

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHIMIKA KING,

Petitioner,

vs.

Case No. 16-3378EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, Administrative Law Judge Yolonda Green of the Division of Administrative Hearings ("the Division") held a final hearing in this case on August 19, 2016, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Shimika King, pro se
3009 Grove Street
Tallahassee, Florida 32301

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

STATEMENT OF THE ISSUES

The issues in this case are whether Petitioner has demonstrated by clear and convincing evidence that she is rehabilitated from disqualifying offenses, and whether

Respondent's intended agency action to deny her request for an exemption from disqualification is an abuse of discretion.

PRELIMINARY STATEMENT

In a letter dated May 27, 2016, the Agency for Persons with Disabilities ("Respondent" or "APD") notified Petitioner, Shimika King ("Petitioner" or "Ms. King"), that her request for an exemption from disqualification from employment in a position of trust was denied. As a result of the agency action, Petitioner was determined to be not eligible to be employed, licensed, or registered in positions having direct contact with children or developmentally disabled people served in programs regulated by the APD. The basis for the denial of exemption was that Petitioner had not submitted clear and convincing evidence of rehabilitation from past disqualifying criminal offenses. In response to the denial, Petitioner timely requested a final administrative hearing. On June 16, 2016, Respondent referred this case to the Division for a final hearing.

On June 22, 2016, a Notice of Hearing scheduling the final hearing for August 10, 2016, was issued. On July 7, 2016, Respondent filed an unopposed motion for continuance. The motion was granted and the final hearing was rescheduled for August 19, 2016. On July 26, 2016, the parties filed their Joint Prehearing Statement. The stipulated facts have been incorporated in this Recommended Order.

On August 2, 2016, this matter was transferred from Administrative Law Judge Gary Early to the undersigned. On August 19, 2016, the hearing proceeded as scheduled, with both parties present. At the hearing, Respondent presented testimony of Lynne Daw, Respondent's regional operations manager of the Northwest region. Respondent's Exhibits 1 through 5 were admitted into evidence and the undersigned took official recognition of Exhibits 6 and 7. Petitioner testified on her own behalf but presented no evidence.

Respondent ordered a transcript of the final hearing. The one-volume Transcript was filed with the Division on September 12, 2016. Respondent timely filed a Proposed Recommended Order and Petitioner timely filed a post-hearing statement. Both post-hearing submittals have been considered in preparation of this Recommended Order.

Unless otherwise indicated, all statutory references are to Florida Statutes (2016).^{1/}

FINDINGS OF FACT

Parties

1. Respondent is the state agency responsible for regulating employment of persons who provide direct service to APD clients. APD clients are a vulnerable population of individuals whose developmental disabilities include intellectual disability, autism, spina bifida, cerebral palsy,

Prader-Willi syndrome, and Down syndrome. Respondent's clients are often incapable of adequately communicating their needs or whether they have been harmed. Therefore, employment as a direct service provider to Respondent's clients is considered a position of trust.

2. A person seeking employment in a position of trust must undergo a pre-employment Level 2 background screening to ensure the person has not been convicted of crimes that may pose a threat to vulnerable persons.

3. Petitioner is a 35-year-old female who seeks to qualify for employment with a direct service provider (Right Direction Christian Center, Inc.) in a position of trust. The position for which she applied required that she undergo Level 2 background screening.

4. The Level 2 background screening revealed that Petitioner committed five disqualifying offenses between July 1, 2004, and August 4, 2005, which were described as follows:

- a. Count I: Aggravated Child Abuse with a Deadly Weapon (first degree felony);
- b. Count II: Aggravated Child Abuse by Great Bodily Harm (first degree felony);
- c. Count III: Child Neglect (third degree felony);
- d. Count IV: Child Neglect (third degree felony); and

e. Count V: Child Neglect (third degree felony).

Disqualifying Offenses

5. The events leading to the disqualifying offenses occurred 11 years ago, when Petitioner was 24 years old. She had two biological children, a son (age 6) and a daughter (age 3), at the time of the events. Each of the disqualifying events involved Petitioner's children.

