

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GEORGE SPIVAK, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-1515  
 )  
 OFFICE OF FINANCIAL REGULATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on April 30, 2009, by telephone conference call at sites in West Palm Beach and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: George Spivak, pro se  
118 Cassilly Way  
Jupiter, Florida 33458

For Respondent: Robert H. Schott, Esquire  
Assistant General Counsel  
Office of Financial Regulation  
P.O. Box 8050  
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STATEMENT OF THE ISSUE

Whether Petitioner's application for licensure as a mortgage broker should be denied on the grounds set forth in the

Office of Financial Regulation's October 31, 2008, Notice of Denial of Application.

PRELIMINARY STATEMENT

By issuance of a Notice of Denial of Application (Notice of Denial) on October 31, 2008, the Office of Financial Regulation (Office) advised Petitioner that it had preliminarily decided to deny Petitioner's application for licensure as a mortgage broker based on the following:

(a) On September 2, 1999, the National Association of Securities Dealers ("NASD," now known as Financial Industry Regulatory Authority or FINRA) found that you had violated securities rules and regulations. Specifically, NASD found that you had churned six accounts[,] making unsuitable bond purchases for three of those accounts[,] and making material misrepresentations of fact in selling one bond issue to those clients. As a result, NASD enjoined you from committing future violations and barred you from association with any broker or dealer. These actions by NASD and your conduct state grounds for license denial within the meaning of section 494.0041(2)(q) and (u)1., Florida Statutes.

(b) On September 26, 2001, the State of Washington Department of Financial Institutions Securities Division found that you had acted as an unregistered salesperson and made misrepresentations of material fact in connection with the offer and sale of commodities. As a result, Washington State ordered you to cease and desist from acting as an unregistered salesperson and from violating the anti-fraud provisions of the Commodities Act of Washington. These actions by Washington State and your conduct state grounds for license denial within the

meaning of section 494.0041(2)(q) and (u)1., Florida Statutes.

(c) On January 1, 2003, in the U.S. Court for the Southern District of Florida, in a civil action Commodit[y] Futures Trading Commission v. World-Wide Currency Services Corp., Genady Spivak a.k.a. George Spivak and Ellison Kent Morrison, [the court] entered Judgment against Defendants for Permanent Injunction and other Ancillary Relief. The court found that you were director and acted as president of World-Wide and oversaw its day to day operations. The court further found that the defendants engaged in solicitation fraud and fraud by misappropriation of customer funds. You caused \$226,950 of customer funds to be disbursed to yourself. The judgment assessed civil monetary penalties in the amount of \$4,331,658.90 against World-[W]ide and \$1,361,700.00 against you. Your actions, described in the judgment, constitute misconduct within the meaning of section 494.0041(2)(q), and the judgment is for fraud, misrepresentation and deceit within the meaning of section 494.0041(2)(t).

(d) In submitting your license application on June 11, 2008, you answered "NO" to question 10F that asks:

Has a final judgment been entered against you in a civil action upon grounds of fraud, embezzlement, or deceit?

Because of the January 1, 2003 judgment, you should have answered "YES," and your "NO" answer was a material misstatement on an initial application within the meaning of section 494.0041(2)(c), Florida Statutes.

(e) On June 18, 2008, the Office of Financial Regulation, in processing your current license application, wrote a letter advising you of deficiencies in your

application. That letter instructed you inter alia, to provide the Office of [Financial Regulation] certified copies of any administrative final orders entered against you. That letter advised you of a September 16, 2008 deadline. As of today, you have not complied. This is a violation of the requirements of Rule 60V-40.031(2), Florida Administrative Code, and is a ground for denial within the meaning of subsection 494.0041(2)(j).<sup>[1]</sup>

The facts stated immediately above are grounds for denial of your application based on section 494.0041(2)(c),(j),(q),(t) and (u)1, Florida Statutes, and Rule 69V-40.031(2), Florida Administrative Code, quoted above. . . .

On November 17, 2008, Petitioner submitted to the Office a written request for a hearing "to contest this action of [the Office]." On December 2, 2008, the Office issued an Order Dismissing Petition for Hearing with Leave to Amend. On December 23, 2008, Petitioner filed an amended hearing request.

