

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NANCY VIAU,

Petitioner,

vs.

Case No. 17-1534

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held May 17, 2017, in Tallahassee, Florida, before Yolonda Y. Green, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("Division").

APPEARANCES

For Petitioner: Jonathon Howard Glugover, Esquire
Glugover Law & Mediation
Post Office Box 2613
Daytona Beach, Florida 32115

For Respondent: Brian Christopher Meola, Esquire
Department of Children and Families
400 West Robinson Street, Suite S-1129
Tallahassee, Florida 32801

STATEMENT OF THE ISSUES

The issues are:

1) Whether children who were adopted through a private adoption agency are entitled to tuition waiver; and

2) Whether Petitioner timely requested a final hearing.

PRELIMINARY STATEMENT

In a letter dated December 21, 2016, the Department of Children and Families ("Respondent" or "Department") notified Petitioner that her request for a tuition waiver for her adopted children was denied.

As a result of the Department's action, Petitioner's four adopted children were deemed ineligible to receive adoption assistance, i.e., tuition waiver. The basis for the denial of the tuition waiver was that the children were not "adopted from the Department." Petitioner requested a final administrative hearing on January 23, 2017. Whether that request was timely is an issue for determination in this proceeding.

On March 13, 2017, this matter was referred to the Division and it was assigned to the undersigned to conduct a final hearing. On March 21, 2017, the undersigned issued a Notice of Hearing scheduling the final hearing for May 17, 2017.

On May 17, 2017, the hearing commenced as scheduled. Pursuant to the Order of Pre-hearing Instructions, on May 9, 2017, the parties filed a Pre-hearing Stipulation wherein they stipulated to certain facts, which, to the extent relevant, have been incorporated in the Findings of Fact below.

Petitioner testified on her own behalf and offered no other witnesses. Petitioner offered no exhibits.

Respondent offered the testimony of two witnesses: Jennifer Peterson, adoptions manager, Community Based Care of Central Florida; and Vanessa Snoddy, operations management consultant, Department of Children and Families. Respondent offered Exhibits R-1 through R-4, which were admitted.

The proceeding was recorded by a court reporter but the parties did not order a transcript of the final hearing. At the end of the final hearing, the parties stipulated that their proposed recommended orders would be filed within 20 days of the final hearing. On June 6, 2017, the parties timely submitted Proposed Recommended Orders which have been considered in preparation of this Recommended Order.

Except as otherwise indicated, all references to Florida Statutes or rules of the Florida Administrative Code refer to the 2016 editions.

FINDINGS OF FACT

Based upon the stipulations of the parties and the evidence presented at hearing, the following relevant Findings of Fact are made.

1. Petitioner adopted four children ("the children"), who are siblings, after the biological parent's parental rights were terminated. The parental rights were terminated on June 27, 2016. Petitioner seeks a college tuition waiver for the children.

2. The Department is the state agency responsible for reviewing and approving requests for adoption assistance. Community Based Care of Central Florida ("CBC") is the licensed child-placing agency that has been designated as the agency to facilitate such requests.

3. The children were removed from the custody of their biological mother (L.H.) due to her inability to provide food, clothing, medical care, and other material needs for the children during a shelter hearing in 2014. The children were temporarily placed in two separate homes. On January 13, 2014, three of the children were placed with Petitioner. On June 14, 2014, one child was placed with a different caretaker.

4. Petitioner desired to adopt the children so they could remain together.

5. Jennifer Peterson, adoption manager with CBC, testified at hearing that CBC reviews requests for adoption subsidies, conducts home studies, and ensures compliance with adoption procedures.

6. Ms. Peterson explained the process for adoption from the Department if two families are interested in adopting the same children. An adoption review committee ("adoption committee") determines whether a person is appropriate to adopt children.

7. An adoption committee convened to determine whether Petitioner would be eligible to adopt the children. At the time, the Department's Petition for Termination of Parental Rights was pending.

8. Due to Petitioner's desire that the children remain together, she retained Florida Home Study LLC ("Florida Home Study") to assist with the adoption process. Florida Home Study is a private, Florida-licensed, child-placing agency and holds the same license as CBC.

9. Florida Home Study filed a Motion to Intervene in Seminole County, Circuit Court, Seventh Judicial Circuit, Case Number 13-DP-0123 (dependency case) on Petitioner's behalf.

10. The court granted the intervention on November 3, 2015. The judge entered an order which states in pertinent part:

2. That jurisdiction will be maintained by this Court and the Department of Children and Families will abate the current Termination of Parental Rights while the private termination of parental rights and adoption case is completed in family court. Abatement of the petition to terminate parental rights before the adoption committee made a final determination.

3. That Florida [Home Study] will assume responsibility of the adoption case.

4. That Florida [Home Study] will file a report with all parties and the Court every 90 days until the completion of the case.

