STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DANIEL BANKS,

Petitioner,

vs. Case No. 15-7267

DEPARTMENT OF HEALTH, OFFICE OF COMPASSIONATE USE,

Respondent.
_______________________________/

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on February 4, 2016, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings. The parties were represented as set forth below.

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STATEMENT OF THE ISSUE

The issue in this case is whether a nolo contendere plea by Petitioner, Daniel Banks, to possession of a controlled substance (phenobarbital) in the State of Kansas in 2004 is a disqualifying offense under section 435.04, Florida Statutes. (Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2015 version.)

PRELIMINARY STATEMENT

By letter dated November 23, 2015, Respondent, Department of Health, Office of Compassionate Use (the "Office" or "OCU"), notified Petitioner that his Level 2 background screening contained a disqualifying offense and that he had not, therefore, "passed" the screening. The basis of the failure to pass was that Petitioner had pled nolo contendere to illegal possession of a depressant/stimulant/hallucinogen/steroid (phenobarbital) in Kansas in 2004. Petitioner timely requested an administrative hearing to contest the Office's contention that he had failed to pass the background screening.

Several non-parties moved to intervene in the proceeding, but their motions were denied. At least one of those non-parties has appealed the Order denying the motions to intervene. <u>See</u> Case No. 1D16-0505, Fla. First Dis. Ct. App. On January 22, 2016, the Office filed a Motion to Dismiss the instant case, arguing that the only basis for challenging a disqualification under chapter 435 was proof of mistaken identity. Section 435.06(1), Florida Statutes, states in part, "The only basis for contesting the disqualification is proof of mistaken identity." The Motion was denied on the basis that no "disqualification" had yet been determined, and the Office's allegation of disqualification needed to be proven. Under the Office's rationale, a state agency could accuse any person of any disqualifying crime and the accused could not contest the charge except as to mistaken identity. The irrationality of that argument is the basis for denial of the Motion. Just prior to the final hearing, the Office filed a Motion for Relinquishment of Jurisdiction on the same grounds. That Motion was denied for the same reasons.

At the final hearing, there was considerable discussion and argument as to which party had the burden of proof. In an effort to expedite the final hearing, the Office agreed to put on its case-in-chief first notwithstanding who had the burden. OCU called the following witnesses: Daniel Banks; and Christian

Bax, director of OCU. OCU's Exhibit 1 was admitted into evidence. Banks testified in his own behalf and called one additional witness: Rodney W. Smith, Esquire, accepted as an expert in "criminal practice and procedure as it relates to drug crimes, pre-trial intervention, and Florida drug court." Banks' Exhibits 1 through 9 were admitted into evidence. Four joint Exhibits were also offered and accepted into evidence.

A Transcript of the final hearing was ordered; it was filed at the Division of Administrative Hearings on February 8, 2016. By rule, parties were allowed 10 days to submit proposed recommended orders. Each party timely submitted a Proposed Recommended Order, and each was duly considered in the preparation of this Recommended Order.

(In recognition of the critical nature of DOAH Case Nos. 15-7268, 15-7274 and 15-7276, concerning Banks' employer and Respondent in the instant matter, this Recommended Order has been abridged for rapid issuance and resolution of the dispute herein.)[1/]

FINDINGS OF FACT

1. Banks is a 30-year old resident of Northglenn, Colorado. He is currently employed as the coordinator of integrated pest management for MJardin Management Company. Banks is also designated as the research and development director of San Felasco Nurseries, Inc. ("San Felasco"), an

applicant to become designated as a low-THC cannabis dispensing organization by the State of Florida. See §§ 381.986, et seq, Fla. Stat. San Felasco filed an application identifying Banks and other owners or managers, all of whom were required to undergo a Level 2 background screening pursuant to section 435.04, Florida Statutes.

2. After Banks' background information was submitted to the Florida Department of Law Enforcement as part of San Felasco's application, a Level 2 background screening was undertaken by that agency.

3. By letter dated August 7, 2015, OCU notified Banks that they needed more information concerning his arrest on June 3, 2004, and subsequent plea of nolo contendere to the charge of possession of phenobarbital. In response, Banks had the Clerk of Court for Geary County, Kansas provide a document entitled "Journal Entry" in Case No. 04 CR 294. The Journal Entry is equivalent to a Final Judgment in a Florida criminal court.

4. OCU then notified Banks, via letter dated November 23, 2015, that he had failed to pass his Level 2 background screening. San Felasco was also notified of Banks' failure to pass, inasmuch as that failure would impact San Felasco's pending application to be designated as a dispensing organization.

5. Banks' failure to pass the screening was due to the fact that his nolo contendere plea in Kansas was to a crime OCU deemed similar to a crime enumerated in section 435.04 as a disqualifying offense. The construction of the Kansas and Florida statutes are, indeed, similar. Kansas Statutes Annotated (K.S.A.) 65-4162(a)(1) states in pertinent part:

> Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to possess or have under such person's control: Any depressant designated in subsection (e) of K.S.A. 6504105, subsection (e) of K.S.A. 65-4109 or subsection (b) of K.S.A. 65-4111, and amendments thereto.

