

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANIBAL STEPHENSON,

Petitioner,

vs.

Case No. 17-0616

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy by video teleconference with locations in Miami and Tallahassee, Florida, on March 31, 2017.

APPEARANCES

For Petitioner: Lucia C. Pineiro, Esquire
Lucia C. Pineiro & Associates, P.A.
Suite 221
717 Ponce De Leon Boulevard
Coral Gables, Florida 33134

For Respondent: Carlos Alberto Garcia, Esquire
Department of Children and Families
Suite N-1014
401 Northwest Second Avenue
Miami, Florida 33128

STATEMENT OF THE ISSUE

Whether Petitioner, a Program Director of a residential child-caring agency, is entitled to a waiver of the educational requirements of Florida Administrative Code Rule 65C-14.023(15) (b), pursuant to section 120.542, Florida Statutes.

PRELIMINARY STATEMENT

On August 22, 2016, Petitioner, Anibal Stephenson, filed a Petition for Waiver of Rule 65C-14.023(15) (b). On November 22, 2016, the Department of Children and Families (DCF) issued an Order on Petition for Waiver denying Petitioner's request for waiver. Petitioner timely requested a formal administrative hearing, which was referred to the Division of Administrative Hearings (DOAH) on January 26, 2017.

The final hearing was held as scheduled on March 31, 2017. Petitioner testified on his own behalf and called three witnesses: Silvia Torres, Executive Director of His House Children's Home (His House); Elizabeth Anon, Esquire, Counsel for His House; and Dr. Jesus Perez, Clinical Psychologist. Petitioner's Exhibits 1 through 86 were admitted into evidence without objection.

Respondent presented the testimony of three (3) witnesses: Sonia De Escobar, DCF Family Safety Program Manager; Adriana Clavijo, DCF Family Services Specialist; and Xiomara Turner, DCF

State Foster Care Licensing Specialist. Respondent's Exhibits 1 through 5 were admitted into evidence.

Neither party ordered a transcript of the hearing, and consequently, this Recommended Order was prepared without the benefit of the same. Both parties timely filed proposed recommended orders, which have been considered in the drafting of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect at the time the decision is made on Petitioner's application for waiver.^{1/}

FINDINGS OF FACT

The Parties

1. Petitioner has worked continuously at His House, a non-profit child-caring agency, since 2000. Since July 2013, Petitioner has served as the Program Director of the Unaccompanied Children (UC) Program, established through a grant to His House from the federal government, which temporarily shelters and places foreign children who enter the United States without an adult caregiver.

2. In his role as Program Director, five His House supervisors report to Petitioner. These include the supervisors of the clinical staff, case managers, residential services, administration, and medical services. The UC Program currently

employs a staff of 175, has 120 beds available, and an annual budget of \$12 million.

3. Rule 65C-14.023(15)(b) requires that program directors or staff serving a similar function, who are responsible for supervising, evaluating, and monitoring the delivery of services within the child-caring agency and for overseeing supervisors of direct care staff, shall have a master's degree in social work or in a related area in section 402.402(1)(b), Florida Statutes, of study from an accredited college or university and at least two (2) years of experience in social services or a bachelor's degree from a college or university and four (4) years of experience working with children.

4. During a random personnel file check as part of a routine DCF relicensing audit of His House in March and April 2016, conducted by Adriana Clavijo, DCF Family Services Specialist, it was discovered that Petitioner's highest level of education completed is high school. Petitioner does not hold a bachelor's or master's degree. Ms. Clavijo advised Petitioner how to comply with the DCF rule and told His House and Petitioner to seek a waiver of the educational requirements.

5. Ms. Clavijo first met Petitioner in 2009 when doing relicensing for His House. She performed inspections at His House for approximately three years, and Petitioner responded to

her requests for information and aided her licensing investigations.

6. When Ms. Clavijo discovered Petitioner did not have the requisite degree, she had no concern regarding his ability to do the job of UC Program Director. She was aware Petitioner filed a waiver request in August 2016, and His House informed her of its compliance efforts on Petitioner's behalf.

