

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PUTNAL GROVES,)
)
 Petitioner,)
)
 vs.) Case No. 03-4704
)
 THE CITRUS STORE AND FIDELITY &)
 DEPOSIT COMPANY OF MARYLAND,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to notice and in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2003), this cause came on for formal hearing before Fred L. Buckine, the designated Administrative Law Judge of the Division of Administrative Hearings, on February 10, 2004, in Sarasota, Florida.

APPEARANCES

For Petitioner: Russ Putnal, pro se
Putnal Groves
10755 Russ Road
Myakka City, Florida 34251

For Respondent The Citrus Store:

Richard S. Pipkin, Esquire
Fletcher & Pipkin
559 South Commerce Avenue
Sebring, Florida 33870

For Respondent Fidelity & Deposit Company of Maryland:

(No appearance)

STATEMENT OF THE ISSUES

Whether Respondent, Donnie Selph, d/b/a The Citrus Store and D & D Citrus (Donnie Selph), failed to pay amounts owing to Petitioner for citrus fruit harvested from Petitioner's groves, as set forth in the Complaint dated October 13, 2003, and, if so, the amount Petitioner is entitled to recover.

PRELIMINARY STATEMENT

On October 13, 2003, Petitioner, Russ Putnal, d/b/a Putnal Groves (Russ Putnal), filed a Complaint with the Department of Agriculture and Consumer Services (Department), alleging that Donnie Selph failed and refused to pay for 11,251 boxes of late-season Valencia oranges harvested from Russ Putnal's groves located in Manatee and Sarasota Counties, Florida, during the May 7, 2003, through June 9, 2003, citrus season pursuant to a written contract between the parties. Russ Putnal claimed that he and Donnie Selph entered into a written contract January 29, 2003, for 10,000 mid-season oranges and 40,000 late-season Valencia oranges, estimated to be all of Russ Putnal's 2002-2003 production for those two varieties of citrus fruit. Payments were made to Petitioner by The Citrus Store and by D & D Citrus,¹ for mid-season citrus fruit harvested. No payment was tendered for the 11,251 boxes of late-season Valencia oranges harvested from Russ Putnal's groves. Russ Putnal attached to his

Complaint copies of the contract, statements from Donnie Selph, and delivery trip tickets evidencing the following accounting:

Total Purchase Price [Valencia oranges]:	\$71,443.85
Less Harvesting, Mutual, Taxes, etc.:	\$2,373.57
Less Amount Received:	\$5,000.00
Net Amount or Claim (Balance Now Due):	\$64,070.28

Respondent, Fidelity & Deposit Company of Maryland, was named in the Complaint as surety for Donnie Selph.

On or about November 21, 2003, Donnie Selph, d/b/a The Citrus Store, 3365 U.S. Highway 17 North, Bowling Green, Florida 33834, licensed as a dealer in citrus fruit under License Number 756, supported by Surety Bond Number LPM8142573, for \$30,000, written by Fidelity & Deposit Company of Maryland, inception October 14, 2002, during the 2002-2003 citrus shipping season, filed an answer denying that the claim is valid. By affidavit, Donnie Selph filed the following answer to the Complaint:

1. As to Item 12, respondent would say that he entered into an agreement [written contract] with the complainant to pick 40,000 boxes of Valencia oranges. The price to be paid thereon was \$6.35 per box. In the two to three year time period preceding said contract, all of the complainant's fruit had been boxed and not juiced. Therefore, there was no historical basis for

the respondent to be aware of the pound solids per box that would be yielded from the fruit. Respondent relied on the complainant's assertions that the pound solids would be 6.8 to 7.0 pounds per 90-pound box. This was an affirmative representation by the complainant, upon which the Respondent relied to his detriment. When the fruit was picked, the average pound was 5.9 pounds solid per box. The respondent would assert an affirmative defense, against the claim of the claimant, of fraudulent misrepresentation.

2. As to item 13, a term of the purchase is [sic] other, and is \$6.35 per box.

3. As to item 14, purchase was made by Donnie Selph, d/b/a The Citrus Store. Purchase was made by other; other being by contract.

