

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MOLITA CUNNINGHAM,

Petitioner,

vs.

Case No. 17-2769EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, this case was held on July 13, 2017, via video teleconference at sites in Tallahassee and Miami, Florida, before June C. McKinney, a designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Molita Cunningham, pro se
12437 Southwest 220th Street
Miami, Florida 33170

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 she is rehabilitated from her 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 "Cunningham") that her request for exemption from disqualification had been denied. As a result, Petitioner was determined ineligible "to be employed, contract with, be licensed or otherwise authorized to have direct face-to-face contact with a client while providing services to the client, have access to a client's living areas, or have access to a client's funds or personal property." 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."

On May 1, 2017, Petitioner filed her Request for Administrative Hearing with Respondent. On May 15, 2017, APD referred the case to DOAH.

On June 1, 2017, a Notice of Hearing by Video Teleconference was entered, scheduling the final hearing for July 13, 2017, at 9:30 a.m. in both Tallahassee and by video teleconference in Miami, the locations requested by both parties.

At the formal hearing, Petitioner testified on her own behalf and called one witness, Crystal Kingcade. Petitioner's Exhibits 1 through 3 were received into evidence.

Respondent presented the testimony of three witnesses: Evelyn Alvarez, APD Southern Regional Operations Manager; Tom Rice, Program Administrator for Regional Supports/Licensing; and Petitioner. Respondent's Exhibits 1 through 5 were received into evidence.

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

FINDINGS OF FACT

1. APD serves clients with disabilities such as autism, intellectual disabilities, Downs Syndrome, and Prader-Willi Syndrome. APD's clients range from those needing total care to those who can live on their own with minimal assistance.

2. The services APD provides to its clients include personal care, respite care, adult day training, supported living, and a wide variety of other services.

3. The aforementioned services are provided by APD's vendors in individual homes, group homes, and supported living arrangements.

4. Petitioner is seeking to work as a direct service provider in a group home for persons with developmental disabilities.

5. Section 435.06(2), Florida Statutes, mandates that an employer may not hire someone for a position requiring contact with any "vulnerable person" until a completed background screening "demonstrates the absence of any grounds for the denial or termination of employment."

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

APD's Action

7. Petitioner's background screening identified three felony counts that are disqualifying criminal offenses, and all for resisting an officer with violence to his person.

8. On November 14, 2016, DCF notified Petitioner that she was disqualified from employment due to her criminal history and specifically because of the three counts of resisting an officer with violence to his person from a November 26, 1975, Miami Dade incident.

9. On or around December 1, 2016, Petitioner submitted a request for exemption, which included the exemption application and questionnaire to DCF. The instructions provided: "[f]or EACH criminal offense appearing on your record, please write your

DETAILED version of the events and be specific. Attach extra pages as needed and please type or write legibly.

10. When Petitioner filled out the questionnaire, she provided the following answers to each question on the exemption questionnaire:

11. Question #1 asked for "disqualifying incident(s)." Petitioner responded "3 Counts of Resisting Arrest with Violence."

12. In response to Question #2 "Non-disqualifying Offenses(s)," Petitioner again provided none of the details surrounding these offenses. She listed two non-disqualifying offenses, "Battery" and "Petit Theft" to which she had criminal dispositions.

13. Question #3 asks, "What is the current status in the court system?" Petitioner responded, "N/A."

14. In Response to Question #4 on her Exemption Questionnaire, regarding "the degree of harm to any victim or property (permanent or temporary), damages or injuries," Petitioner indicated "N/A."

15. In answering Question #5, about whether there were "any stressors in [her] life at the time of the disqualifying incident," Petitioner again indicated "N/A."

16. Question #6 asked whether there are any current stressors in her life, Petitioner responded: "[D]ivorced living

at home with my 3 minor children. I am a spokes-person for the SEIU union. Fight for Fifteen. I feed the homeless in my community."

