

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BERTHA DELANEY,

Petitioner,

vs.

Case No. 17-2254

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on June 7, 2017, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Bertha Delaney, pro se
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For Respondent: Kurt Eric Ahrendt, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner should be granted an exemption from disqualification from employment with

a private contractor providing adult day training to developmentally disabled clients of Respondent.

PRELIMINARY STATEMENT

By a letter dated March 17, 2017, the executive director of Respondent Agency for Persons with Disabilities, Barbara Palmer, notified Petitioner Bertha Delaney that her request for an exemption from disqualification from employment with a private contractor providing services to developmentally disabled persons would be denied. In a Petition for Administrative Hearing, which her representative submitted on April 6, 2017, Petitioner exercised her right to be heard in a formal administrative proceeding. On April 13, 2017, the agency referred the matter to the Division of Administrative Hearings, where the case was assigned to an Administrative Law Judge.

The final hearing took place as scheduled on June 7, 2017, with both parties present. Petitioner testified on her own behalf and called Yvonne Ginsberg as a witness. She also moved Petitioner's Exhibits 1 through 4 into the evidentiary record. Respondent called Petitioner and two additional witnesses, Gerard C. Driscoll and Thomas Rice. Additionally, Respondent's Exhibits 1 through 5 were received in evidence.

The final hearing transcript was filed on July 18, 2017. Each party timely filed a Proposed Recommended Order on or

before the deadline established at hearing, which was July 28, 2017.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2016.

FINDINGS OF FACT

1. From April 2016 to October 2016, Petitioner Bertha Delaney ("Delaney") was employed by Cypress Place, Inc. ("Cypress"), a private, nonprofit corporation that provides services to developmentally disabled clients, and operates under the regulatory jurisdiction, of Respondent Agency for Persons with Disabilities ("APD"). Delaney was hired by Cypress as a receptionist, and her responsibilities included answering the phones, handling clerical tasks such as maintaining attendance sheets and filing, and assisting other employees as needed.

2. Cypress operates an adult day training program, which offers "adult day training services" to APD clients. Such services include "training services that take place in a nonresidential setting, separate from the home or facility in which the client resides, and are intended to support the participation of clients in daily, meaningful, and valued routines of the community. Such training may be provided in work-like settings that do not meet the definition of supported employment." § 393.063(1), Fla. Stat.

3. There is no persuasive evidence showing that, during her employment with Cypress, Delaney ever had face-to-face contact with a client while performing adult day training services. She was not, therefore, a "direct service provider" as that term is defined in section 393.063(13), Florida Statutes. Delaney did, however, have incidental, in-person interactions with clients, the evidence establishes, occasionally assisting clients in need of immediate help. Thus, although Delaney did not provide *training* services to clients, she provided *some* services in the broader sense of "helpful acts."

4. In early August of 2016, an incident involving a client occurred at Cypress's facility, which the Department of Children and Families ("DCF") investigated. In the course of the investigation, the DCF investigator interviewed Delaney and learned that, because the subject client had appeared to be limping on the day in question, Delaney had helped the client walk from the bus to the building. At the time, Delaney had not yet undergone level 2 background screening because Cypress had not instructed her to do so. Rather, in or around April 2016, when she was hired, Cypress had required Delaney to go to the police department for a local criminal background check, which she did. Delaney, in fact, did everything that Cypress asked her to do with regard to background screening.

5. Soon after (and perhaps because of) the DCF investigation, Cypress directed Delaney to submit to a level 2 background review, which she did.^{1/} And so it happened that in late August 2016, a search of Delaney's criminal history was performed, and the results were forwarded to DCF, which administers the background screening process for APD.

6. By letter dated October 3, 2016, DCF notified Delaney that it had discovered her criminal conviction on a charge of grand theft of the third degree, to which she had pleaded no contest on June 13, 2001. This crime is a "disqualifying offense" under the applicable screening standards, which means that Delaney is ineligible to work as a direct service provider without an exemption from such disqualification. DCF advised Delaney that she needed to quit her job at Cypress and obtain an exemption from disqualification if she wanted to resume working there. Delaney promptly resigned her position with Cypress.

