

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MARCUS DOWNES,

Petitioner,

vs.

Case No. 15-2261EXE

AGENCY FOR PERSONS WITH  
DISABILITIES,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (DOAH) heard this case on July 28, 2015, by video teleconference in Tallahassee and Orlando, Florida.

APPEARANCES

For Petitioner: Paula Coffman, Esquire  
Post Office Box 561229  
Orlando, Florida 32856-1229

For Respondent: Michael Sauve, Esquire  
Agency for Persons with Disabilities  
400 West Robinson Street, Suite S-430  
Orlando, Florida 32801-1736

STATEMENT OF THE ISSUE

Did Petitioner, Marcus Downes, prove by clear and convincing evidence of rehabilitation that it is an abuse of discretion to deny his request for an exemption, as allowed by section 435.07, Florida Statutes (2015),<sup>1/</sup> from disqualification due to a criminal

offense, from working with children and other vulnerable individuals?

PRELIMINARY STATEMENT

By letter dated March 12, 2015, Respondent, Agency for Persons with Disabilities (Agency), denied Mr. Downes' request for an exemption from disqualification from working with vulnerable individuals because of a criminal offense. He requested a hearing to challenge the denial. On June 30, 2015, the Agency referred the matter to DOAH to conduct the requested hearing. After one agreed continuance, the hearing was scheduled for July 28, 2015.

Mr. Downes testified on his own behalf. He also presented testimony from Joel Bolden, Paula Carr, Jabril Downes, and Stephanie Miller. His Exhibits A through J were accepted in evidence.

The Agency presented testimony from Clarence Lewis. Agency Exhibits A through E were accepted into evidence.

The parties did not order a transcript. Each party timely filed a proposed recommended order, which has been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Mr. Downes seeks employment with Independent Living Services, LLC (Independent Living). His aunt, Stephanie Miller, and his mother are partners in Independent Living. It provides

services to people with disabilities, including cerebral palsy, bipolar illness, and dual-diagnosed individuals. The services include supported living, coaching, companion services, and personal supports. Independent Living serves about 15 individuals in their homes. Some of the consumers are not verbal. Independent Living does not currently serve minors. But it could. The individuals are vulnerable adults as defined by section 415.102(28), Florida Statutes. Independent Living receives compensation through the Florida Medicaid Waiver program administered by the Agency.

2. If employed by Independent Living, Mr. Downes would provide companion and personal support services to persons with disabilities. He has been providing similar services through a privately paid arm of Independent Living. For instance, for the past two years, Mr. Downes has provided Paula Carr light housekeeping, shopping services, and transportation. Ms. Carr is a dialysis patient and has cancer. She likes Mr. Downes and is satisfied with his service.

3. If employed by Independent Living, Mr. Downes would be alone with Independent Living's consumers at times.

4. Mr. Downes' employment with Independent Living would be a position of trust as a direct service provider to individuals with disabilities. The position requires satisfaction of background screening requirements. People with identified

criminal offenses are disqualified from working in positions serving vulnerable adults, unless exempted from the disqualification.

5. On December 1, 2008, Mr. Downes entered a plea of "no contest" to a charge of traveling to meet a minor for an unlawful sexual act after use of a computer online or internet service, a violation of section 847.0135(4)(a), Florida Statutes (2008). This is a disqualifying offense. § 435.04(2), Fla. Stat.

6. The court imposed a sentence of one day in the Orange County Jail, with credit for one day served, and withheld adjudication. The court also sentenced Mr. Downes to five years supervised probation, with leave to move for early termination after one-half of the term was completed and all conditions of probation had been satisfied.

7. The conditions required a sexual evaluation and completion of any recommended treatment. They also limited Mr. Downes' use of the internet to use for work and school purposes.

8. The required sexual evaluation did not result in a recommendation for treatment.

9. On April 14, 2011, as permitted by the sentence, Mr. Downes moved, without opposition from the State, for early termination of his probation. The court granted the motion.

10. When Mr. Downes entered his plea, the offense did not trigger registration requirements for sexual offenders and sexual predators. The State and Mr. Downes did not intend for Mr. Downes to plea to an offense that required registration.

11. In 2009, the Legislature amended the law to require registration for violators of section 847.0135(4), Florida Statutes (2008). In September 2009, the court granted a stipulated motion to relieve Mr. Downes from the requirement for sexual offender registration.

12. The charge against Mr. Downes resulted from his actions in January 2008. Mr. Downes was 18 at the time and a recent high school graduate. He was a student at Valencia Community College.

13. Mr. Downes, using the name FSUPlayer56, engaged in conversation in an American On Line chat room with an individual named Aprilgurly407.

14. In an exchange of messages with Mr. Downes, Aprilgurly407 advised that she was 14 years old. They exchanged photographs. Mr. Downes observed "damn ur sexy 4 14." Aprilgurly407 was an undercover detective. Mr. Downes began sending sexually charged messages, including asking if Aprilgurly407 liked sex, if she was a virgin, if she "ever did oral," and if she would "do" him. He proposed coming over to see her. But he did not go that evening.

