

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CATHERINE SCHUBERT RIVERA,

Petitioner,

vs.

Case No. 15-5039EXE

AGENCY FOR PERSONS WITH  
DISABILITIES,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 20, 2015, in Brooksville, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Catherine Schubert Rivera, pro se  
3279 Seaview Drive  
Spring Hill, Florida 34606

For Respondent: Michael Sauve, Esquire  
Agency for Persons with Disabilities  
400 West Robinson Street, Suite S-430  
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner has, pursuant to section 435.07, Florida Statutes, demonstrated by clear and convincing evidence that she should not be disqualified from employment in a position involving direct contact with children or

developmentally disabled persons and, thus, whether the intended action to deny an exemption from disqualification from employment is an abuse of the agency's discretion.

PRELIMINARY STATEMENT

By letter dated August 27, 2015, the Agency for Persons with Disabilities ("APD" or "Respondent") issued its notice of proposed agency action by which it informed Catherine Schubert Rivera ("Petitioner") that her request for exemption from disqualification was denied. As a result, Petitioner was determined to be "not eligible to be employed, licensed, or registered in positions having direct contact with children or developmentally disabled people served in programs regulated by the Agency for Persons with Disabilities." The basis for APD's determination, as alleged in its notice of proposed agency action, was that Petitioner "[had] not submitted clear and convincing evidence of [her] rehabilitation" from disqualifying criminal offenses in her past.

On September 10, 2015, Petitioner timely filed her Request for Administrative Hearing with APD. In her Request for Administrative Hearing, Petitioner disputed APD's determination that she had not proven her rehabilitation. On September 14, 2015, APD referred the case to the Division of Administrative Hearings for a formal administrative hearing.

A Notice of Hearing scheduling the final hearing for October 20, 2015, was entered. On October 15, 2015, the parties filed their Joint Prehearing Stipulations. The stipulated facts have been used in the preparation of this Recommended Order.

At the final hearing, Respondent presented the testimony of Clarence H. Lewis, APD's central region operations manager. Respondent's Exhibits A through E were received in evidence.

Petitioner testified on her own behalf and presented the testimony of Reverend Raymond H. Willis, pastor of the First Baptist Church of Weeki Wachee Acres; Major Ralph James Anderson, U.S.A.F. (Ret.); Billy Bowling; and Patsy Bowling Anderson. Petitioner's Exhibits A through E were received in evidence.

A transcript of the final hearing was not provided. Respondent timely filed a Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Petitioner did not submit a post-hearing document.

References to statutes are to Florida Statutes (2015).

#### FINDINGS OF FACT

##### The Agency Action

1. Petitioner seeks an exemption from disqualification to allow her to serve as a direct care service provider for One Mainstream, a direct services provider for developmentally disabled clients.

2. APD is the state agency responsible for licensing and regulating the employment of persons in positions of trust, and charged with serving and protecting children or adults with developmental disabilities. Vulnerable populations served by APD include individuals with developmental and intellectual disabilities, autism, cerebral palsy, spina bifida, Prader-Willi syndrome, and Down's syndrome. Some of APD's clients are incapable of expressing their needs, or unable to express whether something is wrong.

3. As part of the application process for employment as a direct services provider with One Mainstream, Petitioner was subject to a routine pre-employment background screening pursuant to section 435.04. The screening revealed the existence of two disqualifying criminal incidents (resulting in three charged offenses) in Petitioner's past. The offenses were described in the Joint Prehearing Stipulations as follows:

a. In April 1998, Petitioner committed her first disqualifying offense, Domestic Violence Battery, a first degree misdemeanor. Petitioner failed to appear before the court and an arrest warrant was issued. Subsequently, Petitioner pled nolo contendere to the offense and adjudication was withheld. Petitioner was approximately thirty-four years old at the time of this offense. Petitioner was ordered to pay various court costs/fines.

b. In January 2002, Petitioner contemporaneously committed her second and third disqualifying offenses, two counts of Domestic Violence Battery, first degree

misdemeanors. Petitioner failed to appear before the court and an arrest warrant was issued. Petitioner contends there was no physical violence involved in these offenses. Petitioner pled guilty to the offenses and was adjudicated guilty. Petitioner was approximately thirty-seven and nine months old at the time of this offense. Petitioner was ordered to serve thirty days in the county jail and pay various court costs/fines.

4. As a result of the background screening results, Respondent determined that Petitioner was disqualified from further employment in a position of special trust with children or the developmentally disabled.

