

BEFORE THE
DEPARTMENT OF SOCIAL SERVICES
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

FRED SHIOTA
38 Rosier Circle
Sacramento, CA 95833

Respondent.

Case No. 7801155001

OAH No. N200110480

10 CDSS 08

PROPOSED DECISION

Ann E. Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 23, 2002, in Sacramento, California.

Harry Skaletzky, Staff Attorney, represented complainant, Department of Social Services.

Richard F. Antoine, Attorney at Law, represented Fred Shiota, respondent.

Evidence was received, the record closed and the matter was submitted.

FACTUAL FINDINGS

1. On October 24, 2001, Martha Lopez made and filed the Accusation in her official capacity as Deputy Director, Community Care Licensing Division, Department of Social Services, State of California (hereafter "Department").

2. Respondent and his wife applied for a Certificate of Approval from Family Connections Adoptions (hereafter "licensee") to operate a certified family home located at their home in Sacramento. A review of respondent's criminal record disclosed that an exemption was required for respondent to operate or remain in a family home or to have contact with clients of the home. Respondent and licensee applied to the Department for a

criminal record exemption.¹ The Department denied the application for criminal record exemption on May 22, 2001.

3. Respondent timely appealed the Department's decision. The Department served an Accusation (Exclusion Action) upon respondent in compliance with the requirements of Government Code section 11505. Respondent filed a timely Notice of Defense. A hearing was held pursuant to Government Code section 11505.

4. On March 24, 1994, respondent was convicted, on a plea of guilty, of violating Penal Code section 487, grand theft-embezzlement by employee with 12022.6-(a) enhancement of excessive taking, a felony. He was sentenced to six months of jail time, under the work furlough program, three years of probation, fines, and restitution in the amount of \$39,459.73. Respondent was permitted to elect between prison time and restitution. He chose restitution.

5. The facts and circumstances of respondent's criminal conviction were that between December 1, 1990 and March 31, 1993, respondent embezzled over \$50,000 from his employer, Spencer's Auto Haus. Spencer's Auto Haus is an automotive repair shop, owned by Spencer Jewell. It can best be characterized as a small business.

6. Spencer's Auto Haus employed respondent as a bookkeeper and office manager. Respondent was thirty seven years old. He began employment in late 1989 and began stealing his employer's funds almost immediately. Respondent periodically wrote out checks to himself after he got his employer to sign a blank check ostensibly for a business expense. He inflated the amount of his own paychecks. He used various ploys to prevent his employer from discovering his embezzlement. He intercepted bank statements and cancelled checks from the mail and destroyed them. He destroyed a letter from Imperial Bank notifying the employer that his account had been closed due to "bounced checks". He deposited his employer's checks into his own bank account and paid his employer's creditors by personal check. He destroyed the incriminating records from his own bank account. Respondent prevented his employer from seeing the company checkbook. He told Mr. Jewell that he had taken the checkbook home to balance, had left the checkbook on the hood of the car and it had been destroyed by rain.

7. The local police authority and the employer's bank conducted an investigation of the embezzlements and determined that respondent had embezzled \$58,931.29 from the Spencer's Auto Haus business account. The first unauthorized check written and cashed by respondent was dated in December of 1990.

¹ The exemption application was made pursuant to California Code of Regulations, Title 22, Division 06, section 80019 and Health and Safety Code section 1522.

8. In 1993, respondent began double charging credit card customers by filling out additional merchant checks. The merchant checks were deposited into the Spencer's Auto Haus bank account which unrealistically inflated the account balance. This scheme concealed from the employer the fact that his bank balance was below expectations. It also allowed respondent to draw more money out of his employer's bank account, because the balance in the account was higher. As a result of respondent's actions, the credit card customers were billed for a second transaction by the credit card company.

9. Respondent told investigating police officers that he estimated he had taken from five to seven thousand dollars. He told officers that he began embezzling his employer's funds in January of 1992, because his eighteen year old son was coming to live with him in June and he did not feel he made enough money to support his son. He stated that he was "too proud" not to provide a good home for his son by any method he could. At the hearing of this matter, respondent repeated this rationale for his thefts, despite the fact that the embezzlements began in December of 1990, long before his adult son came to live with him.