K.S.A. 65-4111(b)(44) lists phenobarbital as one of the depressants designated as a controlled substance.

By comparison, Section 893.13(6)(a), Florida Statutes, states in relevant part:

> A person may not be in actual or constructive possession of a controlled substance unless such person's controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription. . . .

The two statutes are different, however, in the penalties which will inure from violation of the statutes. Section 893.13(6)(a) states that:

> [A] person who violates this provision commits a felony of the third degree . . . .

K.S.A. 65-4162(b) contains the following penalty language:

> Except as otherwise provided, any person who violates this subsection shall be guilty of a class A nonperson misdemeanor. If any person has a prior conviction under this section, a conviction of a substantially similar offense from another jurisdiction . . . then such person shall be guilty of a drug severity level 4 felony.

Thus, the crime in Florida is a felony; in Kansas it is a misdemeanor.

6. Banks came to be in possession of phenobarbital while working at an animal hospital. He was a senior in high school at the time, just two months after reaching the age of 18 years. He stole the phenobarbital from the animal hospital and took it home for his own use. His father found the drugs, confronted Banks with them, and made Banks self-report his theft to the police department. The police notified the doctor at the animal hospital, but she refused to press charges against Banks. Nonetheless, on June 3, 2004, Banks was eventually charged with the crimes of theft of and possession of a controlled substance, to wit: phenobarbital. Both crimes in Kansas at that time were misdemeanors. Pursuant to advice from his attorney, Banks pled nolo contendere to the possession charge in exchange for dismissal of the charge for theft. He was given a suspended sentence, placed on 12 months' probation and ordered to pay $115.00 in court costs. The theft charge would not have been a disqualifying offense in Florida. A fact taken into

consideration by Banks before agreeing to the plea bargain was that the crime was only a misdemeanor.

7. When he was arrested, and when he pled to the charge, Banks did not advise the police that he had previously been arrested and charged with possession of cannabis, a crime enumerated under the same statute (K.S.A. 65-4162) to which he was charged for possessing the phenobarbital. His prior arrest occurred in Riley County, Kansas, on May 7, 2004. He was charged with possession of a small amount of marijuana, possession of drug paraphernalia, and the purchase and consumption of alcohol by a minor. He received a suspended sentence, 12 months' unsupervised probation, and paid a $250.00 fine in the Riley County matter. The crime was later expunged from Banks' record.

8. Under K.S.A. 65-4162, the existence of the prior charge just weeks before the Geary County possession of phenobarbital charge could have resulted in the Geary County crime being upgraded to a felony. However, for whatever reason, Banks' Geary County violation was handled as a first offense and Banks was only found guilty of a misdemeanor.[2/]

9. The illegal possession of a controlled substance, in this case phenobarbital, is the similarity tying the Kansas and Florida statutes. In that respect, they are similar. However,

the degree of penalty differs greatly between the two states' laws, at least for a first offense.

10. Following his arrest and nolo contendere plea in Geary County, Banks attempted to rehabilitate his life.[3/] He entered college, attending the University of Northern Colorado in 2004 and 2005. He attended Kansas State University in 2005 and 2006. He then took time off from his formal studies to work in various jobs for a few years. He returned to college in 2009, attending and ultimately graduating magna cum laude from Colorado State University in 2012. He has since worked for various organizations in the fields of horticulture and agriculture. That experience led to his current position with San Felasco.

11. There is no doubt Banks' life following his arrest in 2004 has been successful and devoid of any further criminal activity. He has engaged in activities indicative of a stellar member of society. However, this proceeding is not an "exemption from disqualification" case. If it was, there is little doubt Banks would receive such an exemption based upon his obvious and documented rehabilitation from the 2004 crime. The issue in this case, however, is simply whether the arrest and conviction in Kansas was for a crime similar to a disqualifying offense in Florida and, if so, whether the crime constitutes a disqualifying offense.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

13. The general rule is that the party asserting the affirmative of an issue has the burden of presenting evidence as to that issue. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933 (Fla. 1996), (citing Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981)). In the instant matter, the Office had the burden of proving that the Kansas violation was similar to a Florida crime and that it was a disqualifying event. OCU clearly established that the illegal possession of a Schedule 4 controlled substance (phenobarbital in this case) is a crime under K.S.A. 65-4162 and also under section 893.13(6)(a), Florida Statutes. It is of no moment that the penalties for the two crimes are different in each of the states; the crimes themselves are essentially identical. The crimes are therefore similar. But the examination cannot end there.

14. Level 2 employment screening standards set forth in section 435.04(2)(ss) provide that a person who has pled nolo contendere to an offense under chapter 893 relating to drug abuse prevention and control is disqualified from employment in

a position of trust or, in the present case, as an officer, owner, or manager of a cannabis dispensing organization, "if the offense was a felony."

