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Dan Davis

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DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILY SERVICES

AP

VERNON JACKSON

Petitioner,

vs.

Case No. 02-2672 DWD -Clos
Rendition No. DCF-03-025 FO

DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Respondent.
_____/

FILED
JAN 28 2003
DCF Department Clerk

FINAL ORDER

THIS CAUSE is before me as the result of a Recommended Order (RO) that was issued by an Administrative Law Judge (ALJ) assigned by the Division of Administrative Hearings (DOAH), to hear this case. Transcript of the hearing was not filed. The Respondent and Petitioner filed a Proposed Recommended Order (PRO) with DOAH. The Respondent also filed Exceptions to the ALJ's RO with the Agency Clerk, and these Exceptions, along with the PRO's have been considered in the preparation of this Final Order.

1. All findings of fact in the ALJ's RO are accepted, adopted and incorporated herein by reference.

2. Conclusion of law number 11 is accepted, adopted and incorporated herein by reference.

3. Conclusions of law number 12 and 13 are rejected and substituted as follows:

Chapter 95-228, Laws of Florida did more than simply create ch. 435. Among other things, the law created a new criminal offense of "luring or enticing a child" (§787.025). The "on or after" language can only possibly relate to these new offenses. If you read the "on or after" language as applying to pre-existing disqualifiers, then you have a dangerous and absurd result.

The danger in such interpretation is that everyone instantly became "rehabilitated" and "undisqualified" at the stroke of midnight on January 1, 1996; e.g. an aggravated child abuser who committed his/her offense on 12/30/95 was disqualified under ch. 39 until midnight, when ch. 435 "undisqualified" him or her.

The absurdity is, such an interpretation makes the act internally inconsistent. For example, the act added some new disqualifying offenses, including "prohibited acts of persons in familial authority" (§ 794.041). But 794.041 was REPEALED effective October 1993 (see, 93-156, §4). How, then, could 794.041 ever be a disqualifying offense if it only applied to offenses committed "on or after" October 1, 1995? The addition of this offense would be nullified by the "on or after" interpretation, as recommended by the ALJ.

The absurdity of the conclusion of law in paragraphs 12 and 13 are further exemplified as follows. Based upon 2001 statutory amendments, Chapter 2001-125, §7, added language to 435.04 that prohibited the Department of Juvenile Justice from granting exemptions "for any offense disposed of during the most

recent 7-year period." See s. 435.04(3)(c), F.S., (2002). This law took effect on October 1, 2001, meaning that you were not eligible for an exemption if your offense was disposed after October 1, 1994. Such an offense would have obviously been committed prior to that date. Thus, if everyone, who committed disqualifying offenses prior to October 1, 1995, were not disqualified by virtue of 95-228, then what was the meaning of this later 2001 legislation? In short, the 7-year "reach-back" period imposed in 2001 makes no sense if you interpret the 95-228 "on or after" language in the way recommended by the ALJ. Such a result demonstrates why the ALJ's conclusion of law is not reasonable, and thus must be rejected.

In support of conclusions of law number 12 and 13, the case of Guest v. Department of Juvenile Justice, 786 So.2d 677 (Fla. 1st DCA 2001) (*per curiam*), is cited as authority. However, that case does not support the positions suggested in these conclusions of law. In Guest, the appellant was disqualified under the 1997 version of law, and thus, section 11.2422 (general repeal statute) would limit his arguments to that version. To the extent the 1995 statutes limited disqualification to post-1995 offenses, that limitation was not included in the 1997 statutes.

Further, the Guest case, is a *per curiam* affirmed decision which cited Singletary v. State, 322 So.2d 551 (Fla.1975) as authority for the holding that the appellant had no standing to challenge the constitutionality of Chapter 435.07. The rule of law supported by Singletary deals with the issue of a court's determination of constitutional questions, in that, "a court should not pass upon

the constitutionality of a statute if a case in which the question arises may be effectively disposed of on other grounds". Id. at 552.

Because there is no reason given in the Guest decision for the court's reliance upon Singletary, the Guest case is of no precedential value to the ALJ's proposition that the department has no authority, for screening purposes, to consider crimes committed prior to 1995. *See e.g.*, Acme Specialty Corp. v. City of Miami, 292 So.2d 379 (Fla. 3 DCA 1974)(per curiam affirmance opinion with no reasons or authorities given does not stand for any general pronouncement of principles of law).

