

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ROSEMARY BRINSON,

Petitioner,

vs.

Case No. 16-3855EXE

AGENCY FOR PERSONS WITH  
DISABILITIES,

Respondent.

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RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings ("Division"), on August 15, 2016, by video teleconference at sites located in St. Petersburg and Tallahassee, Florida.

APPEARANCES

For Petitioner: Rosemary Brinson, pro se  
1010 Eldridge Street  
Clearwater, Florida 33755

For Respondent: Jeannette L. Estes, Esquire  
Agency for Persons with Disabilities  
Suite 422  
200 North Kentucky Avenue  
Lakeland, Florida 33801

STATEMENT OF THE ISSUE

The issue is whether Petitioner's request for exemption from disqualification should be granted.

PRELIMINARY STATEMENT

By letter dated May 27, 2016, Respondent, Agency for Persons with Disabilities ("Agency" or "Respondent"), informed Petitioner that her request for an exemption from disqualification was denied. Petitioner filed a request for an administrative hearing dated June 25, 2016. The request was forwarded to the Division on July 8, 2016.

The Division set this matter for hearing by video teleconference before Administrative Law Judge Robert S. Cohen on August 15, 2016, at sites located in St. Petersburg and Tallahassee, Florida.

At the hearing, Petitioner testified on her own behalf and offered two composite exhibits, which were accepted into evidence. Respondent presented the testimony of Jeffrey Smith and offered six exhibits, which were accepted into evidence.

No transcript of the hearing was prepared. Respondent filed its proposed recommended order on August 25, 2016. Petitioner did not make any post-hearing submittal.

References to statutes are to Florida Statutes (2015), unless otherwise noted.

FINDINGS OF FACT

1. Respondent is the state agency responsible for regulating the employment of persons in positions of special trust as direct service providers.

2. Petitioner is seeking employment with Always Promoting Independence, LLC, and Supporting Independence/Honor Health Care Management, both service providers are regulated by Respondent.

3. Petitioner wants to work as a direct service provider, which requires background screening. The results of Petitioner's background screening revealed a history of criminal offenses.

4. Respondent relies on the Department of Children and Families Background Screening Unit ("Department") to initially receive exemption from disqualification requests and to compile documents related to such requests.

5. On February 8, 2016, Petitioner submitted a Request for Exemption, Exemption Questionnaire ("Questionnaire"), various criminal records, character references, and other various documents (the "Exemption Packet"), to the Department seeking to demonstrate support for the granting of an exemption from employment disqualification. The Department subsequently forwarded the Exemption Packet to the Agency for review.

6. To begin its exemption review, Respondent considered Petitioner's disqualifying offense. In May 1991, Petitioner committed the disqualifying offense of "Fraudulent Use of Credit Card" (six counts). Petitioner pled nolo contendere to the disqualifying offense and adjudication was withheld. She was sentenced to 24 months' probation and payment of fines and court costs. She completed her term of probation early.

7. In its continued exemption review, Respondent considered the following non-disqualifying offenses, which Petitioner obtained subsequent to her May 1991 disqualifying offense: an arrest for "Aggravated Assault with a Firearm" in August 1997 (a violation of section 784.021, Florida Statutes); an arrest for "Driving While License Suspended with Knowledge" in October 2007 (a violation of section 322.34(2), Florida Statutes); an arrest for "Driving While License Suspended with Knowledge" in September 2008 (another violation of section 322.34(2)); an arrest for "Possession of Cannabis" in March 2012 (a violation of section 893.13(6)(b), Florida Statutes); and a conviction for "Possession of Drug Paraphernalia" in March 2012 (a violation of section 893.147(1)).

8. Petitioner received notification by letters dated September 22, 2015, and January 12, 2016, from the Department, Respondent's background screening entity, of her disqualification from employment due to criminal history.

9. The specific disqualifying offense listed in both letters was "Fraud-Illegal Use of Credit Cards," a violation of section 817.61, Florida Statutes.

10. Petitioner provided details of the circumstances surrounding the disqualifying offense. In short, Petitioner indicated she gave three "associates" a ride to the mall in exchange for their promise to buy her a new pair of shoes. She

left the Champs sports store with her shoes, expecting one of her companions to pay for them. She was in her car when her companions ran from the store with a security guard in pursuit. They told her to start the car which she refused because she believed she had not done anything wrong. Unfortunately for her, one of her companions had attempted to pay for her new shoes with a stolen credit card. She and her companions were arrested and charged with credit card fraud. Petitioner provided documentation of the charge, the disposition after her no contest plea, and the fact that her probation was terminated early.

