

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RAYMOND TYSON,

Petitioner,

vs.

Case No. 16-3914EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Ft. Myers and Tallahassee, Florida, on September 16, 2016, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Raymond Tyson, pro se
3864 Washington Avenue
Fort Myers, Florida 33905

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

STATEMENT OF THE ISSUE

Whether the Agency for Persons with Disabilities abused its discretion when denying Petitioner's request for exemption from being disqualified to work in a position of special trust.

PRELIMINARY STATEMENT

On or about August 7, 2015, the Department of Children and Families, as agent for the Agency for Persons with Disabilities (Respondent), notified Petitioner that his criminal background check revealed offenses that disqualified him "from working or being licensed in accordance with sections 435.04 and, if applicable, 408.809(4), Florida Statutes." On or about April 4, 2016, Petitioner submitted to Respondent a request seeking an exemption from being disqualified to work in a position of special trust. On or about June 14, 2016, Respondent informed Petitioner that his request for exemption was denied. Petitioner filed a request for administrative hearing and on July 14, 2016, Respondent forwarded Petitioner's request to the Division of Administrative Hearings for a final hearing.

At the final hearing, Petitioner testified on his own behalf and presented testimony from Kimberly Fain, who works with Petitioner, and Halsey Watkins, III, assistant pastor, Jesus Christ Outreach Center. Respondent presented testimony from a single witness, its employee Jeffrey Smith, who works for Respondent as regional operations manager. No exhibits were

admitted into evidence on behalf of Petitioner. Respondent's Exhibits A through E were admitted into evidence.

A transcript of the final hearing was not filed. Petitioner and Respondent each filed a Proposed Recommended Order. The Proposed Recommended Orders filed by the parties were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. It is undisputed that Petitioner has an extensive criminal background. His disqualifying offenses (larceny) occurred in April 1998 and July 2009, respectively. Petitioner's first recorded involvement, as an adult, in the criminal enterprise commenced in 1997, when, at the age of 19, he was charged with burglary. During the 12-year period between 1997 and 2009, Petitioner was arrested multiple times for criminal violations such as marijuana possession, shoplifting, and failure to appear in court. He also had multiple instances during this period where he violated the terms of his probation and was cited for motor vehicle traffic infractions. Petitioner readily acknowledges that from 1997 through July 2009, his life was in a fairly constant state of chaos, and he recognized that if he did not make a change he would likely end up in prison or dead.

2. In or around October 2009, Petitioner started a new chapter in his life when he made the decision to become a member of the Jesus Christ Outreach Center (JCOC). Petitioner has been

a committed member of JCOC as evidenced by his extensive involvement in several ministries of the church, which include working with troubled youth, coordinating church-related conferences, and serving as a praise and worship leader.

3. Since September 2009, Petitioner has been continuously employed. In July 2012, Petitioner went to work for Sandy Park Development Center where he worked as a direct care aide for individuals with developmental disabilities. In early 2015, Petitioner went to work for the Shalimare Company in Ft. Myers, Florida, where he also provided assistance to individuals with developmental disabilities. According to the testimony of one of his co-workers, Petitioner has proven himself to be a hard-working, trustworthy, and a reliable individual.

4. In order to provide assistance to individuals served by Shalimare, it was necessary that Petitioner pass a background screening check. On July 10, 2014, the Agency for Health Care Administration (AHCA), pursuant to a request from Shalimare, cleared Petitioner to work in positions of special trust, including those positions where services are provided directly to individuals with developmental disabilities.

5. Petitioner believes that he has clearly and convincingly proved that he is rehabilitated because since 2009 he has not engaged in criminal activity, has maintained steady employment where he distinguished himself as being hard-working, trustworthy

and reliable, and has demonstrated dedicated and unwavering commitment to his church and community. Furthermore, Petitioner also believes that his claim of rehabilitation is bolstered by the fact that since July 10, 2014, he has been authorized by AHCA to work in positions of special trust.

6. Respondent, the Agency for Persons with Disabilities, believes that Petitioner has failed to demonstrate that he can be trusted to work in positions of special trust as to clients under the jurisdiction of the agency. In support of its position that Respondent has not demonstrated that he is rehabilitated, APD cites discrepancies between Petitioner's account of his criminal activity and the law enforcement records pertaining to the same, his actions of knowingly driving with a suspended driver's license while transporting a minor, and his pattern of poor decision making as evidenced by his multiple arrests.^{1/} While APD commends Petitioner for the positive steps he has taken towards turning his life around, APD believes that ultimately Petitioner's 12 years of deviant behavior are not, at this time, counterbalanced by the normalized behavior that he demonstrated during the last 7 years.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569, 120.57(1), and 435.07, Fla. Stat. (2016).^{2/}

8. Section 393.0655, Florida Statutes, provides in part as follows:

(5) Disqualifying offenses.--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:

(a) Any authorizing statutes, if the offense was a felony.

