

**STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT**

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In the Matter of the Proceeding Pursuant
To Section 44, subdivision 4, of the
Judiciary Law in Relation to

Brief of the
Respondent

BRYAN R. HEDGES

a Former Judge of the Family Court,
Onondaga County
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STATEMENT OF FACTS AND ARGUMENT

Since 1985, Onondaga County Family Court Judge Bryan Hedges served with distinction and without blemish. He retired in April of 2012. There is no allegation that his service as a Judge was anything but honorable.

THE 1970's INCIDENT

Sometime in the early 1970's when E [REDACTED] was seven years old or less and Bryan Hedges was twenty-five years old E [REDACTED] walked into a bedroom Bryan occupied with his wife Elizabeth. (R322) The exact date is unknown. (Exhibit D) E [REDACTED] estimates that she was five years old at the time of this incident. (Exhibit D)

Ms. [REDACTED], then E [REDACTED], was deaf, used hearing aids and had limited speech at that time. It had been established that the virus she had contracted at birth had only caused deafness and not brain damage. She could not speak or carry on a conversation until between ages seven and nine. She learned American Sign Language between seven and a half and age eight. (R232-233)

Elizabeth Hedges and Bryan Hedges were in bed. (R322)

Ms. [REDACTED] walked into the room and awakened them. (R322)

The bedroom was the spare bedroom once occupied by Tom ██████████, Elizabeth's brother, on the third floor of the house that was owned and occupied by Elizabeth's mother, the late E ██████████ (R322) at ██████████ St., Albany, NY. (R235)

The bedroom was in the attic, a remote part of the house. (R184) (R235-236)

It is undisputed that a staircase led to the bedroom with a small hall and bathroom outside the bedroom door. The rest of the third floor was attic. (R235-236)

Bryan and Elizabeth were overnight guests at the house. (R322)

Ms. ██████████ was visiting the ██████████ Street house for the day with her parents and younger sister. (R321)

Bryan Hedges and Elizabeth were recently married. Bryan had recently returned from service in the U.S. Army in Vietnam. He was a student at Syracuse University Law School. (R320)

Upon being awakened Elizabeth Hedges took Ms. ██████████ downstairs to breakfast. (R321)

Bryan Hedges remained in bed with the covers pulled down below his waist. He commenced the act of masturbation while lying in the bed. (R322-323)

There is no proof as to whether or not Bryan and Elizabeth had been sleeping with their door open at the time E ██████████ entered the room. Ms. ██████████ walked back into the room. Bryan Hedges only became aware of her presence when she contacted the bed and reached onto the bed and touched Bryan's hand while he was in the act of masturbation. (R322) Ms. ██████████'s hand was in touch with Bryan Hedges' hand for three to four seconds before Bryan pulled the sheet up and rolled over. (R323) Bryan Hedges immediately got dressed and took Ms. ██████████ downstairs to breakfast. (R323)

Prior to E ██████████'s presence in the room, Bryan thought he was alone and having a private moment when he was interrupted. (R382) Bryan Hedges was groggy, half asleep, not really understanding or seeing and was surprised by E ██████████'s presence in the room. (R369) He acknowledged that he was logy, tired, sluggish, embarrassed, stunned and surprised at E ██████████'s presence back in the room which explained his delayed reaction before covering up by several seconds. (R323) The entire incident from the commencement of the act of masturbation when E ██████████ was not in the room until he pulled the sheet up and rolled over took less than a minute. (R322-323) Bryan Hedges did not report the event to Ms. ██████████'s parents who were present downstairs. (R326-327)

THE 1980's REPORT BY MS. [REDACTED] OF THE 1970's INCIDENT

In the 1980's when she was in her mid-teens Ms. [REDACTED] told two people about the incident. When Ms. [REDACTED] was between 15 and 18 years of age she told her mother about the incident. (R205) She also told her cousin Elizabeth Stracher about the incident, telling her that she had seen Uncle Bryan naked. (R300)

On direct examination Ms. [REDACTED] testified initially when she was fifteen she told her mother that:

Yes I told my mom when I was about 15 I told my mom what happened.
(R45)

Ms. [REDACTED] denied remembering telling Mrs. Stracher or any cousin about the incident on direct examination. (R71) This contradicts an e-mail exchange with her mother about the incident. The e-mail exchange occurred shortly before the date of her testimony and in the e-mail exchange she acknowledges talking to her cousin about the incident. (R191-192).

Ms. [REDACTED] initially testified that she told her mother she touched Uncle Bryan with no specific description of the anatomical area touched.

On cross examination after repeated questions, Ms. [REDACTED] finally acknowledged in the 1980s that she only told her mother that she had "touched" Uncle Bryan's "private parts". (R64) Ms. [REDACTED]'s mother, M [REDACTED], had a different recollection, testifying when E [REDACTED] was 15 she advised her of the incident. Ms. [REDACTED] testified to the following regarding what Ms. [REDACTED] advised her:

It had to do with Bryan being naked in the room upstairs in grandmother's house and that he had asked her to touch his penis and that was pretty much the extent of the communication. (R156)

Ms. [REDACTED]'s mother testified that she immediately told "what I had heard from E [REDACTED]" to E [REDACTED]'s father R [REDACTED]. (R157)

Ms. [REDACTED]'s father, R [REDACTED] testified that his recollection was markedly different, that E [REDACTED]'s mother M [REDACTED] told him the following:

She said that E [REDACTED] had called her to specifically tell her that as a child she had walked in on Bryan, in the third floor bedroom of my mother's house when he was in bed alone.

