

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AUBREY MEDARIES,

Petitioner,

vs.

Case No. 16-6425EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case on December 19, 2016, via video teleconference sites in Tallahassee and Gainesville, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Aubrey Medaries, pro se
1338 Southeast 1st Court
Gainesville, Florida 32601

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

STATEMENT OF THE ISSUE

Whether the Agency for Persons with Disabilities' (Agency) 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 September 16, 2016, the Agency issued its notice of agency action by which it informed Petitioner that his 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 [his] rehabilitation."

Petitioner filed his Request for Administrative Hearing with the Agency on October 21, 2016, which request was referred to the Division of Administrative Hearings on November 2, 2016. The final hearing was scheduled for December 19, 2016, and commenced as scheduled.

At the final hearing, Petitioner testified on his own behalf and offered the testimony of his wife, Dawnese Medaries, and an Agency provider, Diyonne McGraw. Petitioner did not introduce any exhibits.

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

The proceedings were recorded, but the parties did not order a transcript thereof. Both parties timely filed Proposed Recommended Orders, which have been considered in preparing this Recommended Order.

FINDINGS OF FACT

Parties and Background

1. Petitioner is a 41-year-old male residing in Gainesville, Florida. For the last four months Petitioner has been employed by Plane Techs, where he has been contracted out to Haeco Aviation for repair of interior aviation mechanics.

2. Petitioner wishes to become employed by Successful Living II, an Agency provider which operates residential treatment group homes serving people with both moderate and severe behavioral disabilities.

3. 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.

Disqualifying Offenses

4. Petitioner's record contains two felony offenses which automatically disqualify him from employment in any position of special trust with children or vulnerable adults.

5. The first offense is the armed robbery of an Arby's restaurant in Lake City, Florida, in May 1998. Petitioner conspired with his two male cousins, then employees of the subject Arby's, to rob the restaurant. A first attempt was scrapped due to the number of customers in the restaurant, but Petitioner returned and finished the job just prior to closing.

6. Petitioner was tried and convicted by a jury of both armed robbery and burglary of an occupied structure. He was sentenced to 32 months in prison, followed by eight months of probation.

7. In the second offense the same month as the first, Petitioner and the same two cousins robbed a man in the parking lot of a hotel in Gainesville. The trio held up the man at gunpoint and deprived him of a duffle bag containing a computer and other valuables, as well as his wallet containing cash and credit cards.

8. Petitioner was tried and convicted by a jury of aiding and abetting robbery while armed with a deadly weapon. He was sentenced to 64 months in prison, to be served concurrently with the sentence from the first offense.

9. Petitioner was 22-years old at the time of the disqualifying offenses.

10. Petitioner served 64 months (approximately five years) in a state correctional facility and eight months' probation.

The Department of Corrections terminated his supervision on December 13, 2010.

11. At hearing, Petitioner denied that he and his co-conspirators used a gun during the Arby's robbery. He failed to appreciate that adjudication of the offense had established a weapon was utilized.

12. At hearing, Petitioner downplayed his involvement in the robbery of the man in the hotel parking lot. Petitioner insisted that he had no idea his cousin was going to rob the man until the robbery was underway. However, Petitioner admitted that he participated in the robbery by ordering the victim to kick over his duffle bag, while his cousin threatened the victim at gunpoint.

Subsequent Non-Disqualifying Offenses

13. Petitioner's background screening revealed several non-disqualifying offenses subsequent to Petitioner's incarceration.^{1/}

14. Respondent alleges Petitioner had three probation violations: (1) driving with a suspended license on October 14, 1998; (2) an unspecified violation on March 23, 2004; and (3) failure to appear on May 26, 2004.^{2/}

15. No court records concerning these alleged probation violations were offered in evidence. According to a letter from

the Columbia County Clerk's office, no records of the alleged violations could be located.

16. Respondent submitted no evidence of the source of information for the alleged probation violations.

17. The record does contain an Affidavit of Probation Violation dated March 3, 2004, in which Probation Officer Aaron Robert attested to Petitioner's violation of a condition of his probation requiring Petitioner to complete 100 hours of community service within one year of his release from prison. The affidavit states that, as of that date, Petitioner had submitted proof of completion of only 28 hours.

