

**BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AFFAIRS
BUREAU OF ELECTRONIC AND APPLIANCE REPAIR,
HOME FURNISHINGS AND THERMAL INSULATION
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

ALEX PIMENTEL
DBA NORCAL CFS

Bedding and Retailer License No. H-167783

Respondent.

Case No. A1 2015-194

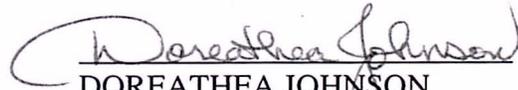
OAH No. 2015080122

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Director of the Department of Consumer Affairs as the Decision in the above-entitled matter.

This Decision shall become effective MUS = 7 2016 .

IT IS SO ORDERED this 18th day of July, 2016.


DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

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PROPOSED DECISION

This matter was heard before Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings, on June 8, 2016 in Sacramento, California.

Stephanie Alamo-Latif, Deputy Attorney General, represented complainant Justin Paddock, in his official capacity as Chief of the Bureau of Electronic and Appliance Repair, Home Furnishings, and Thermal Insulation (Bureau).

Respondent Alex Pimentel (respondent) appeared on his own behalf.

Evidence was received, the hearing concluded, and the record was held open pending receipt of character reference letters on behalf of respondent. Respondent's documents were received on June 16, 2016, marked as Exhibit A, and excluded from evidence as discussed in Factual Finding 14. The record was closed, and the matter was submitted for decision on June 17, 2016.

FACTUAL FINDINGS

1. On February 19, 2015, respondent submitted an application to the Bureau for a Bedding Retailer license. Respondent checked the "No" box on the application, certifying under penalty of perjury that he had never "been convicted of a felony or misdemeanor, other than minor traffic violations." On February 23, 2015, the Bureau issued respondent License Number H-167783. The license will expire on February 28, 2017, unless renewed.

2. On June 18, 2015, the complainant signed and filed an accusation requesting that respondent's license be revoked or suspended based on his conviction of crimes that are substantially related to the qualifications, functions, or duties of a licensed bedding retailer, and on his false statement in his Application that he had never been convicted.

3. Respondent timely filed a Notice of Defense. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code Section 11500 et seq.

Respondent's Convictions

JUNE 7, 2001 CONVICTION

4. On June 7, 2001, in the Superior Court of the State of California, County of Shasta, respondent was convicted of grand theft of personal property, in violation of Penal Code section 487, subdivision (a), a felony. Respondent was sentenced to 150 days of house arrest, which he served. He also completed five years of formal probation and paid the associated court fines and fees. The court ordered that he pay restitution based on a payment plan. Complainant submitted a dismissal order showing that on October 6, 2006, respondent's conviction was reduced to a misdemeanor and expunged pursuant to Penal Code section 1203.4.

5. The circumstances of respondent's conviction, as outlined in the criminal complaint, occurred between July 1997 and September 1998. During this time period, respondent, along with two others, purchased automobiles, changed their odometers to lower mileage numbers, and resold the automobiles at a higher price. Respondent did not discuss the details of his conviction during the hearing, only saying that the conviction had been expunged. He was ordered to pay restitution of approximately \$3,700 plus court fees and fines. Respondent testified that he believes he has not yet completed the restitution payments, even though the conviction was expunged.

JANUARY 8, 2010 CONVICTION

6. On January 8, 2010, in the Superior Court of California, County of Shasta, respondent was convicted on a plea of nolo contendere of corporal injury to a spouse, in violation of Penal Code section 273.5, subdivision (a), a misdemeanor. Respondent was placed on three years of informal probation, and was ordered to complete a one-year batterer's program and 16 hours of community service. Respondent fulfilled the terms of his sentence and paid the associated court fees and fines.

7. The parties did not submit a police report or other documentary evidence regarding the circumstances of this conviction. Respondent's testimony regarding the circumstances is below.