Q: And did she describe what E [REDACTED] told her Bryan was doing?

A: I only remember that it was that he has relieving himself, masturbating.
(R262)

Asked further:

Q: Did M [REDACTED] report to you, on that date, that E [REDACTED] had reported to her that Bryan had asked her to touch his penis?

A: No. (R262)

R [REDACTED] contacted Bryan Hedges and asked him if the incident of E [REDACTED] interrupting him while he was in the act of masturbation had actually happened. Bryan told R [REDACTED], as follows:

He said there had been an incident and that what I conveyed to him was in fact true. (R266-267)

Thereafter Liz Hedges wrote a letter to E [REDACTED]. (R266)

THE DECEMBER, 2011 NEW STORY ABOUT THE 1970's INCIDENT

There was a new version in late 2011 of the 1970's incident. E [REDACTED] told the new lurid story to her mother on or about December 29, 2011, and later to the District Attorney and to the Commission in 2012. (Exhibit H) (R70, lines 20-23)

It was a new story, "pieced" together (Exhibit H) by Ms. [REDACTED]'s mother during days of conversation over the telephone and internet. (R215) (R211) (R176) (R168-171). It came out in pieces. (R176-177). The new story accuses Bryan Hedges of luring the 5 year old E [REDACTED] into the bedroom, showing her how to masturbate him and ejaculating. (R214-215) The mother records various versions of the story by email to R [REDACTED] in Exhibits H I, J, and K. The new story is detailed, with material factual conflicts recorded as to the specifics recollected by Ms. [REDACTED] in recounting the story to her mother in December and January and to the District Attorney of Onondaga County, the Commission staff, and ultimately this tribunal. The conflicts as set forth below fatally infect the lurid story and render that story unbelievable. The scheming, plotting, editing, blank spots, lack of lineal thinking, little snatches here and there of memory, pecuniary interest and obvious lack of candor of Ms. [REDACTED] and her mother, render their testimony and lurid charges incredible and unbelievable. (Exhibit H, R201, Exhibit J, Exhibit K). That on December 29, 2011 it would take "almost 3 hours to get it out of her", "here's the story I've pieced together" (Exhibit H); that more was told on January 9, 2012 with "a new piece" (Exhibit J) that perhaps was declared on January 7, 2012 because a "blank area more cleared up" on that date (Exhibit K) all of the foregoing suggests fabrication to create a more lurid and sensational story to attempt to obtain money from Bryan Hedges. Ms. [REDACTED] acknowledges that Ms. [REDACTED]'s memory was not lineal and there were little snatches of memory. (R201) The foregoing certainly confirms a lack of reliability

in the testimony of Ms. [REDACTED] and Ms. [REDACTED] and suggests that the new story is a concoction.

R [REDACTED], Ms. [REDACTED]'s father, did not hear any more about the incident after approximately 1982 until he received the December 2011 email (Exhibit H) from M [REDACTED] with new and additional information setting forth the new lurid story about the 1970's incident. (R269) When informed by M [REDACTED] about the new lurid story, R [REDACTED] contacted Bryan Hedges as he had in the 1980s, and Bryan disagreed with the new lurid story. (R271)

On March 28, 2012, Ms. [REDACTED] told the Onondaga County District Attorney that she had told her mother the following, as directly quoted from the March 28, 2012 letter of District Attorney William Fitzpatrick to the Commission (Exhibit B):

As she passed through the open door of a bedroom, she saw her uncle, Bryan Hedges, alone and on the bed. He somehow gestured for her to come in and she observed that he was naked and had an erection. He placed her hand on his penis and after a brief period of time, she described what she now knows to be an ejaculation.

E [REDACTED] recalls that her mother was shocked by this disclosure and her mother called her ex-husband and informed him."(Emphasis added) (Exhibit B)

Both Ms. [REDACTED] and Ms. [REDACTED] testified that E [REDACTED] did not tell Ms. [REDACTED] this full story twenty-five years ago. It is incredible that the District Attorney would not ask Ms. [REDACTED] what she told her mother twenty-five years ago. It is logical to infer she told the District Attorney that she told her mother the whole story twenty-five years ago.

E [REDACTED] also was not truthful when she told the Commission that she had told her parents the complete story in 1982. The Commission notes state the following:

She did not disclose the abuse until her mid-teenage years, when she told her parents."(Exhibit C)

Both Ms. [REDACTED] and Ms. [REDACTED] testified Ms. [REDACTED] did not tell Mrs. [REDACTED] the full story twenty-five years ago. (R69, R205). It is incredible that the Commission staff would not have asked Ms. [REDACTED] what she told her mother twenty-five years ago. It is logical to infer she told the Commission staff that she told her mother the whole story twenty-five years ago.

