

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEILAH LONGMORE,)
)
 Petitioner,)
)
 vs.) Case No. 10-7292
)
 AGENCY FOR HEALTH CARE)
 ADMINISTRATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

An administrative hearing was conducted in this case on February 1, 2011, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Keilah Longmore, pro se
Post Office Box 165
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For Respondent: Sharon Jones, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Building 3, MS 3
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STATEMENT OF THE ISSUE

Whether Petitioner's request for an exemption from disqualification pursuant to sections 408.809(6) and 435.07(3), Florida Statutes, should be granted.

PRELIMINARY STATEMENT

In May 2010, Petitioner submitted a request for exemption to the Agency for Health Care Administration (Respondent), requesting an exemption from disqualification. An informal hearing with the Petitioner was conducted by Respondent via telephone on May 26, 2010. By letters dated July 7, 2010, and July 13, 2010, Respondent advised Petitioner that her request for an exemption from employment disqualification pursuant to section 435.07, Florida Statutes, was denied. Petitioner timely requested an administrative hearing, and the case was referred to the Division of Administrative Hearings (DOAH) on or about August 9, 2010.

On October 5, 2010, Respondent filed a Motion to Dismiss Petition with Prejudice and Cancel Formal Hearing. The motion was denied on October 6, 2010.

The administrative hearing in this matter was initially scheduled for October 29, 2010, but was rescheduled for February 1, 2011, by Order granting Respondent's motion to continue the final hearing.

At the final hearing held February 1, 2011, Petitioner testified on her own behalf and offered one exhibit which was received into evidence as Exhibit P-1 without objection. Respondent presented the testimony of three witnesses and offered two composite exhibits which were received into evidence

as Exhibits R-1 and R-2 without objection. The proceedings were recorded but neither party ordered a transcript.

Following the end of the evidentiary portion of the final hearing on February 1, 2011, the parties were given until February 11, 2011, to file their respective proposed recommended orders. Respondent filed its Proposed Recommended Order on February 11, 2011, which has been taken into consideration in preparing this Recommended Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Respondent is authorized to conduct certain background screenings and grant exemptions for employees providing specific types of services within health care facilities licensed under chapters 400, 408, and 435, Florida Statutes. See § 408.809, Fla. Stat. (2010)^{1/}

2. Petitioner holds a valid license as a licensed practical nurse from the Florida Department of Health, Board of Nursing (Department of Health).

3. As part of an application for employment with a nursing home for a position other than as licensed practical nurse that does not require licensure or certification,^{2/} Petitioner underwent background screening which revealed the following criminal convictions:

a) Petitioner's guilty plea and adjudication of guilt on February 14, 2003, of two third degree felonies, including Organized Fraud of Less than \$20,000 and Criminal Use of Personal Identification Information; and

b) Petitioner's plea of no contest to the first degree misdemeanor of contributing to the delinquency of a minor and adjudication of guilt on January 30, 2009.

4. Each of the above-referenced criminal convictions revealed in Petitioner's background check would make Petitioner ineligible to provide a service other than a service within the scope of her nursing license in a health care facility licensed by Respondent unless Petitioner receives an exemption from Respondent pursuant to sections 408.809(6) and 435.07(3), Florida Statutes.

5. Petitioner submitted an application for exemption in accordance with sections 408.809(6) and 435.07 to Respondent dated April 27, 2010, which Respondent received on May 3, 2010.

6. The application for exemption submitted by Petitioner makes it clear that Petitioner sought, and is seeking in this proceeding, an exemption for employment with an assisted living facility or nursing home in a capacity other than as a licensed practical nurse for which she holds a license.

7. The application for exemption submitted by Petitioner was on Respondent's pre-printed form. Petitioner selected the third box on page one of the pre-printed form. The pre-printed

language corresponding to the third box provides: "I am a licensed or certified health care professional and I applied for employment with a health care provider in a position that does not require licensure or certification."

8. The pre-printed language next to the third box further provides: *"NOTE: If you are seeking an exemption to work as a CNA, RN, LPN or other licensed or certified position, please contact the appropriate licensing board."*

9. On page 2 of the pre-printed form, Petitioner checked boxes indicating that she had been denied employment with an assisted living facility and a nursing home and is seeking an exemption for positions providing a "Dietary" service or as an "Employee/Staff Person."

10. At a telephonic hearing conducted by Respondent on May 26, 2010, Petitioner explained her version of the facts surrounding her arrests and convictions. In addition to Petitioner, the telephone hearing was attended by Respondent's background screening manager, Sherri Ledbedder, and Respondent's background screening consultants, Bob Wrightfinger, Bobbie Oday, and Pam Smith.

11. Respondent's file for Petitioner's exemption request contains police reports, plea and conviction records, and a number of letters in support of Petitioner's requested exemption, all of which were received into evidence in this

proceeding as Exhibit R-1. In addition, a transcript of the telephonic hearing was received into evidence as Exhibit R-2.

12. As noted above, after the telephonic hearing, Respondent preliminarily denied Petitioner's request for an exemption, and Petitioner requested an administrative hearing.