18. The record also contains an Order of Modification of Probation entered on July 8, 2004, finding Petitioner admitted to the violation, was found in violation, and adjudicated guilty of the violation. However, the same terms of probation were reinstated.

19. The record supports a finding that Petitioner is guilty of only one probation violation subsequent to commitment of the disqualifying offenses.

20. Petitioner was cited for driving with license suspended (DWLS) in November and December 2006; October 2009; and February, July, and August 2011.

21. With regard to the November and December 2006 DWLS adjudications, Petitioner's license had been suspended for lack

of insurance. Petitioner claimed not to have known his license had been suspended when he was first stopped in November 2006.

22. For the November 2006 DWLS charge, Petitioner pled guilty and was sentenced to serve 12 months' probation and ordered to pay court costs, fines, and fees. Columbia County Court Judge Tom Coleman presided over Petitioner's case, and terminated Petitioner's probation on January 31, 2008, finding Petitioner had satisfied all conditions of probation.

23. Petitioner likewise plead guilty to the December 2006 DWLS charge, was placed on 12 months' probation, and ordered by Judge Coleman to complete 50 hours of community service and produce a valid driver's license within 10 months. Judge Coleman allowed the probation to run concurrent with the November sentence. Judge Coleman terminated Petitioner's probation on January 31, 2008, finding Petitioner had satisfied all conditions of probation.

24. On October 4, 2008, Petitioner was cited for violating a municipal open container ordinance, and ordered to appear in Columbia County Court on October 30, 2008. Although the citation was admitted in evidence, no court record of the violation was produced in response to Petitioner's records request.

25. Again in 2009, Petitioner's automobile insurance was canceled for nonpayment, leading to the suspension of his driver's license. On October 27, 2009, Petitioner was again

charged with DWLS and ordered to appear in county court on November 10, 2009. On March 11, 2010,^{3/} Petitioner was ordered to pay court costs, fines, and fees in the amount of \$373.50 by September 9, 2010, or return to court on that date.

26. On November 16, 2010, Petitioner appeared before Judge Coleman on the October 27, 2009 DWLS charge. Judge Coleman withheld adjudication and again sentenced Petitioner to 12 months' probation and payment of court costs (of which \$343.50 was remaining from the partial payment plan), allowing for early termination within six months, if all conditions were met.

27. In 2011, Petitioner became employed at Target and assumed the risk of driving to and from work without a valid license in order to earn an income. Petitioner was stopped by police three separate times that year and cited for driving with a suspended license.^{4/}

28. During the February 2011 traffic stop, Petitioner falsely identified himself as his cousin, and gave his cousin's address, in an effort to avoid another citation. However, the police officer discovered Petitioner's Target employee badge which revealed his correct identity. Petitioner was charged with both giving a false name to law enforcement (Count I) and DWLS (Count II).

29. On March 29, 2011, Judge Coleman entered an order withholding adjudication on Count I, but adjudicating Petitioner

guilty on Count II. As to Count I, Judge Coleman sentenced Petitioner to 12 months' probation and ordered Petitioner to write a letter of apology to the arresting officer, pay court costs and fees, complete 15 community service hours per month until Petitioner either became employed or completed 150 hours, and produce a valid driver's license within 10 months. As to Count II, Petitioner was also sentenced to 12 months' probation to run concurrently with the sentence for Count I.

30. Unfortunately for Petitioner, the March 29, 2011, adjudication constituted a violation of the probation order entered on September 16, 2010. On January 24, 2012, Judge Coleman entered a new judgement on the 2009 DWLS violation, sentencing Petitioner to 20 days in county jail, but allowing him to serve the sentence in consecutive weekly installments of 48 hours from 5 a.m. Sundays to 5 a.m. Tuesdays.

31. On June 5, 2012, Judge Coleman terminated Petitioner's probation under the September 16, 2010, judgement as Petitioner had satisfied all conditions of probation.

32. On April 30, 2013, Judge Coleman terminated Petitioner's probation under the March 29, 2011, judgement as Petitioner had satisfied all conditions of probation.

33. For Petitioner's subsequent July 12, 2011, DWLS charge, and August 27, 2011, DWLS charge, he was adjudicated guilty and sentenced to two consecutive jail terms of 30 days, probation of

12 months, and ordered to pay court costs and fees. Judge Coleman allowed Petitioner to serve the jail time on subsequently designated weekends.

