

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DESHONDA ROSS,

Petitioner,

vs.

Case No. 17-2567EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case on June 19, 2017, via video teleconference at sites in Tallahassee and Jacksonville, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Deshonda Ross, pro se
1519 Southeast Loquat Way
Lake City, Florida 32025

For Respondent: Kurt Eric Ahrendt, Esquire
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
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STATEMENT OF THE ISSUE

Whether the Agency for Persons with Disabilities' (Agency) intended decision to deny Petitioner's application for exemption

from disqualification for employment is an abuse of the Agency's discretion.

PRELIMINARY STATEMENT

By letter dated April 11, 2017, the Agency issued its notice of agency action by which it informed Petitioner that her request for exemption from disqualification was denied. As a result, Petitioner was deemed ineligible to "be employed, contract with, be licensed, or otherwise authorized to" serve Agency clients. In the letter, the Agency reported its determination that Petitioner had "not submitted clear and convincing evidence of [her] rehabilitation."

Petitioner filed her Request for Administrative Hearing with the Agency on April 20, 2017, which request was referred to the Division of Administrative Hearings on May 2, 2017. The final hearing was scheduled for June 19, 2017, and commenced as scheduled.

At the final hearing, Petitioner testified on her own behalf but offered no witnesses and introduced no exhibits in evidence.

Respondent presented the testimony of Leslie Richards, the Agency's Northeast Regional Operations Manager. Respondent's Exhibits 1 through 5 were admitted in evidence. The undersigned granted the Agency's request for official recognition of chapter 435 and section 393.0655, Florida Statutes.

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.

All references herein to the Florida Statutes are to the 2016 version.

FINDINGS OF FACT

1. Petitioner is a 33-year-old female residing in Lake City, Florida. Petitioner has three children, ages 19, 16, and 12, from her first marriage. Her first husband is deceased. Petitioner was remarried in April 2015. Petitioner and her husband live with, and care for, her three children, as well as two young grandchildren and her seven-year-old niece.

2. Between November 2015 and September 2016, Petitioner was employed at CARC, a residential group home licensed by the Agency.^{1/} Petitioner provided personal care to the residents, as well as transportation for the residents to doctor's appointments, shopping, and occasionally to cash their personal checks. In her capacity with the group home, Petitioner had access to and responsibility for the group home van, as well as the corporate credit card for purchasing gasoline.

3. Since being disqualified from employment serving Agency clients, Petitioner has been employed at "Still Waters," a residential nursing home facility. She works 12-hour shifts,

four days on, three days off. Petitioner testified that the hours make it too difficult to care for her children, grandchildren, and niece. Petitioner wishes to return to her employment in the group home as a direct service provider to clients of the Agency.

4. 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 Offense

5. On May 23, 2005, Petitioner was arrested for forgery and grand theft, stemming from having cashed a forged check. The check was written for \$391.83, payable to a third party and cashed by Petitioner at her bank.

6. Petitioner pled guilty to both charges, which are third-degree felonies.

7. In August 2005, the court withheld adjudication, ordered Petitioner to complete two years' probation, and entered a final judgment for fines and costs in the amount of \$373.

8. Petitioner's fines and costs were later converted to community service hours, which she completed. Petitioner was also required to pay restitution to the bank, which she

satisfied. Petitioner completed probation timely on August 22, 2007.

9. Petitioner was 21 years old at the time of the disqualifying offense. The details are sketchy. Neither Petitioner's testimony nor her exemption questionnaire provide much of an explanation.

10. The explanation in Petitioner's exemption questionnaire indicates that a friend gave her a check from the friend's employer, and Petitioner cashed it at Petitioner's bank and kept the cash. She explained that she was young and dumb and did not know better.

11. Petitioner's testimony was brief, stating that she had been hanging around with the wrong crowd, and that a friend got a check from McDonald's which Petitioner deposited in her own account.

12. In the questionnaire, Petitioner indicated no one else was involved in the crime because "I did not tell on my friend." She answered "n/a" to questions regarding the degree of harm to the victim or property (permanent or temporary), as well as whether there were any stressors in her life at the time of the disqualifying offense.

13. When prompted in the questionnaire to provide any additional comments, Petitioner explained that she knew what she did was wrong; that she does not get in trouble any more; that

she has three kids, and only has time to go to work, church, and home; and that she wants to take care of "my people," which she enjoys.