11. A home study was completed by Florida Home Study on March 6, 2016.

12. Florida Home Study filed a Petition to Terminate the Parent's Parental Rights, which was granted on June 28, 2016.

13. The order terminating parental rights in pertinent part states:

3. Under section §39.811(4), Florida Statutes, the Children [N.W., A.H., K.H., and A.W.] are permanently committed to Florida Home Study LLC for the purposes of subsequent adoption.

4. Under section §39.811(2), Florida Statutes, the Children [N.W., A.H., K.H., and A.W.] are placed in the temporary legal custody of Florida Home Study LLC, under the protective supervision of the State for the purposes of subsequent adoption.

14. The adoption took place on or about December 16, 2016.

15. Adoption assistance is available to prospective adoptive parents and adopted children to provide financial assistance and services including a college tuition waiver. In September 2016, Petitioner submitted an application for adoption assistance. The children were classified as "special needs" as they were adopted as a sibling group and as a result of that classification, were eligible for adoption assistance.^{1/}

16. Ms. Peterson reviewed the adoption assistance request for Petitioner. She reviewed the case history and actions of the case manager.

17. Respondent approved the request and granted Petitioner a maintenance subsidy until the children turn 18, an attorney fee credit, and Medicaid until age 18.

18. While Respondent granted a portion of Petitioner's request for assistance, it denied the request for tuition waiver. The Department issued a formal notice of its decision to deny ("Notice") on December 21, 2016, and served it on Petitioner by Certified U.S. Mail.

19. Respondent provided notice to Petitioner of the procedural requirements to challenge the agency action.

20. The Notice stated:

RIGHT TO ADMINISTRATIVE PROCEEDING

**IF YOU BELIEVE THIS DECISION IS IN ERROR,
YOU MAY REQUEST AN ADMINISTRATIVE HEARING IN
ACCORDANCE WITH THE BELOW "NOTIFICATION OF
RIGHTS UNDER CHAPTER 120, FLORIDA STATUTES"**

**NOTIFICATION OF RIGHTS UNDER CHAPTER 120,
FLORIDA STATUTES**

IF YOU BELIEVE THE DEPARTMENT'S DECISION IS IN ERROR, YOU MAY REQUEST AN ADMINISTRATIVE HEARING UNDER SECTIONS 120.569 AND 120.57, FLORIDA STATUTES, TO CONTEST THE DECISION. YOUR REQUEST FOR AN ADMINISTRATIVE HEARING MUST BE RECEIVED BY THE DEPARTMENT BY 5:00 P.M., NO LATER THAN 21 CALENDAR DAYS AFTER YOU RECEIVED NOTICE OF THE DEPARTMENT'S DECISION.

You must submit your request for an administrative hearing to the Department at the following addresses:

Brian Meola, Assistant Regional Counsel
Department of Children & Families
400 W. Robinson Street, 1129
Orlando, FL 32801

IF YOUR REQUEST FOR AN ADMINISTRATIVE
HEARING IS NOT RECEIVED BY THE DEPARTMENT BY
THE ABOVE DEADLINE, YOU WILL HAVE WAIVED
YOUR RIGHTS TO A HEARING AND THE
DEPARTMENT'S PROPOSED ACTION WILL BE FINAL.

21. Petitioner received the Notice on December 24, 2016. Twenty-one days from the date of receipt of the Notice was January 16, 2017. Petitioner submitted a written request for a final hearing by email through her attorney, on January 23, 2017. The letter indicated in the first sentence, "Please be advised that this office has been retained to appeal the above decision [Denial of Request for Tuition Waiver] rendered on December 21, 2016." The record contains no additional evidence regarding a written notice of appearance related to denial of the tuition waiver.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to sections 120.569, 120.57(1), and 435.07, Florida Statutes (2016).

Eligibility for Tuition Waiver

23. Petitioner seeks a tuition waiver for the children based on their classification as special needs children.

24. The rule that addresses eligibility for a tuition waiver, Florida Administrative Code Rule 65C-16.012(6), underwent modifications that took effect on July 7, 2016. It now provides:

(6) Tuition Waiver. Children who were in the custody of the Department and who were adopted from the Department after May 5, 1997, are eligible for an exemption of undergraduate college tuition fees at Florida universities or community colleges as stated in section 1009.25, F.S.

25. Whether the children were "adopted from the Department" is a critical issue in this proceeding.

26. Rule 65C-16.001(3) defines "adopted from the department" and provides:

(3) "Adopted from the Department" means a child permanently committed to the custody of the Department for the purpose of adoption and has been adopted by parents who have an approved home study by the Department.

27. Petitioner seeks a tuition waiver for the children. Because she is seeking affirmative relief, Petitioner has the burden of demonstrating the children's entitlement to a tuition waiver by a preponderance of the evidence. See Dep't of Banking & Fin. v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996) (The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue.); see also § 120.57(1)(j), Fla. Stat.

28. Petitioner did not introduce any evidence to demonstrate that the children were adopted from the Department.

29. To prove the children are entitled to a tuition waiver, Petitioner must demonstrate by a preponderance of the evidence that the children were: 1) in the custody of the Department; and 2) adopted from the Department.

