

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



FILED
OSAH

MAR 18 2013

Kevin Westray, Legal Assistant

Petitioner, :
v. : Docket No.:
GEORGIA DEPARTMENT OF EARLY :
CARE AND LEARNING, :
Respondent. :

INITIAL DECISION

I. Introduction

The Petitioner in this matter seeks review of the Respondent's determination that the Petitioner's alleged criminal record precludes approval of her application to operate a family day care home. The hearing was held by telephone 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, _____, submitted an application to the Respondent seeking approval to be the owner and director of a family day care home. In conjunction with her application, 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 May 7, 2001, in the Superior Court of Decatur County, Georgia, the Petitioner entered a plea of *nolo contendere* to one felony charge of Theft By Shoplifting. The Petitioner was sentenced to serve ten years on probation and ordered to pay a fine of \$1,000.00, among other terms. (Testimony of Petitioner; Exhibit R-2.)

3.

The Petitioner explained that the criminal charges arose when she was in her twenties. The Petitioner had recently left her husband, and she and two cousins stole items from a Kmart store. The Petitioner is now 42 years old. She successfully completed her term of probation in 2010, and she has had no further interaction with the criminal justice system. (Testimony of Petitioner; Exhibits R-1, R-2.)

4.

The Petitioner has three children, ages twenty-five, twenty-one, and sixteen. Her two oldest children are currently serving in the military, while her youngest child lives at home. The Petitioner is currently unemployed. Her most recent employment was in 2010, when she worked as a cashier at Betty's Cafeteria. She has previously worked at two daycare centers: Little Blessings, where she served as the director; and Little Blessings, where she taught a class of two-year-olds. She also worked for five years at the Crate Factory, a company that makes boxes. The Petitioner has obtained certificates in cosmetology and business administration from Bainbridge College. (Testimony of Petitioner; Exhibit R-1.)

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. Further, there is no evidence that the Petitioner has 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, any director or employee of a licensed or registered day care center, group day care home, family day care home, or child care learning center is required to submit to a criminal records check. O.C.G.A. § 20-1A-32; Ga. Comp. R. & Regs. r. 591-1-1-.09.

3.

A director or 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. §§ 20-1A-33, 20-1A-39, 20-1A-43; Ga. Comp. R. & Regs. r. 591-1-1-.09. The term "criminal record" is defined by statute as:

(A) Conviction of a crime;¹

¹ Under O.C.G.A. § 20-1A-30(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; 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."

- (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. § 20-1A-30(4)

4.

Pursuant to O.C.G.A. § 20-1A-43, "upon motion from any party, the [administrative law judge] may, in his or 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"

5.

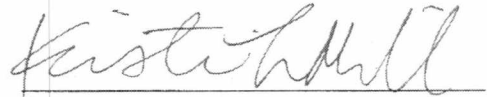
In this case, the Petitioner was convicted of the covered offense of Theft By Shoplifting, a felony. However, the incident that led to the Petitioner's conviction occurred more than ten years ago. Further, the evidence presented at the hearing regarding the Petitioner's character and subsequent employment history were sufficient to establish mitigation.² The Petitioner is therefore eligible for employment by a child-caring institution.

² At the hearing, the Respondent took no position on mitigation.

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 18th day of March, 2013.



KRISTIN L. MILLER
Administrative Law Judge