DECEMBER 15, 2014 CONVICTION

8. On December 15, 2014, in the Superior Court of California, County of Shasta, respondent was convicted on a plea of nolo contendere of violating a protective order against his ex-wife, in violation of Penal Code section 273.6, subdivision (a), a misdemeanor. Respondent was placed on three years of informal probation, ordered to serve 15 days in jail, and to complete 16 counseling sessions. Respondent has completed nine of the 16 counseling sessions. The court initially allowed respondent to complete this sentence by participating in 15 work days with the Sheriff's work project in lieu of jail time. Because respondent was about to move to Sacramento, the court was concerned he would not complete the 15 days of work and converted the sentence back to 15 days of jail time. Respondent testified he served one day and was released from jail and relieved from the remaining jail sentence. Respondent paid the associated court fees and fines and will be on probation until December 15, 2017.

9. The parties did not submit a police report or other documentary evidence describing the events leading to this conviction. Respondent's testimony regarding the circumstances is below.

Respondent's Testimony

10. Respondent testified that the events that were the basis for the 2010 conviction for violation of Penal Code section 273.5, subdivision (a), occurred on October 26, 2009, when respondent and his wife got into an argument while packing to move. Respondent locked himself in the garage to separate himself while he focused on packing the garage. After several hours, he unlocked the garage door, and his wife came in, lunged toward him, and respondent's fingernail caught his wife's cheek. The scratch or cut on her cheek was the basis for the conviction. The couple remained married until November 2014.

11. Respondent testified that the circumstances leading to his 2014 conviction for violating a restraining order began after respondent and his ex-wife divorced in November 2014. At the time of the divorce, respondent's ex-wife filed for and was granted a one-year restraining order against him. Respondent and his ex-wife shared custody of their two-year-old daughter. On the weekends he was with his daughter, he would take her to a new church, not wanting to violate the restraining order by attending the family's church, and she would go to child care while he attended services. Because the unfamiliar child care class upset their daughter, respondent's ex-wife asked him to attend the family's church and bring her to the familiar child care if he had custody of their daughter on a Sunday. When respondent did so, his ex-wife had him arrested for violating the restraining order.

12. In December 2015, respondent's ex-wife attempted to renew the restraining order against him for a five-year period. After hearing testimony from both parties, the judge dismissed the request for the restraining order renewal. Respondent and his ex-wife are now on much better terms and peacefully share custody. Over the past 18 months, respondent and his ex-wife have worked to develop an amicable relationship. They share custody of their

four-year-old daughter and he is active in raising her. Though they have a set schedule of visitation, respondent sees her more often than his scheduled days when possible.

13. Respondent has only been selling mattresses for the last year and a half. Prior to this, he worked for Charter Communications in Redding. In late 2014, around the time of his divorce, respondent visited his brother who is a pastor in Oregon. Respondent was inspired to give back to his community when he saw all that his brother does to support his community. It was around this time that respondent discovered "Custom Fundraising Services" (CFS), a company from the Midwest with a business model based on raising money for schools. Because he wanted his work to "mean something," he began "NorCal CFS," which is a Sacramento contingent of CFS. There is no brick and mortar mattress store; rather, respondent works with local schools that contract with him for fundraising. At the school, respondent will set up a 'mobile mattress store.' The sale lasts for one day and the proceeds go to the school. Respondent works for the parent company, but largely operates independently.

Respondent's other evidence

14. Respondent was granted time to submit letters of character reference. He did not avail himself of this opportunity and instead submitted information about the company Custom Fundraising Solutions, records of his convictions, and other documentation. (Exhibit A.) Complainant objected to this evidence. Exhibit A was excluded and not considered as it does not comply with the order to limit additional evidence to letters in support of his character.

Mitigating and Aggravating Factors and Rehabilitation

15. Respondent testified that NorCal CFS allows him to do more for his community than he ever has in his life. In 2015, NorCal CFS donated over \$40,000 to local schools. He would like to continue operating this business so that he can raise more money for schools, but he has not had a 'mattress event/sale' for several months. He is also employed full-time as a salesperson for E&S Appliances where he has worked for approximately seven months.

