

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LARRY WOODS,

Petitioner,

vs.

Case No. 15-2424EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

On July 22, 2015, a duly-noticed video teleconference hearing was held at locations in Miami and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Larry Woods, pro se
5520 Northwest 52nd Circle
Coconut Creek, Florida 33073

For Respondent: Tomea A. Sippio-Smith, Esquire
Agency for Persons with Disabilities
401 Northwest 2nd Avenue, Suite S811
Miami, Florida 33128

STATEMENT OF THE ISSUE

The issue is whether Petitioner should be exempt from disqualification from employment in a position of trust, pursuant to section 435.07, Florida Statutes (2014).^{1/}

PRELIMINARY STATEMENT

In a letter signed by the director of the Agency for Persons with Disabilities (Respondent or the Agency), dated March 18, 2015, Petitioner was notified that his request for exemption from disqualification from employment was denied, based upon the seriousness of the offenses and the Agency's determination that Petitioner had failed to demonstrate rehabilitation. On April 9, 2015, Petitioner requested a formal hearing. On April 29, 2015, Respondent referred the matter to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the final hearing.

At hearing, Respondent presented the testimony of Ms. Evelyn Alvarez, regional operations manager for the Southern Region at the Agency. Respondent's Exhibits A through D were received into evidence without objection. Petitioner testified on his own behalf, offered the testimony of his wife, and offered no exhibits.

The proceeding was transcribed, but neither party ordered a copy of the transcript. The parties were advised that proposed recommended orders must be received by August 3, 2015. Respondent timely filed a proposed recommended order, which was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the competent evidence presented at hearing, the following findings of fact are made:

1. Respondent is the state agency which supports persons with autism, intellectual disability, cerebral palsy, Down syndrome, Prader-Willi syndrome, spina bifida, and similar developmental disabilities. Respondent contracts with direct service providers and is responsible for regulating the employment of persons serving in positions of trust with these providers.

2. Alliance Community and Employment Services (Alliance) was under contract with the Agency. Persons employed at Alliance in positions of trust were required to complete level 2 background screening.

3. On June 5, 2014, Petitioner was given a background screen as a result of his employment with Alliance, where he was beginning work as an employment consultant.

4. In response to inquiries concerning his arrest on June 5, 1992, in Broward County, Florida, for possession of cocaine, Petitioner stated:

I was stopped by the police for a rolling stop violation at a stop sign. The officer searched my car and found some drug paraphernalia. I was charged with a misdemeanor. After further testing of the paraphernalia, the charge was upgraded to

possession of cocaine. This happened in 07/1992, twenty-two years ago.

5. Petitioner testified at hearing that he did not plead "nolo contendere" to the charge of possession of cocaine, but only to possession of drug paraphernalia. This testimony is rejected as not credible, however. The allegations in the information that was before the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County clearly indicate not only the misdemeanor charge of possession of drug paraphernalia in violation of section 893.147(1), Florida Statutes, but also possession of cocaine, contrary to section 893.03(2)(a)4. The information is endorsed with the note that Petitioner "pleaded nolo open court." Court documents similarly indicate that adjudication was withheld on both counts on September 11, 1992. The Court Status form also shows that at arraignment, Petitioner pled nolo contendere to Count I, possession of cocaine, as well as Count II, possession of drug paraphernalia. Finally, the Order of Probation, also dated September 11, 1992, and signed by the Circuit Court Judge shows a plea of nolo contendere to both counts, and this document was also signed by Petitioner.

6. Petitioner pled nolo contendere to the felony offense of possession of the controlled substance of cocaine on September 11, 1992.

7. Petitioner stated: "The status is all clear with the court system. Everything they asked me to do, I did." There was no evidence at hearing contrary to this assertion. A letter dated October 16, 2014, from the Florida Department of Corrections indicates that based upon computer information, Petitioner completed his probation on August 26, 1994. Many more than three years have elapsed since Petitioner completed or was lawfully released from confinement, supervision, or non-monetary condition imposed for his disqualifying felony offense.