Subsequent Non-Disqualifying Offenses

14. The Agency's Exemption Review Summary lists two^{2/} non-disqualifying offenses subsequent to Petitioner's disqualifying offense.^{3/}

15. In March 2006, Petitioner was arrested for, and adjudicated guilty of, passing a worthless check to Publix in the amount of \$76. On June 8, 2006, Petitioner was ordered to complete 12 months' probation and pay restitution, court fines, and fees in the amount of \$329.

16. Petitioner's probation was terminated on June 4, 2007, having satisfied all terms thereof.

17. Petitioner wrote the check to Publix on October 3, 2005. Petitioner was 21 years old, caring for her seven-year-old, four-year-old, and infant children, and her husband was incarcerated.

18. Petitioner testified, both in her questionnaire and at final hearing, that she wrote the check knowing she did not have the money to cover it because she needed food for her children and diapers for the baby.

19. On February 20, 2012, Petitioner was charged with leaving the scene of a traffic accident. On March 15, 2012,

Petitioner was adjudicated guilty and placed on six months' probation, ordered to complete an eight-hour driver improvement course, and pay court costs and fines in the amount of \$416.

20. Petitioner was released from probation on August 14, 2012, having satisfied all probation conditions.

21. Petitioner was 28 years old at the time of the incident. Petitioner was driving with a friend as a passenger, when she crashed her car in a ditch. Petitioner left her car in the ditch and contacted another friend to give them a ride home.

22. The following day, the police came to her home and charged her with leaving the scene of an accident.

23. Petitioner testified that she left the scene because she had no insurance, and that it was late and dark. No evidence was introduced to support a finding that any other vehicle was involved in the accident, or that the accident resulted in any property damage or injury.

Educational and Employment History

24. Petitioner graduated from high school in 2002.

25. Petitioner completed the educational requirements to become a Certified Nursing Assistant (CNA) at Lake City Community College in 2004. However, Petitioner has not passed the written state board exam to become certified.

26. Petitioner lists no employment history prior to 2011, although there is some evidence that she worked as a caregiver at a "cluster home" in Lake City in 2005.

27. Petitioner worked as a caregiver in a group home known as "Open Heart" from January 2011 to October 2014. Petitioner was subsequently employed as a housekeeper with Holiday Inn in Lake City from February to November 2015. Petitioner left Holiday Inn to become a caregiver at CARC in November 2015.

28. As noted previously, subsequent to Petitioner's disqualification, she has been employed at a nursing home facility.

Subsequent Personal History

29. Petitioner divorced her first husband in 2014 and he is now deceased. Petitioner has full custody of all three of her children and has taken on the responsibility of her 19-year-old daughter's two children, as well as her seven-year-old niece.

30. In April 2015, Petitioner married her current husband Octavius, who is a 13-year employee of Red Lobster.

31. Petitioner is active in her church where she sings in the choir, attends Tuesday night bible study and Wednesday night worship, and has her niece involved in a praise dance for children program on Saturdays.

32. One of Petitioner's sons is disabled. Petitioner reports that both sons play football and that she is, or has been, a team mom for the football team.

Petitioner's Exemption Request

33. Petitioner's exemption questionnaire is bereft of details. Most questions are answered in just a few words or are answered as "not applicable."^{4/}

34. Petitioner expresses remorse for her disqualifying and non-disqualifying offenses. However, it is not entirely clear that Petitioner understands the ramifications of her forgery offense, since she indicated there was no harm done by her passing of a forged check.

35. Petitioner submitted five personal letters of reference with her exemption application. One is from one of her sons, another from a friend at church, and the remaining letters are from former co-workers at care-giving agencies. Each attests to her compassion for disabled persons and her sincerity in the care of those persons.

36. Petitioner did not submit any letter of reference from a current or former employer or another individual in a position of authority. Petitioner did not offer any witness testimony or additional letters of reference at the final hearing.

Ultimate Facts

37. Petitioner's recent employment history evidences her work ethic and emphasizes a passion for serving persons with disabilities. Petitioner's personal references support a finding that she is committed to family and community, and has a heart for service.

38. However, Petitioner's disqualifying offense, and at least one of the subsequent non-disqualifying offenses, involves attempts to attain money to care for her family when times were tough. Petitioner's failure to describe any stressors in her life at the time, and to clearly distinguish her circumstances at present, substantiates the Agency's reticence to allow Petitioner to work with the most vulnerable clients. Petitioner has more dependents at present than she did when the disqualifying offenses occurred. The record contains few details of how her situation differs today from the past.

