

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MARIA CLACHER,

Petitioner,

vs.

Case No. 19-6185

AGENCY FOR HEALTH CARE  
ADMINISTRATION,

Respondent.

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RECOMMENDED ORDER

On January 9, 2020, Administrative Law Judge Yolonda Y. Green, of the Division of Administrative Hearings (“Division”), conducted a hearing pursuant to section 120.57(1), Florida Statutes (2019), by video-teleconference with locations in Tallahassee and Port St. Lucie, Florida.

APPEARANCES

For Petitioner: Theodore Charles Shafer, Esquire  
T. Charles Shafer, Attorney at Law PLLC  
309 Orange Avenue  
Fort Pierce, Florida 34950

For Respondent: Richard J. Santurri, Esquire  
Agency for Health Care Administration  
Building 3, Room 3428A  
2727 Mahan Drive  
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

The issues to be determined are whether Petitioner should be granted an exemption from disqualification from employment in a position of trust; and,

if so, whether Respondent's intended agency action to deny her request for an exemption is an abuse of discretion.

PRELIMINARY STATEMENT

In a letter dated October 3, 2019, the Agency for Health Care Administration ("Respondent" or "AHCA") notified Maria Clacher ("Petitioner" or "Ms. Clacher") that her request for exemption from disqualification from employment had been denied. As a result of the agency action, Petitioner was determined to not be eligible to be employed or enrolled as a Medicaid provider.

In response to the denial, Ms. Clacher timely requested a formal administrative hearing to dispute AHCA's denial of her exemption request. On November 20, 2019, AHCA referred this matter to the Division for assignment of an administrative law judge ("ALJ") to conduct the formal hearing.

On November 21, 2019, this matter was assigned to ALJ June C. McKinney. ALJ McKinney scheduled this matter for a formal hearing by video teleconference for January 9, 2020. On January 8, 2020, this case was transferred to the undersigned.

On December 30, 2019, the parties filed a Joint Pre-Hearing Stipulation in which they agreed to the admission of certain facts, which will be incorporated in the Findings of Fact below, to the extent relevant.

On January 9, 2020, the hearing commenced as scheduled. At the final hearing, Petitioner testified on her own behalf and presented the testimony of two witnesses: Margie Clacher (Petitioner's sister) and Francine Russo (Petitioner's friend). Petitioner's Exhibits 1 through 4 were admitted. Respondent presented testimony of Vanessa Risch (operations management

consultant, manager for AHCA). Respondent's Exhibits 1 through 12 were admitted.

The Transcript of the final hearing was filed with the Division on January 22, 2020. At the conclusion of the hearing, the parties requested 30 days to submit proposed recommended orders ("PROs"). Thereafter, the parties timely filed PROs, which have been carefully considered in preparation of this Recommended Order.

Unless otherwise indicated, all statutory references are to Florida Statutes (2019).<sup>1</sup>

#### FINDINGS OF FACT

Based on the evidence presented at hearing and the stipulated facts, the following Findings of Fact are made:

1. Petitioner is a 57-year-old woman seeking exemption from disqualification so she may continue to provide care to her sister. In order to provide care, she must be approved to provide care to the elderly and vulnerable adults.

2. Petitioner has taken care of her disabled sister for a number of years, and seeks to continue providing care for her as a Medicaid healthcare provider. As a result, she is required to undergo a Level 2 criminal background screening.

3. AHCA is the state agency charged with protecting vulnerable persons such as Medicaid recipients and the Medicaid program, and in that capacity, it maintains discretion to approve or deny requests for exemption.

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<sup>1</sup> Because a final order has not yet been issued for this case, Petitioner's application for exemption is governed by current law. *See E.J. v. Dep't of Child. & Fams.*, 219 So. 3d 946 (Fla. 3rd DCA 2017); *See also Ag. for Health Care Admin. v. Mount Sinai Med. Ctr.*, 690 So. 2d 689, 691 (Fla. 1st DCA 1997).

4. When evaluating a request for exemption, AHCA considers the circumstances surrounding the disqualifying offense, nature of the offense, rehabilitation since the offense, time that has passed since the offense, the degree of harm caused to the victim, if any, and any subsequent criminal offenses.

5. Petitioner completed a background screening application for exemption from disqualification and submitted it to AHCA. AHCA conducted a background screening which revealed that on May 3, 2012, Petitioner was arrested for falsifying records in violation of section 839.13(2)(c), Florida Statutes (2011), a third-degree felony. On September 6, 2012, Petitioner entered a plea of *nolo contendere* to falsifying records of the Department of Children and Families Services, with adjudication withheld,<sup>2</sup> and was ordered to serve two years of probation, and pay fines and court costs in the amount of \$2,193.00. Petitioner completed the terms of her probation on August 20, 2014.

