STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SONIA LEGGS-STEWART,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-4497
	)	
DEPARTMENT OF JUVENILE JUSTICE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

The parties having been provided proper notice, Administrative Law Judge John G. Van Laningham of the Division of Administrative Hearings convened and completed a formal hearing of this matter by video teleconference on February 7, 2002. Petitioner and her witnesses appeared in Miami, Florida. Respondent, through counsel, and its witness appeared, and the Administrative Law Judge presided, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Sonia Leggs-Stewart, pro se
25833 Southwest 123rd Place
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For Respondent: Richard M. Coln, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner is eligible for an exemption from disqualification from working with children.

PRELIMINARY STATEMENT

In or around December 2000, Petitioner Sonia Leggs-Stewart was hired by a contractor for Respondent Department of Juvenile Justice as an employee in a program for children. A few months later, a mandatory background screening revealed that Petitioner was a convicted felon legally disqualified from such employment. Petitioner requested an exemption from disqualification. By letter dated September 18, 2001, Respondent notified Petitioner that the agency had denied her request.

Petitioner timely exercised her right to be heard in a formal administrative proceeding. On November 14, 2001, the agency referred the matter to the Division of Administrative Hearings. The case was assigned to an administrative law judge and set for final hearing on February 7, 2002.

The hearing took place as scheduled with all parties present. At hearing, Petitioner testified in her own behalf and called three witnesses: Joan Carter, Sammie Stewart (her husband), Fred Leggs (her father), and Nicole Scott. In addition, Petitioner introduced one exhibit (identified as Petitioner's Exhibit A) into evidence. Respondent presented the

testimony of one witness, Acting Inspector General Lynn T. Winston, and offered 13 exhibits (Respondent's Exhibits A through M), which were admitted.

Neither party ordered a transcript of the final hearing. Each timely submitted a proposed recommended order. The parties' respective post-hearing papers were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The evidence presented at hearing established the facts that follow.

1. In 2000, Petitioner Sonia Leggs-Stewart ("Leggs-Stewart") sought employment with at least two entities that provide services under contract to Respondent Department of Juvenile Justice ("DJJ"). These two providers are the Dade Marine Institute, Inc. (the "Institute") and Youth Services International/Everglades Academy (the "Academy").

2. The positions that Leggs-Stewart sought entailed contact with children. As a condition of applying for such employment, she was required to consent to a background investigation. Further, the employment applications that Leggs-Stewart completed and submitted to these two providers included queries pertaining to the applicant's criminal record. Finally, Leggs-Stewart, as required for employment, executed and

delivered to each prospective employer an Affidavit of Good Moral Character (the "Affidavit").

3. The Affidavit is a DJJ form. In it are listed 45 consecutively numbered criminal offenses, each identified by a citation to the applicable section of the Florida Statutes and a brief description of the crime. The affiant must either (a) attest that she has not been convicted of any of these disqualifying offenses "or of any similar offense in another jurisdiction" or (b) disclose any such convictions.[1]

4. Above the notary's signature line on the Affidavit are two separate statements. The affiant is supposed to certify the accuracy of one or the other by signing below the applicable statement. These are the options:

> 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, under penalty of perjury, all employees in such positions of trust and responsibility shall attest to meeting the requirements for qualifying for employment and agreeing to inform the employer immediately if arrested of any of the disqualifying offenses. I also understand that <u>it is my responsibility to obtain clarification on anything contained in this affidavit</u> which I do not understand prior to signing. <u>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.</u>

_____
SIGNATURE OF AFFIANT

OR

> To the best of my knowledge and belief, my record contains one or more of the disqualifying acts or offenses listed above. (If you have previously been granted an exemption for this disqualifying offense, please attach a copy of the letter granting exemption.) (Please circle the offense(s) contained in your record.)

_____
SIGNATURE OF AFFIANT

(emphasis added).

