

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

GARNETT BOWE,

Petitioner,

vs.

Case No. 20-4379

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes,¹ before Administrative Law Judge ("ALJ") Cathy M. Sellers of the Division of Administrative Hearings ("DOAH") on December 15, 2020, Zoom Conference.

APPEARANCES

For Petitioner: Garnett Dwayne Bowe, pro se
2208 Avenue East
Fort Pierce, Florida 34950

For Respondent: Katie Jackson, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 7
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

Whether Petitioner has demonstrated, by clear and convincing evidence, that he is rehabilitated from his disqualifying offenses, and if so, whether Respondent would abuse its discretion in denying his request for an exemption from disqualification from employment.

¹ All references to Florida Statutes are to the 2020 codification.

PRELIMINARY STATEMENT

By letter dated February 21, 2020, Respondent, Agency for Health Care Administration, notified Petitioner, Garnett Dwayne Bowe, that his request for an exemption from disqualification from employment in a position of trust was denied. The letter stated, in pertinent part:

In evaluating your application, [AHCA] 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[.]

On March 12, 2020, Petitioner requested a hearing challenging the denial of his exemption request. On October 1, 2020, the matter was referred to DOAH for assignment of an ALJ to conduct a hearing. Following a telephonic status conference, the final hearing was scheduled for December 1, 2020, by Zoom Conference. Subsequently, the final hearing was rescheduled for December 15, 2020, by Zoom Conference.

The final hearing was conducted on December 15, 2020. At the final hearing, Petitioner testified on his own behalf and presented the testimony of Barry Mitchell, Arthur Lewis Baker, Dean Mosley, and David Cook. Petitioner's Composite Exhibit 1 was admitted into evidence without objection. Respondent presented the testimony of Vanessa Risch and Respondent's Composite Exhibit 1 was admitted into evidence without objection.

The one-volume Transcript was filed at DOAH on January 12, 2021. Petitioner timely filed his Letter Regarding Disqualification, which has been

treated as his proposed recommended order, on January 5, 2021. Respondent timely filed its proposed recommended order on January 22, 2021. Both post-hearing submittals have been duly considered in preparing this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner is a 62-year-old male who seeks an exemption from disqualification from employment from positions that require compliance with level II background screening requirements under section 435.04, Florida Statutes.

2. Specifically, Petitioner is seeking to become the owner and administrator of a facility that would provide housing and related services for persons who are in isolation due to having been infected with the virus that causes Covid-19. Because such facilities are subject to regulation by Respondent, pursuant to section 435.06, Petitioner is subject to the background screening requirements and restrictions of section 435.04 regarding his employment in positions of trust working with individuals who would be temporarily residing in such facilities.

3. Respondent is the agency responsible for conducting background screening under section 435.04 for persons seeking to become employed in a position of trust in connection with assisted living facilities, such as that sought to be established by Petitioner.

Evidence Presented at Final Hearing

4. As more fully discussed below, section 435.04(2) establishes a list of criminal offenses that are considered "disqualifying offenses" for purposes of disqualifying persons who have been convicted of, or pled nolo contendere to,

the listed offenses, from being employed in a position involving contact with vulnerable persons.²

5. Between 1992 and 2015, Petitioner was arrested 25 times. The competent substantial evidence establishes that Petitioner was convicted of, or pled nolo contendere to, six disqualifying offenses.

6. Petitioner's six disqualifying offenses are as follows: dealing in stolen property, in violation of section 812.019, Florida Statutes, committed on February 12, 1982; burglary and aggravated assault with a deadly weapon, in violation of sections 810.02 and 784.021, Florida Statutes, committed on November 18, 1992; possession of cocaine, in violation of section 893.13, Florida Statutes, committed on November 3, 1993; sale of cocaine, in violation of section 893.13, committed on November 3, 1998; and resisting officer with violence, in violation of section 843.01, Florida Statutes, committed on November 3, 1998.

7. Petitioner was incarcerated for approximately 11 years, and was released from incarceration in or about 2009.

8. Although Petitioner has been arrested 11 times since he committed his last disqualifying offense in 1998, all but one of those arrests were disposed of by the criminal charges being abandoned, or by nolle prosequi, which means that the charges were dropped.³

9. Of the arrests subsequent to Petitioner's most recent disqualifying offense, the great majority of them stemmed directly from a difficult personal relationship in which Petitioner's then—now former—girlfriend would frequently call the police when they argued, resulting in Petitioner being

² "Vulnerable person" is defined in section 435.02 as a minor or a vulnerable adult. A "minor" is a person who has not attained the age of 18 years. § 1.01(13), Fla. Stat. A "vulnerable adult" is a person 18 years of age or older whose ability to perform the normal activities of daily living or provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging. § 415.102(28), Fla. Stat.