Although there is no precedential authority to support the conclusions of law in either paragraph 12 or 13 of the RO, there are decisions by the First District Court of Appeal with precedential value, which directly contravene these conclusions of law. It is well established that an exemption under section 435.07 is not as a matter of right, but instead is a matter of discretion that has been delegated to the Department from the Legislature. Heburn v. Department of Children and Families, 772 So.2d 561(Fla. 1st DCA 2001). Because sections 435.03 and 435.04 were enacted to protect the public welfare, exemptions from these statutes are to be strictly construed against the person claiming the exemption. Id.

The extent of an agencies discretion to grant or deny an exemption request is demonstrated in Phillips v. Department of Juvenile Justice, 736 So.2d 118 (Fla. 4th DCA 1999)(*per curiam).* In that case, the Petitioner, a former professional football player, applied for the job of Youth Program Coordinator for

the CHOICES Program, a position of special trust and responsibility that requires working with juveniles in the Department of Juvenile Justice.

As part of the application process, the Petitioner underwent background screening which revealed he had charges of carrying a concealed weapon (3/6/89-arrest sealed); of firing a weapon into an occupied dwelling (9/23/93-adjudication withheld), and of domestic battery (9/23/93-adjudication withheld). It should be noted that all of these offenses were committed prior to 1995.

As a result of his disqualification, he requested and was denied an exemption. At the section 120 hearing, the Petitioner presented unrefuted, clear and convincing evidence of his rehabilitation, the Department presented no evidence and his exemption was denied. In upholding the Department's Final Order, the Court held that "section 435.07(1), F. S., gives discretion to the agency to give individuals an exemption for the enumerated acts and thus, it follows, that even if a Petitioner presents clear, convincing, and unrefuted evidence that he qualified for an exemption, the agency is not under any obligation to give him one." Id. This ruling cannot be harmonized with the conclusion of law recommended by the ALJ.

The discretion of an agency in exemption cases has been suggested to be even broader than the discretion granted a licensing agency in determining the physical fitness of applicants to engage in a business or occupation potentially injurious to the public welfare. Heburn at 563 Cf. Astral Liquors v. Dep't of Business Regulation, 463 So.2d 1130 (Fla.1985) (agency exercises broad discretionary authority when entitlement is a privilege rather than a right).

In both Heburn and Phillips , as in this case, the disqualifying events occurred prior to 1995. In order to accept the ALJ's conclusion of law that one cannot be disqualified from a position of trust if the disqualifying event occurred prior to 1995, one must ignore the 2001 written opinions reached in Heburn and Phillips. It must also be concluded that a nonprecedential per curium affirmed decision has the affect of overturning written opinions with precedential value. Such results cannot reasonably be accepted.

I find this conclusion of law is as or more reasonable than the ALJ's conclusions of law, hereby being rejected.

4. Conclusion of law 14 is accepted, adopted and incorporated herein by reference.

5. Respondent's Exceptions number 5 through 15 are accepted, adopted and incorporated herein by reference.

And, the undersigned being fully advised, it is therefore, **ORDERED** that the Petitioner's request for exemption is GRANTED.

DONE and **ORDERED** on this 27th day of January, 2003 in Tallahassee, Leon County, Florida.

LUCY D. HADI, Deputy Secretary
Department of Children and Family Services

Copies of this Final Order are being furnished to:

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NOTICE OF RIGHT TO APPEAL

A party who is adversely affected by this final order is entitled to judicial review. To initiate judicial review, the party seeking it must file one copy of a "Notice of Appeal" with the Agency Clerk. The party seeking judicial review must also file another copy of the "Notice of Appeal," accompanied by the filing fee required by law, with the First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. The Notices must be filed within thirty (30) days of the rendition of this final order.[1]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **FINAL ORDER** has been sent by U.S. Mail or hand delivery to each of the persons named above on this 28th day of January, 2003.

Paul Flounlacker

PAUL FLOUNLACKER, Agency Clerk
Department of Children and Family Services
1317 Winewood Blvd. Bldg. 2 Room 204
Tallahassee, FL 32399-0700

[1]The date of the "rendition" of this Final Order is the date that is stamped on its first page. The Notices of Appeal must be received on or before the thirtieth day after that date.