

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EUGENIA MAYS,

Petitioner,

vs.

Case No. 17-3557EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 26, 2017, by video teleconference at sites in Sarasota and Tallahassee, before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Leland M. Taylor, Esquire
Leland M. Taylor, Esquire, PL
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Bradenton, Florida 34205

For Respondent: Trevor S. Suter, Esquire
Agency for Persons with Disabilities
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STATEMENT OF THE ISSUES

Whether Petitioner, Eugenia Mays, has demonstrated by clear and convincing evidence that she should not be disqualified from

employment in a position involving direct contact with developmentally disabled persons; and, thus, whether Respondent's intended action to deny Petitioner's request for an exemption from employment disqualification is an abuse of discretion.

PRELIMINARY STATEMENT

By letter dated May 16, 2017, the Agency for Persons with Disabilities (APD or Respondent) informed Petitioner 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. A client is any person determined eligible for services by the Agency." 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."

Petitioner timely filed a request for a hearing. On June 20, APD referred the case to the Division. The Initial Order was entered on June 21. A Joint Response to the Initial Order was filed by APD on June 27, and the hearing was scheduled for August 22. After one continuance, the hearing was held on October 26, by video teleconference in Tallahassee and Sarasota.

At the final hearing, Petitioner testified on her own behalf and presented the testimony of Marvin Smith, Kathy Barnes, Marvinna Johnson-Allen, and Edward Gresham. Petitioner's Exhibit 1 was received into evidence over objection.

Respondent presented the testimony of Jeff Smith, APD's regional operations manager (ROM), and Daniella Jones, APD's management review specialist. Respondent's Exhibits 1 through 5^{1/} were received into evidence.

The Transcript was filed with the Division on November 17. On November 20, APD filed an agreed motion seeking an extension of time in which to file the proposed recommended orders (PROs). The agreed motion was granted. Respondent filed its PRO on December 8. Petitioner filed her PRO on December 11. As the Recommended Order had not been finalized and there was no objection to the late PRO, both have been considered.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2017 Florida Statutes.

FINDINGS OF FACT

1. APD is the state agency responsible for licensing and regulating the employment of persons in positions of trust, and is charged with serving and protecting adults or children with developmental disabilities, sometimes referred to as vulnerable individuals.^{2/}

2. Vulnerable populations served by APD may include individuals with developmental and intellectual disabilities, autism, cerebral palsy, spina bifida, Prader-Willi syndrome, and Down syndrome. Some of APD's clients are incapable of expressing their needs or unable to express whether something is wrong. APD also has administrative jurisdiction to enforce the laws governing such licensees.

3. Petitioner is a 55-year-old female seeking licensure from APD to serve as a direct care provider for Respondent's clients.

4. As part of the application process for employment as a direct service provider, Petitioner was subject to a routine pre-employment background screening pursuant to section 435.04, Florida Statutes. The screening revealed the existence of several disqualifying criminal incidents in Petitioner's past. In 1987, 1990 and 1994, Petitioner was convicted of possession of cocaine, possession of cocaine with the intent to sell, and the sale of cocaine. Additionally, there were several non-disqualifying events in Petitioner's background.

5. On January 9, 2017, Petitioner executed her Request for Exemption, which was filed with the Department of Children and Families (DCF).^{3/} DCF conducts the initial screening of all applicants by making sure all the required documents are present

and then it conducts the initial background investigation for APD.

6. Background screening and local criminal records revealed a history of involvement with law enforcement. Petitioner admitted and took full responsibility for the offenses in both the paperwork she filed with APD and in her testimony at hearing. DCF then issued a "high level summary" to APD.

7. Among the items submitted by Petitioner in support of her Request for Exemption were her employment history record, information regarding the final court dispositions of the arrest reports and/or charging affidavit; information regarding the completion of sanctions; her proof of rehabilitation; letters of recommendation; her personal history; an executed affidavit of good moral character; the non-disqualifying issues; and an updated local law result.

