

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE REGULATION
Before the Commissioner of Financial and Insurance Regulation

Jonathan Wendell Clark,
Petitioner

v

Case No. 10-772-L
Docket No. 2010-495

Office of Financial and Insurance Regulation,
Respondent

For the Petitioner:

Paul Cassidy, Attorney
51150 Washington
New Baltimore, MI 48047

For the Respondent:

Marlon F. Roberts
Office of Financial & Insurance Regulation
P.O. Box 30220
Lansing, MI 48909

Issued and entered
this 8th day of February 2011
by Ken Ross
Commissioner

FINAL DECISION

I. Background

In July 2009, Jonathan Clark (Petitioner) applied for a producer license. He answered "Yes" to the question on the application asking whether he had been convicted or charged with a crime. Petitioner was convicted in 2001 of the misdemeanor attempted criminal sexual conduct, 4th degree.

OFIR licensing staff denied him a license citing section 1239(1)(h) of the Code which provides:

In addition to any other powers under this act, the commissioner may place on probation, suspend, or revoke an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions,

and the commissioner shall refuse to issue a license under section 1205 or 1206a, for any 1 or more of the following causes:

* * *

(h) Using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere.

Petitioner appealed the license denial. The appeal was assigned for hearing to the State Office of Administrative Hearings and Rules. Hearings were held on June 10 and August 18, 2010 on motions for summary decision which both parties filed. A detailed account of the procedural history of the case is found in the Proposal for Decision which the administrative law judge issued on August 25, 2010.

The ALJ granted the OFIR staff's motion for summary decision and recommended that the denial of Petitioner's license be affirmed.

Neither party filed exceptions to the Proposal for Decision. Michigan courts have long recognized that the failure to file exceptions constitutes a waiver of any objections not raised.

Attorney General v. Public Service Comm 136 Mich App 52 (1984).

II. Findings of Fact and Conclusions of Law

The factual findings which are required to resolve this matter are found in the Proposal for Decision and are not in dispute. Those facts, which are appropriate to support a summary decision are stated below:

1. In 2001, Jonathan Clark was convicted in Macomb County Circuit Court of the misdemeanor of attempted criminal sexual conduct 4th degree, MCL 750.520e(1)(a).

This offense is defined in the Michigan Penal Code:

A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

- (a) That other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.
2. A child under the age of 16 is legally incapable of consenting to sexual contact with an adult.
3. Respondent's conduct was coercive in nature as that term is used in section 1239(1)(h) of the Insurance Code, as the ALJ reasoned in his PFD. That analysis, which appears on pages 4 through 6 of the PFD is adopted.

The PFD is, as a whole, supported by reasoned opinion. Its findings and conclusions are adopted with the following exceptions: On page 3 of the PFD, the ALJ incorrectly cited the date of Petitioner's conviction as March 1, 2010. The correct date is March 1, 2001. Also on page 3 of the PFD, the ALJ cited the transcript of the Petitioner's plea hearing in Macomb County Circuit Court. The transcript had been attached to one of the Respondent's briefs but was never offered or admitted as an exhibit. Since it was not an admitted exhibit, it was not appropriate to cite the document. However, the Commissioner finds that the transcript is not essential to the factual findings in this matter. That portion of the PFD which references the circuit court transcript is not adopted.

III. Order

The refusal to issue an insurance producer license to the Petitioner is upheld.



Ken Ross
Commissioner

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

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| In the matter of | Docket No. | 2010-495 |
| Jonathon Wendall Clark, Petitioner | Agency No. | 10-772-L |
| v | Agency: | Office of Financial and Insurance Regulation |
| Office of Financial and Insurance Regulation, Respondent | Case Type: | Intent to Deny Refusal to License |

Issued and entered
this 25th day of August, 2010
by C. David Jones
Administrative Law Judge

**PROPOSAL FOR DECISION BASED
ON MOTION FOR SUMMARY DECISION**

A. Application, Denial and Hearing

On July 8, 2009, Petitioner submitted an application for an insurance producer license. On January 25, 2010, Respondent sent Petitioner Notice of License Denial and Opportunity for Hearing. The Denial, in part, said Petitioner was ineligible under MCL 500.1205 and MCL 500.1239(1)(h) because Petitioner failed to disclose the prior revocation of his license on his application, and because he was convicted in 2001 for a misdemeanor of attempted criminal sexual conduct in the 4th degree, which showed coercive and dishonest practices. On or about February 12, 2010 Petitioner filed his Petition for a Contested Case Hearing.