34. Petitioner was released from probation on those charges on January 29 and March 31, 2015, respectively.

35. Petitioner has subsequently obtained a restricted license which allows him to drive to and from work, as well as to pick up his children from school and other activities.

Subsequent Employment History

36. Petitioner has had varied employment since his release from prison. He worked for Hunter Panels in Lake City on the insulation assembly line for approximately two years, then Accurate Car Care as Assistant Manager of the detail shop for another year.

37. Petitioner's last job in Lake City was with Target, where he was terminated for tardiness.

38. After his relocation to Gainesville, Petitioner worked for the Florida Farm Bureau in maintenance before becoming employed by Plane Techs. Petitioner anticipates being laid off by Plane Techs at the conclusion of the current contract with Haeco, due to lack of contract opportunities.

39. In the summer of 2014, Petitioner was certified as a basketball referee by the Mid-Florida Officials' Association.

Petitioner officiates basketball games three to four times a week during basketball season, as well as post-season tournaments.

40. Petitioner had to undergo background screening with Mid-Florida Officials' Association, and was originally denied certification due to his criminal record. However, the association allowed him to proceed with certification following an exemption review.

Subsequent Personal History

41. Petitioner was divorced in late 2015. Petitioner has joint custody of his five children, who reside with him every other weekend, portions of each summer, and certain holidays.

42. For the last ten years, Petitioner has volunteered as a football coach in Lake City (commuting from Gainesville) to remain involved in his son's life. Additionally, Petitioner has volunteered as a coach for Columbia County little league football for approximately four years. In this capacity, he has worked with children ages five, six, and seven.

43. Petitioner has completed some of his required community service by sharing his experiences with high school students, and encouraging them to make better life choices.

44. Petitioner remarried on November 12, 2016. The couple met approximately four and a half years earlier. Petitioner revealed his criminal history to his new wife on their third date, approximately three years earlier.

45. Petitioner met Dyonne McGraw a little over two years ago through her husband, who is also a volunteer football coach. Ms. McGraw became more familiar with Petitioner through his wife, who is Ms. McGraw's hairdresser.

46. Ms. McGraw owns Successful Living II, under which she operates three group homes and is working to license a fourth. She specializes in "intensive behavior focus," meaning she serves clients with mental health issues, sexual issues, and physical and verbal aggression, some of whom have dual and triple diagnoses, and many of whom were recently released from incarceration.

47. Ms. McGraw is a former probation officer. She testified, credibly, that, based on her observation of Petitioner's interaction with her own children, as well as many other children involved in recreational sports, he has the patience to effectively deal with her clients. Further, she testified that Petitioner has demonstrated a commitment to her agency and a passion for the work it entails.

Petitioner's Exemption Request

48. In his exemption request, in response to the question regarding the "degree of harm to victim or property (permanent or temporary), damage, or injuries," Petitioner answered, "[n]one."

49. In response to the question regarding any stressors in his life at the time of the disqualifying offenses, Petitioner also stated, "[n]one."

50. Petitioner achieved a Graduate Equivalency Diploma (GED) while incarcerated. Petitioner reported no further educational pursuits.

51. In his exemption request, Petitioner accepted responsibility for "poor and wrong decision[s] [he] chose early in [his] life." He admitted that he is embarrassed by his charges, but is not ashamed to talk about his history and advise young people that such mistakes can change the course of your life. Petitioner's request also demonstrates a dedication to providing life lessons for his children and preventing them from going down the path he chose.

52. In the employment history section, Petitioner listed only his employment with Target in Lake City.

53. Petitioner's exemption request included two personal reference letters--one from his wife, then Dawn Teasley, and one from Matthew Dillard, a teacher at Lake City Middle School in Columbia County.

54. The letter from Petitioner's wife described Petitioner as "reliable, honest and responsible" both in his capacity as maintenance and groundskeeper for her salon and as a head coach for her nephew's football team in Lake City. She also commented

on Petitioner's "ability, patience and genuine concern and care for youth" and his ability to "bring out the very best of every youth he coaches regardless of their skill set or level." His wife further described Petitioner as an "enthusiastic leader," as well as "reliable, honest and responsible."

