

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs.

Case No. 21-2997

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.

RECOMMENDED ORDER

On November 1, 2021, Hetal Desai, Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH), conducted the final hearing, by Zoom teleconferencing.

APPEARANCES

For Petitioner: **, pro se
 (Address of Record)

For Respondent: Christopher Vignieri, Esquire
 Department of Children and Families
 2295 Victoria Avenue
 Fort Myers, Florida 33901

STATEMENT OF THE ISSUES

Whether Petitioner has shown rehabilitation from his disqualifying offenses; and, if so, whether the intended action by Respondent, Department of Children and Families (Department or DCF), to deny his request for an exemption from disqualification constitutes an abuse of discretion.

PRELIMINARY STATEMENT

The Department notified Petitioner in a letter dated August 24, 2021 (Denial Letter), that it denied his request for an exemption from disqualification from employment with children or vulnerable adults. The Department did not identify the nature of his disqualifying offense or cite to any specific statute or rule, but explained its decision as follows:

The department considered all the evidence about your history presented to us. The denial of your request for exemption is based upon the seriousness of the offense(s), and the Department's conclusion that you did not demonstrate rehabilitation from the disqualifying offenses such that you should be permitted to hold a position of a special trust with children or vulnerable adults.

On September 8, 2021, Petitioner sent a letter to the Department requesting an administrative hearing. On September 30, 2021, the Department referred the matter to DOAH, where it was assigned and noticed for an evidentiary hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes (2021).¹

On October 26, 2021, the parties participated in a telephonic pre-hearing conference. During this conference the parties discussed the conduct of the hearing, burden of proof, and issues regarding witnesses and exhibits.

At the final hearing Petitioner presented his own testimony and that of Crystal Wanke, a Family Developmental Specialist for Children's Network of South West Florida (CNSWFL). Petitioner's Exhibits P1 through P9 were made part of the record. The Department presented the testimony of Diane Harris, the Department's Chief of Policy and Public Relations. The

¹ Current law governs Petitioner's application for exemption and all statutory references are to the 2021 codification of the Florida Statutes unless otherwise indicated. *See Ag. for Health Care Admin. v. Mount Sinai Med. Ctr.*, 690 So. 2d 689, 691 (Fla. 1st DCA 1997).

Department's Exhibits R1 through R8 and R10 through R12 were admitted into evidence.²

During the hearing, Petitioner indicated that based on his previous interactions with DCF's counsel, he believed DCF's exemption file—including the documentation he provided with his application for exemption to DCF—would be provided to DOAH by the Department.³ As such, the undersigned advised the parties at the conclusion of the final hearing that the record in this proceeding would remain open until November 8, 2021, to allow both parties to provide any documentation relevant to Petitioner's application for exemption from disqualification to the undersigned that was previously provided to DCF or that DCF relied upon in denying the exemption.

Petitioner mailed his additional documentation to DOAH on November 5, 2021, some of which were made part of the record as Exhibits P1 through P9.⁴ The Department did not submit any additional documentation.

A court reporter recorded the proceedings, but neither party ordered a transcript. On November 9, 2021, the undersigned entered an Order Closing Record and Requesting Proposed Recommended Orders, requiring proposed recommended orders (PROs) to be filed by November 19, 2021. Petitioner

² On October 26, 2021, the undersigned entered an Order Granting Respondent's Motion for Official Recognition for documents that were marked as Exhibits R4 through R12, which consist of court records. The Department withdrew Exhibit R9 before the hearing, and it was not made part of the record.

³ This was a reasonable assumption because DCF sent Petitioner's DCF exemption application file to Petitioner at the same time it sent Petitioner its proposed exhibits.

⁴ Petitioner offered over 100 pages of documents which consisted of (1) Respondent's Exhibits, and (2) DCF's exemption application summary and file, including the materials Petitioner had submitted to DCF as part of his Application for Exemption. As part of this submission, Petitioner provided documentation consisting of court records relating to his criminal history. Many of these pages were blank or unreadable and have not been admitted into evidence or considered in the preparation of this Recommended Order.

failed to file a PRO; the Department timely submitted its PRO, which has been duly considered.

FINDINGS OF FACT

PARTIES AND PROCEDURAL HISTORY

1. Petitioner is a 37-year-old male seeking approval from the Department to serve as a foster care provider for children.

2. The Department is the state agency charged with regulating the employment of persons seeking to be employed, licensed, or registered in positions having direct contact with children or vulnerable persons.