In May 2010, the Chief Deputy Commissioner issued an Order Referring Petition for Hearing and an Order to Respond.

On February 12, 2010 Petitioner filed a Motion for Summary Decision.

On May 10, 2010, Respondent filed Respondent's Reply to Petitioner's

Motion for Summary Decision and Cross Motion for the Same.

On May 13, 2010, Notice of Hearing was mailed to the parties scheduling the hearing for June 10, 2010 at 9:00 a.m., at 611 W. Ottawa Street, Lansing, Michigan.

On June 9, 2010 I received a Request for Oral Arguments in Lieu of Hearing. I orally granted the request.

On Jun 10, 2010 oral arguments were held on the Motions. Attorney Paul A. Cassidy represented Petitioner, and Attorney Elizabeth V. Bolden represented Respondent. My detailed rulings are found in my Summary of Adjournment and Evidentiary Hearing and Motion Hearing, issued June 16, 2010. Among other things, (1) I denied Petitioner's request that the tribunal reverse the Commissioner's April 28, 2009 decision and reinstate his license, since he was bound by *res judicata*; (2) I held that the January 25, 2010 Notice of License Denial should be considered amended to include MCL 500.1239(1)(a) as a ground for denial; (3) I denied Petitioner's Motion for Summary Decision to reverse the January 25, 2010 License Denial; (4) I denied Respondent's Motion for Summary Decision to affirm the January 25, 2010 License Denial; and (5) I scheduled the hearing for August 18, 2010 at 9:00 a.m., at 611 W. Ottawa, Lansing, Michigan.

On August 11, 2010, I received Respondent's Motion for Reconsideration of Its Motion for Summary Decision and Request for Adjournment.

On August 11, 2010, I issued an order Scheduling Hearing on Respondent's Motion. The order converted the hearing into a hearing on the Motion and ordered Petitioner to be prepared to answer the Motion by August 18, 2010.

On August 16, 2010, I issued an Order Denying Request to Waive Oral Argument (made by Petitioner).

On August 17, 2010, I received Petitioner's Answer to Motion for Reconsideration, and Counter Motion for Reconsideration.

On August 18, 2010, the Motion Hearing convened as scheduled. Paul A. Cassidy, attorney, represented Petitioner. Elizabeth V. Bolden, Attorney, represented Respondent.

At this hearing, I granted Respondent's Motion, and denied Petitioner's Counter Motion for Reconsideration. Respondent then dropped the issue of violation of MCL 500.1239(1)(a), and requested a Proposal for Decision for the Commissioner.

B. Merits

It is undisputed that on March 1, 2010, Petitioner was convicted of Attempted Criminal Sexual Conduct in the 4th degree in violation of MCL 750.520e(1)(a), by a no contest plea, a misdemeanor. He was not licensed at the time. The question is whether he violated MCL 500.1239(1)(h).

Attached to Respondent's Motion for Reconsideration was a transcript of the January 18, 2010 Plea hearing in Macomb County Circuit Court. Petitioner, in his Answer, did not challenge the authenticity of the transcript, object to its use, or offer other proposed documents.

The Court used the transcript of the preliminary exam as a factual basis for the plea. The Court found the defendant intentionally made the complaining witness touch his genital area, the touching was for sexual purposes, and it was not voluntary by the victim, who was under 16.

MCL 500.1205(1)(b) provides that an application for a resident producer license shall be approved unless he or she has committed any act listed in Section 1239(1).

Respondent claims Petitioner has committed such an act. The relevant section of Section 1239(1), reads as follows:

. . . the commissioner shall refuse to issue a license under Section 1205 or 1206a, for any 1 or more of the following causes: . . .

(h) Using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere. MCL 500.1239(1)(h).

Furthermore, Respondent seeks summary decision under the following:

A party may move for a summary decision in the party's favor upon any 1 of the following grounds: . . .

(c) there is no genuine issue as to any material fact and the moving party is therefore entitled to a decision in that party's favor as a matter of law."