8. In response to inquiries concerning an arrest for battery on November 18, 2011, Petitioner stated:

My wife and I had an argument that started in the house and ended outside in front of the neighbors. The police were called and I was arrested.

This response only indicated there was an "argument" and did not explain or describe any battery. In response to a question about the degree of harm to any victim, he stated that "there was no harm at all."

9. A letter dated June 8, 2012, was sent from the Agency for Health Care Administration to Petitioner informing him that Petitioner was granted an exemption from disqualification from employment in a position of trust. Although the letter was not sent until June 8, 2012, it did not take into account

Petitioner's arrest for battery, because the letter was based upon background screening completed on May 7, 2011.

10. Ms. Evelyn Alvarez is the regional operations manager for the Southern Region in the Agency, who has been employed with the Agency for 11 years and with the State of Florida for 26 years. She testified that in her review of Petitioner's request for exemption, she concluded that Petitioner had misrepresented the facts of the November 2011 battery. She concluded that there were indications of substance abuse and injury to his wife.

11. In his request for exemption, Petitioner admitted that "I used to go drinking with the fellows quite often. I don't do that as often as I used to." With regard to drug and alcohol involvement, Petitioner answered:

None
Drinking--age 15
Marij.--age 15
Cocaine--age 33/2005 stopped
have a drink occasionally
socially
holidays

12. Petitioner's wife, R.W., did not testify as to the specific events surrounding Petitioner's November 18, 2011, arrest. When testifying generally about the incident, she stated that Petitioner "lost it," that she does not "condone abuse," and that "we got through it" and have "moved on." She

testified that nothing like it had happened before and nothing has happened since.

13. A "Reporting Officer Narrative" describing those events indicated that the arresting officer, "observed and photographed [R.W.'s] injuries which included a large scratch on her right eye and dark red marks on her forehead."^{2/} This seems directly contrary to Petitioner's statement that there was "no harm at all" caused by the incident. The officer's observations are credited.

14. At hearing, Petitioner testified only that the events of November 18th were "one incident" that "got out of hand."

15. Documents submitted by Petitioner to Respondent in support of his request for exemption included his bachelor's degree in business administration from 1983, a Certificate of Completion for the 2011 OSHA Bloodborne Pathogens Quiz, a Certificate of Completion of an Interview Workshop in 2014, a Certificate of Completion of the Professional Placement Network in 2014, a Certificate of Completion of a Resume Workshop in 2014, a Certificate of Successful Completion of Best Practices in Supported Employment in 2014, and a Certificate of Completion of a Social Networking Workshop in 2014. He also submitted a Letter of Recommendation.

16. Passage of time is a factor to be considered in determining rehabilitation, and the disqualifying offense was

many years ago. Petitioner's history since that offense is largely unremarkable, except for the November 2011 incident resulting in his arrest for battery. It is troubling that Petitioner did not acknowledge that a battery took place or testify as to exactly what occurred in this fairly recent incident. He did not address the role, if any, that use of alcohol or other drugs might have played in this incident, or throughout his life. It is found that in stating that the November 2011 incident did not cause any harm at all, Petitioner misrepresented the facts. It is also difficult to understand Petitioner's failure to acknowledge that he pleaded guilty to both possession of cocaine and paraphernalia. While Petitioner presented some evidence of rehabilitation, that evidence did not clearly and convincingly show that he is rehabilitated.

17. Petitioner failed to prove that he is rehabilitated and that he will not present a danger if he is exempted from his disqualification from employment in a position of trust.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to sections 120.57(1) and 435.07(3)(c), Florida Statutes (2015).

19. Petitioner's disqualification limits the employment opportunities that are available to him. He will be unable to

work at Alliance Community and Employments Services, Inc., or other facility in a position of trust, unless an exemption is granted. Petitioner has demonstrated standing to maintain this proceeding.

20. Level 2 employment screening standards set forth in section 435.04(2)(ss) provide that a person who has pled nolo contendere to a felony offense under chapter 893, relating to drug abuse prevention and control, is disqualified from employment in a position of trust.

