

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)
)
Petitioner,)
)
vs.) Case No. 05-1236
)
RAN D VOU CAFÉ, INC., d/b/a RAN)
D VOU CAFÉ,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 22, 2005, by video teleconference with connecting sites in Lauderdale Lakes and Tallahassee, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Sorin Ardelean, Esquire
Department of Business and
Professional Regulation
Northwood Centre, Suite 6
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Mary Fernand, pro se
1200 Northwest 47th Avenue
Lauderhill, Florida 33313

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Administrative Action and, if so, what action should be taken.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (DABT) issued a two-count Administrative Action against Ran D Vou Café, d/b/a Ran D Vou Café (Café) on August 18, 2004.¹ The Administrative Action charged Café with the following: Count 1--failing, during the period from December 18, 2003 through March 31, 2004, to derive at least 51 percent of its gross revenue from sales of food and non-alcoholic beverages as required to qualify for its license in violation of Section 561.20(2)(a), Florida Statutes, within Section 561.29(1)(a), Florida Statutes; and Count 2--failing, during the period from December 18, 2003 through March 31, 2004, to maintain records of all purchases and other acquisitions of alcoholic beverages, in violation of Section 561.55(3)(b), Florida Statutes, within Section 561.29(1)(a), Florida Statutes. Café disputed the material allegations of fact in the Administrative Action and requested a hearing. On April 6, 2005, this matter was referred to the Division of Administrative Hearings.

At hearing, DABT presented the testimony of three witnesses and entered five exhibits (Petitioner's Exhibits numbered 1-3 and 6-7) into evidence. The undersigned reserved ruling on two exhibits (Petitioner's Exhibits numbered 4 and 5), leaving the record open for two weeks to permit DABT to provide affidavits that the exhibits were the documents provided by Café to DABT.² Subsequently, the undersigned issued an order admitting into evidence Petitioner's Exhibits 4 and 5. Also, at hearing, the owner of Café testified on behalf of Café and no exhibits were entered into evidence on behalf of Café. Official recognition was taken of Chapter 561, Florida Statutes, and Florida Administrative Code Chapter 61A.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on July 1, 2005. Subsequently, Café obtained counsel and its counsel filed a Notice of Appearance and an Unopposed Motion to Extend Time to Submit Proposed Recommended Order; the motion was granted. However, prior to the due date of Café's post-hearing submission, Café's counsel filed an Unopposed Motion to Withdraw as Counsel and the motion was granted. Another order granting Café an extension of time to file its post-hearing submission was issued. Afterwards, Café again requested an extension of

time to which DABT did not file a response, having been notified by a Notice of Ex-Parte Communication, and the request was granted. Later, Café filed yet another request for an extension of time to which DABT did not object, having been notified by a Notice of Ex-Parte Communication, and the request was granted.

Prior to the due date for the filing of Café's post-hearing submission, Café filed a notice on January 5, 2006, indicating that it desired to relinquish its license and close this matter and that it would be contacting DABT to accomplish this finalization. Based upon the representation of Café, no action was taken on this matter. Not having received a pleading requesting the closure of this matter, the undersigned issued an order on February 6, 2006, requiring the parties, no later than February 17, 2006, to advise the undersigned as to whether this matter should be closed. DABT advised the undersigned that, even though it had discussed this matter with Café, Café had offered no action as to its license, and DABT requested the undersigned to issue a recommended order. Café did not file a response to the order issued on February 6, 2006.

Only DABT filed a post-hearing submission, which has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Café was a restaurant, serving full course meals, and was located at 1599 North State Road 7, Lauderhill, Florida.

