

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAMIE PETERSEN-MCLAURN,

Petitioner,

vs.

Case No. 16-4102EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case on October 4, 2016, via video teleconference sites in Tallahassee and Jacksonville, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mamie Peterson-McLaurin, pro se
2747 Sophia Street
Jacksonville, Florida 32208

For Respondent: Melissa E. Dinwoodie, Esquire
Agency for Persons with Disabilities
3631 Hodges Boulevard
Jacksonville, Florida 32224

STATEMENT OF THE ISSUE

Whether the Agency's intended action to deny Petitioner's application for exemption from disqualification for employment is an abuse of the Agency's discretion.

PRELIMINARY STATEMENT

By letter dated June 14, 2016, the Agency for Persons with Disabilities ("Agency" or "Respondent") issued its notice of agency action by which it informed Petitioner that her request for exemption from disqualification was denied. As a result, 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 Agency. In the letter, the Agency reported its determination that Petitioner had "not submitted clear and convincing evidence of [her] rehabilitation."

Petitioner filed her Request for Administrative Hearing with the Agency, which was referred to the Division of Administrative Hearings on July 20, 2016. The final hearing was scheduled for October 4, 2016, and commenced as scheduled.

At the final hearing, Petitioner testified on her own behalf and introduced Petitioner's Exhibits P1 and P2, which were admitted in evidence.

Respondent presented the testimony of Leslie Richards, the Agency's Regional Operations Manager. Respondent's Exhibits R1 through R5 were admitted in evidence.

The proceedings were recorded, but the parties did not order a transcript thereof. Respondent timely filed a Proposed Recommended Order on October 24, 2016. Petitioner filed a

Proposed Recommended Order on October 27, 2016, to which Respondent did not object. Both parties' Proposed Recommended Orders have been considered in preparing this Recommended Order.

FINDINGS OF FACT

Parties and Background

1. Petitioner is a 57-year-old female residing in Jacksonville, Florida. Petitioner wishes to open her own group respite care home for adults with developmental disabilities. As such, Petitioner seeks to become a direct-care provider to the Agency's clients with developmental disabilities.

2. Respondent is the state agency responsible for licensing and regulating the employment of persons in positions of special trust. Specifically, the Agency's mission includes serving and protecting vulnerable populations, including children and adults with developmental disabilities.

3. For the last 29 years, Petitioner has been employed by Vistakon, a division of Johnson & Johnson Vision Care, Inc. Her current position is Distribution Operator II, fulfilling customer orders for shipping.

4. Petitioner is a long-term member of Faith United Miracle Temple in Jacksonville, where she serves on the usher board, greets churchgoers on Sunday mornings, and teaches children's Sunday school classes.

5. Petitioner is involved in many community service projects including Habitat for Humanity, Florida Blood Drive, feeding the homeless, and supporting her employer's diversity and inclusion programs.

The Disqualifying Offense

6. On December 26, 2003, Petitioner, then known as Mamie Faith Fields, was arrested at her home and charged with domestic battery on her husband, Gregory Fields. Petitioner's mother witnessed the incident.

7. Petitioner was 44 years old at the time of the offense.

8. The facts surrounding the incident are in dispute and there was insufficient reliable evidence for the undersigned to make any findings of fact relative to the details of the incident.^{1/}

9. Petitioner pled no contest to the offense of domestic battery, was sentenced to eight months' probation, and ordered to attend a batterer's intervention course and pay court costs of \$480.

10. On June 26, 2004, Petitioner completed the Hubbard House First Step Program, a 24-class batterer's intervention course.

11. Petitioner's probation was terminated early on July 26, 2004.

Subsequent Non-Disqualifying Offense

12. On May 8, 2007, Petitioner was involved in another physical altercation with Mr. Fields. The incident occurred while Petitioner was a right front-seat passenger in the vehicle Mr. Fields was driving.

13. Petitioner was arrested and charged with domestic battery. The arresting officer observed scratches on Mr. Fields' face and on the back of his right shoulder. The arresting officer observed no injury to Petitioner.