7. Delaney then sought an exemption from disqualification from employment, submitting her Request for Exemption to DCF in November 2016. By letter dated March 17, 2017, APD informed Delaney that it intended to deny her request based solely on the ground that Delaney had "not submitted clear and convincing evidence of [her] rehabilitation." In other words, APD determined as a matter of ultimate fact that Delaney was not rehabilitated, which meant (as a matter of law) that the head of

the agency had *no discretion* to grant an exemption.^{2/} APD did not, as an alternative basis for its proposed agency action, articulate any rationale for denying the exemption notwithstanding a showing of rehabilitation, assuming *arguendo* that such had been made.

8. Delaney initiated the instant proceeding, hoping to prove her rehabilitation. The undersigned has considered the evidence as it relates to the statutory criteria for assessing rehabilitation, and makes the following findings of fact as a predicate for the ultimate determination.

The Circumstances Surrounding the Criminal Incident.

9. In or around September of 2000, Delaney stole cash receipts from her employer, Blockbuster Video, totaling approximately \$13,800.00. She was soon arrested and charged with grand theft of the third degree, a felony offense as defined in section 812.014, Florida Statutes.

10. At the time of the offense, Delaney, then 25 years old, was experiencing financial difficulties raising two young daughters. Although married, Delaney managed the household mostly on her own, as her husband, an interstate truck driver, was often on the road. Exercising what she now acknowledges was poor judgment, Delaney stole her employer's funds to ease her personal financial burden.

11. On June 13, 2001, appearing before the Circuit Court in and for the Eleventh Judicial Circuit of Florida, Delaney entered a plea of nolo contendere to the criminal charge, was convicted by plea (adjudication withheld), and was sentenced to two years' probation with orders to make restitution in the amount of \$13,778.00 to Blockbuster.

12. Delaney completed her term of probation and complied with all of the other conditions imposed by the court, including the payment of restitution.

The Time Period That Has Elapsed since the Incident.

13. The disqualifying offense was committed about 17 years ago. Delaney thus has had ample time to restore her reputation and usefulness to society as a law abiding citizen following her conviction, and to mature into an older, more responsible adult.

The Nature of the Harm Caused to the Victim.

14. Delaney did not cause personal injury to any person in the commission of her crime. She was ordered to make restitution to the victim, and did, although the details of this transaction are not available in the record. Therefore, the economic harm caused by Delaney's theft appears to have been minimal.

The History of the Applicant since the Incident.

15. Since her conviction, Delaney has completed a training program to become a patient care technician and obtained a license to practice in Florida as a certified nursing assistant. She has held positions in these fields and performed admirably. Delaney lives with her two adult daughters, son-in-law, grandson, and fiancé; her current family situation is stable, both emotionally and financially. Her civil rights have been restored. She has not reoffended or otherwise run afoul of the law.

16. APD severely faults Delaney for a so-called nondisclosure in her response to a question on the exemption request form concerning previous employment. The form asks the applicant to "provide your employment history for the last three years." Delaney answered, in relevant part, by stating: "I have not been employed for the last three (3) years." She followed this statement by describing employment *predating* "the last three (3) years" and explaining that an ankle injury in May 2013 (which required multiple surgeries to repair), together with the attendant convalescence and rehabilitation, had kept her out of the workforce for a couple of years. APD argues that Delaney lied about her employment history—it is undisputed that she had, in fact, worked (for Cypress) during the three years preceding her request for an exemption—and that this alleged

"lie" proves Delaney had known not only that she was required to undergo level 2 background screening before taking the job with Cypress, but also that such screening would reveal her disqualifying criminal conviction, and that, therefore, to avoid detection, she had worked without being screened, in knowing violation of law.

17. Put aside for the moment the issue of fact regarding whether Delaney "lied" about her employment history. APD's argument (that this "lie" is proof of Delaney's knowing violation of the background screening law) is illogical. For even if (as a matter of fact^{3/}) Delany were required to be screened, and even if (as a matter of law^{4/}) the background screening statutes were personally violable by an applicant or employee, Delaney's allegedly fraudulent answer to the employment history question does not rationally lead to the conclusion that she knew either of these premises to be true.