See § 435.02, Fla. Stat.

3. CNSWFL works with DCF to evaluate, train, and support foster care providers through the Parent Resource Information for Development and Education (PRIDE) program. As part of its foster parent screening process, CNSWFL submitted Petitioner's information to the Department for a background check.

4. The Department's screening revealed Petitioner had a criminal record, including arrests from 2002 to 2014. Of these arrests, the Department found two which resulted in disqualifying offenses pursuant to section 435.04, Florida Statutes.

5. In response, Petitioner filled out an Application for Exemption and submitted relevant documentation (exemption application file), including a four-page letter dated March 25, 2021 (explanation letter). Petitioner also submitted a separate page for each of the offenses identified by DCF outlining Petitioner's explanation and description of the circumstances surrounding his arrests and criminal charges.

6. Petitioner also submitted to DCF three notarized letters of reference regarding his character and rehabilitation. There was no evidence anyone at DCF contacted these references.

7. The Department staff prepared the exemption application file, including a summary of Petitioner's exemption application and

documentation, but did not offer the file or summary into evidence. None of the staff who conducted the background information or prepared DCF's exemption application packet or summary testified at the hearing. According to Petitioner, no one from DCF interviewed him as part of the exemption process.

8. Rather, Diane Harris, the Department's Chief of Policy and Public Relations, testified she reviewed the summary and packet prepared by DCF staff. She believed the only evidence Petitioner had offered toward rehabilitation was his explanation letter and proof that he owned a business. She did not mention the reference letters or Petitioner's additional statements regarding each offense.

9. Based on her review, Ms. Harris felt Petitioner had alcohol abuse issues that he had not addressed. She also was concerned about inconsistencies between his version of events and the statements in the police reports. She admitted, however, that the documents she relied on were not offered into evidence by the Department.

10. Ms. Harris testified she recommended denying Petitioner's application for exemption from disqualification to the Secretary of the Department. The Secretary agreed with Ms. Harris' recommendation and denied the exemption.

11. On April 24, 2021, the Department issued the Denial Letter to Petitioner.

DISQUALIFYING OFFENSES

12. Relevant to this proceeding, Petitioner, at age 24, had a 2007 offense for Burglary of a Conveyance, Unarmed, in violation of section 810.02, Florida Statutes (2007 offense). Petitioner pled guilty to the 2007 offense, adjudication was withheld, and he was placed on probation.

13. The 2007 offense disqualifies Petitioner from employment or volunteering with DCF or its vendors. § 435.04(2)(z), Fla. Stat. This would include serving as a foster parent.

14. According to Petitioner, the 2007 offense occurred when he had become intoxicated at a strip club while he waited for his friend to get off work. He wanted to leave, but his friend told him he could take a nap in her truck until she got off work. He got into the wrong truck. When he awoke he was being pulled out of the truck by the police.

15. The Department cites an arrest affidavit to establish that Petitioner was seen walking in the parking lot, attempting to get into parked vehicles, and then forcibly getting into a vehicle. *See* Resp. PRO, p. 5. Based on this version of events, at the hearing Ms. Harris testified she felt Petitioner's version of what happened was not consistent with the police's account of events. Neither the arrest affidavit or any police report, however, was offered into evidence. Moreover, an arresting officer's affidavit description what he or she was told by witnesses would not be admissible to prove the truth of what was told to him or what happened. Nonetheless, even if there was evidence in the record establishing these facts, they are not inconsistent with Petitioner's explanation.

16. When he was asked on cross-examination if his version of the events were consistent with the police report (which, again, was not entered into evidence by the Department), Petitioner admitted he was drunk at the time and he would defer to any statements made by sober witnesses. Petitioner took full responsibility for his actions, admitted he had previously had a bad relationship with alcohol, and testified that he has stopped drinking.

17. Although not mentioned at the hearing, at age 21, Petitioner was arrested for possession of cocaine, in violation of section 893.13, Florida Statutes (2005 offense). Petitioner pled guilty to the 2005 offense with adjudication withheld.

18. The 2005 offense disqualifies Petitioner from employment with DCF or its vendors or serving as a foster parent. § 435.04(2) (ss), Fla. Stat.

19. Although not addressed in the hearing by either DCF or Petitioner, the 2005 offense occurred on April 1, 2005, on the same date Petitioner was pulled over in his vehicle and charged with driving under the influence (DUI).

