

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SHAMIKA WILLIAMS

Petitioner,

vs.

Case No. 16-1006EXE

AGENCY FOR PERSONS WITH  
DISABILITIES,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this matter before the Division of Administrative Hearings duly-designated Administrative Law Judge Diane Cleavinger on April 14, 2016, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Shamika Williams  
91 Henry Drive  
Gretna, Florida 32332

For Respondent: Tracie Hardin, Esquire  
Agency for Persons with Disabilities  
4030 Esplanade Way, Suite 380  
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue in this proceeding is whether Petitioner should be granted an exemption from employment disqualification.

PRELIMINARY STATEMENT

On February 6, 2016, Petitioner received a letter from the Agency for Persons with Disabilities (Department, Agency or Respondent) that her request for exemption from disqualification from employment had been denied based upon the lack of clear and convincing evidence of rehabilitation since conviction of a disqualifying offense for domestic violence. Petitioner disagreed with the Department's denial and filed a Request for Administrative Hearing. Thereafter, the matter was referred to the Division of Administrative Hearings for hearing.

At hearing, Petitioner testified in her own behalf. She did not offer any exhibits into evidence. Respondent presented the testimony of one witness and introduced six exhibits into evidence.

After the hearing, Respondent filed a Proposed Recommended Order on May 4, 2016. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. The Agency for Persons with Disabilities provides services to disabled clients. As part of its responsibilities, the Agency oversees the background screening process of caregivers, as well as any exemptions should a caregiver be disqualified by his or her background. Towards that end, the

Agency's primary concern in considering requests for exemption is the health and safety of the clients served by the Agency.

2. Petitioner applied for an exemption from disqualification pursuant to section 435.07, Florida Statutes (2015). The application included two letters of recommendation regarding Petitioner's character. Those letters were from people who knew Petitioner in the community or around town, but were neither detailed nor informative about the extent of their knowledge, the length of time the writers had known Petitioner, or any rehabilitation efforts by Petitioner. Additionally, the application for exemption included Petitioner's explanation of the events surrounding her multiple criminal convictions. In her explanation and at hearing, Petitioner admitted her criminal history but attempted to blame the other parties involved in the events that led to the police being summoned. Although she claimed remorse in her application, Petitioner did not appear particularly remorseful about her criminal past.

3. Ms. Lynne Daw received and reviewed Petitioner's exemption application packet prepared by the Department of Children and Families. The exemption packet contained the application; the requestor's criminal history; information and questionnaires from the applicant; educational background and references; any documents that the applicant wished to submit on his or her behalf, as well as information that the background

screening office had obtained, such as Florida Department of Law Enforcement reports; and other law enforcement documents.

Ms. Daw testified to the steps followed and individuals who reviewed Petitioner's request for an exemption. The evidence showed that the Department complied with its review process and ultimately determined to deny Petitioner's request for an exemption from disqualification.

4. Petitioner began her criminal activity on January 11, 2009, when at a local bar in Gretna, she engaged in a verbal altercation with her "live-in" boyfriend who was also the father of her son. The altercation caused both to be escorted from the bar, where the affray continued in the parking lot with the police eventually being summoned. During the altercation, Petitioner attempted to pepper spray the boyfriend by reaching around the police officer who was between them with a can of pepper spray in her hand. Petitioner was arrested and entered a plea of nolo contendere to domestic assault, a second-degree misdemeanor, on January 28, 2009. The plea was accepted by the court. Adjudication was withheld and a fine of \$200.00 was imposed. From the court records, Petitioner completed the terms of her sentence in 2009 when she paid the fine. Petitioner attributed the altercation to the bad break-up she and her boyfriend were going through at the time or had just gone through.

5. The conviction for domestic violence was the only disqualifying offense in regards to Level 2 background screening. However, around February 15, 2013, Petitioner was intoxicated at a local bar "screaming at the top of her lungs" and threatening to discharge a weapon. The police were again summoned to the bar. Petitioner continued to engage in a verbal altercation with another woman over some past love interest and threw her keys at her. She was arrested, placed in handcuffs, slipped out of them and continued to yell. Ultimately, she was charged with disorderly conduct and resisting an officer without violence.

6. Petitioner entered a plea of nolo contendere to the charge of disorderly conduct. The court accepted the plea, withheld adjudication and imposed a fine. From the court records, Petitioner has made payments on the imposed fine, but has not paid the fine in full and has not completed her sentence. At hearing, Petitioner blamed the incident on the other women and indicated that somehow such behavior was less serious because the people involved all knew each other. More troubling is that Petitioner denied using and/or misusing alcohol in her application for exemption when her record clearly demonstrates that she does use alcohol to the point that it has led to at least one criminal conviction.

7. The evidence showed that Petitioner, who was 35 at the time of hearing, was 32 years of age at the time of her last conviction, three years ago, and 28 at the time of her disqualifying domestic violence conviction, seven years ago. She currently works as a security officer and holds a certificate as a certified nursing assistant. Evidence showed that she has not received any exemptions from disqualification for these professions. Although Petitioner claims that she now only goes home to take care of her three children, the evidence did not demonstrate that she has removed herself from the rowdy drinking and bar life she has lived in the past.

8. In this case, the good character of Petitioner was not attested to by character witnesses, who knew the Petitioner on both a personal and professional level. As indicated, the two reference letters were not helpful on the issue of character or rehabilitation.

