

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CURTIS A. JACKSON,

Petitioner,

vs.

Case No. 16-5481EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

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 December 16, 2016, in Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Curtis A. Jackson, pro se
2860 Northwest 187th Street
Miami Gardens, Florida 33056-3131

For Respondent: Llamilys Maria Bello, Esquire
Agency for Persons with Disabilities
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201 West Broward Boulevard
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

By letter dated August 10, 2016, Respondent, Agency for Persons with Disabilities (the "Agency"), informed Petitioner that his request for exemption from disqualification was denied. Petitioner filed a request for an administrative hearing dated August 23, 2016. The request was forwarded to the Division on September 20, 2016.

The final hearing in this case was scheduled to commence on November 8, 2016. On November 3, 2016, Respondent filed an Agreed Motion for Continuance, stating that the parties needed additional time to reach a possible settlement. The motion was granted, and the hearing was reset for December 16, 2016. The parties did not settle the case, and it proceeded to hearing as scheduled.

At the hearing, Petitioner testified on his own behalf and offered no exhibits into evidence. Respondent presented the testimony of Gerry Driscoll, regional operations manager for the Agency's Southeast Region, and offered 11 exhibits, which were accepted into evidence.

No transcript of the hearing was prepared. Respondent timely filed its Proposed Recommended Order on January 11, 2017, which was considered in the preparation of this Recommended Order. Petitioner did not make any post-hearing submittal.

References to statutes are to the Florida Statutes (2016), 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 as a caregiver with Dynamic Healthcare Providers, Inc. ("Dynamic Healthcare"), a service provider regulated by Respondent.

3. Since Petitioner applied to be a caregiver, a position of special trust, with Dynamic Healthcare, he is required to undergo a Level 2 background screening.

4. The Department of Children and Families ("Department" or "DCF") conducts initial screening on behalf of the Agency. Background screening and local criminal records revealed a history of involvement with law enforcement, as Petitioner admitted in both the paperwork he filed with the Agency and in his testimony at hearing.

5. On September 27, 1994, Petitioner entered a plea of guilty to cocaine possession, a third-degree felony, and to possession of drug paraphernalia, a first-degree misdemeanor. The cocaine possession conviction is a disqualifying offense for employment in a position of trust. He was ordered to pay court

fees and costs, and sentenced to 14 days' confinement in county jail.

6. In the course of that same arrest, Petitioner also was charged with battery on his pregnant girlfriend, a misdemeanor offense, but that charge was later abandoned.

7. In his response to the Exemption Questionnaire, Petitioner explained the incident as follows:

A lady whom I was getting high with on a daily basis and shared my residence with[,] we got into an argument. I refused to share my drugs with her that particular day[.] She then became irate and called the police and told them I assaulted her. I was searched by the officer[s.] [T]hey found a crack pipe on my person with residue. I was charged with cocaine possession[.]

8. At the hearing, when asked if he had another prior arrest for domestic violence, Petitioner admitted he had been arrested previously, and charged with domestic violence in a separate incident, regarding a dispute he had with a previous girlfriend. Petitioner also explained his other previous arrests.

9. Concerning his January 22, 1995, arrest for cocaine possession, a third-degree felony, Petitioner explained in his Exemption Questionnaire:

While standing on the corner in the Miami Over Town area[,] I was suddenly approached by [a] Miami Dade Police Officer. I was in possession [of] what appeared to be crack cocaine. I was arrested and charged with

possession. No action was taken because it was not cocaine. It gave the appearance of an illegal substance.

10. Concerning his March 31, 1995, arrest for cocaine possession, a third-degree felony, Petitioner explained in his Exemption Questionnaire:

While traveling south on Biscayne Blvd and NW 69[th] Street[,] I was involved in an accident[.] I had a crack pipe and approximately two crack rocks in the vehicle. A search was conducted by Miami Dade Police, I was subsequently charged with possession and DWLS [;] no action was taken.

11. Concerning his April 24, 1998, arrest for driving while license suspended/habitual offender, a felony, Petitioner explained in the Exemption Questionnaire:

I was driving a young lady home who was feeling ill at the time. I was pulled over at a DUI check point on 175st [sic] NW 27th Avenue in Miami Gardens. My license was suspended during that time[.] [C]onsequently; [sic] I was arrested for DWLS and for a bench warrant[.] I really cannot remember what it was for. Eventually; [sic] I got my licenses [sic] reinstated.

12. Concerning his May 29, 2008, arrest for failure to appear [capias] regarding a traffic offense, Petitioner explained in his Exemption Questionnaire:

I was pulled over by Miramar police while going to the store. The officer informed me that there was an outstanding bench warrant for failing to appear. The charge was DWLS which was a 22 year old case. The charges [sic] was eventually dropped [;] case was dismissed.

13. Petitioner also was questioned concerning a June 13, 1992, charge of homicide-willful kill with a weapon, which the Agency had originally listed as a disqualifying offense to employment in a position of trust. In an addendum to his Exemption Questionnaire, Petitioner explained:

A guy I was hanging out with got into an argument with another individual, [sic] he produced a firearm. Consequently; [sic] he shot the guy in the leg and the guy fell [sic] to the ground. The shooter then pointed the gun at the guy's head in an attempt to shoot [sic] him in the head area. I then grabbed the shooter to stop him from shooting the other guy in the head. We then left the area in the shooter's car. Metro Dade Police gave chase, the gun was thrown out the car [sic] consequently, the shooter pulled over. We were both taken into custody. The charge [sic] was eventually dropped down to a misdemeanor.

