

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUDY ANN HENNY,

Petitioner,

vs.

Case No. 15-4459EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on October 9, 2015, in Jacksonville, Florida, before Administrative Law Judge R. Bruce McKibben, of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Judy Ann Henny
Apartment 78
8024 Southside Boulevard
Jacksonville, Florida 32256

For Respondent: Melissa E. Dinwoodie, Esquire
Agency for Persons with Disabilities
3631 Hodges Boulevard
Jacksonville, Florida 32224

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Agency for Persons with Disabilities (APD or the Agency), abused its discretion in denying Petitioner's request for exemption from

disqualification for employment, and, if so, whether Petitioner proved rehabilitation by clear and convincing evidence.

PRELIMINARY STATEMENT

By letter dated July 27, 2015, the Agency notified Petitioner that her request for an exemption from disqualification had been denied. Petitioner timely filed a Request for Administrative Hearing, which was forwarded to the Division of Administrative Hearings (DOAH) and assigned to the undersigned Administrative Law Judge. By agreement of the parties and Order of the undersigned, the hearing was held at the place and date set forth above.

At the final hearing, Petitioner testified on her own behalf and did not offer any documentary evidence for consideration. The Agency called one witness, Leslie Richards, regional operations manager. The Agency's Exhibits A through D were admitted into evidence without objection.

The parties did not order a transcript of the final hearing. The parties were given 10 days from the date of final hearing, i.e., until October 19, 2015, to submit proposed recommended orders (PROs). Neither party timely filed a PRO.

FINDINGS OF FACT

1. Petitioner is an African American woman in her mid-40's who resides in Jacksonville, Florida. She has lived in Florida for about two years; moving from her prior home in New York City, New York. While in New York, Petitioner worked for the Business Integrity Commission from June 2006 until February 2011. She listed her duties for that entity as "Patrol NYC's public markets for violations: parking, dumping and licenses."

2. While working for the Business Integrity Commission, Petitioner was dealing with personal medical issues, including an overactive thyroid. That condition was treated with radiation from 2007 until 2009. Those treatments were discontinued before the problem was completely resolved.

3. Due to her medical issues, Petitioner would become very ill; sometimes to the extent that she could not even walk. She had to take off many days from work because of her illness. When she ran out of vacation and sick days, Petitioner made the unfortunate decision to utilize physicians' work excuses from prior absences, altering them to appear as if they were current. It was an act of desperation on the part of Petitioner, who could not afford to lose her job and her benefits.

4. When the Business Integrity Commission became aware that Petitioner had committed this fraud, they terminated her employment. (It would be unseemly for an Integrity commission to tolerate unethical behavior by its employees.)

5. Petitioner's employer reported her deceit to the police and Petitioner was charged with violation of New York PL 175.30, Offering a False Instrument for Filing in the Second Degree. Under New York law, the charge was a misdemeanor. Petitioner pled guilty to the crime, was fined \$200, and had to provide 10 days of community service. Petitioner satisfied the penalty completely.

6. When she moved to Florida, Petitioner was hired as a direct care worker by a company known as Empowerment Program, Inc. Her responsibilities were to assist disabled adults with daily care; including food, baths and clothing. When she applied for the job she did not disclose her arrest and conviction because it was a misdemeanor in New York and she reasonably believed it did not meet the requirements of a disqualifying event in Florida.

7. Shortly after commencing work at Empowerment Program, her employer initiated a background check which uncovered the incident in New York. The employer contacted APD who made the decision that the New York conviction fell under a Florida statute which would consider the violation a felony.

Petitioner was thus deemed ineligible to work with the disabled adults served by her employer.

8. Petitioner waited the requisite three-year period and sought an exemption from her disqualification so that she could continue working. Meanwhile, she accepted part-time work at a warehouse in order to remain employed pending her exemption request.

9. The Agency maintains that PL 175.30, the New York statute, is comparable to sections 831.01 and 831.02, Florida Statutes. A review of the elements of each of the three statutes is necessary in order to ascertain whether Petitioner is guilty of a disqualifying offense.

10. PL 175.30 states:

A person is guilty of offering a false instrument for filing in the second degree when, knowing that a written instrument contains a false statement or false information, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant. Offering a false instrument for filing in the second degree is a class A misdemeanor.

11. Section 831.01 states:

Forgery. Whoever falsely makes, alters, forges or counterfeits a public record, or a certificate, return or attestation of any clerk or register of a court, public register, notary public, town clerk or any public officer, in relation to a matter

wherein such certificate, return or attestation may be received as a legal proof; or a charter, deed, will testament, bond, or writing obligatory, letter of attorney, policy of insurance, bill of lading, bill of exchange or promissory note, or an order, acquittal, or discharge for money or other property, or an acceptance of a bill of exchange or promissory note for the payment of money, or any receipt for money, goods or other property, or any passage ticket, pass or other evidence of transportation issued by a common carrier, with intent to injure or defraud any person, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

12. Section 831.02 states:

Uttering forged instruments. Whoever utters and publishes as true a false, forged or altered record, deed, instrument or other writing mentioned in s. 831.01 knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud any person, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

13. Petitioner's conviction under New York law was specifically for submitting a false document to a public office or public servant, i.e., the Business Integrity Commission, her employer. Had she not been working for a public entity, some other statute than PL 175.30 may have come into play. There is no evidence in the record concerning what law may have applied, but that is not relevant to the findings herein.