4. As to item 15, in support of this answer, attached hereto is documentary evidence.

5. Respondent, Donnie Selph, d/b/a The Citrus Store.

On December 12, 2003, Russ Putnal's Complaint, the Answer of Respondent, Supplemental Exhibits for Respondent's Response, and the Agency referral were referred to the Division of Administrative Hearings, where it was assigned to an Administrative Law Judge and set for hearing.

On January 7, 2004, the Notice of Hearing, scheduling the final hearing for February 10, 2004, in Sarasota, Florida, and the Order of Pre-hearing Instructions were entered.

On January 29, 2003, a notice of appearance, Witness/Exhibit list, and reply by Russ Putnal to the Initial Order were filed.

At the formal hearing, Russ Putnal testified on his own behalf and presented four exhibits (P-1 through P-4) that were accepted into evidence. Donnie Selph testified on his own behalf and presented one exhibit (R-1) that was accepted into evidence.

The hearing was recorded and transcribed. The Transcript of the hearing was filed on February 27, 2004. On March 12, 2004, Donnie Selph filed a Memorandum of Law and Proposed Order that were given careful consideration in the preparation of this Recommended Order. In lieu of a proposed recommended order, Russ Putnal elected to give a summation of his claim at the close of hearing that was given careful consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon observation of the witnesses and their demeanor while testifying; stipulations by the parties; documentary materials received in evidence; evidentiary rulings made pursuant to Sections 120.569 and 120.57, Florida Statutes (2003); and the entire record of this proceeding, the following relevant and material findings of fact are determined:

1. At all times material to this proceeding Russ Putnal was a "producer of citrus fruit" and owner of Putnal Groves located at 10755 Russ Road, Myakka City, Florida. A producer of citrus is one that grows citrus in this state for market.

2. At all times material to this proceeding, Donnie Selph was a "Florida-licensed [License Number 756] citrus fruit dealer" operating within the Department's regulatory jurisdiction. Donnie Selph admitted that he is owner of and does business under the names of The Citrus Store and D & D Citrus.

3. On October 13, 2002, Donnie Selph entered into a written contract with Russ Putnal under which Donnie Selph agreed to harvest 10,000 boxes of mid-season oranges on or before June 1, 2003. Donnie Selph agreed to pay \$4.35 per box for the mid-season oranges and agreed to pay \$6.35 per box for the late-season (grove production) Valencia oranges harvested from Russ Putnal's groves.

4. The form contract, dated January 29, 2003, entered into by Donnie Selph and Russ Putnal contained the following terms and conditions:

[T]he Grower, for and in consideration of the payment this date received and to be received as herein provided, has agreed and do by these presents agree to sell to the Buyer all citrus fruits, of merchantable quality at the time of picking, from the grove or groves hereinafter mentioned. The

price to be paid to the Grower by the Buyer for said fruit per standard field crate by volume or weight [weight was circled] at election of buyer on the trees, for all fruit of merchantable quality at the time of picking, shall be as follows:

Oranges, mids, 10,000 boxes (or production), \$4.35 [per] box

Valencia Oranges, 40,000 boxes (or production), \$6.35 [per] box

The term "merchantable" as used herein shall be defined as that standard of quality required by the United States Department of Agriculture for interstate shipment in fresh/juiced [juiced was circled] fruit form. . . .

* * *

It is agreed that the advance payment hereby receipted for is to be deducted from said payment as follows:

As fruit is harvested, \$12,000.00, ck# 6318

* * *

Note: Less all state taxes owned by Grower.

Mutual YES[] NO[]

A bond or certificate of deposit posted with the Florida Department of Agriculture and Consumer Services does not necessarily ensure full payment of claims for any nonperformance under this contract. . . .
(emphasis added)

5. The undisputed evidence established that Donnie Selph harvested mid-season oranges from Russ Putnal's groves and paid Russ Putnal for those mid-season oranges harvested per the terms

of the written contract. According to Russ Putnal, the contract was for mid-season oranges "which are basically a pineapple variety." "Mid-season juice oranges and Valencia oranges are late--late-season oranges. The mids were all paid for--the balance is on the Valencia oranges."

