

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LASHAE THOMAS,

Petitioner,

vs.

Case No. 15-4875EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

This matter was heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, D. R. Alexander, on November 19, 2015, at video teleconferencing sites in Lakeland and Tallahassee, Florida.

APPEARANCES

For Petitioner: LaShae Thomas, pro se
3217 Julia Court
Lakeland, Florida 33810-5510

For Respondent: Michael Sauve, Esquire
Agency for Persons with Disabilities
400 West Robinson Street, Suite 430
Orlando, Florida 32801-1764

STATEMENT OF THE ISSUES

The issues are whether Petitioner has shown, by clear and convincing evidence, that she is rehabilitated from her disqualifying offense, and if so, whether Respondent's intended action to deny Petitioner's request for an exemption from

disqualification from employment would constitute an abuse of discretion.

PRELIMINARY STATEMENT

By letter dated July 27, 2015, the Agency for Persons with Disabilities (Agency) advised Petitioner that her request for an exemption from disqualification from employment had been denied based on a background screening performed on January 15, 2015. Petitioner timely requested a hearing to contest the agency action, and the matter was referred to DOAH to conduct a formal hearing.

At the hearing, Petitioner testified on her own behalf and presented three witnesses. The Agency presented the testimony of one witness. Respondent's Exhibits A through E were accepted in evidence.

A transcript of the hearing was not prepared. Proposed findings of fact and conclusions of law were filed by the Agency, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Agency is the state agency responsible for regulating the employment of persons in positions of trust for which Petitioner seeks to qualify.

2. Petitioner is a 38-year-old female who seeks to qualify for employment in a position of special trust with Success for

All of Florida, Inc., a service provider regulated by the Agency. Because she wishes to work as a direct service provider, Petitioner was required to undergo a background screening. The results of that screening identified a history of criminal offenses, including a disqualifying offense in 2003. Accordingly, Petitioner filed a request for exemption from disqualification, which triggered the instant proceeding.

3. In a letter dated July 27, 2015, the Agency's Director, Barbara Palmer, notified Petitioner that after reviewing all information that led to her disqualification, her exemption request was denied. The letter advised Petitioner that this decision was based upon Petitioner's failure to "submit clear and convincing evidence of [her] rehabilitation." Resp. Ex. C.

4. Before Director Palmer made her decision, Petitioner's request for an exemption was reviewed by a Department of Children and Families screener who compiled a 34-page report entitled "Exemption Review" dated June 10, 2015. See Resp. Ex. B. The packet of information contains Petitioner's Request for Exemption, Exemption Questionnaire, various criminal records, and two character references. The Exemption Review did not make a recommendation one way or the other, but simply compiled all relevant information that would assist the Director in making her decision. The report was first given to the

Agency Regional Operations Manager in Orlando, who reviewed it and then made a preliminary recommendation to the Director.

5. In 2003, Petitioner had a disqualifying offense, Grand Theft, a third-degree felony, which automatically disqualified her from employment in a position of special trust. Around the same time, she committed a second-degree misdemeanor, Trespassing in a Structure or Conveyance, a non-disqualifying offense. Both offenses occurred at a JC Penney store in Lakeland. Petitioner pled guilty to both offenses and was adjudicated guilty. For the felony conviction, she was placed on probation for 25 months, given credit for time served in jail, and ordered to pay various fines and costs. Petitioner was then 26 years old.

6. Petitioner's account of her disqualifying offense differs in several respects from the account memorialized in the Lakeland Police Department reports and is inconsistent with her plea of guilty. In her Exemption Questionnaire, she stated that the criminal offense was actually committed by her younger sister and not her. She wrote that "I didn't tell on my sister because she was only 16 at the time so I took the charge for her." Resp. Ex. A, p. 3. This version of events was never presented to the court. At hearing, she also stated that she pled no contest to the crime, but court records indicate she pled guilty.