30. The order terminating parental rights clearly states that the children were permanently committed to Florida Home Study for the purposes of subsequent adoption. The order further indicated that the Department only maintained protective supervision until the adoption. Thus, the children were not in the custody of the Department, but rather they were in the permanent custody of Florida Home Study for purposes of adoption. Petitioner did not meet the first requirement to prove entitlement to a tuition waiver.

31. Similarly, the children were not adopted from the Department. To demonstrate the children were adopted from the Department, Petitioner must present evidence that: 1) the children were permanently committed to the custody of the Department for purposes of adoption; and 2) the children have been adopted by parents who have an approved home study by the Department.

32. For the reasons discussed in paragraph 28 above, Petitioner did not demonstrate that the children were

permanently committed to the Department for purposes of the adoption. Petitioner also did not present evidence to prove by a preponderance of the evidence that she had an approved home study by the Department. Instead, Petitioner had the home study completed by Florida Home Study. Thus, Petitioner failed to demonstrate the children were adopted from the Department.

33. For the reasons set forth above, Petitioner did not meet her burden to demonstrate that the children are entitled to a tuition waiver. Petitioner did offer persuasive evidence that the children were in the custody of the Department (at the time of adoption) and adopted from the Department.

34. Petitioner argues that the version of rule 65C-16.012 in effect at the time of Petitioner's intervention in the dependency case should apply here.^{2/} However, the undersigned is not persuaded by Petitioner's argument.

35. Because a final order has not yet been issued for Petitioner's request for a tuition waiver, Petitioner's request is governed by current law. See Ag. for Health Care Admin. v. Mt. Sinai Med. Ctr., 690 So. 2d 689, 691 (Fla. 1st DCA 1997) (agency must apply law in effect at the time it makes its final decision).

36. Thus, Petitioner did not prove the children are entitled to a tuition waiver.^{3/}

Timeliness of Request for Final Hearing

37. Under section 120.569(1), "[u]nless waived, a copy of the [proposed agency action] shall be delivered or mailed to each party or the party's attorney of record at the address of record."

38. Unless otherwise provided by law, persons seeking a hearing regarding an agency decision shall file a petition for hearing with the agency within 21 days of receipt of the agency's written notice. See Fla. Admin. Code R. 28-106.111(2). Any person who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters. See Fla. Admin. Code R. 28-106.111(4). A request for hearing that has been untimely filed shall be dismissed. See § 120.569(2)(c), Fla. Stat.

39. Petitioner asserts that her attorney represented her before the Notice was sent to Petitioner and the representation was acknowledged by attorney for Respondent. However, the request for hearing was the only evidence in this proceeding that demonstrates a written notice of appearance establishing Petitioner's attorney as the attorney of record and was not filed until January 23, 2017. Petitioner did not demonstrate that her attorney was the attorney of record at the time the tuition waiver was denied, and, therefore, Respondent was not required to serve the attorney with the Notice.

40. Respondent failed to timely request a hearing to dispute the denial of tuition waiver by filing her request nine days late. Therefore, pursuant to section 120.569(2)(c), Respondent's petition for hearing must be dismissed. See e.g., Cann v. Dep't of Child. & Fam. Servs., 813 So. 2d 237 (Fla. 2d DCA 2002) (request for administrative hearing untimely filed where request filed with Department one day late); and Whiting v. Fla. Dep't of Law Enf., 849 So. 2d 1149 (Fla. 5th DCA 2003) (dismissal of employee's administrative appeal from notice of final agency action upheld where appeal was filed one day late).

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 dismissing Petitioner's request for an administrative hearing as untimely filed.

DONE AND ENTERED this 7th day of July, 2017, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of July, 2017.

ENDNOTES

^{1/} Section 409.166 provides in pertinent part:

(2) DEFINITIONS.—As used in this section,
the term:

(a) "Special needs child" means:

* * *

e. A member of a sibling group of any age,
provided two or more members of a sibling
group remain together for purposes of
adoption;

^{2/} Rule 65C-16.012 (7), regarding tuition waiver states,
"Children who were in the custody of the department and who were
adopted after May 5, 1997 are eligible for an exemption of
undergraduate college tuition fees at Florida universities or
community colleges as stated in Section 1009.25, F.S."

^{3/} The undersigned is aware that adhering to the plain language
of rule 65C-16.012 mandates a result not favored by Petitioner
and may be contrary to legislative intent to make adoption
assistance available to families who adopt a child in the
State's foster care system. However, unless or until a
promulgated rule is repealed or invalidated in a rule challenge,
the Department is required to enforce its own rules. See, e.g.,
Marrero v. Dep't of Prof'l Reg., 622 So. 2d 1109, 1112 (Fla. 1st
DCA 1993) ("the [agency] is bound to comply with its own
rules until they have been repealed or otherwise invalidated
. . . .").

COPIES FURNISHED:

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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.