

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JENNIFER GARCIA,

Petitioner,

vs.

Case No. 20-1337

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings for final hearing on June 15, 2020, by video teleconferencing via Zoom.

APPEARANCES

For Petitioner: Ginger Barry Boyd, Esquire
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For Respondent: Susan Sapoznikoff, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Petitioner has provided clear and convincing evidence of rehabilitation from her disqualifying offense; and, if so, whether Respondent abused its discretion in denying Petitioner's request for an exemption from disqualification from employment as a Medicaid provider.

PRELIMINARY STATEMENT

By letter dated December 20, 2019, the Agency for Health Care Administration ("AHCA") notified Petitioner Jennifer Garcia ("Petitioner" or "Garcia") that her "request from disqualification from employment and/or from enrollment as a Medicaid provider under Section 435.07, Florida Statutes, is DENIED." Petitioner timely protested the denial and requested an administrative hearing.

On March 11, 2020, AHCA transmitted Petitioner's letter to the Division of Administrative Hearings ("DOAH"), and the undersigned was assigned to hear the case. After a continuance for good cause, the final hearing was heard on June 15, 2020, as rescheduled.

On June 9, 2020, the parties filed a Joint Pre-hearing Stipulation in which they identified stipulated facts for which no further proof would be necessary, and the relevant facts stipulated therein are accepted and made part of the Findings of Fact below.

At the hearing, Petitioner presented the testimony of six witnesses: Dr. Laviniu Anghel; Jeremy Kroll; Erik Stuehrenberg; Dr. Mitchell E. Spero; Kelly Goff; and herself. Petitioner's Exhibits 1 through 12 were received into evidence without objection. Respondent presented the testimony of one

witness: Vanessa Risch. Respondent's Exhibits 1 through 11 were received into evidence without objection.

On June 23, 2020, the parties filed a Supplement to Joint Pre-hearing Stipulation, stipulating to Samantha Heyn's ("Heyn"), AHCA's unit manager of the Background Screening Unit, testimony by stipulated facts instead of live testimony. Heyn's testimony is accepted by the undersigned, and the relevant facts are made part of the Findings of Fact below.

The proceeding of the hearing was recorded by a court reporter and transcribed. A two-volume Transcript of the hearing was filed at DOAH on July 2, 2020. The parties each filed a timely proposed recommended order, which has been considered by the undersigned in the preparation of the Recommended Order.

Unless otherwise indicated, all statutory references are to Florida Statutes (2019).

FINDINGS OF FACT

1. AHCA is the state agency charged with protecting vulnerable persons such as Medicaid recipients and the Medicaid program, and in that capacity, it maintains discretion to approve or deny requests for exemption.

2. Petitioner is a licensed advanced practice registered nurse ("APRN") and a certified nurse midwife who provided obstetric and gynecological care to Medicaid patients in Broward County, Florida, until she was disqualified from the Medicaid program.

3. Petitioner is seeking to continue to provide obstetric and gynecological care to Medicaid recipients. She has a passion for working with obstetric Medicaid patients and wants to provide them the same opportunity for care as non-Medicaid patients.

AHCA'S ACTION

4. Petitioner applied for re-enrollment in the Medicaid program. After completing Petitioner's background screening, Petitioner's May 22, 2018, disqualifying felony criminal arrest and charge of larceny was identified.

5. On February 4, 2019, by letter, AHCA informed Petitioner that the May 22, 2018, larceny offense disqualified her from working for a Medicaid healthcare provider, but that she could apply for an exemption.

6. Petitioner self-reported her May 22, 2018, arrest to the Department of Health. On April 4, 2019, by letter, the Department of Health closed Petitioner's case after an investigation without taking any disciplinary action against Petitioner's license for the arrest.

7. On July 31, 2019, Petitioner applied to AHCA for a Medicaid exemption. On October 15, 2019, AHCA closed Petitioner's July application after Respondent determined the application was incomplete.

8. That same month, Petitioner resubmitted the request for exemption from disqualification, which included the exemption application and supporting documentation ("exemption package").