13. At the final hearing in this case, Petitioner once again explained her version of the facts surrounding her arrests and convictions.

14. Petitioner was attending nursing school at the time of her 2003 convictions. According to Petitioner, her convictions in 2003 were the result of her confessions to crimes that she knew about but did not actually commit. Petitioner explained that others used her home computer to purchase another computer by fraudulent use of identification information obtained from a hospital patient. Petitioner further explained that, although she did not actually commit the crimes for which she was convicted in 2003, she confessed in order to protect her friends and because the crimes were committed in her home using her computer. She explained that she felt responsible because she was aware of the crimes and had not timely advised authorities.

15. As a result of her confessions and convictions in 2003, Petitioner was sentenced to six months in jail and three years of probation. Petitioner was released after four months

and completed her probation, during which she successfully passed regular drug tests.

16. Despite her convictions and incarceration, Petitioner completed her nursing education in 2004, and graduated with honors, receiving a diploma in Practical Nursing from Orange County Public Schools, Orlando Tech, on October 15, 2004.

17. As a result of her felony convictions, Petitioner lost her civil rights. In 2007, Petitioner posted an application to the clemency board and her civil rights were restored on June 4, 2007.

18. Since her felony convictions, Petitioner has started an organic soap company named "Planthead," which is registered and operating in the United States and Jamaica. She also has a business interest in a taxi service in Jamaica. In addition, Petitioner had an ownership interest in a bar in Jamaica, which is now closed.

19. As to her plea of no contest to the first-degree misdemeanor of contributing to the delinquency of a minor and adjudication of guilt on January 30, 2009, Petitioner explained that she pled nolo contendere on the ill-advised recommendation of a lawyer. Petitioner testified that she was living in a house with her mother and her mother's boyfriend in November 2008, when the police came to the house at the request of

Petitioner's mother's boyfriend to serve eviction papers on Petitioner and her mother.

20. According to Petitioner, when the police arrived, they smelled marijuana and proceeded to search the house. Petitioner testified that her son was playing outside at the time. Then, according to Petitioner, the police fabricated a story that they had found marijuana in Petitioner's possession and arrested her.

21. Petitioner advised that she was arrested for possession of marijuana and child abuse. Petitioner said that she was afraid that she would lose her son.

22. According to Petitioner, after she obtained a lawyer to represent her in the case, he persuaded her to plea nolo contendere to a lesser offense of contributing to the delinquency of a minor. Petitioner said she followed her lawyer's advice because he told her that, since he was an out-of-town lawyer, the judge would not be favorable to her and she could end up with a long prison sentence.

23. As a result of her conviction, she received a 30-day sentence which was suspended on the condition that she complete 20 hours of community service, attend a parenting class, and undergo two random drug tests, to be completed by July 29, 2009.

24. Petitioner successfully completed the conditions of her suspended sentence.

25. Thereafter, Petitioner applied for an exemption from the Department of Health, Board of Nursing, regarding her convictions that are the subject of this proceeding. On February 11, 2010, the Board of Nursing granted the exemption, in a letter stating:

Dear Ms. Longmore:

The Florida Board of Nursing has completed the review of your Level 1 Criminal History report for licensed Practical Nurse licensure. Based on the information provided by the Florida Department of Law Enforcement (FDLE), you have been found guilty of, regardless of adjudication, or entered a plea of guilty or nolo contendere to the criminal offenses listed above in Section 435.03(2), F.S.

It has been determined; you have demonstrated clear and convincing evidence you will not present a danger if employed within the healthcare field. This exemption is granted to cover Certified Nursing Assistants, Licensed Practical Nurses and Registered Nurses should you be employed or seek employment within a facility licensed under Chapter 400, F.S. If any disqualifying offense(s) are committed after the date of this letter, a new exemption is required.

If your employer has received a background screening from the Agency for Health Care Administration (AHCA) or their website, which shows "pending" or "not ok" you may work with this exemption. However, you must also contact AHCA regarding information they may need. This exemption does not change your criminal history, but merely provides eligibility for employment; therefore the "not ok" will remain on their website regardless.

26. Other than the letter granting the exemption itself, there was no evidence presented which explains or elaborates on the Board of Nursing's rationale for granting the exemption.

27. There are a number of favorable letters of recommendation in Respondent's file in support of Petitioner's requested exemption. Those letters were received into evidence as part of Exhibit R-1, and were considered in preparing this Recommended Order.

28. While Petitioner's versions of the facts surrounding her convictions of disqualifying offenses are plausible, they conflict with her confessions and pleas of those crimes and are therefore less than clear and convincing.

29. In addition, while there is favorable evidence supporting Petitioner's request for exemption, based upon the period of time since the disqualifying felony violations, the seriousness of those offenses, the nature of harm caused to the victim, and Petitioner's relatively recent conviction of contributing to the delinquency of a minor, which is also a disqualifying offense, it cannot be said that Petitioner proved by clear and convincing evidence that she is entitled to receive the exemption she seeks from Respondent.

