351 for the legal basis for its denial. Section 626.611 establishes grounds for the Department to refuse to issue a license to a customer representative applicant and states, in pertinent part:

(1) The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:

* * *

(a) Lack of one or more of the qualifications for the license or appointment as specified in this code.

* * *

(g) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.

39. Section 626.7351 governs the qualification for a customer representative's license and states in pertinent part:

The department shall not grant or issue a license as customer representative to any individual found by it to be untrustworthy or incompetent

40. Petitioner challenges the Department's denial of his application. Petitioner, as the party asserting the affirmative, carries the ultimate burden of persuasion to prove that he satisfied the requirements for licensure and is entitled to a customer representative license. Dep't of Child. & Fams. v. Davis Fam. Day Care Home, 160 So. 3d 854, 857 (Fla. 2015); Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996); Dep't. of Transp. v. J. W. C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

41. The preponderance of the evidence standard of proof applies in an initial license application proceeding. Davis Fam. Day Care Home, 160 So. 3d at 855 (the preponderance of the evidence standard applies in a case involving the denial of an initial application for a professional license); Osborne Stern & Co., 670 So. 2d at 934.

42. Preponderance of the evidence is defined as “the greater weight of the evidence,” or evidence that “more likely than not” tends to prove a certain proposition. S. Fla. Water Mgmt. v. RLI Live Oak, LLC, 139 So. 3d 869, 872 (Fla. 2014); see Dufour v. State, 69 So. 3d 235, 252 (Fla. 2011) (“Preponderance of evidence is defined as evidence ‘which as a whole shows that the fact sought to be proved is more probable than not.’”).

43. However, while Petitioner, as the applicant, maintains the ultimate burden of demonstrating he should be granted the license, “where the agency proposes to deny the license because the applicant is unfit, it has the burden to prove the applicant's unfitness.” Davis Fam. Day Care, id. (citing to Osborne Stern & Co. II, 670 So. 2d at 934) (“[T]he Department had the burden of presenting evidence that appellants had violated certain statutes and were thus unfit for registration.”); see also M. H. v. Dep’t of Child. & Fams., 977 So. 2d 755, 761 (Fla. 2d DCA 2008) (“Without question, an applicant for a license has the initial burden of demonstrating his or her fitness to be licensed. Osborne Stern & Co. I, 647 So. 2d at 248. But if the licensing agency proposes to deny the requested license based on specific acts of misconduct, then the agency assumes the burden of proving the specific acts of misconduct that it claims demonstrate the applicant's lack of

fitness to be licensed. Osborne Stern & Co. II, 670 So. 2d at 934.”).^{10/}

44. Further, the agency must rely on “something more than a suspicion of wrongdoing or untrustworthiness.” Comprehensive Med. Access, Inc. v. Office of Ins. Reg., 983 So. 2d 45, 47 (Fla. 1st DCA 2008). Consequently, despite the fact that the applicant continuously has the burden of persuasion to prove entitlement to be licensed, “the agency denying the license has the burden to produce evidence to support a denial.” Id. at 46.

45. An administrative agency's burden of proof in a license application proceeding is governed by the preponderance of the evidence standard. M.H. v. Dep't of Child. & Fams., 977 So. 2d at 760, citing to Osborne Stern & Co. II, 670 So. 2d at 934-35.

46. In this matter, the Department seeks to deny Petitioner's license application on the ground that Petitioner is unfit to engage in the business of insurance. The factual basis for the Department's denial is Petitioner's “inappropriate sexual contact with a child.” Therefore, while the ultimate burden of proof in this proceeding remains with Petitioner, the legal analysis begins with examining whether the Department proves the specific act of misconduct that makes Petitioner unfit for licensure.

47. In addition, the evidence must show how Petitioner's alleged misconduct disqualifies him from working as a customer representative for an insurance agency. Denying Petitioner's application requires more than simply making a moral judgment or invoking an emotional, but unsubstantiated, reaction based on a mere "suspicion of untrustworthiness." In other words, while the undisputed facts describing the night of June 2, 2012, may be unsettling, the Department must demonstrate how this incident proves that Petitioner cannot be trusted to perform his responsibilities under chapter 626, i.e., assist an insurance agent transact the business of insurance or interact with customers regarding their insurance concerns.

48. Based on the evidence presented at the final hearing, competent substantial evidence establishes that Petitioner committed an "inappropriate sexual contact with a child." The undisputed facts show that Petitioner's genital area touched A.C.'s skin. This "contact" resulted in his ejaculation. A.C. felt the "wetness" on her thighs and her bed sheets. These facts, combined with Petitioner's less than persuasive explanation of the encounter (see further discussion below), establishes that A.C.'s description of what occurred in June 2012 is the most credible version of the event. Accordingly, the Department proved, by a preponderance of the evidence, the

specific act of misconduct that demonstrates Petitioner's lack of fitness to be licensed.