³ A nolle prosequi ends a criminal proceeding. *Wilkins v. State*, 90 So. 3d 305, 306 (Fla. 1st DCA 2012), citing *State v. Aguilar*, 987 So. 2d 1233, 1235 (Fla. 5th DCA 2008).

arrested. Importantly, a review of the documentation of these arrests reveals that all of the charges related to these incidents were dropped or abandoned. Petitioner testified, credibly, that his former girlfriend was incarcerated for filing false reports with police, and that he obtained an injunction requiring her to stay away from him. Importantly, Petitioner testified, credibly and persuasively, that he no longer is in a relationship with this individual.

10. It has been approximately six years since Petitioner's most recent arrest. He has completed all court-ordered requirements and has fully paid all related fines and fees.

11. Petitioner's only conviction since his most recent disqualifying offense was in May 2014, for possession of marijuana. At the final hearing, Petitioner testified, credibly and persuasively, that he was wrongfully charged with marijuana possession in connection with police having been called by neighbors to investigate him for burglary of his own dwelling. Petitioner credibly testified that he was counseled by his lawyer, Dean Mosley, not to contest the charges because if he went to trial and was convicted, he could be sentenced to a year in jail. Consequently, Petitioner pled guilty and was fined \$227.00, plus court costs. Mosley, who testified on behalf of Petitioner at the final hearing, confirmed Petitioner's testimony regarding this incident.

12. Petitioner obtained a bachelor's degree from Florida Agricultural and Mechanical University in 1983, and a technical degree in Computer and Engineering Technology from Tampa Technical Institute in 1984.

13. Petitioner also completed the adult congregate living facility Extended Congregate Care Program provided by the Department of Health and Rehabilitative Services, Respondent's predecessor agency, in 1995, and completed a course in HIV/AIDS exposure to bloodborne pathogens provided by Emergency Medical Consultants, Inc., in 1998.

14. Between 1994 and 1996, Petitioner served as co-administrator for Bowe's Retirement Home, Inc., a licensed assisted living facility owned and operated by his mother. Although he no longer is a co-administrator for this facility, he currently serves as its marketing executive.

15. Additionally, Petitioner owns and operates Bowes Restorative Care/Services, through which he provides transitional housing for persons who are homeless and HIV-positive, in conjunction with the Department of Health and the Mental Health Court of St. Lucie County, Florida. Petitioner's transitional housing facility was the first in the Treasure Coast region of Florida to be approved by the U.S. Veterans Administration, and provides a transitional residential facility setting for homeless veterans as they transition into an independent residential living arrangement. Petitioner has owned and successfully operated his transitional housing facility since 2011.

16. Petitioner testified, credibly, that he has not used drugs for at least 20 years, and that he does not drink alcohol.

17. Petitioner has applied for the exemption at issue in this proceeding because he desires to own and operate a Covid-19 isolation facility, which would provide transitional residential housing for persons who are isolating from others while recovering from Covid-19.

18. Petitioner also noted that he eventually would like to assume operation of his mother's retirement home business, and pass it on to his children to operate as a family business.

19. Petitioner submitted numerous character references and letters of recommendation prepared on his behalf to Respondent as part of his exemption application package.

20. Laura Saputo, a mental health court case worker with the Indian River County Sheriff's Office, wrote a character reference letter, dated March 10, 2020, on behalf of Petitioner. Saputo stated that in working in the community, Petitioner demonstrates empathy, compassion, caring, a strong positive belief system, and a true desire to assist people, all of which are vital

characteristics for helping those in need better their lives. She also stated that Petitioner works well with the Mental Health Court in Indian River County, has a great rapport with group home clients, and conducts himself in a calm, professional manner, even when dealing with difficult clients. Based on her experiences in working with Petitioner, Saputo stated that she has a great deal of faith in Petitioner and places her trust in him.