2. At all times material hereto, the sole owner of Café was Mary Fernand.

3. On December 18, 2003, Café, through Ms. Fernand, made application for a license from DABT. The type of license applied for was a retail alcoholic beverage license, in particular a special alcoholic beverage license, allowing it to purchase and sell alcoholic beverages. In a section of the application, "SECTION VIII-SPECIAL LICENSE REQUIREMENTS," Ms. Fernand was notified, among other things, that the "Special Alcoholic Beverage License" was "issued pursuant to 561.20(2)(b), Florida Statute [sic] or Special Act and as such we acknowledge the following requirements must be met and maintained: ... DERIVE 51 % OF GROSS REVENUE FROM FOOD AND NON-ALCOHOLIC BEVERAGES. SERVICE OF FULL COURSE MEALS MUST BE AVAILABLE AT ALL TIMES ALCOHOLIC BEVERAGES ARE BEING SERVED." As the person completing the application, Ms. Fernand was required to read, initial, and date Section VIII.

4. A temporary special alcoholic license was issued by DABT to Café on December 18, 2003. The application was approved

by DABT on December 19, 2003, and, subsequently, a permanent special alcoholic license was issued by DABT.

5. DABT issued Café license number BEV16-17022 4-COP SRX. The license was held through Ms. Fernand. As a result of having been issued such a license by DABT, Café was and is subject to the regulatory jurisdiction of DABT.

6. DABT conducts periodic audits of all restaurants holding a special SRX license to make sure that the restaurants are complying with the special license requirements. As part of this audit process, special agents from DABT, among other things, conduct announced visits, as well as undercover visits, at the restaurants and request the licensee to submit all necessary records for the audit.

7. A SRX license holder has a continuing requirement to derive at least 51 percent of its gross revenue from sales of food and non-alcoholic beverages.

8. DABT places the burden upon the licensee to show compliance with the SRX license requirements. Furthermore, DABT requires the licensee to keep clear, legible records in English and to submit such records if requested by one of its agents.

9. When DABT requests the licensee to produce the records to establish compliance with the SRX license requirements, but the licensee fails to show compliance through the requested

records, DABT determines that the licensee was not meeting the requirements to operate with the SRX license.

10. The proof that DABT considers to establish compliance include monthly sales and purchase records of food and non-alcoholic beverages and sales and purchase records of alcoholic beverages, guest checks, z-tapes, monthly income statements (showing separately the food and non-alcoholic beverage sales), and sales of alcoholic beverages.

11. On July 19, 2004, DABT's Special Agent Trenesa Davis visited Café to request Café to produce the records necessary for an audit under the SRX license. She found Café closed and locked.

12. Special Agent Davis obtained Ms. Fernand's telephone number and contacted her that same day. Special Agent Davis informed Ms. Fernand of the records needed for the audit, and Ms. Fernand indicated that she would provide the requested records on July 21, 2004. However, Ms. Fernand failed to provide the requested records on July 21, 2004.

13. The following day, July 22, 2004, Special Agent Davis again contacted Ms. Fernand by telephone. Ms. Fernand indicated that she would provide the requested records on July 23, 2004. But, again, Ms. Fernand failed to provide the requested records.

14. On July 26, 2004, once again, Special Agent Davis contacted Ms. Fernand by telephone regarding the non-production

of the requested records. Ms. Fernand indicated that she was ill, and Special Agent Davis informed Ms. Fernand that she could come to where Ms. Fernand was living and issue her an official notice of what DABT needed, with the compliance date.

Ms. Fernand agreed, and Special Agent Davis proceeded to where Ms. Fernand was living.

15. On that same day, July 26, 2004, Special Agent Davis issued Ms. Fernand an official notice to produce certain documents. The notice provided, among other things, that Ms. Fernand had "14 days to produce the following records: Separate records of all purchases and gross retail sales of food and non-alcoholic beverages & alcoholic beverages, Guest checks, cash register tapes, and any other documentation used to determine your food & beverage sales." Furthermore, the notice warned that "Failure to comply may result in administrative charges being filed against your alcoholic beverage license. *COMPLIANCE DATE AUGUST 13, 2004*." The notice was dated July 26, 2004. Ms. Fernand signed the notice.