EXEMPTION PACKAGE

9. In Petitioner's exemption package, she listed her work history, which included the following employment: OB Hospitalist Group, from October 2017 to May 2019; First Class OBGYN, from June 2018 to present; Unified Medical Group, from October 2015 to October 2017; and Global OBGYN, from January 2013 to August 2018.

10. Petitioner completed the education and training section of her exemption package by providing the answers that she had a master's degree, completed training to become an APRN and a certified nurse midwife at Frontier University from 2009 to 2011, and provided her license number APRN 09190212.

11. Petitioner also included a signed letter detailing her December 7, 2004, charge of permitting an unauthorized person to drive from Columbia

County, Florida. She explained in the letter that she was charged after her brother drove her car while she was at work and had a fatal head on collision that claimed both his life and the other driver's.

12. In Petitioner's exemption package, she included court records and dispositions for the following three criminal offenses: a 2004 misdemeanor, permit unauthorized person to drive, offense for which she successfully completed the six months' probation after she paid her fines; a 2018 third-degree grand theft charge that was reduced to a misdemeanor petit theft when Petitioner pled to the offense; and a 2018 municipal ordinance petit theft charge that was dismissed.

13. Petitioner also submitted letters of reference to support her application. The first letter dated August 23, 2019, was from Dr. Mitchell Spero ("Dr. Spero"), Petitioner's treating psychologist. Dr. Spero stated in his letter that Petitioner had suffered traumatic events, she attended 27 individual psychotherapy sessions with him since June 18, 2019, and Garcia would not "ever again steal or demonstrate any negative behaviors worthy of any legal involvement."

14. The other letters supporting Petitioner's application summarized how well-respected and knowledgeable Petitioner is in the profession as an APRN. Syed Rodriguez's letter outlined how she has known Petitioner for over ten years, as Petitioner served as her preceptor. In her letter, she acknowledged Petitioner's mistakes, but stated that the "medical profession needs more caring individuals like her" and that, "if given the opportunity, she can prove only excellence."

15. Another letter included in the exemption package was from Deline Somoza who grew up with Petitioner and referred to her as an amazing friend, mother, doctor, daughter, and, best of all, caretaker of anyone in need.

16. Christina Kopingon, who worked with Petitioner for three years, stated in her letter in the exemption package that Petitioner "was an asset to

our team and exhibited all the qualities necessary to safely and competently perform her role as a hospitalist certified nurse midwife.”

17. The fifth letter Petitioner included in her exemption package was from Angela Melendez, who detailed how she worked with Petitioner for four years. She described Petitioner as knowledgeable, provides excellent patient care, skillful, and someone who she would trust “with my children as well as my own life.”

TELEPHONIC EXEMPTION HEARING

18. On December 18, 2019, as part of the exemption application process, Petitioner participated in an approximately 33-minute telephonic exemption hearing (“interview”) with Kelley Goff (“Goff”), a health services and facilities consultant at AHCA in the Background Screening Unit. During the interview, Garcia was honest about all her encounters with the law. Petitioner even offered to discuss her case that was expunged¹ but Goff stopped Garcia and told her she did not have to because AHCA did not consider expunged cases, only sealed cases.

19. In the interview, Petitioner explained the three criminal offenses Goff questioned her about. Garcia explained that the December 7, 2004, incident was when her brother took her vehicle while she was at work and had an accident that killed both him and the person in the other car he hit. Petitioner told Goff that because the vehicle was registered in her name, she was charged with permitting an unauthorized person to drive. She disposed of the case after going to court, and, under the advisement of a public defender, she accepted a plea to probation.

20. Petitioner also admitted to Goff during the interview that she committed the larceny case on May 22, 2018. Petitioner explained to Goff

¹ At hearing and in its proposed recommended order, AHCA asserts that Petitioner opened the door to explore Petitioner’s expungement case. The undersigned is not persuaded by AHCA’s position. During Petitioner’s interview, Goff specifically stopped Petitioner from discussing expungement and informed Petitioner that AHCA would not be considering any expungement in her case. Hence, expungement is a nonissue in this matter to which the undersigned cannot deliberate.

that the case came about when she confessed that she had previously stolen scallops, steak, two laptops, and a raincoat when apprehended at Costco for stealing clothing on May 19, 2018, and that is how Costco was able to charge her with both cases. Petitioner told Goff that the disposition of the cases included the municipal ordinance case being dismissed and she pled to the larceny case that was amended to petit theft with one year's probation and restitution of \$1,198.00, which she paid back, and her probation was terminated early.