6. On July 14, 2014, approximately one month before her probation ended, Petitioner was arrested for violation of probation (VOP), for failure to pay the probation supervision costs and court ordered fine, related to the case involving the disqualifying offense. At hearing, Petitioner testified that she was unable to pay the fine and costs because she was unemployed. On August 4, 2014, upon motion filed by the assistant state attorney, the VOP case was dismissed. Petitioner completed payment of the fees and costs on January 20, 2017.

7. No evidence was presented that indicates Petitioner has been involved with law enforcement since 2014.

8. At the time of arrest for the disqualifying offense, Petitioner was employed by Family Preservation Services of Florida, a sub-contractor for Department of Children and Families (“DCF”), as a case manager.

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<sup>2</sup> Although the Order of Probation was entered on September 6, 2012, it was dated for August 21, 2012, *nunc pro tunc* (effective date).

Petitioner's arrest stemmed from allegations that, over a period of three to four months, Petitioner submitted several forms attesting that she conducted in-home visits with children she was responsible for monitoring.

9. The reports involved 13 visits for five separate families, and it was discovered that Petitioner had not conducted the home visits as she falsely reported. Ms. Clacher's caseload included "high-risk" families where there were prior reports of substance abuse and domestic violence. Thus, the children involved would be considered a vulnerable population.

10. Petitioner's journey in requesting an exemption was not a clear path.

11. On October 6, 2014, as the result of a background screening, AHCA issued a letter to the Petitioner notifying her that she was disqualified from working for a Medicaid healthcare provider, pursuant to sections 435.04, 408.809(4), 409.907, Florida Statutes (2014), due to the May 14, 2012, arrest for a "public order crime." Although not an enumerated offense at that time, AHCA considered falsifying records a disqualifying offense because AHCA classified falsifying records as a "public order crime."<sup>3</sup>

12. Petitioner first applied for an exemption from disqualification on or about February 7, 2018.

13. On March 27, 2018, AHCA issued a letter to Petitioner notifying her that it no longer interpreted her criminal charge (falsifying records) to be a disqualifying offense, and, thus, it would be rescinding her disqualification from employment. Due to the rescission of the disqualification, Petitioner did not pursue an exemption at that time.

14. Although falsifying records was not an enumerated disqualifying offense when Petitioner underwent the prior background screenings, on July 1, 2018, the applicable statute was amended in July 2018 making falsifying records an enumerated disqualifying offense. § 435.04(b)(6), Fla. Stat.

15. On August 13, 2019, Petitioner received her third letter stating she was disqualified from working as a Medicaid healthcare provider because of her disqualifying offense.

16. On August 29, 2019, Petitioner submitted an application for an exemption from disqualification for the second time. At that point, Petitioner had worked as a caregiver from 2014 through 2019 without incident. During that time period as a caregiver, she primarily provided care to her sister.

17. In her application, Petitioner indicated that she has earned a master's degree since the disqualifying offense. She has not completed any additional training or classes, nor has she received any other awards or recognition since her disqualifying offense.

18. Petitioner submitted four reference letters. The first letter was from a former colleague, Dr. Michael Kessler, a psychologist, who worked with Petitioner when she was working as a social worker in New York. He stated that Petitioner is a hard-working and caring person who has provided primary care to her sister. He did not indicate in the letter whether he was aware of the charges that lead to the disqualification offense. The second letter was authored by Petitioner's friend of 32 years, who stated that Petitioner is a thoughtful and giving person who cares for her sister. Petitioner's disabled sister, Margie, provided a third letter, which corroborated that Petitioner is her primary caregiver. Finally, the fourth letter was from Stacy Malinowski, the program director of Mustard Seed Ministries, who highlighted that Petitioner has served as a volunteer with the agency for four years and Petitioner completes her assigned tasks.

19. Petitioner has participated in community service with Mustard Seed Ministries, a United Way agency, by serving on the annual Thanksgiving Feast committee. She also actively participates in a church with community

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<sup>3</sup> AHCA did not offer evidence regarding the definition of a "public order crime" at hearing. However, AHCA acknowledged that falsifying records was considered a disqualifying offense based on the AHCA's interpretation of which crimes constituted a disqualifying offense.

outreach by planning the annual holiday party for children with parents in prison.

20. In addition to writing a letter, Margie testified that Petitioner provides good care to her and she is dependent upon her each day. Margie explained that Petitioner's inability to be paid for her services as a Medicaid provider places a significant financial burden on them. Margie also reviews Petitioner's worksheets and verifies that Petitioner provided the care as stated on the form before the forms are submitted to her case manager.