16. Ms. Fernand received the notice on July 26, 2004.

17. On August 6, 2004, Special Agent Davis received a package from Café, but did not open it. She immediately took the package to DABT's auditor assigned to conduct Café's audit, Ronald Flores.

18. Special Agent Davis opened the package in the presence of Auditor Flores. Inside the package were the following: (1) 11 receipts, dated between May 6 and June 23, 2004, showing purchases of alcohol from another vendor, BJ's Wholesale Club; (2) three blocks of guest checks: block one--numbered from 512402 to 512450; block two--numbered 100703, 100705, 100707-100709, 100711, and from 100713 to 100750, with the guest checks from 100713 to 100750 being blank; and block three--numbered from 100592 to 100595 and 100632; and (3) 26 loose kitchen tickets, numbered from 84551 to 84570 and from 84572 to 84577. All of the kitchen tickets failed to reflect a date, the name Café or of any restaurant, and food sales. Further, the guest checks reflected only sales of alcoholic beverages; reflected only dates on those numbered 100708 and 100709 ("05-28-04" and "6/4"); and reflected dates ("4/18/04" through "5/31/04") and the name Café on those numbered 512402-512450, with the dates on three checks not being legible.

19. The package contained no other record of food sales or purchases and no record of purchasing alcoholic beverages from distributors. Furthermore, the package contained no record of monthly schedules showing food and non-alcoholic and alcoholic beverage sales.

20. Based on the records presented by Ms. Fernand, Auditor Flores was unable to perform an audit required by Café's SRX

license and unable to make a determination as to whether Café met the 51 percent requirement of its license.

21. On August 8, 2004, Special Agent Davis contacted Ms. Fernand by telephone in the presence of Auditor Flores, with the telephone on speaker-phone. Special Agent Davis inquired as to the whereabouts of Café's food and non-alcoholic beverage records. Ms. Fernand responded that she was not aware that Special Agent Davis wanted the food and non-alcoholic records but that she (Ms. Fernand) would provide them by August 13, 2004, which was the original compliance date of DABT's notice to produce records.

22. However, Special Agent Davis did not receive any records from Ms. Fernand until August 16, 2004, three days beyond the compliance date to produce the records. The package received from Ms. Fernand contained three computer-generated documents for Café: an income statement, representing "6 Months Ended June 30, 2004"; a 2004 balance sheet, as of June 30, 2004 and 2003, and a balance sheet of liabilities and stockholders' equity, as of June 30, 2004 and 2003. Reflected at the bottom of each document was the following: "See Accountants' Compilation Report."

23. The income statement reflected for January 1 through June 30, 2004, among other things, the following: food sales in the amount of \$8,417.34 and alcohol sales in the amount of

\$3,039.66, totaling \$11,457.00; gross profit in the amount of \$5,942.51; total operating expenses in the amount of \$23,901.19; and a net loss of income in the amount of \$17,958.68. The income statement did not reflect monthly schedules of sales or any source of documents to verify the figures in the statement of income.

24. No document in the package received on August 16, 2004, reflected its source or its creator, and none were signed. However, at hearing, Ms. Fernand admitted that she had prepared the income statement.

25. Moreover, in the package received on August 16, 2004, no food sales and purchase records and no alcohol sales and purchase records were included.

26. Again, based on the records presented by Ms. Fernand on August 16, 2004, as well as August 6, 2004, Auditor Flores was unable to perform an audit required by Café's SRX license and unable to make a determination as to whether Café met the 51 percent requirement of its license.

27. On August 18, 2004, Auditor Flores forwarded to Special Agent Davis a memorandum advising her, among other things, that the records submitted by Café were incomplete to make a determination as to whether Café complied with the "SRX" requirements, that Café needed to provide the register tapes in order to verify sales, and that Café needed to provide monthly

sales schedules with a breakdown of food and alcoholic beverage sales.

28. Further, on August 18, 2004, Special Agent Davis issued a notice to Café that DABT intended to file an administrative complaint against it for failure to maintain records, citing the statutory provision, and SRX violations, citing the statutory provisions. The notice was mailed, certified to Café.