21. In 1992, Petitioner pled nolo contendere to possession of the controlled substance of cocaine. Cocaine is listed as a schedule II drug under section 893.03(2)(a)4. Under section 893.13(6)(a), possession of cocaine is a third-degree felony. Petitioner's plea of nolo contendere to the third-degree felony of possession of cocaine disqualifies Petitioner from employment in a position of trust.

22. Under section 435.07(1), the head of the Agency may grant exemption from disqualification, if at least three years have elapsed since the applicant for exemption has completed or been lawfully released from confinement, supervision, or non-monetary condition imposed for a disqualifying felony offense. Petitioner meets this requirement and is eligible for consideration for such an exemption.

23. In order to receive an exemption, the applicant has the burden of proving that he is rehabilitated. Under section 435.07(3), Petitioner must prove rehabilitation by clear and convincing evidence.

24. The prohibition from employment in positions of trust of individuals convicted of disqualifying offenses is intended to protect the public welfare, and the statute must be strictly construed against the person claiming exemption. Heburn v. Dep't of Child. & Fams., 772 So. 2d 561, 563 (Fla. 1st DCA 2000).

25. The clear and convincing standard of proof has been described by the Florida Supreme Court:

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 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)).

26. Under section 435.07(3)(a), evidence of rehabilitation may include, 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 applicant 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.

27. Section 435.07(3)(c) 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."

28. Although the statutory language prescribes a "standard of review," it also provides that the review is of the agency's "intended" action and makes applicable the "hearing procedures set forth in chapter 120," which call for the issuance of a recommended order back to the agency head for final agency action.

29. The statute thus combines elements of a de novo evidentiary hearing with elements of review of earlier action. While providing for consideration of new evidence, the statute requires that some deference be given to the agency's intended action. The recommended order must contain a legal conclusion as to whether the agency head's intended action to deny the exemption constitutes an "abuse of discretion." J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127, 1131 (Fla. 1st DCA

2013) (ultimate legal issue to be determined by ALJ is whether the agency head's intended action was an "abuse of discretion" based on facts as determined from the evidence presented at a de novo chapter 120 hearing).

30. In Canakar v. Canakar, 382 So. 2d 1197, 1203 (Fla. 1980), the Court noted that, "[d]iscretion, in this sense, is abused when the . . . action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted." See also Kareff v. Kareff, 943 So. 2d 890, 893 (Fla. 4th DCA 2006) (holding that pursuant to the abuse of discretion standard, the test is whether "any reasonable person" would take the position under review).

31. While he provided some evidence of rehabilitation, Petitioner failed to prove by clear and convincing evidence that he is rehabilitated or that he will not present a danger if he is exempted from his disqualification from employment in a position of trust.

32. Under the facts determined here, a reasonable person could conclude that Petitioner should not be granted an exemption from disqualification. The Agency's determination to deny Petitioner an exemption from his disqualification does not constitute an abuse of discretion.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Persons with Disabilities enter a final order denying Petitioner's application for exemption from disqualification.

DONE AND ENTERED this 4th day of September, 2015, in Tallahassee, Leon County, Florida.

F. Scott Boyd

F. SCOTT BOYD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of September, 2015.

ENDNOTES

^{1/} All statutory references are to the 2014 Florida Statutes, except as otherwise indicated. Petitioner's application is governed by the law in effect at the time the final order is issued. See Ag. for Health Care Admin. v. Mt. Sinai Med. Ctr., 690 So. 2d 689, 691 (Fla. 1st DCA 1997) (agency must apply law in effect at the time it makes its final decision). Chapter 2015-79, Laws of Florida, effective July 1, 2015, amended the definition of "specified agency" in section 435.02(5), but this amendment had no effect on this case.

^{2/} Other portions of the report, containing statements made by Petitioner's wife as to what happened in the altercation, were not "matters observed" pursuant to a duty imposed by law within

the meaning of section 90.803(8), Florida Statutes, and were not sufficient in themselves to support a finding of fact.

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.