In this proceeding, on direct examination, Ms. [REDACTED] was not asked any specifics about what she told her parents when she was fifteen.

On cross examination Ms. [REDACTED] was non-responsive and evasive when asked what she had specifically told her parents in her mid-teens about the incident in the

bedroom at her grandmother's house at age five and about how it conflicted with her present story. (R56-66)

Her testimony regarding that conversation with her mother was:

I remember telling her I was touching him when I was 15 I was first learning all of the vocabulary. (R57)

I don't remember the exact words. I just remember telling her what had happened.... I can't remember the exact words but I do remember telling my mom what happened. (R60)

Yes I told mom but I didn't go into great detail. I, I couldn't. (R62)
I do remember telling mom that I remember using the word you know touch. (R62)

Finally at the hearing she was asked the following by respondent's counsel:

Q: Well did you tell your mother that you had touched Uncle Bryan's private parts, yes or no?

A: Yes I do remember that. (R64)

Her mother testified that E [REDACTED] had told her a different story twenty-five years ago. Her mother testified that E [REDACTED] told her twenty-five years ago that Uncle Bryan had asked her to touch him, which the mother also testified as being Ms. [REDACTED]'s present recollection of that conversation. (R205) This is a significant conflict between the mother's recollection of Ms. [REDACTED]'s present story and Ms. [REDACTED]'s present recollection regarding what was said twenty-five years ago. The mother's recollection as to what Ms. [REDACTED] told her presently regarding the twenty-five year old conversation is also markedly different from Ms. [REDACTED]'s testimony as to what was said at that time.

Ms. [REDACTED] acknowledged that what she told her mother at age fifteen was different from her testimony at this proceeding:

It was different because I was scared. I didn't tell her everything until later. (R69)(Emphasis added)

I didn't go into detail. It was just superficial as to what Bryan did. (R69)
Well the point was, I just told her the story. I mean it wasn't all the details, it was just the story. (R70)

I remember telling her that you know I touched Bryan and that's why I asked mom to call my dad so dad could talk to Bryan. (R70)

This testimony is inconsistent with Ms. ██████'s statements to both the District Attorney (Exhibit B) and the Commission (Exhibit C). Both statements represent that E ██████ told her mother the same story in the 1980s that she told to them in 2012.

E ██████ WAS NOT TRUTHFUL ABOUT TELLING HER COUSIN ABOUT
THE 1970's INCIDENT AND NEVER TOLD HER COUSIN
THE NEW STORY

E ██████ was asked at the hearing if she told her cousins about this incident. She said she couldn't remember. (R71)

That is inconsistent with what she told her mother in their telephone and recent e-mail exchanges. Just prior to her testimony Ms. ██████ had an email exchange with her mother, who voiced concern about cousin Beth Stracher's recollection of what E ██████ had told her as a child about the incident: "The problem is what you told her is different from what you are saying now, that's what they mean by inconsistency...." (R191) (Emphasis added) Ms. ██████ then states in email to the question "would you have tried to tell her the whole story," E ██████'s answer was "Yes I would have tried but the timing was wrong time." (R192) E ██████ by email told her mother "I don't remember what I told her but I do remember want to tell her how I feel but don't know if she took this seriously or what." (R191) (Emphasis added). Clearly Ms. ██████ remembers that she told her cousin Beth Stracher something about this incident years ago.

Elizabeth Stracher testified that E ██████ told her that "E ██████ was where she should not have been and she saw her Uncle Bryan naked and this was the extent of the story." (R300)

Ms. Stracher was in elementary school when she learned this information from E ██████. (R300)

Ms. Stracher testified that Ms. ██████ stayed at her house for several days after staying at a shelter about one and a half years ago. (R306) Ms. Stracher testified that Ms. ██████ never expressed adverse feelings toward Bryan, anger, distrust or unwillingness to be around him. (R303) Ms. Stracher testified that Ms. ██████ never told her at any time that she had any kind of sexual contact with Bryan Hedges. (R303) Ms. ██████ confirmed that she resided in a half-way house in 2010-2011 and that she did not report any abuse by Bryan Hedges. (R121-123)

BRYAN HEDGES' CONDUCT DURING THE 1970's INCIDENT ACCORDING TO
E ██████'S MOTHER WAS A "CARELESS ACTION" UNTIL DECEMBER 20, 2011

Ms. [REDACTED], according to her mother, first described the new story of what happened with Bryan Hedges forty years ago on or about December 29, 2011. (Exhibit H, R203)

Prior to that the incident had come up, according to Ms. [REDACTED], in Ms. [REDACTED]'s memory sufficient for comment several times. She mentioned the incident to her mother again without the new story and in December, 2011 her mother authored an email to Bryan Hedges in December that was not produced, was not disclosed and is not in evidence. (R153)

Her mother, M [REDACTED] [REDACTED], on December 20, 2011 (Exhibit G) did send an email to Bryan Hedges. Ms. [REDACTED] testified as of that date she was only aware of the original story regarding the 1970's incident, which had been told to her by E [REDACTED] when she was in her mid-teens. (R155) Ms. [REDACTED] testified that she was not aware of the complete details of what had occurred.... "I was still going on the information E [REDACTED] had told me when she was about 15." (R155) Ms. [REDACTED] refers to Bryan's actions as follows in the December 20, 2011 e-mail:

