

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROXANNA MARCHAN,

Petitioner,

vs.

Case No. 16-1312EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

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RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016),^{1/} on May 16, 2016, by video teleconference at sites in Fort Myers and Tallahassee, Florida.

APPEARANCES

For Petitioner: Roxanna Marchan
241 San Carlos Boulevard, No. 22
Fort Myers Beach, Florida 33931

For Respondent: Jeannette L. Estes, Esquire
Agency for Persons with Disabilities
Suite 422
200 North Kentucky Avenue
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STATEMENT OF THE ISSUES

The issues in this matter are whether Petitioner has shown, by clear and convincing evidence, that she is rehabilitated from

her disqualifying offense, and, if so, whether Respondent's action to deny Petitioner's request for exemption from disqualification constitutes an abuse of discretion.

PRELIMINARY STATEMENT

On June 28, 2015, Petitioner, Roxanna Marchan ("Petitioner"), applied for a Request for Exemption from disqualification from Respondent, Agency for Persons with Disabilities (the "Agency").

By correspondence, dated February 4, 2016, the Agency notified Petitioner that it denied her Request for Exemption pursuant to section 435.07, Florida Statutes.

On March 1, 2016, Petitioner timely requested an administrative hearing to challenge the Agency's action. On March 9, 2016, the Agency referred the matter to the Division of Administrative Hearings ("DOAH") and requested assignment to an Administrative Law Judge ("ALJ") to conduct an evidentiary hearing pursuant to sections 120.569 and 120.57(1).

The final hearing was held on May 16, 2016. Petitioner testified on her own behalf. Petitioner submitted Exhibits 1 and 2, which were admitted into evidence. The Agency presented the testimony of Jeffrey Smith, regional operations manager for the Agency. Agency Exhibits 1 through 4 were admitted into evidence without objection.

A court reporter recorded the final hearing. However, the parties did not order a transcript.

At the close of the hearing, the parties were advised of the ten-day timeframe following the final hearing for filing post-hearing submittals. Both parties submitted post-hearing submittals which were duly considered in preparing of this Recommended Order.

FINDINGS OF FACT

1. Petitioner seeks employment as a direct service provider for persons with developmental disabilities. Petitioner desires to work with Project Choice, LLC, a service provider the Agency regulates.

2. The Agency is the state agency responsible for regulating the employment of persons in positions of special trust as direct service providers. See § 393.0655(1), Fla. Stat. A "direct service provider" is a person who has direct contact with and provides services to an Agency client. See § 393.063(11), Fla. Stat.

3. The Agency's clients are a vulnerable population consisting of those persons who are eligible for services and support for developmental disabilities. See § 393.063, Fla. Stat. Agency clients often have severe deficits in their ability to complete self-care tasks and communicate their wants and needs. Agency clients are at a heightened risk of abuse,

exploitation, and neglect because of their developmental disabilities and inability to self-preserve. Consequently, employment as a direct service provider is regarded as a position of special trust.

4. The Agency relies on the Department of Children and Families, Background Screening Unit (the "Department"), to initially receive and screen requests for exemption from disqualification from individuals seeking employment as direct service providers.

5. On June 28, 2015, Petitioner submitted a Request for Exemption, with attachments, to the Department. The Department subsequently forwarded Petitioner's application to the Agency for review.

6. To qualify as a direct service provider, Petitioner must comply with the employment screening requirement established in chapter 435. See § 393.0655(1), Fla. Stat. Petitioner's background screening revealed a criminal offense. In September 1978, Petitioner was arrested for felony possession of marijuana in the State of Texas. Petitioner pled guilty and was given a suspended sentence. The court deferred adjudication of guilt and placed Petitioner on two years of probation.

7. At the final hearing, the Agency also produced evidence of several non-disqualifying criminal offenses Petitioner committed subsequent to her 1978 drug arrest. Petitioner was

arrested for or convicted of the following crimes: 1) a misdemeanor conviction for Possession of Marijuana in 2005; 2) Bail Jumping and Failure to Appear in 2008; 3) Bail Jumping and Failure to Appear in 2010; and 4) Failure to Appear in 2013.

8. In accordance with section 435.04(2), Petitioner's criminal misconduct, as a "disqualifying offense," disqualified her from working as a direct service provider for persons with developmental disabilities. Consequently, in order to be employed in such a capacity, Petitioner was required to seek an exemption from disqualification from the Agency. Therefore, Petitioner submitted to the Agency a Request for Exemption from her disqualifying offenses as provided in section 435.07.

