

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NICOLE BELINDA HENRY,

Petitioner,

vs.

Case No. 17-3896

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case on September 21, 2017, via video teleconference at sites in Tallahassee and Jacksonville, Florida, before W. David Watkins, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Nicole Henry, pro se
1609 Chatham Road
Jacksonville, Florida 32208

For Respondent: Lindsay Worsham Granger, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 7
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Whether the Agency for Health Care Administration's (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 June 19, 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 provided clear and convincing evidence of [her] rehabilitation as required by Florida Law."

Petitioner filed her Request for Administrative Hearing with the Agency on June 26, 2017, which request was referred to the Division of Administrative Hearings on July 11, 2017. The undersigned was assigned the matter, and by notice dated July 25, 2017, scheduled the final hearing for September 21, 2017.

At the final hearing, Petitioner testified on her own behalf and offered the testimony of one additional witness, Sheila Long.

Respondent presented the testimony of Sherry Ledbetter, the Agency's operations and management consultant manager of the Background Screening Unit. Respondent's Exhibits R1 through R3 were admitted in evidence.

The proceedings were recorded, but the parties did not order a transcript thereof. Respondent timely filed a Proposed

Recommended Order, which has been considered in preparing this Recommended Order. Petitioner did not make any post-hearing filings.

Unless otherwise noted, all references to the Florida Statutes are to the 2017 version.

FINDINGS OF FACT

1. Respondent is required to conduct certain background screenings for employees who provide specific types of services within health care facilities licensed under chapters 400, 408, and 429, Florida Statutes. § 408.809, Fla. Stat.

2. Petitioner seeks employment in a position providing such services to residents of a health care facility licensed by Respondent, and, as such, is required to participate in Respondent's background screening process pursuant to section 408.809, Florida Statutes.

3. Petitioner submitted to the required background screening, which revealed that in 2006, Petitioner was adjudicated delinquent for the felony offense of Aggravated Battery with a Deadly Weapon, in violation of section 784.045, Florida Statutes, in Franklin County, Florida, Case No. 06000033CJAXMX.

4. In 2010, Petitioner was charged with Child Abuse and Child Neglect, but pleaded guilty to Contributing to the Delinquency of a Minor, in Duval County Circuit Court, Case

No. 162010CF002633AXXXMA, in violation of section 827.04, Florida Statutes.

5. The two above-referenced criminal convictions render Petitioner disqualified and ineligible to provide the listed services in a health care facility licensed by Respondent unless Petitioner receives an exemption from Respondent, pursuant to section 435.07, Florida Statutes.

6. In addition, Petitioner's background check revealed that she was arrested in 2014 for Battery, although the charge was dismissed, and Petitioner pleaded no contest to Disorderly Conduct, in Gulf County Court, Case No. 14-100MM.

7. Petitioner was also arrested in 2014 for two (2) counts of Aggravated Battery with a Deadly Weapon, but those charges were dismissed. However, Petitioner pled no contest to the offense of Affray, in Gulf County Court, Case No. 14-179-CF.

8. Petitioner initially submitted an application for exemption to the Agency in accordance with sections 408.809 and 435.07, on or about April 21, 2017, and participated in a telephonic hearing conducted by Respondent on June 13, 2017.

9. Respondent's witness, Sherry Ledbetter, the operations and management consultant manager for the Background Screening Unit, testified that she attended the telephonic hearing on June 13, 2017.

10. Following the telephonic hearing, Respondent denied Petitioner's request for an exemption by letter dated June 19, 2017, and Petitioner subsequently requested an administrative hearing.

11. At the administrative hearing, Sherry Ledbetter testified that, in making the decision to deny the exemption request, Respondent considered Petitioner's entire case file, including all submissions received from Petitioner, as well as her explanations of her past offenses.

12. Ms. Ledbetter also testified that the instant denial was separate from, and did not impact, any exemption that Petitioner may receive for her Certified Nursing Assistant (CNA) license through the Florida Department of Health.

13. As explained by Ms. Ledbetter, once there is a disqualifying offense or conviction, Respondent is legally authorized to consider all subsequent arrests or convictions, even if those arrests or convictions are not disqualifying offenses. Indeed, Respondent considered Petitioner's subsequent arrests and convictions during the review of Petitioner's application for exemption. Ms. Ledbetter testified that Respondent also considered the circumstances surrounding Petitioner's most recent arrests, even though the charges were not disqualifying under the law. She further testified that the recency of those 2014 incidents was a large factor in

Respondent's decision to deny Petitioner's application for exemption.