8. Several letters were sent to Petitioner seeking additional information, and Petitioner responded to the best of her ability to each request for information.

9. Once Ms. Jones received the DCF summary, she reviewed Petitioner's documentation. She then checked the court and other systems for any additional charges that may not have been included by the Florida Department of Law Enforcement or the Federal Bureau of Investigation. Ms. Jones also verified that any court-ordered sanctions were completed. Ms. Jones had access

to state and federal government databases, including a comprehensive case information system to ensure that all fines and fees were paid, and she checked the applicant's "driving record through the DMV." Additionally, she checked Petitioner's "eligibilities through AHCA and Medicaid."

10. Ms. Jones then prepared a summary packet, which was provided to the ROM. The ROM must review the packet within a certain time frame and provide a recommendation to the State Office Committee (SOC).

11. ROM Smith identified the factors that he considered when making his recommendation: the disqualifying offense(s); the circumstances surrounding the offense; any proof or some evidence of rehabilitation or counseling; any show of "some remorse and/or ownership of the charges that have been filed"; the possible consequences to "the health and safety of the individuals that" APD serves; and "any non-disqualifying offenses that may have been charged against the individual." ROM Smith recommended denial of Petitioner's exemption request.

12. Upon receipt of the ROM's recommendation, Ms. Jones then prepared a recommendation summary and presented that to the SOC. The SOC consists of APD's chief of staff and a program administrator from the regional support unit. An APD attorney was present for legal advice.

13. Ms. Jones identified the factors that APD's SOC considers in making the recommendation for the denial of an exemption request as: "any arrests or criminal convictions after the original disqualifying offense; the employment history; training and education; professional references"; driving record; other agency exemptions or involvement with other agencies; and any inspections or exemptions of the other agencies. Ms. Jones averred that APD takes "into account those inspections or those exemptions."

14. Once the SOC made its recommendation, Ms. Jones took the two recommendations (the ROM's and the SOC's) to APD's director who reviewed the material to make the final decision.

15. Ms. Jones averred that "most of the time common sense is used" when APD approached the question of rehabilitation standards. That if the issue involved a drug-related offense, one would look for drug rehabilitation, and if that were missing, "that is a lack of responsibility on the applicant's part."

16. A review of Petitioner's application, and her uncontroverted testimony confirmed that she has been employed in several successful occupations since 1990. Petitioner's first business, started in 1990, was Precise Nail and Beauty Salon (Salon). When the economy went down, Petitioner determined she needed a second job and that is when she started working for a

home companion company in Bradenton. The Salon continues in operation today.

17. Petitioner did research to begin her own home companion company and started Precise Home Companions (PHC). PHC is a non-medical operation, which is certified through the state to go into private homes and provide non-medical home care. This care includes preparing meals, doing laundry, making their beds, helping persons with their bills, taking them to and from doctors' appointments, and whatever other activities they need. Petitioner successfully completed a Level 2 background screening and took the classes and/or training necessary for the license. Petitioner obtained the requisite insurance and continues to hold the appropriate bond for PHC.

18. In setting up PHC, Petitioner was given access to conduct background screenings to hire more staff. Once the staff was on board, Petitioner had to ensure they had training and were tested for "TB." Petitioner was responsible for making sure the six employees recorded their work hours in order for the payroll service to issue their pay.

19. Petitioner recognized another area of need when a PHC client needed more attention than PHC could provide. Petitioner researched and opened an adult family care home. Petitioner's adult family care home (AFCH) is licensed by the Agency for Health Care Administration (AHCA). AFCH is Petitioner's

responsibility and she maintains the requisite insurance and bond. AFCH is a home which provides room and board for up to five elderly clients, although only four were in residence on the hearing date. The clients may need assistance with their activities of daily living. AFCH also keeps the residents busy with various activities, outings and events.