9. Section 435.07 provides, in part, as follows:

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;

2. Misdemeanors prohibited under any of the statutes cited in this chapter or under similar statutes of other jurisdictions for which the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court;

3. Offenses that were felonies when committed but that are now misdemeanors and for which the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court; or

4. Findings of delinquency. For offenses that would be felonies if committed by an adult and the record has not been sealed or expunged, the exemption may not be granted until 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 offense.

* * *

(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.

* * *

(5) Exemptions granted by one agency shall be considered by subsequent agencies, but are not binding on the subsequent agency.

10. Petitioner bears the burden of proving by clear and convincing evidence that he should not be disqualified from employment and is, therefore, entitled to the exemption sought. § 435.07(3)(a), Fla. Stat.

11. In considering Respondent's intended action of denying Petitioner's exemption request, the undersigned must consider whether the agency head abused his or her discretion when passing on Petitioner's request. The "'abuse of discretion' standard is highly deferential." E.R. Squibb & Sons v. Farnes, 697 So. 2d 825, 826 (Fla. 1997). An agency head abuses his or her discretion within the meaning of section 435.07 when the "intended action" under review "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 by the [agency head]. If reasonable [persons] could differ as to the propriety of the [intended] action . . . , then it cannot be said that the [agency head] abused [his or her] discretion." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

12. The essence of "rehabilitation" within the meaning of section 435.07(3)(a) is that an applicant thereunder would "not present a danger if employment or continued employment is allowed."

13. Petitioner is to be commended for the progress that he has made towards rebuilding his life. In particular, Petitioner's commitment to youth and his dedication to his church are to be applauded. However, the evidence presented to the undersigned demonstrates that Respondent's intent to deny Petitioner's exemption request is not unreasonable. Respondent is tasked with protecting the public welfare, especially when it comes to the care of the vulnerable in our society. Based on Petitioner's disqualifying offenses, his repeated violations of law during a 12-year period, doubts as to the truthfulness of his statements as part of the exemption review process, and legitimate concerns regarding his judgment (i.e., knowingly operating a vehicle with an expired driver's license while

transporting his nephew to day care), Respondent did not abuse its discretion when it denied Petitioner's request for an exemption.

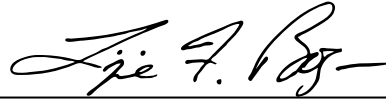
14. It certainly is of significance that Respondent's sister agency, the AHCA, cleared Petitioner to work in a position of special trust. However, section 435.07(5) makes clear that exemptions granted by one agency are not binding on another agency.

15. Petitioner has failed to establish that the reasons offered by Respondent in denying his request for exemption are arbitrary, fanciful, or unreasonable. Accordingly, Petitioner has failed to meet his burden of proving by clear and convincing evidence that Respondent's decision to deny his exemption request was 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's request for exemption.

DONE AND ENTERED this 14th day of October, 2016, in
Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of October, 2016.

ENDNOTES

^{1/} For example, in explaining his December 7, 1998, arrest for shoplifting, Petitioner stated that “[w]hen we got out of the store we were told to stop [running], [and] I did.” The narrative prepared by the arresting officer notes that when Petitioner exited the store, security personnel “were all yelling at them to stop as [Petitioner] ran across the parking lot to [the awaiting] vehicle,” and that Petitioner did not stop running when instructed to do so. Another incident of particular concern to APD occurred in early 2009 when Petitioner was pulled over for speeding and arrested for driving with a suspended license. Petitioner was driving his nephew to day care when this incident occurred. Also, in its Proposed Recommended Order, APD notes that at the final hearing Petitioner mentioned for the first time that one of his shoplifting incidents was motivated by a desire to secure items for a child that he mistakenly believed that he had fathered. As correctly noted by Respondent, Petitioner previously described this particular shoplifting incident as being motivated by his desire to feed his drug dependency. Petitioner’s inconsistent testimony, according to APD, is further evidence that Petitioner is not sufficiently trustworthy so as to warrant receiving the requested exemption.

^{2/} All subsequent references to Florida Statutes will be to 2016, unless otherwise indicated.

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.