

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT B. NEMEROFSKY, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 03-4248  
 )  
 DEPARTMENT OF HEALTH, BOARD OF )  
 MEDICINE )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on January 16, 2004, at the Miami-Dade County Courthouse in Miami, Florida, before Michael M. Parrish, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Monica Felder-Rodriguez, Esquire  
Dresnick & Rodriguez  
Suntrust Plaza, Suite 701  
201 Alhambra Circle  
Coral Gables, Florida 33134

For Respondent: Rosanna Catalano, Esquire  
Office of the Attorney General  
The Capitol, Plaza Level 01  
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's application for a license by endorsement to practice medicine in the State of Florida should be granted or denied.

PRELIMINARY STATEMENT

Petitioner filed an application with the Board of Medicine (Board) seeking to be licensed by endorsement to practice medicine in Florida. On October 17, 2003, the Board issued a Notice of Intent to Deny Licensure, in which the Board notified Petitioner of its intent to deny his application. Petitioner filed a timely request for an evidentiary hearing, and in due course the matter was referred to the Division of Administrative Hearings. A final hearing was held in this case on January 16, 2004. At the final hearing, Petitioner testified on his own behalf, but did not call any additional witnesses to testify at the final hearing. Petitioner also offered two exhibits that were received in evidence; a certificate of post-graduate training marked as "Petitioner Exhibit 1," and a residency agreement marked as "Petitioner Exhibit 2."

Respondent presented the testimony of Chandra Prine, Licensure Administrator for the Board. Two depositions were filed in lieu of live testimony. Dr. James Tyburski's deposition was filed as Joint Exhibit 1 and Dr. Mark Granick's deposition was filed as Joint Exhibit 5. Petitioner's complete licensure file with the Board was received in evidence as Joint Exhibit 2. Requests for Admissions served by both parties were moved into evidence as Joint Exhibit 3, and responses to both sets of Requests for Admissions were received in evidence as

Joint Exhibit 4. At the conclusion of the final hearing, the parties requested and were granted ten days from the date of the filing of the transcript within which to file their proposed recommended orders.

Following an unusual and unfortunate delay on the part of one of the court reporters, the complete transcript of the final hearing was not filed with the Division of Administrative Hearings until March 31, 2004. Both parties filed timely Proposed Recommended Orders containing proposed findings of fact and conclusions of law. The parties' proposals have been carefully considered during the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner is a medical doctor. Petitioner graduated medical school from the University of Miami in Miami, Florida, in May 1994.

2. Petitioner signed an application for medical licensure by endorsement with the Board on January 9, 2003. On or about January 16, 2003, the Department of Health received Petitioner's application for medical licensure by endorsement. Following receipt and review of the subject application, Petitioner was required to provide some additional information to the Board. Petitioner was eventually required to appear before the Credentials Committee of the Board to answer questions about his

application. On October 17, 2003, the Board issued a Notice of Intent to Deny Licensure, in which the Board notified Petitioner of its intent to deny his application. That notice read as follows, in pertinent part:

This matter came before the Credentials Committee of the Florida Board of Medicine at a duly-noticed public meeting on September 13, 2003 in Tampa, Florida[,] and the full Board on October 3-4, 2003, in Ft. Lauderdale, Florida. The applicant appeared before the Credentials Committee on September 13, 2003, and presented testimony regarding the application file.

The application file shows:

The applicant lied before the Committee and lied on the licensure application as to the following:

- a. the applicant took a leave of absence during his training;
- b. the applicant was placed on probation at 3 schools;
- c. the applicant did not finish his training in the normal time frame; and,
- d. the applicant answered #15 b, c, d and #31 incorrectly on the application.

The applicant is guilty of violating Section 458.331(1)(gg), Florida Statutes, for misrepresenting or concealing multiple material facts at any time during any phase of a licensing or disciplinary process or procedure. Based on the foregoing, the Board may refuse to certify an applicant for licensure, or restrict the practice of the licensee, or impose a penalty, pursuant to Sections 458.3331(2) and 456.072(2), Florida Statutes.