CONCLUSIONS OF LAW

39. 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.

40. 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:

* * *

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

41. Section 393.0655(5), Florida Statutes, provides that the background screening conducted under this section (for direct service providers), must ensure that

in addition to the disqualifying offenses listed in s. 435.04, no person subject to the [screening] . . . has been found guilty of, regardless of adjudication, . . . any offense prohibited under any of the following provisions of state law of similar law of another jurisdiction:

* * *

(1) Section 831.02, relating to uttering forged instruments.

42. The Agency based its disqualification of Petitioner on her 2005 convictions for grand theft and uttering a forgery.

43. 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.

44. 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).

45. 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).

46. The Agency has a heightened interest in ensuring that the vulnerable population being protected by chapter 393, 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 offenses in their past.

47. 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.

48. Twelve years have passed since Petitioner's disqualifying offense and much has changed in her life, including

her marital status and her responsibilities with regard to her extended family.

49. The type of harm caused by her disqualifying offense was economic, rather than physical or emotional in nature, and was not a violent crime. The subsequent non-disqualifying offense of passing a worthless check was likewise economic in nature, and the victim was a corporation and the amount of damage was less than \$100. There is no evidence of any harm arising from Petitioner's subsequent non-disqualifying offense of leaving the scene of a single-car accident.

50. Petitioner's subsequent personal history demonstrates an ongoing commitment to family and a caring spirit for disabled persons. However, the evidence does not truly distinguish Petitioner's current situation from her former situation with respect to stressors. The record does not demonstrate what responsibilities Petitioner's husband and her 19-year-old daughter have with respect to the other children, grandchildren, and her niece. It is not clear whether Petitioner's church and community involvement is a departure from the influences in her life in 2005 and 2006. Petitioner provided so little information that the record is neither clear nor convincing.

51. Petitioner's case would be significantly strengthened by evidence from the former employers regarding her work with disabled clients at the group homes. While Petitioner's

testimony that she dealt responsibly with client funds and the Agency's credit card is helpful, testimony from her superiors regarding the extent of her responsibility and her performance on the job would be more persuasive.

52. Given the dearth of evidence, the undersigned concludes that the Agency's intended denial of Petitioner's requested exemption does not constitute an abuse of discretion.

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 11th day of July, 2017, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of July, 2017.

ENDNOTES

^{1/} The evidence is unclear how Petitioner gained employment with an entity regulated by the Agency with a disqualifying offense in her criminal record. The evidence shows that Petitioner was screened for APD employment in 2005, 2009, 2010, and 2015, prior to the 2016 screening giving rise to the case at hand. Petitioner received an exemption from disqualification in August 2012 from the Agency for Health Care Administration (AHCA) to work as a provider, or an employee of a provider, in the Florida Medicaid Program.

^{2/} Although not listed on the Agency's Exemption Review Summary, Leslie Richards, the Agency's Regional Operations Manager, testified that she also considered, in formulating her decision to recommend denial of the exemption, a third subsequent non-disqualifying offense of allowing an unlicensed minor to operate a vehicle. Inasmuch as the charge was not listed by the Agency as a basis for denying Petitioner's application for exemption, the undersigned is not assured that Petitioner was on notice that the Agency relied upon this subsequent offense as a basis for denial. Without appropriate notice, Petitioner would have been unable to meet the charge with evidence at the final hearing, thus denied basic due process of law. As such, the undersigned does not rely upon the testimony and other evidence of the 2013 charge of allowing an unlicensed minor to operate a vehicle in reaching the recommendation in this matter.

^{3/} In reaching its intended decision to deny Petitioner's exemption request, the Agency also considered a charge of petit theft against Petitioner which predates her disqualifying offense. The operative statute does not authorize the agency to consider offenses which occurred prior to the disqualifying offense, and to do so was error. Medaries v. Ag. for Pers. with Disab., Case No. 16-6425 n.1 (Fla. DOAH Jan. 25, 2017; Fla. APD Mar. 8, 2017); 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 Mar. 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.).

^{4/} The brevity of Petitioner's answers may be due to the fact that she previously applied to the Agency for an exemption in 2009, and that she was granted an exemption from AHCA in 2012 (presumably based upon completion of an exemption questionnaire). Petitioner should be made aware that the undersigned is confined to the record of the current exemption request in making a determination in the case at hand.

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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.