

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOANNE DAWSON,

Petitioner,

vs.

Case No. 16-0661EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

A final administrative hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015),^{1/} before Robert L. Kilbride, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on March 21, 2016. The final hearing was conducted by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: JoAnne Dawson, pro se
3001 Boston Avenue
Fort Pierce, Florida 34947

For Respondent: Llamilys Maria Bello, Esquire
Agency for Persons with Disabilities
201 West Broward Boulevard, Suite 305
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

The issues in this case are: (1) whether Petitioner has been rehabilitated from her disqualifying offense in 2003, and, if so, (2) whether the intended action to deny Petitioner's exemption request pursuant to section 435.07(3), Florida Statutes, would constitute an abuse of discretion by the agency.

PRELIMINARY STATEMENT

In a letter dated January 15, 2016, Respondent, Agency for Persons with Disabilities ("Respondent" or "APD"), notified Petitioner, JoAnne Dawson, 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, Respondent referred the matter to DOAH to assign an ALJ to conduct the final hearing.

A final hearing was held before the undersigned by video teleconference on March 21, 2016, with both parties present. Petitioner testified on her own behalf and also called her husband, Mason McBride, to testify. She offered some additional letters of support marked as Petitioner's Exhibit A. Respondent presented the testimony of Jerry Driscoll, APD's regional operations manager for the Southeast Region of Florida. Respondent's Composite Exhibits A through H were admitted into evidence without objection. At the hearing, the undersigned

granted Respondent's request for official recognition of section 435.07 and related provisions.

A Transcript of the final hearing was filed with the Clerk of DOAH on April 8, 2016. Respondent timely submitted a Proposed Recommended Order. Petitioner submitted a timely post-hearing letter. Both submissions were 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 47-year-old female seeking to qualify, pursuant to section 435.07, 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. APD is the state agency responsible for licensing and regulating the employment of persons in positions of trust. Specifically, the mission of APD includes serving and protecting the vulnerable population, including children or adults with developmental disabilities.

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

4. The screening revealed that, in January 2003, Petitioner committed the disqualifying offense of battery on an emergency medical care provider, a third-degree felony. Petitioner was 35 years old at the time of this offense. She pled nolo contendere, and adjudication of guilt was withheld.

5. On August 5, 2003, she was placed on 24 months of probation and was ordered to pay applicable court fines and costs.

6. On September 21, 2004, the court issued an order of modification of probation adding the following conditions to her probation: 24 days in the county jail with credit time served of 24 days, probation conditions to remain in effect, and an additional fine of \$65.00, public defender fee.

7. Petitioner's account of the disqualifying charge of Battery on an Emergency Medical Care Provider as reported on the Exemption Questionnaire is that she was falsely accused and that, in fact, it was the attending hospital nurse that mistreated her and hit her with a thermometer three times. Petitioner alleged in her account, and maintained at hearing, that she was falsely accused of this crime and that her account of the facts was ignored by the police officers who arrested her. Petitioner admits she was taking medicine for anxiety and depression and went to the hospital because she was suffering from an anxiety

attack at home and was hoping to get a prescription for more medications.

8. From the testimony of APD's witness, Jerry Driscoll, it appeared that APD also properly considered the following arrests and convictions which occurred subsequent to the 2003 felony conviction:

- a. Domestic violence/battery arrest 2008--case dismissed.
- b. Violation of felony probation in 2004--sentenced to 24 days in the county jail.

9. APD also considered an arrest in 1987 for possession of cocaine and marijuana (dismissed), a misdemeanor conviction in 1989 for petty theft, as well as multiple civil traffic infractions and a driving while license suspended conviction predating 2003.^{2/}

10. Driscoll testified that Petitioner's application, which he reviewed, together with all of the court records submitted by Petitioner, was submitted on September 30, 2015.

11. The arrest in 2008 pertained to a physical altercation and fight that Petitioner had with her father's neighbor. That incident did not result in a separate criminal charge or conviction, and the case was nolle prossed or dismissed.