14. Ms. Ledbetter noted that some of Petitioner's statements conflict with the police reports and other documentation in Petitioner's exemption file, particularly with respect to the 2010 Contributing to the Delinquency of a Minor conviction. Petitioner's child, who was four months old at the time, was discovered to have a broken leg and a broken arm. At the telephonic hearing, Petitioner was unable to explain what happened and blamed the injuries on the babysitter, although no proof was presented that the babysitter was charged with a crime related to this incident.

15. When determining to deny the exemption request, the Agency was aware of the fact that Petitioner had taken court-ordered anger management courses in 2006, and again in 2014.

16. In summary, Ms. Ledbetter testified that, based on Petitioner's entire file and her responses during the teleconferences, Petitioner had not satisfied her burden of proving, by clear and convincing evidence, her rehabilitation subsequent to her disqualifying offenses.

17. Petitioner testified on her own behalf and explained how her past does not define her today, and that she is a changed person. She explained that she has grown up a lot, and has learned to love herself. She also stated that she has learned

how to be honest with herself, and to take responsibility for her actions.

18. Petitioner explained that in 2015, her mother had lung cancer and was in hospice. She acknowledged that this experience with her mother was the pivotal moment in her life that changed her.

19. Petitioner professed that she wants nothing more than to help people, and would do so if granted the exemption. Specifically, Petitioner would like to return to her work helping elderly adults.

20. Petitioner called as a character witness her friend since high school, Sheila Long, who testified that Petitioner has grown up a lot, is a good mother, and is trying to be a better person.

21. Petitioner successfully completed a CNA course in March 2017.

22. Included with Petitioner's application for exemption from disqualification were several letters of reference, all lauding Petitioner's good character and geniality. Three of those letters attested to her successful employment in recent years, including two from representatives of the Eisenhower Center, a rehabilitation facility where Petitioner worked as a CNA until her disqualification. A third, from the assistant manager at the Walmart where Petitioner had been employed,

praised Petitioner's pleasant and courteous demeanor, and her honesty in revealing her criminal background.

23. Although Petitioner appeared genuinely remorseful for her criminal convictions and has clearly made an effort to turn her life around, due to the recency of some of the offenses, it cannot be concluded that she is rehabilitated and should not be disqualified from employment. Petitioner has thus failed to meet her burden of proof by clear and convincing evidence that she should be granted an exemption from disqualification.

CONCLUSIONS OF LAW

24. 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.

25. 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.

* * *

(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:

* * *

(i) Chapter 784, relating to assault, battery, and culpable negligence, if the offense was a felony.

* * *

(jj) Section 827.04, relating to contributing to the delinquency or dependency of a child.

26. Due to Petitioner's 2006 and 2010 convictions, she is disqualified from employment in a position requiring background screening under section 408.809 and chapter 435.

27. 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 nonmonetary condition imposed by the court for the disqualifying felony;

* * *

4. Findings of delinquency. For offenses that would be felonies if committed by an adult and the record has not been sealed or expunged, the exemption may not be granted until 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 offense.

* * *

(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 decision is an abuse of discretion.

28. Thus, pursuant to statute, Petitioner has the burden to show by clear and convincing evidence that she should not be disqualified from employment. § 435.07(3)(a), Fla. Stat.

29. The Supreme Court has stated:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witness must be lacking in confusion as to the facts in 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 Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

30. 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).

31. 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).

32. The Agency has a heightened interest in ensuring that the population being protected by chapter 408, i.e., vulnerable 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.

33. The undersigned concludes that Petitioner did not provide enough evidence to prove her rehabilitation clearly and convincingly. The circumstances surrounding Petitioner's

criminal incidents, the brief time that has elapsed since the incidents in 2014, and the nature of the harm to the victims, cast doubt on Petitioner's rehabilitation.

34. Because Petitioner has failed to present clear and convincing evidence that she should be granted an exemption from disqualification, Respondent's decision to deny the application for exemption necessarily is not 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 28th day of November, 2017, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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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.