

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM BRIGHT, AS PERSONAL)
REPRESENTATIVE OF THE ESTATE OF)
RONALD BRIGHT,)
)
Petitioner,)
)
vs.) Case No. 03-2142
)
DEPARTMENT OF MANAGEMENT)
SERVICES, DIVISION OF)
RETIREMENT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 23, 2003, in Vierra, Florida, before Carolyn S. Holifield, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Wayne L. Allen, Esquire
Wayne L. Allen & Associates, P.A.
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Melbourne, Florida 32935-8865

For Respondent: Thomas E. Wright, Esquire
Division of Retirement
Department of Management Services
4050 Esplanade Way, Suite 260
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STATEMENT OF THE ISSUE

The issue is whether Petitioner, William Bright, is entitled to receive retirement benefits of his deceased son, Ronald Bright.

PRELIMINARY STATEMENT

Ronald Bright was a member of the Florida Retirement System with approximately 29 years of creditable service. On or about October 31, 2002, Ronald Bright's application for regular disability retirement was filed with the Department of Management Services, Division of Retirement (Division). Ronald Bright died on November 9, 2002, before the Division determined his eligibility for disability retirement. On November 18, 2002, Petitioner, William Bright, executed and, acting as attorney-in-fact for Ronald Bright, filed an option selection with the Division, selecting Option 2.

In December 2002, the Division determined that Ronald Bright was eligible for disability retirement but that the option selection was invalid because it was executed after Ronald Bright died. By letter dated February 4, 2002, the Division notified Petitioner that since no valid option selection was made, no continuing benefit was available. Petitioner challenged the decision and requested a formal hearing.

At hearing, Petitioner testified on his own behalf and called four witnesses, all employees of the Brevard County, Board of County Commissioners (Brevard County): Frank Abbate, director of the Human Resources Department; Joanne Adams, a supervisor in the Planning Department; Fannie Gray, a supervisor in the Human Resource Department; and Kathryn Patterson, a benefits specialist. Petitioner offered 31 exhibits, 30 of which were admitted. The Division presented the testimony of Deena Howell, the Division's disability benefits administrator. The Division also offered the deposition testimony of Stanley Colvin, the Division's benefits administrator; Fredrica Edwards, a Division benefits specialist; and Kathryn Patterson, a benefits specialist with the Brevard County. The Division offered and had 18 exhibits admitted. Official recognition was taken of the applicable provisions of Chapters 20, 121, and 709, Florida Statutes (2001); and Florida Administrative Code Rule Chapter 60S.

The proceeding was recorded but no transcript was ordered. At the conclusion of the hearing, the parties agreed to file proposed recommended orders on November 28, 2003. Both parties timely filed Proposed Recommended Orders which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, William Bright (Petitioner/William Bright), is the 84-year-old father and beneficiary of Ronald Bright.

2. Ronald Bright was an employee of Brevard County with approximately 29.5 years of creditable service in the Florida Retirement System (FRS), which is administered by the Division.

3. Ronald Bright was diagnosed with lung cancer in December 2001, and two months later, he underwent surgery to have a lung removed. Thereafter, he received radiation treatments and chemotherapy.

4. Despite his being diagnosed and treated for cancer, Ronald Bright was optimistic about his future and continued to work part-time for the Brevard County Planning Department.

5. In October 2002, Ronald Bright entered the hospital and underwent further surgery, when it was determined that his cancer had spread to his colon. After five days in the hospital, he was placed in intensive care.

6. On October 28, 2002, William Bright first learned from Ronald Bright's doctor that his son was terminally ill. That same day, Joanne Adams, Ronald Bright's supervisor in the Brevard County Planning Department, also first learned that Ronald Bright was terminally ill.

7. Upon learning that his son, Ronald Bright, was terminally ill, Petitioner requested a meeting with the Brevard

County Human Resources Department (Human Resources) staff to discuss and apply for disability retirement benefits on behalf of his son. The meeting was held on October 31, 2002, in the office of Human Resources. In addition to Petitioner, Joanne Adams, Fannie Gray, and other Brevard County staff attended the meeting.