21. Karleen Russ, a mental health counselor, also wrote a letter of recommendation on behalf of Petitioner regarding his request for an exemption. Specifically, Russ stated that she has known Petitioner for many years and that, in her experience, he has always exhibited a professional demeanor, and character, and high moral standard as a mental healthcare provider; and that he has worked diligently with clients having serious and persistent mental health, substance abuse, geriatric, and criminal issues. She recommended that he be granted the approval necessary to enable him to continue his work in the community.

22. Daniel Bin, a certified behavioral health case manager, also wrote a letter of recommendation on behalf of Petitioner. Bin stated that he has worked with Petitioner in a professional setting, and that Petitioner exhibits preparation, skill in successfully completing complex tasks, follow-up efforts, dedication to perfection, professionalism, and a superb work ethic. He noted that any company would be improved by having Petitioner as an employee.

23. Eric Eschmann, a Florida registered professional guardian, wrote two letters of recommendation on Petitioner's behalf. Eschmann stated that Petitioner took on the responsibility of housing and caring, for five years, for a particularly high maintenance ward who received care due to mental incapacity, and that Petitioner accurately and proficiently manages the ward's diet, medications, appointments, and shopping, while assuring that the ward is well-fed; does not elope; does not harass or assault others; and is housed in a clean and safe environment. Bin also praised Petitioner's communication in keeping him (Bin) apprised of developments regarding the

ward requiring his attention, while proficiently handling the matters that do not require Bin's involvement. He highly recommended Petitioner for any role having to do with the management or care of persons requiring assistance.

24. Morgan Libbey, a court-appointed professional guardian and executive of the Public Guardianship Program of Indian River County, Inc., provided a statement that she has worked with Petitioner for approximately two years through her organization's client services program. She stated that Petitioner has provided excellent care and oversight of a ward of the court, and that in doing so, provided crucial services for the community, while demonstrating honesty and compassion for others.

25. Florida Representative Larry Lee, Jr., also wrote a character reference letter on Petitioner's behalf. Based on his more than 30 years of friendship with Petitioner, Lee described Petitioner as a very caring and committed person, determined to help others. He also noted that Petitioner "made choices that were not advantageous early in life," but that he had accepted responsibility for his mistakes and learned from them. Lee recognized and commended Petitioner for his work in the community, and appealed "to any organization that can assist him" to help him continue his work.

26. Colleen Barnes, a realtor with Sun Group Realty, Inc., wrote a character reference letter for Petitioner. She stated that she has known Petitioner in a professional capacity for approximately five years, and she characterized him as warm, compassionate, personable, highly motivated, and "capable of achieving any goal he sets his mind to." She commended him for his cool composure and confidence, which enables him to keep situations under control while working with many diverse personalities in his profession.

27. Petitioner also presented the testimony of three character witnesses at the final hearing.

28. Barry Mitchell, a certified public accountant who has been Petitioner's friend for over 60 years, testified at the final hearing and also wrote a letter

of recommendation that was included in Petitioner's application package. In his letter, Mitchell characterized Petitioner as being a caring, productive person who has "rolled up his sleeves and gone to work for the community" in caring for physically and mentally challenged persons in his home. He also noted that Petitioner works with his mother to assist her in operating her retirement living facility, and that he is a "thinker and a doer." At the final hearing, Mitchell testified that Petitioner is a hard-working, caring individual with a vision of making his community a better place. In Mitchell's view, Petitioner's talent, hard work, and potential to help his community far outweigh his criminal record, and he urged that Petitioner be granted the exemption, so that he can have the opportunity to contribute to his community in a healthcare provision setting.

29. Arthur Lewis Baker also testified at the final hearing on Petitioner's behalf. Baker is a certified peer recovery specialist who is employed with New Horizons, a community mental health and substance abuse provider, in St. Lucie County. Baker has known and worked with Petitioner for approximately four years in connection with placement, by the Indian River Mental Health Court, of clients in Petitioner's transitional residential facility. Baker testified that Petitioner has worked with extraordinary needs clients who have schizophrenia or bipolar disorder, and provides excellent, compassionate care for these individuals. Specifically, Baker testified that Petitioner always exhibits a calm demeanor when interacting with mental health clients, and ensures that they are well-fed, given their medications, taken to doctor's appointments, and are otherwise well-cared for.