It is therefore ORDERED that the application for licensure be DENIED.

3. Petitioner attended the following four postgraduate training programs (residency programs): Medical College of

Pennsylvania; Sinai Hospital<sup>1</sup>; Wayne State University/Detroit Medical Center; and University of Medicine and Dentistry of New Jersey ("UMDNJ"). Petitioner's dates of attendance in those four residency programs were as follows:

- a) Medical College of Pennsylvania from July 1, 1994 to June 30, 1995.
- b) Sinai Hospital from July 1, 1995 to June 30, 1999.
- c) Wayne State University/Detroit Medical from July 1, 1999 to June 30, 2001.
- d) UMDNJ from July 1, 2001 to June 30, 2003.

4. Question number 15a on the application for medical licensure by endorsement asks, "Have you ever been dropped, suspended, placed on probation, expelled or requested to resign from a postgraduate training program?" Petitioner answered "yes" to question number 15a and submitted a written supplemental answer which stated, "I was placed on probation regarding the expectations of running a University service in a manner that kept attending physicians informed of patients' clinical changes in July of 2000. Specific goals were given to me that I immediately fulfilled and was taken off probation in September of 2000 and remained in good academic standing until the time of my graduation." On his application for licensure, Petitioner only admitted to being on probation at one residency program, Wayne State University/Detroit Medical Center.

5. During the processing of the subject application, an employee of the Department of Health, Wendy Alls, advised Petitioner as follows by e-mail: "We are in receipt of your response to the inquiry from Wayne State University [Sinai Hospital], regarding your Residency from 7/95 to 6/99. It indicates that you were placed on probation and received negative reports. It also stated that limitations were placed upon you due to academic incompetence. Please respond."

6. On May 6, 2003, Petitioner submitted an e-mail response to Wendy Alls regarding his probation at Wayne State University [Sinai Hospital] which stated: "It is true that I did receive negative reports during my residency training from 7/95 to 6/99 for my work ethic. However, I was never formally placed on probation as per the guidelines of the Wayne State University. I, as well as the Graduate Medical Education Office, must receive formal written notification identifying the areas of deficiency and the duration of the probation period. Written notification must be submitted to both the GME office and myself after successful completion of the probation period. This was never done. In addition, no limitations or restriction were ever placed upon me due to academic incompetence or for any other reason for that matter." Petitioner did not admit this on his initial application to the Florida Board of Medicine.

7. Sinai Hospital submitted a Training Evaluation Form to the Board and stated on the form that Petitioner was on academic probation during his residency from 1996 to 1997.

8. Sinai Hospital submitted a report to the Federation Credentials Verification Service ("FCVS")<sup>2</sup> and stated on the report that Petitioner was on academic probation during his residency from 1996 to 1997.

9. Sinai Hospital reported that Petitioner was placed on probation during his residency in response to faculty concerns regarding both academics and behavior.

10. While at Sinai Hospital, Petitioner was informed of the issues he needed to improve during his probationary period. These issues included, but are not limited to the following: Petitioner's tardiness, sleeping during conferences, unavailability when on call, failing to follow hierarchy, and inability to carry his share of the workload.

11. Petitioner admitted at the formal hearing he was told that he was on probation at Sinai Hospital. During his appearance before the Credentials Committee on September 13, 2003, Petitioner testified under oath, that he did not disclose the fact he was on probation at Sinai Hospital because he was never informed that he "was ever placed on probation."

12. A letter dated November 4, 1999, from Dr. Andrew Saxe (who was then the general surgery residency program director at Sinai Hospital) states that Petitioner was on "probationary status" at Sinai Hospital during his residency from 1996 to 1997. Dr. Andrew Saxe also noted Petitioner's probationary status in a memo dated April 28, 1999, which Petitioner himself signed.

13. Petitioner signed a memo dated December 18, 1996, stating that he was on "probationary status" at Sinai Hospital during his residency. Petitioner also signed a memo dated April 16, 1997, stating that he was "off probationary status" at Sinai Hospital during his residency.

