



PRELIMINARY STATEMENT

By letter dated September 26, 2008, the Agency for Persons with Disabilities (Respondent) denied the request of [REDACTED] (Petitioner) for exemption from employment disqualification. By letter dated October 17, 2008, the Petitioner filed a request for formal hearing. On November 26, 2008, the Respondent forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of three witnesses, testified on [REDACTED] own behalf, and had one exhibit admitted into evidence. The Respondent presented the testimony of two witnesses and had Exhibits numbered 1 through 10 admitted into evidence.

No transcript of the hearing was filed. The Respondent filed a Proposed Recommended Order. The Petitioner filed a letter, which has been treated as a Proposed Recommended Order.

FINDINGS OF FACT

1. The Petitioner is seeking exemption from disqualification so that [REDACTED] can resume employment as a personal caretaker by agencies that provide services to disabled adults living independently in private or group homes.

2. Prior to being disqualified from personal caretaker employment, the Petitioner generally visited agency clients in

their homes and assisted them with activities such as grocery shopping, laundry tasks, and meal preparation.

3. On June 8, 2002, the Petitioner was arrested in [REDACTED] and charged with misdemeanor petit theft. The Petitioner was eventually sentenced to participate in a "Theft Abatement" program and adjudication was withheld.

4. According to the June 8, 2002, arrest report, [REDACTED] security personnel observed the Petitioner place two shirts into [REDACTED] purse before exiting the store. At the time of the arrest, the Petitioner was leaving the store with another woman, known as [REDACTED]

5. At the hearing, the Petitioner testified that [REDACTED] was not involved in the shoplifting and that [REDACTED] placed the shirts into the Petitioner's purse as they exited the store.

6. On September 21, 2002, the Petitioner was arrested in [REDACTED] Florida, and charged with second degree petit theft. The Petitioner entered a plea of nolo contendere and adjudication was withheld.

7. At the time of the September 21, 2002, arrest, the Petitioner was again leaving the store with [REDACTED].

8. On April 3, 2003, the Petitioner was arrested in [REDACTED] Florida, and charged with

one count of "Grand Retail Theft/Larceny," a third degree felony pursuant to Subsection 812.014(2)(c), Florida Statutes (2003).

9. On June 21, 2003, the Petitioner was arrested in [REDACTED] in relation to a series of shoplifting incidents that had occurred on that date.

10. The Petitioner had driven [REDACTED] and a third woman to [REDACTED]. The Petitioner remained in the car while the other two women stole merchandise from several local department stores, including [REDACTED] and then returned to the car with the merchandise. Store security personnel observed the vehicle as the women fled the shopping center and reported the vehicle description to law enforcement officers. The law enforcement officers located the vehicle and made the arrest.

11. The charges against the Petitioner were eventually dropped. The Petitioner asserted that the charges were not prosecuted because the state attorney determined that [REDACTED] was not involved in the shoplifting.

12. On March 1, 2004, the Petitioner entered a guilty plea to the April 3, 2003, arrest, which is a disqualifying offense pursuant to Subsection 435.04(2)(y), Florida Statutes (2008).

13. By 2007, the Petitioner had moved from [REDACTED] [REDACTED].

14. In November 2007, the Petitioner was employed as a personal caretaker with an organization identified as [REDACTED].



20. The Petitioner asserted that [REDACTED] was always the actual shoplifter and that the Petitioner was not aware of intent until the two were in retail stores and [REDACTED] began to steal merchandise. The Petitioner's testimony in this regard was not credible and is rejected.

21. The Petitioner presented testimony of several acquaintances, who spoke highly of the Petitioner's friendship and whose testimony suggests that the Petitioner is attempting to make more appropriate decisions in [REDACTED] life and to avoid the negative behavior that resulted in the employment disqualification at issue in this proceeding.

22. In addition to the Petitioner's attempt to avoid responsibility for [REDACTED] participation in the shoplifting incidents, the Petitioner falsely stated on [REDACTED] Affidavit of Good Moral Character that [REDACTED] had no disqualifying offenses and sought caretaker employment after being disqualified on the basis of the disqualifying offense.

23. The evidence fails to clearly and convincingly establish that the Petitioner should not be disqualified from employment. The evidence further fails to establish that the Petitioner has achieved rehabilitation sufficient to warrant granting the requested exemption from the employment disqualification.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008).

25. Section 435.04, Florida Statutes (2008), provides in relevant part as follows:

(1) All employees in positions designated by law as positions of trust or responsibility shall be required to undergo security background investigations as a condition of employment and continued employment. For the purposes of this subsection, security background investigations shall include, but not be limited to, fingerprinting for all purposes and checks in this subsection, statewide criminal and juvenile records checks through the Florida Department of Law Enforcement, and federal criminal 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 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 the Florida Statutes or under any similar statute of another jurisdiction:

\* \* \*

(y) Chapter 812, relating to theft, robbery, and related crimes, if the offense is a felony.

\* \* \*

(5) Under penalty of perjury, all employees in such positions of trust or responsibility shall attest to meeting the requirements for qualifying for employment and agreeing to inform the employer immediately if convicted of any of the disqualifying offenses while employed by the employer. Each employer of employees in such positions of trust or responsibilities which is licensed or registered by a state agency shall submit to the licensing agency annually, under penalty of perjury, an affidavit of compliance with the provisions of this section.

26. The 2003 grand theft felony is a disqualifying offense pursuant to Subsection 435.04(2)(y), Florida Statutes (2008).

27. Section 435.07, Florida Statutes (2008), provides in relevant part as follows:

(1) The appropriate licensing agency may grant to any employee otherwise disqualified from employment an exemption from disqualification for:

(a) Felonies committed more than 3 years prior to the date of disqualification;

\* \* \*

(3) In order for a licensing department 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 sufficient 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 continued employment is allowed. The decision of the licensing department regarding an exemption may be contested through the hearing procedures set forth in chapter 120. (Emphasis supplied)

28. In this case, the evidence is insufficient to clearly and convincingly establish that the Petitioner should not be disqualified for employment or that the request for exemption from disqualification should be granted.

29. At the hearing, the Petitioner attempted to minimize [REDACTED] involvement in shoplifting. The Petitioner suggested that [REDACTED] was the active shoplifter, who shoved merchandise into the Petitioner's handbag on one occasion and into the trunk of the Petitioner's car on another occasion.

30. After the Petitioner's initial shoplifting arrest with [REDACTED], it is reasonable to presume that at the very least, the Petitioner was aware of [REDACTED] propensity for shoplifting. Nonetheless, the Petitioner continued to "shop" with [REDACTED] in various locations and was subsequently arrested for shoplifting on multiple occasions.

31. The Petitioner's attempt to shift responsibility for [REDACTED] illegal behavior to an accomplice suggests that the Petitioner has not been sufficiently rehabilitated to warrant receiving an exemption from disqualification in employment

wherein the Petitioner would have open access to the residences of disabled or elderly persons.

32. Additionally, the Petitioner's submission of a false Affidavit of Good Moral Character and ██████ attempt to obtain personal caretaker employment immediately after having been disqualified from such employment further suggests that there has been insufficient rehabilitation and requires that the Petitioner's request for exemption from employment disqualification be denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Persons with Disabilities enter a final order denying the Petitioner's request for exemption from employment disqualification.

DONE AND ENTERED this 20th day of February, 2009, in Tallahassee, Leon County, Florida.

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WILLIAM F. QUATTLEBAUM  
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Division of Administrative Hearings  
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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.