9. As noted, the evidence showed that Petitioner's disqualifying crime occurred seven years ago. However, the evidence was insufficient to demonstrate that, since her conviction, she has rehabilitated herself to the extent she has either controlled her use of alcohol or her anger. To her credit, Petitioner is taking care of her young disabled daughter. But, such evidence covering only a short period of time does not on these facts constitute clear and convincing

evidence of rehabilitation. Given these facts, the denial of the exemption is consistent with and supported by the evidence adduced at the hearing. The Department did not abuse its discretion in denying an exemption to Petitioner. As such, the Petitioner's request for an exemption from disqualification should be denied.

#### CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

11. Section 110.1127(3) (a), Florida Statutes, provides that "[a]ll positions in programs providing care to children, the developmentally disabled, or vulnerable adults for 15 hours or more per week . . . are deemed to be persons and positions of special trust or responsibility, and require employment screening pursuant to chapter 435, using the level 2 standards set forth in that chapter."

12. Section 435.04 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.

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(2) The security background investigations under this section must ensure that no person 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 . . . ;

13. Under the "level 2 standards" for screening set forth in chapter 435, individuals, such as Petitioner, who have been convicted of domestic violence offenses specified in section 435.04 are disqualified from working in "positions of special trust or responsibility." § 435.04(3), Fla. Stat. However, the statutes allow that the Agency may grant exemptions from employment disqualification. § 435.07(1), Fla. Stat. (2015).

14. In this case, Petitioner is seeking an exemption from disqualification from holding a position of trust.

15. The procedure for such exemption 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.

16. An applicant seeking an exemption under section 435.07 must demonstrate to the agency head that the conditions prescribed by the statute to obtain an exemption have been met. In interpreting the statute to ascertain exactly what the precise contours and extent of these conditions are, any reasonable doubt must be resolved against the applicant. See Heburn v. Dep't of Child. & Fams., 772 So. 2d 561, 563 (Fla. 1st DCA 2000) ("[Because it allows] [a]n exemption from a statute,

enacted to protect the public welfare, [section 435.07] is strictly construed against the person claiming the exemption.").

17. 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.").

18. The "clear and convincing evidence" standard requires that the evidence be found credible, the facts to which the witnesses testify must be distinctly remembered, the testimony must be precise and explicit, and the witnesses must be lacking in confusion as to the facts in issue. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re: Graziano, 696 So. 2d 744, 753 (Fla. 1997). 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); see also In re Adoption of Baby E.A.W.,

658 So. 2d 961, 967 (Fla. 1995) ("The evidence [in order to be clear and convincing] must be sufficient to convince the trier-of-fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp., Inc. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

19. 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., supra.

20. 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).

21. Significantly, and since administrative hearings under chapter 120 are "de novo," this abuse of discretion should be judged and based on all the evidence adduced during the hearing

before the Administrative Law Judge. § 120.571(1)(k), Fla. Stat. This analysis may, therefore, include facts and observations not previously considered by the agency. 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 the agency is measured. See J.D. v. Fla. Dep't of Child. & Fams., 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).

22. To even be considered for an exemption under section 435.07, an applicant who is disqualified as a result of disqualifying offenses, must show, as a threshold matter that, for felonies, "three years have elapsed since [he or she] has completed or been lawfully released from confinement, supervision, or sanction for [each] disqualifying offenses; or, for misdemeanors, the applicant has completed or been lawfully released from confinement, supervision, or sanction for [each] disqualifying offenses." § 435.01(1)(a) and (b).

23. In addition to showing that the waiting period prescribed by subsection (1)(a) and (b) of the statute has

expired, a disqualified applicant must also provide clear and convincing evidence of his or her "rehabilitation," as that term is described in the statute. This is a "heavy burden." Cf. Fla. Bd. of Bar Exam'rs re J.J.T., 761 So. 2d 1094, 1096 (Fla. 2000) ("[D]isbarment alone is disqualifying unless [the applicant] can show clear and convincing evidence of rehabilitation and disbarred attorneys should be readmitted only if they can meet this heavy burden.") (citation and internal quotation marks omitted).

24. In this case, Petitioner has passed the waiting period established for exemption eligibility under the statute. However, based on the totality of evidence, Petitioner has not shown by clear and convincing evidence that she is rehabilitated. § 435.07(3(a), Fla. Stat. Given that Petitioner has not demonstrated by clear and convincing evidence that she has been rehabilitated, the Agency's denial of an exemption from disqualification from employment should be upheld.

#### RECOMMENDATION

Based upon 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 an exemption from employment disqualification.

DONE AND ENTERED this 31st day of May, 2016, in  
Tallahassee, Leon County, Florida.

*Diane Cleavinger*

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DIANE CLEAVINGER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of May, 2016.

COPIES FURNISHED:

Shamika Williams  
91 Henry Drive  
Gretna, Florida 32332

Tracie Hardin, Esquire  
Agency for Persons with Disabilities  
4030 Esplanade Way, Suite 380  
Tallahassee, Florida 32399-0950  
(eServed)

David De La Paz, Agency Clerk  
Agency for Persons with Disabilities  
4030 Esplanade Way, Suite 380  
Tallahassee, Florida 32399-0950  
(eServed)

Richard D. Tritschler, General Counsel  
Agency for Persons with Disabilities  
4030 Esplanade Way, Suite 380  
Tallahassee, Florida 32399-0950  
(eServed)

Barbara Palmer, Director  
Agency for Persons with Disabilities  
4030 Esplanade Way, Suite 380  
Tallahassee, Florida 32399-0950  
(eServed)

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.