9. On February 4, 2016, the Agency issued a letter notifying Petitioner that it denied her Request for Exemption. The Agency denied Petitioner's application because it did not believe Petitioner submitted clear and convincing evidence of her rehabilitation.

10. At the final hearing, Petitioner testified on her own behalf. Petitioner expressed her desire to work as a caregiver for disabled persons. Petitioner described herself as a giving, helpful, and responsible person. Petitioner further explained that she is seeking a change in her career in light of her recent health challenges. She is also the sole supporter of her family. Petitioner believes that a job as a health care assistant for

persons with developmental disabilities will allow her to take care of her family, as well as accommodate her physical limitations.

11. Regarding her disqualifying offense, Petitioner explained that her 1978 felony arrest for marijuana possession occurred when she was only 19 years old. She explained that she had little life experience after growing up in a small town, and she had just started college in Houston. Her boyfriend asked her to carry a suitcase for him in her car on a drive back to college. Unfortunately for Petitioner, a state trooper stopped her car for speeding. Even more unfortunately for Petitioner, the state trooper searched her trunk. The state trooper found her boyfriend's suitcase. And, inside it, the state trooper found marijuana. Petitioner claimed that she had no knowledge of the contents of her boyfriend's suitcase. Despite her lack of knowledge, Petitioner pled guilty to the charge.

12. Regarding her four non-disqualifying offenses, Petitioner explained that her 2005 conviction for marijuana possession also involved a car trip near Houston. She disclosed that a friend asked her to carry some Christmas presents in her car. In a lamentable case of déjà vu, a state trooper stopped her car for speeding. The state trooper searched her trunk. The state trooper found her friend's Christmas presents. And, inside a present, the state trooper found marijuana. Once again,

Petitioner stated that she had no knowledge of the contents of her friend's presents. Despite her lack of knowledge, Petitioner pled guilty to the charge.

13. Regarding the multiple bail jumping and failure to appear convictions, Petitioner explained that she had problems knowing when her court dates were scheduled.

14. In expressing that she has rehabilitated from her disqualifying offense, Petitioner asserts that she has moved past her criminal misconduct, and her record is now clear. She has satisfied all fees, fines, and sentences from her criminal charges. Petitioner stated that she has learned not to expose herself to these bad situations. Furthermore, her crimes did not result in harm to any victims or property.

15. Petitioner testified that there are no present stressors in her life, and she relies on her faith for inner guidance and strength. Petitioner has had a stable work history for the past six years. Petitioner also represented that she has taken several Agency training courses in order to become better prepared to work with disabled persons. Additionally, at the final hearing, Petitioner produced evidence that she voluntarily attended a faith-based, alcohol rehabilitation program in 2006. She sought assist from the rehabilitation program based on her concerns with her alcohol consumption. Petitioner asserted that the rehabilitation program was very helpful and successful.

16. Petitioner also provided four letters of reference attesting to her good character. The letters were written by various individuals, including some in notable positions, who have known Petitioner for several years. The letters describe Petitioner as hard-working, caring, and nurturing.

17. At the final hearing, the Agency presented the testimony of Jeffrey Smith, regional operations manager for the Suncoast Region. Mr. Smith oversees all services to persons with developmental disabilities in his jurisdiction. Mr. Smith's responsibilities include reviewing requests for exemption from disqualifying offenses.

18. Mr. Smith explained that the Agency serves vulnerable individuals who are highly susceptible to abuse, exploitation, and neglect due to their developmental disabilities. Many of the tasks direct service providers offer Agency clients involve financial, personal, and/or social necessities. Therefore, the Agency must ensure that direct service providers are detail-oriented and trustworthy. When considering a request for an exemption, the Agency must weigh the benefit against the risk of endangerment to its clients.

19. Mr. Smith described the Agency's process when reviewing a request for exemption from disqualification. Mr. Smith relayed that the Agency considers the disqualifying offense itself, the circumstances surrounding the offense, the nature of any harm

caused to a victim, the history of the employee since the incident and, finally, any other evidence indicating that the individual will present a danger if employment is allowed.

