

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

Petitioner, :  
v. : Docket No.: OSAH-DHS-DECAL-CRC-1343276-25-  
DEPARTMENT OF EARLY CARE AND : Schroer  
LEARNING, :  
Respondent. :



FILED  
OSAH

AUG 14 2013

Kevin Westray, Legal Assistant

INITIAL DECISION

**I. Introduction**

This matter is the administrative review of the decision of the Respondent that an unsatisfactory criminal record precludes Petitioner from being approved to continue as an employee of a childcare facility. Respondent's decision is hereby **REVERSED**.

**II. Findings of Fact**

The Judge has considered the entire evidence in this case, and based upon a preponderance of the evidence makes the following findings of fact.

1.

Petitioner is married to Mrs. [redacted]. Mrs. [redacted] has applied with the Department of Early Care and Learning ("DECAL") for a permit to operate a daycare center out of her home. Petitioner, as a resident of the home, must submit to a criminal records check. O.C.G.A. § 20-1A-30(7) ("employee" is defined to include any adult person who resides at the family day-care home).

2.

In March 2013, Petitioner submitted a *Criminal Records Check Application for Child Care Facilities* as a "non-employee" of Mrs. [redacted] day care center. On or about March 14, 2013, DECAL notified Petitioner in writing that Petitioner's criminal records check was unsatisfactory.

3.

Petitioner has an extensive criminal history. Specifically, at age thirty-three, Petitioner pled guilty to theft by snatching in 1990 and was sentenced to four years of probation with intensive supervision

(Case #1).<sup>1</sup> In 1994, Petitioner pled guilty to a felony count of theft by shoplifting, arising out of an incident in 1991, and was sentenced to five years, to be served on probation, which included mandatory drug treatment, counseling, and testing (Case #2). A "nolle prosequi" order was entered on a second count of simple battery relating to the same incident as Case #2.<sup>2</sup> Also in 1994, Petitioner pled guilty to the following two counts: (1) criminal attempt to possess a controlled substance and (2) possession of marijuana less than an ounce ("Case #3). Petitioner was sentenced to six years on Count 1 and twelve months on Count 2, to be served concurrently with his sentence from Case #2. He was ordered to serve two years in prison and the remainder on probation, with mandatory drug treatment and six months at a half-way house upon his release.<sup>3</sup> In 1997, Petitioner pled guilty to four felony counts of forgery and five misdemeanor counts of theft ("Case #4). He was sentenced to four years on each of the felony counts and twelve months on each of the misdemeanor counts, to be served concurrently and concurrent with the remainder of his sentence on Case #3. Finally, in 2003, Petitioner pled guilty to one felony count of possession of a controlled substance and four related misdemeanor counts ("Case #5). He was sentenced to thirty years on the felony count and 12 months on the four misdemeanor counts, all to run concurrently. Petitioner was ordered to serve five years without parole, with the remaining twenty-five years suspended. With credit for time served, Petitioner was released in 2006. (Testimony of Petitioner; Exhibits R-1 through R-5)

4.

Petitioner, now fifty-five years old, testified at the administrative hearing that his first conviction in 1990 began after he became addicted to illegal drugs. His addiction lasted for over fifteen years, during which time his wife, Mrs. \_\_\_\_\_ divorced him and he was in and out of prison. During his

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<sup>1</sup> In 1992, Petitioner's probation was revoked for violation of the special conditions of his probation, namely, (i) violating criminal laws, including felony shoplifting, (ii) testing positive for alcohol and cocaine, and (iii) failing to pay outstanding fines and fees on time. He was ordered to serve the remainder of his sentence on Case #1 in the penitentiary. (Ex. R-1)

<sup>2</sup> In the Bill of Indictment, Count II alleged that Petitioner intentionally caused physical harm by striking a person in the mouth with his elbow. According to Petitioner's testimony at the administrative hearing, this charge, which was nolle prossed, arose out of Petitioner's attempt to flee the police after taking food and other items from a Kroger without paying for them. Petitioner credibly testified that no physical injury occurred during this incident. DECAL presented no evidence to contradict Petitioner's testimony. (Ex. R-2)