8. Kathryn Patterson was the primary person in Human Resources charged with the responsibility for assisting employees in filing for retirement benefits, including disability retirement benefits. However, Ms. Patterson did not attend the October 31, 2003, meeting because she was on leave that day. In Ms. Patterson's absence, Fannie Gray, who 12 years before had primary responsibility for assisting employees with retirement applications, provided disability retirement application forms for Ronald Bright to Petitioner.

9. The package of forms Ms. Gray provided to Petitioner on October 31, 2001, did not include an FRS-110 form, Option Selection Form (FRS-110 form).

10. During the October 31, 2002, meeting, Petitioner executed the forms, including the disability retirement application, that were provided to him. These forms were completed by Petitioner pursuant to the durable power of attorney executed by Ronald Bright on March 26, 2003, three months after he was diagnosed with cancer.

11. On October 31, 2002, Ms. Gray faxed to the Division the disability retirement application package for Ronald Bright. The fax cover sheet contained a handwritten legend that said: "This is urgent[.] Thank you."

12. On November 4, 2002, Ms. Patterson returned to work after a short period of leave. Upon her return, she called the Division and spoke with Frederica Edwards to confirm the receipt of Ronald Bright's disability application. Ms. Patterson was informed by Ms. Edwards that only part of the facsimile transmittal had been received. Apparently, the facsimile transmittal initially received and filed by the Division included only the signature page of the application, the facsimile cover sheet, and part of the power of attorney document. Ms. Patterson then immediately re-sent, by facsimile, the disability application, the power of attorney, and the previously-submitted cover sheet with the original handwritten notation, "This is urgent[.]"

13. The disability application package that was re-sent to the Division by facsimile on November 4, 2002, did not include the FRS-110 form. Although the FRS-110 form, could have been filed at the same time as the application, that form was not required for the Division to determine if Ronald Bright was eligible for disability retirement.

14. On November 5, 2002, Frederica Edwards sent a letter to Ronald Bright at his home address informing him that two physician statements were required to make a disability determination. The letter further advised him of items that would be required if the application was approved, including an FRS-110 form. Blank copies of all of the forms mentioned were included with the letter.

15. On November 5, 2002, the same day the Division sent the letter and forms described in paragraph 14, the Human Resource staff sent, by facsimile, one physician report to the Division. That physician's report, completed by Dr. Acosta noted that "[T]his patient [Ronald Bright] is terminal." The following day, November 6, 2002, Human Resources received and faxed to the Division a second physician's statement which also attested to Ronald Bright's disability.

16. Ronald Bright never received the letter and enclosed forms sent out by the Division on November 5, 2002, because he was confined to the hospital, where he remained until his death on November 9, 2002.

17. On November 14, 2002, Ms. Patterson called Ms. Howell and inquired about the status of the application. Ms. Howell informed Ms. Patterson that everything needed for a disability determination had been received. Notice was also given to Ms. Howell of Ronald Bright's passing. Based on this telephone

conversation with Ms. Howell, the Human Resources staff believed that all information required to process Ronald Bright's disability retirement application had been received.

18. On or about November 14 or 15, 2002, a few days after Ronald Bright's death, Petitioner received the November 5, 2002, letter from the Division and the forms included with it. The delay in receipt of the letter was because Petitioner had executed a mail-forwarding directive to the U.S. Postal Service, effective November 6, 2002, directing that all mail for his son be forwarded to Petitioner's residence.

19. Upon receipt of the Division's November 5, 2002, letter and enclosed documents, Petitioner contacted Human Resources regarding the FRS-110 form. As he had done previously, Petitioner relied on Human Resources for assistance and guidance in the disability retirement application process.