20. Specifically regarding Petitioner's application, Mr. Smith explained that the Agency reviewed all of the documentation Petitioner provided in her Request for Exemption, including the various records documenting Petitioner's criminal history, her work experience, and her character reference letters. In addition to her criminal records, the Agency reviewed Petitioner's driving record. Mr. Smith advised that a direct service provider will often be tasked to transport clients. Mr. Smith noted that Petitioner's driving record included several traffic related violations. He commented that these records show a pattern of questionable judgment by Petitioner.

21. Mr. Smith further testified that the Agency considered Petitioner's evidence of rehabilitation, including Petitioner's statements submitted with her Request for Exemption and the letters of recommendation supporting her application.

22. Mr. Smith explained that, based on its review, the Agency determined that Petitioner's criminal history indicates a pattern of poor judgment and a lack of acceptance of full responsibility for her actions. Petitioner's repeated involvement with the criminal court system reflects a lack of

remorse for her misconduct. In addition, the Agency found that Petitioner failed to disclose the full and complete details of her criminal offenses in her application. Mr. Smith testified that inconsistencies in Petitioner's Exemption Questionnaire, including her unreported attendance at the alcohol rehabilitation program, called her truthfulness into question. Finally, Mr. Smith was concerned about the nature of Petitioner's offenses (disqualifying and non-disqualifying), as well their close proximity in time with Petitioner's application.

23. Upon careful consideration of the record evidence, the undersigned finds that Petitioner did not demonstrate, by clear and convincing evidence, that she is rehabilitated from her disqualifying offense from 1978. While Petitioner has made commendable strides to change her life, her repeated criminal proceedings since 1978 raise serious concerns, and some hesitancy, in finding that she has sufficiently established that she should be employed in a position of special trust with persons with developmental disabilities. Despite the fact that Petitioner's disqualifying and non-disqualifying offenses did not result in harm to another, they do demonstrate a failure to exercise good judgment and responsibility that cannot be discounted.

24. Therefore, based on the evidence set forth, Petitioner has not met her burden of demonstrating that she has

rehabilitated from her past disqualifying offense or proven that the Agency should grant her request for exemption from disqualification under sections 393.0655 and 435.07.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 393.0655(4), Florida Statutes.

26. To be employed as a direct service provider for persons with developmental disabilities, Petitioner must comply with certain background screening requirements. As explained in section 393.0655:

(1) MINIMUM STANDARDS. – The agency shall require level 2 employment screening pursuant to chapter 435 for direct service providers who are unrelated to their clients, including support coordinators, and managers and supervisors of residential facilities or comprehensive transitional education programs licensed under this chapter and any other person, including volunteers, who provide care or services, who have access to a client's living areas, or who have access to a client's funds or personal property. Background screening shall include employment history checks as provided in s. 435.03(1) and local criminal records checks through local law enforcement agencies.

* * *

(2) EXEMPTIONS FROM DISQUALIFICATION. – The agency may grant exemptions from disqualification from working with children or adults with developmental disabilities only as provided in s. 435.07.

27. Section 435.04 establishes the level 2 screening standard and states, in pertinent part:

(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.

* * *

(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:

* * *

(ss) Chapter 893, relating to drug abuse prevention and control, only if the offense was a felony or if any other person involved in the offense was a minor.

28. Petitioner's criminal history includes a plea of guilty to a charge of felony drug possession in violation of the Texas Controlled Substance Act of 1970, section 4.12. This offense is similar to chapter 893 relating to drug abuse prevention and

control. Accordingly, Petitioner's criminal offense from 1978 is a "disqualifying offense" which prevents her from working as a direct service provider. Therefore, if Petitioner desires to work with children or adults with developmental disabilities, she must seek an exemption from her disqualifying offense from the Agency under section 435.07. See § 393.0655(2), Fla. Stat.

29. Pursuant to section 435.07(1)(a), Petitioner is eligible to seek an exemption from disqualification "for which at least 3 years have elapsed since the applicant has completed or been lawfully released from confinement, supervision, or sanction for the disqualifying felony." An individual seeking an exemption "must demonstrate by clear and convincing evidence that the employee should not be disqualified from employment." Section 435.07(3)(a) further states that the individual bears "the burden of setting forth clear and convincing evidence of rehabilitation." Section 435.07 states, in pertinent part:

Exemptions from disqualification. - Unless otherwise provided by law, the provisions of this section 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)(a) The head of the appropriate agency may grant to any employee otherwise disqualified from employment an exemption from disqualification for:

1. Felonies for which at least 3 years have elapsed since the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court for the disqualifying felony[.]