21. During the interview, Petitioner also showed remorse and explained to Goff three separate times that she had made poor decisions to steal and that, obviously, there was no excuse for her actions. She told Goff she was very disgusted with her decisions. Petitioner described how she had a patient that died in her arms, which killed her soul and really hurt her, and she started making poor decisions and, unfortunately, stealing was one of them. Petitioner told Goff that she has been in counseling for it all and has learned how to deal with her stress now. Petitioner conveyed to Goff that seeing Dr. Spero has been an amazing help for her to understand how to deal with the trauma that has gone on in her life. Petitioner specified that in addition to her brother dying from the accident, and the patient dying in her arms, she had seven losses in ten years, including her mother who had died two and one-half years ago from suicide. She explained in the interview that she had never stopped going to counseling with Dr. Spero and was still currently in counseling because it "helps me."

22. Petitioner also told Goff how she had started a women's support group, which focused on postpartum depression. She explained that the group meets on third Thursdays to discuss issues and listen, so the women will not feel alone.

23. After the telephonic interview and discussion, AHCA denied Petitioner's request for an exemption by letter dated December 20, 2019. The letter provided the following grounds for the denial:

[Agency] has considered the following factors including but not limited to:

- the circumstances surrounding the criminal incident for which an exemption is sought;
- the time period that has elapsed since the incident;
- the nature of the harm caused to the victim;
- a history of the employee since the incident; and any other evidence or circumstances indicating that the employee will not present a danger if continued employment is allowed; and found that you have not provided clear and convincing evidence of your rehabilitation as required by Florida Law.

24. Although Heyn, AHCA's unit manager for the Background Screening Unit, played no role in reviewing Petitioner's application, the interview, recommending or making the decision to deny Petitioner's exemption, Heyn signed the form denial letter and sent it to Garcia at the direction of AHCA's secretary. AHCA's secretary also did not make the decision to deny Petitioner's exemption.

25. Subsequently, on February 11, 2020, Petitioner requested an administrative hearing contesting her denial.

HEARING

26. At hearing, Dr. Laviniu Anghel ("Dr. Anghel") testified that Petitioner has been employed with him as a mid-wife since 2016. He credibly explained that Petitioner is one of his best employees and that he had no concerns regarding her work performance. Dr. Anghel pointed out that Petitioner is even one of the most highly rated providers in his practice on social media. Dr. Anghel testified that he retained Petitioner at his office as an employee even though she is unable to treat Medicaid patients because of her disqualification.

27. Dr. Anghel stated that Petitioner told him about her 2018 arrest, and he was surprised because he did not expect her to steal out of a store. He also

testified Petitioner has access to all types of things with his two practices, but she has never stolen from him and he trusts her like a sister. Dr. Anghel further testified that Petitioner told him she regretted stealing.

28. At hearing, Jeremy Kroll (“Kroll”), Petitioner’s criminal defense attorney, also testified. He explained that he initially represented her on the notice to appear case, but there was an ongoing investigation regarding Petitioner’s incident on May 7, 2018, and he ended up representing her on both cases. He explained that the notice to appear, Case 2018-1031M030A, was a municipal case brought by the Town of Davie, charging Petitioner with a misdemeanor of petit theft for stealing four pairs of shorts, two pairs of shoes, and some t-shirts from Costco, to which all the items were recovered. Kroll told how the Town of Davie’s prosecutor dropped the municipal case on July 16, 2018, after Petitioner successfully completed the terms of her pre-trial diversion program that required Petitioner to pay a \$350.00 fine and continue ongoing treatment with Dr. Spero.