20. The FRS-110 form adopted, pursuant to Section 121.091(6), Florida Statutes (2001), provides for four options: Option 1 provides for full benefits for the life of the member; Option 2 is a reduced benefit for ten years with those benefits payable to a beneficiary in the event the member dies before the end of ten years; Option 3 applies to a deceased member who is survived by a joint annuitant, which is defined in Section 121.021(28), Florida Statutes (2001), as a spouse, or children, or a parent, or other person over age 25, for whom the member is

the legal guardian and dependent upon the member for over one-half of his or her support; and Option 4 is applicable if there is a joint annuitant and the member desires to elect that the survivor of them would receive a reduced benefit of 66 and 2/3 percent.

21. The FRS-110 form incorporates the following statements in its instructions: "What Retirement Option Should You Choose," which accompany the FRS-110 form. Under Option 2, it states:

Option 2 would be particularly appropriate if you are in ill health and your beneficiary does not qualify as a joint annuitant. Anyone can be named as a beneficiary under Option 2, as well as charities, organizations, or your estate or trust.

22. Ronald Bright was a single person who had never been married, had no children, and there was no parent for which he was legal guardian or who was dependent upon him for support. Due to his terminal condition and his family status, the only viable option on the FRS-110 form was Option 2, if an election was made.

23. On October 28, 2002, when Ronald Bright knew that his condition was terminal, in a conversation with Petitioner and with his supervisor, Ms. Adams, he stated his intent that his father receive a ten-year payout of his retirement benefits in the event of his untimely death, which he knew to be imminent.

24. On or about November 18, 2002, after talking to the Human Resources staff and reviewing the FRS-110 form, Petitioner executed the form election, as attorney-in-fact for Ronald Bright, choosing Option 2 benefits for Ronald Bright, with Petitioner as beneficiary. Human Resources then sent the executed FRS-110 form, by facsimile, to the Division.

25. The FRS-110 form executed by Petitioner as attorney-in-fact, on November 18 or 19, 2002, was invalid as a matter of law, pursuant to Section 709.08(3)(b), Florida Statutes (2001), because it was executed after the death of Ronald Bright.

26. On December 26, 2002, Ronald Bright's application for disability benefits was approved and his effective retirement date was November 1, 2002. However, after Ronald Bright's application was approved, the Division determined that the FRS-110 form, was executed after the death of Ronald Bright and was, therefore, invalid. As a result, no continuing benefit under Option 2 was available.

27. On February 4, 2003, the Division officially denied Petitioner's request for payment of the Option 2 retirement benefits of Ronald Bright.

28. The Division receives many disability retirement applications from FRS members that contain the word "Urgent," due to the fact that these members have terminated employment and may have no income. Because of this, employees in the

Division's Disability Determination Section process applications with the notation "Urgent," or similar language, like any other application.

29. The Division has no rules or procedures that address or govern expediency in processing disability applications where an FRS member is terminally ill. However, when the Division is notified by telephone, either by a member, a member's family, or an employer that an applicant is terminal and has only a short time to live, the Division's Disability Determination Section's practice is to process that application out-of-order.

30. Because of the Division's practice of disregarding written notations indicating that a particular application is urgent, when the disability retirement application of Ronald Bright was faxed to the Division on October 31, 2002, and again on November 4, 2002, the Division took no special action regarding the application. Moreover, no special action was taken based on the physician's statement faxed to the Division on November 5, 2002, which noted that Ronald Bright was terminal.

31. The Division is responsible for administering the provisions of Chapter 121, Florida Statutes (2001). In accordance with its duties, the Division, which has over 600,000 members, disseminates information handbooks and forms regarding retirement issues to members of the FRS. The Division also

provides forms, information, handbooks, and training regarding retirement issues to governmental entities whose employees are a member of the Florida Retirement System. The Division also provides governmental employers with various publications, such as the Employer Handbook and various forms relative to retirement.

32. The Employer Handbook was provided to and used by Brevard County. The introduction of the Employer Handbook contains the following on Page XIII:

TO PAYROLL AND PERSONNEL OFFICERS

You are the key link between the Division of Retirement and the employees of your organization to ensure that your employees receive information from the Division that informs them of their choices and rights under the Florida Retirement System (FRS) and that the permanent retirement records maintained by the Division are accurate, you must be thoroughly informed of FRS procedures. However, as agency representatives, you are not agents of the Division. The Division will be not be responsible for an erroneous information you may provide to members.

