

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VIJAY RAMJIT,

Petitioner,

vs.

Case No. 17-2471EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, this case was held on June 15, 2017, by video teleconference at sites in Tallahassee and Lauderdale Lakes, Florida, before June C. McKinney, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Matthew M. Fischer, Esquire
Chapman Law Group
4000 Hollywood Boulevard, Suite 555-S
Hollywood, Florida 33021

For Respondent: Kurt Eric Ahrendt, Esquire
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUES

Whether Petitioner has shown, by clear and convincing evidence, that he is rehabilitated from his disqualifying

offenses, and, if so, whether Respondent's intended action to deny Petitioner's request for an exemption from employment disqualification would constitute an abuse of discretion.

PRELIMINARY STATEMENT

By letter dated March 17, 2017, the Agency for Persons with Disabilities ("APD" or "Respondent") issued its notice of proposed agency action by which it informed Petitioner ("Petitioner" or "V.R.") that his request for exemption from disqualification had been denied. As a result, Petitioner was determined ineligible "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 [his] rehabilitation".

On or about April 4, 2017, Petitioner filed his Request for Administrative Hearing with Respondent. On April 24, 2017, APD referred the case to the Division of Administrative Hearings ("DOAH").

The Initial Order was entered on April 24, 2017. A Joint Response to the Initial Order was filed by Respondent on April 28, 2017. On May 1, 2017, a Notice of Hearing by Video Teleconference was entered, scheduling the final hearing for

June 15, 2017, at 9:30 a.m., by video teleconference in Tallahassee and Lauderdale Lakes, Florida, the locations requested by both parties.

At the formal hearing, Petitioner testified on his own behalf and called one witness, Donovan Ramcharan ("Ramcharan"). Petitioner's Exhibits 1 and 2 were received into evidence.

Respondent presented the testimony of two witnesses: Gerry Driscoll, Regional Operations Manager; and Tom Rice, Program Administrator. Respondent's Exhibits 1 through 5 were received into evidence.

The undersigned took official recognition of chapter 435 and section 393.0655, Florida Statutes (2016).

The proceedings of the hearing were recorded by a court reporter but not transcribed.

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

FINDINGS OF FACT

1. Respondent is the state agency charged under chapter 393 with regulating the employment of persons who seek to become employed working in positions of trust with persons with disabilities.

2. Petitioner is seeking to start and operate a group home, Sunshine Loving Care, for persons with developmental disabilities.

3. Petitioner plans to serve as an administrator for Sunshine Loving Care and performs work as a direct service provider. Petitioner is required to have a background screening before becoming a provider of services.

4. The Department of Children and Families ("DCF") administers the background screening process for APD.

5. Petitioner's background screening identified two criminal convictions: a burglary and larceny stemming from the same June 2, 1995, incident.

6. On June 24, 2016, DCF notified Petitioner that he was disqualified from employment due to his criminal history and specifically because of the two disqualifying offenses, burglary and larceny.

7. On or around November 14, 2016, Petitioner submitted a request for exemption and supporting documentation ("exemption package") to Respondent.

8. On March 17, 2017, Agency Director Barbara Palmer advised Petitioner by letter that his request for an exemption from the disqualifying offenses was denied. The basis for the denial was that Petitioner failed to submit clear and convincing evidence of his rehabilitation.

9. On or about April 10, 2017, Petitioner requested to appeal APD's denial.

10. At the hearing, as well as in the exemption package considered by APD, Petitioner took full responsibility for the incident regarding his disqualifying offenses. At hearing, Petitioner credibly explained the circumstances under which he committed the offenses. On or about June 2, 1995, as General Manager of a U-Haul self-storage facility, a customer did not pay his storage unit fee and the items in the unit went up for auction. Before the auction date, two of Petitioner's employees asked for the unit's items. Petitioner gave the employees authority to take the items. Then, Petitioner and the two employees took the items from the unit for their personal use. On the day of the auction, the unit owner showed up to pay the outstanding bill and contacted the police when he learned his items had been taken. When questioned by police, Petitioner immediately took responsibility for taking the items with his two employees, confessed, and helped facilitate returning the items.

11. Petitioner provided the same account of the incident in his personal statement portion of the exemption package and stated:

While working at U-Haul as the General Manager, a customer did not pay for his storage unit and it went up for auction. After several failed attempts to contact the customer, on June 2, 1995, I authorized two of my employees to empty his storage bin. His personal effects were taken with my authorization; he then returned the day of the auction and wanted to pay for his unit.

He asked [where] his stuff was and I told him we had them. He said it was theft and he reported it. The police came and asked for the things. I told them that I authorized the employees to take the items but we will return all of it. Nevertheless, we were all arrested and charged. I received 2 year probation and was ordered to pay restitution. After a year and a half, I was finished paying the restitution and my probation was then terminated early.

12. Petitioner's full admission of his involvement at hearing coincides with his personal history statement above from his exemption package because he admits it was him three times specifically stating "we had them," "we will return all of it" and "we were all arrested and charged."

