

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALEXANDER FONSECA,)
)
 Petitioner,)
)
 vs.) Case No. 99-3931
)
 DEPARTMENT OF JUVENILE JUSTICE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 15, 2000, at Miami and Tallahassee, Florida, via video teleconference before Susan B. Kirkland, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alan K. Marcus, Esquire
7300 North Kendall Drive, Suite 540
Miami, Florida 33156

For Respondent: Lynne T. Winston, Esquire
Department of Juvenile Justice
Inspector General's Office
2737 Centerview Drive
Tallahassee, Florida 32399-3100

STATEMENT OF THE ISSUE

Whether Petitioner should be given an exemption from employment disqualification pursuant to Section 435.07, Florida Statutes.

PRELIMINARY STATEMENT

By letter dated August 1, 1999, Respondent, Department of Juvenile Justice (Department), advised Petitioner, Alexander Fonseca (Fonseca), that his request for exemption from employment disqualification pursuant to Section 435.07, Florida Statutes, was denied. Fonseca requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on September 17, 1999, for assignment to an Administrative Law Judge.

The case was scheduled for final hearing on December 21, 1999. On December 16, 1999, Petitioner filed an Amended Motion for Continuance, which was granted. The case was re-scheduled for March 15, 2000.

At the final hearing, Petitioner testified in his own behalf and presented no exhibits. Respondent called Perry S. Turner as its witness. Respondent's Exhibits 1-7 were admitted in evidence.

The parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript, which was filed on March 29, 2000. Petitioner filed his Proposed Recommended Order on April 13, 2000, and Respondent filed its Proposed Recommended Order on April 10, 2000. The parties proposed recommended orders have been considered in rendering this Recommended Order.

FINDINGS OF FACT

1. At the age of twenty-eight, Petitioner, Alexander Fonseca (Fonseca), was arrested for felony possession of marijuana on February 21, 1989. For this charge, adjudication was withheld, and Fonseca was credited for time served.

2. Petitioner's other criminal history includes a 1983 arrest for misdemeanor possession of marijuana for which he was credited for time served; a 1988 arrest for driving with a suspended license for which adjudication was withheld; a 1988 arrest for driving with a suspended license for which he was found guilty; and a 1991 arrest for reckless driving for which adjudication was withheld.

3. In April 1999, Fonseca sought employment as a Juvenile Probation Officer with the Department. In conjunction with his application for employment, Fonseca was required to submit to the Department's background screening process since he would be working with juveniles.

4. Fonseca was told by a receptionist with the Department that if he had a criminal record he would not be hired.

5. As part of the application and background screening process, Fonseca submitted a State of Florida application and an Affidavit of Good Moral Character. Fonseca failed to disclose on both of these documents his felony arrest for and adjudication withheld on felony possession of marijuana. The affidavit

contained Fonseca's notarized signature dated April 27, 1999, attesting to the following statement:

I attest that I have read the above carefully and state that my attestation here is true and correct that neither my adult nor juvenile record contains any of the listed offenses. I understand that it is my responsibility to obtain clarification on anything contained in this affidavit which I do not understand. I am aware that any omissions, falsifications, misstatements or misrepresentations may disqualify me from employment consideration and, if I am hired, may be grounds for termination at a later date.

6. Fonseca did not disclose his criminal history because, based on what the receptionist told him, he did not believe that he would get the job if he revealed that he had a criminal history. His failure to disclose his criminal history was not an error or oversight. It was intentional.

7. A Florida criminal history conducted by the Department revealed Fonseca's 1989 arrest for felony possession of marijuana. As a result, on May 6, 1999, Fonseca was determined to be disqualified and ineligible for a position in the Department working with juveniles.

8. In a letter dated June 1, 1999, the Department advised Fonseca that he could request a desk review to pursue an exemption from employment disqualification. Fonseca was required to submit specified documentation, which he did.

9. As Inspector General for the Department, Perry Turner makes the final departmental decision on exemption requests. In

an interoffice memorandum dated July 29, 1999, Fonseca's exemption request was forwarded to Mr. Turner along with Fonseca's complete background screening file.

10. In a desk review, Mr. Turner does not interview the applicant's seeking an exemption. Each applicant has an opportunity to submit to the Department documentation, which he desires the Department to consider in determining whether an exemption should be granted.