14. Looking at the allegedly comparable Florida statutes deemed by the Agency to be relevant, the Forgery statute addresses the alteration of a public record. The doctors' notes that Petitioner altered would not fit into that category. The statute also lists a number of kinds of documents which, if offered with intent to injure or defraud, could constitute forgery. Physicians' notes are not included in the list of documents.

15. The Uttering Forged Instrument statute states that publishing as true any altered record to any person with intent to injure or defraud constitutes uttering. Petitioner readily admitted that she used falsified doctors' orders to obtain additional days of paid leave. The Business Integrity Commission would fall under the term "any person."

16. Petitioner nonetheless showed by clear and convincing evidence that her alleged disqualifying event occurred at least three years prior to her request for an exemption.

17. Petitioner showed by clear and convincing evidence that the circumstances surrounding the event were such that she was desperate, battling a serious illness, and under extreme stress. In response, she made a very bad decision, her first criminal action in her life.

18. Petitioner showed by clear and convincing evidence that the only harm to the victim (the City of New York) was the financial impact on the Business Integrity Commission caused by Petitioner being paid for days she did not work.

19. Petitioner also proved (although the evidence fell short of clear and convincing) that since the time of the incident, she has continued to be gainfully employed and has sought to improve her life.

20. Petitioner also proved by clear and convincing evidence that she is sorry for the illegal action she took and that she knows her behavior was not socially acceptable.

21. The Agency considered all of Petitioner's evidence but decided, based upon the relatively short time since the last disqualifying event, plus the fact that Petitioner provided no current employment references, and that Petitioner had not been engaged in any volunteer or social work, that Petitioner had not learned from her mistake and no exemption was warranted. The Agency was concerned that Petitioner could be working with individuals who had finances which, if misused, could result in serious consequences to the individuals. That Petitioner had been found guilty of altering documents was a great cause of concern to the Agency. Petitioner said she would be happy not to have direct contact with her patients' financial documents, but there was no

testimony from her perspective employer to corroborate Petitioner's statement.

22. Petitioner did not rebut the Agency's findings, except that she did show some remorse for her actions and seemed to have learned a lesson from her mistakes. Otherwise, the Agency's findings are reasonable and within its realm of discretion.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes. Unless stated otherwise herein, all references to Florida Statutes shall be to the 2015 codification.

24. In the present case, Petitioner was found guilty of violating a law in the State of New York that had to do with offering a false instrument. (See PL 175.30, New York.) The crime - - a misdemeanor in New York - - is reasonably akin to section, 831.02, entitled, Uttering Forged Instruments. A conviction under the Florida uttering statute would be deemed a felony.

25. Section 435.04, Florida Statutes, provides in relevant part as follows:

(1) (a) All employees required by law to be screened pursuant to this section must undergo security background investigations as a condition of employment and continued employment, which includes, but need not be limited to, fingerprinting for statewide criminal history records checks through the Department of Law Enforcement, and national criminal history records checks through the Federal Bureau of Investigation, and may include local criminal records checks through local law enforcement agencies.

* * *

(2) The security background investigations under this section must ensure that no persons subject to the provisions of this section have been arrested for and are awaiting final disposition of, have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have been adjudicated delinquent and the record has not been sealed or expunged for, any offense prohibited under any of the following provisions of state law or similar law of another jurisdiction:

* * *

(k) Section 831.01, relating to forgery.

(l) Section 831.02, relating to uttering forged instruments.

* * *

(3) The security background investigations under this section must ensure that no person subject to this section has been found guilty of, 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.

26. An applicant who has been denied employment as a result of findings from a background screening may seek an exemption from disqualification.

27. The procedure is set forth in section 435.07, which states in pertinent part:

(3) (a) In order for the head of an agency 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 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.

(b) The agency may consider as part of its deliberations of the employee's rehabilitation the fact that the employee has, subsequent to the conviction for the disqualifying offense for which the exemption is being sought, been arrested for or convicted of another crime, even if that crime is not a disqualifying offense.

(c) 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. The Agency was justified in considering a New York misdemeanor as a disqualifying event because there is a similar statute in Florida that would deem the violation a felony. The existence of section 831.02 would substantiate the finding that Petitioner was guilty of a disqualifying crime.

29. The Agency considered all of Petitioner's evidence as to whether she had been rehabilitated since the commission of her misdemeanor in New York. Taking all the evidence in whole, the Agency deemed it insufficient to warrant an exemption from disqualification. It must, therefore, be determined whether the Agency abused its discretion in making that decision.

30. The standard of review for abuse of discretion is essentially the "reasonableness" test. Discretion is abused "when the judicial action is arbitrary, fanciful, or unreasonable" and "[i]f reasonable [people] could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." See Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); 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" could take the position under review).

31. Petitioner was found guilty of a disqualifying offense. Her attempt to prove rehabilitation from that offense was lacking. There is insufficient evidence in the record that the Agency abused its discretion in this case.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Respondent, Agency for Persons with Disabilities, finding that the Agency's decision to deem Petitioner, Judy Ann Henny, disqualified from working with children or adults with developmental disabilities was proper.

DONE AND ENTERED this 3rd day of November, 2015, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
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this 3rd day of November, 2015.

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.