

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

CLIFFORD PENNYWELL,

Petitioner,

vs.

Case No. 21-0340EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, via Zoom video conference on March 18, 2021, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Clifford Pennywell, pro se
Apartment B3
5295 59th Circle West
Kenneth City, Florida 33709

For Respondent: Radhika Puri, Esquire
Trevor S. Suter, Esquire
Agency for Persons with Disabilities
4030 Esplanade Way
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether the Agency for Persons with Disabilities abused its discretion when denying Petitioner's request for exemption from being disqualified to work in a position of special trust.

PRELIMINARY STATEMENT

On or about July 5, 2018, the Department of Children and Families, as agent for the Agency for Persons with Disabilities (Respondent), notified Petitioner that his criminal background check revealed offenses that disqualified him “from working or being licensed in accordance with sections 435.04 and, if applicable, 408.809(4), Florida Statutes.” Petitioner submitted to Respondent a request seeking an exemption from being disqualified to work in a position of special trust, and Respondent, by correspondence dated December 9, 2020, informed Petitioner that his request for exemption was denied. Petitioner filed a request for administrative hearing, and on January 26, 2021, Respondent forwarded Petitioner’s request to the Division of Administrative Hearings (DOAH) for a final hearing.

At the final hearing, Petitioner testified on his own behalf and did not offer the testimony of any other witness. Respondent presented testimony from a single witness, its employee Ramsey Garner, who works for Respondent as an operations review specialist. No exhibits were admitted into evidence on behalf of Petitioner. Respondent’s Exhibits 1 and 2 were admitted into evidence.

A one-volume Transcript of the final hearing was filed with DOAH on April 1, 2021. Petitioner and Respondent each filed a Proposed Recommended Order. The Proposed Recommended Orders filed by the parties were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Disqualifying Offenses

1. As noted above, the Department of Children and Families, by correspondence dated July 5, 2018, informed Petitioner that his background check revealed two disqualifying offenses. The first offense is described by the Department as “04/25/2014 PINELLAS PARK POLICE DEPARTMENT,

LARCENY,” and the second is described as “08/30/2005 ST. PETERSBURG POLICE DEPARTMENT, BATTERY DOM-VIOL.”

2. As an initial matter, the August 2005 offense does not disqualify Petitioner from working in a position of special trust. Specifically, on August 30, 2005, Petitioner was arrested, and charged with misdemeanor battery in violation of section 784.03, Florida Statutes (2005), which is a disqualifying offense. Petitioner’s arrest occurred as a result of a physical altercation with his brother, who was a minor when the alleged offense occurred. According to the case summary sheet (Resp. Ex. 2, p. 99), on April 13, 2006, the charge was reduced to the “lesser included misdemeanor [of] disorderly conduct,” to which Petitioner entered a plea of nolo contendere. On or about May 17, 2006, Petitioner was “adjudicated guilty” of disorderly conduct in violation of section 509.143, Florida Statutes (2005). A violation of section 509.143 is not a disqualifying offense under any of the controlling statutes.

3. On April 25, 2014, Petitioner was arrested and charged with violating section 812.014(2)(c)1., Florida Statutes (2013). This section provides, in part, that “[i]t is grand theft of the third degree and a felony of the third degree ... if the property stolen is ... [v]alued at \$300 or more, but less than \$5,000.” On May 28, 2014, Petitioner was found guilty of the offense as charged (adjudication of guilty withheld), and ordered to serve 18 months of probation which included restitution of \$75.00 to the victim. According to Petitioner, this offense occurred when he stole cellphones from a Metro PCS store.

B. Non-disqualifying Offenses

4. On August 20, 2018, Petitioner was cited for multiple traffic violations. According to the arrest affidavit, the following events occurred:

A stop was initiated on the Defendant’s vehicle for failure to stop at a steady red signal. Upon initiating a stop utilizing emergency lights and sirens, the defendant failed to stop for the emergency vehicle. He continued 3 blocks to the

Choice gas station located at 3401 5th Ave., S. Upon making contact, Defendant was identified by FL DL and confirmed via David as being suspended on 8/13/2018 with notice provided on 8/9/2018 for failure to pay a traffic penalty. David also confirmed 4 prior DWLS/R convictions and previously listed as a habitual traffic offender.