49. Because the Department proved the misconduct that supports its denial of Petitioner's license, the burden of persuasion shifts back to Petitioner, as the party carrying the ultimate burden, to prove that he is entitled to a customer representative license. Petitioner essentially argues that A.C.'s description of what happened on the night of June 2, 2012, does not evince his true intent. Therefore, while A.C. consistently, perhaps graphically, communicated what she experienced, her version does not directly refute Petitioner's explanation that he accidentally or involuntary "lost control of his ejaculation" in her presence.

50. Petitioner also questions how A.C.'s testimony, by itself, demonstrates that he is unfit for licensure in the insurance industry. As of the date of the final hearing, Petitioner does not face future criminal prosecution for this incident.^{11/} Therefore, if he was not convicted of any crime based on his interaction with his daughter, Petitioner challenges the Department's contention that he cannot satisfactorily fulfill his duties as a customer representative for an insurance agency; or, why he cannot be trusted to process an insurance payment; or, what unacceptable risk he poses to the insurance-buying public.

51. Petitioner's true intent or motivation is a crucial factor in determining whether this single incident proves that he lacks the fitness or trustworthiness to engage in the business of insurance. Discerning whether Petitioner's actions were deliberately committed with sexual intent, as opposed to resulting from an uncontrollable accident, is distinctly relevant in determining whether Petitioner possesses the necessary characteristics to interact with insurance customers.^{12/}

52. However, in light of Petitioner's ever-evolving description of the incident, his admission at the final hearing that he lied to investigators, and the detached manner in which he testified about his daughter's accusations, Petitioner did not meet his ultimate burden of proving, by a preponderance of the evidence, that he is entitled to a license as a customer representative in Florida.

53. Petitioner's rendition of the incident presents even more credibility issues than A.C.'s story. Petitioner's narratives are too disjointed and fragmentary to piece together a supportable account by which this tribunal can find that Petitioner's version occurred as he represented. Petitioner testified at the final hearing that "it was very, very foggy" at the moment he ejaculated. Petitioner also testified that, as he reflects on the night of June 2, 2012, his story has developed

as he tries to understand for himself what happened between his daughter and him. If Petitioner's memory of the incident is so "very foggy," and his understanding has evolved with each retelling, then, it is very difficult for the undersigned to confidently find competent substantial evidence to support his story.

54. What the facts do conclusively establish, however, is that Petitioner directly lied, under oath, to state investigators when first confronted about his daughter's statements. Petitioner admitted that he did not tell the truth to the Orlando Police Department when asked whether he had "humped" or "peed" on A.C. This finding creates two issues that directly impact whether Petitioner has met his ultimate burden of proving that he is entitled to a customer representative license. First, Petitioner expressly misled state officials when interviewed about these extremely serious allegations. This fact creates grave concerns regarding whether Petitioner has told the truth during each of his sworn statements, including his testimony at the final hearing. Consequently, Petitioner's explanation of the incident with his daughter lacks credibility.

55. Secondly, the fact that Petitioner intentionally misled state officials affects whether Petitioner demonstrates the requisite fitness or trustworthiness to engage in the

insurance business. Neither section 626.611(1)(g) nor section 626.7351 defines the terms "fitness" or "trustworthiness." In applying these sections as the legal basis for its denial, the Department represented at the final hearing that it used its common understanding and the dictionary definition of these terms to mean "integrity," "accountability," and "good judgment."^{13/} The Department also testified that a customer representative carries a fiduciary duty to consumers because they are often trusted with a customer's personal and financial information, as well as the onus to properly process insurance payments.

56. By lying about the circumstances surrounding the night of June 2, 2012, Petitioner showed that he lacks a certain degree of integrity, accountability, and good judgment. These character traits are essential for individuals who are to be entrusted by consumers with personal and financial information regarding their insurance needs. Consequently, Petitioner has not proven that he is qualified for and entitled to a license to engage in the business of insurance.

57. In sum, the preponderance of the evidence establishes that Petitioner committed an "inappropriate sexual contact with a child." Accordingly, the Department met its initial burden of proving Petitioner's unfitness for licensure. Thereafter, Petitioner, who continuously bears the ultimate burden to prove

that he satisfies the requirements for licensure, failed to show that he is entitled to a license as a customer representative. Petitioner's testimony is simply not credible enough to find that incident occurred as he represented. Further, the evidence establishes that Petitioner lied to state officials about his interaction with his daughter. Consequently, Petitioner has not met his burden of proving, by a preponderance of the evidence, that the Department should grant him a license as a customer representative in Florida.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, the Department of Financial Services, enter a final order denying Petitioner's application for licensure as a customer representative in Florida.

DONE AND ENTERED this 29th day of April, 2016, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of April, 2016.

ENDNOTES

^{1/} All statutory references are to Florida Statutes (2014), unless otherwise noted.

