

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JENNIFER FORD,

Petitioner,

vs.

Case No. 16-4357EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

On September 19, 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: Jennifer Ford, pro se
4108 Shelley Road North
West Palm Beach, Florida 33407

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 June 26, 2016, Ms. Jennifer Ford (Petitioner or Ms. Ford) was notified that her request for exemption from disqualification from employment was denied, based upon the Agency's determination that Ms. Ford had failed to submit clear and convincing evidence of her rehabilitation. On July 11, 2016, Ms. Ford requested a formal hearing. On July 29, 2016, the Agency referred the matter to the Division of Administrative Hearings for the assignment of an Administrative Law Judge to conduct the final hearing.

At hearing on September 19, 2016, Respondent presented the testimony of Petitioner and that of Mr. Gerry Driscoll, regional operations manager for the Southeast Region of the Agency. Respondent's Exhibits A through D were received into evidence without objection, with the caveat that many contained hearsay. Petitioner testified on her own behalf and offered no exhibits.

The proceeding was transcribed, but neither party ordered a copy of the transcript. Upon motion from Respondent at hearing, the deadline to file proposed recommended orders was extended to October 3, 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. The ARC of Martin County, Inc. (the ARC), is a service provider for the Agency. Ms. Ford applied with the ARC to become an after-school counselor, 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 history of involvement with law enforcement, as Ms. Ford admitted in her exemption request paperwork and her testimony at hearing, summarized below.

4. On September 30, 2011, Ms. Ford entered a plea of guilty to forgery, driving on a suspended license, and providing a false name to law enforcement, for events that took place on April 9, 2010. Forgery, a felony of the third degree, is a disqualifying offense for employment in a position of trust. She was ordered to pay court fees and costs, and was put on probation for a period of 18 months for that offense.

5. In her responses in the Exemption Questionnaire, Ms. Ford gave few details as to the events surrounding the disqualifying offense itself. She stated only that she was a witness to an accident on March 20, 2011, almost a year after the forgery incident, and, after identifying herself to the police, was arrested on an outstanding warrant from Martin County for the forgery charge. Ms. Ford wrote in her own words:^{2/}

The forgery was do to traffic when I was pulled over and I gave my sister name to the officer. The officer then allowed me to go to go. I didn't know I had a warrant for Martin County until the night of the crash.

6. In response to inquiries concerning another arrest for driving with a suspended license and providing a false name to a law enforcement officer while being arrested or detained a couple of months later on May 9, 2011, Ms. Ford wrote:

I was on my to work and I was running late so I then was doing over milage and I was pulled over and gave officer a other name, cause I didn't want to be late for work.

7. At hearing, in response to inquiries concerning her arrest for shoplifting on January 22, 2013, Ms. Ford acknowledged shoplifting a medical device for her daughter from Wal-Mart.

8. Ms. Ford completed all confinement, supervision, and nonmonetary conditions imposed by the court for her disqualifying offense by March 29, 2013.

9. Mr. Gerry Driscoll is the regional operations manager for the Southeast Region of the Agency. He has served in his current position for three years and has been employed with the Agency for seventeen 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 criminal conduct or dishonesty very carefully.

10. In her written submission to the Agency, Ms. Ford did not recognize that she caused any harm or injury to any victim. However, at hearing, she admitted that she caused injury to her sister when she provided and signed her sister's name to law enforcement after being detained or arrested on more than one occasion.

11. Ms. Ford submitted three identically worded "form" character reference letters to the Agency, stating generally that she is a responsible, reliable, and honest person. The letters do not indicate the employment status or positions of the individuals signing the references.

12. Ms. Ford further stated that she was remorseful. In her Exemption Questionnaire, Ms. Ford wrote:

Yes my remorse is I accepting made bad choose
in my life and I accept full responsibility
for the actions that I made. I want to move

forward and put the pass behind me so I can make a better future for me and my kids.

13. Ms. Ford seems sincere in her desire to assist vulnerable persons and asks for a chance to work with them to demonstrate that she is rehabilitated. However, the statute requires that rehabilitation be shown first; only then may an exemption for disqualification be granted.

14. While Ms. Ford stated that she is rehabilitated, she offered little evidence to clearly demonstrate that. She completed a home health aide course in 2012, but has not participated in other counseling or coursework since the disqualifying offense.

15. Ms. Ford's recent work history includes employment as an administrative assistant with Florida Community Health Centers, Inc., from October 8, 2014, to October 5, 2015, and employment as a mental health technician with Sandy Pines Residential Treatment Center from July 18, 2008, to January 7, 2014.

16. Passage of time is a factor to be considered in determining rehabilitation, and the last disqualifying offense was over five years ago. However, Ms. Ford's history since her disqualifying offense includes more to reflect incidents and does not contain sufficient positive indications of rehabilitation.

17. Ms. Ford failed to prove by clear and convincing evidence that she is rehabilitated and that she will not present a danger if she is exempted from her disqualification from employment in a position of trust.

CONCLUSIONS OF LAW

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

19. Petitioner's disqualification limits the employment opportunities that are available to her. She will be unable to work at the ARC, or with similar providers in a position of trust, unless an exemption is granted. Petitioner has demonstrated standing to maintain this proceeding.

20. 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 following provisions of state law or similar law of another jurisdiction:

* * *

(k) Section 831.01, relating to forgery.

21. Petitioner's guilty plea to forgery on September 30, 2011, disqualifies her from employment in a position of trust.

22. Petitioner is seeking an exemption from employment disqualification for her third-degree felony forgery conviction, pursuant to section 393.0655(2). Section 393.0655(2) requires the Agency to follow the requirements set forth in section 435.07 when reviewing a request for exemption from employment disqualification.

23. 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 conditions 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 her disqualifying offense and is eligible for consideration for an exemption.

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

25. The prohibition against employing individuals convicted of disqualifying offenses in positions of trust 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).

26. 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)).

27. Under section 435.07(3)(a), evidence of rehabilitation may include, but is not limited to, the circumstances surrounding the 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.

28. Section 435.07(3)(c) provides that "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."

29. 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.

30. 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).

31. In Canakarlis v. Canakarlis, 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 Kareef v. Kareef, 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).

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

33. 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 her 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 Ms. Jennifer Ford's application for exemption from disqualification.

DONE AND ENTERED this 11th day of October, 2016, in
Tallahassee, Leon County, Florida.

F. Scott Boyd

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of October, 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/} Quotes from Ms. Ford are reprinted as they appeared, without any attempt to make grammatical corrections.

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.