14. Petitioner was 48 years old at the time of her arrest.

15. The charges against Petitioner were dropped by the State Attorney's Office and Petitioner was not prosecuted for any crime.^{2/}

Subsequent Personal and Professional History

16. Petitioner and Mr. Fields were divorced in 2011.

17. Petitioner reported having attended six weeks of marital counseling with Mr. Fields, but the record does not support a finding of the timeframe in which the counseling occurred.

18. Petitioner's employment has not changed since the disqualifying offense.

19. In 2014, Petitioner sought, and was granted, an exemption from disqualification from the Department of Children

and Families ("DCF"). Her reported interest was in opening, or working in, a day care facility.

20. By May 2015, Petitioner had completed over 50 hours of child care training, including child care facilities rules and regulations, early literacy, and family child care home certificates.

21. Petitioner has not been employed with any child care provider subsequent to receiving the exemption from DCF.

22. In response to questioning by the undersigned as to why Petitioner had not pursued employment with a DCF provider, Petitioner stated that there were "way too many restrictions" and that she had discovered that "if a kid says you hit them, an action could be taken against you."

23. Petitioner's current interest is in opening a group home to provide respite care services for the Agency's adult clients with developmental disabilities.

24. Petitioner filed two previous applications with Respondent--in 2010 and 2014--for exemption from disqualification, but was denied both times.

25. In 2016, Petitioner completed four courses required by the Agency for providers of direct-care services to its clients: Introduction to Developmental Disabilities; Health and Safety; HIV/Bloodborne Pathogens; and Zero Tolerance. The Agency has certified that Petitioner has completed a course required for

providers in the Medicaid Waiver program. Earlier this year, Petitioner also completed HIPAA training and three hours of classroom training in "Personal Outcome Measures-Overview: Choices and Rights."

Petitioner's Exemption Request

26. The Exemption Questionnaire presented by the Agency to Petitioner listed three offenses to which she was to respond: the 2003 disqualifying offense, the 2007 non-disqualifying arrest, and an earlier 1994 arrest for aggravated battery/domestic violence.

27. The 1994 offense involved Petitioner, then known as Mamie Faith Lundy, and her previous husband, John Lundy. The 1994 offense resulted in an arrest, but charges were later dropped and Petitioner was not prosecuted.

28. In response to a request for her detailed version of the events of the 2003 disqualifying offense, Petitioner explained that "it was Christmas Day, my ex-husband was upset about me spending too much money. I didn't want to hear him talk about it he got upset. We [had] guest[s] and it got out of control. Charges were dropped and we forgave each other."

29. Charges for the 2003 offense were not dropped and Petitioner pled no contest to domestic battery.

30. The offense of battery requires an intentional touching of another person against their will, or intentionally causing harm to another person. See § 784.03(1)(a), Fla. Stat. (2015).^{3/}

31. Petitioner's version of the disqualifying offense does not contain any relevant detail regarding the offense.

32. At hearing, Petitioner testified only that "he pushed me and I pushed him back."

33. In response to the question regarding the degree of harm to the victim or property, Petitioner stated "there is no property, no victim harm."

34. According to the observations of the police officer at the scene in 2007, Petitioner scratched her then-husband's face and right shoulder.

35. With regard to stressors in her life at the time of the disqualifying offense, Petitioner wrote "there were divorce[s] in both marriage[s]."

36. With regard to current stressors, Petitioner revealed, "No current stressors. My support system is my family, God, children, job, friends, church family, Bible. I [am] living alone now."

37. When requested to list her educational achievements and training, Petitioner responded that she attends "Word of Life students' bible school."

38. Regarding counseling she has received, she listed "Alison Behrens, six weeks." Apparently Ms. Behrens is the marriage counselor she saw with Mr. Fields, but the record does not reveal whether the counseling was before or after the 2003 offense, or even after the 2007 non-disqualifying offense.

39. The most relevant answer given by Petitioner on her exemption questionnaire was with respect to accepting responsibility, and expressing remorse, for her actions. Tellingly, Petitioner stated, "I feel very bad about my action, not to leave when people get upset. Try not to let people know what going on in my family. And I feel responsibility for let[ting] things go to[o] far. I feel very remorse about it. I'm very much ashamed as a mother, and a Grandmother that I allowed this to happen to me."