11. In reaching his decision, Turner reviewed Fonseca's background screening file and the documentation submitted by Fonseca. On July 30, 1999, Turner denied Fonseca's request for an exemption. The denial was based upon the totality of the circumstances surrounding Fonseca's prior criminal history and his falsification of the notarized Affidavit of Good Moral Character.

12. Mr. Turner notified Fonseca of the denial in a letter dated August 1, 1999.

13. From his early teens until approximately ten years ago, Fonseca was heavily involved with drug and alcohol use and was chemically dependent. He sought help for his dependency and has been clean and sober since 1991. Fonseca is actively involved in the 12-Step Programs of Alcoholics Anonymous and Narcotics Anonymous.

14. In 1992, Fonseca decided to go back to school. He graduated with a degree in criminal justice in 1998.

15. Fonseca did not present any information to the Department concerning his addiction prior to the denial of his exemption request.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

17. Pursuant to Section 39.001, Florida Statutes, applicants seeking employment with the Department to work with any program for children must be of good moral character. The Department requires employment screening pursuant to Chapter 435, Florida Statutes.

18. According to Section 435.04(1), Florida Statutes, background screening standards encompass employment history checks; juvenile, state, and federal criminal records checks; and fingerprinting for state and federal checks.

19. Section 435.04(2), Florida Statutes, specifies that the person being screened must not have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to any offense prohibited under any of the enumerated sections of the Florida Statutes found in Section 435.04(2), Florida Statutes or similar state statutes of other jurisdictions. Subsection 435.04(2)(mm), Florida Statutes, refers to felony drug offenses as being disqualifying in nature.

20. Subsection 39.001(2)(c), Florida Statutes, provides that the Department may grant exemptions from disqualification from working with children as provided in Section 435.07, Florida Statutes. The Department has the authority to grant exemptions for felonies committed more than three years prior to the date of disqualification. Section 435.07(3) sets forth the exemption process for disqualified persons and provides:

In order for a licensing department to grant an exemption to any employee, the employee must demonstrate by clear and convincing evidence that the employee should not be disqualified from employment. Employees seeking an exemption have the burden of setting forth sufficient evidence of rehabilitation, including but not limited to, the circumstances surrounding the criminal incident for which exemption is sought, the time period that has elapsed since the incident, the nature of the harm caused the victim, and the history of the employee since the incident, or any other evidence or circumstances indicating that the employee will not present a danger if continued employment is allowed. The decision of the licensing department regarding an exemption may be contested through the hearing procedures set forth in chapter 120.

21. Petitioner is to be commended for overcoming his addiction and for completing his education. Although, the disqualifying offense is serious, it has been ten years since the commission of the offense. Fonseca was arrested for reckless driving two years after the disqualifying offense and adjudication for the reckless driving was withheld. Based on his history up until the time he applied for employment with the

Department, Fonseca appeared to have made great strides towards rehabilitation. However, Fonseca intentionally failed to disclose his felony conviction on his application and on the Affidavit of Good Moral Character. Fonseca knew that what he was doing was wrong.

22. Pursuant to Section 435.11, Florida Statutes, it is a misdemeanor of the first degree for a person to willfully, knowingly, or intentionally to fail by false statement to disclose in any application for paid employment a material fact used in making a decision of the person's qualifications for a position of special trust.

23. By his dishonesty in applying for employment with the Department, Fonseca has shown that he is not rehabilitated and is not entitled to an exemption from disqualification from employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered denying Alexander Fonseca's application for an exemption from disqualification from employment pursuant to Section 435.07, Florida Statutes.

DONE AND ENTERED this 27th day of April, 2000, in
Tallahassee, Leon County, Florida.

SUSAN B. KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of April, 2000.

COPIES FURNISHED:

William G. "Bill" Bankhead, Secretary
Department of Juvenile Justice
2737 Centerview Drive
Tallahassee, Florida 32399-3100

Robert N. Sechen, General Counsel
Department of Juvenile Justice
2737 Centerview Drive
Tallahassee, Florida 32399-3100

Alan K. Marcus, Esquire
7300 North Kendall Drive, Suite 540
Miami, Florida 33156

Lynne T. Winston, Esquire
Department of Juvenile Justice
Inspector General's Office
2737 Centerview Drive
Tallahassee, Florida 32399-3100

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.