17. As confirmed at hearing, Petitioner listed educational achievements and training as the following:

Fla College of Business - Certified Nursing Assistant (1985)

National School of Technology - Surgical Tech (1998)

Food Service - Brevard C.C.

18. Under Question #8 of the Exemption Questionnaire, in response to the question whether she had ever received any counseling, Petitioner indicated "N/A."

19. Question #9 of the Exemption Questionnaire asks, "Have you ever used/misused drugs and alcohol? Please be specific and list the age at which you started and how you started." Petitioner again responded "N/A."

20. Question #10 of the Exemption Questionnaire asks whether Petitioner was involved in any community activities. Petitioner responded, "I have volunteered with Senator Dwight Bullard, Fla. State Rep. McGhee, Mayor Woodard, Joe Garcia, etc."

21. Question #11 asks the applicant to "*Document* any relevant information related to the *acceptance of responsibility for disqualifying and non-disqualifying offenses.*" Petitioner responded as follows: "Yes. I accept responsibility at the time

of this offense I was 17 years of age and trying to fit in with my friends. I have learned when you know better you do better."

22. The Exemption Questionnaire also requested Petitioner to provide her three prior years' work history. Petitioner provided detailed information about her 18-year work history in the health care field, which included care of the vulnerable community. Petitioner has worked in a hospital, nursing home, private home, and with both mental health and hospice patients. Petitioner's answer also outlines how she had performed some of the same job responsibilities as a direct service provider for the following employers:

JR Ranch Group Home LLC: C.N.A 10/3/16
to present-Companion to individual bathing,
feeding, dressing, grooming, etc.

Nurse Plus Agency: C.N.A. 3/12/08 to 9/7/15-
Working in private homes with hospice
patients bathing, feeding grooming, shaving,
R.O.M. T.C.C. vital signs, doctor's
appointments, etc.

Gramercy Park Nursing Home: C.N.A. 2/15/05
to 3/12/08-Working in skilled nursing
facility doing patient care, vitals,
charting, lifting, bathing, feeding,
dressing, physical therapy, etc.

Jackson M. Hospital: C.N.A. 1/7/98
to 5/8/2001-Working on HIV unit, patient
care, R.O.M., bed making, bathing, feeding,
dressing, shaving, oral care, transferring,
lifting, etc.

23. On December 15, 2016, DCF sent a letter to Petitioner requesting additional documentation to complete the exemption

application. Petitioner was asked to "provide the arrest report (from arresting agency) and CERTIFIED **court disposition JUDGMENT AND SENTENCE**" for the following offenses appearing on [her] criminal history screening report:

05/20/2013 MIAMI-DADE POLICE DEPARTMENT,
BW DRIVING WHILE LICENSE SUSPENDED

5/11/2002 MIAMI-DADE POLICE DEPARTMENT,
AGGRAV BATTERY

5/11/2002 MIAMI-DADE POLICE DEPARTMENT,
AGGRAV BATTERY

12/22/2001 MIAMI-DADE POLICE DEPARTMENT,
COUNTY ORD VIOL

1/13/1998 MIAMI-DADE POLICE DEPARTMENT,
AGGRAV BATTERY

1/13/1998 MIAMI-DADE POLICE DEPARTMENT,
BATTERY

1/13/1998 MIAMI-DADE POLICE DEPARTMENT,
AGGRAV BATTERY

1/13/1998 MIAMI-DADE POLICE DEPARTMENT,
BATTERY

9/28/1996 MIAMI-DADE POLICE DEPARTMENT,
AGGRAV BATT-POL OFF

9/28/1996 MIAMI-DADE POLICE DEPARTMENT,
RESISTING OFFICER

9/28/1996 MIAMI-DADE POLICE DEPARTMENT,
BATTERY

9/28/1996 MIAMI-DADE POLICE DEPARTMENT,
RESISTING OFFICER

4/11/1994 MIAMI-DADE POLICE DEPARTMENT,
AGG ASSLT - WEAPON

4/11/1994 MIAMI-DADE POLICE DEPARTMENT,
AGG ASSAULT -WEAPON

01/14/1991 MIAMI-DADE POLICE DEPARTMENT,
SHOPLIFTING

11/07/1981 MIAMI-DADE POLICE DEPARTMENT,
ASSAULT

11/07/1981 MIAMI-DADE POLICE DEPARTMENT,
RESISTING OFFICER

11/07/1981 MIAMI-DADE POLICE DEPARTMENT,
DISORDERLY CONDUCT

24. The DCF letter also instructed Petitioner that if she could not obtain the arrest report and/or court disposition, she might submit a notarized written "detailed statement on each arrest explaining why you were arrested. You must include the victim's age and relationship to you and the sentence you received (probation, jail, prison, etc)."

25. Additionally, the letter requested proof of income, an affidavit of good moral character, two to five letters of recommendation, and a personal history explaining what happened with each arrest, current home life, education, training, family members, goals, and community involvement. The letter provided Petitioner a 30-day deadline and notified Petitioner "[n]o further action [would] be taken on [her] application for exemption until we receive the requested information." (emphasis added).

26. On or about December 21, 2016, Petitioner complied with the DCF letter and provided 99 pages of documents including

Florida Criminal History Record requested, certified police arrest reports, notarized printed dockets of her criminal offenses with court dispositions, notarized document from the Clerk of Circuit and County Court Harvey Ruvin listing all Petitioner's criminal charges and court dispositions available in Miami-Dade, certificate of parole, 2009 certificate of restoration of civil rights, taxes, nursing assistant certification, certificate of liability insurance, continuing education certificates, program certificates, June 13, 2015, White House Conference on Aging program listing Petitioner as a speaker at the White House, 2015 newspaper articles detailing Petitioner's substantive work in minimum pay raise advocacy nationwide for the Fight for Fifteen campaign, letters of recommendation, driving history records, ACHA exemption to work in the healthcare field as a Certified Nursing Assistant ("CNA"), and a personal statement.

27. Petitioner's personal statement and testimony at hearing provided a comprehensive history of how she has been a caregiver since 1982 "working [i]n hospitals, nursing homes, mental health, hospice, private homes, SLF, etc." Petitioner's statement further detailed that she became a Certified Nursing Assistant in 1985 after the disqualifying offense incident and became a surgical technician in 1997. Petitioner also provided the requested following explanations for each of her arrests:

- 1.) 11/26/1975: I was arrested for (3) counts of resisting arrest with violence. At the time I was 17 years of age hanging with the wrong crowd.
- 2.) 11/07/1981: Was at a party drinking got in fight with boyfriend. No case action.
- 3.) 01/14/1991: In store buying groceries didn't realize there were a pair of socks in my buggy charged with petty theft no way I would have stolen a pair of one dollar socks. Judge was dumbfounded.
- 4.) 04/11/1994: Got into argument with my mother in which she was drinking she called police to say I had a gun. In which was not true. Office[r] ask me had I ever been to jail I stated yes he then said put your hands behind your back then placed me under arrest. My Mom was there next morning to bond me out. Case No Action.
- 5.) 09/28/1996: I was witness to a murder I told officer what I seen but didn't want to speak in front of people, also did not want to be labeled as a snitcher. I told the officer I would come to talk but I would not walk with him. I proceeded to walk away the officer grabbed me by the back of my hair, the officer and I proceeded to fight at that time other people got involved. The lead detective asked the officer why he did that. The lead detective promise me he would come to court with me in which he did case was dismissed. Case No Action.
- 6.) Boyfriend and I got into argument he was drinking and he wanted to drive I told him no he wouldn't give me my keys, so I proceeded to knock head lights out. Case No Action.
- 7.) 01/13/1998: Got in fight with boyfriend. Case No Action.