The fact that a careless action on your part has caused this much pain in her life should give you pause. (Emphasis added)
(Exhibit G)

This characterization of Bryan's conduct as careless is clearly supportive of R [REDACTED]'s recollection and Bryan Hedges' recollection that R [REDACTED] was told by M [REDACTED] when E [REDACTED] was in her mid-teens that Ms. [REDACTED], at age five, had interrupted Bryan while he was masturbating in the third floor bedroom. No credible inference can be drawn that Ms. [REDACTED]'s present version of the conversation twenty-five years ago is accurate. If in her mid-teens she told her mother that she touched Bryan's penis or if Ms. [REDACTED]'s present version is accurate which is that E [REDACTED] told her that Bryan asked E [REDACTED] to touch his penis, each version would have prompted a report to criminal authorities. Neither was a careless action. The only logical inference that can be drawn is that Ms. [REDACTED] and Ms. [REDACTED] are inaccurately conveying that conversation of twenty-five years ago and that the "careless action" was Bryan Hedges being interrupted by E [REDACTED] while engaging in the act of masturbation.

A reasonable person could simply not conclude that asking a five year old child to touch the penis of a twenty-five year old, the information Ms. [REDACTED] claimed to have been given by E [REDACTED] at age fifteen, was a "careless action".

MS. [REDACTED] IS MOTIVATED BY ANGER AND MONEY

In the late summer of 2011, Judge Hedges' wife Liz engaged in an argument with Ms. [REDACTED] both about her damaging the Hedge's house in Syracuse when she stayed there as a guest overnight for several nights in July, 2011 with her daughter and about Ms. [REDACTED] not sharing food when she and her family and children stayed at the Hedge's home on Long Island in 2011. (R307-308) The argument occurred at the Hedge's home

on Long Island (R308) It was witnessed by Elizabeth Stracher who described it as a heated discussion. (R308)

E [REDACTED] testified that she left the Hedges' Long Island farm after the argument crying in the car, that she was surprised by Liz Hedges' facial expression and states that she was hurt and keeping everything to herself. (R88). This was obviously a very unhappy and traumatic event for her.

On December 4, 2011 E [REDACTED] sent an email to Judge Hedges asking him to donate and/or to sponsor and/or to find donors for her son's soccer team. She ends the email, addressed to "Uncle Bryan", with the words "Hugs, E [REDACTED]." She testified that she wanted Bryan to pay money to sponsor her son's soccer team. (R77-78) (Exhibit 5)

Judge Hedges responds on December 4, 2011 to E [REDACTED] declining to do any of the above. (Exhibit 5) In light of the very public Sandusky and Fine scandals referred in Exhibit B this is hardly an action of a guilty person fearing exposure to public.

E [REDACTED]'s December 4, 2011 email was not submitted to the Onondaga District Attorney or to the Commission, but was provided by the respondent in Discovery. (Compare Exhibit 5 to attachment to Exhibit B)

Ms. [REDACTED] testified that ... "last December, I decided to share more details because I was older and I couldn't handle it emotionally any more". (R70) Commencing in December 2011, Ms. [REDACTED] also discussed with her mother her desire to obtain money from Bryan or having him pay college tuitions for her four children who either are in college or are approaching college age. (R205-210) On December 27, E [REDACTED] emails her mother that "Bryan should make his move or big make up to pay his consequences..." "It'll be good for him to feel pain after what I went through." (R206)

This is two days before the new story is revealed. Her mother acknowledged that Ms. [REDACTED] was contemplating getting money from Judge Hedges. (R207) On January 9, 2012, she e-mails her Mom stating that Bryan could pay for college for her kids. (R80) She consulted a civil lawyer. (R206-210) She discussed the contingency fee arrangement with the District Attorney and with her mother. (R206-209) Her mother testified that once she reported her lurid story to the District Attorney and the authorities that she would lose control over the situation and the "dominoes" would fall. (R210) Her mother even wrote to the Commission asking to keep this matter private. (R210) On March 31, 2012, E [REDACTED] explained her motivations best by e-mail to her mother, "The DA explained to me that once I get a settlement then we'll pay him some from the settlement, the rest will go to us". (R209) (Emphasis added)

Ms. [REDACTED]'s comportment on the stand was angry and dissembling when cross-examined on key issues. Her mother acknowledged that she was angry with Bryan Hedges (R197), and that she had speculated without basis that Bryan had abused children while he served in Vietnam. (R197). Her e-mails express anger. (Exhibit H-K)

MS. ██████████'S DETAILED LURID STORY WHICH WAS FIRST
DISCLOSED IN DECEMBER 2011 IS INCONSISTENT AND NOT BASED ON
SOUND MEMORY

Neither her mother, Ms. ██████████, the District Attorney, or the Commission staff prepared a signed written or recorded statement, sworn or unsworn, directly authored by Ms. ██████████. In fact, her mother acknowledged that there were things Ms. ██████████ could not remember:

...I was trying to take her through a linear trip of exactly what happened, and there were places where she couldn't answer my question. (R211)

On December 29, 2011, Ms. ██████████ in Exhibit H first writes an email to Ms. ██████████'s father outlining the new lurid story:

It's taken me almost three hours to get it out of her.
Here's the "story" I've pieced together. (Exhibit H)

This discussion was through electronic chat rooms and telephone. (R189, 190, 169-171). Mrs. ██████████ testified that E ██████████ does not have a linear explanation of what happened. "I think it's like little snatches here and there..." (R201)

The piecing together of the "story" by E ██████████ and M ██████████ comes exactly two days after E ██████████ advised her Mom that Bryan must do a "big makeup to pay his consequences..." (R206) The piecing together occurs while E ██████████ is contemplating getting college tuition for her children from Judge Hedges. (R80, R205-210)

On December 29, 2011, in Exhibit H, Ms. ██████████ discloses for the first time as recorded by Ms. ██████████ that:

She walked in the room and he was naked on the bed with an erection.
(Exhibit H)

Ms. ██████████ further advises the father that E ██████████ had manipulated his penis and he ejaculated. (Exhibit H) All disclosed for the first time in forty years.

On January 7, 2012 M ██████████ ██████████ advised R ██████████ ██████████ that she was "able to get a blank area more cleared up and it is very incriminating for Bryan." (Exhibit K) This language must be contrasted with Mrs. ██████████'s calling Bryan's actions "careless" just nine days before on December 20, 2011. (Exhibit G) The exact nature of the blank areas is unclear. What is clear is that Ms. ██████████ is helping E ██████████ write her story.

The new "very incriminating" version filled in from the "blank area," which Mrs. ██████████ mentioned in her email was disclosed in detail to her father on January 9, 2012 on the same day that E ██████████ was discussing by email having Bryan pay for college for E ██████████'s children. Why her father had to wait two days for the incriminating details as E ██████████ and her mother worked on the story can only be the subject of inference by the trier

of fact as no explanation is provided except for the e-mail exchanges about paying for tuition. We obviously cannot know with certainty what was said over the telephone. (Exhibit J)

On January 9, 2012 Ms. [REDACTED] has a further version with a “new piece of info” told to her by Ms. [REDACTED] by telephone she states in Exhibit J.

- She called me and told me.
- He was covered up when she came in the room.
- He motioned for her to come over and she hopped on the bed. Sometime thereafter he whips the covers off and exposed his naked body. (Exhibit J) (Emphasis added)

This version is inconsistent with all later versions. Ms. [REDACTED] told the Onondaga County District Attorney in Exhibit B “He gestured for her to come in and she observed that he was naked and had an erection.”

The January 9th version of Ms. [REDACTED]’s story is inconsistent with what Ms. [REDACTED] told the Commission staff, as no mention is made of being covered up by a sheet. (Exhibit C)

Ms. [REDACTED] in her testimony stated, “I remember the sheet was rolled down”. (R113). “The private area was open”...”I didn’t see it until I was kneeling on the bed.” (R114) This is inconsistent with what she told her mother on January 9, 2012, that “he was covered up when she came in the room”. (Exhibit J) This is a major inconsistency which undercuts the reliability and credibility of Ms. [REDACTED]’s new lurid story.

Ms. [REDACTED] in Exhibit H, reports Ms. [REDACTED]’s description of the scene in the room further as follows:

He called to (sic) over and somehow convinced her to lie on the bed with her body against him. (Exhibit H) (Emphasis added)

Again a major inconsistency occurs when Ms. [REDACTED] testified on direct examination at this proceeding that she did not lie on the bed next to Bryan Hedges.

Q: Did you lay down next to him at all?

A: No I remember kneeling. (R55)

Ms. [REDACTED] testified multiple times that Ms. [REDACTED] had told her that Ms. [REDACTED] did lie down next to Bryan Hedges when she was piecing the story together. Ms. [REDACTED] reported “she just said I remember lying next to him, I remember my body next to him.” (R172) In fact she testified that there were details Ms. [REDACTED] had trouble

remembering but Ms. [REDACTED] was clear in her explanations to Ms. [REDACTED] that she remembered lying next to Bryan. (R172) Ms. [REDACTED] later testified that:

When I asked her how long it took, she said a long time. I mean, that's, for a five year old, a long time could be a minute, could be ten minutes, so that was on, then the period of time from when she was, remembered laying next to him and feeling her body against him, between that time and then, you know, exactly when that happened through the course of the encounter, I wasn't sure in terms of just the position when that happened, and then when she went to sit up, I don't know how long she laid next to him. You know, there were just these little places that she couldn't fill in the blanks, other than she remembered laying next to him, she remembered sitting up, and that's when he took her hands and, but what happened from the time she got on the bed until he took her hands, I, I don't know what happened. Those are the kind of blanks. (R212)
(Emphasis added)

In her testimony Ms. [REDACTED] was explicit that she did not lie down. (R55) She did not mention sitting down. She testified that she kneeled on the bed and he took her left hand, not hands as E [REDACTED] told Ms. [REDACTED] (R212, Exhibit H). These are significant differences that undercut the reliability and the credibility of Mrs. [REDACTED]'s new lurid story.