29. Kroll also testified about Petitioner’s disqualifying offense case he handled. He affirmed Petitioner’s interview explanation with Goff, and Kroll testified that when Petitioner received the notice to appear for the municipal case, Costco went back through store footage from May 7, 2018, and discovered Petitioner stole two laptops. Petitioner was arrested and turned herself in on May 22, 2018, for the third-degree felony grand theft charge. Kroll confirmed Petitioner’s interview that Petitioner pled to a lesser offense of misdemeanor theft, was placed on 12 months of probation, paid the restitution for the two laptops, and continued her psychotherapy with Dr. Spero. Kroll testified that Petitioner immersed herself in therapy with Dr. Spero and received support from Erik Stuehrenberg (“Stuehrenberg”) and his wife. She was also remorseful from day one and took full responsibility for her actions. He described Garcia as having a “true desire to avoid any sort of future conduct even remotely close to [the thefts].”

30. Kroll credibly acknowledged that significant trauma in Petitioner's background played a role in her actions as she had explained in her interview. Kroll detailed some of the traumatic incidents, such as the accident where she broke 21 bones in her back, and had to learn to walk again, and her pregnancy loss in 2013 as a result of domestic violence. He further explained that he provided a letter to the prosecutor from Dr. Spero with Petitioner's forensic evaluation. Kroll stated he believed that "the State Attorney's Office, to their credit, recognized as sort of a trigger, she lost as part of her job as a midwife, she lost one of the mothers that delivered and then lost her own mother almost one after another" and that the theft was a cry for help.

31. Kroll also testified, as Petitioner had explained to Goff in her interview, that "there was a period of time where Garcia was so committed to her patients and to her livelihood that she wasn't as committed to keeping herself healthy as she should have, and I think she regained that balance as part of this whole process."

32. At hearing, Stuehrenberg, a Davie police officer, testified that he helped Petitioner through the criminal process after she told him about the 2018 theft. He testified that he was shocked by her arrest. However, Petitioner was remorseful, admitted she made a mistake, and asked for help.

33. Stuehrenberg made clear that Petitioner noticed things were going on in her life that triggered her, and she took the necessary steps to address her problems. Stuehrenberg explained that he sent her to Dr. Spero to talk about the things going on in her life because he knew the doctor would help her sort things out since he was familiar with Dr. Spero's capabilities, and since he had visited him on occasion for help. He also explained how he and his wife served as a support system to help Petitioner.

34. Goff also testified at the hearing that she has no formal training processing applications but has processed numerous applications over the years that her supervisors had reviewed and approved. Goff explained that

she was assigned Petitioner's application and she follows the statutes and rules when processing an application. Goff also explained that an application starts the review process for an exemption.

35. Goff testified about Petitioner's interview and reviewed the limited handwritten notes she had taken from the 33-minute interview. Goff testified that the only thing in Petitioner's background that might have concerned her is the 2018 arrest, but "it's not up to me to make that decision." She testified that Mary Mayhew, AHCA's secretary, decides the exemptions.

36. Goff also addressed her Exemption Decision Summary ("summary") that she created after the interview and it became part of Petitioner's application file that was forwarded for review when determining Petitioner's exemption application. Goff testified that when addressing Petitioner's criminal offenses, she summarized the three offenses.

37. The summary contained errors, lacked details, and page 1 contained identical answers to the Exemption Decision Summary dated October 15, 2019, when Petitioner's first case was closed.²

38. Goff admitted at hearing that she failed to specify on the summary that the 2004 arrest was neither a disqualifying offense nor that the May 19, 2018, municipal charge was dismissed. Goff also testified that she failed to note that Petitioner was currently employed, had healthcare training, or was licensed on page 1 of the summary, even though Petitioner had provided the correct information on her application regarding her employment with First Class OBGYN, training, and licensure status as a certified nurse midwife.

39. At hearing, Dr. Spero testified about Petitioner's care, diagnosis, and treatment. He credibly discussed Petitioner's psychological evaluation.³ Dr. Spero explained that he began treating Petitioner on June 18, 2018. He acknowledged she had informed him about two thefts within a 12-day period in May 2018. Even though Dr. Spero could not remember specifically what

² Resp.'s Ex. 2.