30. In sum, Petitioner failed to meet her burden of proving by clear and convincing evidence that she is entitled to an exemption issued by Respondent for a position providing a

service that is not within the scope of her license as a licensed practical nurse.^{3/}

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. See §§ 120.569, 120.57(1), Fla. Stat.

32. Section 408.809, Florida Statutes, authorizes Respondent to conduct background screenings under certain circumstances to assure that those seeking positions within the authority of Respondent have not committed disqualifying offenses. Sections 408.809(4)(f) and (j), specifically list the following crimes for which Petitioner was convicted, as disqualifying offenses:

(f) Section 817.034, relating to fraudulent acts through mail, wire, radio, electromagnetic, photoelectronic, or photooptical systems.

(j) Section 817.568, relating to criminal use of personal identification information.

33. Section 408.809(4) also references offenses listed in section 435.04, Florida Statutes, as disqualifying offenses. Included in the disqualifying offenses listed by section 435.04 is section 827.04, Florida Statutes, relating to contributing to the delinquency or dependency of a child, for which Petitioner was convicted. See § 435.04(2)(ii), Fla. Stat.

34. Section 408.809(6) (a) authorizes Respondent to grant exemptions to those, such as Petitioner, who hold licenses issued by the Department of Health under certain circumstances.

That section provides:

(6) (a) As provided in chapter 435, the [Agency for Health Care Administration] may grant an exemption from disqualification to a person who is subject to this section and who:

1. Does not have an active professional license or certification from the Department of Health; or
2. Has an active professional license or certification from the Department of Health but is not providing a service within the scope of that license or certification.

(b) As provided in chapter 435, the appropriate regulatory board within the Department of Health, or the department itself if there is no board, may grant an exemption from disqualification to a person who is subject to this section and who has received a professional license or certification from the Department of Health or a regulatory board within that department and that person is providing a service within the scope of his or her licensed or certified practice.

35. While it is appropriate to consider the fact that Petitioner has received an exemption from the Department of Health to provide care as a licensed practical nurse, "[e]xemptions granted by one agency are not binding on the subsequent agency." See § 435.07(5), Fla. Stat.

36. As noted in section 435.07(3)(a),^{4/} in order to be entitled to an exemption that would allow an employee to be employed capacity for which the exemption is sought:

[T]he 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 clear and convincing 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 employment or continued employment is allowed.

37. For proof to be considered "'clear and convincing' . . . , 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 in 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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

38. As noted in the Findings of Fact above, Petitioner failed to prove by clear and convincing evidence that she was

entitled to an exemption from Respondent to work at a facility licensed by Respondent in a capacity other than as a licensed practical nurse for which she holds a license issued by the Department of Health.

39. This conclusion, however, leaves undisturbed the previous finding of the Department of Health, which "granted [an exemption to Petitioner] to cover Certified Nursing Assistants, Licensed Practical Nurses and Registered Nurses should [she] be employed or seek employment [in that capacity] within a facility licensed under Chapter 400, F.S." See Finding of Fact 25 and Conclusion of Law 34, supra.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Agency for Health Care Administration enter a Final Order, consistent with these findings and conclusions, denying the application for an exemption submitted by Petitioner in this case.

DONE AND ENTERED this 23rd day of March, 2011, in
Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of March, 2011.

ENDNOTES

^{1/} Unless otherwise noted, all references to the Florida Statutes are to the 2010 version.

^{2/} See Findings of Fact 5 through 9.

^{3/} As further explained by section 408.809(6)(a), Florida Statutes, which authorizes Respondent to grant exemptions to those holding licenses issued by the Department of Health under certain circumstances:

(6)(a) As provided in chapter 435, the [Agency for Health Care Administration] may grant an exemption from disqualification to a person who is subject to this section and who:

1. Does not have an active professional license or certification from the Department of Health; or
2. Has an active professional license or certification from the Department of Health but is not providing a service within the scope of that license or certification.

(b) As provided in chapter 435, the appropriate regulatory board within the Department of Health, or the department itself if there is no board, may grant an exemption from disqualification to a person who is subject to this section and who has received a professional license or certification from the Department of Health or a regulatory board within that department and that person is providing a service within the scope of his or her licensed or certified practice.

^{4/} Under the new version of section 435.07(3), Florida Statutes, which was effective on August 1, 2010, after the effective date of Respondent's preliminary decision announcing the intended action in this case, the head of the agency makes the preliminary decision. Section 435.07(3)(c) further provides:

The decision of the head of an agency regarding an exemption may be contested through the hearing procedures set forth in chapter 120. The standard of review by the administrative law judge is whether the agency's intended action is an abuse of discretion.

Under the "abuse of discretion" standard, the test is "whether any reasonable person" could take the position under review. See Kareff v. Kareff, 943 So. 2d 890, 893 (Fla. 4th DCA 2006). Considering the facts and circumstances of this case, it cannot be said that Respondent's preliminary decision and intended action to deny Respondent's requested exemption is unreasonable.

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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.