Petitioner's Experience in Social Work and Child Welfare

7. Petitioner began working for His House in 2000 as a Case Manager/Partial Shelter Case Worker, a position for which no degree was required. At the outset of his employment with His House, Petitioner successfully completed the Professional Development Center training, a six-week, full-time course of professional development training at Florida International University. This course is given locally, primarily to teach case managers how to work in the dependency system with children who have been abused, neglected, or abandoned.

8. During Petitioner's role as a Case Manager/Partial Shelter Case Worker from 2000 through 2005, His House provided two cottages with 12 shelter beds. Petitioner's role included: linking the children to medical and any other services they needed; enrolling them in school; participating in their court hearings; advocating on behalf of the children; facilitating supervised visits with parents; gathering pertinent information

regarding the children's removal from home; assessing and advising the courts of the children's needs; and coordinating transportation of the children to their appointments for services. During this time, Petitioner handled approximately 200 cases.

9. During 2001 through 2003, Petitioner and his wife became co-house parents of one of the cottages. They provided daily shelter and care for over 100 children. When they decided to move off-campus, Petitioner and his wife became licensed foster parents so that they did not have to leave a sibling group of four children behind.

10. In approximately 2005, Florida's foster care system was privatized and Petitioner was selected by His House in-house counsel, Elizabeth Anon, Esquire, to serve as Intake Coordinator and Incident Report Liaison. Petitioner served in this dual role from June 2005 until July 2013 and handled the cases of over 500 children.

11. As the Intake Coordinator, Petitioner was required to be on call 24/7 and worked with Our Kids of Miami-Monroe County (Our Kids)^{2/} and DCF protective investigators to find appropriate placement for children who had been removed from their parents/custodians. His job duties and responsibilities as the Intake Coordinator included daily interface representatives from Our Kids and DCF, information gathering of the children, linking

services, finding an appropriate placement within three hours of the child's removal from home, attending all shelter court hearings, attending case staffings, and participating in the assignment of the His House case managers. Petitioner was responsible for the first 30 days after a child came into foster care. He handled well over 500 cases in this role, and children never got hurt while Petitioner was supervising their care.

12. Petitioner's duties and responsibilities as an Incident Report Liaison included preparing and transmitting incident reports to Our Kids, following up on the nature of the incident, and coordination of any post-incident action that was required to ensure the safety and well-being of the children.

13. In 2008, His House was awarded a contract with the federal government to run a UC Program for children arriving from Cuba and Haiti. Petitioner assumed the additional responsibilities of UC Program Coordinator and was tasked with being the lead employee handling the contract for the UC Program. The program began in 2008 as one cottage with eight beds and a \$1 million budget. Under Petitioner's supervision and guidance, the program grew to 166 beds and a \$12 million budget by 2015.

14. Due to his existing relationship with the federal government, after the Haitian earthquake in 2010, Petitioner approached the federal government regarding His House's capacity to assist in the receipt, relocation, and reunification of

orphans. As a result of Petitioner's management with the UC Program goals and his demonstrated job performance, the federal government designated His House as the facility to receive orphans arriving to the United States directly from Haiti.

15. Petitioner's team was responsible for transporting orphans from the airport to His House. These military flights arrived around the clock. Petitioner's team was available 24/7 to pick up the children who were arriving at His House, ensuring that the children's basic needs were immediately met. All of the children submitted to medical examinations upon arrival. Petitioner's team worked in collaboration with the federal government representative to ensure pre-adoptive families were on campus within 24 to 48 hours of arrival of the children to His House and that the orphans were transitioned to their new homes within 30 days. His House assisted over 500 orphans as a direct result of the earthquake.

16. In 2013, due to the rapid expansion and success of the UC Program, Petitioner was promoted to the position of UC Program Director. Petitioner's duties remained basically the same with the addition of an increased level of responsibility in supervising more employees, being responsible for the UC Program budget, and having to participate in weekly meetings with the Executive Director, His House program directors, and with the directors' team members. Additionally, Petitioner was designated

as the person to have communication with the federal government representatives. Petitioner is now their primary contact at His House.

Petitioner's Training, Evaluations, and Reputation

17. Throughout his tenure with His House, Petitioner has engaged in continuing education in the field of social work and child welfare, participating in at least 30 hours of in-service training a year in these areas. Although Petitioner does not have the required degree, he possesses over 16 years of varied experience in the area of social services, foster care, and almost four consecutive years in management. Petitioner's yearly job appraisals were consistently excellent.

