STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

GARNETT BOWE,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

DOAH CASE NO. 20-4379
AHCA NO. 2020005211
RENDITION NO.: AHCA- 21 - 416 -FOF-SED

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), Cathy M. Sellers, issued a Recommended Order after conducting a formal hearing. At issue in this proceeding is whether the Agency abused its discretion when it denied Petitioner's request for an exemption from disqualification. The Recommended Order dated March 11, 2021, is attached to this Final Order, and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

Respondent filed exceptions to the Recommended Order.

In determining how to rule upon Respondent's exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency must follow section 120.57(1)(l), Florida Statutes, which provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a

> finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . .

§ 120.57(1)(l), Fla. Stat. Additionally, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat. In accordance with these legal standards, the Agency makes the following rulings on Respondent's exceptions:

In Exception One, Respondent takes exception to Paragraph 2 of the Recommended Order, arguing the findings of fact therein are not based on competent, substantial evidence. The findings of fact in Paragraph 2 of the Recommended Order are based on competent, substantial evidence. See Transcript, Page 47. Thus, the Agency cannot reject or modify them. See § 120.57(1)(l), Fla. Stat.; Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (holding that an agency "may not reject the hearing officer's finding [of fact] unless there is no competent, substantial evidence from which the finding could reasonably be inferred"). Therefore, the Agency denies Exception One.

In Exception Two, Respondent takes exception to Paragraph 5 of the Recommended Order, arguing Petitioner was first arrested in 1982, not 1992 as the ALJ found. Respondent is correct. The competent, substantial record evidence demonstrates Petitioner was first arrested in

1982. See, e.g., Transcript, Page 28. Therefore, the Agency grants Exception Two and modifies Paragraph 5 of the Recommended Order as follows:

> 5. Between 19982 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.

In Exception Three, Respondent takes exception to Paragraph 9 of the Recommended Order, arguing the ALJ erred in finding Petitioner's former girlfriend was arrested for filing false reports with the police. Respondent is correct. The record reflects Petitioner's former girlfriend was arrested for violating an injunction. See Transcript, Page 51. Therefore, the Agency grants Respondent's exception and modifies Paragraph 9 of the Recommended Order as follows:

> 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 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~~ violating an injunction 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.

In Exception Four, Respondent takes exception to Paragraph 11 of the Recommended Order, arguing the findings of fact therein are not based on competent, substantial evidence. Contrary to Respondent's argument, the findings of fact in Paragraph 11 of the Recommended Order are based on competent, substantial record evidence. See Transcript, Pages 48-50, 117-118. Respondent is asking the Agency to re-weigh the evidence, which it cannot do. See Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) ("The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise

interpret the evidence to fit its desired ultimate conclusion.") Therefore, the Agency denies Exception Four.

In Exception Five, Respondent takes exception to Paragraph 15 of the Recommended Order, arguing the finding of fact concerning the length of time Petitioner has owned and operated his transitional housing facility is not based on competent, substantial evidence. Respondent is correct. The competent, substantial record evidence indicates Petitioner has owned and operated his transitional housing facility since 2018, not 2011 as the ALJ found. See Petitioner's Exhibit G. Therefore, the Agency grants Respondent's exception and modifies Paragraph 15 of the Recommended Order as follows:

> 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~~8~~.

In Exception Six, Respondent takes exception to Paragraph 16 of the Recommended Order, arguing the findings of fact therein are not based on competent, substantial evidence. Contrary to Respondent's argument, the findings of fact in Paragraph 16 of the Recommended Order are based on competent, substantial record evidence. See Transcript, Pages 81-82 and 89-91. Respondent is asking the Agency to re-weigh Petitioner's testimony to make findings of fact more favorable to its position, but the Agency cannot do that. See Heifetz, 475 So. 2d at 1281 (Fla. 1st DCA 1985) ("The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate

conclusion."); Stinson v. Winn; 938 So. 2d 554 (Fla. 1st DCA 2006) ("Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence."). Therefore, the Agency denies Exception Six.

In Exception Seven, Respondent takes exception to Paragraph 17 of the Recommended Order, arguing the findings of fact therein are not based on competent, substantial evidence. The findings of fact in Paragraph 17 of the Recommended Order are based on competent, substantial record evidence. See Transcript, Pages 47, 54-55 and 75-76. Thus, the Agency is prohibited from rejecting or modifying them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Exception Seven.

In Exception Eight, Respondent takes exception to Paragraph 31 of the Recommended Order, arguing the ALJ shifted the burden of proof from Petitioner to Respondent. The Agency disagrees. Paragraph 31 of the Recommended Order accurately summarizes the testimony of Respondent's witness and makes the statement that Respondent did not present any competent, substantial evidence showing it considered Petitioner's character reference letters as part of its review and decision-making process. Ultimately, the ALJ stated the correct burden of proof in Paragraph 53 of the Recommended Order. Therefore, the Agency denies Exception Eight.

