

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GERALD E. TOMS, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-1113
	)	
MARION COUNTY SCHOOL BOARD,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

On June 21, 2007, a hearing was held in Ocala, Florida, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Leonard H. Klatt, Esquire  
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Ocala, Florida 34476

For Respondent: Mark E. Levitt, Esquire  
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STATEMENT OF THE ISSUE

Whether Respondent has committed an unlawful employment practice in violation of Chapter 760, Florida Statutes, and if so, what remedy should be ordered?

PRELIMINARY STATEMENT

On August 14, 2006, Petitioner filed a complaint with the Florida Human Relations Commission (the Commission), alleging that the Marion County School District (School District) had discriminated against him in its hiring practices based upon his age. On February 19, 2007, the Commission issued a Notice of Determination of No Cause, and on March 5, 2007, Petitioner filed a Petition for Relief. On March 8, 2007, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was originally noticed for hearing May 9, 2007. Petitioner obtained counsel and moved for a continuance. By Order dated May 1, 2009, the motion was denied without prejudice to file an amended motion in compliance with Florida Administrative Code Rule 28-106.204(3). Upon the filing of an Amended Motion, the May 9, 2007, hearing was canceled and re-scheduled for June 21, 2007.

On June 14, 2007, Respondent filed its Witness List in compliance with the Order of Pre-Hearing Instructions. On June 19, 2007, Respondent filed a Motion to Dismiss or in the Alternative to Exclude Witnesses and Exhibits, asserting that Petitioner had failed to provide to Respondent any witness or exhibit lists, or copies of its proposed exhibits. That same day, Petitioner filed a response stating that he had served Respondent with his list of witnesses and exhibits that day, and

that his witnesses and exhibits were also witnesses and exhibits to be used by Respondent. A telephone conference was conducted June 20, 2007. Inasmuch as the file did not reflect that any discovery had been conducted by either party, and all of the witnesses and exhibits Petitioner intended to use were also going to be used by Respondent, Respondent had not demonstrated prejudice by Petitioner's failure to timely comply with the Order of Pre-Hearing Instructions. Therefore, the Motion to Dismiss or in the Alternative to Exclude Witnesses and Exhibits was denied.

At hearing, Petitioner presented the testimony of three witnesses and Petitioner's Exhibits numbered 1 through 11 were admitted into evidence. Respondent presented the testimony of two witnesses, and Respondent's Exhibits numbered 1 through 4 were admitted.

At the close of Petitioner's case, he had presented evidence related to the successful candidates of 7 positions out of over 130 positions for which he had applied. Petitioner then moved for a continuance, asserting that the undersigned should consider evidence related to all 130 positions. Given the lack of discovery conducted pursuant to the Rules of Civil Procedure, the motion was denied.

The transcript of the proceedings was filed with the Division July 27, 2007. The parties were given until August 6, 2007, to file their proposed recommended orders. Both submissions were timely filed and have been carefully considered.

In his Proposed Recommended Order, Petitioner appears to take issue with the selection of other candidates for only three of the positions for which he applied and presented evidence at hearing. However, all seven positions are addressed in this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner is a Caucasian male born December 30, 1952. At present he is 54 years old.

2. Petitioner holds a bachelor's degree in criminology from Florida State University, which he obtained in 1976. He also holds a juris doctorate from Florida Coastal School of Law, obtained in December 1999. In between these two degrees, Petitioner's employment history, included with his application for employment with the School District, indicates that in 1976 he worked at Graham's Dairy farm; from 1979-1980, he worked in telephone communications doing telephone installation, repair, and telephone cable splicing for an unknown employer; and in 1981 he worked for GTE of Florida performing telephone installation and repair.

3. In 1985 Petitioner was the operations manager for Ocala Mack Sales, handling small claims and tag and title work. In 1989, he returned to the telephone industry, splicing cable. There is no indication of the time frame or duration of each job. No credible explanation was given for the significant gaps in his work history, or the reasons for leaving the various jobs listed.

4. Beginning in 1993, Petitioner substituted for a three-month period at Fort King Middle School in Ocala, Florida. This three-month period is the only experience in the education field that Petitioner possesses.

5. That same year, Petitioner began taking additional classes at the community college level part time in an effort to go to medical school. He also stayed home caring for his children. When he was unsuccessful in getting admitted to medical school, he turned his efforts to law school.