6. The undisputed evidence also established that in the contract hereinabove Donnie Selph also agreed to harvest 40,000 boxes (or production) of late-season Valencia oranges and agreed to pay \$6.35 per box for the Valencia oranges harvested from Russ Putnal's groves.

7. The undisputed evidence likewise established that Donnie Selph harvested 11,251 boxes of Valencia oranges pursuant to terms of the written contract with Russ Putnal. During the harvesting of the Valencia oranges, Donnie Selph raised no objection or complaints with Russ Putnal regarding the quality or quantity of late-season Valencia oranges that were harvested. The parties recalled discussing one load that was "light," meaning the average weight per box was less than the average weight per box of the other loads of Valencia oranges picked from the same grove. According to the evidence presented, it is not uncommon in the citrus business to have a few "light" loads when picking 11,251 boxes of fruit. Donnie Selph is obligated to pay Russ Putnal for the 11,251 boxes of Valencia oranges harvested from Russ Putnal's groves and sold for processing.

The net payment due and owing Russ Putnal Groves is computed as follows:

Total Purchase Price [Valencia oranges]:	\$71,443.85
Less Harvesting, Mutual, Taxes, etc.:	\$2,373.57
Less Amount Received [on September 30, 2003]:	\$5,000.00 ^[2]
Net Amount or Claim [Balance Due]:	\$64,070.28

8. Donnie Selph did not pay Russ Putnal for the 11,251 boxes of Valencia oranges harvested from Russ Putnal's groves. Russ Putnal made repeated demands upon Donnie Selph for the past due amount of \$64,070.28, and Donnie Selph refused and failed to pay Russ Putnal the past due amount of \$64,070.28. This debt of \$64,070.28 was due and owing on October 1, 2003, the date Donnie Selph made his last payment of \$5,000 to Russ Putnal.

9. Regarding this contractual transaction, Russ Putnal testified:

I regret that we all have to be here for this, and I've put it off as long as I could and tried every way I knew to avoid coming to this, but basically -- or in simple terms Donnie Selph, Donnie Selph Fruit Company and I had a contract, a written contract for mid-season and late-season oranges for last year (2002/2003). Basically, it hadn't been paid and it's my understanding the bond is for situations of this nature. And I realize the bond is less than half of what's owed, but I think if Donnie had the money he'd pay me. We're all in -- the citrus

industry is in some serious throws so I'm just trying to get what I can to try and keep my bills paid.

10. Donnie Selph admitted entering into a written contract with Russ Putnal. Both men acknowledged their experience in the business of selling and buying citrus fruit and doing business with each other over the years. Russ Putnal is a seasoned producer of fruit and well versed in the business of selling his fruit to citrus dealers. Donnie Selph is a seasoned purchaser and dealer of citrus fruit, having been in the business for over 20 years, and well versed in the business of buying fruit from citrus fruit producers and selling fruit to plants and other outlets.

11. Donnie Selph set the stage of this transaction by first testifying that he is in the business of "buying and selling [fruit], by contract, to the concentration plants." Regarding the sale of Russ Putnal's Valencia oranges, he testified that "based on \$1.10 a pound what I got out of [the sale of] Putnal's fruit and taking out the costs I forwarded [to Russ Putnal] what was left up to the point of where we're at now [i.e. \$64,070.28]." Donnie Selph's refusal to pay Russ Putnal for the Valencia oranges, "because I received only \$1.10 per pound," does not relieve him of his contractual obligations to pay \$6.35 per box for the Valencia oranges harvested.

12. At the conclusion of the hearing and in lieu of submitting a proposed recommended order, Russ Putnal elected to make the following summation of his case that has been considered:

We have a simple contract and a simple problem where fruit was contracted for, harvested, marketed and not paid for by the specifics of the contract. We have a bond in place to cover these discrepancies. The bond is only \$30,000; the amount owed is some \$64,000 plus. The defense has pretty much put up a smokescreen off the subject of the contract. The focusing in on pound solids and there's nothing in the contract about pound solids. The contract is simply in weight boxes.