16. Respondent did not know of the Bureau's existence or that he needed to be licensed until February 2015. He has been to many conventions for those who sell mattresses and no one with whom he spoke has such a license. For this reason, he was surprised when the Bureau sent several enforcement agents to his temporary showroom to close down the sale because he did not have a license. He immediately filled out the license application and submitted it to the Bureau. Respondent testified that he did not read the directions carefully and he wished he had spent more time on it. He did, however, check the box stating that he had no felony or misdemeanor convictions. One of respondent's convictions occurred less than two years ago and he is still on probation. Until the hearing, respondent did not know that he had to disclose his expunged conviction or his

misdemeanors. He took responsibility, however, saying that he filled out the application himself and that he alone was responsible for reading the directions.

17. In evaluating the rehabilitation of an applicant for registration, the Bureau is to consider the following criteria set forth in California Code of Regulations, title 16, section 2768, subdivision (b):

- (1) The nature and the severity of the act(s) or crime(s) under consideration.
- (2) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480 of the Business and Professions Code when considering an applicant pursuant to subsection (a)(1) of this section.
- (3) Total criminal record when considering a person pursuant to subsections (a)(2) and (a)(3) of this section.
- (4) The time that has elapsed since commission of the act(s) or crime(s) under consideration.
- (5) The extent to which the applicant, registrant, or petitioner has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant, registrant, or petitioner.
- (6) Evidence, if any, of rehabilitation submitted by the applicant, registrant, or petitioner. Such evidence may include, but is not limited to, proof of additional training or education, evidence of service to the community, and, if applicable, evidence of expungement proceedings, pursuant to Section 1203.4 of the Penal Code.

18. Respondent has three convictions in his past. While one was nearly 15 years ago, and one just over six years ago, his final conviction was merely 18 months ago. For the most recent conviction, respondent remains on probation and has not completed the mandated counseling sessions. His first conviction was reduced to a misdemeanor and dismissed pursuant to Penal Code section 1203.4. Respondent was ordered to pay restitution under the terms of his sentencing, and he stated he does not know whether he has finished paying per the court's schedule, but he testified that he thinks he has "a couple thousand dollars" left to pay.

19. Applying the Bureau's criteria does not point favorably towards respondent's rehabilitation. Initially, an insufficient amount of time has passed for him to demonstrate

complete rehabilitation. The Bureau looks at rehabilitation from the time probation or incarceration ends, and respondent remains on formal probation until December 15, 2017. Although respondent is apparently in compliance with his probation and continues to attend his counseling sessions, good behavior on probation is substantially discounted because it is expected. Respondent operates his mattress sales business in a relatively independent manner. The company's owner resides in the Midwest of the United States. Respondent did not discuss the manner in which he reports to CFS's owner or the methods of collecting money from his clientele.

20. Respondent has not acknowledged that his prior actions were wrong. He did not offer any explanation of his first conviction (grand theft). In explaining the circumstances of the following two convictions, he stated that a large amount of the responsibility rested with his ex-wife. (See, *Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940 ["Fully acknowledging the wrongfulness of his actions is an essential step towards rehabilitation"].) In addition to acknowledging prior wrongdoing, however, rehabilitation must be demonstrated by sustained conduct over an extended period of time. (See, *In re Menna* (1995) 11 Cal.4th 975, 987, 991.) Because respondent is on probation until December 2017, he is not in a position to demonstrate rehabilitation. In evaluating rehabilitation, minimal weight is given to good behavior while on probation because such behavior is expected. (See, *In re Gossage* (2000) 23 Cal.4th 1080, 1099.) Whether respondent is able to demonstrate rehabilitation can only be determined in the future. It is consequently against the public interest to allow respondent to continue operating with his Bedding Retailer license.

Cost Recovery

21. Complainant has requested that respondent be ordered to pay the Bureau's costs for investigation and enforcement in the amount of \$4,152.50. These costs are for the services provided by the Attorney General's office in prosecuting this matter. They are supported by a Certification of Costs and a declaration of the Deputy Attorney General. Attached to the certification is a computer printout of the tasks the Attorney General's office performed, the amount of time spent performing those tasks, and the amounts charged. Respondent did not object to the costs requested by complainant. The amount requested in costs is reasonable.

LEGAL CONCLUSIONS

1. While there is not a specific statute addressing the burden of proof for a Bedding Retailer, the general rule in an Accusation proceeding to revoke or suspend a license is that complainant bears the burden of proving its case by clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App. 3d 853.)