6. Beginning in 2001, after graduating from law school and passing the bar exam, Petitioner worked as an attorney for the Department of Children and Families. In April 2004, he resigned in lieu of termination.<sup>1/</sup> After an eight-month period of unemployment, he was hired in November 2004 as a corrections officer with the Florida Department of Corrections, and remains in that position today.

7. In 2004, Petitioner began applying for teaching positions in Marion County. To that end, he has applied for and received Statements of Status of Eligibility from the Florida Department of Education indicating that he is eligible for a temporary certificate in the areas of chemistry and biology, grades 6-12, for the period June 22, 2004, through June 22, 2007.

8. The job description for a teaching position in the School District indicates that a candidate must have a bachelor's degree from an accredited institution and be certified by the

State of Florida or have district vocational certification. School District Policy 6.10 requires that all personnel be appointed as prescribed by Florida Statutes and applicable rules of the School Board and the State Board of Education. The job description also lists the following in terms of required knowledge, skills and abilities:

Knowledge of child growth and development, especially of characteristics of children in the age group assigned. Knowledge of prescribed curriculum. Knowledge of current educational research. Basic understanding and knowledge of use of current technology. Knowledge of learning styles and skill in using varied teaching methods to address student learning styles. Skill in oral and written communication with students, parents, and others. Ability to plan and implement activities for maximum effectiveness. Ability to effectively assess levels of student achievement, analyze test results, and prescribe actions for improvement. Ability to maintain appropriate student supervision so that students have a safe and orderly environment in which to learn. Ability to work effectively with peers, administrators, and others.

9. Certification by the Department of Education in the subject matter to be taught is generally required. The School District may waive certification in a particular area only when there is a critical need for teachers in that area and there are no certified teachers available. Even in that instance, the School District usually looks for a closely related certification area. For example, when trying to fill special education positions, the School District will look first for applicants

certified in reading if no one certified in special education is available.

10. In addition to certification for individual subject areas, a teacher may obtain what is referred to as a middle grades integrated certification. Someone with this certification is preferred over other applicants in a middle school setting, because they can teach science, social studies, language arts and math, giving principals more flexibility in filling positions that might include teaching in more than one area. Petitioner does not hold a middle grades integrated certification.

11. Petitioner has applied for 32 science teaching positions, two biology positions and one chemistry position in the School District.

12. In addition to these 35 science-related positions, Petitioner has applied for 47 additional teaching positions in the reading and exceptional education, areas for which he understands there is a critical need, and in criminology and legal systems, areas where he believes he has practical experience. Because he is not certified in these areas, they would be considered out-of-field. Petitioner could only be considered for those positions in the event that there was no qualified and appropriately certified candidate available. He has also applied for approximately 50 other positions for which he is not certified.

13. Petitioner has received five interviews for positions within the Marion County School District. He has received no offers of employment.

14. The School District fills vacancies for teachers in several different ways. A person already working as a teacher in the School District may request a transfer, for example, to a different subject area for which they are qualified or to a different school. Under the teachers' collective bargaining agreement with the School District, that teacher is automatically considered as the preferred candidate for any vacancy consistent with their request, unless the principal at the hiring school presents a compelling reason why they should not be hired. Under these circumstances, no vacancy would be advertised.

15. The School District also encourages applicants to participate at an annual district-wide Job Fair. At that Job Fair, principals at different levels (high school, middle school, elementary school) are available to conduct interviews. Candidates do not necessarily interview for particular positions; they interview with whatever principals are available.

16. Finally, applicants may be called to interview with principals for openings at individual schools, should there not be a qualified applicant requesting a transfer or under "conditional contract" with the District. Conditional contracts will be discussed in more detail below.



17. During interviews at the Job Fair, principals use standardized interview questions that have been approved by the School District. The standardized interview questions have eight categories of questions based upon qualities one would expect to find in a teacher: 1) likes kids; 2) dependable; 3) content knowledge; 4) ability to manage; 5) motivation; 6) positive attitude; 7) team player; and 8) communication.

18. The interviewer selects a question from each category to ask the applicant, and awards one to three points per question, based on whether the answer exceeds expectations, meets expectations or does not meet expectations. The highest total score an applicant can receive based on his or her answers to these questions is 24. Principals may only choose from the questions provided. They may clarify a question should an applicant ask them to, but they may not ask other questions.

19. If the principal is favorably impressed by an applicant and has a vacancy at his or her school in the area for which the applicant is certified, the principal may offer that applicant a position at the interview. If they have no such position available but think the candidate would be a good hire for the School District, they may offer what is referred to as a conditional contract.

