STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHNNIE PORTER,

Petitioner,

vs. Case No. 15-3456EXE

AGENCY FOR PERSONS WITH DISABILITIES,

Respondent.
_______________________________/

RECOMMENDED ORDER

As noticed, a final administrative hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes, before Robert L. Kilbride, an Administrative Law Judge of the Division of Administrative Hearings (DOAH). The hearing was held on August 12, 2015, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Johnnie Mae Porter, pro se
1077 Northwest 46th Street
Miami, Florida 33127

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

STATEMENT OF THE ISSUES

The issues in this case are: (1) whether Petitioner, Johnnie Porter, has been rehabilitated from her disqualifying

offense, and, if so, (2) whether the intended action to deny Petitioner's exemption request pursuant to section 435.07(3), Florida Statutes (2014),[1/] would constitute an abuse of discretion by the Agency.

PRELIMINARY STATEMENT

In a letter dated March 18, 2015, Respondent, Agency for Persons with Disabilities ("APD" or "Agency"), notified Petitioner that her request for an exemption from disqualification from employment was denied. Dissatisfied with the decision, Petitioner timely requested a formal administrative hearing pursuant to sections 120.569 and 120.57(1). Subsequently, the Agency referred the matter to DOAH to assign an Administrative Law Judge to conduct the final hearing.

A final hearing was held before the undersigned by video teleconference on August 12, 2015, with both parties present. Petitioner testified on her own behalf and called no other witnesses. The Agency presented the testimony of Evelyn Alvarez, the Agency's Regional Operations Manager for the South Florida office. The Agency's Composite Exhibits A through D were admitted into evidence without objection. The Agency's Exhibit E (not previously provided, but reviewed by Petitioner during a recess) was also admitted without objection. The Agency's request to late-file Exhibit E was granted. At the hearing, the

undersigned granted Respondent's request for official recognition of the following sections of the Florida Statutes: 393.0655, 435.04, 784.03, 435.07, and 741.28.

A transcript of the final hearing was not ordered. The Agency timely submitted a Proposed Recommended Order (PRO). Petitioner did not submit a timely post-hearing submission or PRO. The Agency's submission was given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence adduced at the hearing, and the record as a whole, the following material Findings of Fact are made:

1. Petitioner is a 66-year-old female seeking to qualify, pursuant to section 435.07, Florida Statutes, for employment in a position of trust as a direct service provider for the care of physically or mentally disabled adults or children. This position requires the successful completion of a Level 2 background screening as set forth in section 435.04.

2. The Agency is the state agency responsible for licensing and regulating the employment of persons in positions of trust. Specifically, the mission of the Agency is to serve and protect the vulnerable population, including children or adults with developmental disabilities.

3. Petitioner was background screened by APD since she applied for a position of special trust as a direct service provider of APD.

4. This background screening revealed that Petitioner had a misdemeanor battery conviction in 1987. It was clear from the Agency's denial letter of March 18, 2015, that this conviction was relied on by the Agency as the disqualifying offense under section 435.04.

5. From the testimony of the Agency's witness, Evelyn Alvarez, it appeared that the Agency may also have considered Petitioner's two (2) DUI convictions in 1976 and 1982 as part of its deliberations. (The undersigned notes that since these convictions pre-dated the battery in 1987, they cannot be considered. See § 435.07(3)(b), Fla. Stat. Likewise, the undersigned is required to exclude them from consideration.)

6. On or about November 13, 1987, Petitioner entered a plea of no contest to the disqualifying criminal offense of simple battery, a misdemeanor. The battery was disqualifying because it was committed against her husband, Robert Porter, thus appearing to violate section 835.04(3), Florida Statutes, as an offense constituting "domestic violence." For this offense, adjudication was withheld, and Petitioner was fined and required to pay court costs.

7. The Agency's Exhibit B, at pages 14 and 15, contained Petitioner's Arrest Affidavit from the 1987 battery incident and also included a second page entitled "Records Copy Back Page." This sheet noted signs of injury described as a "Swollen right eye. Bruise on back." When asked, Ms. Alvarez did not know who suffered these signs of physical injury (whether it was the husband, Mr. Porter, or Petitioner/the wife, Ms. Porter). It should be noted that both the husband and Petitioner were arrested for battery arising out of the same incident in November 1987.

