

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JIM HORNE, AS COMMISSIONER OF )  
EDUCATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 04-3635PL  
 )  
LISA M. GAUSE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 25-26, 2005, in Avon Park, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Edward T. Bauer, Esquire  
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For Respondent: Thomas W. Brooks, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether Respondent committed the acts alleged in the Amended Administrative Complaint, and if so, what discipline should be imposed.

PRELIMINARY STATEMENT

Through a three-count Administrative Complaint dated July 27, 2004, Petitioner alleged that Respondent "engaged in inappropriate conduct with students by assisting them in answering the questions" on the 2003 Florida Comprehensive Assessment Test (FCAT), and based thereupon, Petitioner recommended that the Education Practices Commission (Commission) "impose an appropriate penalty pursuant to the authority provided in Sections 1012.795(1) and 1012.796(7), Florida Statutes."

Respondent timely requested a hearing on the allegations in the Administrative Complaint, and on October 6, 2004, this matter was referred to the Division of Administrative Hearings (Division) for the assignment of an administrative law judge to conduct the hearing requested by Respondent.

The final hearing was initially scheduled for December 2-3, 2004, but it was subsequently rescheduled for January 25-26, 2005, on Petitioner's unopposed motion.

Petitioner's unopposed motion to file an Amended Administrative Complaint was granted through an Order dated

January 18, 2005. The nine-count Amended Administrative Complaint alleged additional statute and rule violations, but it did not include any additional factual allegations.

At the final hearing, Petitioner presented the testimony of Victoria Ash; Rebecca Fleck; Pam Burnaham; students B.B. (girl), R.C., C.M., A.P., B.B. (boy), C.F., B.Z, and K.J; and Sue Ranew, who was accepted as an expert regarding the professional standards for educators. Petitioner's Exhibits P-1 through P-11 were received into evidence.<sup>1</sup>

Respondent testified at the final hearing in her own behalf and also presented the testimony of Kimberly Henry, Mae Robinson, and student J.M. Respondent's Exhibits R-2 and R-3 were received into evidence.

The two-volume Transcript of the final hearing was filed on February 14, 2005. The parties initially requested 20 days from that date to file their proposed recommended orders (PROs), but the deadline was subsequently extended to March 14, 2005, at the parties' request. The parties' PROs were timely filed, and have been given due consideration.

#### FINDINGS OF FACT

1. Respondent holds, and at all relevant times, held a valid Florida Educator's Certificate.

2. Respondent is and, at all relevant times, was a fifth-grade teacher at Avon Park Elementary School in Highlands County.

3. Respondent has been an elementary school teacher for 19 years. She taught fourth and fifth grade at Zolfo Springs Elementary School in Hardee County from 1986 through the end of the 2000-01 school year. She started teaching at Avon Park Elementary School at the beginning of the 2001-02 school year.

4. Respondent is currently on a year-to-year contract. Her contract was renewed for the 2003-04 and 2004-05 school years notwithstanding the allegations in this case, which occurred during the 2002-03 school year.

5. Respondent has not had any disciplinary problems over the course of her career, and other than the allegations in this case, she has never been accused of any unethical or unprofessional conduct.

6. Respondent has always received good annual performance evaluations. Respondent's most recent performance evaluations - - for the 2002-03 and 2003-04 school years -- state that she "meets or exceeds expectations" in all categories, including the category that assesses whether Respondent "act[s] in a professional and ethical manner and adhere[s] to the Code and Principles of Professional Conduct."

7. Consistent with the information in Respondent's annual performance evaluations, the principal at Avon Park Elementary School, who is Respondent's current supervisor, testified that Respondent "does a good job" as a teacher and that she values Respondent quite highly as a teacher; the former principal at Zolfo Springs Elementary School, who was Respondent's supervisor for approximately five of the years that Respondent taught at that school, testified that Respondent's reputation for complying with the code of ethics is "excellent" and that Respondent always "monitored and cherished" her professionalism; one of Respondent's co-workers at Avon Park Elementary School testified that Respondent is "a very effective and professional teacher"; and the students who testified at the hearing characterized Respondent as a good teacher.

