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BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

CINDY GALL,
Petitioner,

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v.

Docket No.:
OSAH-DCH-HFR-CRC-1616603-146-Miller

[Signature]
Kevin Westray, Legal Assistant

DCH, HEALTHCARE FACILITY
REGULATION DIVISION,
Respondent.

INITIAL DECISION

This matter is an administrative review of the Respondent's preliminary determination that the Petitioner's criminal record precludes approval of her application for authorization to work at Our Country Home, a personal care home licensed by the Respondent. The hearing took place on November 2, 2015. After considering all of the admissible evidence, the Respondent's preliminary determination is hereby **REVERSED**.

I. FINDINGS OF FACT

1. The Petitioner applied to the Respondent for authorization to work at Our Country Home, a personal care home licensed by the Respondent in LaFayette, Georgia. In conjunction with her application, the Petitioner underwent a fingerprint records check. By letter dated September 9, 2015, the Respondent notified the Petitioner that her fingerprint records check was unsatisfactory due to her convictions for the following three felony offenses:

- Possession of Methamphetamine (Chattooga County, Georgia, July 7, 2009);
- Possession of Methamphetamine with Intent to Distribute (Chattooga County, Georgia, July 7, 2009); and
- Use of Communication Facility in Commission of a Felony (Chattooga County, Georgia, July 7, 2009).

For these offenses, the Petitioner was sentenced to a term of thirty years, to be served concurrently, with at least seven years in confinement and the remainder on probation. (Attachment to OSAH Form 1.)

2. The Petitioner does not contest the accuracy of the fingerprint records check and has asked the undersigned to consider matters in mitigation. At the hearing, the Petitioner admitted that she committed the charged offenses and expressed regret for her actions. She explained that when her criminal conduct occurred, she was going through a difficult period in her life, and she "turned to drugs to cope." The Petitioner was diagnosed with cancer during her prison term, and the diagnosis served as a catalyst for her to turn her life around. After serving two years in prison, she was released in July 2011, and she is currently on parole. She is no longer required to report to her parole officer due to her good behavior. When her parole ends, she will begin serving a twenty-three year term of probation, which she expects will be terminated early, provided that she continues to comply with the terms of her parole. The Petitioner has had no other interactions with the criminal justice system, and her cancer is in remission. (Testimony of Petitioner.)

3. On March 28, 2012, several months after her release from prison, the Petitioner found employment with Roy and Doris Fagan, who had recently opened a boarding house. The Petitioner served as the

facility's cook and housekeeper, and she also provided mobility assistance to residents when needed. In December 2014, Mr. and Mrs. Fagan decided to convert their boarding house into a personal care home, and the Petitioner was required to undergo a fingerprint records check as part of the licensure process. When her criminal record was found unsatisfactory, the Fagans were required to terminate the Petitioner's employment. (Testimony of Petitioner.)

4. Both Mr. Fagan and Mrs. Fagan appeared as witnesses at the hearing and presented credible testimony in support of the Petitioner. The Fagans live on the premises of the personal care home, and Mrs. Fagan, a registered nurse, supervises the Petitioner directly.¹ Mr. and Mrs. Fagan hold the Petitioner in high regard, as do the facility's residents. The Fagans have found the Petitioner to be an exemplary employee who consistently exhibits good character, and they hope that she will be able to return to her job in the near future. (Testimony of Roy Fagan, Doris Fagan.)
5. While the fact that the Petitioner has not yet completed the terms of her sentence is a factor that weighs heavily in the mitigation determination, it is not the only factor. After considering all of the admissible evidence, including witness testimony and certified records of the offenses, the undersigned finds that the Petitioner's crimes did not cause physical harm to a victim. The undersigned further finds, after examining the Petitioner's character and employment history, that she has no propensity for cruel behavior or behavior involving moral turpitude. The Petitioner has presented a rare case where, despite the pendency of her criminal sentence, mitigation has been proven based on credible witness testimony.

II. CONCLUSIONS OF LAW

1. Under Georgia law, any adult who seeks employment with a personal care facility must submit to a fingerprint records check. O.C.G.A. § 31-7-259(b). If the fingerprint records check reveals that the individual has a "criminal record" as defined in O.C.G.A. § 31-7-250(3), a preliminary determination of "unsatisfactory" is entered, and the individual is disqualified from working and/or residing at the facility unless the determination is reversed by an administrative law judge. O.C.G.A. § 31-7-259(b), (l).
2. The term "criminal record" is defined by statute to mean:
 - (A) Conviction² of a crime;
 - (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; or
 - (iii) Adjudication or sentence was otherwise withheld or not entered on the charge; 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.

¹ Mrs. Fagan also noted that no resident of Our Country Home takes narcotics, and all medications are double-locked and dispensed solely by Mrs. Fagan. Residents take their medications during meals, under Mrs. Fagan's supervision.

² As defined in O.C.G.A. § 31-7-250, "Conviction" means a finding or verdict of guilty or a plea of guilty regardless of whether an appeal of the conviction has been sought."

O.C.G.A. § 31-7-250(3). Disqualifying crimes include any violation of Chapter 13 of Title 16, relating to controlled substances; and any other criminal offense as “determined by the department and established by rule . . . that would indicate the unfitness of an individual to provide care to or be in contact with persons residing in a facility. O.C.G.A. § 31-7-250(2)(L), (Q).

3. Notwithstanding the existence of a criminal record, “upon motion from any party, the [administrative law judge] may, in his 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. . . .” O.C.G.A. § 31-7-263.
4. The Respondent met its burden and proved, by a preponderance of the evidence, that the Petitioner has a criminal record within the meaning of O.C.G.A. § 31-7-250(3). Nevertheless, the Petitioner has presented sufficient evidence to establish mitigation in accordance with O.C.G.A. § 31-7-263.

III. DECISION

For the reasons set forth in the foregoing Findings of Fact and Conclusions of Law, the Respondent’s preliminary determination that the Petitioner has an unsatisfactory criminal record is **REVERSED**. The Petitioner’s application for authorization to work at a personal care home licensed by Respondent, despite her criminal record, is **GRANTED**.

SO ORDERED, this 3rd day of November, 2015.



KRISTIN L. MILLER
Administrative Law Judge