

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

B.J.,

Appellant,

v.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D06-6103

DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Appellee.

_____ /

Opinion filed March 31, 2008.

An appeal from the Department of Children and Family Services.
Don Winstead, Deputy Secretary.

Gerald B. Stewart, Jacksonville, for Appellant.

Robin Whipple-Hunter, Assistant General Counsel, Department of Department of
Children and Family Services, Jacksonville, for Appellee.

WOLF, J.

We have one issue before us: whether the Department of Children and Family
Services (Department) erred in rejecting the Administrative Law Judge's (ALJ)
recommendation to grant appellant's request for an exemption from disqualification
pursuant to section 435.07(3), Florida Statutes (2005). We find the Department erred

in rejecting the findings of fact of the ALJ, quash the order, and remand to the Department for issuance of an order granting the exemption.

On June 23, 2006, the ALJ issued a 10-page Recommended Order specifically outlining over twenty detailed findings of fact that recommended granting the request for exemption from disqualification. The following pertinent provision, labeled a finding of fact, was included in the Recommended Order:

18. Petitioner has demonstrated rehabilitation by clear and convincing evidence. It has been eight years since his arrests, and there have been no further incidents. Further, for almost four of those eight years, he has been employed in child care without complaint, thereby demonstrating clearly and convincingly that he is not a risk to the safety and well-being of the children he transports and monitors.

As a conclusion of law, the Recommended Order further stated:

27. Petitioner has demonstrated by clear and convincing evidence that he has rehabilitated himself and that he is entitled to an exemption from his disqualification from employment in child care.

In contrast to the Recommended Order, the Department issued a two-page Final Order, on October 23, 2006, denying appellant's request for an exemption. The Final Order took issue with paragraphs 18 and 27 of the Recommended Order and stated, in pertinent part:

I cannot agree that petitioner's evidence is clear and convincing. Petitioner's testimony is obviously self-serving. Additionally, petitioner's testimony concerning the disqualifying offenses was quite vague. He professed to being unable to remember details of the offenses or of their disposition. . . . Finally, the mere absence of arrest or

conviction for subsequent criminality, while certainly a positive for petitioner, does not clearly and convincingly establish his rehabilitation.

Accordingly, petitioner's request for an exemption from disqualification from employment in a position of special trust is hereby DENIED.

(Footnote omitted; citation omitted). "The law is well established that an agency is bound to honor a[n ALJ's] findings of fact unless they are not supported by competent, substantial evidence." Belleau v. Dep't of Env'tl. Prot., 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997). However, an agency may reject conclusions of law without limitation. Szniatkiewicz v. Unemployment Appeals Comm'n, 864 So. 2d 502 (Fla. 4th DCA 2004).

In K.J.S. v. Department of Children & Family Services, 33 Fla. L. Weekly D94 (Fla. 1st DCA Dec. 31, 2007), this court considered appellant's challenge to the Department's Final Order denying his request for an exemption pursuant to section 435.07(3), Florida Statutes (2005), based on the assertion that the Final Order impermissibly rejected the ALJ's recommendation to grant the exemption. In discussing the discretion allowed the Department in rejecting the ALJ's Recommended Order, this court noted:

Section 435.07, Florida Statutes (2005), provides that "[t]he appropriate licensing agency **may** grant to any employee otherwise disqualified from employment an exemption from disqualification." (emphasis added). Thus, the Department has broad discretion to grant or deny exemptions. However, an agency's discretion is not unbridled; discretionary agency

action is subject to a review for reasonableness. Astral Liquors, Inc. v. Dep't of Bus. Regulation, 463 So. 2d 1130, 1132 (Fla. 1985).

The weight or credibility of witness testimony is a factual finding made by the hearing officer. See Strickland v. Fla. A & M Univ., 799 So. 2d 276 (Fla. 1st DCA 2001); Tuveson v. Fla. Governor's Council on Indian Affairs, Inc., 495 So. 2d 790, 793 (Fla. 1st DCA 1986). Section 120.57(1)(l), Florida Statutes (2005), provides that after an administrative hearing, an "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." The Department failed to comply with this statutory requirement.

Id. at D94. After discussing the standard of review, this court noted:

In the instant case, the Department rejected the detailed findings of fact made by the ALJ to reach an opposite conclusion. The ALJ made specific findings of fact regarding the weight and credibility to be given to the evidence. The ALJ balanced the evidence of K.J.S.'s inaccurate account of his role in the very serious past crimes and the review committee's concerns about those statements and crimes, on the one hand, against the overwhelming evidence of K.J.S.'s life rehabilitation during his incarceration and since his release, to find that clear and overwhelming evidence of rehabilitation had been presented, so that an exemption should be granted. However, the Department ignored these factual findings (which are supported by competent, substantial evidence) and, instead, re-weighed the evidence by balancing the very same facts to conclude that the exemption should be denied. This constitutes an abuse of discretion. See Strickland, 799 So. 2d at 279.

Moreover, the Department failed to review the entire record or state with particularity that the findings lack competent, substantial evidence. See Pillsbury, 744 So. 2d at 1041 (noting that the final order

did not comply with the requirements of chapter 120, Florida Statutes, in that the order did not establish that the Department had reviewed the complete record, and the Department erroneously rejected the hearing officer's factual findings of rehabilitation without indicating that such findings were not supported by competent, substantial evidence); Nest v. Dep't of Prof'l Regulation, Bd. of Med. Examiners, 490 So. 2d 987, 989-90 (Fla. 1st DCA 1986) As the finder of fact, the ALJ was in a unique position to assess witness demeanor and credibility and weigh the evidence based upon his first-hand observation of each witness. The Department's rejection of the ALJ's nuanced fact-findings required, at the very least, that the full record be reviewed to determine whether the weight assigned by the ALJ to such testimony lacked a basis in competent, substantial evidence. Absent the Department's compliance with the applicable statutes and interpretive case law, we are compelled to conclude that the Department's rejection of the ALJ's factual findings in this case is unreasonable and constitutes an abuse of discretion.

Id. at D94-95 (emphasis added; footnote omitted). In the instant case, similar to the Department's final order in K.J.S., the Department rejected the ALJ's recommendation based on a very general statement.

Further, the Department's rejection of the Recommended Order focuses on issues of credibility which may not be reweighed. See Strickland, 799 So. 2d at 276 (holding that the weight or credibility of witness testimony is a factual finding made by the hearing officer); Tuveson, 495 So. 2d at 793. Additionally, the Final Order is completely devoid of an express finding that the ALJ's recommendation was not based on competent substantial evidence. The Department merely reweighed the probative value to be given the testimony and questions the quality of the evidence

presented, without stating that the ALJ's Recommended Order erroneously found that competent substantial evidence supported the granting of the exemption.

A review of the record evidences that the ALJ's findings of fact are supported by competent substantial evidence and, thus, should not be overturned. Specifically, the Recommended Order includes twenty findings of fact, supported by the record, which demonstrate that (1) appellant had been honest and forthright regarding his previous convictions; (2) appellant had successfully rehabilitated based on testimony establishing his rapport and good nature with both his own children as well as the children at the center where he was employed; (3) appellant had not been involved in any similar incidents in the last eight years; (4) appellant and his ex-wife, the victim of the earlier incidents, shared a mutually cooperative and friendly relationship; and (5) appellant had been working in the child care field for over four years without any complaints or incidents. Accordingly, because the Final Order improperly reweighed the ALJ's findings of fact, which are based on competent substantial evidence, we reverse. K.J.S., 33 Fla. L. Weekly at D94-95.

KAHN and VAN NORTWICK, JJ., CONCUR.