8. Respondent has administered the FCAT to her students since the test's inception in the 1990s, and as a result, she is very familiar with what teachers can and cannot do when administering the test.

9. Respondent and other teachers at Avon Park Elementary School received training on the administration of the 2003 FCAT, and as part of the training, Respondent received a copy of the Test Administration Manual for the 2003 FCAT.

10. The Test Administration Manual is published by the state Department of Education (Department) and is distributed to

teachers by the testing coordinators at each school. The school-level testing coordinators report to a testing coordinator at the school district level, who is ultimately responsible for the administration of the FCAT to the district's students.

11. The Test Administration Manual summarizes the "dos and don'ts" of test administration for the FCAT. It also includes a copy of the statute and rule governing test security, which for the 2003 FCAT were Section 228.301, Florida Statutes, and Florida Administrative Code Rule 6A-10.042.

12. On the issue of test security, the Test Administration Manual explains that:

it is not appropriate to talk with [students] about any test item or to help them answer any test item. For example, if students finish the test before the allotted time for the session has elapsed, or have not attempted to complete a question, it would be appropriate to encourage them to go back and check their work. It is **not acceptable** to provide the students with any information that would allow them to infer the correct answer, such as suggesting that they might want to check their work on a specific question. (Emphasis in original).

13. The FCAT is required by state law to be administered annually to public school students in the third through tenth grades to measure the students' proficiency in reading, writing, science, and math.

14. The FCAT measures the students' performance against state standards. The Norm Referenced Test (NRT), which is administered in conjunction with the FCAT, measures the students' performance in math and reading against national standards.

15. The FCAT is an important test, both to students and the schools. The student's promotion to the next grade and/or class placement is affected to some degree by his or her performance on the FCAT. The school's grade, which has an impact on the funding that the school district receives from the state, is also affected to some degree by the students' performance on the FCAT.

16. The math and reading portions of the 2003 FCAT were administered to fifth graders on Monday through Wednesday, March 3-5, 2003. The science portion of the FCAT and the NRT were administered the following week, on Monday through Wednesday, March 10-12, 2003.

17. Throughout the 2002-03 school year, Respondent "taught the FCAT" and gave her class practice FCAT questions. She used the questions as teaching tools and to help prepare her students for the actual FCAT.

18. Respondent would sometimes explain the wording of the practice questions to her students and, as needed, she would

provide the students other assistance, both individually and as a class, while they were working on the practice questions.

19. On Friday, February 28, 2003, Respondent administered two practice tests to her students in which she tried to simulate the environment in which the students would be taking the actual FCAT the following week. For example, the tests were timed and Respondent walked around the room as she proctored the tests.

20. Respondent helped the students during the practice tests as she had done with the practice questions administered throughout the year. At one point, she stopped the test and reviewed a math problem on the board with the class because she observed a number of students having problems with a particular question.

21. Respondent administered the math and reading portions of the actual FCAT to 18 students in her homeroom class on March 3-5, 2003. None of those students were exceptional education students who were entitled to special accommodations.

22. Respondent did a 15 to 20 minute "mini-review" each morning that the students were taking the actual FCAT during which she went over terminology and concepts that the students might see on the test that day.

23. Respondent started the administration of the actual FCAT by reading the directions verbatim from the "scripts" in



the Test Administration Manual. Once the students began taking the test, she monitored them from her desk and she also walked around the room on a periodic basis. Respondent also went to students' desks when they raised their hands.

24. The Test Administration Manual contemplates that students might raise their hands and ask questions during the test; indeed, the "scripts" that the teacher is required to read verbatim state more than once, "Please raise your hand if you have any questions."

25. Respondent denied giving the students any assistance in answering the test questions on the actual FCAT.

26. According to Respondent, when a student asked her about a particular test question, she told the student that "I can't help you," "go back and re-read the directions," "do the best you can," or other words to that effect. The Department's testing coordinator, Victoria Ash, testified that responses such as those are acceptable.