5. On February 16, 2015, Petitioner filed her Request for Exemption. All such requests are made to the Department of Children and Families, which conducts the initial background investigation. The file was assigned to Beatriz Blanco, DCF's central region background screening coordinator.

6. By July 10, 2015, the request for exemption had been assigned to Respondent. Daniella Jones, APD's state office exemption background screening coordinator, requested additional information regarding Petitioner's drug counseling and anger management courses. The record is not clear as to which items contained in Respondent's Exemption Review file, if any, were submitted in response to Ms. Jones' request.

7. Among the items submitted by Petitioner in support of her Request for Exemption were a completed employment history record;

information related to her having obtained a certified nursing assistant license; and six letters of recommendation. The Exemption Review file also included Petitioner's written explanation of the disqualifying offenses and subsequent non-disqualifying incident<sup>1/</sup>; and copies of law enforcement, prosecution, and court documents related to the disqualifying offenses, a subsequent non-disqualifying incident, and three prior non-disqualifying incidents.

8. Petitioner responded to the best of her ability to each request for information.

9. Among the factors identified by Mr. Lewis as bases for the recommendation of denial of the exemption by staff was the perception that Petitioner's answers to questions about her past conduct were "immature," that she did not take responsibility for some of the past incidents, and that she did not show sufficient remorse for those incidents.

10. The exemption request was ultimately provided by APD staff to the director of APD, who entered the notice of denial on August 27, 2015.

#### Petitioner's Background

11. Petitioner grew up in a tough neighborhood in Brooklyn, New York. Her parents were hard drinkers, and she was raised in an environment in which the use of alcohol was accepted. By the

time she was 17 years of age, Petitioner was a drinker and a "brawler."

12. Over the years, Petitioner's issues with alcohol led her into drunken choices that resulted in the brushes with law enforcement and the criminal justice system described herein. Petitioner readily acknowledged that she had been an alcoholic during the times when she committed the disqualifying offenses.

#### The Disqualifying Offenses

##### 1998 Disqualifying Offense

13. On or about April 18, 1998, Petitioner was told by a friend that her husband was staying with a girlfriend at an apartment in a nearby town. Petitioner "had some drinks" and went to the apartment to confront her husband. She burst in on the husband and his girlfriend unannounced and became embroiled in a brawl. The police were called.

14. By the time the police officer arrived, Petitioner was gone. The police report,<sup>2/</sup> which was based on the statements of the husband and his girlfriend, indicated that Petitioner threw a conch shell at the husband, striking him in the head, whereupon she left the apartment, returning to throw a boot at the husband which missed and broke a clock. Since Petitioner was not on the scene, and based on Petitioner's testimony described herein, an inference is drawn that the husband and girlfriend painted as

exculpatory a picture as possible, omitting anything that could cast any blame on the husband for the incident.

15. Petitioner testified that the altercation was not nearly as one-sided as portrayed in the hearsay police report, with the husband holding her down and choking her at one point. She denied throwing the conch shell, but admitted throwing the boot and breaking the clock. Although the evidence suggests that Petitioner may indeed have thrown the shell, the evidence also supports that the husband was more than a passive victim.

16. Petitioner was arrested for "domestic violence (simple)." She pled nolo contendere to Battery (Domestic Violence), a first-degree misdemeanor. Adjudication of guilt was withheld, and Petitioner was ordered to pay \$620 in court costs.

#### 2002 Disqualifying Offense

17. On or about January 23, 2002, Petitioner was involved in an altercation with her boyfriend, in which her sister was involved. Petitioner was, according to the police report, "intoxicated and [ ] belligerent."

18. Petitioner had earlier received an inheritance from her mother, which she used to buy a house in Tampa, Florida. Her boyfriend moved in with her. The money soon ran out. Nonetheless, the boyfriend would not get a job, would not contribute to expenses, and would not move out.



19. Petitioner and the boyfriend got into an altercation when she tried to evict him, during which Petitioner hit him with a frozen porterhouse steak. Petitioner indicated that she selected that as her weapon of choice, since he was eating all of her steaks but not paying for them.