18. Petitioner maintains a stellar reputation in his field. It is undisputed that he is considered the consummate professional who is knowledgeable, organized, efficient, and a dedicated, beloved, and proven leader with talent and compassion for the welfare of children who are abused, neglected, or abandoned.

19. According to the His House Executive Director, Silvia Torres, who supervised Petitioner since her hiring in 2014, Petitioner was directly responsible for increasing the bed capacity of His House. Petitioner has an outstanding reputation and relationship with the federal government to the extent that Ms. Torres rarely interacts with it regarding the UC Program.

Even when Ms. Torres attends meetings regarding the UC Program, Petitioner leads due to his unparalleled knowledge of the frequently changing applicable federal rules and the program. Ms. Torres characterized Petitioner's team as "high achievers" due to Petitioner's leadership. Petitioner not only embraced Ms. Torres' recommendations, but he created his own tracking processes to hold staff accountable and put performance measures in place.

20. Since 2014, His House's UC Program has met all measurable outcomes in the contract with the federal government. The main criterion is to reunify 25 percent of the children in the program every week. His House met and continues to exceed these goals under Petitioner's direction. From 2008 through 2016, under Petitioner's guidance, the UC Program has assisted approximately 3,000 children.

21. In order to do this, Petitioner ensures that all departments work together in a timely fashion. Petitioner is known for his saying, "all hands on deck," meaning that the staff must do everything for the best interests of the children. According to Ms. Torres, Petitioner leads by example and has inculcated his staff with the culture that the number one goal is to ensure the children are safe and quickly reunified with family.

22. Ms. Anon, the in-house counsel who supervised Petitioner from 2004 until 2013, considered Petitioner her "right hand person." During the time they worked together, Ms. Anon described Petitioner's performance as "outstanding," that he had exceptional follow through, and exemplary managerial skills. Ms. Anon frequently relied upon Petitioner to represent the interests of His House and the children it served in court.

23. Dr. Jesus Perez, a clinical psychologist, has known and worked with Petitioner since they were both employed as partial Case Managers at His House in 2000. Dr. Perez left His House in 2001 to pursue two master's degrees and his doctorate, but returned as a psychology intern in 2006 and has provided services as a clinical psychologist for His House clients since 2009. Dr. Perez describes Petitioner as an excellent professional "whose work ethics are beyond compare." According to Dr. Perez, Petitioner is a fast learner, who analyzes things well and provides good feedback and assessment regarding the best interests of the children and families served.

24. Dr. Perez teaches courses as an adjunct professor at graduate school. Dr. Perez believes Petitioner's experience of 17 years in social work and child welfare is more valuable than a formal education. Petitioner's knowledge regarding the dependency system and working with a vulnerable population is something that most students do not have. Further, according to

Dr. Perez, Petitioner possesses qualities an education does not provide--ethics, collaboration, and leadership.

25. Even two of DCF's witnesses readily acknowledged Petitioner's unique combination of knowledge and experience. Sonia De Escobar, DCF Family Safety Program Manager, who supervises licensing, public assurance, and protective investigations, has known Petitioner throughout his tenure at His House, and she placed children in his care while he was a house parent. Ms. De Escobar described Petitioner as easy to work with and an "educated professional." Similarly, Ms. Clavijo found Petitioner "knowledgeable in the areas of child welfare, crisis management, and child safety."

26. Petitioner's expertise and accomplishments in the fields of social work and child welfare have been recognized by other professionals outside of His House. For example, in 2004, Petitioner received a commendation from Miami-Dade Juvenile Court Judge Cindy Lederman for his work. Petitioner received an Outstanding Service Award from Our Kids in 2007 for "service above and beyond with dedication, compassion, and perseverance." From 2011 to the present, His House received numerous commendations from the federal government for the work of Petitioner and his UC Program team for the reunification process, handling transfers from Homestead, taking on challenging cases, and an overall thank you for a job well done. Further,

Petitioner's UC Program is used by the federal government as a training example for similar programs across the country.

Hardship to Petitioner and His House If a Waiver Is Not Granted

27. Petitioner earns \$80,000.00 at His House and is the sole source of income for his family. He financially supports his wife, who stays at home to take care of her mother, his mother-in-law, and his adult son who recently returned from a military deployment in Afghanistan and is attending firefighter's school.