27. Respondent also made a general statement to the class during the test reminding the students to go back and check their work if they finished the test before the allotted time expired. Ms. Ash testified that a general reminder such as that is "absolutely acceptable."

28. Respondent's testimony was corroborated by student J.M., who credibly testified that he recalled more than once

hearing Respondent tell other students that she could not help them during the actual FCAT.

29. Several students testified that Respondent helped them during the actual FCAT by explaining words that they did not understand, explaining how to solve math problems, and/or by suggesting that they check their work on particular problems. That testimony was not persuasive because it lacked specificity and precision, and other than A.P., B.B. (boy), and K.J., the students testified that they were not certain that the help they remembered receiving was on the actual FCAT rather than on the practice tests that they were given by Respondent. With respect to B.B. (boy), the undersigned did not find his testimony persuasive because he also testified that Respondent helped the entire class with a math problem during the actual test, which contradicted the statements given by the other students and which suggests that he was recalling events from the practice test during which Respondent gave such help to the entire class. With respect to A.P. and K.J., the undersigned did not find them to be particularly credible witnesses based upon their demeanors while testifying.

30. There were other inconsistencies in the students' accounts of Respondent's administration of the FCAT that make their testimony generally unpersuasive. For example, B.B. (girl) testified that Respondent played classical music during

the actual test, which was not corroborated by any other student in the class and was contradicted by Respondent's credible testimony that she played music during the practice tests to relax the students but that she and the other fifth-grade teachers at Avon Park Elementary School made a conscious decision not to play music during the actual FCAT.

31. As a result of the students' apparent confusion regarding events occurring during practice tests rather than the actual FCAT, the inconsistencies in the students' accounts of the events during the administration of the test, the general lack of specificity and precision in the students' accounts of the events, and Respondent's credible denial of any wrongdoing, the evidence does not clearly and convincingly establish the truth of the allegations against Respondent.

32. In making the foregoing finding, due consideration was given to the investigation undertaken by the district-level testing coordinator, Rebecca Fleck, at the time of the allegations against Respondent, and the materials generated through that investigation.

33. The reason for the investigation was a phone call that Ms. Fleck received on Wednesday, March 5, 2003, from a Department employee who told Ms. Fleck that the Department had received an anonymous complaint about Respondent's administration of the FCAT.

34. Ms. Fleck went to Avon Park Elementary School on Friday, March 7, 2003, to investigate the complaint. On that date, she met with the school's assistant principal and interviewed several of the students in Respondent's class. She also spoke briefly with Respondent to "get her side of the story," which consistent with her testimony at the hearing, was an unequivocal denial of any wrongdoing.

35. Ms. Fleck decided, based upon the student interviews, that Respondent should not administer the science portion of the FCAT or the NRT the following week. As a result, Respondent was assigned to work at the school district office on March 10-12, 2003, while her students were taking the tests on those dates.

36. Ms. Fleck also decided to interview and get statements from all of the students in Respondent's class, which she did on the following Monday and Tuesday, March 10 and 11, 2003.

37. On those days, the students were called to the principal's office in groups of two or three and they were asked to fill out a questionnaire developed by Ms. Fleck. Pam Burnaham, the principal of Avon Park Elementary School, and Ms. Fleck supervised the students while they filled out the questionnaires.

38. The students were not told that Ms. Fleck was investigating alleged wrongdoing by Respondent; they were told

that the purpose of the questionnaire was to find out about their "FCAT experience."

39. Ms. Fleck testified that she was confident that the students understood that the questionnaire related only to the actual FCAT and not any of the practice tests administered by Respondent; however, Ms. Burnaham testified that she did not place any emphasis on the distinction, and as noted above, the students' testimony at the hearing indicates that they may have been confused on this issue.