2. The Bureau may revoke a license for a variety of reasons, including the following:

a. the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties authorized by the license (Bus. & Prof. Code § 490, subd. (a).); and,

b. the licensee knowingly makes a false statement of material fact or knowingly omits a material fact in an application for licensure.¹ (Bus. & Prof. Code § 475, subd. (a).)

3. As set forth in Factual Findings 4 and 5, respondent was convicted of a felony that was based on defrauding the public. Pursuant to California Code of Regulations, title 16, section 868, a crime or act shall be considered to be substantially related to the qualifications, functions, or duties of a licensee “if it evidences present or potential unfitness of an applicant or licensee to perform the functions authorized by the license in a manner consistent with the public health, safety, and welfare.” The crimes or acts shall include, but not be limited to, any violation of the provisions of the Contractors’ State License Law (§ 7000 et seq.); crimes or acts involving dishonesty, fraud, deceit, or theft with the intent to substantially benefit oneself or another or to substantially harm another; and crimes or acts that indicate a substantial or repeated disregard for the health, safety, or welfare of the public. (Cal. Code Regs., tit. 16, § 868.)

While respondent was not explicitly convicted of false advertising, his grand theft conviction was based on advertising cars for sale that were worth far less than the advertised price due to manipulated odometers. This crime is substantially related to the qualifications, functions, and duties of a Bedding Retailer Licensee. Cause exists to revoke respondent’s license under Business and Professions Code section 490, subdivision (a).

4. As set forth in Factual Findings 6 through 9, respondent was also convicted on a charge of domestic violence and of violating a restraining order against him. Complainant’s mattress-sales business includes entering public schools and doing business there for at least a full day. He works with school leaders as well as student groups with little or no supervision. Because the convictions demonstrate a “potential unfitness . . . to perform the functions authorized by the license,” they are substantially related to the qualifications, functions, or duties of the license. Cause exists to revoke respondent’s license under Business and Professions Code section 490, subdivision (a).

5. Pursuant to Factual Findings 1 and 4 through 9, cause exists to revoke respondent’s license for failing to disclose his criminal convictions. Respondent declared under penalty of perjury that the contents of his application were true and correct. Additionally, respondent’s license requires that he carefully track sales, income, receipts, and regulations regarding bedding sales, among others. The industry requires that he carefully

¹ Pursuant to Business and Professions Code section 475, subdivision (b), a license may be revoked for the same reason that an application may be denied.

follow instructions as well as laws, which he did not demonstrate when failing to disclose his convictions.

6. As set forth in the Factual Findings and Legal Conclusions as a whole, and particularly in Factual Findings 15 through 20, respondent has not met his burden of demonstrating rehabilitation. Rehabilitation is akin to an affirmative defense; the burden of proof to establish an affirmative defense is on the proponent of that defense. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156, 164.) The Board has adopted regulations that outline criteria to be considered when evaluating a licensee's rehabilitation, as discussed above. These regulations have been considered.

7. Pursuant to Business and Professions Code section 125.3, a licensee found to have violated a licensing act may be ordered to pay the reasonable costs of investigation and prosecution of a case. As set forth in Finding 21, complainant seeks \$4,152.50 in costs. The cost recovery amount having been found reasonable, respondent should be permitted to pay the costs pursuant to a reasonable payment plan developed with the Bureau.

ORDER

1. Bedding Retailer License Number H-167783 is REVOKED. Respondent shall relinquish his license to the Bureau within ten (10) days of the effective date of this decision. Respondent may not reapply or petition the Bureau for reinstatement of his revoked license for two (2) years from the effective date of this decision.

2. Within 60 days of the final decision in this matter, respondent shall reimburse the Bureau for its reasonable costs of investigation and prosecution in the amount of \$4,152.50, or shall begin making payments pursuant to a reasonable payment plan developed with the Bureau. Payment of this full amount is a condition precedent to reinstatement of respondent's revoked Bedding Retailer License, unless otherwise ordered by the Bureau.

DATED: June 27, 2016

DocuSigned by:

Heather M. Rowan

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HEATHER M. ROWAN
Administrative Law Judge
Office of Administrative Hearings