Petitioner was cited for felony “driving while license suspended or revoked, fleeing and eluding police officer, [and] possession of marijuana.” On October 9, 2018, the State Attorney administratively closed the “marijuana and fleeing” charges, and on October 11, 2018, reduced the felony “driving while license suspended or revoked” charge to a misdemeanor. On November 14, 2018, the Court (Judge Dittmer) accepted Petitioner’s guilty plea, and adjudicated him guilty of the misdemeanor offense of “driving while license suspended or revoked.” *See Resp. Ex. 2, p. 253 and 255.*

5. While the charges referenced in the previous paragraph were pending, Petitioner, on October 6, 2018, was stopped by the police, and again cited for the felony offense of “driving while license suspended or revoked.” Unlike before, there was no reduction in this charge, and on November 14, 2018, Petitioner entered a plea to the charged offense, and was adjudicated guilty (Judge Quesada) of the third-degree felony of “Driving While License Revoked (Felony-Habitual).” *See Resp. Ex. 2, p. 260-265.*

C. General Background Information

6. Petitioner is enrolled as a student, and is working towards earning his associate of arts degree. Petitioner has a sporadic work history, and during the last few years has subsisted primarily on student loans. Petitioner testified that he regularly attends church. He is not involved in any community activities, nor has he received any special recognition or awards since his conviction for the disqualifying offense.

7. From approximately October 2016 through June 2020, Petitioner worked at several institutional facilities that offer services to vulnerable

adults. During this timeframe, Petitioner was investigated five times for possible mistreatment of vulnerable individuals, with each investigation dismissed as unsubstantiated.¹

CONCLUSIONS OF LAW

8. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569, 120.57, and 435.07, Fla. Stat. (2020).²

9. Petitioner's April 2014 felony conviction, which resulted from his violation of section 812.014(2)(c)1., is a disqualifying offense under section 435.04(2)(cc), Florida Statutes.

10. Section 435.07 provides, in part, as follows:

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;

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

¹ Oddly, each of the five investigation reports, no matter the date, notes that Petitioner is 34 years of age.

² All subsequent references to Florida Statutes will be to the 2020 codification, unless otherwise indicated.

lawfully released from confinement, supervision, or nonmonetary condition imposed by the court;

3. Offenses that were felonies when committed but that are now misdemeanors and for which the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court; or

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.

(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.

11. In considering Respondent's intended action of denying Petitioner's exemption request, the undersigned must consider whether the agency head abused his or her discretion when passing on Petitioner's request. The "abuse of discretion" standard is highly deferential." *E.R. Squibb & Sons v. Farnes*, 697 So. 2d 825, 826 (Fla. 1997). An agency head abuses his or her discretion within the meaning of section 435.07 when the "intended action" under review "is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the [agency head]. If reasonable [persons] could differ as to the propriety of the [intended] action ... , then it cannot be said that the [agency head] abused [his or her] discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

12. The essence of "rehabilitation" within the meaning of section 435.07(3)(a) is that an applicant thereunder would "not present a danger if employment or continued employment is allowed."

13. During the seven year period since committing his disqualifying offense, Petitioner, less than three years ago, secured a felony conviction for habitually operating a motor vehicle while his license was suspended or revoked, failed to hold steady employment, has not secured any special recognition or awards of any type, and has done nothing in terms of involving himself in activities that uplift and otherwise improve his community. While Petitioner is to be commended for attending church and working diligently towards securing an associate of arts degree, these activities, without more, are insufficient to demonstrate rehabilitation within the meaning of section 435.07.

14. Petitioner has failed to establish that the reasons offered by Respondent in denying his request for exemption are arbitrary, fanciful, or unreasonable. Accordingly, Petitioner has failed to meet his burden of proving by clear and convincing evidence that Respondent's decision to deny his exemption request was an abuse of discretion.

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 denying Petitioner's request for exemption.

DONE AND ENTERED this 22nd day of April, 2021, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of April, 2021.

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.