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OSAH

MAR 14 2013

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA


SHAWANTEE GEARO,  
Petitioner,

v.

OFFICE OF RESIDENTIAL CHILD  
CARE, GEORGIA DEPARTMENT OF  
HUMAN SERVICES,  
Respondent.

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Docket No.:  
OSAH-DHS-CRC\_ORCC-1329912-44-Miller

  
Kevin Westray, Legal Assistant

INITIAL DECISION

I. Introduction

The Petitioner in this matter seeks review of the Respondent's determination that the Petitioner's alleged criminal record precludes her employment by a child-caring institution. The hearing was held on March 8, 2013, before the undersigned administrative law judge of the Office of State Administrative Hearings. After considering all of the admissible evidence, the Respondent's action is hereby **REVERSED**.

II. Findings of Fact

1.

The Petitioner, Shawantee Gearo, is employed by Little Debbie's Second Chance Home ("Little Debbie's") in Lithonia, Georgia, a child-caring institution. In conjunction with her employment, the Petitioner was required to undergo a criminal records check. The Respondent subsequently notified the Petitioner in writing that her criminal records check was unsatisfactory. (Testimony of Petitioner; OSAH Form 1 and attachments.)

2.

On November 22, 2005, in the Superior Court of the District of Columbia, the Petitioner entered a plea of guilty on three misdemeanor criminal charges: Attempted Possession of a Prohibited Weapon, Destroying Property, and Assault. The Petitioner was sentenced to serve 180 days in jail each count, to run concurrently. Additionally, she was placed on one year of supervised probation and ordered to complete a Domestic Violence Intervention Program and perform 40 hours of community service work. (Testimony of Petitioner; Exhibit R-1.)

3.

The Petitioner explained that the criminal charges arose from an incident that occurred when she was romantically involved with a man who was married. The man was the father of the Petitioner's child, and he had also fathered a child with his wife. On March 30, 2004, the Petitioner and her child

visited the man's home, where they came in contact with his wife. His wife was previously unaware of her husband's relationship with the Petitioner, and an argument ensued in the driveway. The Petitioner returned to her car and attempted to drive away. However, she struck another vehicle, which contained the child that the man had fathered with his wife. The Petitioner was therefore charged with Assault of a minor. She was also charged with Destroying Property, for the damage to the other vehicle, and Attempted Possession of a Prohibited Weapon (her car). There is no evidence that the incident caused physical harm to the man, his wife, or either of the children. (Testimony of Petitioner; Exhibit R-1.)

4.

From 2001 to 2012, the Petitioner resided in Washington, D.C. She was employed in the accounting department of the Center for Nonprofit Advancement from 2001 to 2006. She then spent three years as the manager of accounts receivable for Staffing, Inc., a temporary employment agency, before returning to school to become a medical assistant. She worked as a medical assistant for approximately one year, then moved to Georgia in June 2012. In August 2012, she began working at Little Debbie's, a group home for teen mothers. She is aware of only one, unsubstantiated complaint against her at Little Debbie's. The Petitioner's employment was suspended in January 2013, after she received the unsatisfactory criminal records check. Little Debbie's is holding the Petitioner's position pending the outcome of the present matter. (Testimony of Petitioner.)

5.

Having examined the circumstances of the Petitioner's criminal record, her character, and her employment and other history since the conviction, the undersigned finds that no physical harm was done to a victim and that the Petitioner does not have a propensity for cruel behavior or behavior involving moral turpitude.

### **III. Conclusions of Law**

1.

The Respondent bears the burden of proof in this matter. Ga. Comp. R. & Regs. r. 616-1-2-.7(1). The burden of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4).

2.

Under Georgia law, all potential employees of child-caring institutions are required to submit to a criminal records check. O.C.G.A. § 49-5-69(a). See O.C.G.A. §§ 49-5-60(1), 49-5-12(a).

3.

A potential employee with a criminal record based on a felony or other enumerated offense may not be hired unless the criminal record is deemed satisfactory by the Respondent or an Administrative Law Judge. O.C.G.A. §§ 49-5-60(3)-(4), 49-5-69(a), 49-5-73. The term "criminal record" is defined by statute as:

- (A) Conviction of a crime;<sup>1</sup>
- (B) Arrest, charge, and sentencing for a crime where:
  - (i) A plea of nolo contendere was entered to the charge;
  - (ii) First offender treatment without adjudication of guilt pursuant to the charge was granted; provided, however, that this division shall not apply to a violation of Chapter 13 of Title 16, relating to controlled substances . . . ; or
  - (iii) Adjudication or sentence was otherwise withheld or not entered on the charge; provided, however, that this division shall not apply to a violation of Chapter 13 of Title 16, relating to controlled substances . . . ; or
- (C) Arrest and being charged for a crime if the charge is pending, unless the time for prosecuting such crime has expired pursuant to Chapter 3 of Title 17.

O.C.G.A. § 49-5-60(4).

4.

Pursuant to O.C.G.A. § 49-5-73, “upon motion from any party, the [administrative law judge] may, in [her] discretion, consider matters in mitigation of any conviction, provided the [administrative law judge] examines the circumstances of the case and makes an independent finding that no physical harm was done to a victim and also examines the character and employment history since the conviction and determines that there is no propensity for cruel behavior or behavior involving moral turpitude . . . .” See O.C.G.A. § 49-5-69.1(a).

5.

In this case, the Petitioner was convicted of the covered offense of Assault of a minor.<sup>2</sup> However, the incident that led to the Petitioner’s conviction occurred nearly nine years ago. Further, the evidence presented at the hearing regarding the Petitioner’s character and subsequent employment

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<sup>1</sup> Under O.C.G.A. § 49-5-60(3), “‘Crime’ means any felony; a violation of Code Section 16-5-23, relating to simple battery, when the victim is a minor; a violation of Code Section 16-12-1, relating to contributing to the delinquency of a minor; a violation of Chapter 6 of Title 16, relating to sexual offenses, excluding the offenses of bigamy or marrying a bigamist; a violation of Code Section 16-4-1, relating to criminal attempt when the crime attempted is any of the crimes specified by this paragraph; or any other offenses committed in another jurisdiction which, if committed in this state, would be one of the enumerated crimes listed in this paragraph.”

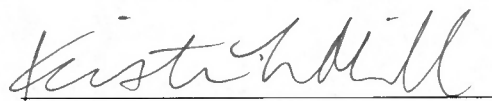
<sup>2</sup> Under Georgia law, “by definition an assault is nothing more than an attempted battery.” *Scott v. State*, 141 Ga. App. 848, 849 (1977). Accordingly, the Petitioner’s conviction involved an assault, i.e., an attempted battery, of a minor, it is a covered offense. O.C.G.A. §§ 49-5-60(3), (4)(A).

history were sufficient to establish mitigation.<sup>3</sup> The Petitioner is therefore eligible for employment by a child-caring institution.

#### IV. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Petitioner's motion for authorization to be employed by a child-caring institution, despite her criminal record, is **GRANTED**. The Respondent's action precluding the Petitioner's employment by a child-caring institution is hereby **REVERSED**.

SO ORDERED, this 13<sup>th</sup> day of March, 2013.

  
KRISTIN L. MILLER  
Administrative Law Judge

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<sup>3</sup> At the hearing, the Respondent took no position on mitigation.