^{2/} After the final hearing, the Department filed an Unopposed Motion for Leave to Supplement the Record with an Order Granting Admission of Child Hearsay Statements at Trial issued by the Orange County Circuit Court on October 4, 2013. The Department's motion was granted.

^{3/} Section 800.04, Florida Statutes (2012), reads:

Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.

(1) DEFINITIONS.--As used in this section:

(a) "Sexual activity" means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

(b) "Consent" means intelligent, knowing, and voluntary consent, and does not include submission by coercion.

(c) "Coercion" means the use of exploitation, bribes, threats of force, or intimidation to gain cooperation or compliance.

(d) "Victim" means a person upon whom an offense described in this section was committed or attempted or a person who has reported a violation of this section to a law enforcement officer.

^{4/} Petitioner's daughter is identified by her initials due to confidentiality concerns.

^{5/} At the final hearing, the Department did not offer an alternative criminal charge or statute that Petitioner allegedly violated in place of the "non-existent" crime of Lewd Act on a Child under section 800.04(1).

^{6/} Based on the opinion of the Fifth District Court of Appeal, section 800.04(1) does not create a crime for "lewd act upon a child."

^{7/} Prior to the final hearing, upon the Department's motion, the undersigned determined that A.C. was unavailable to testify at the final hearing under section 90.804(1)(e), Florida Statutes. The Department sufficiently demonstrated that it had attempted to obtain A.C.'s presence at the final hearing but was unable to procure her attendance or testimony by process or all other reasonable means. Thereafter, in accordance with section 90.804(2)(a), the undersigned allowed the Department to introduce A.C.'s former, sworn testimony from Petitioner's criminal trial into evidence. The undersigned further finds that A.C.'s prior statements are admissible under section 90.803(23), a hearsay exception for statements of a child victim, as well as Florida Administrative Code Rule 28-106.213, as supplementing and explaining A.C.'s former testimony. The undersigned notes that in the course of Petitioner's criminal trial, following a hearing, the court issued an Order Granting Admission of Child Hearsay Statements at Trial in which the court determined that the time, content, and circumstances of A.C.'s prior statements provided sufficient safeguards of reliability and trustworthiness.

^{8/} A.C.'s trial testimony was entered into evidence as Department's Exhibit 9. See also Endnote 7 above.

^{9/} As discussed in paragraph 31, Petitioner produced no medical or other documentation to support his claim that he suffers from folliculitis, or that such condition can produce the effects he described.

^{10/} The court in M. H. v. Department of Children and Families, 977 So. 2d at 760, found instructive language in Osborne Stern & Co. I, 647 So. 2d at 248, which analyzed the shifting burden of proof between the agency and the applicant in a registration application proceeding and concluded: "The hearing officer correctly ruled that an applicant for licensure or registration to engage in a particular profession or occupation bears the

burden of showing entitlement thereto by a preponderance of the evidence. However, that does not mean that the applicant must disprove that violations occurred as alleged by the Department; the Department had the burden of proving the alleged violations actually occurred if the registration is to be denied on that ground."

^{11/} Neither section 626.611(1) nor section 626.7351 requires that an applicant be convicted of a crime in order for the Department to determine that the applicant is unfit or untrustworthy to engage in the business of insurance. Compare Endnote 12 below.

^{12/} The Department, in its proposed recommended order, references section 626.207 and section 626.621(8), suggesting that it may automatically conclude that Petitioner lacks the fitness and trustworthiness to engage in the business of insurance simply because he committed an alleged "felonious act." Such argument is not proper in this matter. First, at this date, no Florida court has convicted Petitioner of a felony or other criminal act based on this incident. Similarly, no Florida court has held that Petitioner's alleged actions were "prohibited conduct." The evidence and testimony received at the final hearing does not establish that Petitioner committed the ("non-existent") felony of "lewd contact with a child" under section 800.04(1). Neither did the Department prove that Petitioner committed the other two criminal charges of lewd or lascivious molestation or lewd or lascivious conduct or any other crime based on the underlying incident.

In this matter, the undersigned focused on a different proposition than that Petitioner's underlying action constitutes a statutory crime. Instead, the undersigned finds that based on the evidence and testimony produced at the final hearing, the Department proved, by a preponderance of the evidence, that Petitioner committed an act ("inappropriate sexual contact with a child"). And, by committing that act, the facts demonstrate that Petitioner lacks the fitness or trustworthiness to perform the duties and responsibilities of a customer representative in Florida. Compare Endnote 11 above.

^{13/} See Seagrave v. State, 802 So. 2d 281, 286 (Fla. 2001) ("When necessary, the plain and ordinary meaning of words [in a statute] can be ascertained by reference to a dictionary."); see also Raymond James Fin. Servs. v. Phillips, 110 So. 3d 908, 910 (Fla. 2d DCA 2011) ("It is appropriate to refer to dictionary definitions when construing statutes or rules.")

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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.