In Exhibit H, Ms. [REDACTED] described Ms. [REDACTED] telling her...."he took her hands and put them on his private parts." (Emphasis added) Ms. [REDACTED] in her testimony quoted above from page 212 of the record twice stated that "he took her hands". In her testimony Ms. [REDACTED] stated "he led my hand on his private area." (R39) "It was my left hand that he put on his private area." (R40) This is yet another, important detail which is inconsistent and undercuts the reliability and credibility of Ms. [REDACTED]'s new story.

As a further attempt to collaterally demonstrate Bryan Hedges culpability Ms. [REDACTED] told her mother the following as set forth by Ms. [REDACTED] in Exhibit H:

She said he has never spoken to her other than to say hello and goodbye and has never said he's sorry or shown any indication of "remorse." (Her word) (Exhibit H)

On cross examination Ms. [REDACTED] at first testified that over the last forty years, she only had very brief short conversations with Bryan Hedges. (R108) On further cross examination Ms. [REDACTED] acknowledged, inconsistent with that testimony, that she had called Judge Bryan Hedges on the telephone twice in the last several years to ask for advice regarding a legal issue with a child and another time regarding his advice about a counseling issue for a child. (R108-109) Judge Hedges described these telephone discussions in detail. (R353-34) Judge Hedges testified that over forty years he had a number of conversations with E [REDACTED] [REDACTED] about her children, their schooling, their sports, and their learning to drive for example. (R352) This was confirmed by E [REDACTED]'s

father, R [REDACTED] (R 272) and E [REDACTED]'s cousin, Liz Stracher, each of whom observed E [REDACTED]'s discussions with Bryan. (R308-309) This issue raised by Ms. [REDACTED] is another example of Ms. [REDACTED] not being candid with this tribunal by making an inaccurate and sensational allegation.

THE REFEREE IGNORED E [REDACTED] [REDACTED]'S MAJOR INCONSISTENCIES AND REVELANT FACTS

The conflicts set forth above are major inconsistencies. How the referee could find Ms. [REDACTED] credible in describing that the respondent placed her hand on his penis and gestured to lure her into the room, but not credible as whether or not ejaculation occurred is impossible to reconcile. The actual sexual act as detailed by E [REDACTED] Warner is inconsistently described undercutting her credibility. The referee simply ignores these contradictions. The inconsistency includes whether she was kneeling, lying down, or sitting before and during the act. She is inconsistent regarding whether one hand was used or two, testifying that she used one hand but telling her mother she used both hands. She is inconsistent regarding whether Hedges was covered up upon entering the room or exposed at that time, telling her mother one version and then testifying to another. She is inconsistent as to the duration of this occurrence, telling the Onondaga District Attorney one version, her mother another, and the referee a third version.

Moreover, she has been inconsistent in describing this event over the years. She told her cousin E [REDACTED] Stracher during her teenage years that she was some place she was not supposed to be and saw Uncle Bryan naked. She told her mother at age fifteen, according to her hearing testimony only that she touched Uncle Bryan. She then later testified that she told her mother she touched Uncle Bryan's private area. Her mother recalls her stating that Uncle Bryan asked her to touch him. Her father recalls that her mother told him that she reported she had walked in on Bryan while he was engaged in the act of masturbation. Therefore as to virtually every major element of the sexual act, from the description of her entry into the room, how she touched the Respondent, the position of her body throughout the event, the duration of the touching, and ejaculation, she is in conflict with her own statements or discredited. The Referee found her testimony to not be credible regarding ejaculation.

THE COMMISSION COUNT HAS NOT MET THE EVIDENTIARY STANDARD

If this case were a criminal case, the inconsistencies would warrant reversal of a conviction as against the weight of the evidence. *People v. Bleakley*, 69 N.Y.2d 490, 508 N.E.2d 902, 826 N.Y.S.2d 163 [2006]. Respondent's point in the case at bar is simply that unlike the fact situation in *People v. Weber*, the inconsistencies are specific to the details of the sexual touching both as volunteered to third parties and as testified to the hearing. 25 A.D.3d 919, 807 N.Y.S2d 222, 2006.

The testimony does not meet the preponderance of the evidence standard. The cacophony of contradictions regarding the December 29, 2011 story simply argues for

Judge Hedges' version which was told to his brother in law in 1982 and 2011, to M [REDACTED] on the wire, and to the Commission in his deposition.

Judge Hedges acknowledges he was wrong in not telling E [REDACTED]'s parents about the incident on the day of the incident, and could have denied the entire event in 1982. He did not. While in retrospect E [REDACTED]'s incidental four second contact with his hand looms large today, at that time it did not. E [REDACTED]'s parents obviously are people willing to consult physicians and healthcare providers, the records demonstrates their intensive effort to diagnose and remediate E [REDACTED]'s hearing problem. It is simply incredible if told in 1982 that E [REDACTED] touched the Respondent's penis or was asked or was truly recurrently troubled by walking in on him while in the act of masturbation, they would have sought help for her. It is also inconceivable that if the 1982 version of E [REDACTED] and Ms. [REDACTED] was the truth, that the police would be called and the Respondent charged. Why would Ms. [REDACTED] on December 20, 2011 call Bryan Hedges actions a "negligent act" if he had induced his daughter to touch his penis?