20. A conditional contract does not entitle the applicant to a job. However, as vacancies arise within the School District, if there are individuals with conditional contracts

that are qualified for the vacancies, those individuals are referred to the hiring principal for consideration. The hiring principal chooses from among those candidates with conditional contracts, and if there is only one such candidate, he or she would, absent extraordinary circumstances, get the job.

21. Petitioner participated in the School District's Job Fair in June 2006. He was interviewed by Lisa Krysalka, the principal at Belleview Middle School. When Petitioner appeared for his interview at the Job Fair, he was not wearing a suit and did not bring a resume. Ms. Krysalka's notes reflect that he did tell her he had served as a substitute 10 years before.

22. Based on his answers to the standardized questions, Ms. Krysalka gave Petitioner an overall score of nine. She ranked his answers as not meeting expectations for eight out of nine questions. Her scoring was reasonable in light of the answers he gave. For example, when asked to describe his classroom management plan, Petitioner indicated that he had no plan because he did not have problems with discipline. When Petitioner was asked how he would get his students excited about entering the classroom, he stated that most kids are excited already, and he would have a plan (although unspecified) and stick to it. Other answers he gave were either not responsive to the questions asked or did not relate to a school setting or to work with children. Ms. Krysalka felt some of Petitioner's

responses were unrealistic and showed that he was unprepared to teach middle school in today's climate.

23. Ms. Krysalca's assessment is reasonable. Petitioner's answers to these standardized questions do not demonstrate that he possessed the knowledge, skills and abilities required to perform as a teacher in the Marion County School District.

24. Petitioner interviewed at individual schools outside the purview of the Job Fair. None of those interviews resulted in offers for a teaching position.

25. While Petitioner testified that he has applied for dozens of positions, he presented evidence regarding only seven of those positions. The qualifications for the successful candidates for the positions are listed below.

26. Petitioner admitted at hearing that he had no personal knowledge as to the qualifications of any of these candidates. He simply felt that, given the number of positions for which he applied, the only reasonable explanation for his not getting a teaching position was his age.

27. Matthew Bates was born in 1981, and is younger than Petitioner. He has a B.A. in history and is working on his master's degree in educational leadership. He has passed the M/J Integrated Certification exam. Bates was originally hired in September 2005 at Dunellen Middle School for a "split" position, teaching both seventh grade science and language arts. Mr. Bates requested and was granted a transfer within the School District

under the collective bargaining agreement to fill a vacant seventh grade science position at the same school. Consistent with the School District's collective bargaining agreement, no other candidate was considered or interviewed.

28. Petitioner has not established that he is equally qualified or more qualified than Mr. Bates for the position sought.

29. Ronald Long was born in February 1981, and is younger than Petitioner. Mr. Long was selected for a science position at Forest High School. He holds a B.S. degree in biology; served as a substitute teacher for the School District during the 2003-2004 school year, and was an assistant and junior varsity basketball coach at Trinity Catholic High School during that time. Mr. Long's resume also indicates that he has worked with the Boy Scouts and several basketball teams at both the high school and college level. Based on his interview and experience, Milford Lankford, the principal at Forest High School, believed Long to be the better qualified candidate.

30. Petitioner was interviewed for the position at Forest High School. At the time of his interview, Mr. Lankford was filling two positions in the science department. The first position was filled by Mr. Downs, who was 63 years old at the time he was hired. However, based on his interview, Mr. Lankford did not feel that Petitioner had the skills necessary to be successful in the classroom. His impression was confirmed after

Petitioner interviewed with his assistant principal, Ms. Bounds. Mr. Lankford had eliminated Petitioner from consideration by the time he offered the second position to Mr. Long. In any event, his determination that Mr. Long was better qualified for the position is reasonable.

31. David Mahfood, was born in 1983 and is younger than Petitioner. He was selected for a physics position at one of the high schools in the School District. The position required that the applicant be highly qualified in and certified to teach physics, and Mr. Mahfood met those qualifications. Petitioner is not certified in physics, as required for this position.

32. Bret Mills, born in 1982, is also younger than Petitioner. He has a middle grades integrated certification. Mr. Mills holds a B.S. in animal biology and while his resume does not reflect any teaching experience, it does reflect experience working with children in church and little league, as well as working as a literacy program leader while at the University of Florida. Mr. Mills' certification was preferable for the position being advertised.