14. The Agency reviewed all of Petitioner's criminal records and determined that his 1992 charge of homicide-willful kill with a weapon had been reduced to accessory after the fact, a misdemeanor, for which adjudication of guilt was withheld on June 13, 1992. The Agency did not consider this conviction to be a disqualifying offense, but did consider it in the totality of the evidence it reviewed concerning Petitioner's exemption from disqualification.

15. Mr. Gerry Driscoll, the regional operations manager for the Agency's Southeast Region, credibly testified that the Agency has a significant responsibility to a vulnerable population, many

of whom lack competency, and are unable to communicate to others any negative or improper actions carried out by their caregivers. These individuals are often solely dependent on their caregivers, and are thus susceptible to exploitation. Mr. Driscoll noted that the Agency considers any prior criminal conduct involving violence or aggression with particular care when exercising its authority and discretion to grant exemptions for employment in positions of trust.

16. In his written submission to the Agency, Petitioner did not specifically admit to causing any harm or injury to any victim. However, at the hearing, he admitted that he had caused injury to others with whom he associated during his period of addiction, especially his family, girlfriends, and children.

17. Academically, Petitioner has accomplished a great deal. He has received the following post-secondary school degrees: an associate of arts degree from Miami Dade College (2010), a bachelor degree in Liberal Studies from Barry University (2013), and a masters in Social Work ("MSW") (2016) from Barry University. He has been a lifetime member of the Delta Epsilon Iota Academic Honor Society since 2013.

18. Petitioner's résumé demonstrates an uninterrupted work history since 1997, with experience in the fields of social services, mental health, and substance abuse counseling, primarily involving individuals with mental illness and substance

addictions. He was most recently employed with Dynamic Healthcare and has been providing substance abuse counseling and support to non-Agency clients with addiction issues.

19. Petitioner submitted letters of reference and recommendations from: his current employer, Samuel E. Kelly, director of Dynamic Healthcare; Justice for Life, a psycho-education provider for the Misdemeanor Drug Court Program in Broward County; Better Way of Miami, Inc., an inpatient facility for drug and alcohol addiction; and Overtown Youth Center and John F. King, Attorney at Law, from 2008.

20. Petitioner submitted additional training certificates that were considered by the Agency, including: The McShin Foundation Leadership Training Institute Peer Addiction Recovery Training; The Broward House HIV/AIDS Continuing Education (2014); HIPAA Basics Training (2013); Aggressive Control Training (2014); and Ethics Training (2014).

21. Mr. Driscoll testified that the Agency also considered the following exemptions previously granted to Petitioner by other agencies: an employment waiver granted by DCF on October 10, 2008, to work with adults in mental health and substance abuse; an exemption from disqualification from employment under section 435.07, Florida Statutes, granted by the Agency for Health Care Administration on January 23, 2015; and another more recent exemption from DCF granted on April 29, 2016.

22. At the hearing, Petitioner admitted he had suffered a "22-year addiction to a controlled substance." He started drinking alcohol at age ten, and ended with crack cocaine. He received substance abuse counseling from two different providers: Better Way of Miami in 1995-1996, and Spectrum Programs in 2002-2003. Moreover, he offered credible testimony that he has been clean from this addiction for 20 years and attends regular meetings of Narcotics Anonymous ("N.A.") or Alcoholics Anonymous ("A.A.") to this day.

23. Mr. Driscoll's position was that, despite there being some evidence of rehabilitation submitted with the Application for Exemption, and the subsequent request for hearing, and even the sincere testimony given by Petitioner at hearing concerning his addiction, this did not amount to sufficient evidence for him to recommend an exemption from disqualification. When considering all the evidence in its totality, he testified, the Agency did not conclude Petitioner had met his burden by the standard of clear and convincing evidence.

CONCLUSIONS OF LAW

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. "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.

Canakarlis v. Canakarlis, 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).

30. 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.

31. 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.

32. The abuse of discretion standard is indeed a harsh one. It is not beyond the realm of possibility a reasonable mind could believe an individual, whose principal disqualifying offense and related crimes occurred during a period of drug addiction, has not and never will fully recover, because as many people believe, "once an addict, always an addict," or at least a recovering addict. Despite the difficulty in finding that the Agency abused its discretion in denying the exemption from disqualification sought by Petitioner, Petitioner has proven, by clear and convincing evidence, that he has been rehabilitated from his disqualifying offense. Here, the disqualifying offense was a narcotics offense more than 22 years ago. Since that time, even taking into account subsequent offenses, mostly within a few years of the disqualifying offense and while still using drugs, Petitioner has voluntarily submitted himself to constant meetings of N.A. or A.A. for more than 20 years. He has been sober for 20 years and remains sober today. He also has bettered his lot in life by successfully seeking a college education and earning both an undergraduate and graduate degree, the latter an MSW that will

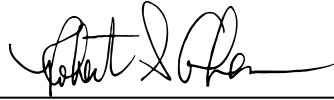
allow him to serve patients with a high degree of skill, if granted the exemption.

33. Without disparaging the sincere beliefs held by Mr. Driscoll and others within the Agency as to the ability of an individual like Petitioner to rehabilitate himself, the undersigned believes this is exactly the case in which the Agency should find Petitioner has rehabilitated himself to such an extent that he is both qualified and safe to be allowed to serve the vulnerable population under the Agency's jurisdiction. Further, the faith other Florida agencies have shown in Petitioner, by granting him exemptions from disqualification or waivers for employment, lends further credence to his current ability to serve the Agency's patient population. Petitioner's life experiences and continuing recovery from his tribulations qualify him to hold a position of trust.

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 granting Petitioner's Application for Exemption from Disqualification.

DONE AND ENTERED this 1st day of February, 2017, in
Tallahassee, Leon County, Florida.



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.