5. Leggs-Stewart applied for employment with the Academy in March 2000. On the employment application, she answered "yes" to the question: "Have you ever been convicted of a felony or a first degree misdemeanor?" Leggs-Stewart explained that she had been convicted in February 1991 of "possession with intent to distribute cocaine." On the corresponding Affidavit, however, which she executed on March 13, 2000, Leggs-Stewart incongruously signed below the first certificate (meaning no convictions) and failed to circle any of the listed offenses, including this one:

> [Chapter 893, Florida Statutes,] relating to drug abuse possession and control if the offense was a felony or if any other person involved in the offense was a minor (this includes charges of possession of controlled substances, the sale of controlled

substances, intent to sell controlled substances, trafficking in controlled substances, and possession of drug paraphernalia, etc.)

6. The record is silent as to whether the Academy offered Leggs-Stewart a job; there is no evidence that she worked for the Academy.

7. In December 2000, Leggs-Stewart applied for a job with the Institute. The employment application asked: "Have you ever been committed [sic] or convicted of a crime, pled guilty or nolo contendere, had a pretrial intervention or withheld adjudication? Yes ____ NO ____ If yes, give dates and type of action: _____." Leggs-Stewart left these lines blank. Also, as before in connection with her application to the Academy, Leggs-Stewart signed the Affidavit below the first certificate and circled none of the listed offenses.

8. The Institute hired Leggs-Stewart to work in a program for youth called W.I.N.G.S. for Life South Florida.

9. Some months later, in June 2001, DJJ notified Leggs-Stewart that an investigation of her background had uncovered arrests for, on one occasion in 1990, federal charges involving the importation and possession of cocaine with intent to distribute and, on another in 1989, an unrelated state aggravated assault charge.[2] She was asked to furnish DJJ with a detailed description of the circumstances surrounding the

disqualifying offenses, to complete a new Affidavit, and to explain why the previous Affidavit failed to indicate any disqualifying offenses.

10. On July 3, 2001, Leggs-Stewart executed a new Affidavit on which she circled the disqualifying offenses of aggravated battery and drug trafficking. In a letter of that same date, Leggs-Stewart wrote to DJJ:

> In regards to the Affidavit of Good Moral Character and providing a detailed explanation as to why the original affidavit was not truthful, to be honest I completed the affidavit in accordance to what my supervisor, at that time instructed me to do. I diligent [sic] explained the incidents to him and I personally did not identify which offense to circle for the Arrest #2 [aggravated assault] due to nothing never happen [sic] in court to my knowledge. In regards to Arrest #1 [drug trafficking], I believe that we, (both my supervisor and I) focused on the second part of the offense description that mentioned involving a minor which was his primary concern. I did not intentionally mean to mislead anyone regarding these offenses.

11. The basic material facts concerning Leggs-Stewart's arrest and conviction on drug-related criminal charges were not disputed. Leggs-Stewart was arrested in late 1990 by federal authorities for bringing cocaine into the United States from Panama. She was charged with two counts relating to this criminal activity. In February 1991, Leggs-Stewart pleaded guilty before the United States District Court for the Southern

District of Florida to one count of possession with intent to distribute cocaine. (The second count relating to importation was dismissed.) The court sentenced Leggs-Stewart to four years in prison followed by five years of supervised release. Leggs-Stewart served her time and successfully completed probation. She has not been in trouble with the law since her arrest for the federal drug crime.

12. Leggs-Stewart requested an exemption from disqualification from employment. As a result, an informal hearing on the matter was conducted on August 8, 2001, by a committee of three individuals whose responsibility was to make a recommendation to the ultimate decision maker, DJJ's Inspector General. In a report dated August 9, 2000, the committee unanimously recommended that Leggs-Stewart be granted an exemption from disqualification, citing factors showing her rehabilitation.