Disqualifying Offenses

20. Petitioner testified that her "downfall," as she refers to it, occurred in and before 1994. Between 1987 and 1994, Petitioner (when she was between 25 and 31 years of age) was convicted of possession of cocaine with intent to sell, sale of cocaine, and possession of cocaine, all disqualifying offenses. Petitioner steadfastly maintained that she has never used drugs, but possessed and sold them in order to support her children. No evidence was presented to establish that Petitioner ever used drugs. Petitioner admitted that it was her "decision to do wrong," and she took full responsibility for those actions. However, Petitioner was clear that it was also her determination to change when she realized she had been wrong. Petitioner did change and for the past 23 years has not had a disqualifying offense.

21. Petitioner changed her environment. She joined a church and became very active in it. She divorced her then-husband who she found to be using drugs. Petitioner recently

married a man with a bachelor's degree in rehabilitation counseling.

22. Petitioner completed the sanctions imposed by the courts, and all fees and costs related to the disqualifying offenses were paid. For the past 23 years, Petitioner has not had any disqualifying offenses.

23. Marvin Smith has known Petitioner for approximately ten years, having married Petitioner's mother. Smith visits in Petitioner's home once or twice a month, and does not think her residence is a "destructive environment." Smith has attended church with Petitioner, and sees her lifestyle as "moving in the right direction." Further, in the ten years Smith has known Petitioner, he has never seen her act in a violent manner.^{4/}

24. Marvin Johnson-Allen has known Petitioner for over 20 years, and has witnessed Petitioner caring for people in her church and home. Additionally, Johnson-Allen provided insight into the various successful businesses that Petitioner has started, and Petitioner's volunteer work in the community.

25. Kathy Barnes has known Petitioner for over ten years, having met her at Petitioner's beauty salon. Barnes was not Petitioner's employee, but as a customer, Barnes watched Petitioner work hard. In over ten years, Barnes has never seen Petitioner use drugs or alcohol. At one point Barnes had major

surgery, and without being asked by Barnes, Petitioner supplied housekeepers to enable Barnes to recover from the surgery.

26. Edward Gresham has known Petitioner for approximately three years, and is now Petitioner's husband. Gresham works as a rehabilitation counselor in the health care field, and also works in the home that Petitioner operates. Gresham has successfully cleared a Level 2 background check. Further, he has observed Petitioner ensuring that residents are clothed in their own clothes, are fed, and receive their allowances. In the three years he has known Petitioner, Gresham has not seen Petitioner use alcohol or illegal drugs.

Non-Disqualifying Offense

27. APD focused on (in addition to the drug rehabilitation issue) Petitioner's driving record, and her designation as a habitual driving offender. The basis for this focus was a concern that Petitioner might drive a client to an appointment. Petitioner recently completed a driver's education course, from which she learned a great deal about her responsibilities as a driver. She paid the fines associated with the offender status, and she has a current, valid work driver's license. Petitioner anticipates obtaining a completely clear driver's license in June 2018.

28. In denying the request for exemption, APD "considered all available information that led to [Petitioner's]

disqualification, as well as all information provided by”
Petitioner regarding the disqualification. APD denied
Petitioner’s request because she had “not submitted clear and
convincing evidence of [her] rehabilitation.”

Other Attributes of Significance

29. Petitioner has worked consistently over a sustained
period in a position in which she cares for multiple persons. By
all accounts, Petitioner is a reliable, kind, caring and diligent
worker, and her current continuous employment demonstrates that
she can be trusted to work appropriately in situations involving
vulnerable adults.

30. Petitioner is licensed by AHCA. She holds an exemption
from AHCA which has been appropriately renewed since its
issuance.

31. Petitioner is allowed to participate in the Medicaid
program as a provider.

32. Petitioner completed courses necessary to obtain the
requisite licenses.

33. Section 435.07, Florida Statutes, the controlling
statute regarding the exemptions from disqualification, provides
the following, in pertinent part:

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;

* * *

(b) A person applying for an exemption who was ordered to pay any amount for any fee, fine, fund, lien, civil judgment, application, costs of prosecution, trust, or restitution as part of the judgment and sentence for any disqualifying felony or misdemeanor must pay the court-ordered amount in full before he or she is eligible for the exemption.