30. Dean Mosley, an attorney who has personally known Petitioner for more than 40 years, testified at the final hearing and also wrote a character reference letter that was included in Petitioner's exemption application package. Mosley particularly noted Petitioner's sense of empathy; strong work ethic; extensive knowledge of assisted living facilities; and dedication to continuing, and ultimately operating, his mother's business.

31. Respondent did not present any competent substantial evidence showing that it considered Petitioner's character reference letters as part of its review and decision-making regarding Petitioner's application for exemption. To this point, Respondent's witness, Vanessa Risch, testified that she did not know whether Respondent considered or verified the references included in Petitioner's application in reviewing Petitioner's exemption request.⁴

32. Petitioner testified, credibly and persuasively, that he is very remorseful regarding his criminal offenses over the years. He presented compelling testimony to the effect that he understands and takes responsibility for his actions, and that he has taken substantial steps to change the circumstances in his life that led to him committing crimes. As more extensively discussed above, Petitioner's actions in successfully and safely operating a transitional residential facility while not having been arrested in six years, and not having been convicted of a crime in seven years, bear out Petitioner's testimony that he has changed his life.

33. Petitioner testified, credibly and persuasively, that he is committed to taking whatever actions are necessary to enable him to own and operate the Covid-19 isolation facility for which he seeks the exemption, including not committing criminal offenses. Importantly, Petitioner understands that if he were again to commit a criminal offense, any exemption that he may be granted could be revoked.

34. As Petitioner put it, he is asking for a second chance in order to be able to work in an area to which he is dedicated, and in which he has extensive knowledge and successful experience.

⁴ The pertinent testimony regarding Respondent's consideration of Petitioner's references as part of its decision-making process regarding his exemption request was as follows: "Q: Well, was that [considering and contacting Petitioner's character references] done, to your knowledge? A: I . . . I don't make the decision, I'm not sure."

Findings of Ultimate Fact

35. Upon consideration of the competent substantial evidence in the record, it is determined that Petitioner has demonstrated, by clear and convincing evidence, that he is rehabilitated from his disqualifying offenses.⁵

36. Under section 435.07(3)(a), matters that are relevant to demonstrating rehabilitation include 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, the history of the employee since the incident, and other evidence indicating that the employee will not present a danger if employment is allowed.

37. Additionally, under section 435.07(3)(b), the agency may consider, as part of its deliberations regarding an applicant's rehabilitation, arrests or convictions of the applicant subsequent to the conviction for the disqualifying offense, even if arrest or conviction is for a crime that is not a disqualifying offense.

38. As discussed above, it has been over 20 years since Petitioner committed his last disqualifying offense. Although Petitioner has been arrested multiple times since that disqualifying offense, all but one of those arrests resulted from a now-former girlfriend calling law enforcement during arguments with Petitioner, resulting in Petitioner being arrested. Crucially, the charges for each of those arrests were dropped. Petitioner has exhibited the sound judgment to extricate himself from that relationship, and since doing so, has not been arrested.

39. Moreover, his only conviction since his last disqualifying offense, for possession of marijuana, was the result of having pled guilty at the advice of counsel in order to avoid risking a potentially lengthy jail sentence.

40. Petitioner's conduct over the past six years since his last arrest is most probative in demonstrating that he is rehabilitated.

⁵ See *J.D. v. Dep't of Child. and Fams.*, 114 So. 3d 1127, 1131 (Fla. 1st DCA 2013)(whether an applicant for an exemption has demonstrated rehabilitation is an ultimate issue of fact).

41. Specifically, as discussed in detail above, Petitioner has successfully operated, for the past several years, a transitional residential facility for veterans and other individuals in need of a stable, caring environment while they transition into permanent living arrangements.

42. Importantly, Petitioner is currently engaged in *precisely* the kind of activity, in the same type of residential setting, in which he would continue to work if he is granted the exemption. That he has successfully worked with vulnerable individuals for several years, without any problems whatsoever, is strong evidence that Petitioner is rehabilitated and will not present a danger or threat to vulnerable individuals staying in his facility.

43. Furthermore, the fact that the Mental Health Court of Indian River County has placed individuals in Petitioner's care at his transitional residential facility is particularly strong evidence that Petitioner will not present a danger or threat to vulnerable individuals residing in his residential care facility. To this point, the fact that the *judicial branch*—which obviously is fully privy to the information regarding Petitioner's background—has deemed Petitioner sufficiently rehabilitated and trustworthy to place vulnerable individuals in his care constitutes compelling evidence that Petitioner is rehabilitated from his disqualifying offenses and will not present a danger to vulnerable individuals entrusted to his care.