13. DJJ's Inspector General disagreed with the committee, however, and decided that the exemption should be denied.

Ultimate Factual Determinations

14. The undisputed circumstances surrounding Leggs-Stewart's conviction for drug possession demonstrate that the offense was more than a mere youthful indiscretion. Smuggling cocaine into the United States from a foreign country with intent to distribute is a serious crime. While there are no

identifiable victims of Leggs-Stewart's criminal misconduct, trafficking in cocaine is an offense that both the federal and state governments have deemed, as a matter of public policy, to be harmful to society as a whole. The gravity of Leggs-Stewart's offense clearly "raises the bar" in terms of establishing rehabilitation.

15. To her credit, Leggs-Stewart by all appearances has turned her life around. She is married and raising a family, owns a home, has attended community college, and has been gainfully employed since being released from prison. In short, she is now leading a stable and responsible life. These factors demonstrate that Leggs-Stewart has been largely, if not completely, restored to the capacity of law-abiding citizen.

16. In addition, more than 11 years have passed since Leggs-Stewart's arrest and conviction, and she has not been arrested during that time. This consideration also favors a finding of rehabilitation.

17. Leggs-Stewart does not presently pose a danger to the safety or well being of children.

18. However, the Affidavits that Leggs-Stewart signed—— wherein she attested, incorrectly, that her criminal record was clean——are a problem. Even if Leggs-Stewart's explanations for nondisclosure are accepted[3], the inescapable fact is that the

Affidavits were not truthful, and she reasonably should have known that.[4]

19. Leggs-Stewart knew when she executed the Affidavits that she had served time in a federal prison on a serious drug charge. She knew (or reasonably should have known) that the list of disqualifying offenses in the Affidavit specifically included "possession of controlled substances" and "intent to sell controlled substances"——plainly apposite descriptions of the crime to which she had pleaded guilty. And she knew that any omissions or misstatement might be grounds for disqualification or termination. Yet, she attested under oath that her criminal record contained none of the listed disqualifying offenses.

20. Thus, it is determined that while Leggs-Stewart did not intend to defraud her prospective employers, she nevertheless culpably misrepresented her past. In failing to disclose her criminal record, Leggs-Stewart committed acts tinged with dishonesty.[5] Considered in light of all the relevant facts and circumstances, Leggs-Stewart's willingness to be untruthful in applying for a position of trust and responsibility in a program for youth or children, regardless of her motivation, causes the trier of fact some hesitancy about the completeness of her rehabilitation.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida, and the parties have standing.

22. Section 39.001, Florida Statutes, provides in pertinent part:

> (2) DEPARTMENT CONTRACTS.–The department may contract with the Federal Government, other state departments and agencies, county and municipal governments and agencies, public and private agencies, and private individuals and corporations in carrying out the purposes of, and the responsibilities established in, this chapter.
>
> (a) When the department contracts with a provider for any program for children, all personnel, including owners, operators, employees, and volunteers, in the facility must be of good moral character. A volunteer who assists on an intermittent basis for less than 40 hours per month need not be screened if the volunteer is under direct and constant supervision by persons who meet the screening requirements.
>
> (b) The department shall require employment screening, and rescreening no less frequently than once every 5 years, pursuant to chapter 435, using the level 2 standards set forth in that chapter for personnel in programs for children or youths.
>
> (c) The department may grant exemptions from disqualification from working with children as provided in s. 435.07.

(emphasis added).

23. The level 2 standards to which Section 39.001(2)(b), Florida Statutes, refers are set forth in Section 435.04 as follows:

> (1) All employees in positions designated by law as positions of trust or responsibility shall be required to undergo security background investigations as a condition of employment and continued employment. For the purposes of this subsection, security background investigations shall include, but not be limited to, fingerprinting for all purposes and checks in this subsection, statewide criminal and juvenile records checks through the Florida Department of Law Enforcement, and federal criminal records checks through the Federal Bureau of Investigation, and may include local criminal records checks through local law enforcement agencies.
>
> (2) The security background investigations under this section must ensure that no persons subject to the provisions of this section 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:
>
> * * *
>
> (mm) Chapter 893, relating to drug abuse prevention and control, only if the offense was a felony or if any other person involved in the offense was a minor.
>
> * * *
>
> (5) Under penalty of perjury, all employees in such positions of trust or responsibility shall attest to meeting the requirements for qualifying for employment and agreeing to

> inform the employer immediately if convicted of any of the disqualifying offenses while employed by the employer. Each employer of employees in such positions of trust or responsibilities which is licensed or registered by a state agency shall submit to the licensing agency annually, under penalty of perjury, an affidavit of compliance with the provisions of this section.