33. Although the governmental employers are liaisons between the Division and FRS members, these entities are not considered agents of the Division.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the subject matter and of the parties to this

proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes (2003).

35. Chapter 121, Florida Statutes (2001), known as the Florida Retirement System Act, established the Florida Retirement System. Pursuant to Section 121.1905, Florida Statutes (2001), the Division is within the Department of Management Services and is responsible for administering the provisions of Chapter 121, Florida Statutes (2001).

36. The issue in this case is whether Petitioner, as beneficiary of his deceased son, is eligible to receive retirement benefits under Option 2 of the FRS.

37. Petitioner argues that he is entitled to benefits under Option 2, even though neither Ronald Bright, an FRS member, nor anyone on his behalf ever completed the FRS-110 form prior to Ronald Bright's death. Petitioner contends that the sole reason the FRS-110 form was not completed prior to his son's death was that Human Resources and/or the Division failed to provide him with the form. Petitioner further argues that Human Resources, in providing assistance to him in completing the disability retirement application and advising him in related matters, was acting as an agent for the Division and, thus, the Division should be barred from denying him benefits under the principle of equitable estoppel.

38. The Division's position is that no benefit is payable to Petitioner under Option 2 because prior to Ronald Bright's death, an FRS-110 form was not completed by him or on his behalf. Moreover, the Division disputes the assertion that the Human Resources or its employees are agents of the Division. Therefore, the actions, or in this case the inaction, of representations of the Human Resources staff could not be attributable to the Division so as to result in the Division's being estopped from denying benefits to Petitioner.

39. Petitioner has the burden of proof in this proceeding. The burden of proof in an administrative proceeding is on the party asserting the affirmative of the issue unless the burden is otherwise established by statute. Young v. State, Department of Community Affairs, 567 So. 2d 2 (Fla. 3d DCA 1990); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

40. In order to prevail, Petitioner must demonstrate by a preponderance of evidence that he is entitled to monthly benefits under Option 2 of the FRS. Petitioner has failed to meet his burden of proof.

41. Pursuant to Section 121.091, Florida Statutes (2001), "[b]enefits may not be paid under this section unless the member

has terminated employment . . . and a proper application has been filed in the manner prescribed by the [Division]."

42. Section 121.091(4), Florida Statutes (2001), addresses "disability retirement benefit[s]" and provides such benefits for FRS members who are vested and become totally and permanently disabled before reaching normal retirement by virtue of age or years of service.

43. Prior to approval of disability retirement payments by the Division, the FRS member must provide proof that they are totally and permanently disabled and must include certification of such disability by two licensed physicians.

§ 121.091(4)(c)1., Fla. Stat. (2001).

44. Pursuant to Florida Administrative Code Rule 60S-4.007(2)(b), which implements Section 121.091, Florida Statutes (2001), a proper application for disability retirement must include documentation attesting that the member was in the employ of an FRS employer at the time he became disabled. Additionally, that provision requires that the member submit the following: (1) the Application for Disability Retirement (Form FR-13) to be completed by the member; (2) the Statement of Disability by Employer (Form FR-13a) to be completed by the member's employer; (3) two physician reports (Form FR-13b) to be completed by two Florida licensed physicians; and (4) any other

evidence of disability requested by the administrator. See Fla. Adm. Code R. 60S-4.007(2)(b)1. through 4.

45. The Division, upon receipt of the completed forms (Forms FR-13, FR-13a, and FR-13b), is required to determine if the FRS member is totally and permanently disabled. See Fla. Adm. Code R. 60S-4.007(2)(d)1. and § 121.091(4)(c), Fla. Stat. (2001).