In Exception Nine, Respondent takes exception to Paragraph 32 of the Recommended Order, arguing the findings of fact therein are not based on competent, substantial evidence. To an extent, Respondent is correct. The findings of fact in the last sentence of Paragraph 32 of the Recommended Order concerning the time that has elapsed since Petitioner's last arrest and conviction are not accurate. As of the date of the final hearing (December 15, 2020), it had been only 6.25 years since Petitioner's last conviction, and just over 5 and a half years since Petitioner's last arrest. The rest of Paragraph 32 of the Recommended Order is based on

competent, substantial record evidence. See Transcript, Pages 48, 51-55, and 62-69. Therefore, the Agency grants Respondent's exception to the extent that it modifies Paragraph 32 of the Recommended Order as follows:

> 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~~ five and a half years, and not having been convicted of a crime in ~~seven~~ six and a quarter years, bear out Petitioner's testimony that he has changed his life.

In Exception Ten, Respondent takes exception to Paragraph 33 of the Recommended Order, arguing the findings of fact therein are not based on competent, substantial evidence. Based on the Agency's ruling on Exception One supra, which is hereby incorporated by reference, the Agency denies Exception Ten.

In Exception Eleven, Respondent takes exception to Paragraph 42 of the Recommended Order, arguing the ALJ erred in finding Petitioner is currently engaged in the same activity he is seeking an exemption for. Respondent is correct. As Respondent pointed out, Petitioner's own testimony shows he is not engaged in any activities like the services provided by the licensee of an assisted living facility because his residents are fully able to care for themselves, and do not meet the definition of "vulnerable persons" in section 435.02, Florida Statutes. See Transcript, Page 67. Therefore, the Agency grants Respondent's exception to the extent it modifies Paragraph 42 of the Recommended Order as follows:

> 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.

In Exception Twelve, Respondent takes exception to Paragraph 43 of the Recommended Order, arguing Petitioner is not currently responsible for vulnerable adults. The Agency agrees. The ALJ's use of the term "vulnerable" in Paragraph 43 of the Recommended Order to describe the individuals Petitioner is currently serving is not supported by competent, substantial record evidence. Indeed, as stated in the ruling on Exception Eleven supra, Petitioner's own testimony demonstrates that the residents in his housing facility are not "vulnerable persons" as the term is defined in section 435.02, Florida Statutes. Therefore, the Agency grants Respondent's exception to the extent it modifies Paragraph 43 of the Recommended Order as follows:

> 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.

In Exception Thirteen, Respondent takes exception to Paragraph 46 of the Recommended Order based on its arguments in Exception Eight and Exception Nine. The findings of fact in Paragraph 46 of the Recommended Order are based on competent, substantial record evidence. See Transcript, Pages 33 and 106-113. Thus, the Agency is unable to reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Exception Thirteen.

In Exception Fourteen, Respondent takes exception to Paragraph 47 of the Recommended Order based on its arguments in Exception Nine and Exception Thirteen. Based on the ruling on Exception Thirteen supra, which is hereby incorporated by reference, the Agency denies Exception Fourteen.

In Exception Fifteen, Respondent takes exception to Paragraph 56 of the Recommended Order based on its arguments in Exception Nine and Exception Thirteen. Respondent is asking the Agency to re-weigh the evidence presented in this matter, which the Agency cannot do. See Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) ("The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion."). Therefore, the Agency denies Exception Fifteen.

In Exception Sixteen, Respondent takes exception to Paragraph 57 of the Recommended Order based on its argument in Exception Eleven. Based on the Agency's ruling on Exception Eleven supra, which is hereby incorporated by reference, the Agency finds it has substantive jurisdiction over the conclusions of law in Paragraph 57 of the Recommended Order and can substitute conclusions of law as or more reasonable than those of the ALJ. Therefore, the Agency grants Exception Sixteen to the extent it modifies Paragraph 57 of the Recommended Order as follows:

> 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.

In Exception Seventeen, Respondent takes exception to Paragraph 58 of the Recommended Order based on its arguments in Exception Nine, Exception Thirteen, and Exception Fifteen. Based on the Agency's ruling on Exception Fifteen supra, which is hereby incorporated by reference, the Agency denies Exception Seventeen.

In Exception Eighteen, Respondent takes exception to Paragraph 60 of the Recommended Order, arguing the Agency's action of denying Petitioner's exemption application is not unreasonable. However, Paragraph 60 of the Recommended Order does not address the Agency's decision. Instead, ALJ concludes Petitioner demonstrated he is rehabilitated. While the Agency has substantive jurisdiction over the conclusions of law in Paragraph 60 of the Recommended Order, it cannot substitute conclusions of law as or more reasonable than those of the ALJ. Therefore, the Agency denies Exception Eighteen.

In Exception Nineteen, Respondent takes exception to Paragraph 61 of the Recommended Order, arguing it should be stricken. Respondent is asking the Agency to re-weigh the evidence presented in this matter, which the Agency cannot do. See Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) ("The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion."). Therefore, the Agency denies Exception Nineteen.

In Exception Twenty, Respondent takes exception to Paragraph 63 of the Recommended Order, arguing the ALJ erred in concluding the Agency abused its discretion when it denied Petitioner's request for an exemption from disqualification. In Paragraph 63 of the Recommended Order, the ALJ concludes "the undersigned believes that Respondent would

abuse its discretion if it were to deny Petitioner's request for an exemption" (emphasis added) based on all the evidence presented at hearing.