21. Petitioner's friend, Ms. Russo, relayed that Petitioner is a "good, upstanding person and involved in church." She is aware of Petitioner's criminal offense and she firmly believes Petitioner would not repeat the same activity if granted an exemption.

22. At hearing, Petitioner admitted that she committed the disqualifying offense. She explained that she was a dependency case manager who was assigned a caseload of more than 40 cases. She was overwhelmed and stressed by her caseload and serving as the caregiver for her sister. By way of background, Margie suffers from the residuals effects of a stroke and requires significant in-home care and three hours of hospice care each day. At the hearing, the undersigned observed Margie and it was clear that she required extensive assistance walking and she had difficulty speaking due to the stroke. According to Petitioner, her sister depends on her assistance with bathing, toileting, cooking, and cleaning. There is no dispute that Petitioner has the skills to provide, and is dedicated to providing, care for her sister.

23. Petitioner has provided similar direct care services to other individuals besides her sister. She worked for her pastor's wife as a caregiver providing care, providing transportation, preparing meals, and administration of medication.

24. Petitioner credibly testified that she has received no complaints about inappropriate actions regarding documentation.

25. After review of her exemption application packet, AHCA denied Petitioner's request for exemption. Vanessa Risch described the process for considering exemption applications. The background-screening unit organizes the documents submitted by the applicant for review by the Secretary of AHCA.

26. The background-screening unit considered all materials in Ms. Clacher's exemption file. In addition to Ms. Clacher's application for exemption submitted in August 2019, Ms. Clacher's file included several letters involving disqualification from employment based on the same offense as further described above. Since the background-screening unit does not make the final decision on the request for exemption, the file was then provided to the Secretary for final determination. The Secretary then reviewed the file and denied Ms. Clacher's request for exemption. Although Ms. Risch did not provide testimony regarding the basis for Ms. Clacher's denial, she testified generally that falsifying records could place a vulnerable population in danger.

27. The record developed at the final hearing does not include any information regarding the Secretary's thought process when she determined that Ms. Clacher's exemption application should be denied. However, when she reviewed the exemption application packet, she did not have the benefit of evidence developed at the hearing. The exemption packet did not include Ms. Clacher's community service work or church activities, and thus, the Secretary did not have the benefit of that information. She did not have the benefit of the testimony of Petitioner's witness, Ms. Russo, that she is aware of Ms. Clacher's criminal offense and firmly believes she would not commit the crime again. Also presented at hearing was Ms. Clacher's testimony that she cared for her sister Margie as a caregiver between April 2018 and August 2019, and there have been no reports of inappropriate actions. Finally, the Secretary did not have the benefit of Ms. Clacher's credible testimony where she expressed that she understands the mistakes she has



made and works “daily towards not making and doing things in an inappropriate manner, incorrect manner, or an illegal manner.”

Finding of Fact

28. Petitioner demonstrated by clear and convincing evidence that she is rehabilitated.

CONCLUSIONS OF LAW

29. The Division has jurisdiction over the subject matter of the proceeding and the parties thereto pursuant to sections 120.569, 120.57(1), and 435.07(1)(c), Florida Statutes.

30. As the applicant for an exemption pursuant to section 435.07, Petitioner bears the burden of proof to establish rehabilitation. Section 435.07 provides, in pertinent part:

(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;

2. Misdemeanors prohibited under any of the statutes cited in this chapter or under similar statutes of other jurisdictions for which the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court;

\* \* \*

(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.

31. The statutory provision that addresses exemptions from disqualification, section 435.04(b), underwent modifications that took effect on July 1, 2018.

32. Section 435.04(b) lists those crimes for which disqualification from employment in a position of trust that is applicable to participation in the Medicaid program, which now includes section 839.13, falsifying records. § 435.04(b)(6), Fla. Stat.

33. Petitioner was disqualified from employment based on one disqualifying offense, a felony. There has been no dispute that Petitioner meets the eligibility requirement to seek exemption as prescribed in section 435.07(1)(b). She completed her probation in August 20, 2014. She also completed payment of the court fees and costs on January 20, 2017.

34. To be granted an exemption, Petitioner must demonstrate by clear and convincing evidence that she is rehabilitated from her disqualifying offense. *J.D. v. Dep't of Child. & Fams.*, 114 So. 3d 1127, 1131 (Fla. 1st DCA 2013) (“The ultimate issue of fact to be determined in a proceeding under section 435.07 is whether the applicant has demonstrated rehabilitation by clear and convincing evidence.”).