³ Pet.'s Ex. 11.

was stolen, he testified that the other theft was “also from Costco involving two laptop computers.”

40. Dr. Spero explained, as part of his psychology practice, he evaluates individuals to determine whether they have been rehabilitated. Dr. Spero testified that he performed a lot of psychological testing to gain insight and direction for Petitioner’s treatment. He determined she was depressed, anxious, had suffered post-traumatic stress disorder several times, and had emotional issues. Dr. Spero summarized some of Petitioner’s events that led to her trauma, including an abusive relationship and numerous losses including a brother, mother, grandmother, stepsister, best friend, and boyfriend. He also concluded that Petitioner’s level of stress exacerbated when she lost a patient because of an embolism and Petitioner’s actions of stealing during the 12-day period were isolated incidents of behavior, out of her character, based on triggered events. Dr. Spero testified that he tested Petitioner multiple times and she does not have a propensity to steal, but the level of stress of loss, including her mother, who committed suicide; grandmother; her stepsister, who overdosed; and the loss of a patient traumatized her and caused the behavior.

41. Dr. Spero also credibly confirmed that Petitioner was still in treatment with him at the time of the hearing and he believes that she is “without any hesitation 100 percent rehabilitated” because he has taught her to deal with her trauma and stress.

42. Petitioner also testified at hearing and explained that she worked at First Class OBGYN full time since 2018, and was a licensed healthcare worker, as she had put on her application. She explained that she had worked at Bethesda Memorial East, but stopped working there after she was disqualified from working with Medicaid patients.

43. At hearing, Petitioner admitted getting caught leaving the Costco after she stole shorts, shirts, and shoes in May 2018, as she had told Goff during the interview. Petitioner credibly explained that while being questioned by

the Costco employee that apprehended her, she confessed to also previously stealing laptops, scallops, steak, and a rain jacket, which she was later arrested for and charged with a felony. She testified that she was never charged for taking all the items like the scallops and steak and verified that she turned herself in on the felony charge and spent a night in jail, which she felt was eye awakening and not a “life that I could ever, ever want to live.”

44. Petitioner credibly and persuasively explained that 2018 was a traumatic year for her after she lost her first patient. She testified about how she felt guilt about the patient’s death and grieved after her death. Petitioner conceded that she was not in a good place mentally after the death.

45. Petitioner further testified that she contacted Stuehrenberg and told him what she had done, and he told her to go to Dr. Spero, a licensed professional, for help. Petitioner described how she started seeing Dr. Spero in June 2018 and was still having individual counseling with him as of the date of the hearing. Petitioner pays for each visit. She elaborated how Dr. Spero has helped her tremendously and she has been able to forgive herself, gotten better, and found methods to deal with stress.

46. Petitioner also testified that she started a women’s postpartum depression group as she had discussed in her interview with Goff. She explained that women need someone to talk to and by her being in a domestic altercation when she was pregnant and losing her son at 15 weeks after being hurt badly, she understood the group’s needs and thought she could help them. She founded the women’s group to provide an outlet for release for women who might need it.

47. Petitioner also credibly testified that she has volunteered for about five years with Power Buddies, an organization that helps disabled individuals compete in marathons by pushing them in strollers. She explained that she could relate to the kids because she was hit by a drunk driver and fractured 21 bones, had a head injury, and had to learn to walk

again, so it is rewarding to her when she pushes the competitors over the finish line in their strollers.

FINDINGS OF ULTIMATE FACT

48. Upon careful consideration of the entire record, it is determined that Petitioner has demonstrated by clear and convincing evidence that she is rehabilitated from her misdemeanor disqualifying offense of petit theft and that she will not present a danger to the Medicaid patients with whom she would have contact with as a certified nurse midwife.

49. Petitioner has shown that she is a responsible individual by successfully holding jobs in the healthcare field as a certified midwife handling prenatal visits, gynecological visits, labor, and postpartum care and treatment for more than seven years without incident, and as a nurse prior to that. All her employment has been in positions where she cared for patients, and no evidence was presented that Petitioner was a danger while doing so.