6. On August 4, 2005, the paternal aunt of Petitioner's son observed injuries to the son's foot and contacted the Leon County Sherriff's Office to report suspected child abuse. The responding officer recorded his observations in a police report.^{2/} Petitioner's son indicated that Petitioner struck him with a metal mop handle on his feet, legs, and arms as punishment. The deputy observed a three-quarters inch, circular-shaped laceration, with two smaller lacerations beside it on the inside of the son's left heel.

7. On August 16, 2005, a detective continued the investigation. During an interview with the detective, Petitioner's son indicated that Petitioner struck him with a hanger causing "marks" on his back, which the detective photographed. The detective observed the "marks." Petitioner's son also complained of a toothache. He indicated Petitioner placed a heated hairpin in his tooth to resolve the tooth decay.

The detective noted in his report that the tooth appeared to be decayed to the root. Petitioner also left her son and daughter at home without supervision, while Petitioner was at work. At the conclusion of the investigation, Petitioner was arrested and charged with child abuse and neglect.

8. On October 26, 2005, Petitioner entered a plea of nolo contendere to all five disqualifying offenses described above. The court withheld adjudication of guilt, sentenced Petitioner to imprisonment of 70 days (with 62 days credited for time served), imposed 42 months of probation with special conditions that she: 1) follow orders of the Department of Children and Families; 2) complete parenting and anger management classes within one year; and 3) pay court costs and fees.

9. Petitioner completed all terms and was released from probation on July 30, 2009. On May 10, 2016, Petitioner paid the civil judgment related to costs and fees imposed for her 2005 offenses and the court issued a Satisfaction of Judgment.

Non-Disqualifying Offense

10. In addition to disqualifying offenses, agencies may also consider criminal events that occur after the disqualifying offense. The background screening revealed one non-disqualifying offense. On June 13, 2006, Petitioner was charged with Violation of Probation ("VOP") for driving without a valid

driver's license. As a result of the VOP charge, on November 16, 2006, the court issued an Order modifying the probation. The Order of modification added 30 days in jail with credit for time served and prohibited Petitioner from early termination of probation.

Exemption Request/Agency Review

11. By letter, Respondent notified Petitioner that she was disqualified from employment because of her criminal offenses. She requested an exemption from disqualification.

12. Petitioner filed her Request for Exemption with the Department of Children and Families ("DCF"). DCF conducts the background screening and prepares an exemption investigation file on Respondent's behalf. A DCF background screener compiled the investigation materials and forwarded the exemption review file to Respondent.

13. Petitioner's file was assigned to Lynne Daw for a recommendation regarding the exemption request. Ms. Daw is the regional operations manager for the Northwest region. She has been employed in that position since April 2012. Her job responsibilities include overseeing operations of the region, background screening, and eligibility for direct service providers.

14. Ms. Daw reviewed Petitioner's exemption request file, which included the exemption review summary, court documents,

police reports and supporting affidavits, Petitioner's exemption questionnaire, notice of termination of probation supervision, affidavit of good moral character, character reference letters, reference check verification form, high school diploma from Cornerstone Christian Correspondence School, and certificate of completion for a parenting class.

15. Respondent considers the nature of the disqualifying offenses when evaluating a request for exemption. At hearing, Ms. Daw testified that the nature of the disqualifying criminal charges were concerning due to the vulnerability of the clients Respondent serves. In her review, Ms. Daw relied upon statements contained in the police report made by a physician who examined Petitioner's son. Those statements are hearsay within hearsay. Because the statements do not meet any hearsay exception, they cannot be considered for a finding of fact.

16. Respondent also considers the history of an applicant since the incident and other evidence or circumstances indicating whether the applicant would present a danger to Respondent's clients if employment is permitted.

17. Respondent considers counseling a factor, when the nature of the offense involves acts of anger. Ms. Daw testified that there was no evidence in the exemption packet to show Petitioner completed an anger management course. During the hearing, however, Petitioner refuted this contention and stated

she completed an anger management course. The evidence in the record includes a notice of termination of supervision from Petitioner's probation officer. Completion of an anger management course was a term of Petitioner's probation. Therefore, a reasonable inference could be drawn that she completed the anger management course.

