



BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

FILED
OSAH
FEB 17 2014

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

K. Westray
Kevin Westray, Legal Assistant

INITIAL DECISION

I. Introduction

The Petitioner in this matter seeks review of the Respondent's determination that the Petitioner's criminal record precludes approval of her application to own and operate a childcare learning center. The hearing took place on February 7, 2014, 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 childcare learning center. 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.

Between 1982 and 1985, the Petitioner was convicted of four prostitution-related misdemeanors in the District Court of Nassau County, New York, as follows: Loitering For the Purpose Of Prostitution (March 1, 1982); Prostitution (November 14, 1983); Prostitution (May 10, 1985); and Prostitution (July 5, 1985). None of her crimes caused physical harm to a victim. (Testimony of Petitioner; Exhibit R-1.)

3.

The Petitioner explained that she was born and raised in New York City and became a somewhat unruly teenager. She dropped out of high school and supported herself beginning at age sixteen, when her mother moved to Georgia and the Petitioner chose to remain in New York City. The criminal charges arose when she was in her late teens and early twenties. The Petitioner is now fifty

years old, and she has had no further interaction with the criminal justice system. (Testimony of Petitioner; Exhibits R-1, R-2.)

4.

The Petitioner moved to Georgia in 1985 or 1986, shortly after her fourth conviction. She lived in Warrenton for several years before moving to Augusta in 1991. In 1994, she obtained her GED and began doing volunteer work in Augusta. Her volunteer work eventually led to paid employment, through a community outreach grant, at the Medical College of Georgia. Since 1996, the Petitioner has worked for several Augusta-area organizations that provide community health services, such as pregnancy support services and HIV testing. She has continued to work full-time at Serenity Mental Health in Augusta, where she has been employed since 2001, while preparing to open a childcare learning center. (Testimony of Petitioner.)

5.

The Petitioner has a son, Kerry, who is thirty-one years old and is the co-owner of the childcare learning center. She has also raised another child, Britteny, whose biological mother left her with the Petitioner when she was one year old. Although no formal custody arrangement has ever been in place, the Petitioner considers Britteny, who is currently twenty-two years old, to be her daughter. (Testimony of Petitioner.)

6.

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 the Petitioner has no 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. 616-1-2-.7(1). The burden of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 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. 591-1-1-.09.

3.

A director or employee with a criminal record based on a felony or other enumerated offense may not work in a licensed or registered day care center, group day care home, family day care home, or child

care learning center 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. 591-1-1-.09. The term "criminal record" is defined by statute as:

- (A) Conviction of a crime;¹
- (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 that 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 three counts of the covered offense of Prostitution. This offense, although it is a misdemeanor, is a "crime" within the meaning of O.C.G.A. § 20-1A-30(3)(E) and (G), as it would amount to a violation of Chapter 6 of Title 16 if committed in Georgia. See O.C.G.A. § 16-6-9. Thus, absent mitigation, the Petitioner has a criminal record that would

¹ Under O.C.G.A. § 20-1A-30(3), "'Crime' means: (A) Any felony; (B) A violation of Code Section 16-5-23 when the victim is a minor; (C) A violation of Code Section 16-5-23.1, relating to battery, when the victim is a minor; (D) A violation of Code Section 16-12-1; (E) A violation of Chapter 6 of Title 16; (F) A violation of Code Section 16-4-1; or (G) Any other offenses committed in another jurisdiction which, if committed in this state, would be one of the enumerated crimes listed in this paragraph."

disqualify her from owning and operating a childcare learning center. O.C.G.A. §§ 20-1A-33, 20-1A-39, 20-1A-43; Ga. Comp. R. & Regs. 591-1-1-.09.


6.

The Petitioner's convictions, however, occurred nearly thirty years ago and caused no physical harm to a victim. Further, the evidence presented at the hearing regarding the Petitioner's character and subsequent employment history was sufficient to establish mitigation,² as the Petitioner has no propensity for cruel behavior or behavior involving moral turpitude. See O.C.G.A. § 20-1A-43. The Petitioner is therefore eligible to serve as the owner and director of a childcare learning center.

IV. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Petitioner's motion for authorization to serve as the owner and director of a childcare learning center, despite her criminal record, is **GRANTED**. The Respondent's determination that the Petitioner's criminal record precludes approval of her application to own and operate a childcare learning center is hereby **REVERSED**.

SO ORDERED, this 14th day of February, 2014.


KRISTIN L. MILLER
Administrative Law Judge

² At the hearing, the Respondent did not object to mitigation.