

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DWAYNE GASKIN,

Petitioner,

vs.

Case No. 16-3377EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

On August 23, 2016, a video teleconference hearing was held at locations in West Palm Beach and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dwayne Gaskin, pro se
2310 Jo Hayward Drive
Fort Pierce, Florida 34946

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

STATEMENT OF THE ISSUE

The issue is whether Petitioner should be exempt from disqualification from employment in a position of trust, pursuant to section 435.07, Florida Statutes (2016).^{1/}

PRELIMINARY STATEMENT

In a letter signed by the director of the Agency for Persons with Disabilities (Respondent or the Agency), dated May 27, 2016, Mr. Dwayne Gaskin (Petitioner or Mr. Gaskin) was notified that his request for exemption from disqualification from employment was denied, based upon the Agency's determination that Mr. Gaskin had failed to submit clear and convincing evidence of his rehabilitation. On May 31, 2016, Mr. Gaskin requested a formal hearing. On June 16, 2016, the Agency referred the matter to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the final hearing.

At hearing, Respondent presented the testimony of Petitioner and that of Mr. Gerry Driscoll, regional operations manager for the Southeast Region at the Agency. Respondent's Exhibits A through K were received into evidence without objection, with the caveat that many contained hearsay. Petitioner testified on his own behalf and offered no exhibits.

The proceeding was transcribed, but neither party ordered a copy of the transcript. At the request of Respondent at hearing, the deadline to file proposed recommended orders was extended to September 9, 2016. Respondent timely filed a Proposed Recommended Order, which was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented at hearing, the following findings of fact are made:

1. The Agency is the state entity which supports vulnerable persons with various developmental disabilities. The Agency contracts with direct service providers and is responsible for regulating the employment of persons serving in positions of trust with these providers.

2. Vision Builders One, Inc., is a service provider for the Agency. Mr. Gaskin applied with Vision Builders One, Inc., to become a caregiver, a position of trust which requires completion of level 2 background screening.

3. The Department of Children and Families conducts initial screening on behalf of the Agency. Background screening and local criminal records revealed a significant history of involvement with law enforcement for Mr. Gaskin.^{2/}

4. In response to inquiries concerning possession of cocaine on December 2, 1988, Mr. Gaskin stated:

I was young, not thinking straight, and decided to experiment with selling illegal drugs. I was arrested in a known location for having three cocaine rocks. I was placed on probation.

5. On February 8, 1989, Mr. Gaskin entered a plea of nolo contendere to possession of a controlled substance, cocaine, a felony of the third degree.

6. In response to inquiries concerning violation of probation on May 31, 1990, Mr. Gaskin stated:

I didn't want to result back to selling illegal drugs. I was unable to find employment; therefore, I didn't have money to pay my probation fees. I violated and was sentenced to 18 months in prison.

7. In response to inquiries concerning resisting an officer without violence on April 9, 1993, Mr. Gaskin stated:

I do not recall this arrest or charge. Once researched, the clerk was unable to locate court documents for this charge.

8. In response to inquiries concerning contempt of court regarding child support on November 15, 1993, Mr. Gaskin stated:

I was unemployed and unable to pay the child support purge.

9. In response to inquiries concerning possession of cocaine on February 15, 1994, Mr. Gaskin stated:

I was hanging out with a few guys, and one of them left cocaine in the backseat of my car, unknowingly to me. This charge against me was dropped.

10. In response to inquiries concerning cocaine possession on February 5, 1995, Mr. Gaskin stated:

I was parked in my car and had cocaine in my possession when the law officers approached my car. I received one year house arrest probation, six months weekend jail, and 75 hours of community service work, in addition to court fines and suspended driver license.

11. On June 19, 1995, Mr. Gaskin entered a plea of nolo contendere to possession of a controlled substance, cocaine, a felony of the third degree.

12. In response to inquiries concerning a domestic battery on July 20, 2000, Mr. Gaskin stated:

My wife and I were separated. I stayed away for four weeks and when I returned to our home, my wife had a male friend in the house. I was upset and she wouldn't let me in our home, so I knocked the door in to enter. When entering, she and I exchanged hurtful words and we struck each other. She called police and I was arrested. Those charges were downsized to lesser charges. I was sentenced to one year probation, attend and complete an anger management class.

13. On January 31, 2001, Mr. Gaskin entered a plea of nolo contendere to trespass of an occupied dwelling, a misdemeanor of the first degree and to domestic battery, a misdemeanor of the first degree.

14. In response to inquiries concerning contempt of court for violation of a protective injunction regarding domestic violence on September 3, 2000, Mr. Gaskin stated:

My bondsman neglected to notify me of my court date; therefore, I didn't appear on day of court. When informed of the contempt of court, I turned myself in, so no arrest record. The bondsman notified the court of negligence and the contempt of court charges were dropped.