8. Petitioner testified that she was the one who suffered "back bruising" and that her husband, Mr. Porter, suffered no physical injuries of any nature during the altercation. Further, Petitioner testified she did not recall having any swelling of her eye.

9. In the face of this somewhat imprecise testimony and in light of the fact that the "Records Copy Back Page" sheet describing these physical injuries was attached as the back page of Petitioner's arrest affidavit, the undersigned finds that it was Petitioner who received the described physical injuries during this altercation in 1987.

10. As a part of its deliberations, the Agency noted that Petitioner did not articulate any "stressors" related to the 1987 battery incident. Petitioner advised that her current stressor

is staying healthy. Friends are her support system. She lives alone in her home. See Ex. A, pg. 6.

11. Testimony from the APD witness indicated that Petitioner expressed "remorse for her actions" for the 1987 incident, said she had "no other problems since then," was "sorry the incident happened," and felt that it was an "isolated event." Petitioner contends she accepts responsibility for her actions and is remorseful. My observations of Petitioner during the hearing confirmed these statements.

12. Both before and after the 1987 battery incident, Petitioner enrolled in community college classes at Miami-Dade Community College in the late 1980's and early 1990's and completed 57 of the 60 hours needed to obtain an associates of arts degree.

13. The testimonial and documentary evidence revealed that Petitioner has had no other criminal arrests or convictions since 1987 and has led a productive and industrious life since then. Further, several of her jobs have been assisting and caring for developmentally disabled adults and children.

14. During her case-in-chief, Petitioner testified that the 1987 battery involved her husband, Mr. Porter, and that she initiated the call to the police. She testified that she hit him with her purse in the presence of the responding officers. The Arrest Affidavit at Exhibit B, page 14, seems to belie her

testimony that she only used her purse. The Arrest Affidavit says she struck Mr. Porter in the chest, he then struck her back, and she came back at Mr. Porter after they were separated by the officers, and he was moved into the living room. There is no mention of a purse, but the use of a purse was not ruled out.

15. Ms. Porter testified that she and Mr. Porter remained happily married 18 more years, until they were divorced in 2005. She raised several generations of children and grandchildren after the 1987 battery incident.

16. Since 1987, Ms. Porter has held various jobs caring for or assisting physically and mentally disabled clients, including positions at MACtown, Inc.; The Village South, Inc.; Faye Clarke New Horizon; and Family Health Center, Inc.

17. During rebuttal, the Agency raised, and it was undisputed, that while at MACtown, Inc., there was an incident on March 10, 2004, in which Petitioner was investigated for verbally abusing two (2) developmentally disabled adults. The investigative report (Exhibit E, "Report"), which was late-filed by the Agency, was read by the undersigned.

18. In summary, the Report indicates that two (2) clients at MACtown, Inc., a male and a female, reported that Petitioner told one of them to "Sit his crippled a_ _ down." The other client reported that during the same exchange, Petitioner told her "F_ _ _ you," which caused her to become upset.

19. In Section IV of the Report, it was noted that there were no signs of physical abuse. An independent witness heard the male client speaking very loudly saying that if you continue to curse at me like that, "he will show then who he is."

20. The Report revealed that when questioned by the investigator, Petitioner said that she had had problems with the male client in the past and that during this particular incident he was being disobedient and not following her instructions. In the Report, Petitioner also explained that she found the two (2) clients in an isolated area of the dining room, holding hands. They had been boyfriend and girlfriend before. She told them both to leave the isolated area and to join the others.

21. The male client told her that he would not leave the area, and the female victim responded similarly. She told the male client that since he was crippled and was in an isolated area, that if he fell, no one would know and he would not be able to get up. She denied that she ever ridiculed any of the clients.