15. The relevant portion of section 435.02 states:

> (2) The security background screening under this section must ensure that no persons subject to the provisions of this section have been arrested for and are awaiting final disposition of, have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have been adjudicated delinquent and the record has not been sealed or expunged for, any offense prohibited under any of the following provisions of state law or similar law of any jurisdiction:
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> * * *
>
> (ss) Chapter 893, relating to drug abuse prevention and control, only if the offense was a felony or if any other person involved in the offense was a minor.

16. There is no allegation that a minor was involved in Banks' offenses in Kansas.

17. This hearing, to determine whether Banks' arrest and nolo plea in Kansas is a disqualifying offense in Florida, is a "de novo proceeding intended to formulate agency action, and not to review action taken earlier or preliminarily." Beverly Enters.-Fla., Inc. v. Dep't of HRS, 573 So. 2d 19, 23 (Fla. 1st DCA 1990). Banks, in this case, has the opportunity to rebut the Office's determination that the Kansas conviction was a disqualifying event in Florida and to change the Office's mind

concerning his disqualification. See Capaletti Bros., Inc. v. Dep't of Gen. Servs., 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). While showing quite clearly that his arrest and conviction could have ended in pretrial diversion or drug court had it happened in Florida, the disposition of his case in Kansas was handled differently. He pled nolo contendere and received punishment for the crime for which he had been charged. That crime was similar to the chapter 893 charge set forth in the Florida employment screening statute.

18. Banks' efforts at final hearing to differentiate between his plea to a misdemeanor offense in Kansas and the similar felony offense in Florida were credible. However, the distinction was irrelevant to the issue of whether the two offenses were similar under the provisions of chapter 435, Florida Statutes. While the distinction would be given due consideration in an exemption from disqualification proceeding, it had no weight in the instant case.

19. It is equally clear that the offense to which Banks pled nolo contendere was not a felony, at least in Kansas. And since he was charged in Kansas, not Florida, his crime was a misdemeanor, not a felony, for purposes of determining whether it was a disqualifying offense. Stated differently, the "similar law of another jurisdiction" [K.S.A. 65-4162(1)(a)] was

not a felony. Thus, Banks did not plead nolo contendere to a "drug abuse prevention and control" offense that was a felony.

20. The only mention of expungement in the Florida statute addressing disqualification is contained within the phrase which discusses a person who has been adjudicated delinquent. That does not apply in the instant case. However, the expungement statute in Kansas is relevant. K.S.A. § 21-6614(i)(2015) says that the person who has been expunged is to be treated as not having been arrested, convicted, or diverted of the crime. Under Kansas law, the 2004 conviction and nolo plea would not be a disqualifying event under section 435.04 because the conviction never happened.

21. The Office argues that, as in a Recommended Order issued by the undersigned in DOAH Case No. 15-4459, if the elements of a crime in another jurisdiction were similar to a crime in Florida, then the crime could be disqualifying regardless of the penalty in the other jurisdiction. That Recommended Order is distinguishable: The offenses listed in section 435.04 in that case did not add the "only if the offense was a felony" language. There are no Florida cases which establish whether the "only if the offense was a felony" language is construed to mean a felony in Florida or a felony in the jurisdiction where the crime occurred. The plain language of the statute appears to suggest the latter. Inasmuch as

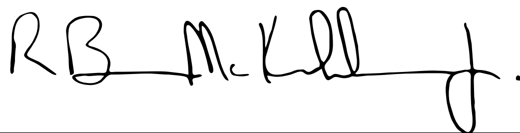
possession of phenobarbital in Florida is already a felony, adding the phrase "only if the offense was a felony" could logically be intended to look at the other jurisdiction's "similar law" and whether it was a felony. The Legislature failed to clearly elucidate its meaning. Needless to say, the recommendation herein is a very close call.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by Respondent, Department of Health, Office of Compassionate Use, finding that Petitioner, Daniel Banks, does not have a disqualifying event in his Level 2 background screening.[4/]

DONE AND ENTERED this 26th day of February, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 26th day of February, 2016.

ENDNOTES

[1/] A number of legal issues were raised by the parties but, as none of them were completely dispositive of this matter, they are not discussed further herein for expediency's sake. Included in those issues are the following: The Office's argument regarding Banks' ability to challenge the background screening only on the basis of mistaken identity; Banks' estoppel argument relating to the Office's proceeding with San Felasco's application review; the possibility that – in Florida – Banks would not have been convicted anyway due to diversion projects; and whether the expungement of Banks' conviction can be considered.

[2/] It would only be speculation to say why Geary County did not know about or act upon the Riley County conviction. No competent evidence was introduced at final hearing to establish that fact.

[3/] In furtherance of his rehabilitation, Banks was able to have his Geary County conviction expunged from his record in October 2015.

[4/] It is fairly obvious that Banks would be eligible for an exemption from disqualification should he apply for one. But this case did not involve an exemption request; it was solely focused on whether the conviction of a crime in Kansas constituted a disqualifying offense in Florida.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.