24. Having pleaded guilty to a felony drug crime under laws of the United States similar to provisions in Chapter 893, Florida Statutes, Leggs-Stewart is disqualified from employment in a program for youth or children. Accordingly, Leggs-Stewart's employer was required "either [to] terminate [her] employment . . . or place [her] in a position for which background screening is not required unless the employee is granted an exemption from disqualification pursuant to s. 435.07." See Section 435.06(2), Florida Statutes.

25. Under Section 435.07, Florida Statutes, DJJ is granted authority to exempt some employees from disqualification. Employees whom the agency may exempt (as opposed to employees it may not exempt) include those, such as Leggs-Stewart, whose convictions were for felonies committed more than three years before the date of disqualification. See Section 435.07(1)(a), Florida Statutes.

26. The agency is prohibited, however, from granting exemptions to all employees who are "exemptible" under Section 435.07(1), Florida Statutes. As provided in Section 435.07(3),

> [i]n 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.

(emphasis added). Thus, to fall within the agency's power to award an exemption from disqualification, an employee must be both "exemptible" under Section 435.07(1) and prove by clear and convincing evidence that he or she has been rehabilitated, according to the standards prescribed in Section 435.07(3), Florida Statutes.

27. A clearly rehabilitated, "exemptible" employee is not entitled to an exemption, however, but is merely eligible to be granted one at the agency's broad discretion. See Heburn v. Department of Children and Families, 772 So. 2d 561 (Fla. 1st DCA 2000), rev. denied, 790 So. 2d 1104 (2001); Phillips v. Department of Juvenile Justice, 736 So. 118 (Fla. 4th DCA 1999). As the courts in Heburn and Phillips made clear, the denial of

an exemption to an eligible employee will not generally be considered an abuse of discretion.[6]

28. Further, it follows from Heburn and Phillips that the ultimate issue in a formal administrative proceeding brought by a disappointed employee pursuant to Section 435.07(3), Florida Statutes, generally should not be whether the exemption should be granted (for that is a matter committed to the agency's wide discretion) but rather in most cases should be whether the employee is eligible for an exemption——that is, whether the agency even has the discretionary power to award him one. If the employee is ineligible in fact, then the agency does not have the discretion to grant him an exemption, and the employee's request must be denied for that reason, not as a discretionary matter but as a legal one.

29. Typically, as here, the resolution of an eligibility dispute will turn on whether the employee establishes, by clear and convincing evidence, that he or she has been rehabilitated, taking into account the criteria enumerated in Section 435.07(3), Florida Statutes.

30. Regarding the burden of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of

necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the fourth district's description of the clear and convincing evidence standard of proof. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp., Inc. v. Shuler Brothers, Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (1992)(citation omitted).

31. By imposing a heightened standard of proof on employees who seek exemptions from disqualification, the legislature plainly intended to make exemptions difficult to obtain, reducing the margin for error in favor of the agency (and the public whose safety the agency is charged with

protecting). Put another way, the legislature effectively has said it is better mistakenly to deny exemptions to some employees who are truly rehabilitated than mistakenly to permit one who is actually not rehabilitated to hold a position of trust or responsibility.

32. In this case, Leggs-Stewart has not carried her burden to establish rehabilitation clearly and convincingly. Therefore, she is not eligible for an exemption even if DJJ were inclined to grant her one (which it obviously is not).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Juvenile Justice enter a final order denying Leggs-Stewart an exemption from disqualification from working with children.