28. Petitioner responded to the best of her ability to each of DCF's requests for information.

29. DCF summarized Petitioner's 99 document submission in an Exemption Review Summary ("summary") and forwarded the application, questionnaire, and supporting documents to APD for review. The summary correctly identified Petitioner's 1975 acts of resisting an officer as the disqualifying offenses. The summary outlined twelve non-disqualifying offenses with which Petitioner was charged. However, the summary categorized one non-disqualifying offense as a driving charge and outlined an additional nine non-disqualifying offenses as dismissed or dropped, as Petitioner had reported in her personal statement when she said "no action" was taken. The summary only listed a 1991 shoplifting charge and a 2001 county ordinance violation for which Petitioner was prosecuted.

30. On March 17, 2017, Agency Director Barbara Palmer advised Petitioner by letter that her request for an exemption from the disqualification has been denied. The basis for the denial was that Petitioner failed to submit clear and convincing evidence of her rehabilitation.

31. On May 1, 2017, Petitioner requested to appeal APD's denial.

Hearing

32. At hearing, as well as in the exemption package, Petitioner took full responsibility for her disqualifying offenses. At hearing, Cunningham also showed remorse. In her personal statement she stated she "paid her debt to society . . . learned from [her] mistakes."

33. Petitioner also credibly explained the circumstances at hearing for her 1975 disqualifying convictions and testified that she was 17 years old when she broke into the neighbor's empty house across the street and was hanging out there. When she was arrested they were handling her roughly. She was originally charged with burglary, larceny and resisting arrest. The burglary and larceny charges were dropped and she pled to three counts of resisting an officer with violence to his person.

34. Petitioner was sentenced to a youth program but left it, was bound over as an adult, and was sentenced to prison where she served three and a half years.

35. Petitioner successfully completed her parole on August 23, 1981, and her civil rights were restored on May 8, 2008.

36. Petitioner testified to her other non-disqualifying offenses as she had detailed in her personal statement. She explained that the 1981 criminal charge was dropped and stemmed from a fight with her boyfriend while at a party where she had

been drinking. In 1994, her mom, who was a drinker, was acting out and called the police on Petitioner. Her mother lied and told the police Petitioner had a gun, which she did not. The police asked Petitioner if she had been to jail previously and she answered yes and was arrested. Her mother came and got her out of jail the next morning and the case was dismissed.

Petitioner verified that in 1996, she would not tell the police officer what she saw regarding a murder because she was going to the police station to report it privately. The officer grabbed her from behind, they fell to the ground, and she was arrested for Battery on an Officer. The next day the lead detective came to court and testified on Petitioner's behalf that the officer's behavior was inappropriate and Petitioner was released and the charges were dropped. Petitioner also explained that she received another arrest because her boyfriend was drunk and took her car keys and was going to drive. Petitioner testified she could not stop him so she knocked the headlights and windows out of her car to prevent him from driving and ultimately the charges were dropped.

37. Petitioner confirmed at hearing that at least nine of the criminal charges she obtained were either dismissed or dropped and she had not been arrested in over 10 years. Petitioner's credible detailed testimony during the hearing was

information that APD did not have the benefit of having while reviewing her application.

38. Petitioner affirmed that she had a July 1999 public assistance fraud case on which adjudication was withheld for her trading food stamps to pay her light bill. DCF failed to ask Petitioner about the case in the request letter with the list of other charges. Petitioner admitted that the public assistance fraud case was the only case in which Petitioner had to make restitution. She paid back the total amount of food stamps she sold and then her food stamps were reinstated.

39. Evelyn Alvarez ("Alvarez"), APD Regional Operations Manager for the Southern Region, made an independent review of Petitioner's Request for Exemption, Petitioner's Exemption Questionnaire, and documentation submitted on December 21, 2016.

40. Among the factors identified by Alvarez as a basis for the recommendation of denial of the exemption was the perception that Petitioner's application was incomplete. Alvarez determined Petitioner did not take responsibility for her arrests or show any remorse.

41. Alvarez testified that APD needs to be able to rely on the answers provided by the applicant in the Exemption Questionnaire to get the information needed to decide whether to grant an exemption. Although she relied on other information

gathered as well, what the applicant stated in the Exemption Questionnaire is very important.