7. In January 2004, while on probation for the Grand Theft charge, Petitioner violated her probation by committing a non-disqualifying offense and was sentenced to 60 days in jail.

8. In November 2005, Petitioner violated her probation a second time by testing positive for cocaine during a probationary drug screening. The record is unclear if Petitioner served any jail time for this violation.

9. In September 2012, or approximately three years ago, Petitioner committed the non-disqualifying offense of Use or Possession of Drug Paraphernalia, a first-degree misdemeanor. She pled nolo contendere, was adjudicated guilty, placed on probation for 12 months, and ordered to pay various fines and costs. At hearing, Petitioner blamed her cousin for the arrest and stated that she was unaware her purse contained drug paraphernalia (a straw and cocaine residue), as she had not used cocaine since 2005. In any event, she stated that her drug of choice was previously ecstasy and not cocaine, and admitted that she had used that drug while working at Success for All in Florida, Inc., from 2001 until around 2005.

10. Between 2006 and 2014, Petitioner was employed as a warehouse worker by Publix. Along with five other workers, she was terminated by Publix in 2014 for improperly accepting damaged merchandise from a co-worker. There is no record of any employment since that time.

11. Petitioner blamed her criminal arrests on stress in her life, mainly due to a lack of family support and raising two children as a single parent, and being just "plain stupid" while she was young. She expressed remorse for her mistakes and now wishes to help others as a direct service provider. Three witnesses testified on Petitioner's behalf. They described her as being a good worker, a caring individual, dependable, and very determined to improve her life.

12. The Agency's rationale for denying the application is Petitioner's failure to take responsibility for her actions, that is, blaming her arrests on others, and a failure to provide a truthful and full account of the circumstances surrounding her disqualifying offense. The Agency also expressed concerns over Petitioner's lack of specificity regarding her criminal background, and the short period of time (three years) since her latest arrest, albeit for a non-disqualifying offense. Finally, the Agency noted that Petitioner has never had counseling, she lacks any specialized training, and there is no record of employment since being terminated by Publix more than a year ago.

CONCLUSIONS OF LAW

13. Petitioner's application for an exemption from disqualification is subject to the following standards in section 435.07(3)(a), Florida Statutes (2015):

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 the 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.

14. The Agency considered Petitioner's request for exemption and issued a notice of intended denial, which is the subject of Petitioner's request for an administrative hearing. The standard of review in this proceeding is specified in section 435.07(3)(c), which 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.

15. Because Petitioner has one disqualifying offense, she is disqualified from serving in a position of special trust, as defined in statutes, unless and until she obtains an exemption from disqualification by meeting the above-quoted standards in section 435.07.

16. Petitioner is to be commended for wanting to turn her life around and help others as a direct service provider with her former employer, Success for All of Florida, Inc. Even assuming, however, that Petitioner has demonstrated rehabilitation and is eligible for an exemption, in considering the Agency's action of denying her exemption request, the standard of review is whether Director Palmer abused her discretion when passing on Petitioner's request. The "abuse of discretion" is highly deferential. See, e.g., E.R. Squibb & Sons v. Farnes, 697 So. 2d 825, 826 (Fla. 1997). An agency head abuses her discretion within the meaning of section 435.07 when an intended action under review 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 by the [agency head]." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

17. Given the serious nature of the disqualifying offense, the conflicting information about that arrest, a lack of accountability, and no employment record since 2014, the Director's determination denying Petitioner's request for an exemption was not unreasonable, and it is not a decision that no reasonable person would adopt. Therefore, no abuse of discretion was shown. The undersigned notes, however, that section 435.07 does not preclude Petitioner from filing another

request for exemption sometime in the future, which might include additional evidence of rehabilitation not previously considered by the Director.

RECOMMENDATION

Based on 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 an exemption from disqualification.

DONE AND ENTERED this 7th day of December, 2015, in Tallahassee, Leon County, Florida.

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of December, 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 of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.