18. Ms. Daw also expressed concern for safety of Respondent's clients who could be transported by Petitioner. Of note, Petitioner's background screening revealed several traffic violations. However, none of the violations involved injuries to passengers or others.

19. Subsequent to the disqualifying offenses, Petitioner has furthered her education by earning a general education diploma (also known as GED) on December 1, 2011, and a certified nursing assistance (CNA) certification on November 16, 2015. She is not eligible to take the certification exam due to the Level 2 screening results.

20. Petitioner also maintained employment after her convictions until June 4, 2015. From April 3, 2006, to June 4, 2015, Petitioner worked at Big Lots as a recovery associate. From April 8, 2012, to May 6, 2014, Petitioner worked at Vector Connect (Cutco) as a sales representative. She described her duties as selling cutlery.

21. Petitioner provided favorable reference letters in support of her request for exemption. The first letter described Petitioner as patient, dependable, and trustworthy. The author indicated that Petitioner served as the primary caregiver for her physically disabled mother. It is not clear, however, the length of time Petitioner provided the care to the author's mother or whether Petitioner was paid for her work. The second letter indicated Petitioner is kind and professional. The author of that letter is described as a friend. Overall, the letters indicated Petitioner may be a good employee but were not helpful on the issue of rehabilitation.

22. Ms. Daw concluded that, considering the totality of the circumstances, there was no clear and convincing evidence that Petitioner could work in a position of trust without posing a safety risk to Respondent's clients. As a result, Ms. Daw recommended the request for exemption be denied and submitted the exemption file to the agency director, Barbara Palmer, for final determination. The agency director issued the notice of denial on May 27, 2016, notifying Petitioner of Respondent's determination to deny her request for exemption.

23. Given the nature of harm due to physical abuse and the potential of harm due to neglect, Petitioner's actions raise concern about her ability to work with vulnerable persons.

Absent compelling evidence that such serious behavior will not be repeated, Petitioner has not met her burden.

Ultimate Findings of Fact

24. The evidence in this case did not clearly and convincingly establish that Petitioner has been rehabilitated from her disqualifying offenses. Despite Petitioner's statements that she accepts full responsibility for her actions, she continues to shift blame to her son's aunt for her arrest and continues to deny that she left her young children at home alone.

25. To her credit, Petitioner has taken steps to improve her life by earning a GED and CNA certificate and by volunteering with the elderly in the community. However, such evidence is not sufficient clear and convincing evidence of rehabilitation.

26. Respondent did not abuse its discretion in denying Petitioner's request for exemption from the disqualifying offenses because, on these facts, a reasonable person would reach the same conclusion.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter of the proceeding and the parties thereto pursuant to sections 120.569, 120.57(1), and 435.07(1)(c), Florida Statutes.

28. Section 435.04 provides, in pertinent part, that:

(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.

29. Petitioner was disqualified from employment based on five disqualifying offenses involving child abuse and child neglect, each of which is a felony.

30. The statutory provision that addresses exemptions from disqualification, section 435.07, underwent modifications that took effect on July 1, 2016. It now provides:

435.07 Exemptions from disqualification.--
Unless otherwise provided by law, the provisions of this section shall 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

* * *

(1) (b) A person applying for an exemption who was ordered to pay any amount for any fee, fine, fund, lien, civil judgment, application, costs of prosecution, trust, or restitution as part of the judgment and sentence for any disqualifying felony or misdemeanor must pay the court-ordered amount in full before he or she is eligible for the exemption.

* * *

(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.

* * *

(4)(c) Disqualification from employment under this chapter may not be removed from, and an exemption may not be granted to, any current or prospective child care personnel, as defined in s. 402.302(3), and such a person is disqualified from employment as child care personnel, regardless of any previous exemptions from disqualification, if the person has been registered as a sex offender as described in 42 U.S.C. s. 9858f(c)(1)(C) or has been arrested for and is awaiting final disposition of, has been convicted or found guilty of, or entered a plea of guilty or nolo contendere to, regardless of adjudication, or has 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 a similar law of another jurisdiction:

1. A felony offense prohibited under any of the following statutes:

* * *

p. Section 827.03, relating to child abuse, aggravated child abuse, or neglect of a child.