22. Section IV of the Report indicates that Petitioner "would" be given a three-day suspension followed by counseling. However, Petitioner testified at the hearing that the internal investigation concluded without any discipline and she was paid back for her suspended time. Curiously, there was no conclusive imposition of a penalty expressly stated in the Report.

23. Section V of the Report, entitled Statement, indicated that there were "some indicators" of verbal abuse since the staff overheard the male client telling Petitioner to stop cursing. In Section VII of the Report, entitled Decision, the Report concluded that the final risk level was low.

24. Insofar as this case is concerned, there was testimony that the APD director considered this Report in her deliberations. The undersigned finds that the Report is not a model of clarity, and as worded, it is difficult to see what significant value the 2004 Report offers regarding the issue of rehabilitation, one way or the other.[2/]

25. The good character, compassion, and work ethic of Petitioner was attested to in eight (8) different letters of reference admitted by the Agency, spanning a period from 2001-2015, all of which supplemented Petitioner's testimony and my observations during the final hearing.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 435.07(3), Florida Statutes (2015).

27. Individuals, such as Petitioner, who are seeking to work in a position having direct contact with vulnerable children or adults served by programs administered by Respondent are

required to undergo a Level 2 background screening. § 402.305, Fla. Stat.

28. Pursuant to section 435.04(3), the purpose of the background screening is to:

> (3) [E]nsure that no person subject to this section has been found guilty, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense that constitutes domestic violence as defined in s.741.28, whether such act was committed in this state or in another jurisdiction.

29. Further, section 741.28(2), Florida Statutes, defines domestic violence as follows:

> "Domestic violence" means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member.

30. Individuals who have disqualifying offenses may request, as Petitioner has done here, an exemption from disqualification from the head of the appropriate agency. § 435.07(1), Fla. Stat.

31. Pursuant to section 435.07(1)(a)2., the agency head may grant to any employee otherwise disqualified from employment an exemption from disqualification for misdemeanors prohibited under any of the statutes cited in chapter 435, if the applicant has completed or been lawfully released from confinement,

supervision, or non-monetary condition imposed by the court. In this case, Petitioner successfully completed all conditions imposed by the court.

32. To be eligible for an exemption, Petitioner must demonstrate by clear and convincing evidence that she should not be disqualified from employment. § 435.07(3(a), Fla. Stat.; J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127, 1131 (Fla. 1st DCA 2013)("the ultimate issue of fact to be determined in a proceeding under section 435.07 is whether the applicant has demonstrated rehabilitation by clear and convincing evidence.").

33. More specifically, Petitioner has 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.

§ 435.07(3)(a), Fla. Stat.

34. The "clear and convincing evidence" standard requires that the evidence be found 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. Clear and convincing

evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re: Graziano, 696 So. 2d 744, 753 (Fla. 1997). 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); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

35. Pursuant to section 435.07, even if rehabilitation is shown, the applicant is only eligible for an exemption, not entitled to one. Respondent retains discretion to deny the exemption, provided its decision does not constitute an abuse of discretion. J.D. v. Fla. Dep't of Child. & Fams., supra.

36. In Canakaris v. Canakaris, 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).

37. Significantly, and since administrative hearings under chapter 120 are "de novo," this abuse of discretion should be judged and based on all the evidence adduced during the hearing before the Administrative Law Judge. § 120.571(1)(k), Fla. Stat. This analysis may, therefore, include facts and observations not previously considered by the Agency. Further, if the purpose of the chapter 120 administrative hearing is to ferret out all the relevant facts and allow the "affected parties an opportunity to change the agency's mind," then, logically, it should be the facts and observations adduced at the final hearing that carry the day, and upon which any final action by the Agency is measured. See J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127 (Fla. 1st DCA 2013), citing with approval Couch Const. Co. v. Dep't of Transp., 361 So. 2d 172 (Fla. 1st DCA 1978). See also Caber Sys., Inc. v. Dep't of Gen. Servs., 530 So. 2d 325, 334 HN5 (Fla. 1st DCA 1988).