44. As discussed above, Petitioner presented numerous character references, including letters from, and the in-person testimony of, persons who have worked with Petitioner regarding vulnerable individuals placed in Petitioner's facility through the mental health court program. To a person, each of these references attested to Petitioner's dedication, compassion, and trustworthiness in working with, and providing a safe, stable environment for, the individuals entrusted to his care.

45. Additionally, Petitioner presented the compelling, persuasive testimony of additional witnesses at the final hearing, further attesting to his

trustworthiness, diligence, compassion, energy, and dedication in providing a safe, stable transitional residential environment for vulnerable individuals.

46. Respondent did not present any competent evidence showing that it considered Petitioner's character reference letters in reviewing his request for an exemption, and it did not provide any specific evidence at the final hearing showing that, notwithstanding Petitioner's six-plus years of exemplary conduct during which he has successfully operated a facility in which he has provided care to vulnerable individuals placed in his facility by the court, he is not rehabilitated and, thus, may present a threat to vulnerable individuals such that his exemption request should be denied.

47. In sum, the competent, persuasive evidence clearly and convincingly establishes that Petitioner is rehabilitated from his disqualifying offenses such that he should be granted an exemption from employment disqualification in this proceeding.

CONCLUSIONS OF LAW

48. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding. §§ 120.569, 120.57(1), and 435.07, Fla. Stat.

49. Because Petitioner seeks to serve as the owner and operator of an assisted living facility regulated by Respondent that will place him in a position of trust having contact with vulnerable persons, he is required to undergo level II background screening, pursuant to section 435.04.

50. Section 435.04(2) sets forth a list of criminal offenses that are considered "disqualifying offenses," in that they disqualify a person who has been found guilty of, or for which a plea of nolo contendere has been entered for, such offenses, from employment in positions involving contact with vulnerable persons. The disqualifying offenses enumerated in section 435.04(2) include offenses for which Petitioner was convicted under chapter 812, relating to theft; section 810.02, relating to burglary; chapter 784,

relating to felony assault; section 843.01, relating to resisting arrest with violence; and chapter 893, relating to felony drug abuse.

51. As stated above, if a person has been found guilty or pled nolo contendere to a disqualifying offense, he or she may not be employed in a position having contact with vulnerable persons unless the person is granted an exemption from the disqualification by the agency, pursuant to section 435.07. § 435.04(3), Fla. Stat.

52. Section 435.07 authorizes the head of an agency to grant a person otherwise disqualified from employment, pursuant to section 435.04, an exemption from disqualification under certain circumstances. The statute states, in pertinent part:

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:

1. Felonies for which at least 3 years have elapsed since the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court for the disqualifying felony[.]

* * *

(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.

§ 435.07, Fla. Stat.

53. Under the statute, the applicant for an exemption from disqualification from employment has the ultimate burden to demonstrate, by clear and convincing evidence, that he or she is rehabilitated from the disqualifying offense. § 435.07(3)(a), Fla. Stat. This is a heightened evidentiary standard, requiring more than a preponderance of the evidence. *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997). This evidentiary standard has been described as follows:

[C]lear and convincing evidence requires that the 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)).

54. If the applicant demonstrates rehabilitation, he or she is eligible for an exemption, but not entitled to one. *J.D. v. Dep't of Child. & Fams.*, 114 So. 3d 1127, 1131 (Fla. 1st DCA 2013). The agency head possesses the discretion to deny an exemption request, but may not lawfully do so if the denial would constitute an abuse of discretion. *Id.* Under the "abuse of discretion" standard, discretion is abused when the action is arbitrary, fanciful, or unreasonable. *A.P. v. Dep't of Child. & Fams.*, 230 So. 3d 3, 6 (Fla. 4th DCA 2017). Stated another way, discretion is abused when the agency's action is arbitrary because it is not supported by facts *established by the evidence of record*, or it is unreasonable. *Id.* at 7; *see J.D.*, 114 So. 3d at 1133; *see Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

55. As the court in *J.D.* explained, a hearing to determine rehabilitation under section 435.07 is a de novo chapter 120 hearing in which the ALJ determines anew whether an applicant for an exemption under section 435.07 has demonstrated rehabilitation. *J.D.*, 114 So. 3d at 1131, 1132. Whether an applicant for an exemption has demonstrated rehabilitation by clear and convincing evidence is an ultimate issue of fact that is within the ALJ's province to determine. *Id.* at 1131.