40. Petitioner's explanation sounds more like regret for allowing others to learn the details of incidents involving battery on her husband, rather than remorse for losing her temper and striking out at another person. Furthermore, Petitioner's statements express regret for what has happened to her, rather than harm she has inflicted on others.

41. Similarly, at hearing, Petitioner testified that in 2003 she had left her home, but that her mother called her and asked her to return. Petitioner stated that it was a "mistake"

for her to have returned to the house, but she did not describe as mistakes the actions she took upon her return.

42. Along with her exemption application, Petitioner submitted two character reference letters.^{4/}

43. Anthony Howard, an Elder in Petitioner's church, described her as "kind, compassionate, and a hard working person" and applauded her commitment to the church as an active member, Sunday School teacher, and usher.

44. A letter from Michelle Dunnam describes Petitioner as the "most kind hearted person I know" and applauds her volunteerism. The letter does not reveal how long she has known Petitioner or in what capacity. There is no record evidence of Ms. Dunnam's relationship to Petitioner, whether family, friend, employer, or otherwise.

45. Along with her request for a hearing, Petitioner submitted one additional character reference letter. Eric Mitchell, her employer's Diversity and Inclusion Community Ambassador, submitted a "letter of appreciation" for Petitioner's continuous service to the Jacksonville community through Habitat for Humanity, Florida Blood Drive, feeding the homeless, and supporting the Employee Resource Groups in their message of diversity and inclusion and at her church.

46. When asked if any of those who submitted character references were aware of her disqualifying offense, Petitioner

was defensive and seemed concerned that someone at the Agency might reveal her background to them.

Final Hearing

47. At final hearing, Petitioner presented very little testimony and no witnesses on her behalf.

48. Petitioner presented two additional character reference letters: One each from both of her ex-husbands.

49. In his letter, Mr. Lundy described Petitioner as an excellent mother, caring, intelligent, motivated, and "more than capable of managing a group of people." He cited her long-term employment and her involvement with the church as evidence of her dedication to family and community. He explained that Petitioner had asked for forgiveness and that they have forgiven each other.

50. Mr. Fields wrote that Petitioner has expressed that she is truly sorry, that he has forgiven her, and that he hopes for her to have a successful life.

51. Despite Petitioner's obvious commitment to her church and community, Petitioner's case for rehabilitation is thin. Petitioner was involved in a subsequent domestic battery incident, in which she caused minor injury to her husband, after completing a batterer's intervention course. There is no evidence of Petitioner pursuing anger management or any other counseling subsequent to the 2007 incident. Furthermore, the 2007 incident took place in a car while Mr. Fields was driving,

which put Petitioner, her husband, and other drivers at risk, a fact which was not acknowledged by Petitioner.

52. Petitioner was not forthcoming with the details of any of the incidents in question, yet denied the details as recorded in the police reports.

53. Petitioner was middle-aged when the 2003 and 2007 incidents occurred, thus eliminating any explanation on the basis of lack of maturity.

54. Petitioner's community volunteer work is laudable and she has reason to be proud of her service. However, the work does not demonstrate Petitioner's ability to calmly handle day-to-day difficult situations with developmentally-disabled clients. Even Petitioner admitted that she has not encountered behavioral issues with the children in her Sunday school class because their "parents are right there."

CONCLUSIONS OF LAW

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

56. Section 435.04, Florida Statutes, 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.

* * *

(3) The security background investigations under this section must ensure that no person subject to this section has been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense that constitutes domestic violence as defined in s. 741.28, whether such act was committed in this state or another jurisdiction.

57. The Agency based its disqualification of Petitioner on her 2003 nolo contendere plea to battery/domestic violence.

58. Section 435.07 establishes a process by which persons with criminal offenses in their backgrounds, that would disqualify them from acting in a position of special trust working with children or vulnerable adults, may seek an exemption from disqualification. That section 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 sanction for the disqualifying felony;

* * *

(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.

* * *

(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 decision is an abuse of discretion.

59. An exemption from a statute enacted to protect the public welfare is strictly construed against the person claiming

the exemption. Heburn v. Dep't of Child. & Fams., 772 So. 2d 561 (Fla. 1st DCA 2000).