20. Petitioner was unclear as to the involvement of her sister, Geraldine Dreviak née Schubert, who also lived in Petitioner's house, but denied that her sister was injured during the fracas. Petitioner introduced a letter from Ms. Dreviak in which Ms. Dreviak confirmed the boyfriend's indolence, described her participation in requests that he leave, and substantiated Petitioner's testimony that Ms. Dreviak was not injured. No objection was raised as to the authenticity of the letter, though it was noted that the letter was hearsay. The letter was admitted, and is used in this proceeding "for the purpose of supplementing or explaining other evidence." § 120.57(1)(c), Fla. Stat. Thus, the evidence supports a finding that Ms. Dreviak suffered no physical injury in the altercation between Petitioner and her boyfriend.

21. As a result of the altercation, Petitioner was arrested for "simple battery." She pled guilty to Battery (Domestic Violence), a first-degree misdemeanor. Petitioner was sentenced to 30 days in jail, with credit for time served, and assessed \$678 in court costs and liens.

22. Petitioner completed or was lawfully released from all nonmonetary sanctions imposed by the courts, and all fees and costs related to the two disqualifying offenses were paid.

Other Non-Disqualifying Offenses

Properly Considered Offense

23. In September 2002, Petitioner was arrested in New York with several other persons for Criminal Possession of a Controlled Substance in the Seventh Degree, a misdemeanor. The controlled substance was cocaine. Petitioner contended she was wrongfully accused, but pled guilty to the offense and was adjudicated guilty. She testified that she just wanted to be done with the incident, and failed to appreciate the effect it would have in her later life. Petitioner was sentenced to time served and her license was suspended for six months. The incident was not only a singular and isolated event of its kind, but was Petitioner's last involvement with law enforcement.

Improperly Considered Offenses

24. As set forth in the Joint Prehearing Stipulations, Petitioner was involved in the following non-disqualifying offenses:

3. In September 1983, Petitioner committed the offense of Disorderly Conduct. Petitioner was convicted for this offense and adjudicated guilty. Court records concerning this offense were destroyed in compliance with the Criminal Court of New York City's records retention policy. Petitioner was approximately nineteen

years and five months old at the time of this offense.

4. In October 1988, Petitioner committed the offense of Criminal Possession of Stolen Property. Petitioner contends she was wrongfully accused, but pled guilty to the offense and was adjudicated guilty. Court records concerning this offense were destroyed in compliance with the Criminal Court of New York City's records retention policy. Petitioner was approximately twenty-four years and six months old at the time of this offense.

5. In December 1994, Petitioner committed the offense of Criminal Mischief with Reckless Property Damage. Petitioner pled guilty to the offense and was adjudicated guilty. Court records concerning this offense were destroyed in compliance with the Criminal Court of New York City's records retention policy. Petitioner was approximately thirty years and eight months old at the time of this offense.

25. Respondent considered it to be significant that Petitioner was unable to provide information regarding non-disqualifying incidents<sup>3/</sup> despite the fact that she had no control over New York City's records retention policy. Mr. Lewis noted that it would have been to the benefit of Petitioner to have provided records of those non-disqualifying offenses since, without those records, Respondent could not fully review that information.

26. In denying the exemption, Respondent considered the information in totality, including the non-disqualifying offenses committed from 1983 through 1994. Petitioner's failure to provide

a "detailed explanation" of those offenses was a factor in Respondent's decision.

27. Section 435.07(3)(b) plainly provides that:

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. (emphasis added).

28. Considering evidence of non-disqualifying crimes committed prior to the disqualifying offenses exceeded the powers and duties granted by the Legislature. Thus, Respondent's consideration of non-disqualifying offenses that occurred prior to the conviction for the disqualifying offenses was error.

#### Evidence of Rehabilitation

29. Petitioner's last disqualifying offense occurred on January 23, 2002. Petitioner's last involvement with law enforcement of any kind occurred in September 2002. Petitioner has no arrests or involvement with law enforcement of any kind since then.

30. At some point, the passage of time itself is evidence of rehabilitation. While by no means dispositive, the passage of almost 14 years since the last disqualifying offense is substantial evidence of Petitioner's rehabilitation.

31. Petitioner showed contrition and remorse for the disqualifying offenses.

32. Petitioner has been married since 2008 to a man that she describes as supportive. Thus, the stresses of the abusive relationships that led to her disqualifying offenses have been alleviated.

33. Petitioner initially provided letters from six persons who were acquainted with Petitioner, two of whom testified at the final hearing. The letters were sincere, left the impression that they were written by persons with knowledge of Petitioner's present character, and were consistent with and corroborated by the testimony of witnesses at the hearing.