FACTORS TO BE CONSIDERED UNDER SECTION 435.07(3)

Circumstances Surrounding the Criminal Incident

38. Under this factor, the actions by Petitioner in 1987 should be viewed in an objective and realistic context. For instance, Petitioner was the one who called the police when she became involved in a domestic altercation with her husband. During the domestic disturbance, self-defense appears to have played a role and may explain, in part, her actions that day.

She had a bruised back and a swollen eye. The husband had no injuries. By contrast, this did not involve an unprovoked attack by Petitioner on a helpless or vulnerable third party or violent behavior in a public place. The undersigned concludes that this factor weighs heavily in favor of Petitioner.

Time Period that has Elapsed Since the Incident

39. The intervening period of 28 years, without any other criminal incidents or arrests, is alone, an exceptionally compelling factor that warrants a reconsideration of the intended action. Petitioner should be given considerable credit for avoiding any arrests or other trouble with the law over such a long period of time--28 years. With this much time having elapsed since the 1987 incident, Canakaris leaves the undersigned with a firm conviction that it would be unreasonable not to conclude that Petitioner has been sufficiently rehabilitated.

Nature of the Harm Caused to the Victim

40. Based on the credible evidence presented, there was no physical harm to the husband. This was supported by the documentary evidence submitted by the Agency.[3/]

History of the Employee Since the Incident

41. The evidence showed that Petitioner has pursued a productive and industrious life since the incident 28 years ago. There have been no other criminal arrests or convictions since then. There was no evidence offered to suggest that she

reasonably poses a risk to vulnerable adults. To the contrary, her raising of several children and grandchildren, and her faith based and school volunteer activities are commendable and noteworthy.

Any Other Evidence or Circumstances Indicating that the Employee will not Present a Danger

42. My observations of Petitioner at the hearing, her attitude and remorsefulness, as well as the eight (8) letters of reference that supplemented her testimony, indicate that it is unlikely that she will present a danger to vulnerable adults or children if she is employed in a position of special trust.

43. Based on the totality of evidence the undersigned credited at the hearing, it is concluded that Petitioner, Johnnie Mae Porter, has shown by clear and convincing evidence that she is sufficiently rehabilitated. § 435.07(3(a), Fla. Stat.

44. While it may not have been an abuse of discretion for the Agency to initially deny Petitioner's request for an exemption, in light of the evidence developed at the final hearing, the undersigned is firmly convinced that it would constitute an abuse of discretion for the Agency to deny her request for an exemption from disqualification under section 435.07(3)(c) and the standard enunciated in Canakaris, supra.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Persons with Disabilities reconsider its previous denial and enter a final order on Petitioner's application granting her request for an exemption from disqualification.

DONE AND ENTERED this 2nd day of September, 2015, in Tallahassee, Leon County, Florida.

ROBERT L. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of September, 2015.

ENDNOTES

[1/] References to Florida Statutes are to the 2014 version, unless otherwise indicated.

[2/] The undersigned notes that no witnesses were called to provide any details of the MACtown, Inc., incident in 2004 or the preparation of the Report. Further, what may have more probative value is that when Petitioner left MACtown, Inc., she was provided with a letter of recommendation from the organization's director, Mr. Tonge.

[3] "For Simple Battery to be a disqualifying offense, it must be shown that the victim of the spousal abuse suffered "physical injury." § 741.28, Fla. Stat. The evidence at hearing failed to show that the battery on Mr. Porter, for which Petitioner was charged, resulted in "physical injury" to the "other" family member. As a result, there is a serious question in my mind whether this particular battery qualifies as a disqualifying offense in the first instance.

COPIES FURNISHED:

Tomea A. Sippio-Smith, Esquire
Agency for Persons with Disabilities
Suite S811
401 Northwest 2nd Avenue
Miami, Florida 33128
(eServed)

Johnnie Mae Porter
1077 Northwest 46th Street
Miami, Florida 33127

David Martin De La Paz, Agency Clerk
Agency for Person with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950
(eServed)

Richard D. Tritschler, General Counsel
Agency for Person with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950
(eServed)

Barbara Palmer, Executive Director
Agency for Person with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950
(eServed)

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.