60. 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.

* * *

The discretionary power that is exercised by a trial judge is not, however, without limitation [T]he trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner.

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).

61. The Agency has a heightened interest in ensuring that the vulnerable population being protected by chapter 435, i.e., developmentally disabled children and adults, is not abused, neglected, or exploited. In light of that mission, the legislature has imposed a heavy burden on those seeking approval

to serve this vulnerable population when they have disqualifying events in their past.

62. The statutorily-enumerated factors to be considered by the Agency in evaluating an exemption application are the details surrounding the disqualifying offense, the nature of the harm caused, the history of the employee since the incident, and the time period that has elapsed since the incident. § 435.07(3)(a), Fla. Stat.

63. The limited details of the disqualifying offense demonstrated Petitioner's inability to control her anger. By her own testimony, Petitioner left the scene, presumably allowing time to "cool off," but when she returned, violence still ensued. The fact that Petitioner was not forthcoming with details and seemed to be more concerned with harm to her reputation than the harm she caused others, did nothing to support her cause.

64. Of note, in arriving at its intended decision to deny Petitioner's exemption application, the Agency considered the 1994 arrest for aggravated battery/domestic violence. That arrest, for which no charges were brought, occurred prior to the disqualifying offense.

65. Section 435.07(3)(b) provides that "[t]he agency may consider as part of its deliberations . . . 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.”

66. The statute does not authorize the agency to consider offenses which occurred prior to the disqualifying offense, and to do so was error. Dawson v. Ag. for Pers. with Disab., Case No. 16-0661 n.2 (Fla. DOAH Apr. 28, 2016; Fla. APD May 23, 2016) (criminal arrests and convictions predating the disqualifying offense should not have been considered by the Agency); Rivera v. Ag. for Pers. with Disab., Case No. 15-5039 (Fla. DOAH Nov. 10, 2015; Fla. APD Dec. 8, 2015) (“Considering evidence of non-disqualifying crimes committed prior to the disqualifying offenses exceeded the powers and duties granted by the Legislature.”); Edwards v. Ag. for Pers. with Disab., Case No. 14-4987 n.4 (Fla. DOAH March 17, 2015) (Respondent’s consideration of Petitioner’s criminal offenses that occurred prior to the disqualifying offense violated the principle of statutory construction which requires statutes to be interpreted in a manner that gives meaning and effect to all of their provisions.).

67. While it was error for the Agency to have considered the 1994 incident in arriving at its intended decision to deny Petitioner’s exemption request, it did not undermine the Agency’s determination under the circumstances of this case. Even

excluding evidence of the 1994 arrest, Petitioner failed to prove rehabilitation by clear and convincing evidence.

68. The undersigned concludes, based on the totality of the circumstances, that the Agency's intended denial of Petitioner's requested exemption does not constitute an abuse of discretion.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered denying Petitioner's request for an exemption from disqualification.

DONE AND ENTERED this 8th day of November, 2016, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of November, 2016.

ENDNOTES

^{1/} The police report is hearsay. However, since 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 a duty imposed by law as to matters which there was a duty to report." The statements in the police report attributed to Petitioner, Mr. Fields, and the witness are simple hearsay for which there exists no applicable exception under section 90.803. However, the police officer's observations of the extent of injury or damage fall squarely within the exemption.

In an administrative proceeding, hearsay evidence is insufficient to support a finding of fact unless the evidence falls within an exception to the hearsay rule. See Fla. Admin. Code R. 28-106.213(3). While hearsay statements are admissible in an administrative proceeding to supplement or explain other non-hearsay evidence, pursuant to rule 28-106.213(3), the hearsay statements in this case were inadmissible because they were disputed, rather than corroborated, by Petitioner.

^{2/} Thus, this incident is not a disqualifying offense pursuant to section 435.04(2), Florida Statutes.

^{3/} Unless otherwise noted herein, all references to the Florida Statutes are to the 2015 version.

^{4/} A third letter, from Vistakon Human Resources simply verified the length, title, and address of Petitioner's employment.

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.