42. Alvarez explained that she considered both Petitioner's disqualifying and non-disqualifying offenses, the circumstances surrounding those offenses, the nature of the harm caused to the victim, the history of the applicant since the disqualifying incident, and finally, any other evidence indicating whether the applicant will present a danger to vulnerable APD clients if employment is allowed. Alvarez also testified that she looked for consistency in the applicant's account of events in her Exemption Questionnaire, whether or not the applicant accepted responsibility for her actions and whether the applicant expressed remorse for her prior criminal acts. Alvarez concluded that there were inconsistencies between Petitioner's account of her disqualifying and non-disqualifying offenses compared with those found in the police reports.

43. Alvarez further testified she was concerned that Petitioner had numerous traffic citations. Alvarez explained the citations concerned her because individuals who are granted exemptions would potentially be in positions to transport clients and an applicant that maintains a good driving record demonstrates an ability to ensure the health and safety of clients being served.

44. At hearing, Petitioner testified that her driving record "was not the best." The summary detailed that the 2008 infractions included failure to pay required tolls, improper left, and lack of proof of insurance. Petitioner also had other driving offenses, such as a DWLS and Driver License in 2007 and a safety belt violation in 2006.

45. After her review, Alvarez decided that Petitioner had exhibited a continuing pattern of criminal offenses over an extended period of time, many of which were violent and involved fights, and she concluded Petitioner had not demonstrated rehabilitation.

46. At hearing, Tom Rice ("Rice"), APD Program Administrator for Regional Supports/Licensing, testified that an individual's good character and trustworthiness is important for individuals who provide direct care for APD because service providers are frequently responsible for assisting individuals in making decisions of a financial, medical, and social nature. APD must weigh the benefit against the risk when considering granting an exemption.

47. Rice explained that APD's clients are susceptible to abuse because they are reliant on others to assist with intimate tasks, such as getting dressed, going to the bathroom, feeding, medicine, and funds. Direct service providers need to care and keep clients safe.

48. Rice verified that Petitioner was eligible to work in an APD group home as a CNA.

49. Rice also testified that APD was concerned with Petitioner's failure to disclose details in her accounts regarding her criminal offenses because it calls into question her trustworthiness. He further testified such factors demonstrate a pattern of poor judgment and decision-making and provide cause for APD to question Petitioner's fitness for providing services to the vulnerable individuals for which it is responsible and that is why Petitioner was denied.

Findings of Ultimate Fact

50. Upon careful consideration of the entire record, the undersigned finds that Petitioner has demonstrated by clear and convincing evidence that she is rehabilitated from her disqualifying offenses of resisting an officer with violence to his person and that she will not present a danger to disabled or otherwise vulnerable persons with whom she would have contact if employment in a group home were allowed.

51. Petitioner has shown she is a responsible individual by successfully holding jobs in the health field for approximately 18 years. Her employment has been in positions where she cared for vulnerable persons and no evidence was presented that Petitioner was a danger while doing so. Instead, Petitioner's exemption package mirrors her credible testimony of her previous

employment serving as a companion, bathing, feeding, dressing, grooming, taking vital signs, transporting patients to doctor's appointments, and working in a private home, which are personal care services that some direct service providers also supply.

52. Petitioner was honest and forthright about her past and supplied 99 pages detailing her past to comply with DCF's request to complete her application. Petitioner testified convincingly that she has turned her life around.

53. Petitioner's only disqualifying offenses occurred over 40 years ago. Even though she was arrested at least twelve times since then, nine of the charges were dismissed and Petitioner's last criminal arrest was 2002.

54. Petitioner also obtained three certificates after her disqualifying offenses. Petitioner received licensure as a CNA and she has been successfully practicing under her license with an ACHA exemption in the health care field. Some of Petitioner's work has even been with vulnerable adults in both a hospital and nursing home.