28. If Petitioner is not granted a waiver from the educational requirement, he will lose his job at His House, which will impose a severe financial hardship on his family. It is highly unlikely Petitioner can find comparable employment with any other child-caring agency without an advanced degree. Failure to secure a waiver would force Petitioner to leave the profession he loves and to which he has dedicated his life over the last 17 years.

29. Denial of Petitioner's waiver request will also create a significant hardship to His House, its employees, and the children they serve. Ms. Torres estimated it would take her at least six months to identify a qualified candidate and fill the UC Program Director position. There would be a challenging and steep learning curve for any replacement. The UC Program is funded by a grant, and, therefore, many are reluctant to become

involved with such a program. If Petitioner is forced to leave his job at His House, it will drastically affect morale and the ability to meet the daily and weekly reunification goals. As described by Ms. Anon, replacing Petitioner would be like "trying to change the wheels of a car while the car is still moving."

DCF's Basis for Denial

30. Xiomara Turner, a DCF Statewide Licensing Specialist, who has been in this role for less than two years, is the individual who reviewed Petitioner's waiver petition, supporting materials, and who recommended denial of the waiver. According to Ms. Turner, she has never granted a waiver of this rule. If the person does not have the education, she will not grant the waiver.

31. Ms. Turner stated that there was no combination of years of experience, knowledge, productivity, or performance by Petitioner that would have resulted in granting him a waiver. "The Department's stance is that years of experience are not to be a substitute for education," said Ms. Turner.^{3/}

32. Ms. Turner is aware that section 120.542(2) allows a waiver when the purpose of the underlying statute is achieved by other means. However, Ms. Turner stated that the hardship must be created by DCF, and it must be more onerous for the Petitioner than for anyone else. In this case, she did not see a hardship created by DCF and believed it no more unfair for Petitioner than

anyone else to abide by the educational requirement for a program director level position.

33. Ms. Turner testified that despite Petitioner's exceptional experience in every aspect of the child welfare system over the last 17 years, she recommended denial because of the "Department's current position that they will deny a waiver, regardless of experience, if there is a lack of a diploma." No evidence was presented to show that Petitioner's experience, education, and training was not adequate to demonstrate competence as a supervisor or in ensuring the health, safety, and welfare of the children in his care.

CONCLUSIONS OF LAW

34. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 120.542(8), Florida Statutes.

35. Section 120.542, states in pertinent part as follows:

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.

* * *

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and

when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

* * *

(5) A person who is subject to regulation by an agency rule may file a petition with that agency, . . . requesting a variance or waiver from the agency's rule.

* * *

(8) An agency shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57. Any proceeding pursuant to ss. 120.569 and 120.57 in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter.

36. Section 409.175 governs the licensure of family foster homes, residential child-caring agencies, and child-placing agencies. Section 409.175(1) states that the purpose of the statute is to provide licensing requirements to "protect the health, safety, and well-being of all children in the state who

are cared for by family foster homes, residential child-caring agencies, and child-placing agencies." Notably absent from the statute is any educational requirement for staff of these entities.

37. Chapter 65C-14 implements section 409.175. Regarding the educational requirements of residential child-caring agency personnel, rule 65C-14.023(15) provides:

(b) Program directors, or staff serving a similar function, who are responsible for supervising, evaluating and monitoring the delivery of services within the child caring agency and for supervising supervisors of direct care staff shall have a master's degree in social work or in a related area in Section 402.402(1)(b), F.S., of study from an accredited college or university and at least two (2) years of experience in social services, or a bachelor's degree from a college or university and four (4) years of experience working with children.

38. DCF's position, that no waiver shall be granted for the educational requirement of this rule, is contrary to the mandate of section 120.542(2).^{4/} Ms. Turner erroneously concluded that Petitioner must demonstrate his training and experience are equivalent to the education obtained in securing a bachelor's or master's degree.

39. Section 120.542 requires a variance when the purpose of the "underlying statute," not the rule, has been achieved by other means. Here, the stated purpose of the underlying statute is to "protect the health, safety, and well-being of all

children" placed in residential care agencies. The evidence is overwhelming that Petitioner's 17 years of practical experience through on-the-job training, continuous in-service training, and demonstrated excellence in the fields of social work and child care within the dependency system, achieved the stated mission of protecting the health, safety, and welfare of the children served by His House.

