

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSE RANGEL,

Petitioner,

vs.

Case No. 16-4506EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice on October 11, 2016, in Titusville, Florida, a hearing was conducted before J. D. Parrish, an administrative law judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Jose Rangel, pro se
2596 Emerson Drive Southeast
Palm Bay, Florida 32909

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

STATEMENT OF THE ISSUES

Whether Jose Rangel (Petitioner) has established by clear and convincing evidence that he is entitled to an exemption to work in a position of special trust; and, if so, whether Agency

for Persons with Disabilities (Respondent) abused its discretion in denying the exemption.

PRELIMINARY STATEMENT

On or about July 8, 2016, Respondent notified Petitioner that his request for an exemption to work in a position of special trust had been denied. The grounds for the denial were stated to be Petitioner's failure to submit clear and convincing evidence of rehabilitation. According to a background screening (required of all persons who seek to work in positions of special trust), Petitioner committed a disqualifying offense. As such, he was required to seek an exemption and to set forth information that would demonstrate by clear and convincing evidence that he is rehabilitated and entitled to the exemption sought. Upon receipt of the notice of denial Petitioner timely challenged the proposed action and requested an administrative hearing. The case was forwarded to the Division of Administrative Hearings on or about August 11, 2016.

At the hearing Petitioner testified in his own behalf and offered a three-page exhibit that was received in evidence over objection.^{1/} Petitioner failed to comply with the prehearing Order and failed to provide a copy of his exhibit to Respondent in a timely manner before the hearing. Respondent presented the testimony of Michael Sauve, deputy regional operations manager, and Respondent's Exhibits A through E were admitted into

evidence. Respondent provided copies of its exhibits to Petitioner before the hearing as ordered.

A transcript of the proceedings was not filed. The parties were granted ten days within which to file their proposed recommended orders. The proposed order timely submitted by Respondent has been fully considered.

FINDINGS OF FACT

1. In connection with his desire to work for the Devereaux Florida Treatment Network, a service provider under the authority of Respondent, Petitioner sought an exemption to work in a position of special trust. As a direct service provider who has contact with persons who are challenged in one manner or another, Petitioner was subject to a background screening to assure he meets the requirements of persons working with those served by his potential employer.

2. Petitioner's background screening disclosed criminal offenses that required explanation and further comment from Petitioner. Petitioner's criminal offense of Uttering a Forged Instrument, a violation of section 831.02, Florida Statutes (2016), is a disqualifying offense that requires an exemption. Should Respondent grant Petitioner an exemption, Petitioner would be allowed employment as a direct provider of services to clients served under the umbrella of Respondent's provider network. As

such, Respondent takes its responsibility to screen applicants for employment very seriously.

3. Respondent's clients are perhaps the most vulnerable of all individuals served within the framework of social services. By definition, Respondent's clients are those who are intellectually disabled, autistic, have spina bifida, Prader-Willi syndrome, cerebral palsy, Down syndrome and/or Phelan-McDermid Syndrome. Without assistance from Respondent, typically, these clients would face institutionalization. Instead, Respondent attempts to provide services to persons meeting its criteria at the local level. Respondent's clients are vulnerable to abuse, neglect, exploitation, and in many instances, cannot self-advocate for their best interests. Respondent's obligation is to assure all persons working with its clients meet the highest standard of trust.

4. In seeking to protect Respondent's clients, the Florida Legislature designated certain criminal offenses as disqualifying so that persons who commit those acts may not work in positions of special trust. It is undisputed that uttering a forged instrument constitutes a disqualifying offense.

5. On February 5, 2016, Petitioner submitted a Request for Exemption, Exemption Questionnaire, criminal records, character references, and other documents in an attempt to obtain the

exemption from employment disqualification. Petitioner asserts that he is rehabilitated and entitled to an exemption.

6. In August 2003 Petitioner committed the criminal offense of Uttering a Forged Instrument, a felony. In 2005, Petitioner pled guilty to the charge and adjudication was withheld. Petitioner was sentenced to two days' jail time with credit for time served, was given probation, and was required to pay fines and court costs. This crime constitutes a disqualifying offense.

7. Petitioner was also charged with non-disqualifying offenses in August 2003 contemporaneous with the disqualifying charge. Non-disqualifying charges include Driving Under the Influence (2nd Offense) and giving a false name.

8. Petitioner's third criminal charge of Possession of an Undersized Redfish would not be a disqualifying crime.

9. Petitioner's exemption questionnaire represented that all criminal matters were "satisfactory/closed".

10. Petitioner's driving record demonstrates a series of moving violations that include: two driving under the influence charges; a failure to use designated lane; a failure to use due care; and a leaving the scene of a crash before police arrived.

11. Petitioner falsified his Affidavit of Good Moral Character by indicating he had not been found guilty of or entered a plea of nolo contendere, regardless of adjudication, of the offenses listed. By falsely completing the form,

Petitioner's current character and trustworthiness are subject to question. Petitioner suggested the incorrect response was an oversight.