13. Donnie Selph's first defense, to the debt claimed in the Complaint, was oral modification of the written contract. Donnie Selph's evidence to support his oral modification defense consisted solely of his recollection, "Mr. Putnal agreed with me that the contract price to be paid would be based on pound solid [unknown at the time of entering the contract]." Donnie Selph testified that he and Russ Putnal discussed, and agreed, that the encircled word "juiced" on the written contract meant that he would pay Russ Putnal at the price Donnie Selph received when he sold the Valencia oranges "as juiced." Russ Putnal emphatically denied making the alleged oral modification of the written contract of \$6.35 per box for his Valencia oranges.

Russ Putnal insisted that throughout this entire episode with Donnie Selph the written contract called for "weight boxes."

14. In his post-hearing Memorandum of Law, Donnie Selph admitted entering into a written contract with Russ Putnal, but raised as a defense to payment of the debt Russ Putnal "is going against the bond of The Citrus Store." Donnie Selph argued that Russ Putnal offered no evidence of entering into a written contract with The Citrus Store or personally with Donnie Selph. Donnie Selph's argument is without a foundation in fact and law in this proceeding and is, therefore, rejected.

15. Donnie Selph's second defense, a claim of "detrimental reliance on fraudulent statements made by Russ Putnal," is without foundation in fact. Russ Putnal adamantly denied making a verbal agreement with Donnie Selph that he would accept as payment for his Valencia oranges some amount Donnie Selph may receive when, and if, he sold the Valencia oranges to processing plants as "juiced" rather than by "pound per box." This defense to the contractual debt obligation is without foundation in fact or law in this proceeding and is likewise rejected.

16. The documentary evidence presented by Russ Putnal in support of his demand for payment is uncontroverted. The majority of the documents submitted by Russ Putnal reflected that the fruit described therein was harvested from Russ Putnal's groves in Manatee County. Likewise, the documents from

the processing plants reflected that the fruit from Russ Putnal's Manatee County groves averaged a "pound solids per box weight of 6.03676 pound[s] per box."

17. The undisputed evidence established that Donnie Selph picked 11,251 boxes of Valencia oranges from Russ Putnal's grove. The agreed contract price for each box of Valencia oranges picked was \$6.35 per box.

18. Likewise, the undisputed evidence established Donnie Selph entered into a written contract with Russ Putnal to purchase a specific citrus fruit (Valencia oranges) at a specific price (\$6.35) per box. The evidence established that Donnie Selph picked Russ Putnal's Valencia oranges, sold those Valencia oranges, and failed and refused to pay Russ Putnal the agreed contracted price of \$6.35 per box for his Valencia oranges.

19. The evidence of record demonstrated clearly that Donnie Selph is indebted to Russ Putnal for the net sum of \$64,070.28 due and owing as of October 1, 2003. This outstanding debt is computed from the gross sum of \$71,443.85, less: harvesting, mutual, and taxes for a subtotal of \$2,373.57, and less \$5,000.00 money paid and received from Donnie Selph.

20. The uncontroverted evidence establishes that Donnie Selph was, at the times material to this proceeding, a Florida-licensed and bonded citrus fruit dealer and that, as of October 1, 2003, Donnie Selph harvested 11,521 boxes of Valencia oranges from Putnal Groves. Russ Putnal timely filed a complaint alleging that Donnie Selph failed to promptly pay its indebtedness to Russ Putnal for the Valencia oranges harvested pursuant the contract. Russ Putnal is, therefore, entitled to payment of the principal amount of \$64,070.28 plus pre-judgment interest. Based on the date of the last payment made by Donnie Selph to Russ Putnal, pre-hearing interest would run from October 1, 2003.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.57(1) and 120.569, Florida Statutes (2003).