<sup>3</sup> In 1997, Petitioner's probation was revoked for violating the conditions of probation for Cases #2 and #3. (Ex. R-3) Although the petition for revocation alleged that Petitioner violated several criminal laws, including obstruction and simple battery against a police officer, forgery, and theft by taking, the Order revoking his probation did not specifically find which of the alleged violations occurred and DECAL only presented documentation relating to convictions for forgery and theft. (Ex. R-4) Accordingly, the Court finds that there is insufficient evidence to prove that Petitioner committed the acts of obstruction and simple battery as alleged in the petition for revocation.

last incarceration, Petitioner overcame his addiction and has not used illegal drugs in over ten years. Although divorced from Petitioner, Mrs. [REDACTED] brought her children to visit Petitioner during this time, and she saw a difference in him. After he was released in 2006, he began attending church with Mrs. [REDACTED] and they eventually reunited, marrying a second time after bible study. Mr. [REDACTED] has worked steadily since 2006, and the [REDACTED] have bought a home, where they live with their children and grandchildren. In his job as a painter, Petitioner is away from home during the work day, and occasionally is away from home on an out-of-town job for up to a month. (Testimony of Petitioner, Mrs. [REDACTED])

5.

Petitioner takes full responsibility for his actions during the long period of his addiction. For the past ten years, he has been off drugs and he has worked hard to make a better life for himself and his family for the past seven years. He is a deacon in his church. Petitioner submitted letters of support from his pastor and a long-time family friend, who attested to his humility, his stability, and his love and dedication to his family, particularly his grandchildren. Since his recovery and release from prison, Petitioner counsels young people about the importance of making the right choices and the possibility of rebounding from bad ones. The Court carefully observed Petitioner during his testimony and found him to be a sincere, honest man who has sustained his recovery and has become a productive citizen and loving husband, father and grandfather. Moreover, having examined the record in this case, the Court finds that there is no evidence of physical harm done to a victim and no propensity for cruel behavior or behavior involving moral turpitude on the part of Petitioner.

### III. Conclusions of Law

Based upon the findings of fact, the Judge makes the following conclusions of law.

1.

Respondent has the burdens of persuasion and going forward in this matter. OSAH Rule 616-1-2-.07. The standard of proof on all issues is a preponderance of the evidence presented. OSAH Rule 616-1-2-.21(4).

2.

Under Georgia law, employees of licensed childcare facilities are required to submit to a criminal records check. O.C.G.A. § 20-1A-30, *et seq.*

3.

An employee who has an unsatisfactory criminal record based on a felony or other enumerated offense may not work at a child care facility until he has the unsatisfactory determination reversed. O.C.G.A. §§ 20-1A-33. Petitioner is considered an employee because he resides in the facility that will be used for the family day-care home. O.C.G.A. § 20-1A-33(7).

4.

Upon motion by any party, the Administrative Law Judge may, in his or her discretion, consider matters in mitigation of any conviction, provided that no physical harm was done to a victim and that

there is no propensity for cruel behavior or behavior involving moral turpitude on the part of Petitioner, based on an examination of the Petitioner's character and employment history since the conviction. O.C.G.A. § 20-1A-43.

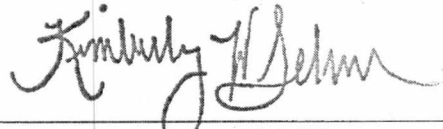
5.

Having considered matters in mitigation as set forth in the findings of facts above, the undersigned determines that Petitioner has proven sufficient mitigation to warrant an exception.

#### IV. Decision

Accordingly, Petitioner's motion to be allowed to be an "employee" of a childcare facility as an exception to the sanctions normally imposed in such circumstances is **GRANTED**. Respondent's action prohibiting such employment is hereby **REVERSED**.

**SO ORDERED**, this the 14<sup>th</sup> day of August, 2013.



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**KIMBERLY W. SCHROER**  
**ADMINISTRATIVE LAW JUDGE**