

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN PARKS,)
)
 Petitioner,)
)
 vs.) Case No. 00-4376
)
 AGENCY FOR HEALTH CARE)
 ADMINISTRATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 4, 2001, by teleconference between Dade City and Tallahassee, Florida, before Carolyn S. Holifield, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: No appearance

For Respondent: Tracey S. Cottle, Esquire
Agency for Health Care Administration
2727 Mahan Drive
Building Three, Suite 3426C
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

By letter dated April 25, 2000, Respondent, the Agency for Health Care Administration, advised Petitioner that his request for an exemption from employment disqualification pursuant to Section 435.07, Florida Statutes, was denied. Petitioner challenged the denial and requested a formal hearing. The case was referred to the Division of Administrative Hearings on October 25, 2000.

The final hearing was initially scheduled for December 11, 2000. On November 8, 2000, Respondent filed a motion requesting that the final hearing be continued. The motion was granted, and the final hearing was rescheduled for January 4, 2001.

On November 8, 2000, the undersigned issued the Order of Pre-Hearing Instructions (Order). In compliance with that Order, Respondent filed a unilateral Pre-hearing Stipulation on December 26, 2000. In the Pre-hearing Stipulation, Respondent indicated that one issue of law to be determined at the final hearing was whether Petitioner had waived his right to a hearing by failing to timely request the hearing. This matter was addressed at a pre-hearing conference held on December 29, 2000. After extensive discussion, the parties agreed that the facts relative to the issue of the timeliness of Petitioner's request for hearing were disputed; that no stipulation could be reached as to those facts; and that the issue would be litigated at the

final hearing. Also, during the pre-hearing conference, Petitioner requested and Respondent agreed to make Sam Powers and Alberta Granger, two employees of the Agency for Health Care Administration, available to testify at the final hearing.

Pursuant to the Order Granting Continuance and Rescheduling the Hearing (Order Rescheduling Hearing), the final hearing was scheduled to convene on January 4, 2001, at 10:00 a.m., at City Hall, Commission Room, 38020 East Meridian Avenue, Dade City, Florida. A copy of the Order Rescheduling Hearing was mailed to Petitioner at his address of record on December 1, 2000. Counsel for Respondent, the undersigned, and Respondent's witness were present for the final hearing at the designated time and place. However, Petitioner did not appear at the hearing even though the undersigned delayed convening the hearing by one hour to give Petitioner additional time to arrive.

When the final hearing convened, counsel for Respondent indicated that Respondent wanted to proceed with the case on the merits and, thus, would concede or stipulate that Petitioner had timely requested a hearing in this matter. During the evidentiary part of the hearing, Respondent presented the testimony of one witness, Glenda Ricks, a Background Screening Unit Consultant with the Agency for Health Care Administration. Respondent offered ten exhibits, all of which were received into

evidence. No testimony or evidence was presented by or on behalf of Petitioner.

A Transcript of the proceeding was filed on January 22, 2001. Respondent filed a Proposed Recommended Order on January 26, 2001. As of this date, Petitioner has not filed a proposed recommended order.

FINDINGS OF FACT

1. Petitioner, John F. Parks (Petitioner), was employed at Serenity West, an assisted living facility in Zephyrhills, Florida, on or about January 3, 2000. While employed there, Petitioner's duties included passing medications and dressing and otherwise assisting residents with activities of daily living.

2. Pursuant to Chapter 435, Florida Statutes, the owner or administrator of an assisted living facility is required to conduct a level one background screening on all employees hired on or after October 1, 1998, who perform personal services for vulnerable persons. The purpose of background screening is to protect the public welfare by preventing individuals that have demonstrated behavior that may be harmful to vulnerable individuals from working in Florida's health care facilities.

3. Respondent, the Agency for Health Care Administration (Agency), conducted a level one background screening on Petitioner which revealed that, in 1979, Petitioner had pled

guilty to the charge that he had committed a lewd and lascivious act in violation of Section 798.02, Florida Statutes.

4. On or about April 7, 2000, the Agency notified Petitioner and his employer that it had received information that disqualified Petitioner from working as a caretaker of vulnerable persons. Petitioner was also advised of his right to seek an exemption from disqualification.

5. On or about April 13, 2000, Petitioner filed an Application Request for Exemption from Disqualification (Application).