18. Moreover, as discussed in endnote 1, it is unacceptable for an agency to rely upon an applicant's alleged violation of a regulatory statute as grounds to deny an exemption request where such alleged violation has never been proved in an enforcement proceeding. This is because any person charged with committing a disciplinable offense must be served with an administrative complaint and afforded clear notice of the right to a hearing, at which, if timely requested, the

agency must prove the alleged wrongdoing by clear and convincing evidence. APD wants to skip all that and just have the undersigned find here, for the first time, that Delaney clearly violated section 393.0655 by working at Cypress for at least six months without being screened. See Resp.'s PRO at 9. That's not happening. The only relevant finding in this regard, which the undersigned makes, is that Delaney has never been found to have violated section 393.0655 by working at Cypress for at least six months without being screened.

19. As for the alleged "lie," APD's position that Delaney's response to the employment history question was knowingly and intentionally false (by omitting reference to Cypress) does not make sense, because DCF already knew (from investigating an unrelated matter) that Delaney had worked for Cypress, and Delaney knew that DCF was aware of this fact when she filled out the form. That cat was out of the bag.

20. At hearing, Delaney testified credibly and convincingly that she had not intended to mislead DCF. It is clear that she interpreted the question as asking about her employment during the three years before the job from which she had been disqualified (as opposed to the three years before completing the exemption request form). She misunderstood the question, to be sure, but it was an honest mistake, and the undersigned can appreciate how a person in Delaney's shoes could

conclude that the job from which one has recently been disqualified does not "count" towards her employment history for purposes of seeking an exemption from disqualification.

21. Delaney's testimony in this regard is corroborated by the fact that she submitted to DCF, as part of her exemption request package, two letters of recommendation from employees of Cypress, written on Cypress letterhead, attesting to her good character. These letters, taken together, make it clear that Delaney had recently been an employee of Cypress. Obviously, if Delaney had intended, knowingly, to deceive DCF by concealing her employment with Cypress, she would not have provided these letters.

22. APD argues that one of these letters, from Rashard Williams, which is dated October 27, 2016, does not specifically indicate that Delaney ever worked at Cypress—and thus does not bolster Delaney's testimony that she never intended to conceal the fact that she had. To reach this conclusion one must discount the writer's statement that "Ms. Delaney has proven herself to be reliable, trustworthy, and compassionate both as a person and as an employee." If the Williams letter were the only written recommendation from a Cypress employee, however, the undersigned would consider APD's interpretation to be, while certainly not the best or most reasonable, at least plausible in view of Mr. Williams's additional comments about how well

Delaney took care of his grandmother in a capacity, apparently, other than as an employee of Cypress.

23. But the companion to the Williams letter, a recommendation from Mark Chmiel dated October 24, 2016, leaves no room for doubt that Delaney was a recent employee of Cypress. A short, two-sentence excerpt suffices to support this finding: "Bertha is an invaluable addition to our agency [i.e., Cypress,] and she has fulfilled the potential of her position far better than anyone before her. Her moral character is beyond reproach and I have no qualms about trusting her with our clients."^{5/}

24. The letters of recommendation that Delaney furnished DCF refute the notion that she knowingly omitted Cypress from her employment history with the intent to mislead DCF. They prove, instead, that Delaney took for granted DCF's knowledge of her work for Cypress, for she was certain DCF already knew about it. In turn, that foundational assumption (which, in fact, was true) prompted Delaney to provide a history of her employment during the several years leading up to the job with Cypress. The undersigned finds that Delaney is not guilty of knowingly withholding material information from DCF in response to the question about her previous employment.

25. Finally, the undersigned observes that APD, in its preliminary decision-making, impermissibly allowed speculation and conjecture to take the place of facts. In forming its

intent to deny Delaney's application, APD took into account the "possibility that Ms. Delaney was trying to protect Cypress Place from demonstrating that they were in violation of the screening laws" as well as the "possibility that Rashard Williams *might* have tried to hide the fact [*sic*^{6/}] that there was a violation of the screening requirements by Cypress Place." Resp.'s PRO at 10 (emphasis added). On the basis of this rank speculation, APD conjectured that "Ms. Delaney was willing to collude with [Cypress employees] in order not to spotlight their violation of the licensing law." Resp.'s PRO at 18. APD proved none of this imaginative guesswork.