15. In response to inquiries concerning failure to appear on March 1, 2002, Mr. Gaskin stated:

I do not recall this arrest or charge. I will be following up on researching to receive clarification that this was actually me. Once the research is completed I will provide a detailed statement.

16. In response to inquiries concerning violation of probation for trespassing in an occupied dwelling March 1, 2002, Mr. Gaskin stated:

I was violated because my wife made an untrue statement to the police that I was harassing her. I called to ask for visitation with my son and we got into a verbal argument.

17. In response to inquiries concerning driving while license suspended on July 24, 2010, Mr. Gaskin stated:

I got a traffic ticket leaving work which violated my probation. I notified my probation officer and turned myself in, so there wasn't an arrest. My probation was re-instated; I then paid it off and completed it to its entirety.

18. Since September 10, 2002, Mr. Gaskin has been released from all confinement, supervision, and non-monetary sanctions imposed for the disqualifying offenses he committed. Since April 14, 2016, Mr. Gaskin has been released from all monetary conditions.

19. Mr. Gerry Driscoll is the regional operations manager for the Southeast Region in the Agency. He has served in his current position for 3 years and has been employed with the Agency for 17 years. Mr. Driscoll credibly testified that the Agency has responsibility for a very vulnerable population, many

of whom are unable to later tell others about the actions of their caregivers. This population is thus very susceptible to exploitation. Mr. Driscoll noted that the Agency must consider any prior instance of violence very carefully.

20. While in his written submission to the Agency Mr. Gaskin stated that he never caused any harm or injury to any victim, at hearing he admitted that he caused injury to his wife when he hit her after breaking into their home and injury to others in selling them controlled substances, testimony that is credited.

21. Mr. Gaskin submitted three character reference letters to the Agency stating generally that he is hardworking, intelligent, and committed.

22. Mr. Gaskin further stated that he was very remorseful and admitted he had made poor choices in his life in the past. He explained that he just wants an opportunity to be a productive citizen, to work, and to take care of his family.

23. Mr. Gaskin seems sincere in his desire to care for vulnerable persons, and asks for a chance to work with them to demonstrate that he is rehabilitated. However, the statute requires that rehabilitation be shown first through other work history and by additional means: only then may an exemption to disqualification be granted.

24. While Mr. Gaskin stated that he is rehabilitated, he offered little evidence to clearly demonstrate that. He completed some courses toward certification as a firefighter in 2004-2005, but has evidently not pursued that further. He completed some courses required as a condition of probation, but has not participated in other counseling or coursework.

25. Mr. Gaskin's work history in the past decade, a very important element in demonstrating rehabilitation, has been very "sketchy," as Mr. Driscoll testified. Mr. Gaskin indicated that his last employment ended in July 2014. He was employed by Manpower Staffing Services doing temporary work for about 14 months in several jobs such as maintenance worker, demolition worker, and equipment/maintenance technician. He also worked at United Parcel Service for a couple of months in 2010.

26. Although Mr. Gaskin has not had steady work in recent years, he noted that when needed, he assists his father-in-law with handyman work, his son with his entertainment business, his cousin with his bail bonds business, and his nephew with his marketing business. He noted that he also assists at his church.

27. Passage of time is a factor to be considered in determining rehabilitation, and the last disqualifying offense was many years ago. However, Mr. Gaskin's history since his disqualifying offenses continues to reflect minor incidents and

does not contain sufficient positive indications of rehabilitation.

28. Petitioner failed to prove by clear and convincing evidence that he is rehabilitated and that he will not present a danger if he is exempted from his disqualification from employment in a position of trust.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over this case pursuant to sections 120.57(1) and 435.07(3)(c), Florida Statutes.

30. Petitioner's disqualification limits the employment opportunities that are available to him. He will be unable to work at Vision Builders One, Inc., or with similar providers in a position of trust, unless an exemption is granted. Petitioner has demonstrated standing to maintain this proceeding.

31. Level 2 employment screening standards set forth in section 435.04(2)(ss) provide that a person who has pled nolo contendere to a felony offense under chapter 893, relating to drug abuse prevention and control, is disqualified from employment in a possession of trust.

32. At the time of Petitioner's offense of possession of cocaine on December 2, 1988, cocaine was listed as a controlled substance under schedule II in section 893.03(2)(a)4., Florida Statutes (Supp. 1988). Under section 893.13(1)(f), possession of

a controlled substance was then a third-degree felony.

Petitioner's plea of nolo contendere to felony possession of cocaine disqualified him from employment in a position of trust.