6. The Agency's Application form required that the applicant explain the reason for the employment disqualification and provide a copy of the Florida Department of Law Enforcement criminal history, the arrest report, and the court disposition for any disqualifying violation.

7. Petitioner completed the Application and included, as part of his application, copies of the arrest report and the court disposition related to the disqualifying offense. The documents submitted by Petitioner indicated that on April 4, 1979, he pled guilty to committing a lewd and lascivious act, a second degree misdemeanor, in violation of Section 798.02, Florida Statutes. According to those documents, Petitioner entered the plea in the County Court in and for Hillsborough County, Florida, in Case No. 79-2630.

8. On April 24, 2000, the Agency conducted an exemption hearing on Petitioner's request for exemption from employment disqualification. The following day, the Agency denied Petitioner's request and advised him that as a result of the denial, he continued to be "ineligible for employment in those positions that require working with residents or patients of nursing homes, home health agencies, assisted living facilities, homemaker-companion-sitter services, or nurse registries."

9. Petitioner challenged the Agency's denial of his request for exemption from employment disqualification and requested a formal hearing. The Agency forwarded the request to the Division of Administrative Hearings on or about October 25, 2000.

10. In the December 1, 2000, Order Granting Continuance and Re-Scheduling Hearing, the final hearing was scheduled for January 4, 2001. A copy of the Order was mailed to Petitioner at his address of record, 5647 19th Street, Zephyrhills, Florida 33540.

11. Petitioner provided several letters of reference to the Agency as part of his application for request for exemption. These letters appeared to be from a neighbor, as well as former colleagues and employers. The letters were favorable and described Petitioner as dependable, a good worker, a valued

employee, and knowledgeable in his field. Most of the letters spoke highly of his patience and kindness toward the residents.

12. Petitioner failed to appear at the hearing and no evidence of his rehabilitation was presented. Therefore, Petitioner is not eligible for or entitled to the exemption from employment disqualification that he seeks.

CONCLUSIONS OF LAW

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

14. The Agency is the state agency authorized to grant exemptions from employment disqualification if the applicant meets the statutorily prescribed criterion. Section 435.07, Florida Statutes.

15. Section 435.03(1), Florida Statutes, provides that all employees required by law to be screened shall be required to undergo level one background screening as a condition of employment and continued employment. According to that subsection, "level 1 screenings shall include, but not be limited to employment history checks and statewide criminal correspondence checks through the Florida Department of Law Enforcement."

16. Subsection 435.03(2)(o), Florida Statutes, provides in pertinent part the following:

(2) Any person for whom employment screening is required by statute 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 following provisions of the Florida Statutes or under any similar statute of another jurisdiction:

* * *

(o) Section 798.02, relating to lewd and lascivious behavior.

17. In the instant case, it is undisputed that Petitioner entered a plea of guilty to a lewd and lascivious act, a second degree misdemeanor and a violation of Subsection 798.02(2), Florida Statutes. This is a disqualifying offense and, thus, is a basis for the Agency to deny Petitioner an exemption from employment disqualification. Subsection 435.03(2)(o), Florida Statutes.

18. Section 435.07, Florida Statutes, provides that the Agency may grant an exemption from employment disqualification to an individual who meets the statutory requirements for being granted such exemption. Among the categories of offenses for which the Agency may grant exemptions are "misdemeanors prohibited under any of the Florida Statutes cited in this chapter or under similar statutes of other jurisdictions." Subsection 435.07(1)(b), Florida Statutes.

19. The evidence established that the offense to which Petitioner pled guilty is a misdemeanor. Accordingly, even though Petitioner pled guilty to that offense, the Agency has the authority to grant him an exemption from employment disqualification if he meets the burden of proof set forth in Section 435.07, Florida Statutes.

20. Subsection 435.07(3), Florida Statutes, provides the following:

(3) 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 an exemption is sought, the time period that has elapsed since the incident, the nature of the harm caused to 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 did not appear at the hearing. Moreover, no evidence of rehabilitation was presented on his behalf. Therefore, Petitioner failed to meet his statutory burden of demonstrating by clear and convincing evidence that he should

not be disqualified from employment. Having failed to meet his burden of proof, Petitioner is not eligible for or entitled to an exemption from employment disqualification.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Agency for Health Care Administration enter a final order denying Petitioner's request for an exemption from disqualification from employment.

DONE AND ENTERED this 21st day of February, 2001, in Tallahassee, Leon County, Florida.

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of February, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.