In this case the preponderance standard, as defined in I 1:23 Burden of Proof has not been met. Pattern Jury Instructions 1A, p. 44 [2011]. Neither in credible evidence nor in the quality of the evidence does E [REDACTED]'s description of the December 29, 2011 or after meet the standard. Her claim simply does not support the finding that it is more nearly representing what took place than the evidence opposed to her claim.

KEY FINDINGS OF THE REFEREE ARE INACCURATE OR IGNORE THE WEIGHT OF THE EVIDENCE

Several important findings of the referee are inaccurate and lead to an unfair conclusion and result:

1. The referee found:

c) He did not discourage his five year old niece from approaching him and reaching towards his bare erect penis that he was stroking (TR 367)

The referee omits that Bryan Hedges testified initially in this four second period he thought the hand was his wife's (R370) and that he was logey, sleepy (R370) and that he did not feel the shock until the 3rd or 4th stroke.(R370).

2. The referee found:

d) His eyes were open as E [REDACTED] touched him. TR322, 368-369.

In fact, his testimony was that "I think my eyes opened after, as, as there was pressure or something going on to my left. I don't know whether it was a noise or her getting on the bed or feeling the motion of the bed or her actually touching me with her knee or something but I, my eyes opened, at that point she was touching my arm". R369

3. The referee omits from his findings that E [REDACTED] [REDACTED] could not give a consistent account of the details of her presence on the bed. The referee found in ¶34 that Mrs. [REDACTED] kneeled next to respondent's hip. (TR55, 14).

In fact, kneeling was a brand new version first told at the hearing surprising Commission Counsel. Previously Ms. [REDACTED] had given the detail that she was lured onto the bed by Bryan Hedges, that she was laying on the bed with her body next to his. (Exhibit J, R172, R212), that she sat up (Exhibit J, R212) and then commenced the stroking of his penis.

In the hearing, Ms. [REDACTED] testified that "I jumped up on the bed. O-kay. I was on my knees (R38) and he led my hand on his private area" (R39) "Q. Was any other part of your body touching him? No, it was just his private area." (R39).

Commission Counsel then at the conclusion of Ms. [REDACTED]'s testimony returned to the story and asks the following leading question:

Q. "Did you lay down next to him at all?"

A. No. I remember kneeling." (R55)

The issue was revisited because Ms. [REDACTED] was inconsistent.

This important detail is completely inconsistent with E [REDACTED]'s description of this event on multiple occasions to her mother January of 2012, Exhibit J, and is contradicted by her mother's testimony in the hearing.(R172, 212).

Ms. [REDACTED] in Exhibit H, reports Mrs. [REDACTED]'s description of the scene in the room further as follows:

He called to (sic) over and somehow convinced her to lie on the bed with her body against him. (Exhibit H) (Emphasis added)

Again a major inconsistency occurs when Ms. [REDACTED] testified on direct examination at this proceeding that she did not lie on the bed next to Bryan Hedges.

Q: Did you lay down next to him at all?

A: No I remember kneeling. (R55)

M [REDACTED] [REDACTED], who testified after Ms. [REDACTED], testified that Ms. [REDACTED] had told her that Ms. [REDACTED] did lie down next to Bryan Hedges when she was piecing the story together. Ms. [REDACTED] reported "she just said I remember lying next to him, I remember my body next to him." (R172) In fact she testified that there were details Ms. [REDACTED] had trouble remembering but Ms. [REDACTED] was clear in her explanations to Ms. [REDACTED] that she remembered laying next to Bryan. (R172) Ms. [REDACTED] later testified that:

When I asked her how long it took, she said a long time. I mean, that's, for a five year old, a long time could be a minute, could be ten minutes, so that was on, then the period of time from when she was, remembered laying next to him and feeling her body against him, between that time and then, you know, exactly when that happened through the course of the encounter, I wasn't sure in terms of just the position when that happened, and then when she went to sit up, I don't know how long she laid next to him. You know, there were just these little places that she couldn't fill in the blanks, other than she remembered laying next to him, she remembered sitting up, and that's when he took her hands and, but what happened from the time she got on the bed until he took her hands, I, I don't know what happened. Those are the kind of blanks. (R212) (Emphasis added)

In her testimony in the hearing Ms. [REDACTED] was explicit that she did not lie down. (R55) She did not mention sitting down. She testified that she kneeled on the bed and he took her left hand, not hands as she told Ms. [REDACTED] as described by her at R212. These are significant differences that undercut the reliability and the credibility of Ms. [REDACTED]'s new lurid story.

4. The referee found :

e) He did not lose his erection when he saw E [REDACTED]. (TR369)

Bryan Hedges' testimony is that he felt the hand and presence of someone, thought it was his wife, opened his eyes, recognized it was not his wife but rather E [REDACTED] [REDACTED] and stunned, surprised, embarrassed, lost his erection, pulled up the covers and rolled over in a four second period. R369-370, 323-324

5. The referee found:

e) He did not discourage his five year old niece from approaching him and reaching towards his bare and erect penis that he was stroking. (TR367)

Omitted as a finding is the fact that with a four second period he realized it was E [REDACTED] and rolled over. (R322-323, R369-371).