34. When Petitioner filed her Request for Administrative Hearing, she provided letters of support from four additional persons who knew Petitioner, one of whom testified at the final hearing. As with the previous letters, the letters were sincere, and fully consistent with the witness testimony taken during the hearing.

35. Petitioner has been licensed as a certified nursing assistant, though the date of her licensure was not specified. She has not been able to practice under her license due to the issues that are the subject of this proceeding.

36. Petitioner testified convincingly that she has turned her life around, and is not the same person that she was when she was a drinker.

Petitioner's Work History

37. The Employment History Record form that is part of the Request for Exemption requests "employment history for the last three years." Petitioner provided an employment history that indicated employment from May 11, 2011, to the date of the filing of the Request for Exemption. During that period, Petitioner was employed to perform custodial duties at the First Baptist Church of Weeki Wachee Acres, and worked as a cook for functions held at the church. Her work ethic and performance was, and is, exemplary.

38. In addition to the foregoing, Petitioner has attended to the needs of Billy Bowling on a volunteer basis for the past five or six years. Mr. Bowling, who is 49 years of age, is significantly developmentally disabled. At the hearing, he displayed obvious affection for Petitioner. Mr. Bowling's mother, Patsy Bowling Anderson, testified that, at one time, the family employed a licensed direct service provider who was unacceptably rude, and upset Mr. Bowling. Since then, Petitioner is the only person outside of her family that Mrs. Anderson allows to care for Mr. Bowling. Mrs. Anderson testified that she had complete trust that Petitioner would do nothing that would result in harm to her

son. Her testimony was substantiated by that of Major Anderson. The testimony of the Bowling/Anderson family was credible and compelling, and is accepted as convincing evidence of Petitioner's rehabilitation.

39. In addition to her care for Billy Bowling, Major Anderson and Mrs. Anderson testified that Petitioner, on her own time and without compensation, provides care and assistance to elderly neighbors, and to children at their church, all without incident. Their testimony is credited, and is accepted as further evidence of Petitioner's rehabilitation.

Additional Clear and Convincing Evidence of Rehabilitation

40. Mr. Lewis testified that when disqualifying offenses involve violence, Respondent looks for evidence of anger management counseling. The information provided to the APD director suggested that Petitioner had undergone no anger management courses that would mitigate the possibility of a recurrence of the incidents that occurred in 1998 and 2002. The lack of such evidence was, in this case, a significant factor in the recommendation of denial to the director.

41. Although the evidence of counseling in the Exemption Review file was spotty, the evidence adduced at hearing from Petitioner and Mrs. Anderson was convincing that Petitioner is an active, and successful, participant in Alcoholics Anonymous. Petitioner acts as a sponsor for others and on occasion, has taken

it on herself to conduct meetings when group leaders have failed to appear. She has been sober for more than ten years.

42. Since both of Petitioner's disqualifying offenses were largely fueled by alcohol, ongoing participation in Alcoholics Anonymous is a more appropriate and effective means of rehabilitation than a class in "anger management."

43. Petitioner has been fortunate to find herself in what, by all accounts, is an embracing and supportive community. The individuals testifying on her behalf expressed their firm conviction that Petitioner had turned her life around, with Mrs. Anderson, who has known Petitioner for 14 years, characterizing the change as "remarkable." None of the witnesses could identify any reason to suggest that Petitioner would not be able to provide capable and safe services to children and developmentally disabled persons.

#### Ultimate Findings of Fact

44. Petitioner meets the objective criteria for an exemption from disqualification established in section 435.07(1).

45. When the decision was made to deny the exemption, it appears that APD staff provided the director with information as to non-disqualifying offenses that occurred prior to the disqualifying offenses. It is not known how, or whether, that impermissible information may have colored the director's decision. Nonetheless, an evaluation of Petitioner's suitability



for an exemption should be made without consideration of those earlier events.

46. The credible testimony and evidence in this case established, clearly and convincingly, that Petitioner has been rehabilitated from her disqualifying offenses, and that she currently presents no danger to the vulnerable population served by Respondent if she is allowed to be employed as a direct service provider. The concerns expressed by Respondent in formulating its intended action, without the benefit of the hearing testimony, particularly those regarding her lack of "anger management" classes and her lack of remorse for her actions, were effectively refuted by the credible testimony at hearing.

#### CONCLUSIONS OF LAW

47. The Division of Administrative Hearings has jurisdiction over the subject matter of the proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1).

48. Section 435.04, provides, in pertinent part, that:

(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.

\* \* \*

(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.