Circumstances Showing Applicant Poses No Danger.

26. Yvonne Ginsberg, the executive director of Cypress, testified in support of Delaney's application. Ms. Ginsberg stated that Delaney was an "excellent" employee and affirmed that she had "no qualms" about Delaney's returning to work at Cypress once an exemption has been secured. The undersigned credits Ms. Ginsberg's testimony as to Delaney's character.

27. In addition, Delaney submitted the written character references of Messrs. Chmiel and Williams, which were discussed above. These documents credibly attest to Delaney's trustworthiness, integrity, and ethical behavior.

28. The undersigned finds without hesitation that Delaney would likely *not* present a danger in the future if an exemption from disqualification were granted.

Ultimate Factual Determination

29. The undersigned has determined, based on clear and convincing evidence, including sufficient persuasive evidence of rehabilitation, that Delaney should not be disqualified from employment because she is, in fact, rehabilitated.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 435.07(3)(c), Florida Statutes.

31. Delaney seeks to be an employee of a facility that serves persons with disabilities. Section 393.0655(1) provides that APD "shall require level 2 employment screening pursuant to chapter 435 for direct service providers who are unrelated to their clients, including support coordinators, and managers and supervisors of residential facilities or comprehensive transitional education programs licensed under this chapter and any other person, including volunteers, who provide care or services, who have access to a client's living areas, or who have access to a client's funds or personal property."

32. As mentioned, Delaney does not dispute that she provided "care or services" to APD clients at Cypress and thus

is required to be screened, and accordingly the undersigned has accepted this "undisputed fact." Section 393.0655(1)(b), however, provides that "[l]icensed physicians, nurses, or other professionals licensed and regulated by the Department of Health are not subject to background screening pursuant to this section if they are providing a service that is within their scope of licensed practice." As a certified nursing assistant (holding license number CNA104945), Delaney is licensed and regulated by the Department of Health, and thus is exempt from section 393.0655 to the extent she provides care or services falling within the "[p]ractice of a certified nursing assistant."

33. Certified nursing assistant practice entails "providing care and assisting persons with tasks relating to the activities of daily living" and includes:

tasks . . . associated with personal care, maintaining mobility, nutrition and hydration, toileting and elimination, assistive devices, safety and cleanliness, data gathering, reporting abnormal signs and symptoms, postmortem care, patient socialization and reality orientation, end-of-life care, cardiopulmonary resuscitation and emergency care, residents' or patients' rights, documentation of nursing-assistant services, and other tasks that a certified nurse assistant may perform after training beyond that required for initial certification and upon validation of competence in that skill by a registered nurse.

§ 464.201(5), Fla. Stat. There is no evidence in the present record suggesting that Delaney provided any services to clients at Cypress outside the scope of her licensed practice. Even if APD were to deny Delaney an exemption, therefore, she could resume her employment with Cypress pursuant to section 393.0655(1)(b), as long as she confined her care or services to the practice of a certified nursing assistant.

34. The level 2 screening standards to which section 393.0655(1) refers are set forth in section 435.04, in pertinent part, as follows:

(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:

* * *

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

35. Having been found guilty of grand theft of the third degree, Delaney is disqualified from employment as a direct service provider unless she "is granted an exemption from

disqualification pursuant to s. 435.07." See § 435.06(2), Fla. Stat.

36. Section 393.0655(2) provides that APD "may grant exemptions from disqualification from working with children or adults with developmental disabilities only as provided in s. 435.07."

37. Under section 435.07, the head of APD is granted authority to exempt *some* employees from disqualification. Employees whom the agency head may exempt (as opposed to employees he or she may *not* exempt) include, as relevant, those whose disqualifying convictions were 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 nonmonetary condition imposed by the court for the disqualifying felony.

§ 435.07(1)(a), Fla. Stat.

38. The agency head is prohibited, however, from granting exemptions to all employees who are "exemptible" under section 435.07(1). 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.

(Emphasis added).

39. Thus, to fall within the agency's power to award an exemption from disqualification, an employee must be not only "exemptible" under section 435.07(1), but also able to prove successfully, by clear and convincing evidence, that he or she has been rehabilitated, according to the standards prescribed in section 435.07(3)(a).