46. Florida Administrative Code Rule 60S-4.0035(4)(a) sets forth the procedure the Division follows when it receives an incomplete application and/or needs additional information to make an eligibility determination and/or to compute the monthly benefit payment amount. That provision states in relevant part the following:

(4) When a member's application for retirement benefits is received, the Division will:

(a) Acknowledge the receipt of the member's application and advise him of any required information or documents that have not been received. Such information may include but is not limited to birthdate verification, beneficiary designation, option selection as required by Rule 60S-4.010, F.A.C. (Emphasis supplied)

47. Section 121.091(6), Florida Statutes (2001), and Florida Administrative Code Rule 60S-4.010 address retirement benefit payment options. Those provisions require that a member who is eligible for a retirement benefit, select one of the four options prior to receipt of his first monthly benefit payment.

48. Florida Administrative Code Rule 60S-4.010 provides in pertinent part the following:

(1) Prior to the receipt of his first monthly benefit payment, a member who is eligible for a retirement benefit . . . shall select one of the four optional forms of payment of such benefits, as provided in paragraphs (a), (b), (c), or (d), on the appropriate retirement application form as required in subsection 60S-4.0035(1), F.A.C., or the Option Selection for FRS Members, Form FRS-110. . . The four options are as follows:

(a) Option 1. The maximum retirement benefit payable to the member during his lifetime.

(b) Option 2. A retirement benefit payable during his lifetime and, in the event of his death within a period of 10 years after his retirement, the same monthly amount to be payable to his beneficiary for the balance of such 10-year period.

(c) Option 3. A retirement benefit which shall be payable during the joint lifetime of both the member and his joint annuitant and which shall continue after the death of either during the lifetime of the survivor in the same amount, except as provided in paragraph 60S-4.010(1)(e), F.A.C.

(d) Option 4. A retirement benefit payable during the joint lifetime of the member and his joint annuitant, and which shall continue after the death of either during the lifetime of the survivor in an amount equal to $66 \frac{2}{3}$ percent of the amount which was payable during the joint lifetime of the member and his joint annuitant, except as provided in paragraph 60S-4.010(1)(e), F.A.C.

49. Section 121.091(7)(c)2., Florida Statutes (2001), prescribes the benefits to be paid when a retiring member dies on or after the effective date of retirement, when the member has selected one of the optional forms of retirement and also when the retiring member has not selected such options. That section provides in relevant part the following:

(c) If a retiring member dies on or after the effective date of retirement, but prior to a benefit payment being cashed or deposited, or credited to the Deferred Retirement Option Program, benefits shall be paid as follows:

* * *

2. For a designated beneficiary who does not qualify as a joint annuitant, any benefits payable shall be paid as provided in the option selected by the member; or if the member has not selected an option, benefits shall be paid in the optional form of payment provided in subparagraph (6)(a)1. [Option 1]. (Emphasis supplied)

50. Florida Administrative Code Rule 60S-4.010(6)(c) also sets out the manner in which benefits are paid if, as in this case, a member dies after his effective retirement date and without having selected one of the four retirement options. That rule provides in relevant part the following:

(c) If the member should die after his effective date of retirement and without having selected an option, benefits shall be payable as follows:

1. If the member's designated beneficiary does not qualify as a joint annuitant, benefits shall be paid under option 1, with

any benefits due from his effective date of retirement through the month of death payable to the member's estate. . . .
(Emphasis supplied.)

51. A "beneficiary" is the "joint annuitant or any other person . . . designated by the member or other qualified person to receive benefits, if any, which may be payable . . . in the event of the death of the member or other beneficiary."

See § 121.021(46), Fla. Stat. (2001); and Fla. Admin. Code R. 60S-6.001(8).

52. A joint annuitant may be a member's spouse; a natural or legally adopted child, who is either under 25 or physically or mentally disabled and incapable of self-support regardless of age; a parent or grandparent; or a person aged 25 or older for whom the member is the legal guardian, if said person is financially dependent for no less than one-half of his or her support from the deceased member at retirement, whichever occurs first. See § 121.021(28), Fla. Stat. (2001), and Fla. Adm. Code R. 60S-6.001(33).

