

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WHITNEY BROWN,

Petitioner,

vs.

Case No. 16-0066EXE

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 March 1, 2016, at video teleconferencing sites in Orlando and Tallahassee, Florida.

APPEARANCES

For Petitioner: Whitney Brown, pro se
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Sanford, Florida 32771-2019

For Respondent: Jeannette L. Estes, Esquire
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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 December 16, 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 the results of a background screening report finalized on October 6, 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. The Agency's clients are a vulnerable population, consisting of those individuals whose developmental disabilities include intellectual disability, autism, spina bifida, Prader-Willi Syndrome, cerebral palsy, and/or Down Syndrome. They often have severe deficits in their abilities to complete self-care tasks and communicate their wants and needs. Also, they are at a heightened risk of abuse, neglect, and exploitation because of developmental disabilities. Therefore, employment as a direct service provider to Agency clients is regarded as a position of special trust.

3. Petitioner is a 27-year-old female who seeks to qualify for employment with Trust and Hope, a service provider regulated by the Agency. To work in a position of special trust, an individual must undergo a background screening. Petitioner's screening identified a history of criminal offenses, including a disqualifying offense in 2009. Accordingly, on July 29, 2015, Petitioner filed a request for exemption from disqualification, which triggered the instant proceeding. See Resp. Ex. D.

4. Before a decision was made by the Agency, Petitioner's request for an exemption was reviewed by a Department of

Children and Families (DCF) screener who compiled a 46-page report entitled "Exemption Review" dated October 6, 2015. See Resp. Ex. B. The packet of information contains Petitioner's Request for Exemption, Exemption Questionnaire, various criminal records, and letters from 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 Deputy Regional Operations Manager in Orlando, who reviewed it and then made a preliminary recommendation to deny the application.

5. In a letter dated December 16, 2015, the Agency's Director notified Petitioner that in light of 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.

6. The disqualifying offense occurred on January 17, 2009, when Petitioner, then 20 years of age, was arrested in Sanford, Florida, for Burglary with Assault and Battery, a violation of section 810.02(2)(a), Florida Statutes, and Aggravated Battery, a violation of section 784.045. Both offenses are felonies and constitute disqualifying offenses under section 435.04(2). On April 13, 2009, an Information was filed by the State Attorney

charging Petitioner with Burglary of Dwelling with an Assault and Battery. The other charge was not prosecuted.

7. On August 12, 2009, Petitioner pled nolo contendere to Burglary of a Structure. The court withheld adjudication, placed her on probation for 24 months, and imposed a number of conditions that applied during the probationary period, including a prohibition against having contact with the victim due to the nature of the crime. She later received a Certificate of Eligibility to Petition for a Seal or Expunge Order from the Florida Department of Law Enforcement to seal the charges. Petitioner contends that because she successfully completed probation, and the arrest has been sealed, it should not be considered.

8. After her August 2009 conviction, Petitioner was arrested for a number of offenses. On July 3, 2009, she was arrested for Aggravated Battery Using a Deadly Weapon (a knife), but no information was filed. On July 12, 2012, Petitioner was arrested for Neglect Child without Great Harm, but no information was filed. On December 21, 2013, she was arrested for Battery Domestic Violence, but no information was filed. In addition, she has a string of traffic violations beginning in May 2012 and continuing through July 2014. The driving record of a caregiver is relevant because she may be asked to transport a client in a motor vehicle.

9. At hearing, Petitioner acknowledged that she was arrested on multiple occasions after the disqualifying offense, but contended that because she was never prosecuted for those crimes, they should not be considered. However, in determining whether an individual has demonstrated rehabilitation, the Agency may also consider whether the applicant, after the conviction for the disqualifying offense, has been "arrested for or convicted of another crime, even if that crime is not a disqualifying offense." § 435.07(3)(b), Fla. Stat. Therefore, the Agency may consider subsequent arrests, even if they are not prosecuted. At the same time, it considers "the history of the [applicant] since the incident, or any other evidence or circumstances indicating that the [applicant] will not present a danger if employment or continued employment is allowed." § 435.07(3)(a), Fla. Stat.