55. Mr. Dillard's letter was brief. In the letter, he stated that he has known Petitioner for ten years, has played recreational basketball with Petitioner, and has worked with Petitioner at a local community center volunteering with youth. He noted that he "has never seen [Petitioner] become overwhelmed by a given task or assignment."

56. Along with his exemption application, Petitioner also submitted a personal letter from Judge Coleman. Petitioner received the unsolicited letter in April 2015 following Petitioner's release from court supervision.

57. In the letter, Judge Coleman acknowledged that he "cannot remember writing a letter like this before" but wanted to congratulate Petitioner. The letter reads, as follows:

As you know, I made several decisions to give you additional time and chances to succeed despite the opposition of others. I had faith in you because I saw something in you - a determination and focus. By your actions you have justified my faith in you and I admire you for that.

I am very proud of you and I know that you will go on to accomplish great things with your life. As you know, I see many people

daily and I cannot always remember faces, so I request this of you. If you see me somewhere and recognize me, come and see me so I can congratulate you in person. I wish you all the best life has to offer. Keep working hard.

Ultimate Facts

58. Many of Petitioner's recent decisions and pursuits demonstrate a commitment to a life of responsibility to family and community, concern and respect for others, and the importance of steady and reliable work. Petitioner's volunteerism is commendable, as well as his remarriage and support of his children. Judge Coleman's letter is evidence of Petitioner's determination to better himself and to overcome his prior poor decisions.

59. However, many of the facts established about Petitioner are grounds for the Agency to question his fitness to work with the most vulnerable clients. Petitioner's attempts to downplay his involvement in the 1998 felonies evidence a lack of true remorse for his actions. His willingness to lie to a police officer, as recently as 2011, evidence a lack of respect for law enforcement, and his lack of separation from his cousins, who have been a bad influence in his past, supports the Agency's uneasiness concerning Petitioner's future decisions.

CONCLUSIONS OF LAW

60. The Division has jurisdiction over the subject matter of, and the parties to, this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).^{5/}

61. 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.

* * *

(2) The security background investigations under this section must ensure that no persons subject to the provisions of this section have been arrested for and are awaiting final disposition of, have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have 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:

* * *

(z) Section 810.02, relating to burglary.

* * *

(cc) Chapter 812, relating to theft, robbery, and related crimes, if the offense is a felony.

62. The Agency based its disqualification of Petitioner on his 1998 convictions for robbery and burglary.

63. 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.

64. 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).

65. 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).

66. 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.

67. 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.

68. Although a lengthy time period has elapsed since the disqualifying offense, the felony convictions are for serious crimes involving use of a weapon. While the felonies did not result in any physical harm or property damage, use of firearm, especially in a crowded restaurant, exposed others to significant danger. Further, Petitioner's efforts to downplay the serious nature of the crimes, and his role therein, belie his statements of remorse and question the responsibility he has assumed for them.

69. Petitioner's subsequent history, while laudable in many respects, demonstrates a pattern of behavior disrespectful to law enforcement.

70. Even considering Petitioner's volunteer work and commitment to youth sports, his children, and building a new life by remarriage and efforts at more stable employment, Petitioner failed to prove rehabilitation by clear and convincing evidence.

71. 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. Petitioner may be more successful if he applies again for exemption after more time has elapsed since his non-disqualifying offenses.

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 25th day of January, 2017, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of January, 2017.

ENDNOTES

^{1/} In reaching its intended action to deny Petitioner's exemption request, the Agency also considered a charge of public discharge of a firearm against Petitioner which predates his disqualifying offenses. The operative 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.).

^{2/} Respondent's exemption review summary shows the date of the probation violation as "Mary 26, 2004." The undersigned assumes this is a typographical error and has substituted "May" for the month of the offense. Because no court records of the offenses were submitted, there can be no certainty of the date.

^{3/} The record contains no explanation of the delay between the order to appear on November 10, 2009, and the order of partial payment plan dated March 11, 2010.

^{4/} At hearing, Petitioner complained that the same police officer stopped him multiple times either going to or coming from his place of employment during this timeframe. However, the record revealed that different officers signed the three citations.

^{5/} Except as otherwise noted herein, all references to the Florida Statutes are to the 2016 version.

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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.