33. Petitioner did not establish that he was equally or more qualified than the successful candidate for this position.

34. Michael Orloff was hired for a seventh grade science position at West Port Middle School. Mr. Orloff was born in 1958, and is four years younger than Petitioner. He has a B.S. in marketing with a minor in chemistry. He was interviewed by

Greg Dudley, the principal of West Port Middle School during the Job Fair. Based upon a favorable interview, he was offered a position at that school in accordance with School District policy. There is no evidence that Mr. Dudley even knew of Toms' application at the time that he offered Mr. Orloff the job.

35. Mr. Richard Williams was born in 1971, and is younger than Petitioner. He was offered a position teaching science at Howard Middle School. Mr. Williams holds a B.S. degree in biology and a master's degree in environmental management. He also has experience as a resource teacher with Eckerd's Youth Alternatives and served in the Peace Corps as a forestry extension agent. Mr. Williams originally worked beginning in September 2005 as a substitute teacher at Howard Middle School. He participated in the 2006 Job Fair and interviewed with the incoming principal at Howard Middle School. Based on his outstanding scores on the Job Fair Interview, he was offered a job immediately. Petitioner was not a candidate brought to the attention of the hiring principal at the time of the Job Fair. As previously indicated, Petitioner's interview scores at the same Job Fair were not impressive.

36. Unlike Petitioner, Mr. Williams' degrees and experience are in fields related to the area he was hired to teach. Mr. Williams was the more qualified candidate for the position for which he was hired.

37. Finally, Kristen Wood was born in 1982 and is younger than Petitioner. She was hired to teach agriculture and biology. Ms. Wood graduated from the University of Florida with a major in agricultural education and had a teaching internship in agriculture. She was also certified to teach in both biology and agriculture, and had significant experience with the Florida Future Farmers of America Association. Petitioner is not certified in agriculture and had less experience related to education. Ms. Wood was the more qualified applicant for the position sought.

#### CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

39. Petitioner has the burden of proving by a preponderance of the evidence that the Respondent committed an unlawful employment practice. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

40. Petitioner's complaint is based on perceived violations of Section 760.10(1)(a), Florida Statutes, which makes it an unlawful employment practice for an employer to "discharge or fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of the

individual's race, color, religion, sex, national origin, age, handicap, or marital status."

41. An employer's liability for discrimination on the basis of age is dependent on a determination that the employer's decision was actually motivated by age. Dancy-Pratt v. School Board of Dade County, 2001 U.S. Dist. LEXIS (S.D. Fla. 2001). To establish a prima facie case of discrimination based on his age, Petitioner must show that 1) he was a member of the protected age group of persons between the ages of forty and seventy; 2) he was subjected to adverse employment actions; 3) he was qualified for the position(s) for which he applied; and 4) lost the position to a younger individual. McDonnell Douglass Corp. v. Green, 411 U.S. 792, 802-804 (1973); Cooper v. Southern Co., 390 F.3d 695, 724 (11th Cir. 2004); Van Hoorhis v. Hillsborough Board of County Commissioners, 2007 U.S. Dist. LEXIS 33996 (M.D. Fla. May 9, 2007).

42. Once a petitioner establishes a prima facie case, the burden of proof shifts to the employer to produce evidence that the petitioner was rejected for a legitimate, non-discriminatory reason. Once the employer meets this burden of production, the petitioner has the ultimate burden of showing that the articulated reason for the employer's decision is pre-textual. A petitioner may meet this burden by pointing to weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the proffered explanation. Brooks v. County



Commission of Jefferson County, 446 F.3d 1160, 1162 (11th Cir. 2006); EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1272-1273 (11th Cir. 2002). However, a reason is not pretext for discrimination "unless it is shown both that the reason was false, and that discrimination was the real reason." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993); Brooks, 446 F.3d at 1163.

43. Petitioner has demonstrated that he is within a protected class, in that he was over 40 years old at the time he applied for the positions in question. He has also shown that he was not hired for any of the positions for which he applied, thereby suffering an adverse employment action.

44. Petitioner has conceded that with respect to the positions filled by Williams, Mills, Mahfood and Wood, he has not established a prima facie case for employment discrimination.

45. With respect to the positions filled by Bates, Long and Orloff, Petitioner claims that he has established a prima facie case and that the reason given for the selection of the successful candidates in each instances was pretextual.

46. Petitioner has demonstrated that, for these three positions, he was a candidate over 40 years old; he did not get the desired position; he met the minimum qualifications for the position; and someone younger than Petitioner was hired.