1979 ACS, R 500.2111

Some issues have arisen over the interpretation of Section 1239(1)(h) and below are my conclusions.

I agree with Respondent that the phrase "in the conduct of business in this state or elsewhere", only modifies the words near it (demonstrating incompetence, untrustworthiness or financial irresponsibility) and not the words furthest from it (using fraudulent, coercive, or dishonest practices). This is because the word "or" divides the two sections so the sections should be read in the disjunctive sense. A word or phrase should be given meaning by its context or setting. *Tyler v Livonia Public Schools*, 459 Mich 382 (1999). The literal meaning of "or" should be followed unless it renders a

statute dubious. See, *National Center for Mfg Sciences v City of Ann Arbor*, 221 Mich App 541; 563 NW2d 65 (1997). Indeed, it would seem inadvisable to license agents who have used fraudulent, coercive, or dishonest practices just because they did not do them in the conduct of business.

Coerce is defined as follows:

“Compelled to compliance; constrained to obedience or submission in a vigorous or forcible manner.”

Black’s Law Dictionary, 5th ed (1979), p 234

Although the word “practices” is plural, it may also be applied and limited to the singular number.

Sec. 3b. Every word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number. Every word importing the masculine general only may extend and be applied to females as well as males.

MCL 8.3b

The basic question is whether Petitioner’s action amounted to coercive practices. Below I find that it did.

Petitioner was convicted of attempted criminal sexual conduct in the fourth degree. Criminal sexual conduct in the fourth degree is (in relevant part) defined as follows:

Sec. 520e. (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

(a) That other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.

MCL 750.520e(1)(a)

A minor under the age of consent is legally incapable of consent to sexual activity. *People v Cash*, 419 Mich 230, 351 NW2d 822 (1984).

Thus, criminal sexual conduct in the fourth degree does amount to a coercive practice. It is forced sex with a minor, because the minor can not consent.

The result is not different here because Petitioner was only convicted of attempted criminal sexual conduct in the fourth degree. In the transcript of the plea hearing, the Court used the transcript of the preliminary exam as a factual basis for the plea. The Court found the defendant intentionally made the complaining witness touch his genital area, the touching was for sexual purposes, and it was not voluntary by the victim, who was under 16. While Petitioner was only convicted of an attempt, the court found the criminal sexual conduct in the fourth degree was completed. At any rate, I believe the words "coercive practices" are broad enough to include an attempt.

Petitioner objects to using a no contest plea against him in an administrative hearing. However, a *nolo contendere* plea conclusively resolves issues of guilt in favor of the state. *People v Moore*, 169 Mich App 265; 416 NW2d 407 (1987).

Whether or not Petitioner also engaged in a dishonest practice is unnecessary to decide.

I find that there is no genuine issue as to any material fact and Respondent is entitled to a decision in its favor as a matter of law. Petitioner violated MCL 500.1239(1)(h), so the commissioner shall refuse to issue a license under Section 1205. Since Petitioner violated MCL.1239(1), under MCL 500.1205, the resident producer license shall not be approved.

Respondent has abandoned its claim that Petitioner violated MCL 500.1239(1)(a).

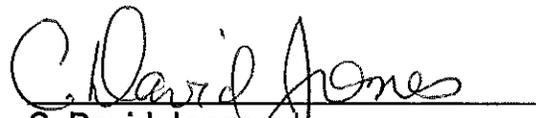
PROPOSED DECISION

Based on the above, I recommend the following decision:

1. Respondent's Motion for Summary Decision is granted.
2. Respondent's charge of violation of MCL 500.1239(1)(a) is dismissed.
3. Respondent's denial of Petitioner's Application for an insurance producer license is affirmed.

EXCEPTIONS

If a party chooses to file Exceptions to this Proposal for Decision, the Exceptions must be filed within twenty (20) days after the Proposal for Decision is issued and entered. If an opposing party chooses to file a Response to the Exceptions, it must be filed within five (5) days after Exceptions are filed. All Exceptions and Responses to Exceptions must be filed with the Official of Financial and Insurance Services, Division of Insurance, Attn: Dawn Kobus, Ottawa State Office Building, 611 West Ottawa, Third Floor, Lansing, Michigan 489089-8195, and served on all parties to the proceeding.


C. David Jones
Administrative Law Judge