50. Petitioner's current supervisor, Dr. Anghel, corroborated Petitioner's exemplary work record. Also, the compelling letters⁴ show, by all accounts, Petitioner is well-respected, knowledgeable, caring, the best caretaker, an asset, excellent, and skilled in her field.

51. Petitioner was honest and forthright at hearing. Petitioner demonstrated by credible and compelling evidence that she had a traumatic ten years comprised of, among other events, the following: an accident where she had to learn to walk again; and seven close deaths, including her brother who died in a fatal car accident where Petitioner was charged with the offense, her mother who committed suicide, grandmother, stepsister who overdosed, and the death of her first patient, who died while in her care. Petitioner was not able to hold it together any longer after her first patient died in her arms in 2018, and Petitioner's trauma caused her to function in an unhealthy mental state.

⁴ Resp.'s Ex. 7.

52. Petitioner's traumatic state triggered out-of-character behaviors, including stealing out of Costco twice during a 12-day period in May 2018. Those who knew Petitioner well, such as Stuehrenberg and Dr. Anghel, were shocked and surprised by Petitioner's actions. Petitioner was immediately remorseful by her behavior and sought help from Dr. Spero in June 2018.

53. Petitioner's municipal ordinance case was dismissed, and her sole disqualifying offense of larceny was reduced to a misdemeanor petit theft after the prosecutor was provided Dr. Spero's letter documenting Petitioner's trauma. Petitioner successfully completed her 12-month probation early by paying restitution and complying with the terms.

54. After evaluating Petitioner, Dr. Spero taught Petitioner how to deal with trauma and stress at the one-on-one counseling sessions. Even after Petitioner's criminal case was over and prior to applying for an exemption, Petitioner continued to pay and voluntarily attend counseling with Dr. Spero because she recognized the benefits of the treatment. Petitioner has worked hard to address her issues and get her mental health together. Petitioner has complied with her psychological treatment, adhered to the recommendations of Dr. Spero, and continued to obtain psychotherapy through the date of the hearing, which comprised a period of over two years. Petitioner has demonstrated a genuine commitment to improving her life and that she has been rehabilitated.

55. Additionally, Petitioner's application package that was forwarded to the decision-maker to make a determination on her exemption request was not completely accurate. The summary contained errors and lacked complete details such as: Petitioner's lengthy successful professional career in the healthcare field was left off page 1 of the summary, which states "No Employment History"; the summary failed to identify Petitioner's sole disqualifying offense, a misdemeanor petit theft; lists the municipal charge on page 1 without indicating a dismissal disposition; page 2 of the summary fails to distinguish disqualifying and non-disqualifying offenses; and neither

the permitting unauthorized person to drive offense nor the municipal ordinance offense are identified as non-disqualifying offenses.

56. Petitioner is also active in her community with the women’s support group she founded and Power Buddies.

57. For these reasons, it is determined that no reasonable individual, upon fully considering the record in this proceeding, could find that Petitioner is not rehabilitated.

CONCLUSIONS OF LAW

58. DOAH has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57, Florida Statutes.

59. Because Petitioner pled to a misdemeanor petit theft, which was reduced from a felony larceny, she is disqualified from employment as a Medicaid provider unless granted an exemption by AHCA pursuant to section 435.07.

60. Section 435.07 provides, in pertinent part:

Exemptions from disqualification.—Unless otherwise provided by law, the provisions of this section apply to exemptions from disqualification for disqualifying offenses revealed pursuant to background screenings required under this chapter, regardless of whether those disqualifying offenses are listed in this chapter or other laws.

(1)(a) The head of the appropriate agency may grant to any employee otherwise disqualified from employment an exemption from disqualification for:

* * *

2. Misdemeanors prohibited under any of the statutes cited in this chapter or under similar statutes of other jurisdictions for which the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court;

3. Offenses that were felonies when committed but that are now misdemeanors and for which the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court;

* * *

(3)(a) In order for the head of an agency to grant an exemption to any employee, the employee must demonstrate by clear and convincing evidence that the employee should not be disqualified from employment. Employees seeking an exemption have the burden of setting forth clear and convincing evidence of rehabilitation, including, but not limited to, the circumstances surrounding the criminal incident for which an exemption is sought, the time period that has elapsed since the incident, the nature of the harm caused to the victim, and the history of the employee since the incident, or any other evidence or circumstances indicating that the employee will not present a danger if employment or continued employment is allowed.