14. Wayne State University/Detroit Medical Center submitted a Training Evaluation Form to the Board and stated on the form that Petitioner was on academic probation during his residency from 1999 to 2000.

15. Petitioner failed to fully disclose all of the reasons why he was placed on probation at Wayne State University/Detroit Medical Center. Wayne State University/Detroit Medical Center submitted a report to the FCVS and stated on the report that Petitioner was on academic probation during his residency for four months beginning in September 2000. The report stated that the probation was based on evaluations which cited "inadequate performances in clinical application of knowledge especially



recognitions of own capabilities and limitations. There were also concerns over attention to details and work habits."

16. Petitioner's supplemental answer to question 15a does not fully disclose his deficiencies in clinical knowledge and work habits at Wayne State University/Detroit Medical Center.

17. At all times material to this case, Dr. Mark Granick has been the director of the plastic surgery program at UMDNJ. UMDNJ submitted a Training Evaluation Form to the Florida Board of Medicine and stated on the form that Petitioner was on academic probation during his residency "due to poor in-service exam scores."

18. After UMDNJ submitted the Training Evaluation Form, Petitioner contacted Dr. Mark Granick to discuss his probation at UMDNJ and the "program's specifications in defining probation." Dr. Mark Granick was prompted to send a second Training Evaluation Form to the Board, changing the substance of the first submitted Training Evaluation Form. The second Training Evaluation Form to the Board was submitted along with a letter from Dr. Mark Granick dated February 14, 2003, which stated he made an error in filling out the original form.

19. When Dr. Mark Granick drafted Petitioner's Fourth-Quarter Report on May 31, 2002, he was "documenting the reasons why I wanted him on a period of supervision, which I thought of as probation at that point in time."

20. Petitioner's Fourth-Quarter Report dated May 31, 2002, was in fact signed by Petitioner. The Fourth-Quarter Report documented that Petitioner was "deficient on multiple occasions" with regard to Patient Care; Petitioner had a "poor acquisition of a central knowledge base in Plastic Surgery"; Petitioner's tardiness needed to "stop"; Petitioner demonstrated "immaturity" in interpersonal skills; and, Petitioner had "been acting in an unprofessional manner."

21. Petitioner signed a memo dated January 8, 2003, stating that he was placed on "probation" at UMDNJ during his residency due to "poor performance on the in-service examination and overall perception of weakness in academic level."

22. Dr. Mark Granick testified that when he used the term "probation" in the January 8, 2003, memo, the word was consistent with his own thinking, and not consistent with university definitions. Dr. Mark Granick stated that Petitioner indicated to him during their meetings at UMDNJ that Petitioner understood he was on "probation" at UMDNJ.

23. Dr. Mark Granick testified that in his mind he considered it "probation" when he put Petitioner under direct supervision, gave Petitioner academic support, and advised Petitioner of the areas in which he needed to improve. Although the period of academic supervision imposed on Petitioner did not qualify as probation at the university level, it did constitute

"probation" in the mind of Dr. Mark Granick and was understood to be "probation" by the Petitioner himself.

24. Petitioner misrepresented to the Board the circumstances which caused him to be placed on probation at Wayne State University/Detroit Medical Center. He also misrepresented his understanding of his probationary status at both Sinai Hospital and UMDNJ.

25. Question number 15c on the subject application asks: "Did you take a leave of absence during a postgraduate training?" Petitioner answered "no" to question number 15c on the application. But Wayne State University/Detroit Medical Center documents show that Petitioner took a month-long leave of absence. Petitioner asserts that his month-long leave of absence from Wayne State University/Detroit Medical Center was not a "leave of absence" because he used a combination of sick time and vacation time. However, Petitioner signed a Family Medical Leave Act Certification asking for a leave of absence due to his being "unable to perform work of any kind" while training at Wayne State University/Detroit Medical Center. Petitioner requested a leave of absence for one month from his training program at Wayne State University/Detroit Medical Center in March of 2001.