Therefore, with respect to the positions offered to Bates, Long and Orloff, Petitioner has presented a prima facie case of discrimination.

47. With respect to each of these positions, the School District has produced evidence that its hiring decisions were based on the superior qualifications of the successful candidates. With the production of this evidence, any presumption of discrimination disappears. Cooper v. Southern Co., 390 F.3d 695, 725 (11th Cir. 2004).

48. Petitioner has failed to present any credible evidence to rebut the reasons given by the School District for its hiring decisions. In each instance, the School District has presented credible, persuasive evidence to support its hiring decision. It is not enough for Petitioner to claim that he meets the minimum requirements for the positions. As stated by the Eleventh Circuit:

[T]he burden shifted to [the complaining applicant] to "meet the proffered reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Chapman v. AI Transp., 229 F.3d [1012, 1030 (11th Cir. 2000)(en banc)]. A plaintiff must show that the disparities between the successful applicant's and her own qualifications were "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff." Cooper v. S.Co., 390 F. 3d 695, 732 (11th Cir. 2004), cert. denied, 126 S.Ct. 478, 163 L.Ed. 2d 363 (2005).

Brooks, 446 F.3d at 1163; see also Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006), on remand, 2006 U.S. App. LEXIS 19750 (11th Cir. 2006).

49. In each instance, a comparison of the Petitioner's qualifications to that of the successful candidate's simply does not reveal a disparity in qualifications mandating selection of the Petitioner. Moreover, whether Petitioner met the requirements for the positions he sought, or even whether he was the most qualified, is not dispositive. The question is whether the decisionmaker in each instance honestly believed that Petitioner did not meet the criteria for employment or that he was not the best candidate for the job. Cooper, 390 F.3d at 729.

50. Petitioner's argument that discrimination is the only plausible basis for his not being selected for employment in light of the sheer number of positions sought is without merit. First, only those instances where Petitioner has placed into evidence information about the job sought and the candidate chosen can be or have been considered in this proceeding. Second, there is no impediment to Petitioner applying for thousands of positions for which he is either not qualified or only marginally so. The number of positions applied for is simply irrelevant. What matters is whether he was qualified for the positions and whether the School District had a legitimate, non-discriminatory reason for hiring someone else on a job-by-job basis. Here, they clearly did.

51. Petitioner also requests in its Proposed Recommended Order that the School District's use of a Job Fair be invalidated as violating State and Federal anti-discrimination laws. This claim is made for the first time in Petitioner's Proposed Recommended Order and is not reflected in his complaint filed with the Florida Human Relations Commission. Inasmuch as the claim was not included its original request for hearing, it is beyond the scope of this proceeding. Cooper, 390 F.3d at 732.

52. Finally, Respondent requests that it be awarded attorneys' fees and costs for this proceeding pursuant to Sections 57.105 and 120.595, Florida Statutes.<sup>2/</sup> Respondent asserts that Petitioner's claims are frivolous under the standards enunciated under both statutes.

53. Section 57.105, Florida Statutes, provides in pertinent part:

(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(5) In administrative proceedings under chapter 20, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). . . .

54. The record in this case does not indicate that Respondent has complied with the "safe harbor" provision of

Section 57.105(4). This omission precludes fees under Section 57.105. See Burgos v. Burgos, 948 So. 2d 918 (Fla. 4th DCA 2007).

55. Section 120.595, Florida Statutes, provides in pertinent part:

(1)(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

(c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

\* \* \*

(e) For the purpose of this subsection:  
1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to

needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

56. Under the standards quoted above, Petitioner did not participate in this proceeding for an improper purpose. Therefore, Respondent's request for attorney's fees and costs is denied.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered dismissing Petitioner's complaint and denying Respondent's request for attorney's fees and costs.

DONE AND ENTERED this 17th day of August, 2007, in Tallahassee, Leon County, Florida.

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LISA SHEARER NELSON  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 17th day of August, 2007.

ENDNOTES

<sup>1/</sup> While Respondent sought a negative inference from the fact that Petitioner's resignation from the Department of Children and Family Services was in lieu of termination, no such inference is appropriate. There are a multitude of reasons a person may be asked to resign from his position, many of them having nothing to do with the employee's abilities or work product. Absent any evidence that Petitioner's work at DCFS was substandard, his resignation is simply that: a resignation.

<sup>2/</sup> Respondent indicates in its Proposed Recommended Order that it is seeking fees pursuant to Section 120.659. The correct reference is to Section 120.595.

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.