(b) The agency may consider as part of its deliberations of the employee's rehabilitation the fact that the employee has, subsequent to the conviction for the disqualifying offense for which the exemption is being sought, been arrested for or convicted of another crime, even if that crime is not a disqualifying offense.

(c) The decision of the head of an agency regarding an exemption may be contested through the hearing procedures set forth in chapter 120. The standard of review by the administrative law judge is whether the agency's intended action is an abuse of discretion.

61. Pursuant to this statute, Petitioner, as an applicant for an exemption, must demonstrate her rehabilitation by clear and convincing evidence. *J.D. v. Dep't of Child. & Fams.*, 114 So. 3d 1127, 1131 (Fla. 1st DCA 2013) (“[T]he ultimate issue of fact to be determined in a proceeding under section 435.07

is whether the applicant has demonstrated rehabilitation by clear and convincing evidence.”).

62. The clear and convincing standard of proof is a heightened standard and has been described by the Florida Supreme Court as follows:

Clear and convincing evidence requires that evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier-of-fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also *In re Henson*, 913 So. 2d 579, 590 (Fla. 2005).

63. When Petitioner demonstrates rehabilitation, then it must be determined whether the agency abused its discretion when it initially determined it would deny the exemption. The abuse of discretion standard of review set forth in section 435.07(3)(c) has been described as follows:

If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); *Kareff v. Kareff*, 943 So. 2d 890, 893 (Fla. 4th DCA 2006) (holding that pursuant to the abuse of discretion standard, the test is “whether any reasonable person” could take the position under review).

64. In determining whether the Agency’s intended action is an abuse of discretion, the First District Court of Appeal has held that:

[A]lthough the ultimate legal issue to be determined by the ALJ in a proceeding under section 435.07(3)(c) is whether the agency head's intended action was an "abuse of discretion," the ALJ is to evaluate that question based on the facts determined from the evidence presented at a de novo chapter 120 hearing.

J.D., 114 So. 3d at 1132. As a result, the agency's initial decision is viewed in light of evidence that the agency did not have the benefit of considering.

65. For the reasons discussed above in the Findings of Fact, the evidence shows Petitioner met her burden and proved her rehabilitation, clearly and convincingly, with substantial evidence that was not available to AHCA when formulating its intended action to deny Petitioner's exemption request.

66. Notably, the concerns expressed by AHCA in the December 20, 2019, denial letter are put to rest by the credible, clear, and convincing live testimony of Petitioner, Dr. Spero, Kroll, and Dr. Anghel that the undersigned heard at hearing to which AHCA was not privy. Dr. Spero's candid and persuasive testimony and Petitioner's Exhibit 11 clarified the circumstances of Petitioner's trauma and level of stress that caused Petitioner to act out and steal. Dr. Spero also provided details of Petitioner's treatment, described her remorse, explained her rehabilitated state, and opined she would not steal again. Kroll candidly disclosed that Costco was the victim of Petitioner's offense, not a person, and that Petitioner made full restitution early for the offense. Additionally, Dr. Anghel credibly confirmed that Petitioner is competent in the health field and he has allowed her to successfully perform her certified nurse midwife duties on non-Medicaid patients in his practice without incident or posing a threat since she has been disqualified. Furthermore, the credible testimony at hearing also refuted the inaccurate errors and lack of details in the summary. With the benefit of Petitioner's Exhibit 11 and all the hearing testimony, much of which was not available to the decision-maker when the original decision was made, it

would be an abuse of discretion under the specific circumstances of this case to deny Petitioner the exemption from disqualification that she seeks.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Agency for Health Care Administration, enter a final order granting Petitioner, Jennifer Garcia's, request for an exemption from disqualification as a Medicaid provider.

DONE AND ENTERED this 14th day of August, 2020, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of August, 2020.

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(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.