35. Prohibiting persons convicted of disqualifying offenses from employment in positions of trust is intended to protect the public welfare, and section 435.07 is strictly construed against the person seeking an exemption. *Heburn v. Dep't of Child. & Fams.*, 772 So. 2d 561, 563 (Fla. 1st DCA 2000).

36. The clear and convincing standard of proof has been described by the Florida Supreme Court as follows:

Clear and convincing evidence requires that 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 witnesses 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 Davey*, 645 So. 2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); *see also In re Henson*, 913 So. 2d 579, 590 (Fla. 2005).

37. Should Petitioner demonstrate rehabilitation, then it must be determined whether the agency abused its discretion when it initially determined it would deny the exemption. *Id.* 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.

*Canakarlis v. Canakarlis*, 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).

38. In determining whether the Agency’s intended action is an abuse of discretion, the First District Court of Appeal has held that:

Although 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 at 1132. As a result, the agency’s initial decision is viewed in light of evidence that the agency did not have the benefit of considering.

39. Cases that discuss the type of evidence presented to demonstrate rehabilitation in support of an exemption have mentioned evidence such as evidence of church involvement and community outreach, education, and community volunteer activities. *See, e.g., E.J. v. Dep't of Child. & Fams.*, 219 So. 3d 946 (Fla. 3d DCA 2017)(completion of AA degree); *J.D. v. Dep't of Child. & Fams.*, 114 So. 3d at 1129 (Fla. 1st DCA 2013)(extensive church involvement, stable employment, education, drug treatment, and support-related activities); and *K.J.S. v. Dep't of Child. & Fams.*, 974 So. 2d 1106 (Fla. 1st DCA 2007)(extensive involvement in prison ministry, commitment to family, educational and vocational accomplishments, efforts to teach young people not to repeat his mistakes.).

40. There is no question that Petitioner's disqualifying offense raises some concerns regarding her ability to work in a position of trust. In contrast, as set forth in the Findings of Fact above, there is no question that Petitioner has taken steps to address her past and improve her life and the lives of others in the community.

41. The evidence presented at hearing demonstrates that Ms. Clacher has proven by clear and convincing evidence that she has been rehabilitated and would not pose a danger to Medicaid recipients.<sup>4</sup>

42. The record at hearing includes not only Petitioner's live testimony, which was candid and persuasive, but also the live testimony of her sister and friend who are closely associated with Petitioner's work habits and abilities as a caregiver. Petitioner's genuine testimony persuasively demonstrated that she accepts full responsibility for her actions and has been rehabilitated. At hearing, the evidence demonstrated that Ms. Clacher not only obtained her master's degree, but also engaged in ongoing community service work and church activities. Ms. Russo's testimony that she was aware of Ms. Clacher's criminal offense and wholeheartedly believes she would not

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<sup>4</sup> While Petitioner asserts that she only wants to provide Medicaid services to her sister, if granted an exemption from disqualification, Petitioner could provide services to any Medicaid recipient.

commit the crime again, is credited. Moreover, Ms. Clacher's testimony that she cared for her sister Margie as a caregiver between April 2018 and August 2019, yet there have been no reports of inappropriate actions, is given great weight.

43. With the benefit of this information, much of which was not available to the Secretary when she made her original decision, it would be an abuse of discretion to deny Petitioner the exemption that she seeks.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Health Care Administration enter a final order granting Maria Clacher an exemption from disqualification that would allow her to enroll as a Medicaid provider.

DONE AND ENTERED this 23rd day of March, 2020, in Tallahassee, Leon County, Florida.



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YOLONDA Y. GREEN  
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](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of March, 2020.

COPIES FURNISHED:

Richard J. Santurri, Esquire  
Agency for Health Care Administration  
Building 3, Room 3428A  
2727 Mahan Drive  
Tallahassee, Florida 32308  
(eServed)

Susan Sapoznikoff, Esquire  
Agency for Health Care Administration  
Mail Stop 3  
2727 Mahan Drive  
Tallahassee, Florida 32308  
(eServed)

Theodore Charles Shafer, Esquire  
T. Charles Shafer, Attorney at Law PLLC  
309 Orange Avenue  
Fort Pierce, Florida 34950  
(eServed)

Richard J. Shoop, Agency Clerk  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308  
(eServed)

Stefan Grow, General Counsel  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308  
(eServed)

Mary C. Mayhew, Secretary  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 1  
Tallahassee, Florida 32308  
(eServed)

Shena L. Grantham, Esquire  
Agency for Health Care Administration  
Building 3, Room 3407B  
2727 Mahan Drive  
Tallahassee, Florida 32308  
(eServed)

Thomas M. Hoeler, Esquire  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308  
(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.