13. Petitioner's exemption package and testimony at hearing also detail he was 22 years old at the time when he committed the disqualifying offenses. Petitioner was terminated from his employment at U-Haul for his actions. He did not challenge the charges. Instead, on September 26, 1995, Petitioner pled no contest to the criminal charges, adjudication of the guilt was withheld, and Petitioner was sentenced to two years of probation with an order to make restitution. He successfully completed his probation early and he paid restitution in full.

14. Petitioner already has experience working, without incident, around and with persons who are or may be considered vulnerable. After Petitioner pled to the charges, he was unable to obtain employment. Eventually, Petitioner started working as

a caregiver for several families. He cared for an elderly father for 16 months until he passed and subsequently went to care for another father for a second family for over a year.

15. Petitioner provided compelling letters of recommendation in his exemption package and at hearing from one family attesting to how he took "excellent care of [the father]" and further attesting to his work ethic, reliability, punctuality, gentleness, and trustworthiness. The Doobay letter also stated the father looked forward to Petitioner's presence every day because he motivated the father to get out the house and mingle with others. Another reference letter in the exemption package further detailed how Petitioner successfully cared for a wheelchair-bound male, took him to his medical appointments, and continuously demonstrated patience, calmness when assisting and was loyal, full of life, caring, and a delight to be around.

16. Additionally, for approximately the last 12 years, Petitioner has assisted Ramcharan who is wheelchair-bound. At hearing, Ramcharan testified that Petitioner picks him up to go to the temple, the movies, shopping and other activities and is very loving, understanding, cares for people and is "capable of taking care of [the] disabled."

17. Petitioner has also made substantial efforts to become well-educated so that he can become gainfully employed. He

provided evidence in his exemption package of obtaining an AA degree in criminal justice and business administration. He also obtained his real estate license about 18 years ago.

18. In Petitioner's exemption package and at hearing, Petitioner demonstrated how he has given back to his community. He actively works at the Christy House, a place for abused women and children. Specifically, he has been helping renovate by painting, cabinetry, building a bench, and attempting to create a butterfly garden. Petitioner also cooks and feeds the homeless.

19. Petitioner has shown that he a responsible individual by successfully holding jobs for over 14 years. His exemption package mirrors his testimony at hearing detailing his employment. Most recently, Petitioner has been employed as an Operations Manager Supervisor for FedEx Freight since 2013. He also works as a real estate agent for Keller Williams handling commercial real estate transactions with deals ranging from \$500,000 to \$1,000,000. Prior to FedEx, he maintained steady employment at management levels in the following roles: Store Manager for Advance Auto Parts from 2003-2006; Sales Manager over a 56-million-dollar store for Lowes Home Improvement from 2006-2009; and Sales Manager and Area Supervisor over three stores and one warehouse for Uniselect Auto Parts from 2010-2013.

20. Over the last 15 years, Petitioner has received 17 traffic citations and he provided the detailed documentation for

each citation to APD as part of Petitioner's exemption package. Fourteen citations were dismissed or closed without prosecution as evidenced by the disposition paperwork in Petitioner's exemption package.

21. At hearing, Respondent presented the testimony of Gerry Driscoll ("Driscoll"). Driscoll explained APD's process for reviewing exemption requests and about the vulnerability of the disabled clients APD serves. Driscoll further testified about the importance of ensuring those who work with the clients are competent to provide services because APD's clients can easily be taken advantage of since providers have access to both their living environment and funds.

22. Driscoll testified regarding Petitioner's submittal of his exemption application package and Respondent's review of that package. Driscoll testified that Petitioner was denied an exemption because he does not feel that Petitioner provided a detailed account of the criminal offenses as compared to the police reports; but, instead, he determined Petitioner blamed others for the stolen items in his home and vehicle.

23. Driscoll also testified Petitioner's exemption package was a problem because Petitioner's report of events did not match the police reports and he felt Petitioner minimized the incidents. Additionally, Driscoll was concerned about Petitioner's 17 traffic citations since the administrator

position Petitioner seeks to get includes transportation of vulnerable individuals. Driscoll determined that Petitioner's traffic record shows a disregard of the law, which is part of the reason Petitioner was denied.

24. At hearing, Thomas Rice ("Rice") confirmed that APD was primarily concerned with Petitioner's exemption package and determined that Petitioner was not rehabilitated because Petitioner did not admit to a more direct role with the stolen merchandise. Rice testified that Petitioner's exemption package was troubling, and it lacked honesty and trustworthiness based on the police reports; and, therefore, APD concluded that rehabilitation was not sufficiently demonstrated.

Findings of Ultimate Fact

25. Upon careful consideration of the entire record, it is determined that Petitioner has demonstrated by clear and convincing evidence that he is rehabilitated from his disqualifying offenses of burglary and larceny and that he will not present a danger to disabled or otherwise vulnerable persons with whom he would have contact if employment is allowed.

26. It has been over 23 years since Petitioner committed the disqualifying offenses as a young adult. Petitioner was not convicted of the disqualifying offenses. Instead, adjudication was withheld, and Petitioner has had no further criminal arrests or convictions subsequent to his disqualifying offenses.