10. Respondent served his jail time and paid his fines. He made restitution payments in the amount of approximately \$100 per month. When his three year probationary term was due to expire, in May of 1997, respondent had paid only \$2,376.36 of the \$39,459.73 he was ordered to pay in restitution. He was arraigned on a violation of probation for failure to keep the probation department advised as to his ability to complete payment of restitution. His probation was extended, with his consent, another two years to allow him time to pay restitution. He was ordered to pay a minimum of \$200 a month. Shortly before the probationary term expired in May of 1999, respondent and his wife took a loan from the wife's mother so that he could pay the restitution in full and avoid being jailed for violation of probation.

11. Respondent testified that he moved to Sacramento after he was released from prison. He had found religion in prison and when he was released he looked up Herbert Rubi, a pastor he had been referred to in prison. Mr. Rubi was trying to build a church congregation and respondent assisted him with building the church congregation. Mr. Rubi testified that respondent was an important part of his church and that respondent devoted himself to assisting in the church. He was entrusted with church collections, and never caused a problem.

12. In 1995, respondent took a job as a front desk clerk at the Stardust Motel. His employer, Curt Evans, testified that for the two years respondent worked at the Stardust Motel he was honest and trustworthy, kind and helpful. He was responsible for collecting money and rents from tenants and had keys to the rooms and to the owners' home. Mr. Evans testified that respondent would often assist him with repairs and maintenance when respondent was off duty.

13. In 1997, respondent married another parishioner of his church and took a job as the front desk receptionist at the Governor's Inn in Sacramento. He did not tell his

employer that he had a criminal record, until a few months ago when he sought a reference from his supervisor, Toni Greenwell. Ms. Greenwell testified that respondent is an excellent and responsible employee. He has worked in this position for approximately five years. He is professional and dependable. He is one of the top five employees she has ever supervised. She has supervised hundreds of employees in her career in hotel management. Ms. Greenwell testified that respondent handles large sums of money daily. There has never been a discrepancy in his accounts. She attested to his devotion to his church. She is convinced of his integrity.

14. Respondent produced additional witnesses and letters of reference from pastors, friends, and co parishioners. They attest to his integrity and his devotion to his church. They speak of his love for children and of the effect his preaching and leadership have had on parishioners and on the segments of the public to which the church provides outreach. The witnesses pointed out that respondent uses his own crime and rehabilitation as a teaching tool to encourage others. All of respondents witnesses attest to his and his wife's ability to raise and love children.

15. Respondent testified that he and his wife wish to adopt children. They cannot do so without obtaining certification as a foster family, so that children can be placed with them until the children are available for adoption. He testified that he has led an honest and trustworthy life since his conviction and has devoted himself to his spiritual life. He and his wife chose to devote all their free time to their church. His wife works part time as a physician's assistant and works the remainder of her time in the church school. Respondent works a forty hour week and devotes his remaining time to his church.

16. Respondent has presented substantial evidence that others believe that he and his wife would be good parents, and that they are devoted to their religion and to their church. However, embracing a religion is not an indicia of rehabilitation. It is not one's spiritual beliefs that demonstrate rehabilitation; but one's conduct. Respondent has not conducted himself in such a way as to show that he is truly remorseful for his embezzlement or that he has made amends. Although he may have sought understanding and forgiveness through his church, he made no effort to contact his victim and seek forgiveness. Respondent knew his employer was a small business. Respondent admitted that he almost put this man out of business. He knew that his employer probably lost the customers respondent had cheated by double charging their credit cards. Even knowing the precarious position of his employer, he did not attempt to pay restitution more quickly or more fully. Indeed, he paid the bare minimum he could, \$100 a month, extended the time for payment by two years, and spent his extra time, not on a second job or doing work for his victim, but performing volunteer services building a church congregation.

17. Indeed, respondent only took his restitution responsibility seriously when he faced the potential of a second violation of probation, when his extended term of probation was about to expire in 1999. It should also be noted that at no time did respondent pay interest on his restitution, even though he did not pay his employer in full for five years

following his guilty plea. Respondent's disregard for his victim undermines his evidence of rehabilitation.

18. Respondent places great weight on the fact that he has had numerous opportunities to commit acts of theft in his employment and in his church activities. This factor does tend to show that respondent would not commit another theft, if he had the opportunity. However, a change of character and attitude is measured not by the crimes one abstains from committing, but by the actions one takes to repair the damage he has done.

19. Respondent also places great weight on the fact that it has been eight years since he committed his last act of embezzlement. However, this fact must be balanced by the seriousness of the crime, the three year duration of respondent's thefts, and by the fact that respondent has only been free of criminal supervision since 1999.