22. Chapter 601, Florida Statutes, is known as "The Florida Citrus Code of 1949." § 601.01, Fla. Stat. (2002). "Citrus fruit" is defined in Section 601.03(7), Florida Statutes:

"Citrus fruit" means all varieties and regulated hybrids of citrus fruit and also means processed citrus products containing 20 percent or more citrus fruit or citrus fruit juice, but, for the purposes of this chapter, shall not mean limes, lemons, marmalade, jellies, preserves, candies, or

citrus hybrids for which no specific standards have been established by the Department of Citrus;

23. The term "oranges" is defined in Subsection 601.03(25), Florida Statutes, to mean the fruit Citrus Sinensis Osbeck, commonly called sweet oranges.

24. Section 601.03(29), Florida Statutes, defines "producer" as any person growing or producing citrus in this state for market. Russ Putnal is a "citrus fruit producer" under this definition.

25. In Section 601.03(8), Florida Statutes, the term "Citrus Dealer" means

any consignor, commission merchant, consignment shipper, cash buyer, broker, association, cooperative association, express or gift fruit shipper, or person who in any manner makes or attempts to make money or other thing of value on citrus fruit in any manner whatsoever, other than of growing or producing citrus fruit, but the term shall not include retail establishments whose sales are direct to consumers and not for resale or persons or firms trading solely in citrus futures contracts on a regulated commodity exchange.

Donnie Selph is a "citrus fruit dealer" under this definition.

26. Citrus fruit dealers are required to be licensed by the Department in order to transact business in Florida.

§ 601.55(1), Fla. Stat. As a condition of obtaining a license, such dealers are required to provide a cash bond or a certificate of deposit or a surety bond in an amount to be

determined by the Department "for the use and benefit of every producer and of every citrus fruit dealer with whom the dealer deals in the purchase, handling, sale, and accounting of purchases and sales of citrus fruits." § 601.61(3), Fla. Stat. Pursuant to the statute, Donnie Selph is a licensed citrus fruit dealer and has posted a surety bond for \$30,000.

27. Section 601.65, Florida Statutes, provides that:

[I]f any licensed citrus fruit dealer violates any provision of this chapter, such dealer shall be liable to the person allegedly injured thereby for the full amount of damages sustained in consequence of such violation. Such liability may be enforced either by proceeding in an administrative action to and before the Department of Agriculture and pursuing such action to its ultimate termination if desired or by filing of a judicial suit at law in a court of competent jurisdiction; however, in such court suit the bond of such citrus fruit dealer theretofore posted with the Department of Agriculture pursuant to s. 601.61 shall not be amenable or subject to any judgment or other legal process issuing out of or from such court in connection with such law suit, whether cash bond or surety company bond, but such bonds shall be amenable to and enforceable only by and through administrative proceedings before the Department of Agriculture, it being the intent and purpose of the Legislature that such citrus dealer's bond so posted with the Department of Agriculture shall be applicable and liable only for the payment of claims duly adjudicated by order of the Department of Agriculture and the determination of such adjudicated claim if and in the event such order is appealed by any aggrieved party to the administrative proceeding.

28. Section 601.64(4), Florida Statutes, defines as an "unlawful act" by a citrus fruit dealer the failure to pay promptly and fully, as promised, for any citrus fruit which is the subject of a transaction relating to the purchase and sale of such goods.

29. The failure and refusal by Donnie Selph to pay promptly and fully, as promised by the terms of the written contract, is an "unlawful act" as defined by the above statute.

30. Any person may file a complaint with the Department, alleging violations of the provisions of Chapter 601, Florida Statutes, by a citrus fruit dealer. § 601.66(1), Fla. Stat. Russ Putnal, alleging violation of Chapter 601, Florida Statutes, by Donnie Selph, filed the Complaint with the Department.

31. The Department is charged with the responsibilities of determining whether the allegations of the Complaint have been established and adjudicating the amount of indebtedness or damages owed by the citrus fruit dealer. If the complaining party proves its case, the Department shall "fix a reasonable time within which said indebtedness shall be paid by the [citrus fruit] dealer." § 601.66(5), Fla. Stat. Thereafter, if the dealer does not pay within the time specified by the Department, the Department shall obtain payment of the damages from the dealer's surety company, up to the amount of the bond. The

Department, if it decides to pay the proceeds to the original complainant, has authority to order an increase in the original bond of the dealer as would be justified under all the circumstances so as to protect other possible claimants and to exercise all powers otherwise confided in Chapter 601, Florida Statutes, to enforce the posting of bond increases. See §§ 601.66(5) and (6), Fla. Stat.