20. Again, in his statements submitted to DCF and at the hearing, Petitioner took full responsibility for all the offenses he had committed, admitted he had an alcohol problem when he had the previous arrests, but testified that he no longer uses drugs or alcohol.

21. Petitioner's last disqualifying offense was 14 years ago.

OTHER FACTORS CONSIDERED BY DCF

22. Ms. Harris testified her primary concern and reason for recommending denial of the exemption was Petitioner's past drug and alcohol use. Specifically, she cited Petitioner's arrests and judgments relating to theft, DUIs, and violations of probation. Ms. Harris was especially concerned Petitioner had not obtained formal treatment for alcohol abuse such as Alcoholics Anonymous (AA).

23. Petitioner acknowledged he has a history of drug and alcohol issues as evidenced by his DUIs.⁵ In his written statement provided to DCF and at the hearing, Petitioner admitted that he made many mistakes due to drug and alcohol use in the past. Although he quit drinking alcohol "cold turkey" and has not attended AA or another formal treatment program, he meditates regularly. He feels no pressure to drink in social situations, and gets support from friends and family. He convincingly testified that he quit drinking four years ago, after becoming an uncle. He acknowledged that he had used alcohol and drugs as a way to deal with the rejection from his family at age 16, after telling them he was homosexual. Since then, he has reconciled with his family, and they have accepted him and his husband.

⁵ Although there was no testimony at the hearing about the other specific charges or dates of arrests Ms. Harris relied upon, the evidence establishes Petitioner had a number of alcohol related violations, including two DUIs in April and July of 2005.

24. The Department argues Petitioner's explanation letter is inconsistent with his hearing testimony that he has stopped drinking. *See Resp. PRO*, p. 6, n.11. A careful reading of the letter indicates that when he married his husband who did not drink alcohol (in October 2015) he found himself "rarely imbibing." He later writes in his explanation letter that he does not miss drugs and alcohol and it will never be part of his life again. This is consistent with the timeline he presented at the hearing that he stopped drinking four years ago after becoming an uncle (in 2017). As such, there undersigned finds there was no inconsistency casting doubt on Petitioner's testimony that he currently abstains from drugs and alcohol.

25. Ms. Harris also expressed concern about Petitioner's long history of criminal acts dating back to 2002, including a non-disqualifying misdemeanor offense for trespass in November 2010.

26. Petitioner explained at the hearing that the 2010 incident was similar to the 2007 offense, where he was drunk and tried to get into the wrong car while he was intoxicated.

27. Petitioner's last non-disqualifying offense was over 11 years ago.

OTHER EVIDENCE OF REHABILITATION OFFERED BY PETITIONER

28. Crystal Wanke, a Family Development Specialist for CNSWFL, testified she has worked with Petitioner for over a year as part of the PRIDE program related to foster care. Ms. Wanke's job duties include screening and training potential foster parents. She has visited Petitioner in his home and observed him in a class setting many times. She has discussed Petitioner's past history—including his drug and alcohol use and criminal history—with him in detail. She has also assessed his mental health to determine if he would make a good foster parent.

29. Based on Ms. Wanke's testimony, other than the disqualifying 2005 and 2007 offenses, Petitioner met all of DCF's requirements for foster parenting.

30. Ms. Wanke convincingly testified that in her professional opinion she had "no concerns" with Petitioner becoming a foster parent. Ms. Wanke described Petitioner as resilient, timely, attentive, and empathetic. Regarding his past criminal history, Ms. Wanke noted that Petitioner had never tried to hide anything, was honest with her about his arrests, and provided her with all the information about those arrests including dates and locations. Ms. Wanke felt Petitioner would be a good foster parent because he had made mistakes and learned from them.

31. Petitioner and Ms. Wanke testified Petitioner had completed the necessary PRIDE courses for foster parent training.

32. Petitioner also presented evidence that he is financially secure. He has owned his own business, a hair salon, for the past five years and recently has hired an employee due to an expansion of the business. He and his husband have recently purchased a home.

33. Petitioner also provided three notarized letters of recommendation to DCF. All of these letters reiterated Ms. Wanke's assessment of Petitioner: he would be an excellent caregiver and foster parent. One of the letters was written by an attorney who works with the foster care program and has known Petitioner since 2006. She writes that at the time they met, Petitioner was "still finding his way in life." While acknowledging his history, she was "confident that anything in [Petitioner's] life is in the past, never to recur again."