29. Ms. Fernand admits that, between December 2003 and March 2004, Café sold food, as it was a "full restaurant," and alcoholic and non-alcoholic beverages; however, no alcoholic beverages were sold in December 2003. Further, she admits that, in December 2003, she had a "get together for a few friends" and a few patrons at Café; and that, in January 2004, a party was held at Café at which alcoholic beverages were sold of which she kept records.

30. Additionally, Ms. Fernand acknowledges that she was aware that she was required to keep records and admits that she kept records of the food sales and alcoholic and non-alcoholic beverage sales.

31. Although she obtained the license from DABT for Café in December 2003, Ms. Fernand did not open Café for business until April 17, 2004, as a grand opening.

32. On June 26, 2004, Ms. Fernand lost access to Café as a result of being closed by the City of Fort Lauderdale. Also, in August 2004, she was evicted by the landlord of the building in which Café was located. Subsequently, she paid the landlord the back rent and was allowed to use the building again. She did not re-open Café until around November 20, 2004, even though the City of Fort Lauderdale notified her around September 7, 2004, that Café could be re-opened.

33. Because of the eviction in August 2004, when Special Agent Davis requested the documents, Ms. Fernand had to request the landlord to go into Café and get the documents for her (Ms. Fernand). Ms. Fernand provided to Special Agent Davis the documents given to her by her landlord.

34. Prior to losing access to the building in which Café was located, during the loss of access, and after re-gaining access, a box containing Café's records was located at Café. At no time, when she did not have access, did Ms. Fernand request the landlord to bring the box to her in order to provide food and beverage records to DABT. At no time, after gaining access to the building or prior to hearing, did Ms. Fernand review the records in the box and provide the requested food and beverage records to DABT.

CONCLUSIONS OF LAW

35. 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 (2005).

36. DABT has the burden of proof to show by clear and convincing evidence that Café committed the offenses in the Administrative Action. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

37. Matters not charged in the Administrative Action cannot be considered as a violation. Chrysler v. Department of Professional Regulation, 627 So. 2d 31 (Fla. 1st DCA 1993); Klein v. Department of Business and Professional Regulation, 625 So. 2d 1237 (Fla. 2nd DCA 1993).

38. Section 561.29, Florida Statutes (2003), provides in pertinent part:

(1) The division [DABT] is given full power and authority to revoke or suspend the license of any person holding a license under the Beverage Law, when it is determined or found by the division upon sufficient cause appearing of:

(a) Violation by the licensee or his or her or its agents, officers, servants, or employees, on the licensed premises, or elsewhere while in the scope of employment,

of any of the laws of this state or of the United States, or violation of any municipal or county regulation in regard to the hours of sale, service, or consumption of alcoholic beverages or license requirements of special licenses issued under s. 561.20 . . .

* * *

(g) A determination that an person required to be qualified by the division as a condition for the issuance of the license is not qualified.

39. Section 561.20, Florida Statutes (2003), provides in pertinent part:

(2)(a) No such limitation of the number of licenses as herein provided shall henceforth prohibit the issuance of a special license to:

* * *

4. Any restaurant having 2,500 square feet of service area and equipped to serve 150 persons full course meals at tables at one time, and deriving at least 51 percent of its gross revenue from the sale of food and nonalcoholic beverages; however, no restaurant granted a special license on or after January 1, 1958, pursuant to general or special law shall operate as a package store, nor shall intoxicating beverages be sold under such license after the hours of serving food have elapsed . . .

40. Section 561.55, Florida Statutes (2003), provides in pertinent part:

(3)(a) Each manufacturer, distributor, broker, agent, and importer licensed under the Beverage Law shall . . .

(b) Each vendor shall keep records of all purchases and other acquisitions of alcoholic beverages for a period of 3 years.

