

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. ██████████
)
AGENCY FOR PERSONS WITH)
DISABILITIES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was held in this case on ██████████, before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearings. The parties, witnesses and court reporter appeared in ██████████, and the Administrative Law Judge appeared by telephone from Tallahassee, Florida.

APPEARANCES

For Petitioner: ██████████, pro se
(Address of record)

For Respondent: Beverly Hunt Diehr, Esquire
Department of Children and
Family Services
9393 North Florida Avenue, Room 902
Tampa, Florida 33612

STATEMENT OF THE ISSUE

The issue is whether Petitioner's request for an exemption from employment disqualification should be granted.

PRELIMINARY STATEMENT

By letter dated [REDACTED], Respondent, Agency for Persons with Disabilities ("Agency"), notified Petitioner, [REDACTED] ("Petitioner"), that [REDACTED] request for an exemption from employment disqualification was denied. According to the letter, in making that decision, the Agency "considered all available information that led to [Petitioner's] disqualification based on [REDACTED] charges of grand theft[,] as well as all information provided by [Petitioner] regarding [REDACTED] disqualification."

Petitioner challenged the decision and timely requested an administrative hearing. On January 13, 2009, the Agency referred the case to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the hearing.

At hearing, Petitioner testified on [REDACTED] own behalf and presented the testimony of three witnesses. Petitioner's Exhibits 1 through 4 were admitted into evidence. Respondent presented the testimony of two witnesses. Respondent's Exhibits 1, 2, 4, 7, 9 and 10 and Composite Exhibits 3, 5, 6 and 8 were admitted into evidence.

No transcript of the hearing was filed. Petitioner and Respondent filed Proposed Recommended Orders.

FINDINGS OF FACT

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

1. Petitioner is seeking an exemption from disqualification because ■■■ desires to work in a position of special trust (i.e., caretaker of children, disabled persons or elderly persons). In order to qualify for such position, Petitioner was required to have a Level 2 background screening.

2. A Level 2 screening of Petitioner was conducted. That screening revealed that Petitioner pled guilty to one disqualifying offense, grand theft, a third-degree felony under Subsection 812.014(2)(c), Florida Statutes (2004).¹

3. Felony grand theft is a disqualifying offense under Subsection 435.04(2)(y), Florida Statutes (2004).

4. The incidents that resulted in the grand theft charge occurred in December 2004 and early 2005, when Petitioner was a program manager for two group homes.

5. On December 17, 2004, Petitioner's employer gave ■■■ a check for \$1,500.00. These funds were to be used to purchase Christmas gifts and/or other items for the clients living in the group homes for which ■■■ served as program manager. The check was made payable to Petitioner, who was responsible for cashing

the check and distributing the funds to designated staff/employees to purchase items for clients.

6. Petitioner cashed the \$1,500.00 check on December 17, 2004, the same day the check was given to [REDACTED]. After cashing the check, Petitioner put the cash in an envelope and placed it in a "safe" in the house where [REDACTED] resided. According to Petitioner, the safe in which [REDACTED] placed the cash either had no lock or had a lock that did not work. Consequently, any money left in the unlocked safe could have been easily accessed by anyone living in the house.

7. When the above-described events occurred, Petitioner was living with [REDACTED] and [REDACTED] family.²

8. On December 17, 2004, after Petitioner put the \$1,500.00 in the safe [REDACTED] went out-of-town (from Tampa to Miami) for almost a week and returned home on December 23, 2004. Petitioner testified that upon [REDACTED] return, [REDACTED] discovered that the money that [REDACTED] put in the safe had been stolen, but is not sure who stole the money.

9. Petitioner did not replace the \$1,500.00 with which [REDACTED] was entrusted or immediately tell [REDACTED] employer that the money had been stolen. Instead, Petitioner attempted to cover-up the fact that [REDACTED] had not properly secured the funds and used them for the intended purpose.

10. Petitioner was responsible for providing receipts to [REDACTED] employer which documented the purchase of gifts and/or items for the clients. Before submitting the receipts, Petitioner was also required to check the validity of receipts provided to [REDACTED] by employees. That documentation was needed to verify that the employees purchased items for clients with funds disbursed to them for that purpose.

11. Petitioner admitted that the receipts [REDACTED] submitted to [REDACTED] employer to document gifts and/or items purchased for clients were not for such purchases. The receipts that Petitioner submitted included receipts for [REDACTED] personal purchases. Other receipts that Petitioner submitted to [REDACTED] employer were for inappropriate and non-client purchases made by employees of the agency. With regard to the latter category of receipts, Petitioner admitted that [REDACTED] failed to check the validity of the receipts as [REDACTED] was required to do.