40. A clearly rehabilitated, "exemptible" employee is not *entitled* to an exemption, but is merely *eligible* to be granted one at the agency's broad discretion. See Heburn v. Dep't of Child. & Fams., 772 So. 2d 561 (Fla. 1st DCA 2000), rev. denied, 790 So. 2d 1104 (Fla. 2001); Phillips v. Dep't of Juv. Just., 736 So. 2d 118 (Fla. 4th DCA 1999). "However, an agency's discretion is not unbridled; discretionary agency action is subject to a review for reasonableness." K.J.S. v. Dep't of Child. & Fam. Servs., 974 So. 2d 1106, 1109 (Fla. 1st DCA 2007). Further, whether the employee has been rehabilitated is a question of fact; the agency may not reject or modify a finding on this issue unless it first determines, based on a review of

the entire record, that the finding is not supported by competent substantial evidence. Id.; see § 120.57(1)(1), Fla. Stat.; accord, B.J. v. Dep't of Child. & Fam. Servs., 983 So. 2d 11, 13 (Fla. 1st DCA 2008) (agency improperly reweighed ALJ's factual findings regarding employee's rehabilitation), reh. denied, 983 So. 2d 11, 16 (agency may not reject ALJ's findings of fact regarding credibility, which are within the discretion of the ALJ and may not be reweighed).

41. In this case, as found above, Delaney carried her burden of establishing rehabilitation clearly and convincingly. Therefore, Delaney is eligible, in fact, for an exemption. See J.D. v. Dep't of Child. & Fams., 114 So. 3d 1127, 1131 (Fla. 1st DCA 2013) ("The ultimate issue of fact to be determined in a proceeding under section 435.07 is whether the applicant has demonstrated rehabilitation by clear and convincing evidence.").

42. Had APD's intended action on Delaney's exemption request involved the exercise of discretion, then the undersigned would have been required to "reach the legal conclusion as to whether the proposed decision was an abuse of discretion." Id. at 1133; see also § 435.07(3)(c), Fla. Stat. APD found, however, that Delaney was not, as a matter of fact, eligible for an exemption, and thus, having so found, deprived itself of any discretion over the proposed decision. This is because the decision to deny the exemption request of an

ineligible applicant is not a matter of discretion but a clear legal duty.

43. There is, accordingly, no discretionary decision for the undersigned to review.

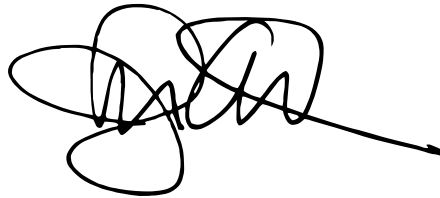
44. The undersigned's opinion as to whether or not Delaney should be granted an exemption is practically worthless since the agency retains the discretion to do what it wants, regardless, within the confines of section 120.57(1)(1). See, e.g., J.D., 114 So. 3d at 1133. As the courts in Heburn and Phillips made clear, moreover, the denial of an exemption to an eligible employee will not generally be considered an abuse of discretion.^{7/}

45. Ordinarily, therefore, the undersigned would refrain from making what is, in effect, a futile recommendation. In this instance, however, where APD's intended denial is based upon patently inappropriate grounds (i.e., Delaney's alleged-but-not-proved violation of the screening requirements); speculation (e.g., that Delaney possibly tried to protect Cypress from being found in violation of the screening laws); and conjecture (e.g., Delaney colluded with Cypress employees to hide their violation of the licensing laws), a recommendation to grant the exemption will be made. A contrary decision, under these circumstances, would be 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 granting Bertha Delaney the exemption from disqualification for which she is, in fact, eligible.

DONE AND ENTERED this 18th day of August, 2017, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of August, 2017.