12. Petitioner has been employed with Ricoh or Adecco as a customer service representative since March of 2012. This employment history is acceptable to demonstrate a stable work history.

13. Petitioner and his wife also worked as licensed foster parents. Although the Department of Children and Families did not render findings confirming that he committed any improper act, Petitioner was the subject of an investigation for an alleged act of sexual abuse on a child.

14. Petitioner maintains he is entitled to an exemption in this case because he does not drink anymore, is in a committed marriage, has demonstrated a stable work history, and is an active, respected member of his church. Petitioner does not believe his criminal acts would indicate any degree of harm to any victim.

15. Respondent reviewed all of the information submitted by Petitioner and determined Petitioner did not demonstrate a sufficient level of rehabilitation to justify an exemption. Among Respondent's concerns were Petitioner's lack of detail in explaining his disqualifying offense and non-disqualifying offenses; Petitioner's failure to acknowledge that using another

person's name and identification could have caused significant legal issues for that person; and Petitioner's failure to acknowledge and comprehend the importance of truthfully completing his Affidavit of Good Moral Character.

16. Over objection Petitioner's three-page exhibit regarding an exemption issued by the Agency for Health Care Administration (AHCA) was admitted into evidence.^{1/} Petitioner erroneously believed that the exemption issued by AHCA would necessitate the issuance of the exemption in this case.

17. After consideration of the exemption issued to Petitioner by AHCA, Respondent found that an exemption to work with Respondent's clients is not warranted. Respondent's clients are considered very vulnerable and all of the reasons previously considered weigh against the issuance of an exemption in this case.

CONCLUSIONS OF LAW

18. Pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016), the Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding.

19. Section 435.07, Florida Statutes (2016), provides, in part:

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.

* * *

(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.

20. Section 393.0655, Florida Statutes (2016), provides, in pertinent part:

(2) 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

* * *

(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:

* * *

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

* * *

(1) Section 831.02 relating to uttering forged instruments.

21. Pursuant to law an applicant for an exemption must provide clear and convincing evidence of "rehabilitation." This "clear and convincing" standard requires proof that is more than a

preponderance of the evidence but less than beyond and to the exclusion of a reasonable doubt. For proof to be considered clear and convincing:

[T]he 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 at 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, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

22. Should the agency determine, as it did in this case, that the applicant for an exemption has not provided clear and convincing evidence to establish rehabilitation, the decision may be contested. In this case, Petitioner timely challenged Respondent's decision to deny the exemption and was afforded an administrative hearing to present evidence in support of his case. The standard of review for this case is set forth by law: whether the agency's intended action is an abuse of discretion. Therefore, the issue for determination is whether the agency's intended action constitutes an abuse of discretion based upon the facts determined from the evidence presented at hearing. If Petitioner failed to present clear and convincing evidence of

rehabilitation, it can hardly be suggested that the agency abused its discretion in denying the exemption. Moreover, the burden to establish that the agency abused its discretion in denying an exemption is difficult. See J.D. v. Dep't of Child. & Fams., 114 So. 3d 1127 (Fla. 1st DCA 2013).

23. In this case, Respondent articulated a concise and well-reasoned explanation for the decision to deny Petitioner's exemption application. Respondent's client population is among the state's most vulnerable. Many clients are unable to self-advocate and cannot attend to their own best interests. In many instances, Respondent's clients are totally dependent on caregivers who must address their physical, medical, and financial well-being. Without direct care, clients served by Respondent's providers would be institutionalized. Persons seeking to provide direct care for this population must be of the highest character. Respondent's obligation to protect its clients is not disputed. Petitioner's disqualifying offense, although committed some time ago, demonstrated a lapse of character. Petitioner's failure to fully explain all of the circumstances related to the charge troubled Respondent. At least two of Petitioner's non-disqualifying charges were alcohol-related. Petitioner did not disclose counseling or other means that enabled him to stop drinking. When looked through the lens of his recent failure to truthfully respond to a question in his Affidavit of Good Moral

Character, Petitioner's criminal history looms large. In addition to other non-disqualifying offenses and allegations, Petitioner has not demonstrated he is rehabilitated to the degree required for this client population.

24. Additionally, Petitioner's belief that the exemption granted by AHCA should be sufficient to support an exemption in this case is erroneous. Each agency must determine whether an exemption is appropriate and must consider the evidence presented to it based upon its clients' needs and the dictates of its judgment. Based upon the facts of this case, it is concluded Respondent did not abuse its discretion in denying Petitioner's exemption.

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 application for an exemption.

DONE AND ENTERED this 30th day of December, 2016, in
Tallahassee, Leon County, Florida.



J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of December, 2016.

ENDNOTE

^{1/} Petitioner's Exhibit 1 consisted of AHCA's exemption letter and recommendations from Petitioner's pastor and employer. Respondent's objection primarily was directed at the exemption letter since Petitioner had not provided it as required before the hearing. Letters of support were a part of Petitioner's application for exemption.

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.