49. The disqualification of Petitioner was based on two disqualifying offenses, i.e., Battery (Domestic Violence) that occurred in April 1998, and Battery (Domestic Violence) (one incident with two charges) that occurred in January 2002, each of which is a first-degree misdemeanor.

50. Section 435.07 establishes a process by which persons with criminal offenses in their backgrounds that would disqualify them from acting in a position of special trust working with children or vulnerable adults may seek an exemption from disqualification. That section provides:

435.07 Exemptions from disqualification.--  
Unless otherwise provided by law, the provisions of this section shall apply to exemptions from disqualification for disqualifying offenses revealed pursuant to background screenings required under this chapter, regardless of whether those disqualifying offenses are listed in this chapter or other laws.

(1) The head of the appropriate agency may grant to any employee otherwise disqualified from employment an exemption from disqualification for:

\* \* \*

2. Misdemeanors prohibited under any of the statutes cited in this chapter or under similar statutes of other jurisdictions for which the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court.

\* \* \*

(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.

51. The statute must be strictly construed against the person claiming the exemption. Heburn v. Dep't of Child. & Fam., 772 So. 2d 561 (Fla. 1st DCA 2000).

52. The abuse of discretion standard of review set forth in section 435.07(3)(c) has been described as follows:

If reasonable men 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. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

\* \* \*

The discretionary power that is exercised by a trial judge is not, however, without limitation . . . . [T]he trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner.

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).

53. It is now established that:

although the ultimate legal issue to be determined by the ALJ in a proceeding under section 435.07(3)(c) is whether the agency head's intended action was an "abuse of discretion," the ALJ is to evaluate that question based on the facts determined from the evidence presented at a de novo chapter 120 hearing.

J.D. v. Dep't of Child. & Fams., 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013).

54. As found above, Petitioner proved her rehabilitation, clearly and convincingly, with substantial evidence that was not available to Respondent in formulating its intended action to deny Petitioner's exemption request. Notably, the evidence addressed Mr. Lewis's stated safety concern for APD clients, which had been based on Petitioner's failure to undertake and complete anger management counseling. That concern was put to rest by credible, clear, and convincing testimony regarding Petitioner's involvement with Alcoholics Anonymous. In addition, the testimony of Billy Bowling and his family provided substantial evidence that Petitioner poses no risk to developmentally disabled persons as a result of her disqualifying offenses.

55. Furthermore, the weight previously given to offenses that occurred prior to the disqualifying offenses was misplaced, as consideration of such prior offenses is not authorized under section 435.07(3)(b).

56. The record shows that in the almost 14 years since her last disqualifying event, and the more than 13 years since her last run-in with the law, Petitioner has steered clear of trouble, and has taken meaningful steps to change her life for the better. Her years of sobriety have removed the predominant cause of her past troubles from her life.

57. Respondent's denial of the exemption was formulated without the benefit of the compelling testimony of Petitioner's four very credible witnesses, all of whom emphatically rejected any notion that Petitioner poses any risk to children, to persons with developmental disabilities, or to any other vulnerable persons. To the contrary, those witnesses spoke to Petitioner's "caring, compassionate heart," her remarkable change since her past improprieties, and to their firm conviction that she would be exemplary in her care of those in need.

58. To be clear, APD has a heightened interest in ensuring that the vulnerable population it serves is not abused, neglected, or taken advantage of. In light of that mission, the Legislature has justifiably imposed a heavy burden on those seeking approval to serve those persons when they have disqualifying events in their past.

59. Notwithstanding the foregoing evidence of rehabilitation, the record reflects that Petitioner's disqualifying offenses were ones involving drunken and tumultuous conduct. It was not an abuse of discretion for that fact to be given significant weight. However, as set forth in the Findings of Fact herein, the incidents were not entirely unprovoked, with the first the result of a confrontation with an unfaithful and philandering husband, and the second the result of an effort to evict an unemployed and freeloading boyfriend.

60. While it may not have been an abuse of discretion for the Agency to initially deny Petitioner's request for an exemption, the clear and convincing evidence adduced at the final hearing leads the undersigned to conclude that Petitioner has demonstrated her rehabilitation from the disqualifying offenses, and does not currently present a danger to vulnerable clients of APD if employment as a direct care service provider for developmentally disabled persons is allowed. In light thereof, it would constitute an abuse of discretion for Respondent to deny her request for an exemption from disqualification.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Agency for Persons with Disabilities approving Petitioner, Catherine Schubert Rivera's, request for an exemption from disqualification.