27. Petitioner was honest and forthright about his past and expressed his remorse in his exemption package by stating "I made a mistake [that ruined my life]."

28. Petitioner has worked reliably over a sustained period in a position in which he cared for vulnerable persons. By all accounts, Petitioner was a reliable, kind, caring, and diligent employee. This experience shows that Petitioner can be trusted to behave appropriately in situations involving vulnerable persons, such as the disabled.

29. Petitioner's completion of his AA degree, licensure as a real estate agent making million-dollar monthly sale totals, and an almost 14-year history of employment in management is further evidence of appropriate behavior and moving his life forward.

30. The undersigned further finds that denial of Petitioner's exemption request would constitute an abuse of discretion. As discussed above, it appears that Respondent relied heavily on the hearsay in the police reports and 17 charged traffic citations in making its decision to deny his exemption request and failed to adequately consider the information Petitioner provided regarding his rehabilitation. In doing so, Respondent failed to recognize Petitioner's admissions of his wrongdoing by using "we" three times in the exemption package personal statement. Respondent also failed to properly

evaluate Petitioner having only three traffic infractions, not 17, because 14 were closed or dismissed. The evidence also indicates that Petitioner has and continues to perform well and safely in a work setting involving interaction with vulnerable individuals.

31. Petitioner demonstrated, by credible and very compelling evidence, that he made a wrong decision and took the initiative to turn his life around.

32. For these reasons, it is determined that no reasonable individual, upon fully considering the record in this proceeding could find that Petitioner is not rehabilitated.

CONCLUSION OF LAW

33. DOAH has jurisdiction over the subject matter of the proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

34. Section 435.07, Florida Statutes, 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 developmentally disabled children or vulnerable adults may seek an exemption from disqualification.

35. 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.

36. Section 393.0655(1) states in pertinent part:

The [Agency for Persons with Disabilities] 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. Background screening shall include employment history checks as provided in s. 435.03(1) and local criminal records checks through local law enforcement agencies.

37. Section 435.04, which establishes level 2 screening requirements, provides:

(2) The security background investigations under this section must ensure that no persons subject to the provisions of this section . . . have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to . . . 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.

38. Because Petitioner pled guilty to burglary and larceny, he is disqualified from employment as a direct service provider

for developmentally disabled clients unless granted an exemption by Respondent pursuant to section 435.07.

39. Section 435.07 provides:

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.

(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 nonmonetary condition imposed by the court for the disqualifying felony[.]

* * *

For the purposes of this subsection, the term "felonies" means both felonies prohibited under any of the statutes cited in this chapter or under similar statutes of other jurisdictions.

* * *

(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.

40. Pursuant to this statute, Petitioner, as the applicant for an exemption, must demonstrate his rehabilitation by clear and convincing evidence. This is a heightened standard, requiring more proof than a mere preponderance of the evidence. This standard requires that the evidence be found credible, the facts to which the witnesses testify be distinctly remembered, the testimony be precise and explicit, and the witnesses 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); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

41. For the reasons discussed above, Petitioner proved by clear and convincing evidence that he is rehabilitated from his disqualifying offenses.

42. Pursuant to section 435.07, even if the applicant demonstrates rehabilitation, he or she is only eligible for an exemption, not entitled to one. The agency head retains discretion to deny the exemption, provided its decision does not constitute an abuse of discretion. Under this statute, if reasonable persons could differ as to the propriety of the agency decision, the decision is not unreasonable and, thus, not an abuse of discretion. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). Conversely, if the agency's decision is arbitrary, it constitutes an abuse of discretion. Id.

43. For the reasons discussed above, under the specific circumstances of this case, if Respondent were to deny Petitioner's exemption request, its action would be arbitrary and thus constitute an abuse of discretion. As discussed above, Respondent's witnesses acknowledged relying on the hearsay police reports and the alleged 17 traffic infractions but not giving full consideration to Petitioner's personal statement and improperly evaluating Petitioner's three traffic infractions. Respondent also appears to have overlooked Petitioner's recent,

successful experience working around vulnerable persons, which provides real-life evidence that he is rehabilitated and will not pose a danger to vulnerable persons entrusted to his care. The agency is charged with determining whether an applicant has been rehabilitated from his or her disqualifying offense, which requires consideration of all information provided by an applicant, including that germane to rehabilitation. See § 435.07(3)(a), Fla. Stat. Here, the evidence indicates that Respondent did not adequately consider information key to accurately determining whether Petitioner is rehabilitated.

44. Accordingly, the undersigned determines that Petitioner has met his burden to demonstrate his rehabilitation from his disqualifying offenses, and that, under the circumstances specific to this case, if Respondent were to deny Petitioner's exemption request, its action would be arbitrary and would constitute an abuse of discretion.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Agency for Persons with Disabilities, enter a final order granting Petitioner's request for an exemption from disqualification from employment.

DONE AND ENTERED this 31st day of July, 2017, in
Tallahassee, Leon County, Florida.

June C. McKinney

JUNE C. MCKINNEY
Administrative Law Judge
Division of Administrative Hearings
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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.