55. The undersigned further finds that denial of Petitioner's exemption request would constitute an abuse of discretion. As discussed above, it appears Respondent relied heavily on the initial application submitted, hearsay in the police reports, and traffic infractions, and failed to adequately consider the 99 pages and nine dismissed charges Petitioner

provided regarding her rehabilitation. In doing so, Respondent failed to properly evaluate Petitioner's disqualifying offenses having occurred over 40 years ago and the last non-disqualifying criminal arrest being at least 15 years ago and the majority of the charges being dismissed. The evidence also indicates that Petitioner has performed successfully in a healthcare work setting, including some care of vulnerable individuals.

56. Additionally, Petitioner has gone above and beyond to contribute in the community. She volunteers with the homeless and also volunteers with legislators and a mayor, and advocated nationally for a minimum wage increase in the Fight for Fifteen campaign, serving as the spokes-person. In 2015, the White House also extended an invitation to Petitioner to speak because of her advocacy, and Petitioner passed the background check and screening that the secret service conducted. As Petitioner testified at hearing, had she been any type of threat or been dangerous or violent based on her previous arrests, she would not have passed the high security screening and been allowed in the White House to speak.

57. Petitioner also testified she does not have anything to hide. She demonstrated, by credible and very compelling evidence, that she made wrong decisions and took the initiative to turn her life around.

58. 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.

59. The concerns expressed by Respondent in formulating its intended action, without the benefit of hearing testimony, particularly with those regarding her untruthfulness and lack of remorse for her actions, were effectively refuted by the credible testimony at hearing.

CONCLUSION OF LAW

60. 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.

61. 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.

62. Section 393.0655(1), Florida Statutes, 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.

63. 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:

* * *

(mm) Section 843.01, relating to resisting arrest with violence.

64. Because Petitioner pled to resisting an officer with violence to his person, she is disqualified from employment as a direct service provider for developmentally disabled clients unless granted an exemption by Respondent pursuant to section 435.07.

65. 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.

66. Pursuant to this statute, Petitioner, as the applicant for an exemption, must demonstrate her 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).

67. For the reasons discussed above, Petitioner proved her rehabilitation, clearly and convincingly, with substantial evidence that was not available to Respondent in formulating its intended action to deny Petitioner's exemption request. Notably, APD's conclusion that Petitioner was untrustworthy was mainly

based on Petitioner's application and the hearsay of police reports. That concern is put to rest by Petitioner's credible, clear, and convincing testimony and the substantial evidence supplied in the 99 documents complying with DCF's request.

68. Furthermore, the weight given to disqualifying offenses over 40 years old is misplaced. The record shows that in the more than 15 years since her last non-disqualifying criminal arrest, Petitioner has steered clear of criminal trouble, and has taken meaningful steps to change her life for the better.

69. Petitioner's change is further shown by her contributions to the community. She has been working with the homeless and advocating on behalf of Americans making a minimum wage. She even worked nationally in the Fight for Fifteen campaign to raise the minimum wage to 15 dollars. Petitioner also spoke at the White House after having met the national security screening and background requirements.

70. While it may not have been an abuse of discretion for APD to initially deny Petitioner's request for an exemption, the clear and convincing evidence adduced at the final hearing leads the undersigned to conclude that Petitioner has demonstrated rehabilitation and does not currently present a danger to vulnerable clients of APD if employment as a direct care service provider for developmentally disabled persons is allowed. Under the specific circumstances of this case, it would constitute an

abuse of discretion for Respondent to deny her request for an exemption from disqualification.

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, Molita Cunningham's, request for an exemption from disqualification from employment.

DONE AND ENTERED this 13th day of September, 2017, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of September, 2017.

COPIES FURNISHED:

Kurt Eric Ahrendt, Esquire
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950
(eServed)

Molita Cunningham
12437 Southwest 220th Street
Miami, Florida 33170
(eServed)

Jada Williams, Agency Clerk
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 335E
Tallahassee, Florida 32399-0950
(eServed)

Richard D. Tritschler, General Counsel
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950
(eServed)

Barbara Palmer, Director
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950
(eServed)

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.