

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████████ )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-0200APD  
 )  
AGENCY FOR PERSONS WITH )  
DISABILITIES, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on April 8, 2009, in ██████████ Florida, before Jeff B. Clark, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████  
For Respondent: Laurel Hopper, Esquire  
Department of Children and  
Family Services  
337 North U.S. Highway 1, Suite A  
Fort Pierce, Florida 34950

STATEMENT OF THE ISSUE

The issue is whether Respondent should exempt Petitioner from disqualification from employment in a position which has contact with children or people with developmental disabilities, who are in programs regulated by Respondent.

PRELIMINARY STATEMENT

By letter dated August 22, 2008, Respondent, Agency for Persons With Disabilities, denied Petitioner, [REDACTED]'s, request for exemption. Petitioner timely requested an administrative hearing. On January 14, 2009, Respondent referred the matter to the Division of Administrative Hearings (DOAH) to conduct the hearing.

An Initial Order was sent to both parties on January 14, 2009. Based on the response of the parties, the case was scheduled for final hearing in [REDACTED] Florida, on March 6, 2009. The case was continued on March 6, 2009, at the request of Petitioner. The case was rescheduled for final hearing on April 8, 2009, and the parties were duly noticed for the hearing.

Petitioner failed to appear at the final hearing. No witnesses were called on behalf of Petitioner, and no exhibits were offered. Respondent called three witnesses, Jerry Kolljeski, Brad Graske and Peter Karlan, and submitted 11 exhibits, which were admitted into evidence. Official recognition was taken of Chapter 435, Florida Statutes, in particular, Section 435.07, Florida Statutes.

As a result of Petitioner's failure to appear at the hearing, Respondent initially moved to have the case dismissed.

A decision on Respondent's motion to dismiss was deferred to be considered in this Recommended Order.

No transcript of the final hearing was ordered. Respondent timely filed a Proposed Recommended Order.

All statutory references are to Florida Statutes (2008), unless otherwise stated.

FINDINGS OF FACT

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

1. Petitioner seeks an exemption pursuant to Sections 435.06 and 435.07, Florida Statutes, to be employed in a position which has contact with children or people with developmental disabilities, who are in programs regulated by Respondent.

2. Respondent is the licensing agency within the meaning of Subsection 435.02(3), Florida Statutes. Respondent is the agency responsible for conducting background screenings for persons employed in positions which have contact with children or people with developmental disabilities, who are in programs regulated by Respondent.

3. The background screening revealed that Petitioner had the following criminal history:

|                                  |                      |
|----------------------------------|----------------------|
| 03/1995-Battery/No Information   | Not disqualification |
| 01/1996-Petit Theft/Guilty       | Not disqualification |
| 03/1996-Failure to Appear/Guilty | Not disqualification |

|  |                      |
|--|----------------------|
| 06/1996-Petit Theft/Guilty                                       | Not disqualification |
| 08/1996-Probation Violation and Failure to Appear/Dismissed      | Not disqualification |
| 04/1997-Petit Theft Larceny/Guilty                               | Not disqualification |
| 04/1997-Fraud/Guilty   | Not disqualification |
| 05/1998-Aggravated Assault-Weapon/Dropped                        | Not disqualification |
| 05/1998-Passing Forged Instrumt/Guilty                           | Not disqualification |
| 04/1999-Petty Larceny/Dismissed                                  | Not disqualification |
| 10/1999-Fraud Utter False Instrument/No Information              | Not disqualification |
| 06/2000-Felony Petit Theft/Pled No Contest/One Year, One Day DOC | Disqualification     |
| 03/2000-Probation Violation/Guilty                               | Not disqualification |
| 07/2000-Contempt of Court/Guilty                                 | Not disqualification |
| 07/2000-Probation Violation/Guilty                               | Not disqualification |
| 10/2000-Felony Petit Theft/Pled No Contest/24 Months DOC         | Disqualification     |

Petitioner entered pleas of "no contest" to two felony offenses specified in Section 435.04, Florida Statutes.

4. Exemptions can be granted when clear and convincing evidence has been provided that supports a reasonable belief that the person seeking the exemption is of good moral character to justify the exemption and that the individual does not present a danger to the safety or well-being of the developmentally disabled.

5. Petitioner failed to submit any evidence or law showing that [REDACTED] satisfies the requirements for an exemption in

Section 435.07, Florida Statutes. Petitioner failed to show that [REDACTED] otherwise satisfies the conditions for exemption prescribed in Subsection 435.07(3), Florida Statutes.

6. When determining whether to grant an exemption, Respondent must consider the vulnerable population whose welfare and well-being it, by law, has a duty to protect.

#### CONCLUSIONS OF LAW

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

8. The burden of proof is on Petitioner. Petitioner must show by clear and convincing evidence that [REDACTED] should not be disqualified from being employed in a position which has contact with children or people with developmental disabilities, who are in programs regulated by Respondent. § 435.07(3), Fla. Stat. No testimony or evidence was offered on behalf of Petitioner, therefore, Petitioner failed to satisfy [REDACTED] burden of proof.

9. It is within Respondent's discretion whether to grant an exemption. § 435.07(1), Fla. Stat. In the case of Calvin Phillips v. Department of Juvenile Justice, 736 So. 2d 118 (Fla. 4th DCA 1999), the Fourth District Court of Appeal held that the agency was under no obligation to grant an exemption even if Phillip's presentation constituted clear, convincing, and unrefuted evidence of rehabilitation. An exemption from

Chapter 435, Florida Statutes, should be strictly construed against the person claiming such exemption.

10. The elements of Petitioner's burden of proof are set forth in Subsection 435.07(3), Florida Statutes, which provides:

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.

11. The evidence shows that Petitioner pled "no contest" to disqualifying offenses.

12. While Petitioner's failure to appear and present testimony warrants a dismissal of [REDACTED] request for exemption, Respondent's evidence clearly shows that denial of [REDACTED] request for exemption is appropriate.

#### RECOMMENDATION

Based upon 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, [REDACTED]'s, request for exemption.

DONE AND ENTERED this 30th day of April, 2009, in Tallahassee, Leon County, Florida.

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JEFF B. CLARK  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of April, 2009.

COPIES FURNISHED:

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[REDACTED]

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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.