40. Ms. Fleck concluded based upon the students' responses on the questionnaires that Respondent "coached" the students during the administration of the actual FCAT. As a result, she invalidated the tests of all 18 students in Respondent's class.

41. Ms. Fleck's decision to invalidate the students' tests was not unreasonable based upon what she was told by the students, which she believed to be true; however, the invalidation of the tests is not sufficient in and of itself to impose discipline on Respondent because, as discussed above, the truth of the students' allegations was not clearly and convincingly proven at the hearing.

42. Several of the students gave written statements to a Department investigator in late May 2003 regarding the help that they recalled being given by Respondent on the FCAT. No weight is given to those statements because no credible evidence was

presented regarding the circumstances under which the statements were made, the statements were made several months after the events described in the statements, and as was the case with the questionnaires the students filled out for Ms. Fleck, the undersigned is not persuaded that the students understood at the time they were giving the statements that they were describing events that occurred during the actual FCAT rather than the practice tests that they were given by Respondent.

43. There is no persuasive evidence that any of the students in Respondent's class whose tests were invalidated suffered any adverse educational consequences. Even though the school administrators did not have the benefit of the students' FCAT scores for purposes of placement and/or developing a remediation plan, they had other information on which they could make those decisions, including the students' scores on the NRT, which was administered the week after the FCAT and was not invalidated.

44. Other than being reassigned to the school district office during the administration of the NRT, Respondent did not suffer any adverse employment consequences from the school district as a result of the students' allegations and/or the invalidation of the students' tests. To the contrary, Respondent continued to get good performance reviews and her

contract has been renewed twice since the administration of the 2003 FCAT.

45. Respondent did not administer the 2004 FCAT because this case was still pending. She was given other duties at Avon Park Elementary School while her students were taking the 2004 FCAT.

#### CONCLUSIONS OF LAW

46. The Division has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 1012.796(6), Florida Statutes (2004).

47. The Commission is the state agency responsible for taking disciplinary action against certified teachers, when appropriate. See § 1012.79(7)(b), Fla. Stat. (2004).

48. Petitioner is the state official responsible for prosecuting complaints against certified teachers. See § 1012.796(6), Fla. Stat. (2004).

49. Petitioner has the burden to prove the allegations in the Amended Administrative Complaint by clear and convincing evidence. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

50. The clear and convincing evidence standard requires that:

the evidence must be found to be credible;  
the facts to which the witnesses testify  
must be distinctly remembered; the testimony  
must be precise and explicit and the  
witnesses must be lacking confusion as to

the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (citation omitted).

See also Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) ("Although [the clear and convincing evidence] standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous.").

51. The substantive law codified in the 2002 edition of the Florida Statutes and the Department's rules applies in this case because the acts alleged in the Amended Administrative Complaint occurred in March 2003. See Heath v. State, 532 So. 2d 9, 10 (Fla. 1st DCA 1988) ("[T]he statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed.").

52. The applicable law includes the "Florida K-20 Education Code" codified in Chapters 1000 through 1013, Florida Statutes (2002), which became effective on January 7, 2003. See Ch. 2002-387, Laws of Fla.

53. Count 1 of the Amended Administrative Complaint alleges that Respondent violated Section 1012.795(1)(c), Florida



Statutes (2002), which authorizes the Commission to discipline a certified teacher that "[h]as been guilty of gross immorality or an act involving moral turpitude."

54. According to prior Commission decisions, "gross immorality" is more egregious than mere immorality and involves acts of serious misconduct that constitute a flagrant disregard of proper moral standards, and "moral turpitude" involves acts of vileness or depravity, which violate the basic moral standards that one owes to his fellow man and to society as a whole. See, e.g., Crist v. D'Agostino, Case No. 04-0664PL, 2004 WL 1474373, at \*5 (DOAH June 28, 2004; EPC Nov. 23, 2004) (citations omitted).