11. Petitioner provided explanations for all but one of the non-disqualifying offenses that ranged from the gun charge being at the end of a "bad relationship" (her then-girlfriend falsely accused her); to she was pulled over for a broken taillight, then charged with driving with a suspended license (she claimed she paid her tickets and the license was reinstated, although no records were provided on this point); to she was pulled over for having too dark a window tint in her car and cannabis was found (she testified it was not hers), but, since no one confessed to ownership, all were cited for possession; and finally to no explanation at all for the 2007 driving with a suspended license charge.

12. Petitioner accepted little responsibility for her criminal offenses and concluded with the statement that she has

no current involvement with any court system; she stated she is in "good standing."

13. Petitioner indicated on her Questionnaire that there was no harm to any victim or property, including damage or injury, in her past.

14. Petitioner indicated on her Questionnaire that there were no stressors in her life at the time of the disqualifying offense.

15. Regarding current stressors in her life, Petitioner testified she is unable to provide for her family and she is eager to obtain and keep steady employment.

16. Petitioner listed her educational achievements as a diploma from Clearwater High School (1988), an Associate in Arts degree from Tampa Tech in computer engineering (1991), and an Associate in Science ("A.S.") degree from St. Petersburg College in human services (2014).

17. Petitioner indicated on her Questionnaire that she has received no counseling for any reason.

18. Petitioner indicated on her Questionnaire that she has no history of alcohol and drug abuse.

19. Petitioner indicated on her Questionnaire that she is involved with a community organization known as "Parents that Care."

20. As to expressing remorse or accepting responsibility for her actions, Petitioner testified she completed her probation early and that she no longer surrounds herself with negative influences and people.

21. Petitioner's recent work history has been stable. Her work history since 2009 indicates she has worked for two groups providing direct support/in-home support staff: Supporting Independence/Honor Health Care Management (2012-present) and Peaceful Dreams, Inc. (2009-2012).

22. In addition to the criminal records submitted, Petitioner also offered affidavits of good moral character, written personal statements, IRS W-2 Forms, a copy of her A.S. degree from St. Petersburg College, and three letters of reference attesting to her character. The letters were written by people who have known Petitioner for many years and who believe her to be hard-working, reliable, and caring. Petitioner also submitted a copy of an exemption from disqualification she had received from the Agency for Health Care Administration ("AHCA") dated May 27, 2014.

23. Jeffrey Smith, regional operations manager for the Suncoast Region, testified that the Agency reviewed all the provided documentation provided by Petitioner, the information provided on the Exemption Questionnaire, the various records

documenting Petitioner's criminal history, her educational record, her character references, and her exemption from AHCA.

24. Following a review of all the documentation included in the Exemption Packet, Agency Director Barbara Palmer advised Petitioner by a letter dated May 27, 2016, that her request for an exemption from her disqualifying offense was denied. The basis for the denial was that Petitioner failed to provide clear and convincing evidence of her rehabilitation.

25. Mr. Smith testified the Agency considered all the documentation submitted by Petitioner in her Exemption Packet, as well as the additional documents provided prior to and at the hearing. He did not find that the documentation negated or refuted the official records of the disqualifying and non-disqualifying offenses.

26. Further, the fact that the non-disqualifying offenses related to Petitioner's driving is relevant to the position for which she seeks an exemption from disqualification. A direct service provider is often called upon to transport individuals entrusted to her care. Petitioner's statement that her license was reinstated and that she received no more driving citations after the offenses described above was refuted by Mr. Smith, based upon subsequent driving records regarding Petitioner.

27. Mr. Smith also noted two additional reports from the Department in which Petitioner was named the alleged perpetrator.



One report showed some indicators of child abuse (cuts/punctures/bites/excessive corporal punishment), and the other report involved allegations of exploitation of a vulnerable adult, specifically, one with a developmental disability, but resulted in no official findings of exploitation.

28. The Agency's clients are a vulnerable population, consisting of individuals whose developmental disabilities are defined as intellectual disability, autism, spina bifida, Prader-Willi syndrome, cerebral palsy, Down syndrome, and/or Phelan-McDermid syndrome. Without the Agency's services, these clients would require institutionalization.

29. Petitioner testified passionately that she enjoys working with individuals with disabilities. Working in this field inspired her to return to school to earn a degree in human services. She testified that working with persons with disabilities is her long-term goal. She admitted she made some "foolish mistakes" when she was younger, but that she now accepts responsibility for her actions. She also testified that she believed her exemption should be granted because another agency, AHCA, had granted her an exemption from disqualification.

30. Respondent countered with the fact that this vulnerable population requires being able to rely on the direct care provider's good character and trustworthiness. Individuals entrusted with the care of the disabled are often called upon to

make decisions of a financial, medical, and social nature. The Agency must weigh the benefit against the risk when considering granting an exemption. Petitioner's history shows poor judgment on her part, and she provided testimony that was inconsistent with the documentation of her criminal history and the report and allegations of abuse or neglect from the Department. Petitioner admitted to use of a credit card of a vulnerable adult, which showed poor judgment on her part. Additionally, the close proximity of Petitioner's most recent arrest (2012) to her request for exemption demonstrates her issues with the law are not limited to the distant past. Finally, Respondent, pursuant to section 435.07(5), Florida Statutes, considered the exemption given Petitioner by AHCA. The exemption from AHCA, however, is neither binding on the Agency nor does such exemption follow the same criteria or involve the same service population as the exemption sought from Respondent.