33. At the time of Petitioner's offense on February 5, 1995, cocaine was still listed as a controlled substance in the same section of the Florida Statutes. Under section 893.13(6)(a), Florida Statutes (1993), possession of a controlled substance was a third-degree felony. Petitioner's plea of nolo contendere to felony possession of cocaine disqualified him from employment in a position of trust.

34. Level 2 employment screening standards set forth in section 435.04(3) also provide that a person who has entered a plea of nolo contendere to any offense that constitutes domestic violence as defined in section 741.28, Florida Statutes, is disqualified from employment in a position of trust.

35. Under section 741.28, "domestic violence" includes any battery causing physical injury to one family or household member by another family or household member. Under this statute, "family or household member" includes spouses and persons who have a child in common.

36. The offense to which Petitioner pled nolo contendere on January 31, 2001, was a battery that resulted in injury to his spouse and mother of his child, a household member, and constituted domestic violence.

37. Petitioner's plea of nolo contendere to battery in violation of section 784.03, Florida Statutes (2000), disqualifies him from employment in a position of trust.

38. Under section 435.07(1), the head of the Agency may grant an exemption from disqualification for offenses for which the applicant has been released from confinement, supervision, or nonmonetary condition imposed by the court. An applicant is eligible for exemption consideration immediately after release from court sanctions imposed for misdemeanors and three years after release from sanctions imposed for felonies. Petitioner meets this requirement with respect to each of his disqualifying offenses and is eligible for consideration for an exemption.

39. In order to receive an exemption, the applicant has the burden of proving that he is rehabilitated. Under section 435.07(3), Petitioner must prove rehabilitation by clear and convincing evidence.

40. The prohibition from employment in positions of trust of individuals convicted of disqualifying offenses is intended to protect the public welfare, and the statute must be strictly construed against the person claiming exemption. Heburn v. Dep't of Child. & Fams., 772 So. 2d 561, 563 (Fla. 1st DCA 2000).

41. The clear and convincing standard of proof has been described by the Florida Supreme Court:

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) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

42. Under section 435.07(3)(a), evidence of rehabilitation may include, but is 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 applicant 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.

43. Section 435.07(3)(c) 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."

44. Although the statutory language prescribes a "standard of review," it also provides that the review is of the agency's "intended" action and makes applicable the "hearing procedures set

forth in chapter 120," which call for the issuance of a recommended order back to the agency head for final agency action.

45. The statute thus combines elements of a de novo evidentiary hearing with elements of review of earlier action. While providing for consideration of new evidence, the statute requires that some deference be given to the agency's intended action. The recommended order must contain a legal conclusion as to whether the agency head's intended action to deny the exemption constitutes an "abuse of discretion." J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127, 1131 (Fla. 1st DCA 2013) (ultimate legal issue to be determined by Administrative Law Judge is whether the agency head's intended action was an "abuse of discretion" based on facts as determined from the evidence presented at a de novo chapter 120 hearing).

46. 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).

47. While Petitioner provided some evidence of rehabilitation, he failed to prove by clear and convincing evidence that he is rehabilitated or that he will not present a danger if he is exempted from his disqualification from employment in a position of trust.

48. Under the facts determined here, a reasonable person could conclude that Petitioner should not be granted an exemption from disqualification. The Agency's determination to deny Petitioner an exemption from his disqualification does not constitute an abuse of discretion.

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 Mr. Dwayne Gaskin's application for exemption from disqualification.

DONE AND ENTERED this 21st day of September, 2016, in Tallahassee, Leon County, Florida.

F. Scott Boyd

F. SCOTT BOYD
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 21st day of September, 2016.

ENDNOTES

^{1/} All statutory references are to the 2016 Florida Statutes, except as otherwise indicated. Petitioner's application is governed by the law in effect at the time the final order is issued. See Ag. for Health Care Admin. v. Mt. Sinai Med. Ctr., 690 So. 2d 689, 691 (Fla. 1st DCA 1997) (agency must apply law in effect at the time it makes its final decision).

^{2/} The criminal history in the record shows arrests and convictions for Dwayne Leonard Wallace, Dwayne Lenard Andrews, and Dwayne Leonard Andrews; however, it is uncontroverted that it all pertains to Mr. Gaskin. Mr. Gaskin admits it is his history. Information in the record indicates that his name was changed to Gaskin in July 2013.

COPIES FURNISHED:

Llamilys Maria Bello, Esquire
Agency for Persons with Disabilities
201 West Broward Boulevard, Suite 305
Fort Lauderdale, Florida 33301
(eServed)

Dwayne Gaskin
2310 Jo Hayward Drive
Fort Pierce, Florida 34946

Lori Oakley, Acting 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.