55. The evidence was not clear and convincing that Respondent provided her students with any inappropriate assistance during the actual 2003 FCAT and, as a result, Petitioner failed to prove that Respondent violated Section 1012.795(1)(c), Florida Statutes (2002). Moreover, even if the allegations in the Amended Administrative Complaint had been proven, they would not rise to the level of gross immorality or moral turpitude as defined above. See Crist v. Goggins, Case No. 03-2382PL, 2003 WL 22767447, at \*\*6-7 (DOAH Nov. 20, 2003; EPC Feb. 4, 2004) (teacher's failure to follow proper testing procedure was professionally inappropriate, but it did not rise to the level of gross immorality or moral turpitude).

56. Count 2 of the Amended Administrative Complaint alleges that Respondent violated Section 1012.795(1)(f), Florida Statutes (2002), which authorizes the Commission to discipline a certified teacher that "has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the district school board."

57. The evidence was not clear and convincing that Respondent provided her students with any inappropriate assistance during the actual 2003 FCAT. Moreover, the evidence was not clear and convincing that the Respondent's effectiveness as a teacher was reduced as a result of the allegations against her; she continued to receive good performance reviews and have her contract renewed after the allegations and, notwithstanding the allegations, the principal at Avon Park Elementary School testified that she still values Respondent as a member of the school's teaching staff. Accordingly, Petitioner failed to prove that Respondent violated Section 1012.795(1)(f), Florida Statutes (2002).

58. Count 3 of the Amended Administrative Complaint alleges that Respondent violated Section 1012.795(1)(i), Florida Statutes (2002), which authorizes the Commission to discipline a certified teacher that "[h]as violated the Principles of Professional Conduct for the Education Profession prescribed by State Board of Education rules."

59. The Principles of Professional Conduct for the Education Profession are contained in Florida Administrative Code Rule 6B-1.006. Counts 5 through 7 of the Amended Administrative Complaint identify the specific provisions of the Principles that Respondent is alleged to have violated. Because Petitioner failed to prove the rule violations alleged in Counts 5 through 7, it also failed to prove that Respondent violated Section 1012.795(1)(i), Florida Statutes (2002).

60. Count 4 of the Amended Administrative Complaint alleges that Respondent violated Section 1008.24(1)(c), Florida Statutes (2002), which provides that it is unlawful for anyone to knowingly and willingly "[c]oach examinees during testing or alter or interfere with examinees' responses in any way." Accord § 228.301(1)(c), Fla. Stat. (2002) (repealed effective January 7, 2003, but included in the Test Administration Manual for the 2003 FCAT as the "Florida Test Security Statute").

61. The evidence was not clear and convincing that Respondent coached her students during the actual 2003 FCAT or that she otherwise altered or interfered with their responses. Accordingly, Petitioner failed to prove that Respondent violated Section 1008.24(1)(c), Florida Statutes (2002).

62. Count 5 of the Amended Administrative Complaint alleges that Respondent violated Florida Administrative Code Rule 6B-1.006(3)(a), which requires teachers to "make reasonable

effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety."

63. The evidence was not clear and convincing that Respondent provided her students with any inappropriate assistance during the actual 2003 FCAT or that Respondent's students suffered any adverse education consequences as a result of the invalidation of their tests. Accordingly, Petitioner failed to prove that Respondent violated Florida Administrative Code Rule 6B-1.006(3)(a).

64. Count 6 of the Amended Administrative Complaint alleges that Respondent violated Florida Administrative Code Rule 6B-1.006(4)(b), which requires teachers to "not intentionally distort or misrepresent facts concerning an educational matter in direct or indirect public expression."

65. The evidence was not clear and convincing that Respondent provided her students with any inappropriate assistance during the actual 2003 FCAT and, as a result, Petitioner failed to prove that Respondent violated Florida Administrative Code Rule 6B-1.006(4)(b).

66. Count 7 of the Amended Administrative Complaint alleges that Respondent violated Florida Administrative Code Rule 6B-1.006(5)(a), which requires teachers to "maintain honesty in all professional dealings."