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.

* * *

(5) Exemptions granted by one agency shall be considered by subsequent agencies, but are not binding on the subsequent agency.

34. Rehabilitation is not defined in statute or rule.

35. Petitioner's last disqualifying offenses occurred in 1994, approximately 23 years ago. At some point, the passage of time itself, without any disqualifying offenses, must be evidence of rehabilitation. While by no means dispositive, the passage of 23 years since the last disqualifying offense is substantial evidence of Petitioner's rehabilitation. Petitioner's forthright demeanor and her willingness to discuss her "downfall" and her

determination to turn her life around are significant.

Petitioner testified convincingly that she has turned her life around, and is not the same person that she was 23 plus years ago.

36. Petitioner has successfully worked with elderly persons in a positive and helpful manner, and currently presents no danger to the vulnerable population served by Respondent. The concerns outlined by Respondent in its decision letter, without the benefit of the hearing testimony, were refuted by the credible testimony adduced at hearing. Common sense tells a huge story of Petitioner's rehabilitated life. Petitioner meets the objective criteria for an exemption from disqualification as established by section 435.07(1).

CONCLUSIONS OF LAW

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

38. Section 435.04, 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.

39. The disqualification of Petitioner was based on three disqualifying offenses, i.e., possession of cocaine, possession of cocaine with the intent to sell, and the sale of cocaine that occurred in 1987, 1990 and 1994. Petitioner has not had any disqualifying offenses in over 20 years.

40. 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. See paragraph 33 above.

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

42. 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).

43. It is now established that:

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

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

44. As found 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.

45. The record shows that it has been over 23 years since Petitioner's last disqualifying event. Petitioner has taken meaningful steps to change her life and has been a successful business woman for over 20 years.

46. APD has a heightened interest in ensuring that its vulnerable clients are not abused, neglected, or exploited. In light of that mission, the Legislature has justifiably imposed a heavy burden on those seeking approval to serve those persons when they have disqualifying events in their past.

47. Notwithstanding the foregoing evidence of rehabilitation, the record reflects that Petitioner's disqualifying offenses were ones involving drug-related offenses. It was not an abuse of discretion for that fact to be given significant weight. However, 23 years without a drug-related arrest is significant, and demonstrates rehabilitation.

48. While it may not have been an abuse of discretion for the Agency 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 her rehabilitation from the disqualifying offenses, and would not currently present a danger to vulnerable clients of APD if employment as a direct care service provider for developmentally disabled persons is allowed. In light thereof, 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 a final order be entered by the Agency for Persons with Disabilities granting Petitioner's request for an exemption from disqualification.

DONE AND ENTERED this 12th day of January, 2018, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of January, 2018.

ENDNOTES

^{1/} Within Respondent's Exhibit 1, a page is missing from the letter which starts at Bates-stamped page 4, and within Respondent's Exhibit 2, page 20, is a poorly copied page which makes it difficult, if not impossible, to read. Personal identification information (i.e., social security numbers) is present on various pages throughout Respondent's exhibits.

^{2/} Section 435.02, Florida Statutes, provides the following definition for "vulnerable person":

[A] minor as defined in s. 1.01 or a vulnerable adult as defined in s. 415.102.

Section 1.01(13), Florida Statutes, provides the word "minor":

[I]ncludes any person who has not attained the age of 18 years.

Section 415.102, Florida Statutes, provides:

Vulnerable adult means a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.

^{3/} It appears that Petitioner filed two Requests for Exemptions, as the first request was not timely completed.

^{4/} There are no allegations of violence alleged in the denial letter; however, the information is valuable in providing a complete assessment of Petitioner's "rehabilitation."

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.