26. While on leave in March 2001, Petitioner was hospitalized for benzodiazepine poisoning, pace maker insertion,

and possible seizure disorder secondary to cardiac rhythm disturbance. After Petitioner's hospitalization, Petitioner needed to have a letter clearing him to resume unrestricted activity. During this period of time Petitioner was also told that he should avoid driving motor vehicles.

27. Once questioned by the Credentials Committee, Petitioner admitted to taking a leave of absence in 2001 while training at Wayne State University/Detroit Medical Center. Prior to being questioned by the Credentials Committee, Petitioner concealed from the Florida Board of Medicine that he took a leave of absence while at Wayne State University/Detroit Medical Center.

28. Question number 31 on the subject application asks "In the last five years, have you been treated for or had a recurrence of a diagnosed physical impairment?" Petitioner answered "no" to question number 31 on the application. However, after questioning by the Credentials Committee, Petitioner admitted he had a pacemaker. After his hospitalization, Petitioner had to be cleared by his doctors to return to his duties as a resident. Despite Petitioner's own definition of "physical impairment," he concealed his hospitalization, pacemaker, and possible seizure disorder from the Board.

29. Question number 15b on the subject application asks "Was attendance in a postgraduate training program for a period other than the established time frame?" Petitioner answered "no" to question number 15b on the application.

30. Petitioner attended the General Surgery postgraduate training program at Medical College of Pennsylvania for one year from July 1, 1994, to June 30, 1995.

31. Petitioner attended the general surgery postgraduate training program at Sinai Hospital for four years from July 1, 1995, to June 30, 1999.

32. Petitioner attended the general surgery postgraduate training program at Wayne State University/Detroit Medical Center for two years from July 1, 1999, to June 30, 2001.

33. As indicated by the foregoing, Petitioner spent seven years attending general surgery postgraduate training programs. Physicians applying for licensure by endorsement in Florida are required to show that they have completed an "approved residency program" in a "slotted" position. The Accreditation Council for Graduate Medical Education ("ACGME") accredits postgraduate training programs, sets the standards for training programs, and determines the number of "slotted" positions a program has.

34. The Board considers an "approved residency program" to be one that has been accredited by the ACGME. The Board relies on the ACGME in making determinations for licensure. The Board

relies on the information provided in the ACGME directory when processing applications. The ACGME established time frame for completing a general surgery postgraduate training program is five years. The ACGME-established time frame for completing the postgraduate training program in general surgery at Medical College of Pennsylvania, Sinai Hospital, and Wayne State University/Detroit Medical Center was five years when Petitioner attended these programs. Thus, a five-year general surgery residency was considered standard by ACGME, the Medical College of Pennsylvania, Sinai Hospital, Wayne State University/Detroit Medical Center, medical educators, and residents like Petitioner.

35. Therefore, Petitioner would have had to complete all his postgraduate training in general surgery within five years in order to have finished his training within the "established time frame." It took Petitioner seven years to complete all of his postgraduate training in general surgery. Petitioner's attendance in his general surgery postgraduate training programs was for a period other than the normal time frame established by both ACGME and by the programs he attended.

36. Question number 15d on the subject application asks, "Were you required to repeat any of your postgraduate training?" Petitioner answered "no" to question number 15d on the application.

37. A memo dated December 3, 1997, written by Dr. Andrew Saxe (general surgery residency programs director at Sinai Hospital) and placed in Petitioner's training file, included the observation that "this is a consequence of his being asked to repeat the current clinical year."

38. In a memo dated April 28, 1999, also written by Dr. Andrew Saxe and also placed in Petitioner's training file, Dr. Saxe stated, "in light of prior probation and concerns regarding clinical competency an additional year of training would be of service to him."

39. At final hearing, Petitioner himself explained that each postgraduate year ("PGY") runs from July 1st of one year to June 30th of the following year. On the Verification of Postgraduate Medical Education form submitted to FCVS, Sinai Hospital listed Petitioner as only completing PGY 2 through PGY 4 while attending their program. On the Verification of Postgraduate Medical Education form submitted to FCVS Wayne State University/Detroit Medical Center listed Petitioner as completing PGY 4 and PGY 5 in their program.