31. Under 435.07, Petitioner meets the eligibility requirements for exemption from her disqualifying offenses.^{3/} Petitioner completed her probation on July 30, 2009, seven years ago. She also satisfied the civil judgment for fees and costs on May 11, 2016.

32. In order to be granted the exemption, Petitioner must demonstrate by clear and convincing evidence that she is rehabilitated from her disqualifying offenses. J.D. v. 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.").

33. Prohibiting persons convicted of disqualifying offenses from employment in positions of trust is intended to protect the public welfare, and section 435.07 is strictly construed against the person seeking an exemption. Heburn v. Dep't of Child. & Fams., 772 So. 2d 561, 563 (Fla. 1st DCA 2000).

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

Clear and convincing evidence requires that 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)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005).

35. Should Petitioner demonstrate rehabilitation, then it must be determined whether the agency abused its discretion when it initially determined it would deny the exemption. Id. The abuse of discretion standard of review set forth in section 435.07(3) (c) has been described as follows:

If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980);
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" could take the position under review).

36. In determining whether the Agency's intended action is an abuse of discretion, the First District Court of Appeal has held that:

Although the ultimate legal issue to be determined by the ALJ in a proceeding under section 435.07(3)(c) is whether the agency head's intended action was an "abuse of discretion," the ALJ is to evaluate that question based on the facts determined from the evidence presented at a de novo chapter 120 hearing.

J.D. v. Dep't of Child. & Fams., 114 So. 3d at 1132.

37. The circumstances of the disqualifying events raise concern that Petitioner would pose a risk of harm as a direct service provider to Respondent's clients. The harm to Petitioner's son was significant in that she struck him with a metal mop handle and hanger, which resulted in visible injury to the child. In addition, leaving her children unattended while she was at work is equally concerning.

38. Petitioner provided evidence to Respondent that she has improved her education, maintained continuous employment, and volunteered with the elderly. She also indicated that she accepts full responsibility for the incidents. However, given the serious nature of the offenses, the evidence is not clear and convincing that she has been rehabilitated.

39. A reasonable person could conclude that Petitioner should not be granted an exemption from disqualification. Thus, Respondent's intention to deny Petitioner an exemption does not constitute an abuse of discretion.

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, Shimika King's, request for an exemption from disqualification.

DONE AND ENTERED this 12th day of October, 2016, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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 12th day of October, 2016.

ENDNOTES

^{1/} Because a final order has not yet been issued for this case, Petitioner's application for exemption is governed by current

law. See Ag. for Health Care Admin. v. Mount Sinai Med. Ctr., 690 So. 2d 689, 691 (Fla. 1st DCA 1997).

^{2/} The undersigned acknowledges that the police report included in Respondent's Exhibit 3 includes statements regarding injuries to Petitioner's son. The police report is hearsay. However, because this case is not criminal in nature, the report falls within the public records hearsay exception in section 90.803(8), Florida Statutes. The public record exception is limited to "matters observed pursuant to duty imposed by law as to matters which there was a duty to report." The officers who contributed to the police report directly observed injuries to Petitioner's son. The direct observations of the officers recorded in the report are admissible as an exception to the hearsay rule and may be relied upon for a finding of fact.

^{3/} The statutory provision that addresses exemptions from disqualification, section 435.07(4)c), underwent modifications that took effect on July 1, 2016, as set forth in paragraph 30. Pursuant to the amended version of the statute, the agency may be barred from granting an exemption from disqualification from employment if an applicant seeks to be employed as prospective childcare personnel. The evidence presented at hearing was not clear regarding the scope of services provided by Right Direction Christian Center, Inc., except that it is a direct service provider. However, if Petitioner's request for exemption is granted, she would be permitted to work with not only developmentally disabled adults, but also with vulnerable children. Therefore, if the potential position involves providing services to children, Petitioner would not be eligible for an exemption.

COPIES FURNISHED:

Shimika King
3009 Grove Street
Tallahassee, Florida 32301
(eServed)

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

Barbara Palmer, Executive Director
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)

Lori Oakley, Acting Agency Clerk
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