10. Petitioner is currently working in the telemarketing field. The Exemption Report indicates that she worked as a patient care tech with John Knox Village Center from 2011 to 2013 and as an assistant manager at a Dunkin Donuts store from 2008 until 2010. Prior to that, she was employed for three years as a bank teller at a bank in Sanford. Petitioner received an Associate Degree in Science in Medical Assisting from Southern Technical College in June 2011 and is currently enrolled in classes to earn a degree in psychology. In 2006,

she was certified by Homestead Job Corps Center in Phlebotomy, EKG, Vitals, Patient Care, and Medical Terminology.

11. Through testimony by its Deputy Operations Manager for the Orlando office, the Agency explained its rationale for denying the application. As explained above, the Agency regulates direct care providers who are at a higher risk of abuse than others, and who are most vulnerable. Because many clients are unable to adequately communicate if they are hurt or abused, the Agency requires that workers must be trustworthy and have a background to ensure that clients are treated properly. Although Petitioner had only one disqualifying offense, and all other arrests were not prosecuted, in making its decision, the Agency considered Petitioner's pattern of conduct since 2009 and her multiple arrests.

12. The Exemption Questionnaire requires an applicant to give a detailed version of the events underlying the disqualifying offense in 2009. The Agency considered Petitioner's explanation to be extremely brief and substantially different from the police report. It simply stated that her "best friend [Ms. Meadows] and [Ms. Meadows'] boyfriend [Mr. Herring] got into an altercation b/c he got caught cheating. I got brought into it for him not to get arrested she changed and put it all on me, thus me going to jail. (This is the only charges that I have obtained.)" Resp. Ex. A., p. 003.

At hearing, Petitioner acknowledged that after arriving at Mr. Herring's apartment, Petitioner began arguing with him and then struck him in the head with a table leg, causing an injury to Mr. Herring. The victim then pressed charges against Petitioner. Although Petitioner indicated in the Exemption Questionnaire that no one had ever suffered any "real harm" from her actions, she acknowledged at hearing that Mr. Herring suffered an injury to his head during the incident. Police reports indicate that on two other occasions, individuals suffered physical harm due to her aggressive behavior.

13. The Exemption Questionnaire also requires an applicant to provide a detailed explanation of any subsequent arrests, even for non-disqualifying offenses. Petitioner's explanation of subsequent arrests in 2010, 2012, and 2013, which were not prosecuted, are also very brief, and they omit facts found in the police reports. See Resp. Ex. A, pp. 3-4. The Agency's characterization of her explanations as "half-truths" and "incomplete" is a fair one.

14. Petitioner denied that there were stressors in her life at the time of the disqualifying offense. Other than stating that she was in the wrong place at the wrong time, she was falsely accused, or she was "child minded," Petitioner did not express remorse or take responsibility for any of her actions. She has not received counseling for any of her past

behaviors. Finally, in her Questionnaire, she denied any drug or alcohol history or use. This statement conflicts with a DCF report dated October 17, 2011, which revealed that Petitioner tested positive for Tetrahydrocannabinol (THC). Petitioner did not dispute this report.

15. Petitioner presented the testimony of three witnesses. All testified that she "is a good person." Despite having knowledge of Petitioner's entire criminal record, one witness described her as a "peaceful person," but qualified that she was always peaceful with him.

16. Given Petitioner's lack of specificity regarding her criminal offenses, her lack of accountability, and the pattern of conduct since her disqualifying offense, there is less than clear and convincing evidence of rehabilitation.

CONCLUSIONS OF LAW

17. 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.

18. 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.

19. 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.

20. Petitioner is to be commended for wanting to help others as a direct service provider with Trust and Hope. For the reasons previously found, however, she has failed to set forth clear and convincing evidence of her rehabilitation. Even assuming 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 the Director 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).

21. Given the serious nature of the disqualifying offense, the conflicting information about that arrest, a lack of accountability, and the pattern of Petitioner's conduct since the disqualifying offense, 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 22nd day of March, 2016, 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 22nd day of March, 2016.

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.