12. In explaining the circumstances surrounding the December 2004 incident, Petitioner indicated that [REDACTED] "let things get out of hand" at [REDACTED] job due to challenges at home (i.e., being abused by [REDACTED]).

According to Petitioner, due to [REDACTED] personal family problems, [REDACTED] was irresponsible and not performing her job duties as required. Moreover, Petitioner testified that [REDACTED] "negligently"

did not check the receipts that employees submitted to [REDACTED] for approval.

13. As a result of Petitioner's conduct with regard to the \$1,500.00 with which [REDACTED] was entrusted, [REDACTED] was charged with grand theft in February 2005 in [REDACTED] County, Florida. On [REDACTED], Petitioner pled guilty to the grand theft charge. An adjudication of guilt was withheld, and Petitioner was ordered to perform 50 hours of community service, serve 24 months of probation, pay costs, submit to random urinalysis³ and pay restitution.

14. On August 22, 2006, while [REDACTED] was on probation, Petitioner was arrested in [REDACTED] County, Florida, for uttering a forged instrument, grand theft, and counterfeit payment instrument. Those three charges were related to a check issued to Petitioner by a company for which [REDACTED] was working (doing on-line surveys) that turned out to be a scam. No information (i.e., indictment) was filed with respect to the counterfeit payment instrument charge, but Petitioner was charged with the other two offenses--uttering a forged instrument and grand theft. On September 25, 2006, Petitioner entered a not guilty plea to both offenses. Two months later, on December 7, 2006, the two charges filed against Petitioner were nolle prossed (i.e., the criminal case was ended because the prosecutor decided or agreed to stop the prosecution).⁴

15. Petitioner completed the terms of [REDACTED] probation for the disqualifying offense, by among other things, paying court costs associated with the case and paying restitution to [REDACTED] former employer. [REDACTED] was released from probation on November 17, 2007.

16. For the past two years, Petitioner has been gainfully employed.

17. Petitioner has worked part-time as a caregiver for an elderly woman in the woman's home for about two years.⁵ Petitioner was referred to [REDACTED], the daughter of the elderly woman, as a caregiver for [REDACTED] mother. During that time, [REDACTED] has come to know Petitioner as a loyal and faithful person who takes very good care of [REDACTED] mother. Also, during the course of working for [REDACTED] mother, Petitioner is sometimes given money to purchase items for the client. According to [REDACTED], in those instances, Petitioner has always handled the funds appropriately.

18. Since January 2007 to the present time, Petitioner has been employed part-time by [REDACTED]. In that job, Petitioner performs bookkeeping duties, including handling the company's payroll. Petitioner also is responsible for making deposits (both cash and checks) in the company's bank account. Also, Petitioner has a power of attorney which authorizes [REDACTED] to handle matters related to the company's bank account.

19. [REDACTED], the owner of [REDACTED], has known Petitioner for several years. In January 2007 [REDACTED] hired Petitioner to perform the above-described duties, even though [REDACTED] was aware of [REDACTED] criminal record (i.e., the disqualifying offense). [REDACTED] has been impressed with the job that Petitioner has done for [REDACTED] company (i.e., organized the company's records and updated the company's bookkeeping system). During the time Petitioner has worked for [REDACTED] [REDACTED] has found [REDACTED] to be honest in carrying out her job duties. Moreover, according to [REDACTED], Petitioner "has always displayed a high degree of integrity, responsibility, honesty and ambition."

20. [REDACTED] is a retired former state employee who has known Petitioner because of [REDACTED] work with [REDACTED] brother. Recently, [REDACTED] brother was released from prison and needed somewhere to stay. In an effort to help [REDACTED] [REDACTED] brother, Petitioner has allowed him to stay in [REDACTED] home. Petitioner also provides care for [REDACTED] brother.

21. [REDACTED] has given funds to Petitioner for the expenses associated with her brother staying in Petitioner's home. [REDACTED] visits her brother at Petitioner's home and has always found that Petitioner is properly caring for and assisting her [REDACTED] brother. Furthermore, based on

██████████ observations, █████ has determined that Petitioner is appropriately using the funds ██████████ has provided to Petitioner for ██████████) brother's care.

22. The assistance that Petitioner has been and is providing to ██████████ brother is a part of Petitioner's volunteer work to assist people recently released from prison with re-entry into the community.

23. In order to continue to improve ██████████, Petitioner is currently enrolled in the Administrative Assistant Program and in the Licensed Practical Nursing Program at ██████████ ██████████ Petitioner's current grade point average is 3.5.

24. Petitioner is a member of ██████████ and sometimes visits ██████████. Petitioner is an active member of ██████ church and works with the youth at church.

