

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AMY VIELAND,

Petitioner,

vs.

Case No. 17-0219EXE

AGENCY FOR PERSONS WITH  
DISABILITIES,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, this case was heard on March 8, 2017, in New Port Richey, Florida, before W. David Watkins, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: No appearance

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

STATEMENT OF THE ISSUES

The issues in this case are whether Petitioner has, pursuant to section 435.07, Florida Statutes, demonstrated by clear and convincing evidence that she should not be disqualified from employment in a position involving direct contact with children

or developmentally disabled persons; and, thus, whether the intended action to deny an exemption from disqualification from employment is an abuse of the agency's discretion.

PRELIMINARY STATEMENT

By letter dated December 15, 2016, the Agency for Persons with Disabilities ("APD" or "Respondent") issued its notice of proposed agency action by which it informed Amy Vieland ("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 for Persons with Disabilities." The basis for APD's determination, as alleged in its notice of proposed agency action, was that Petitioner "[had] not submitted clear and convincing evidence of [her] rehabilitation" from disqualifying criminal offenses in her past.

On January 3, 2017, Petitioner timely filed her Request for Administrative Hearing with APD. In her Request for Administrative Hearing, Petitioner disputed the facts upon which APD relied in determining that she should be disqualified from working with children or developmentally disabled people. On January 13, 2017, APD referred the case to the Division of Administrative Hearings for a formal administrative hearing.

The Initial Order was entered on January 13, 2017. A Joint Response to the Initial Order was filed by Respondent and Petitioner on January 20, 2017. Among the dates provided by Petitioner as being available for the final hearing was March 8, 2017. On January 25, 2017, a Notice of Hearing scheduling the final hearing for March 8, 2017, at 9:30 a.m. in New Port Richey, the location requested by the parties, was entered.

On February 15, 2017, APD filed a Motion to Transfer Venue, seeking to have the matter heard via video teleconference with locations in Tallahassee and Tampa. Petitioner did not file a written response to the motion, so the undersigned convened a telephonic motion hearing/pre-hearing conference on February 24, 2017, for the purpose of hearing argument on the motion, and to discuss other pre-hearing matters. Petitioner attended the telephonic motion hearing, and strenuously objected to the requested change of venue, since she resides in Shadyhills, Florida. On that same date the undersigned entered a written Order denying the Motion to Transfer Venue. Also on February 24, 2017, the undersigned issued an Amended Notice of Hearing in which only the starting time of the hearing was changed. The new starting time for the hearing was designated as 10:30 a.m. in order to accommodate travel of the parties and witnesses.

Petitioner did not file or exchange a witness list, exhibit list, or proposed exhibits, pursuant to the Order of Pre-hearing Instructions. On February 14, 2017, Respondent filed its Witness List and Proposed Exhibit List.

The final hearing was convened at 10:30 a.m. on March 8, 2017, as noticed. No one appeared on behalf of Petitioner. Counsel for Respondent appeared, as did Respondent's witness, Jeffrey Smith. A court reporter was in attendance, having been retained by Respondent. After preliminary matters were dispensed with, a 45-minute recess was granted to allow for an appearance by Petitioner. During this time, the undersigned's assistant attempted to contact Petitioner at her phone number of record, but was unsuccessful. Also during this interval, the undersigned, adorned in his robe, stood in the hallway outside of the hearing room to make himself more visible to Petitioner if she was having difficulty locating the hearing room.

The final hearing was reconvened at 11:15 a.m., without an appearance by Petitioner. Given the burden of proof as discussed herein, the final hearing was thereafter adjourned.

References to statutes are to Florida Statutes (2016) unless otherwise noted.

### FINDINGS OF FACT

1. By letter dated December 15, 2016, Respondent issued its notice of proposed agency action by which it informed Petitioner that her request for exemption from disqualification was denied.

2. A timely Petition for Formal Administrative Hearing involving disputed issues of material fact was filed on behalf of Petitioner.

3. After filing the hearing request, Petitioner responded to the Initial Order, and the final hearing was scheduled on a date provided by Petitioner. Thereafter, Petitioner failed to comply with the Order of Pre-hearing Instructions and failed to appear at the final hearing.

4. Based on Petitioner's failure to appear and offer evidence, there is no evidentiary basis on which findings can be made regarding whether Petitioner proved her rehabilitation from the disqualifying offense such that Petitioner would not present a danger to children or developmentally disabled people served in programs regulated by Respondent.

### CONCLUSIONS OF LAW

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

6. 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, in pertinent part, that:

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.

\* \* \*

(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 action is an abuse of discretion.

7. The statute must be strictly construed against the person claiming the exemption. Heburn v. Dep't of Child. & Fams., 772 So. 2d 561 (Fla. 1st DCA 2000).

8. It is well-established that:

[A]lthough the ultimate legal issue to be determined by the ALJ in a proceeding under section 435.07(3)(c) is whether the agency head's intended action was an "abuse of discretion," the ALJ is to evaluate that question based on the facts determined from the evidence presented at a de novo chapter 120 hearing.

J.D. v. Dep't of Child. & Fams., 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013).

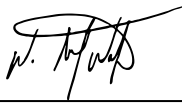
9. APD has a heightened interest in ensuring that the vulnerable population it serves is not abused, neglected, or taken advantage of. In light of that mission, the Legislature has justifiably imposed a heavy burden of proof on those seeking approval to serve those persons when they have disqualifying events in their past.

10. Petitioner failed to meet her burden of proof of setting forth clear and convincing evidence of rehabilitation indicating that she will not present a danger if employment or continued employment is allowed.

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, Amy Vieland's, request for an exemption from disqualification.

DONE AND ENTERED this 16th day of March, 2017, in Tallahassee, Leon County, Florida.



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W. DAVID WATKINS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 16th day of March, 2017.

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.