* * *

For the purposes of this subsection, the term "felonies" means both felonies prohibited under any of the statutes cited in this chapter or under similar statutes of other jurisdictions.

* * *

(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.

30. In reviewing a request for exemption from disqualification, the ALJ is charged with making the factual determination whether, based on the evidence adduced in a de novo hearing conducted pursuant to section 120.57(1), Petitioner has shown rehabilitation by clear and convincing evidence. See § 435.07(3)(a), Fla. Stat.

31. Clear and convincing evidence is a heightened standard that requires more proof than a mere preponderance of the evidence. Clear and convincing evidence requires that the evidence "must be found to be 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. 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).

32. If the ALJ finds that Petitioner has met her burden of proving rehabilitation by clear and convincing evidence, the ALJ also determines whether the Agency head's intended action to deny

Petitioner's request for exemption constitutes an abuse of discretion. J.D. v. Dep't of Child. and Fams., 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013); § 435.07(3)(c), Fla. Stat.

33. An agency abuses its discretion "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." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); See also J.D. v. Dep't of Child. and Fams., 114 So. 3d at 1130 (stating that under the abuse of discretion standard, "[i]f reasonable men could differ as to the propriety of the action taken by the [lower tribunal], then the action is not unreasonable and there can be no finding of an abuse of discretion.") Therefore, if reasonable persons could differ as to the appropriateness of the Agency's decision to deny Petitioner's request for an exemption, the Agency's decision is not unreasonable and, thus, not an abuse of discretion.

34. In determining the ultimate legal issue of whether the agency head's action was an "abuse of discretion," the ALJ "is to evaluate that question based on the facts determined from the evidence presented at the de novo chapter 120 hearing." J.D. v. Dep't of Child. and Fams., 114 So. 3d at 1132, 1133. However, even if the ALJ determines that the agency head's proposed action constitutes an abuse of discretion, the agency is not bound by

the ALJ's determination, although the agency's review is circumscribed by the standards in section 120.57(1)(1). Id.

35. As discussed above, the undersigned determines that Petitioner did not meet her burden of proving, by clear and convincing evidence, that she is rehabilitated from her 1978 disqualifying offense for felony possession of marijuana. Based on her testimony at the final hearing, Petitioner appears genuine in her endeavor to turn her life around. Petitioner recognizes that she needs to address her past misconduct. She also voluntarily sought counseling to ward off potential alcohol abuse issues. Petitioner is also to be commended for her efforts to increase her knowledge of Agency-related matters and clientele through training. However, the evidence Petitioner produced to establish her rehabilitation did not rise to the level of clear and convincing in order for the undersigned to conclude, without hesitancy, that the Agency should allow her to be employed as a direct service provider.

36. It is further determined, based on the record evidence, that a "reasonable person" could have reached the Agency's conclusion that Petitioner's Request for Exemption should be denied. In determining whether an applicant has set forth clear and convincing evidence of rehabilitation, the agency head is to consider matters such as "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. In addition, the agency head may consider whether the applicant has been arrested for or convicted of another crime subsequent to the conviction for the disqualifying offense for which the exemption is being sought, even if the new crime is not a disqualifying offense. § 435.07(3)(b), Fla. Stat.

37. The Agency acknowledges that Petitioner has initiated steps to rehabilitate her life. The Agency also recognizes Petitioner's sincere interest in becoming a home health care assistant for those with disabilities. However, while Petitioner has not committed another disqualifying offense since her 1978 felony drug possession, she has engaged in repeated instances of unlawful behavior. Although Petitioner claims that these incidents were unknowing or unintentional, a "reasonable person" could take the Agency's position that Petitioner has not shown sufficient responsibility to alleviate the Agency's concerns for the risk she may pose to those vulnerable individuals the Agency serves.

38. Therefore, the Agency's conclusion that Petitioner has not achieved sufficient rehabilitation is not unreasonable, and

the Agency's action in denying Petitioner's request for exemption from disqualification does not constitute an abuse of discretion. Accordingly, the Agency's denial of Petitioner's request for exemption from disqualification should be upheld.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Agency for Persons with Disabilities, enter a final order denying Petitioner's request for an exemption from disqualification from employment.

DONE AND ENTERED this 17th day of June, 2016, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
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Filed with the Clerk of the
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ENDNOTE

^{1/} All statutory references are to Florida Statutes (2016), unless otherwise noted.

COPIES FURNISHED:

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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.