40. Strict adherence to the educational requirements in this instance would lead to the unreasonable, unfair, and certainly unintended result of removing arguably one of the most qualified UC Program Directors in the nation from his position. Petitioner's qualifications are beyond reproach, and he is the proverbial "poster-child" for a waiver. No evidence was presented by DCF to show how obtaining a formal degree at this stage would enhance Petitioner's performance in carrying out the objective of the underlying statute.

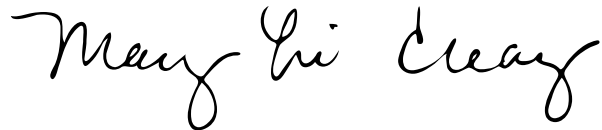
41. Petitioner demonstrated that he and his family would suffer a severe financial hardship if the waiver is denied. Petitioner's unique dedication to the mission of His House and to its children for over 17 years resulted in Petitioner working his way into a leadership role that he cannot replicate elsewhere in the absence of a waiver. Insistence on form over substance in this case would be a travesty and bring harm not only to

Petitioner but to His House and the children in Florida's dependency care system.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Children and Families enter a final order granting Petitioner's request for a waiver from rule 65C-14.023(15) (b).

DONE AND ENTERED this 11th day of May, 2017, in Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of May, 2017.

ENDNOTES

^{1/} Petitioner filed a Petition for Waiver of Florida Administrative Code Rule 65C-14.055(2) and (4) on August 22, 2016. Rule 65C-14.055(2) and (4) were subsequently repealed effective October 20, 2016. Petitioner's waiver application is governed by the law in effect at the time of the decision. Lavernia v. Dep't of Prof'l Reg., 616 So. 2d 53 (Fla. 1st DCA 1993). The applicable law is rule 65C-14.023(15) (b).

^{2/} Our Kids is the lead community-based care organization that contracts with the State of Florida to oversee and direct a coordinated system of care to deliver services to abandoned and neglected children and their families in Miami-Dade and Monroe counties.

^{3/} Ms. Turner's contention, that experience can never be a substitute for education, is also contrary to the express language of rule 65C-14.023(15)(b) which substitutes two additional years of experience for a master's degree.

^{4/} Although not addressed by the parties at final hearing or in their proposed recommended orders, DCF's policy, as articulated by Ms. Turner, that no waiver will be granted for the educational requirement of rule 65C-14.023(15)(b), is an unadopted rule. It is an agency statement of general applicability implementing, interpreting, or prescribing policy. It describes the procedure and practice requirements of the agency. Ms. Turner made it clear that this policy left her with no discretion regarding Petitioner's waiver application. See Dep't of Rev. of State of Fla. v. Vanjaria Enter., Inc., 675 So. 2d 252 (Fla. 5th DCA 1996).

Because this proceeding is not a rule challenge, under former law, the Administrative Law Judge lacked the authority effectively to invalidate the rule. However, effective July 1, 2016, section 120.57(1)(e)1. provides that neither an agency nor an administrative law judge may "base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority." Ch. 2016-116, §§ 4 and 8, Laws of Fla. Accordingly, agency action in this case cannot be based upon, or supported by, reference to an unadopted rule.

COPIES FURNISHED:

Paul Sexton, Agency Clerk
Department of Children and Families
Building 2, Room 204
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700
(eServed)

Anibal Stephenson
His House Children's Home, Inc.
20000 Northwest 47th Avenue
Miami, Florida 33055

Carlos Alberto Garcia, Esquire
Department of Children and Families
Suite N-1014
401 Northwest Second Avenue
Miami, Florida 33128
(eServed)

Lucia C. Pineiro, Esquire
Lucia C. Pineiro & Associates, P.A.
Suite 221
717 Ponce De Leon Boulevard
Coral Gables, Florida 33134
(eServed)

Rebecca Kapusta, General Counsel
Department of Children and Families
Building 2, Room 204
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700
(eServed)

Mike Carroll, Secretary
Department of Children and Families
Building 1, Room 202
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700
(eServed)

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.