67. The evidence was not clear and convincing that Respondent provided her students with any inappropriate assistance during the actual 2003 FCAT and, as a result, Petitioner failed to prove that Respondent violated Florida Administrative Code Rule 6B-1.006(5)(a).

68. Counts 8 and 9 of the Amended Administrative Complaint allege that Respondent violated Florida Administrative Code Rule 6A-10.042(1)(c) and (1)(d), respectively. Those rule provisions state:

(c) Examinees shall not be assisted in answering test questions by any means by persons administering or proctoring the administration of any test.

(d) Examinees' answers to questions shall not be interfered with in any way by persons administering, proctoring, or scoring the examinations.

69. The provisions of Florida Administrative Code Rule 6A-10.042 apply to the 2003 FCAT even though Section 229.57, Florida Statutes, which is one of the statutory sections specifically included within the scope of the rule, was repealed effective January 7, 2003. That statute is virtually identical to Section 1008.22(3)(c), Florida Statutes (2002), which became the statutory authority for the FCAT effective January 7, 2003. Moreover, both Section 229.57, Florida Statutes, and Florida Administrative Code 6A-10.042 were referred to in the Test

Administration Manual for the 2003 FCAT as the controlling authority for the test.

70. The evidence was not clear and convincing that Respondent provided her students with any inappropriate assistance during the actual 2003 FCAT and, as a result, Petitioner failed to prove that Respondent violated Florida Administrative Code Rule 6A-10.042(1)(c) or (1)(d).

71. With respect to the appropriate discipline, Section 1012.796(6), Florida Statutes (2002 and 2004), requires the administrative law judge to "make recommendations in accordance with subsection (7) [of Section 1012.796, Florida Statutes]."

72. Section 1012.796(7), Florida Statutes (2002), requires the Commission to enter a final order "either dismissing the complaint or imposing one or more of the . . . penalties" enumerated in that subsection. The penalties range from revocation of the teacher's certification to a written reprimand by the teacher's supervisor, with a copy placed in the teacher's certification file. Id. See also § 1012.795(1), Fla. Stat. (2002).

73. Because Petitioner failed to prove the allegations against Respondent, no discipline is appropriate and the Commission should dismiss the Amended Administrative Complaint.

RECOMMENDATION

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

RECOMMENDED that the Commission issue a final order dismissing the Amended Administrative Complaint against Respondent.

DONE AND ENTERED this 6th day of April, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of April, 2005.

ENDNOTE

1/ Exhibits P-1, P-4, P-7, P-8, P-9, and P-11 are questionnaires completed by several of the students in Respondent's class approximately one week after they took the FCAT. Exhibits P-2, P-5, P-6, and P-10 are statements given by several of the students approximately two months after they took the FCAT. Respondent agreed at the hearing to the admissibility of those exhibits, but took the position that the statements in the exhibits could not independently support findings of fact because they were hearsay and no hearsay exception applied. See § 120.57(1)(c), Fla. Stat. (2004). Petitioner acknowledged the

hearsay nature of the statements, but took the position that the exhibits satisfied the "past recollection recorded" hearsay exception in Section 90.803(5), Florida Statutes (2004), and that the statements in the exhibits could therefore independently support findings of fact. The undersigned preliminarily determined at the hearing that the exhibits satisfied that hearsay exception, but deferred final ruling on the issue to allow the parties an opportunity to present additional legal argument in their PROs. Having reviewed the exhibits, the pertinent portions of the Transcript, and the legal argument in the parties' PROs, the preliminary ruling is reaffirmed; the exhibits are admissible under the hearsay exception in Section 90.803(5), Florida Statutes (2004). The students identified the statements as their own and testified that they would not have made the statements unless they had believed them to be true at the time, which is an adequate predicate under Section 90.803(5), Florida Statutes (2004). See generally Kimbrough v. State, 846 So. 2d 540, 542-44 (Fla. 4th DCA 2003); Ehrhardt, Florida Evidence § 803.5, at 752 n.5 (2002).

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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.