41. Florida Administrative Code Rule 61A-3.0141 provides in pertinent part:

(1) Special restaurant licenses in excess of the quota limitation set forth in subsection 561.20(1), Florida Statutes, shall be issued to otherwise qualified applicants for establishments that are bona fide restaurants engaged primarily in the service of food and non-alcoholic beverages, if they qualify as special restaurant licenses as set forth in subsection (2) of this rule. Special restaurant licensees must continually comply with each and every requirement of both subsections (2) and (3) of this rule as a condition of holding a license. Qualifying restaurants must meet the requirements of this rule in addition to any other requirements of the beverage law. The suffix "SRX" shall be made a part of the license numbers of all such licenses issued after January 1, 1958.

* * *

(3) Qualifying restaurants receiving a special restaurant license after April 18, 1972 must, in addition to continuing to comply with the requirements set forth for initial licensure, also maintain the required percentage, as set forth in paragraph (a) or (b) below, on a bi-monthly basis. Additionally, qualifying restaurants must meet at all times the following operating requirements:

(a) At least 51 percent of total gross revenues must come from retail sale on the licensed premises of food and non-alcoholic beverages. Proceeds of catering sales shall not be included in the calculation of total gross revenues. Catering sales include food

or non-alcoholic beverage sales prepared by the licensee on the licensed premises for service by the licensee outside the licensed premises.

1. Qualifying restaurants must maintain separate records of all purchases and gross retail sales of food and non-alcoholic beverages and all purchases and gross retail sales of alcoholic beverages.

2. The records required in subparagraph (3)(a)1. of this rule must be maintained on the premises, or other designated place approved in writing by the division [DABT] for a period of 3 years and shall be made available within 14 days upon demand by an officer of the division. The division shall approve written requests to maintain the aforementioned records off the premises when the place to be designated is the business office, open 8 hours per work day, of a corporate officer, attorney, or accountant; the place to be designated is located in the State of Florida; and the place to be designated is precisely identified by complete mailing address.

3. Since the burden is on the holder of the special restaurant license to demonstrate compliance with the requirements for the license, the records required to be kept shall be legible, clear, and in the English language.

4. The required percentage shall be computed by adding all gross sales of food, non-alcoholic beverages, and alcoholic beverages and thereafter dividing that sum into the total of the gross sales of food plus non-alcoholic beverages.

* * *

(d) Full course meals must be available at all times when the restaurant is serving alcoholic beverages except alcoholic beverage service may continue until food service is completed to the final seating of restaurant patrons for full course meals. A

full course meal as required by this rule must include the following:

1. Salad or vegetable;
2. Entrée;
3. Beverage; and
4. Bread.

(e) For purposes of determining required percentages, an alcoholic beverage means the retail price of a serving of beer, wine, straight distilled spirits, or a mixed drink.

42. The evidence is clear and convincing that, at the time Ms. Fernand made application for the SRX license she was notified by DABT, and was aware and understood, that Café was required to derive 51 percent of its gross revenue from sales of food and non-alcoholic beverages. Also, the evidence is clear and convincing that, after the issuance of the temporary and permanent SRX license, Café was required to maintain that 51 percent.

43. Further, the evidence is clear and convincing, through the admission of Ms. Fernand, that Café purchased and sold alcoholic and non-alcoholic beverages and food for the period from December 18, 2003 through March 31, 2004.

44. The burden is upon Café to show that it met the 51 percent requirement through its records. The evidence is clear and convincing that DABT requested from Café, and Café failed to provide to DABT, records of purchases and sales of alcoholic and non-alcoholic beverages and food for the period from

December 18, 2003 through March 31, 2004. The records produced by Café were inadequate and were insufficient for DABT to make a determination as to the purchases and sales of alcoholic and non-alcoholic beverages and food for the time period involved.

45. Additionally, the evidence is clear and convincing that Café failed, for the period from December 18, 2003 through March 31, 2004, to have records of purchases and sales of alcoholic and non-alcoholic beverages and food. Again, the records produced by Café were inadequate and were insufficient for DABT to make a determination as to the purchases and sales of alcoholic and non-alcoholic beverages and food for the time period involved.