32. Russ Putnal bore the burden of proving the allegations in his Complaint against Donnie Selph by a preponderance of the evidence. See Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 415 (Fla. 4th DCA 1974); § 120.57(1)(j), Fla. Stat. However, even though Russ Putnal has the ultimate burden of proving the truth of the claim, once he has made a prima facie case of entitlement to recover from Donnie Selph, Donnie Selph has the obligation to come forward with evidence to refute Russ Putnal's entitlement. See J.W.C., 396 So. 2d at 787.

33. Russ Putnal carried its burden of proving that Donnie Selph has failed and refused to pay, as agreed, "[T]he price . . . for said fruit per standard field crate by volume or weight [weight was circled] . . . for all fruit of

merchantable quality at the time of picking (40,000 boxes) . . . as follows Valencia Oranges, (40,000 boxes) at \$6.35 per box." The unpaid balance of \$64,070.28 is, thus, uncontroverted.

34. Russ Putnal has clearly proven by the evidence of record that Donnie Selph entered into a written contract for the purchase of Russ Putnal's citrus fruit (entire production of Valencia oranges) at \$6.35 per box.

35. Russ Putnal has likewise proven by evidence of record that Donnie Selph harvested 11,521 boxes of Valencia oranges from his citrus grove.

36. Russ Putnal has proven by the undisputed evidence of record that repeated demands for payment made upon Donnie Selph were ignored, and Donnie Selph failed to pay money owed Russ Putnal for his citrus fruit harvested and sold by Donnie Selph.

37. The evidence of record demonstrated that Donnie Selph willfully and intentionally breached the terms and conditions of the written contract for purchase of Russ Putnal's citrus fruit by Donnie Selph's refusal and failure to pay Russ Putnal for his citrus fruit which was harvested and sold by Donnie Selph.

38. The claim of Russ Putnal is based in contract; see Florida Fruit Sales, Inc. v. Kingfisher Groves, 343 So. 2d 840 (Fla. 2d DCA 1976). Russ Putnal is entitled to pre-judgment interest if the Department determines that Donnie Selph is indebted to Russ Putnal, to be calculated on the amount of the

indebtedness from the date payment was due until the Department enters its final order. See Celotex Corp. v. Buildex, Inc., 476 So. 2d 294, 295 (Fla. 3d DCA 1985)("The settled law is that where a disputed contractual claim becomes liquidated . . . as to the amounts recoverable, interest should be awarded from the date payment was due."); Cooper v. Alford, 477 So. 2d 31 (Fla. 1st DCA 1985)("In an action ex contractu, interest runs from the date a liquidated debt is due. This is so even if there exists an honest dispute as to whether the debt was in fact due. Once it is finally determined the debt was due, the person to whom it was owed is entitled to payment of the principal plus interest from the due date. . . . The purpose in awarding such interest is to compensate a party for deprivation of property.").

39. The evidence establishes that there was a written contract governing the dealings between Russ Putnal and Donnie Selph. The contract does not contain a pre-judgment interest rate clause; therefore, the amount of pre-judgment interest payable to Russ Putnal is the statutory rate specified in Section 55.03, Florida Statutes. See § 687.01, Fla. Stat.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order ordering Respondent,

Donnie Selph, d/b/a The Citrus Store and d/b/a D & D Citrus, to pay to Petitioner, Russ Putnal, d/b/a Putnal Groves, the sum of \$64,070.28, together with pre-judgment interest calculated by the Department pursuant to Section 55.03, Florida Statutes, from October 1, 2003, until paid.

DONE AND ENTERED this 3rd day of June, 2004, in Tallahassee, Leon County, Florida.



FRED L. BUCKINE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of June, 2004.

ENDNOTE

1/ Russ Putnal received payments from both The Citrus Store and from D & D Citrus totaling \$5,000.00 on or before September 30, 2003.

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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.