40. While attending his postgraduate training programs, Petitioner was continuously evaluated, as evidenced in his training files. A review of Petitioner's evaluation forms demonstrates that Petitioner was evaluated as a PGY 2 from July 1995 through June 1997. That means Petitioner was a PGY 2 for

two years. A review of Petitioner's evaluation forms demonstrates that Petitioner was evaluated as a PGY 4 from July 1998 through June 2000. That means Petitioner was a PGY 4 for two years. Therefore, Petitioner repeated both PGY 2 and PGY 4 levels of training. As demonstrated by Petitioner's postgraduate training files, Petitioner's education levels of training did not consistently progress through the calendar years. Petitioner concealed from the Board that he had to repeat PGY 2 and PGY 4.

41. Over the course of the last year, the Board has licensed at least 55 applicants who were found to have made one or more material misrepresentations on their licensure applications, or in the course of the licensure process.<sup>3</sup>

42. Over the course of the last year, the Board has licensed a number of applicants alleged to have made material misrepresentations regarding one or more of the issues raised in this matter. In a few cases that are arguably similar to the facts presented in this case, the Board has granted the license application, but with conditions that required the applicant to file a new application, to pay a new application fee, and to pay an administrative fine in the amount of \$5,000.00.

#### CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the



parties thereto, pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

44. In a case of this nature, the burden of proof is by a preponderance of the evidence.

45. Section 458.313, Florida Statutes, lists the requirements for a physician to become licensed by endorsement. One of these requirements is that the physician has met the qualifications for licensure in Section 458.311(1)(b)-(g) or Section 458.311(1)(b)-(e), and (g) and (3), Florida Statutes.

46. Section 458.311(1)(f), Florida Statutes, requires that all graduates from U.S. medical schools complete an "approved residency" of at least one year.

47. Florida Administrative Code Rule 64B8-4.004(1), provides, in pertinent part:

An approved residency of at least one year constitutes a course of study and training in a single program for a period of not less than twelve calendar months by a person holding a degree as a medical doctor. The hospital and the program in which the medical doctor is participating must be accredited for the training and teaching of physicians by the Accreditation Council for Graduate Medical Education (ACGME) and the medical doctor must be assigned to one of the allocated positions or slots approved by the ACGME. Fellowship training or residency training in a non-slotted position shall be considered approved residency training only in the instance when the fellowship or residency training has been recognized and accepted for that applicant toward completion of requirements for specialty

board certification by a specialty board listed by the American Board of Medical Specialties.

48. Section 458.331(1), Florida Statutes, provides, in pertinent part:

The following acts constitute grounds for denial of a license or disciplinary action as specified in Section 456.072(2):

\* \* \*

(gg) Misrepresenting or concealing a material fact at any time during any phase of a licensing or disciplinary process or procedure.

49. Petitioner misrepresented and concealed numerous material facts on his licensure application and in his subsequent written and oral statements to the Board regarding questions 15a, b, c, d, and 31 on the subject application for licensure by endorsement.

50. Petitioner misrepresented and concealed facts on his licensure application and in his subsequent written and oral statements to the Board regarding postgraduate academic probation, repeated training, leave of absence, physical impairment, and normal time frame of residency program completion.

51. The Board uses the licensure application as a basis for obtaining important and relevant information from the applicant regarding his background. Therefore, the answers

Petitioner provided on his licensure application, and in his subsequent oral and written statements to the Board are material facts which affect the Board's ability to review his application and assess his qualifications to be a licensed doctor in Florida.

52. Because Petitioner has misrepresented and concealed a number of material facts during the course of the application process, he has violated Section 458.331(1)(gg), Florida Statutes. Because he has violated Section 458.331(1)(gg), Florida Statutes, the Board has the statutory authority, under Section 456.072(2), Florida Statutes, to enter an order doing any of the following:

(a) Refusal to certify, or to certify with restrictions, an application for a license.