56. For the reasons extensively discussed above, the undersigned has found that Petitioner has demonstrated, by clear and convincing evidence in this de novo proceeding, that he is rehabilitated from his disqualifying offenses.

57. As found above, the evidence that is most probative of whether Petitioner is rehabilitated—i.e., his conduct over the past six years since he was last arrested—establishes that Petitioner is rehabilitated and will not present a threat or danger to vulnerable persons entrusted to his care. As

discussed above, Petitioner has been working, for multiple years, with vulnerable individuals placed in his transitional residential facility by the Mental Health Court in Indian River County. To this point, Petitioner presented compelling testimony, by himself and others, establishing that he has safely and successfully worked with vulnerable individuals for the past several years, with no problems whatsoever.

58. The evidence having clearly and convincingly established that Petitioner is rehabilitated, the question then becomes whether Respondent would abuse its discretion if it denied Petitioner's exemption request, notwithstanding that he has demonstrated that he is rehabilitated.

59. Although Respondent's decision to deny Petitioner's exemption request is subject to the differential abuse of discretion standard, this standard is not without limits. In *Florida Power & Light Company v. Siting Board*, 693 So. 2d 1025 (Fla. 1st DCA 1997), the court noted that even when an agency is vested with considerable discretionary authority, the factual basis for that exercise of discretion must be established by competent substantial evidence in the record, and "*the agency must expose and elucidate its reasons for discretionary action.*" *Id.* at 1028 (emphasis added).

60. Respondent contends that the seriousness of Petitioner's disqualifying offenses and the length of time that has elapsed since his last offense warrant denial of his exemption request. However, importantly, in enacting section 435.07(1)(a)1., the Florida Legislature has made the policy decision that the types of disqualifying offenses committed by Petitioner *are* among those for which an exemption from disqualification may be granted after three years have elapsed, provided the person requesting the exemption can show that he or she is rehabilitated from those offenses. As found above, Petitioner has demonstrated, by clear and convincing evidence, that he is rehabilitated from his disqualifying offenses.

61. Although Respondent presented evidence regarding Petitioner's criminal history, it did not present any evidence to counter the compelling,

clear, and convincing evidence presented at the final hearing—much of it consisting of testimony of persons with whom Petitioner has worked in the mental health court setting—showing that Petitioner is rehabilitated and will not pose a danger to vulnerable persons.

62. It is noted that when Respondent made its initial decision to deny Petitioner's exemption request, it did not have the benefit of the compelling evidence regarding Petitioner's rehabilitation and the lack of danger he may pose to vulnerable individuals that was presented at the final hearing.

63. In light of the new and additional evidence regarding Petitioner's rehabilitation that was presented at the final hearing in this de novo proceeding—particularly the persuasive, compelling testimony by friends and professional contacts, to which Respondent was not privy when it made its initial decision to deny Petitioner's exemption request—and in the absence of any countervailing evidence in the record directly rebutting this evidence, the undersigned believes that Respondent would abuse its discretion if it were to deny Petitioner's request for an exemption.⁶

64. Accordingly, the undersigned recommends that, pursuant to section 435.07, Respondent grant Petitioner's request for an exemption from employment disqualification.⁷

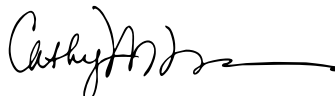
⁶ *A.P. v. Department of Children and Families*, 230 So. 3d 3 (Fla. 4th DCA 2017), also merits discussion. In that case, the agency denied an exemption request under section 435.07, notwithstanding that the ALJ had found, as a matter of ultimate fact, that the applicant was rehabilitated from his disqualifying offense. The court reversed the agency's final order, holding that it was error for the agency to adopt the ALJ's findings of fact, which were based on competent substantial evidence, but effectively disregard those findings of fact in denying the request for an exemption.

⁷ As discussed above, it again bears mention that Petitioner is keenly aware that any exemption granted is subject to being revoked if the holder of the exemption engages in any additional criminal conduct.

RECOMMENDATION

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

DONE AND ENTERED this 11th day of March, 2021, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of March, 2021.

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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.