6. The referee found:

g) He was not immediately shocked...

Bryan Hedges testimony was that he was "logy", "sleepy", "confused", "I originally thought it was Liz' hand" and he felt shock by the third to fourth stroke.(R369) Apparently the referee does not regard the lapse of four seconds in responding by a person who was in bed and not expecting to be interrupted an unacceptable delay. And the referee fails to note that E [REDACTED] was not a house guest. She had arrived that morning and burst into the Hedge's bedroom. (R322-323)

7. The referee finds at ¶38 that “Respondent took Ms. ██████’s hand and guided it to his penis” (TR 39-41, 114). He finds in ¶35 that the “Respondent was lying on the bed with a sheet rolled down” (TR41,54,113). To make these findings the referee must ignore the fact that initially E█████ told her mother different details. He simply ignores the inconsistency of two other main elements of the story about whether Hedges was initially covered up and whether a hand or hands were placed on the penis.

The referee chooses to ignore the following facts:

On December 29, 2011, in Exhibit H, Ms. ██████ discloses for the first time as recorded by Ms. ██████ that:

She walked in the room and he was naked on the bed with an erection. (Exhibit H)

On January 9, 2012 Ms. ██████ has a further version with a “new piece of info” told to her by Mrs. ██████ by telephone she states in Exhibit J.

- She called me and told me.
- He was covered up when she came in the room.
- He motioned for her to come over and she hopped on the bed. Sometime thereafter he whips the covers off and exposed his naked body. (Exhibit J)

This version is inconsistent with all later versions such as what was then later told by Ms. ██████ to the Onondaga County District Attorney who stated in Exhibit B “He gestured for her to come in and she observed that he was naked and had an erection.”

The January 9th version of Ms. ██████’s story is inconsistent with what Ms. ██████ told the Commission staff, as no mention is made of being covered up by a sheet. (Exhibit C)

Ms. ██████ in her testimony stated, “I remember the sheet was rolled down”. (R113). “The private area was open”...”I didn’t see it until I was kneeling on the bed.” (R114) This is inconsistent with what she told her mother on January 9, 2012, that “he was covered up when she came in the room”. (Exhibit J) This is a major inconsistency which undercuts the reliability and credibility of Mrs. ██████’s new lurid story.

In her testimony Ms. ██████ was explicit that she did not lie down. (R55) She did not mention sitting down. She testified that she kneeled on the bed and he took her left hand, not hands as she told Ms. ██████ as described by her at (R212). These are significant differences that undercut the reliability and the credibility of Ms. ██████’s new lurid story and yet they are ignored by the referee.

In Exhibit H, Ms. ██████ described Ms. ██████ telling her...”he took her hands and put them on his private parts.” (Emphasis added) In her testimony Mrs. ██████ stated “he led my hand on his private area.” (R39) “It was my left hand that he put on his private area.” (R40) Ms. ██████ testified that E█████ told her that Bryan put her hands on him.

(R212) This is yet another, important detail which is inconsistent and undercuts the reliability and credibility of Mrs. [REDACTED]'s new story.

Thus, the referee does not acknowledge, much less resolve the inconsistencies in Ms. [REDACTED]'s description of the alleged sexual encounter. Was Hedges covered up or not when she walked in the room? Was she kneeling next to him or did she lie down with her body next to his and sit up and commence touching him? Did he place her left hand on his penis or did he place both hands?

Moreover, the referee is selective in finding credibility of Ms. [REDACTED] and Mr. [REDACTED]. Why is Ms. [REDACTED] credible as to all elements of her hearing testimony as to the encounter except regarding ejaculation?

How does the Referee account for her inconsistencies in her versions of the story told to her mother, the Commission, and the District Attorney?

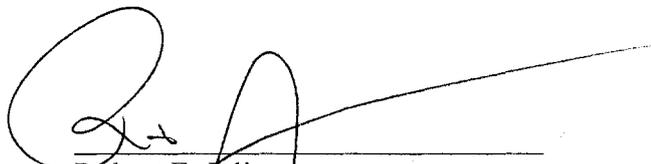
Why is Ms. [REDACTED] credible regarding the 1982 disclosure that E [REDACTED] touched Bryan's penis but not credible as to the E [REDACTED] report that Bryan was covered when she walked in the room, that she was lying next to him, her body next to his, and she used her hands in the act of masturbation? All of these inconsistencies are unresolved, indeed unmentioned by the Referee.

CONCLUSION

The referee is incorrect in key findings of fact causing his recommended conclusions to be flawed. The Commission staff has not met the burden of proof and the Amended Formal Complaint should be dismissed.

Respectfully Submitted,

Dated: 7/31/12


Robert F. Julian
Robert F. Julian, P.C.
Attorney for the Respondent
PO Box 8425
Utica, NY 13505
315-797-5610

cc: John J. Postel, Esq.