31. The granting of an exemption from employment disqualification would allow Petitioner to be employed as a direct service provider to Agency clients. The undersigned appreciates Mr. Smith's thoughtful and comprehensive assessment of Petitioner's criminal history and fitness to hold a position of trust, and finds his testimony at hearing and reasons for recommending the denial to be credible and reasonable.

CONCLUSIONS OF LAW

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

33. Section 393.0655(5), Florida Statutes, provides in pertinent part:

The background screening conducted under this section must ensure that, in addition to the disqualifying offenses listed in s. 435.04, no person subject to the provisions of this section has an arrest awaiting final disposition for, has been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, 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 similar law of another jurisdiction:

\* \* \*

(b) This chapter, if the offense was a felony.

\* \* \*

(j) Section 817.61, relating to fraudulent use of credit cards, if the offense was a felony.

34. Section 435.04 provides 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.

35. Section 393.0655(2) states in relevant part:

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.

36. Section 435.07(3) (a) provides:

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.

37. "The standard of review by the administrative law judge is whether the agency's intended action is an abuse of discretion." § 435.07(3) (c), Fla. Stat. The "abuse of discretion" standard of review has been described as follows:

If reasonable [persons] could differ as to the propriety of the action taken . . . then the action is not unreasonable and there can

be no finding of an abuse of discretion. The discretionary ruling . . . should be disturbed only when [the] 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).

38. An administrative law judge sits in a review capacity here and must decide whether the Agency's determination concerning rehabilitation or lack thereof constitutes an abuse of discretion. An administrative law judge must ascertain whether the Agency abused its discretion in determining that an applicant failed to show rehabilitation by clear and convincing evidence.

39. The logical means of applying this standard is as follows:

Although the hearing before the hearing officer was a de novo proceeding, that simply means that there was an evidentiary hearing during which each party had a full and fair opportunity to develop an evidentiary record for administrative review purposes. It does not mean, as the hearing officer apparently thought, that the hearing officer sits as a substitute for the Department and makes a determination whether to award the bid de novo.

Intercontinental Prop., Inc. v. Dep't of Health & Rehabilitative Servs., 606 So. 2d 380, 386 (Fla. 3d DCA 1992) (emphasis added);

see also, State Contracting & Eng'g Corp. v. Dep't of Transp.,  
709 So. 2d 607, 609 (Fla. 1st DCA 1998) ("In this context, the  
phrase 'de novo hearing' is used to describe a form of intra-  
Department review. The judge may receive evidence, as with any  
formal hearing under section 120.57(1), but the object of the  
proceeding is to evaluate the action taken by the Department.");  
§ 120.57(3)(f), Fla. Stat.

40. The undisputed facts are that Petitioner committed one  
disqualifying offense in 1991. Had this been the only blemish on  
her record since 1991, and had she demonstrated rehabilitation  
from such offense that occurred in the distant past, a case could  
have been made for Petitioner's receiving an exemption from  
disqualification. However, Petitioner's more recent offenses  
involving traffic violations, possession of cannabis, and  
Department investigations into abuse of vulnerable children and  
adults, do not paint a picture of an individual who has learned  
from past mistakes and has been rehabilitated. Furthermore, the  
fact that Petitioner has never sought or received counseling for  
her missteps points to a lack of remorse or a true acceptance of  
responsibility for her past transgressions.

41. Petitioner is to be commended for her return to college  
to receive a degree in human services, a strong step towards  
understanding how individuals entrusted to her care are to be  
treated. Her demeanor depicts a person who wants to help others,

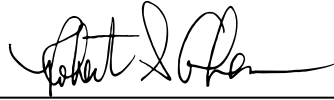
yet her continued criminal offenses, some minor, others directly related to trust concerning persons in her care, demonstrate that she has not yet achieved a level of rehabilitation that can permit the Agency to approve an exemption from disqualification.

42. The Agency has appropriately exercised its broad statutory discretion in denying Petitioner's request for exemption from disqualification. Further, the Agency's action in determining that Petitioner has not been rehabilitated does not constitute an abuse of discretion. Accordingly, the Agency's denial of Petitioner's request for an exemption from disqualification should be upheld.

#### 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 Petitioner's request for an exemption from disqualification.

DONE AND ENTERED this 19th day of October, 2016, in  
Tallahassee, Leon County, Florida.



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ROBERT S. COHEN  
Administrative Law Judge  
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Filed with the Clerk of the  
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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.