ENDNOTES

^{1/} There is no evidence that, before the results of Delaney's background check were known, either DCF or APD gave Delaney and Cypress written notice of grounds for terminating Delaney's employment based upon her alleged "noncompliance" with the screening standards. See § 393.0655(4)(b), Fla. Stat. Yet, APD now contends that Delaney knowingly violated the screening laws by working for Cypress without first undergoing a background check. APD's failure, however, to provide Delaney the requisite

clear point of entry to contest this brand-new charge in an administrative hearing, see section 393.0655(4)(c), means that Delaney has never properly "been found to be in noncompliance" with the screening standards, see 393.0655(4)(d), which undoes APD's contention. This hearing, brought by Delaney to contest APD's decision to deny her exemption request, is not the appropriate place to litigate original charges of wrongdoing. If an agency believes that an applicant for an exemption from disqualification from employment has committed a disciplinable offense of which such applicant has not previously been found guilty, it must bring a separate enforcement action. An agency cannot be permitted to rely upon fresh allegations of wrongdoing to bootstrap its intended denial, as APD seeks to do here.

^{2/} The question of whether to grant an exemption is committed to the agency head's discretion *if and only if* the employee has proved his rehabilitation by clear and convincing evidence. See § 435.07(3)(a), Fla. Stat. If the employee is not rehabilitated, then the agency head has *no choice* but to deny the exemption—there is no discretion to be exercised in that event. Id.

^{3/} To be clear, Delaney is not currently disputing that she must undergo a level 2 background review and consequently obtain an exemption from disqualification in order to return to work for Cypress. It is, therefore, an "undisputed fact" for purposes of this case that Delaney was required to be screened. It is *not* undisputed, however, that Delaney knew she needed to have a level 2 background review before accepting the job with Cypress, and APD failed to prove this allegation. APD merely asserts, without evidence, that "[t]he truth is that everyone who performs direct care work with APD clients knows they have to be screened *prior to* employment." Resp.'s PRO at 18. The undersigned highly doubts that this is true of "everyone" and has seen no persuasive evidence that it was true for Delaney.

^{4/} Whether the background screening law imposes enforceable duties on employees such as Delaney is a legal question. The short answer is *no*—the law obligates *licensees*, i.e., employers, to ensure that their direct service providers timely undergo background screening. See, e.g., Fla. Admin. Code R. 65G-2.008(2) ("The licensee must comply with the screening requirements established in Section 393.0655, F.S. and Chapter 435, F.S. A violation of this subsection shall constitute a Class I violation.").

^{5/} The body of the Chmiel letter, in full, states as follows:

I am writing this on behalf of Bertha Delaney. I am the Program Coordinator for Cypress Place Adult Day Training.

I have known Bertha for over twenty years and I serve as a supervisor in her work setting. Bertha is a superlative example of what a person and an employee should be. Her work ethic is beyond reproach, but her moral character is what separates her from others.

Our particular line of work requires a higher code of ethics than most others and Bertha shines in this area. She is very caring and treats each client as an individual. She understands the challenges our clients face and she strives to make their worlds better.

Bertha served in a medical capacity before working with our agency and she brings that knowledge and compassion with her to work every day. Her experience in that arena is serving our clients well.

Bertha is an invaluable addition to our agency and she has fulfilled the potential of her position far better than anyone before her. Her moral character is beyond reproach and I have no qualms about trusting her with our clients. I would have no problem trusting my children to Bertha. Bertha is a bright line and her ethics are what set her apart.

^{6/} This so-called "fact" has never been proved in an enforcement proceeding, much less alleged in an administrative complaint against Cypress.

^{7/} In Heburn, 772 So. 2d at 563, the court wrote that the agency's "exercise of discretion [in granting or denying an exemption to an eligible employee] is circumscribed by the standards set forth in section 435.07(3)." These standards

specifically bear on the issue of rehabilitation, a fact which an "exemptible" applicant must establish, by clear and convincing evidence, in order simply to be eligible for an exemption. Since the agency has no discretion to exempt ineligible applicants but instead may grant exemptions only to those who are eligible and hence who, by definition, have adequately demonstrated rehabilitation pursuant to the section 435.07(3) standards, it is not entirely clear how those same standards are to be applied in distinguishing between eligible applicants who, in the exercise of sound discretion, reasonably should be exempted from disqualification and those who reasonably should not be. In any event, when denying an exemption to an eligible applicant such as Delaney, the agency ideally should articulate the facts and circumstances upon which its discretionary decision has been based, so that the outcome will not appear to be arbitrary or capricious, and also to enable a reviewing court to determine whether or not the agency's discretion was abused, if the disappointed applicant appeals.

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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.