DONE AND ENTERED this 10th day of November, 2015, in Tallahassee, Leon County, Florida.



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E. GARY EARLY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of November, 2015.

ENDNOTES

<sup>1/</sup> Petitioner's written explanations were offered by Respondent in its case-in-chief. As the statements were offered by Respondent against Petitioner, they are subject to an exception from the hearsay rule as established in section 90.803(18), Florida Statutes, and may be accepted as substantive evidence. As noted by Professor Ehrhardt, "[t]here is no requirement under section 90.803(18), or in the reported decisions that the admissions be against a party's interest . . . . An exculpatory statement of a party is admissible against the party making the statement under section 90.803(18)." Charles W. Ehrhardt, Ehrhardt's Florida Evidence § 803.18, at 923-925 (2010 ed.).

<sup>2/</sup> The undersigned acknowledges that the police report admitted in evidence includes witness statements indicating that Petitioner threw the conch shell at her husband, Mr. Barnes, striking him in the head. The police report is hearsay. However, since this case is not criminal in nature, the report falls within the public records hearsay exception in section 90.803(8), Florida Statutes.

The public record exception is limited to "matters observed pursuant to duty imposed by law as to matters which there was a duty to report." The officer who wrote the report did not observe Petitioner throwing the shell, or engaging in any other form of improper behavior towards her husband. Likewise, the officer was not on the scene to observe or memorialize any actions that the husband may have taken against Petitioner. Records that are not based on the observations of the public official, but "rely on information supplied by outside sources" do not fall within the public records and reports exception to the hearsay rule. Lee v. Dep't of HRS, 698 So. 2d 1194, 1201 (Fla. 1997); see also M.S. v. Dep't of Child. & Fams., 6 So. 3d 102, 104 (Fla. 4th DCA 2009) ("records of DCF could not be admitted into evidence as a business record because the records contained witness statements made to investigators, the substance of which was not within the personal knowledge of the agency employee. On the same rationale, the records could not be admitted as a public record under section 90.803(8)."). Thus, although the direct observations of the officer set forth in the report are admissible as an exception to the hearsay rule, the



hearsay-within-hearsay statements made by the alleged witness do not fall within the hearsay exception.

The officer did observe that the husband's head had abrasions and cuts that appeared to be consistent with having been hit with the shell. Given those observations, it is not unreasonable to believe that Petitioner did, in fact, throw the shell at her husband. However, even though the report is admissible, the determination of the weight to be given the report, as is the case with all evidence, remains within the province of the trier of fact.

Given the credible testimony of Petitioner, the undersigned concludes that the brawl that took place at the husband's apartment, though precipitated by Petitioner's uninvited and drunken appearance, was not the one-sided affair described in the police report, but involved some actions by the husband against Petitioner.

<sup>3/</sup> Respondent argued in its Proposed Recommended Order that the destruction of the court records by the state of New York made it difficult to determine whether certain of the offenses were disqualifying offenses. However, Respondent entered into Joint Prehearing Stipulations, among which was that "[i]n April 1998, Petitioner committed her first disqualifying offense, Domestic Violence Battery, a first degree misdemeanor." (emphasis supplied).

It is well established that:

The primary purpose of a pretrial stipulation is to provide the parties an opportunity to state and simplify the issues to be determined by the [tribunal]. To effectuate this purpose, parties are encouraged to enter into stipulations to limit the issues for consideration and eliminate unnecessary proof. Because due process rights are implicated, a party has a right to rely upon the issues as framed in the pretrial statement.

\* \* \*

The joint stipulation of the parties is binding on the [tribunal], and a finding by the [tribunal] at variance with the

stipulation will be overturned. (citations omitted).

Marin v. Aaron's Rent To Own, 53 So. 3d 1048, 1049-1050 (Fla. 1st DCA 2010); see also Seminole Elec. Coop., Inc. v. Dep't of Env'tl. Prot., 985 So. 2d 615, 621 (Fla. 5th DCA 2008) (As a general rule, and absent a showing of fraud, misrepresentation or mistake, stipulations are binding on the parties who enter them, including administrative agencies participating in administrative proceedings and the courts.).

Thus, by stipulation of Respondent, it is found that the April 1998 offense was Petitioner's first disqualifying offense, and the offenses committed in New York in 1983, 1988, and 1994 were not disqualifying offenses.

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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.