34. Another letter was written by a former DCF Child Protective Investigator and Case Manager who regularly evaluated families for the potential placement of children in foster homes. She has known Petitioner for eight years and expressed her belief that he was accountable, dependable, and would give any child a home of "love, peace, joy and safety above all else." She gave her "unequivocal support" of Petitioner becoming a foster parent.

35. Ms. Harris did not mention the letters of recommendation or Petitioner's explanations of each of his offenses. Instead, she believed that

Petitioner had only provided the explanation letter and proof he had owned a business. She did not feel that these two items were enough to establish that Petitioner had been rehabilitated. Ms. Harris did not have the benefit of the testimony of Petitioner or Ms. Wanke, nor did she consider Petitioner's explanations regarding each of his criminal offenses (disqualifying and otherwise), or the three notarized letters of recommendation which supplement Ms. Wanke's testimony.

ULTIMATE FINDINGS OF FACT

36. Based on the entirety of the record, Petitioner has proven by clear and convincing evidence that he is rehabilitated from the disqualifying 2005 and 2007 offenses.

37. The undersigned finds that Petitioner presents no danger to children or the vulnerable population served by DCF.

38. Additionally, there was no evidence Ms. Harris, who made the recommendation to deny the exemption to the final decisionmaker, considered all the documentation submitted by Petitioner.

CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 435.07(3)(c), Florida Statutes.

40. To be a foster parent, Petitioner must comply with certain background requirements, including level 2 background screenings. *See* § 409.175(k) and (m), Fla. Stat. (outlining the screening process for foster parents).

41. The Department is authorized to grant exemptions from disqualification pursuant to section 435.07. Petitioner is eligible to seek an exemption from disqualification because "at least 3 years have elapsed since the applicant has completed or been lawfully released from confinement,

supervision, or sanction for the disqualifying felony." § 435.07(1)(a)1., Fla. Stat.

42. As the applicant for an exemption, Petitioner bears the burden of proof in this proceeding. More precisely, he "must demonstrate by clear and convincing evidence that the employee should not be disqualified from employment." § 435.07(3)(a), Fla. Stat.

43. Petitioner can meet his burden by providing evidence of the following:

1. The circumstances surrounding the disqualifying offenses in 2005 and 2007;
2. The time period that has elapsed since the incident;
3. The nature of the harm caused to the victim;
4. His history since the 2007 incident; and
5. Any other evidence indicating he would not present a danger if allowed employment.

See § 435.07(3)(a), Fla. Stat.

44. An ALJ is charged with making the factual determination of whether, based on the evidence adduced in a de novo hearing conducted pursuant to section 120.57(1), the applicant for exemption has shown rehabilitation.

See § 435.07(3)(a), Fla. Stat.

45. Clear and convincing evidence is a heightened standard that requires more proof than a mere preponderance of the evidence. Clear 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 at 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); *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

46. Based on the statutory factors noted above, Petitioner's disqualifying events, although unfortunate, were not violent in nature nor did they involve children. They occurred more than 14 years ago and there was no evidence of harm to any victims. If anything, the events were evidence of self-harm in the form of alcohol and drug problems.

47. Since the 2007 offense, Petitioner has had other non-disqualifying offenses, the last in 2010. These also were alcohol-related. As he credibly testified, he has been sober for the last four years, incident free, and has come to terms with the underlying issues for his poor prior relationship with alcohol and drugs. As Ms. Wanke convincingly testified, Petitioner would make a great foster parent and she had no concerns that he would relapse or return to his previous bad habits. Most importantly, she did not believe Petitioner would present a danger to any children placed in his care. DCF did not present any admissible evidence to refute her testimony.

48. For the reasons discussed above, the evidence shows Petitioner met his burden and proved his rehabilitation, clearly and convincingly.

49. As such, where the ALJ finds that Petitioner has met his burden of proving rehabilitation by clear and convincing evidence, the ALJ must also determine whether the Department's intended action to deny an applicant's request for exemption constitutes an abuse of discretion. *See J.D. v. Dep't of Child. and Fams. Servs.*, 114 So. 3d 1127, 1131 (Fla. 1st DCA 2013) ("[E]ven if rehabilitation is shown, the applicant is only eligible for an exemption, not entitled to one."); *A.P. v. Dep't of Child. & Fam. Servs.*, 230 So. 3d 3, 6 (Fla. 4th DCA 2017) (noting an agency's decision to grant or deny an exemption is subject to the deferential abuse of discretion standard of review).