DONE AND ENTERED this 20th day of March, 2002, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of March, 2002.

ENDNOTES

[1]/ The term "conviction" paraphrases the Affidavit's actual language, which is more comprehensive.

[2]/ At the final hearing, DJJ's counsel represented that the assault charge was not a basis for the agency's intended denial of Leggs-Stewart's application for an exemption. Therefore, the circumstances surrounding Leggs-Stewart's 1989 arrest will not be discussed here.

[3]/ Leggs-Stewart testified that someone on the Institute's staff advised her that disclosure of her drug conviction on the Affidavit signed December 18, 2000, was not required because no person involved in the offense was a minor. It is not necessary to decide here whether an agency might, in a particular case, be estopped to challenge a good character affidavit based on representations made to an applicant, or be deemed to have waived a deficiency in such affidavit. For in this case, first, Leggs-Stewart's claim, even if true, would not support a finding that any representations were made upon which Leggs-Stewart could reasonably have relied. The Affidavit's description of drug-related offenses (quoted in paragraph 5 in the text) is simply not susceptible to the interpretation that Leggs-Stewart claims she was told prevailed, namely, that only offenses involving minors needed to be disclosed. Perhaps Leggs-Stewart did in fact receive bad advice about the Affidavit, and if so that is unfortunate, but she should have known better than to follow such patently unreliable instructions. Second, Leggs-Stewart does not claim that any official of DJJ (who might arguably have apparent authority to decide such matters) counseled her not to disclose the drug conviction. In sum, without expressing any opinion as to whether waiver and estoppel are available theories in cases such as this, the facts here do not support any determination except that Leggs-Stewart is personally responsible for the omissions and misstatements in her Affidavit.

[4]/ It is understandable that Leggs-Stewart would want to conceal her criminal background: Obviously many employers look unfavorably upon an applicant with a felony conviction. Indeed, Leggs-Stewart herself has been refused employment literally

dozens of times as a consequence of her record. That one can understand why Leggs-Stewart would not disclose her criminal record, however, does not make her actions right or excusable.

[5]/ It is true, as Leggs-Stewart points out, that in the employment application submitted to the Academy, she did disclose her conviction for possession with intent to distribute cocaine. Thus, arguably, the March 13, 2000, Affidavit is "less" dishonest, since it was coupled with a truthful disclosure. The problem with this argument is that, on the present record, it is not clear that Leggs-Stewart expected anyone except the hiring personnel at the Academy to see the application. There is no evidence that DJJ was furnished a copy of the employment application as part of the background screening process and, perhaps more important, no proof that Leggs-Stewart knew or believed that DJJ would receive the application together with the Affidavit. Because the March 13, 2000, Affidavit is misleading on its face, and because there is no persuasive proof in the record that Leggs-Stewart knew or believed the truthful application would always accompany the misleading Affidavit, the application that Leggs-Stewart tendered to the Academy has little mitigative value.

[6]/ In Heburn, 772 So. 2d at 563, the court wrote that the agency's "exercise of discretion [in granting or denying an exemption to an eligible employee] is circumscribed by the standards set forth in section 435.07(3)." These standards specifically bear on the issue of rehabilitation, a fact which an "exemptible" employee must establish, by clear and convincing evidence, in order simply to be eligible for an exemption. Since the agency has no discretion to exempt ineligible employees but instead may grant exemptions only to those who are eligible and hence who, by definition, have adequately demonstrated rehabilitation pursuant to the Section 435.07(3) standards, it is not entirely clear how those same standards are to be applied in distinguishing between eligible employees who, in the exercise of sound discretion, reasonably should be exempted from disqualification and those who reasonably should not be. In any event, when denying an exemption to an eligible employee, the agency ideally should articulate the facts and circumstances upon which its discretionary decision has been based, so that the outcome will not appear to be arbitrary or capricious.

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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.