15. The two chatted again on March 4, 2008. Mr. Downes proposed coming to her house for sex. They then communicated by text about timing and location. Deputy sheriffs arrested Mr. Downes when he arrived at the agreed location. Mr. Downes was remorseful and wrote a letter of apology to the mother of Aprilgurly407 before the deputies advised him that the person was a detective. The criminal proceedings described above followed.

16. Mr. Downes was admittedly young. He has not been charged with criminal offenses or other misdeeds since the one arrest in 2008.

17. In the exemption process and in the hearing, Mr. Downes minimized the offense, attributing it to youthful indiscretion and near entrapment by the detective. He evaded accepting responsibility.

18. Mr. Downes' statement, in support of his exemption request and his hearing request, said he never knew the age of Aprilgurly407. Excerpts of the chat room transcripts show different. After reviewing the transcripts during the hearing, Mr. Downes said that he did not remember the January exchange when he chatted with Aprilgurly407 in March. He says he has a poor memory.

19. Mr. Downes says that he wanted to maintain a "not guilty" plea, but his lawyer talked him into the "no contest" plea. He also says the undercover detective was very persistent

about meeting. Transcript excerpts do not support this assertion. But there are no transcripts of separate text messages between Mr. Downes and the detective.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2015).

21. Mr. Downes seeks employment serving vulnerable persons which requires him to successfully complete a background screening under section 435.04, Florida Statutes (Level 2).

22. Mr. Downes seeks an exemption from disqualification under section 435.07. The parties agreed that Mr. Downes is eligible to seek an exemption.

23. Section 435.07(3)(a) states that individuals seeking an exemption "must demonstrate by clear and convincing evidence that the employee should not be disqualified from employment." It goes on to state that employees bear "the burden of setting forth clear and convincing evidence of rehabilitation."

24. Clear and convincing evidence must be credible. The memories of witnesses must be clear and not confused. The evidence must produce a firm belief that the truth of allegations has been established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). Evidence that conflicts with other evidence

must be clear and convincing. The trier of fact must resolve conflicts in the evidence. G.W.B. v. J.S.W. (in Re Baby E.A.W.), 658 So. 2d 961, 967 (Fla. 1995).

25. The Agency's decision must be accepted unless Mr. Downes proved rehabilitation by clear and convincing evidence and that denial of the exemption would be an abuse of discretion. J.D. v. Dep't of Child. & Fams., 114 So. 3d 1127 (Fla. 1st DCA 2013). The abuse of discretion review standard is basically a review for reasonableness. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

26. In explaining the standard, the Florida Supreme Court said:

We cite with favor the following statement of the test for review of a judge's discretionary power:

Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Delno v. Market Street Railway Company,  
124 F.2d 965, 967 (9th Cir. 1942).

Id.

27. Section 435.07(3)(a) provides that evidence of rehabilitation includes, but is 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.

28. Mr. Downes refuses to acknowledge that his offense is one that has a victim. His history does not reflect subsequent offenses or poor choices. But it also does not reflect any unusual efforts to rehabilitate or redeem himself. The factor that weighs most heavily against Mr. Downes is his lack of remorse and efforts to justify or minimize his conduct.

29. Mr. Downes relies upon K.L.S. v. Department of Children and Family Services, 974 So. 2d 1106 (Fla. 1st DCA 2007), as a similar case that requires granting an exemption. There are significant differences between that case and this case. The statute is different. The 2005 version of section 435.07 was applied in K.L.S. It did not have the abuse of discretion standard now imposed. In 2005, the standard established by section 435.07 was:

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.

30. The facts here differ, too. Twenty-two witnesses testified to the rehabilitation of K.L.S. The evidence established K.L.S. had become a role model minister in prison and was active in his community working to help young people. There is no similar evidence here.

31. The clear and convincing evidence does show that Mr. Downes was young and that this offense is an isolated incident. The Agency could reasonably choose to conclude that the circumstances surrounding Mr. Downes' criminal incident and his incident-free life since then support granting an exemption. But clear and convincing evidence does not prove rehabilitation. And the evidence does not support concluding that denial of an exemption is arbitrary, fanciful, or unreasonable.

32. Mr. Downes has not carried his burden of proving rehabilitation by clear and convincing evidence and proving that denying an exemption is an abuse of discretion.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Agency for Persons with Disabilities, enter its final order denying the request for an exemption from disqualification submitted by Petitioner, Marcus Downes.

DONE AND ENTERED this 1st day of September, 2015, in Tallahassee, Leon County, Florida.



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JOHN D. C. NEWTON, II  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of September, 2015.

ENDNOTE

<sup>1/</sup> All statutory references are to Florida Statutes (2015), unless otherwise noted.

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.