53. The evidence established and it is undisputed that Petitioner, on behalf of his son, applied for disability retirement. The undisputed evidence also established that, as of November 6, 2002, all documentation required by Florida Administrative Code Rule 60S-4.007(2)(b) and necessary for the Division to determine Ronald Bright's eligibility for disability had been submitted to the Division. Based on that

documentation, the Division properly determined that Ronald Bright was eligible for disability retirement benefits and, in accordance with Fla. Adm. Code Rule 60S-4.0035(3)(b)2., correctly determined that Ronald Bright's effective retirement date was November 1, 2002.

54. There is no dispute that Petitioner is Ronald Bright's beneficiary within the meaning of the provisions cited in paragraph 51 above. However, Petitioner has not asserted and the evidence did not establish that he qualifies as a joint annuitant, as defined in the provisions cited in paragraph 52.

55. Pursuant to Section 121.091(7)(c)2., Florida Statutes (2001), and Florida Administrative Code Rule 60S-4.010(6)(c)1. quoted above in paragraphs 49 and 50, respectively, if a member dies after his effective retirement without selecting an option, the Division is required to pay death benefits in accordance with the provisions of Option 1.

56. Here, it is undisputed that Ronald Bright died after his retirement date and prior to his or Petitioner's completing the FRS-110 form and, thereby, selecting a payment option.

57. Because no option selection was made before Ronald Bright died, the Division was required to pay benefits under Option 1, which provides the maximum retirement benefit payment to the member during his lifetime. In this case, due to Ronald Bright's death on November 9, 2002, he was entitled to only one

monthly disability retirement check and no benefits were payable to his beneficiary.

58. Petitioner does not dispute that the results articulated in paragraph 57 are consistent with the applicable statutory and rule provisions. However, Petitioner contends that the Division should distribute retirement benefits consistent with the provisions of Option 2, which provides a reduced benefit for ten years with benefits payable to a beneficiary in the event the member dies before the end of the ten years.

59. Petitioner argues that the result he seeks is warranted based on principles of "agency" and of "equitable estoppel." Petitioner first asserts that Brevard County, as an employer that participates in the Florida Retirement System, is an agent of the Division. Next, Petitioner asserts that based on the Human Resources' failure to provide to Petitioner the FRS-110 form, the Division should be estopped from denying benefits under Option 2. Petitioner contends that Ronald Bright expressed his desire to select Option 2, knowing that his death was imminent and that Petitioner would have carried out that request had he been provided with the form.

60. In addressing the issue of apparent authority, the Florida Supreme Court, in Almerico v. RLI Insurance Company, 716 So. 2d 774, 777 (Fla. 1998), noted that

Recent cases have applied a three-prong test under general agency law in order to determine the existence of apparent agency: first, whether there was a representation by the principle; second, whether a third party relied on that representation; and, finally, whether the third party changed position in reliance upon the representation and suffered detriment. See Warren v. Department of Admin., 554 So. 2d 568 (Fla. 5th DCA 1989); Smith v. American Auto Ins. Co., 498 So. 2d 448 (Fla. 3d DCA 1986).

61. Here, there is no evidence that the Division ever made representations to Brevard County that the County had actual or apparent authority to act as agent for the Division. On the contrary, the evidence established that in a booklet distributed to Brevard County, as well as other employers participating in the FRS, the Division expressly states that such employers are not agents of the Division. Having failed to prove the first of the three elements required to establish the existence of apparent authority, a further analysis regarding the remaining elements is unnecessary.

62. In order to prove equitable estoppel, the following elements must be established: 1) a representation as to a material fact that is contrary to a later asserted position; 2) a reasonable reliance on that representation; and 3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon. See Warren v. Department of Administration, 554 So. 2d 568, 570 (Fla. 5th DCA 1989).

63. As noted in paragraph 61, Petitioner failed to establish that Brevard County, or any of its agents, had apparent agency authority and could act on behalf of the Division. Therefore, representations, if any, made by Brevard County to Petitioner are not attributable to the Division and the doctrine of equitable estoppel is inapplicable to the Division.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Division of Retirement issue a final order denying benefits to Petitioner under Option 2.

DONE AND ENTERED this 30th day of January, 2004, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of January, 2004.

COPIES FURNISHED:

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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.