In A.P. v. Department of Children and Families, 230 So. 3d 3 (Fla. 4th DCA 2017), an ALJ reached an identical conclusion of law based on the record evidence of that case. The Department of Children and Families ("DCF") then entered a final order rejecting the ALJ's conclusion of law. On appeal, the Fourth District Court of Appeal reversed the Agency's final order, finding DCF's rejection of the ALJ's conclusion of law was unreasonable since DCF had adopted all the ALJ's findings of fact, which demonstrated that A.P. had been rehabilitated and posed no danger if employed in a position of trust.

The Agency has cited to A.P. in three prior final orders as grounds for rejecting exceptions to an ALJ's conclusion of law on the issue of whether the Agency would be abusing its discretion if it denied a request for an exemption of disqualification. See Riquel Gonzalez-Salcerio v. Agency for Health Care Administration, DOAH Case No. 19-0124EXE (AHCA 2019); Aaron Jay Goodrum, M.D. v. Agency for Health Care Administration, DOAH Case No. 19-0643 (AHCA 2019); and Yaron H. Maya, O.D. v. Agency for Health Care Administration, DOAH Case No. 19-2881 (AHCA 2020). However, the record in all three of those cases clearly demonstrated ample grounds for granting the individuals' requests for an exemption from disqualification and supported a conclusion of law that the Agency Secretary would have abused her discretion had she not granted the exemption. For instance, in each of the three cases many years had passed since the last arrest and the date of the exemption request (12 years for Salcerio, 11 years for Goodrum, and 10 years for Maya), and the individuals requesting exemption had been Medicaid providers for 5 or more years without incident prior requesting the exemption (5 years for Salcerio, 9 years for Goodrum, and 21 years for Maya).

In contrast, the record of this case is not replete with evidence favoring Petitioner; rather, there is competent, substantial record evidence that supports a conclusion of law holding the Secretary of the Agency did not abuse her discretion when she denied Petitioner's request for an exemption from disqualification. Unlike the individuals in the three cases referenced above, Petitioner's most recent conviction is closer in proximity to his request for an exemption (5 years). Moreover, Petitioner was arrested 25 times between 1982 and 2015, and was incarcerated for 11 years. See Paragraphs 5 and 7 of the Recommended Order. Finally, Petitioner has six disqualifying offenses, whereas Salcerio had two disqualifying offenses, Goodrum had one disqualifying offense, and Maya had one disqualifying offense.

The Agency has a responsibility to protect the citizens of Florida and does not take that responsibility lightly. Considering the amount of Petitioner's criminal offenses and the seriousness of them, which led to 11 years of incarceration, the fact that Petitioner spent over 30 years of his life in trouble with the law, and the fact that Petitioner's most recent conviction and arrest are closer in proximity to his request for an exemption when compared to Salcerio, Goodrum, and Maya, it would not be an abuse of discretion for the Secretary of the Agency to deny Petitioner's request for an exemption from disqualification. The Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 63 of the Recommended Order because it has the authority to grant or deny requests for an exemption from disqualification from being a Medicaid provider in Florida. The Agency also finds that it can substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants Exception Twenty, and modifies Paragraph 63 of the Recommended Order as follows:

> 63. Even i~~n~~ 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~~ there is countervailing evidence in the record regarding Petitioner's extensive criminal history that directly rebutts~~ing~~ this evidence~~,~~. ~~the undersigned believes that~~ Thus, Respondent would not abuse its discretion if it were to deny Petitioner's request for an exemption.

In Exception Twenty-One, Respondent takes exception to Paragraph 64 of the Recommended Order, based on its arguments in Exception Twenty. Based on the Agency's ruling on Exception Twenty supra, which is hereby incorporated by reference, the Agency grants Exception Twenty-One and rejects the conclusions of law in Paragraph 64 of the Recommended Order.

FINDINGS OF FACT

The Agency adopts the findings of fact set forth in the Recommended Order, except where noted supra.

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order, except where noted supra.

IT IS THEREFORE ADJUDGED THAT:

Petitioner's request for an exemption from disqualification from employment is hereby denied. The parties shall govern themselves accordingly.

DONE and ORDERED this 16th day of April, 2021, in Tallahassee, Florida.

Simone Marstiller

SIMONE MARSTILLER, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY ALONG WITH THE FILING FEE PRESCRIBED BY LAW WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished to the persons named below by the method indicated on this 26th day of April, 2021.

RICHARD J. SHOOP, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, MS #3
Tallahassee, Florida 32308
(850) 412-3630

COPIES FURNISHED TO:

Honorable Cathy M. Sellers
Administrative Law Judge
Division of Administrative Hearing
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(via efiling)

Garnett Dwayne Bowe
2208 Avenue E
Fort Pierce, Florida 34950
(via electronic mail to bowesafch@comcast.net)

Katie Jackson, Esquire
Assistant General Counsel
(via electronic mail)

Samantha Heyn, Manager
Background Screening Unit
(via electronic mail)

Medicaid Fiscal Agent Operations
(via electronic mail)