12. Driscoll was concerned, however, that on Petitioner's exemption application, she represented that there were "no injuries" to the victims of any acts of violence by her.^{3/}

13. Regarding the arrest and convictions that occurred prior to 2003 and an arrest in 2008, Driscoll testified that he did not believe that Petitioner ever accepted responsibility for those incidents. For instance, regarding the domestic battery arrest in 2008, Petitioner only admitted that she "touched" her daughter on the forehead, whereas her daughter indicated that she was slapped several times in the face by Petitioner.

14. Driscoll also found it problematic that Petitioner is not currently employed and, apparently, has not diligently pursued any employment for several years.

15. He also noted that despite her certificate of completion of domestic violence training in 1998, she ignored this training and was subsequently arrested or convicted for multiple violent acts.

16. During his review, Driscoll considered three letters of reference from friends, but found it significant that there were no letters of reference from any current or former employers.

17. The Department of Children and Families, a separate state agency, initially reviewed Petitioner's application and also concluded that she was not sufficiently rehabilitated from the 2003 felony.

18. Driscoll concluded his testimony by stating several reasons why he had recommended a denial of her request for an exemption:

a. Petitioner's criminal history, including a felony conviction for striking an emergency medical care provider.

b. Petitioner's aggressive behavior towards others including incidents, arrests, and convictions both before and after 2003.

c. Petitioner did not appear to take responsibility for any of the criminal conduct, including the convictions. Rather, she shifted the blame to other parties involved.^{4/}

d. Driscoll concluded that Petitioner had not proven rehabilitation and that it was significant that several domestic violence incidents occurred after she had been trained and taught how to avoid domestic violence.

e. Driscoll also felt denial of Petitioner's exemption was warranted since the people she would be serving were very disabled and vulnerable.

f. Driscoll was very concerned that these multiple incidents of domestic violence created a "red flag" to him.

g. Driscoll did not believe that she possessed the amount of patience and caring required to care for the disabled and vulnerable population.

19. Petitioner has three biological children and a step-daughter.

20. She obtained a high school diploma from Westwood High School in St. Lucie County, Florida.

21. She testified that Willis Rolle wanted her to work as a home health aide for his disabled son.^{5/}

22. Petitioner testified that she had worked eight years for Family Health Preservation in the 1990s as a home health aide. Inexplicably, however, this information was not provided in her exemption application, nor was any independent evidence or records provided from that company.

23. Petitioner testified at length about a ten-year period of time, from 1991-2001, during which she endured lots of struggles and stressors in her life. Those struggles dealt primarily with a wayward daughter and a substance abuse problem her husband was suffering from during that period.^{6/}

24. After prompting by the undersigned, Petitioner cited the following reasons why she felt that she had been rehabilitated:

- a. She is not on depression medication anymore.
- b. Her husband is clean and recovered from his substance abuse problem.
- c. Her daughter now has her own place to live.
- d. Essentially, the "stressors" in her life have been gone for approximately ten years.
- e. She is more relaxed now because she has fewer responsibilities and can focus.

25. Mason McBride, Petitioner's husband, characterized her as a loving and caring person who insisted on taking care of her elderly father to avoid his placement in a nursing home. McBride emphasized that she lovingly cares for other family members as well.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 435.07(3).

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(2):

(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:

* * *

(i) Chapter 784, relating to assault, battery, and culpable negligence, if the offense was a felony.

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

30. 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 criminal convictions cited in chapter 435, if the applicant has completed or been lawfully released from confinement, supervision, or nonmonetary conditions imposed by the court. In this case, Petitioner has been released from her supervision.^{7/}

31. 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.").

32. More specifically, Petitioner has the burden of setting forth clear and convincing evidence of her rehabilitation from the felony conviction:

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.

33. The "clear and convincing evidence" standard requires that the evidence be found credible, the facts to which the witnesses testify be distinctly remembered, the testimony be precise and explicit, and the witnesses be lacking in confusion as to the facts in issue. Importantly, 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).

34. 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., 114 So. 3d at 1127.

35. 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).

36. Since this administrative hearing under chapter 120 was "de novo," this abuse of discretion should be judged and based on all the evidence adduced during the hearing before the undersigned. § 120.57(1)(k), Fla. Stat. This analysis may, therefore, include facts and observations not previously considered by Respondent. 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 Respondent is measured. See J.D., 114 So. 3d at 1127, 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 n.5 (Fla. 1st DCA 1988).