25. The exemption which Petitioner seeks would allow ██████ to work with a vulnerable population, such as the one that was affected by the incident related to Petitioner's disqualifying offense.

26. Clearly, Petitioner is seeking to rehabilitate and improve ██████ life. Petitioner is (1) gainfully employed; (2) enrolled in vocational school; (3) volunteers to help inmates recently released from prison to transition back into the community; and

(4) actively involved with the youth at █████ church.

Nevertheless, █████ has not demonstrated that █████ should not be disqualified from employment.

27. The disqualifying offense that Petitioner committed, grand theft, was a serious offense. Here, Petitioner pled guilty to stealing funds that were entrusted to Petitioner to purchase Christmas gifts and/or other items for the clients in the group homes that Petitioner managed. Although Petitioner testified that the money was stolen by someone else, █████ admits that █████ attempted to cover up the theft by submitting receipts for personal purchases and failing to validate other receipts submitted by employees, and █████ pled guilty to the offense.

28. The manner in which Petitioner handled the money (putting it in a safe with no lock) shows poor judgment. However, Petitioner's attempt to cover-up the theft, rather than to disclose her negligence and poor judgment, raises serious questions about █████ character.

29. Petitioner has failed to establish that █████ has been rehabilitated and should be granted an exemption from disqualification. The factors which have been considered in making this finding are: (1) the serious nature of the disqualifying offense; (2) Petitioner's role in the incident (i.e., █████ attempted cover-up); (3) the vulnerable population that was or could have been victimized by Petitioner's actions,

had [REDACTED] actions not been discovered; and (4) the short duration of time that has passed since the incident (four years) and since Petitioner completed probation (16 months).

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Subsection 120.57(1), Florida Statutes.

31. Section 435.04, Florida Statutes, 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 the subsection, security background investigations shall include, but not be limited to, finger printing 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.

(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 offense is a felony.

32. Subsection 435.07, Florida Statutes, provides that under appropriate circumstances, an exemption from disqualification may be granted. That section provides:

(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.

33. Petitioner has the burden of establishing by clear and convincing evidence, entitlement to receive the exemption from disqualification. Subsection 435.07(3), Florida Statutes, provides as follows:

(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 incident, or any other evidence or circumstances indicating that the employee will not present a danger if continued employment is allowed.

34. In this case, Petitioner has failed to meet [REDACTED] burden.

35. Having failed to demonstrate by clear and convincing evidence that [REDACTED] has been rehabilitated since the disqualifying offense occurred, Petitioner's request for an exemption from disqualification was properly denied.

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 the request of Petitioner, [REDACTED], for an exemption from employment disqualification.

DONE AND ENTERED this 19th day of June, 2009, in Tallahassee, Leon County, Florida.

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CAROLYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of June, 2009.

ENDNOTES

^{1/} All statutory references are to Florida Statutes (2008), unless otherwise noted.

^{2/} During this time, Petitioner's [REDACTED] and had a history of dishonest conduct (stealing) and substance abuse. Petitioner testified that [REDACTED] remained with [REDACTED] because, at the time, [REDACTED] had nowhere else to live.

^{3/} Respondent submitted an Affidavit of Violation of Probation and a related Warrant to show that Petitioner violated the terms of [REDACTED] probation by using illegal drugs. However, the Affidavit and Warrant, standing alone, are hearsay and, thus, do not support a finding that Petitioner used illegal drugs on September 9, 2005. Moreover, the credible testimony of Petitioner was that [REDACTED] did not use the illegal drugs as Respondent alleged and had been told by her probation officer that [REDACTED] had been issued a violation because [REDACTED] was not home when the officer came to [REDACTED] house.

^{4/} Law for NonLawyers Dictionary, Second Edition, by Daniel Oran, J.D., West Publishing Company (1985), page 206.

^{5/} Respondent argues that this employment demonstrates that Petitioner is not rehabilitated. According to Respondent, Petitioner's employment as a caregiver violates a provision in the agency's denial letter. That provision states that Petitioner "is not eligible to be employed, licensed or registered in positions having direct contact with children or developmentally disabled people serving in programs regulated by the Department of Children and Family Services or the Agency for Persons with Disabilities." However, no evidence was presented that the elderly woman whom Petitioner cares for is developmentally disabled or in a program regulated by the above-referenced agencies. Furthermore, no legal authority was cited to support the assertion that Petitioner may not provide services to an individual in his or her private homes, if the person is not served in programs regulated by the above-referenced agencies. Accordingly, such employment is not a proper basis for determining that Petitioner is not rehabilitated and, therefore, should not be granted an exemption from disqualification.

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.