50. An agency abuses this discretion when the action is arbitrary, fanciful, or unreasonable. An abuse of discretion can be found in two circumstances: (1) where the evidence in the record does not support the agency's determination; or (2) where the agency's determination rests on an incorrect

conclusion of law. *See Jordan v. Brown*, 855 So. 2d 231, 234 (Fla. 1st DCA 2003); *Corbett v. Wilson*, 48 So. 3d 131, 133 (Fla. 5th DCA 2010).

51. The evidence does not support the Department's position, as presented by Ms. Harris, that Petitioner failed to submit sufficient evidence of his rehabilitation. Although it is impossible to ascertain what Ms. Harris actually reviewed in making her decision because the Department did not offer that information into evidence, it is clear from her testimony she relied mostly on the DCF summary of the documentation provided by Petitioner. She erroneously believed Petitioner had failed to submit any supporting documentation except his explanation letter and proof of his business. This was simply not true. She did not consider the letters of recommendation, or the explanations of all of the arrests and judgements revealed by the screening.

52. Finally, the investigator who drafted the DCF summary relied upon by Ms. Harris did not testify at the hearing. The information in this summary had to be gathered from other sources and constituted double or triple hearsay. *Holborough v. State*, 103 So. 3d 221, 223 (Fla. 4th DCA 2012); *J.B.J. v. State*, 17 So. 3d 312, 319 (Fla. 1st DCA 2009); *Harris v. Game & Fresh Water Fish Comm'n*, 495 So. 2d 806, 808-09 (Fla. 1st DCA 1986).

53. Moreover, the summary relied on does not supplement or explain other admissible evidence. As such, it cannot be used to establish or support any findings of fact in this case. *See* § 120.57(1)(c), Fla. Stat.; *Carter v. State*, 951 So. 2d 939, 943-44 (Fla. 4th DCA 2007) (holding a police summary was "classic hearsay" and "[did] not fit within the business or public records exception to the hearsay rule"); *Rivera v. Bd. of Trs. of Tampa's Gen. Emp. Ret. Fund*, 189 So. 3d 207, 212-13 (Fla. 2d DCA 2016).

54. Again, it is unclear what the Department relied upon because it did not offer its exemption application file into evidence. Nonetheless, Ms. Harris' reliance on the summary and failure to consider the other material submitted by Petitioner was an abuse of discretion.

55. In addition, Ms. Harris was concerned about offenses that occurred prior to the 2005 offense. Section 435.07(2)(b) limits an agency's consideration of an exemption applicant's criminal history to arrests and convictions *subsequent* to the disqualifying offense. As such, it was an abuse of discretion for Ms. Harris to consider any charges prior to 2005.

56. In a case such as this where the facts are in dispute, "the administrative law judge ... has the opportunity to hear the witnesses' testimony and evaluate their credibility." *Yerks v. Sch. Bd. of Broward Cnty.*, 219 So. 3d 844, 848 (Fla. 4th DCA 2017); *see Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Pro. Reg.*, 146 So. 3d 1175 (Fla. 1st DCA 2014) (J. Wetherell concurring) ("[I]t is solely the function of the ALJ to assess the persuasiveness of the evidence as a whole.").

57. The Department did not have the benefit of Petitioner's unrefuted testimony establishing clearly and convincingly the steps he has taken to become reconciled with his family and how he stopped drinking and using drugs. This, coupled with the testimony of a very credible witness who works with DCF in the foster care process, establishes Petitioner has been rehabilitated and will not pose a danger to children entrusted to his care.

58. Based on the evidence presented at the hearing, no reasonable individual could find that Petitioner is not rehabilitated. *See Garcia v. Agency for Health Care Admin.*, 2021 WL 4979084, Case No. 4D20-2257 (4th DCA October 27, 2021). For these reasons, Petitioner has met his burden to demonstrate his rehabilitation from the 2005 and 2007 disqualifying offenses, and, under the circumstances specific to this case, if the Department were to deny Petitioner's exemption request, its action would constitute an abuse of discretion.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Department of Children and Families, enter

a final order granting Petitioner's request for an exemption from disqualification from employment.

DONE AND ENTERED this 7th day of December, 2021, in Tallahassee, Leon County, Florida.



HETAL DESAI
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of December, 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.