37. After determining the relevant facts at the hearing, the ALJ is then required, pursuant to section 435.07(3)(c), to determine whether the agency's intended action is an abuse of discretion. This analysis necessarily involves both the applicant's professed rehabilitation and the basis for denial of

the exemption request by the agency. The ALJ should only disturb the denial if no reasonable person could take the agency's position in light of the determined facts. Cf. Goin v. Comm'n on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995) (under the usual Administrative Procedure Act structure, hearing officer must reach ultimate findings of fact). Under this structure, the agency head is then able to base the final decision as to whether or not an exemption should be granted on facts and observations determined through procedures satisfying the right to a hearing afforded by the Administrative Procedure Act.

THE FACTORS TO BE CONSIDERED UNDER SECTION 435.07(3)

Circumstances Surrounding the Criminal Incident

38. Under this factor, the actions by Petitioner in 2003 at the hospital should be viewed objectively and take into account why she was there and her state of mind at the time. Since she was hospitalized and confined to a hospital bed due to an anxiety attack at home, the true circumstances surrounding her altercation with the emergency medical care provider are difficult to discern or sort out. Petitioner says she did not hit the nurse. There was no testimony or statement from the victim. Nonetheless, upon advice of counsel, she entered a plea to the felony and thereby acknowledged that she improperly struck or touched the nurse, albeit under circumstances where the judge felt it was appropriate to withhold adjudication of guilt. However, on balance, this

factor weighs slightly in favor of the agency, if for no other reason than she entered a plea to the disqualifying felony.

Time Period that Has Elapsed Since the Incident

39. The intervening period of approximately 12 years is a significant period of time and weighs in favor of Petitioner.

Nature of the Harm Caused to the Victim

40. There was no evidence or statement from the victim to describe the type or extent of injuries to the emergency medical care provider. Therefore, in the absence of any evidence, some weight is given to this factor in Petitioner's favor.

History of the Employee Since the Incident

41. Since the incident in 2003, there is evidence that Petitioner has acted in a violent manner on at least two (2) occasions. Her probation was violated in August 2004 for fighting with a neighbor who was bitten by Petitioner (Petitioner claims she bit the woman in self-defense). Additionally, there was evidence of a heated altercation with her daughter in 2008, which involved the daughter being slapped several times by Petitioner. These multiple and repeated instances of aggression and violence are troubling, and this factor weighs heavily in favor of a finding that she has not been rehabilitated.^{8/}

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

42. Respondent's conclusion that Petitioner has not accepted full responsibility for her actions before and after 2003 and tends to shift the blame to others, raises legitimate concerns that she could present a danger to or be incapable of handling disabled or vulnerable children or adults in her care.

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

44. Furthermore, in light of the evidence developed and the undersigned's observations at the final hearing, it would not constitute an abuse of discretion for Respondent to deny Petitioner's 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 confirm its previous denial and enter a final order denying Petitioner's application for an exemption from disqualification.

DONE AND ENTERED this 28th day of April, 2016, in
Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of April, 2016.

ENDNOTES

^{1/} References to Florida Statutes are to the 2015 version, unless otherwise indicated.

^{2/} The undersigned concludes that the criminal arrests and convictions predating 2003 and the civil traffic infractions subsequent to 2003 should not have been considered. Section 435.07(3)(b) expressly limits the consideration to "crimes" occurring "subsequent to" the conviction for the disqualifying offense. Likewise, civil traffic offenses are not "crimes" and should not be considered.

^{3/} This was contradicted by Petitioner's own testimony at the hearing and her written statement that she did, in fact, bite the neighbor.

^{4/} The undersigned's observations of Petitioner's demeanor and mannerisms at the hearing reinforce those concerns.

^{5/} Rolle did not testify and in his unsigned letter dated February 5, 2016, there were no details of what type of position he was holding open for her. There were several other general letters of recommendation from individuals who were not called to testify.

^{6/} The relevance of that information, while unfortunate, was limited and did not help the undersigned to understand whether or not she had been rehabilitated since 2003.

^{7/} The undersigned notes, however, that she violated her court probation in 2004.

^{8/} As Driscoll put it, this aggressive behavior raises "red flags."

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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.