46. Further, the evidence is clear and convincing that Café failed to maintain records of purchases and sales of alcoholic and non-alcoholic beverages and food for the period from December 18, 2003 through March 31, 2004. The non-production of the records by Café shows that Café failed to maintain the records.

47. Without the aforementioned records, DABT was unable to perform its audit and determine whether Café complied with its special licensure requirement to derive 51 percent of its gross revenue from sales of food and non-alcoholic beverages. Café failed to maintain records of all purchases and other requisitions of alcoholic beverages. As a result, Café failed,

for the period from December 18, 2003 through March 31, 2004, to meet its licensure requirement of deriving 51 percent of its gross revenue from sales of food and non-alcoholic beverages and its licensure requirement to maintain records of all purchases and other acquisitions of alcoholic beverages.

48. Moreover, Ms. Fernand admitted that a box in Café contained records of purchases and sales of food and non-alcoholic and alcoholic beverages during the pertinent time period. The evidence demonstrates that she did not have access to the box when DABT requested Café's records; however, the evidence further demonstrates that, when Ms. Fernand did gain access to the box, at no time did she open the box to provide the records to DABT, including prior to the hearing or at the hearing.

49. Consequently, DABT demonstrated by clear and convincing evidence that Café violated Section 561.20(2)(a)4., Florida Statutes (2003), by failing to derive 51 percent its gross revenue from sales of food and non-alcoholic beverages for the period from December 18, 2003 through March 31, 2004; and violated Section 561.55(3)(b), Florida Statutes (2003), by failing to maintain records of all purchases and other acquisitions of alcoholic beverages for the period from December 18, 2003 through March 31, 2004.

50. As to penalty, penalty guidelines are found at Florida Administrative Code Rule 61A-2.022. The penalty guidelines are "imposed upon alcoholic beverage licensees and permittees who are supervised by the division [DABT]." Fla. Admin. Code R. 61A-2.022(1). "The penalties . . . are based upon a single violation which the licensee committed or knew about; . . . or violations which were occurring in an open and notorious manner on the licensed premises." Ibid. "The penalty guidelines set forth . . . penalties that will be routinely imposed by the division for violations." Fla. Admin. Code R. 61A-2.022(11).

51. Pertinent to the instant matter, for a violation of Section 561.20, Florida Statutes (2003), the penalty is "\$1000 and revocation without prejudice to obtain any other type license, but with prejudice to obtain the same type of special license for 5 years"; and for a violation of Section 561.55(3)(b), Florida Statutes (2003), the penalty is revocation. Fla. Admin. Code R. 61A-2.022(11).

52. DABT suggests the revocation of Café's SRX license, with prejudice for Ms. Fernand not to obtain another SRX license for a five-year period, but without prejudice for her to apply for and obtain any other license for which she may be otherwise qualified to hold. DABT's suggested penalty is consistent with the penalty guidelines and is reasonable.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco enter a final order:

1. Finding that Ran D Vou Café, d/b/a Ran D Vou Café violated Section 561.20(2)(a), Florida Statutes (2003).
2. Finding that Ran D Vou Café, d/b/a Ran D Vou Café violated Section 561.55(3)(b), Florida Statutes (2003).
3. Revoking the SRX license of Ran D Vou Café, d/b/a Ran D Vou Café, with prejudice for Ms. Mary Fernand not to obtain another SRX license for a five-year period, but without prejudice for her to apply for and obtain any other license for which she may be otherwise qualified to hold.

DONE AND ENTERED this 24th day of April 2006, in Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of April, 2006.

ENDNOTES

^{1/} The Administrative Action does not reflect when it was filed.

^{2/} The final hearing was held by video teleconference. The originals of Petitioner's Exhibits 4 and 5 were at the connecting site in Tallahassee, but no copies of the exhibits were available at the connecting site in Lauderdale Lakes for review by the witnesses.

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.