(b) Suspension or permanent revocation of a license.

(c) Restriction of practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or any other restriction found to be necessary for the protection of the public health, safety, and welfare.

(d) Imposition of an administrative fine not to exceed \$10,000 for each count or separate offense. If the violation is for

fraud or making a false or fraudulent representation, the board, or the department if there is no board, must impose a fine of \$10,000 per count or offense.

(e) Issuance of a reprimand or letter of concern.

(f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

(g) Corrective action.

(h) Imposition of an administrative fine in accordance with s. 381.0261 for violations regarding patient rights.

(i) Refund of fees billed and collected from the patient or a third party on behalf of the patient.

(j) Requirement that the practitioner undergo remedial education.

53. In view of the Board's orders mentioned in the last two paragraphs of the findings of fact, above, it would appear to be consistent with those orders to issue a final order in this case that granted the license sought by the Petitioner, but that also imposed on the Petitioner a requirement that he file a new application, that he pay a new application fee, and that he pay a substantial administrative fine. Nevertheless, the undersigned is inclined to recommend a different disposition of

this matter: specifically, to recommend denial of the application. This inclination is inspired in large part by the reasoning that underlies the following language from the last paragraph of the "Argument" portion of Respondent's Proposed Recommended Order:

This case is about Petitioner's ability to be forthright and truthful. These characteristics are essential to the practice of medicine. Patient safety requires honest doctors. It is of the utmost importance that doctors tell patients the truth about their illnesses/diagnosis so that cures/treatments can be administered. If a physician makes a mistake, patients need doctors to be forthright and to admit to the mistake so that it can be corrected in a timely manner. If a course of treatment or surgery is unsuccessful, patients should be able to expect a physician to tell them right away so that alternative treatment options can be explored quickly. A physician's self-concept should not get in the way of practicing medicine nor should it get in the way of the licensure process. Full disclosure during the licensure process is essential for Board members to make informed decisions based on an applicant's totality of experiences. Petitioner's initial concealment and subsequent failure to answer Board inquiries truthfully were material misrepresentations which impeded the Board's review of his application. The Board is not looking for "perfect" physicians. They are looking for competent doctors who demonstrate that they can acknowledge mistakes, rise above adversity, and conquer challenges both in life and in professional practice.

54. The first sentence of the foregoing argument was accompanied by a footnote reading as follows:

In Chames v. Department of Professional Regulation, Board of Medicine, DOAH Case No. 86-1438 (Recommended Order issued April 14, 1987), the ALJ stated as follows:

In a field as sensitive as the medical profession, even a talented practitioner must not be in the practice of medicine regardless of his technical qualifications, and clinical and diagnostic skills, if he cannot be called upon to tell the truth when required. Regardless of how qualified a physician might be, such an individual may well at any time be subject to unknown stresses or pressures which would cause him to be less than forthcoming to the detriment of his patients. It is just this eventuality that the review process of the Board was designed to prevent.

55. Because truthfulness, honesty, and candor are so essential to the proper practice of medicine, it does not appear to the undersigned that misrepresentations and concealments of material facts can be adequately addressed by administrative fines, new applications, and new application fees. The consequences of medical mendacity appear to be too serious to be appropriately addressed by anything less than denial of the application.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a final

order denying Petitioner's application for medical licensure by endorsement.

DONE AND ENTERED this 29th day of April, 2004, in Tallahassee, Leon County, Florida.



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MICHAEL M. PARRISH  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of April, 2004.

ENDNOTES

1/ Sinai Hospital was affiliated with Wayne State University during Petitioner's attendance there.

2/ The FCVS is an organization which verifies the medical education and post-graduate training of physicians by resort to primary sources of information.

3/ The findings of fact in this paragraph and in the paragraph which follows are based on the contents of 55 orders of the Board of Medicine of which official recognition was taken during the course of the final hearing in this case.

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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.