LEGAL CONCLUSIONS

1. The licensure of certified family homes is governed by Health and Safety Code section 1500 et seq. The regulations governing certified family homes are contained in Title 22 of the California Code of Regulations, Chapter 1, section 80000 et seq. and Chapter 4, section 83000 et seq.²

2. Pursuant to Health and Safety Code³ section 1558, the Department may prohibit a licensee from employing, continuing the employment of, allowing the presence in a licensed facility, or allowing contact with clients in a licensed facility by, any employee, prospective employee, or other person who is not a client of a community care facility.

3. Pursuant to section 1522, the Department is required to conduct a criminal record review of the applicant for a community care facility, to determine whether the person has been convicted of a crime, other than a minor traffic violation, or arrested for certain crimes or convicted of a crime for which no exemption may be granted by the Department. If it is determined by the Department, that the person has been convicted of a crime, the State Department of Social Services shall notify the licensee to act immediately to bar the person from entering the facility. The Department may subsequently grant an exemption to the exclusion and allow employment, residence or presence in the community care, if the person presents substantial and convincing evidence to support a reasonable belief that the applicant is of such good character as to justify issuance of the license.

4. Title 22 CCR section 80019 provides in pertinent part that the applicant for a criminal record exemption must present substantial and convincing evidence satisfactory to the Department that he has been rehabilitated and presently is of such good character as to justify being issued or maintaining a license, employment, presence, or residence in a

² Excluding certain sections of Chapter 4 83000 et seq.

³ All references are to the California Health and Safety Code unless otherwise noted.

licensed facility. The Department shall consider factors including, but not limited to, the following as evidence of good character and rehabilitation:

- (1) The nature of the crime.
- (2) Period of time since the crime was committed and number of offenses.
- (3) Circumstances surrounding the commission of the crime that would demonstrate the unlikelihood of repetition.
- (4) Activities since conviction, including employment or participation in therapy or education, that would indicate changed behavior.
- (5) Granting by the Governor of a full and unconditional pardon.
- (6) Character references.
- (7) A certificate of rehabilitation from a superior court.
- (8) Evidence of honesty and truthfulness as revealed in exemption application documents.
 - (A) Documents include, but are not limited to:
 1. A Criminal Record Statement (LIC 508, Criminal Record Statement [Rev. 3/99]) and
 2. The individual's written statement/explanation of the conviction and the circumstances about the arrest.
- (9) Evidence of honesty and truthfulness as revealed in exemption application interviews and conversations with the Department.

5. The Factual Findings in paragraphs 2 through 19, inclusive were weighed and balanced as required by Title 22 CCR section 80019. Respondent bears the burden of proof in establishing character rehabilitation sufficient to compel his participation and presence in Department licensed facilities. Cf. In the Matter of Brown (1993) 2 Cal. State Bar Ct. Rptr. 309, 315. On balance, respondent has not shown substantial and convincing evidence that he has been rehabilitated and presently is of such good character as to justify licensure.

6. Under section 1558, the Department may exclude any person who has been denied an exemption to work or to be present in the facility, who has engaged in conduct which is inimical to the health, morals, welfare, or safety of either an individual in or receiving services from the facility, or has engaged in any other conduct which would constitute a basis for disciplining a licensee.

7. It has been established by a preponderance of the evidence⁴ that respondent has been convicted of a crime for which no exemption has been granted. Accordingly, cause exists to exclude him from presence in a community care facility for conviction of a crime as set forth in Factual Findings 4 through 6, inclusive.

8. As set forth in Factual Findings 4 through 6, inclusive, it has been established by a preponderance of the evidence that respondent has engaged in conduct which is inimical to the health, morals, and safety of individuals in or receiving services from a facility and the

⁴ Pursuant to section 1558(e), the burden of proof is on the Department and the standard of proof to be applied to this proceeding is the preponderance of the evidence.

People of the State of California. Accordingly, cause exists to exclude him from presence in a community care facility.

9. A licensee of a foster family home is charged with many responsibilities. Not only is he responsible for the care and safety of children, he is responsible for fully complying with numerous legal regulations and requirements. He must be scrupulously honest in reporting information about the children to governmental agencies. He must manage funds on the children's behalf. He must provide a model of honesty to the children who come into his care.

10. Accordingly, giving due consideration to the facts and circumstances underlying the Accusation and the Factual Findings, the public interest, at this time, would be adversely affected by the employment, presence or contact with clients of or by respondent in a facility licensed by the Department.

ORDER

The Request of Fred Shiota for Exemption to California Code of Regulations, Title 22, sections 80019 and 80019.1, and Health and Safety Code sections 1522 and 1558 (Exemption Request) is DENIED.