Upon reviewing the amended hearing request, the Office determined that it did not raise any disputed issues of material fact. Accordingly, it appointed an Informal Hearing Officer to conduct proceedings in accordance with Section 120.57(2), Florida Statutes.

The Office subsequently determined, during the discovery process, that "a disputed issue of material fact probably exist[ed]." It therefore, on March 20, 2009, referred the matter to DOAH for a "formal hearing."

As noted above, the hearing was held on April 30, 2009. Petitioner was the only witness who testified at the hearing. In addition to Petitioner's testimony, nine exhibits (Respondent's Exhibits A through I) were offered and received into evidence.

At the close of the taking of evidence, the undersigned announced on the record that if the parties desired to file proposed recommended orders they had to do so no later than 21 days from the date of the filing of the hearing transcript with DOAH.

The hearing Transcript (consisting of one volume) was filed with DOAH on May 13, 2009.

The Office filed its Proposed Recommended Order on June 3, 2009. To date, Petitioner has not filed any post-hearing submittal.

#### FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Petitioner held a Series 7 securities license before it was revoked in 1999 by the National Association of Securities Dealers (NASD). As alleged in the Notice of Denial (and as Petitioner admitted during his testimony at the final hearing), NASD took such action on September 2, 1999, based upon its finding that Petitioner had violated securities rules and regulations by "churning six accounts[,] making unsuitable bond

purchases for three of those accounts[, ] and making material misrepresentations of fact in selling one bond issue to those clients." NASD "enjoined [Petitioner] from committing future violations and barred [him] from association with any broker or dealer."

2. As alleged in the Notice of Denial (and as Petitioner admitted during his testimony at the final hearing), "[o]n September 26, 2001, the State of Washington Department of Financial Institutions Securities Division found that [Petitioner] had acted as an unregistered salesperson and made misrepresentations of material fact in connection with the offer and sale of commodities" and, based upon this finding, "ordered [Petitioner] to cease and desist from acting as an unregistered salesperson and from violating the anti-fraud provisions of the Commodities Act of Washington."

3. On or about January 13, 2003, the Commodity Futures Trading Commission filed a two-count civil complaint in the United States District Court for the Southern District of Florida (Civil Action No. 03-80032) against Petitioner, World-Wide Currency Services Corporation (of which he was a director and president) and Ellison Kent Morrison. Count I of the complaint alleged an "offer and sale of commodity future contracts not conducted or subject to a Board or Trade which ha[d] been designated as a contract market or a transaction

execution facility." Count II of the complaint alleged "solicitation fraud and fraud by misappropriation of customer funds." According to the complaint, these acts occurred from December 21, 2000, up until the filing of the complaint.

4. As alleged in the Notice of Denial (and as Petitioner admitted during his testimony at the final hearing), a Summary Judgment against Defendants for Permanent Injunction and other Ancillary Relief" (Judgment) was entered against Petitioner and his co-defendants in Civil Action No. 03-80032).<sup>2</sup>

4. The Judgment was entered on August 5, 2004,<sup>3</sup> and filed with the clerk of the court four days later. It contained the following "Conclusions of Law":

23. Defendants violated section 4(a) of the Commodity Exchange Act ("the Act") 7 U.S.C. § 6a (2003), since the futures contracts sold by the Defendants are not conducted on or subject to the rules of a board of trade which has been designated or registered by the [Commodity Futures Trading] Commission as a contract market or derivatives transaction facility for such contract.

24. Defendants violated Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i) and (iii) (2003) and Commission Regulation 1.1, 17 C.F.R. § 1.1 (2003), by making materially false representations concerning the likelihood that customers will profit from purchasing futures contracts from the Defendants, and by making false representations and material omissions concerning the risk of loss.

25. Defendants violated Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i)

and (iii) (2003) and Commission Regulation 1.1, 17 C.F.R. § 1.1 (2003), by misappropriating customer funds for personal expenses.

26. Defendant Spiva[]k is additionally liable as a controlling person under Section 13(b) of the Act, 7 U.S.C. § 13c(b), because (1) World-Wide, the corporate entity[, ] violated the Act; (2) Spiva[]k "directly or indirectly" controlled that corporate entity; and (3) Spiva[]k "did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation." CFTC v. Baragosh, 278 F.3d 319, 330 (4th Cir. 2002).

5. Injunctive relief as well as the following monetary relief were granted in the Judgment:

IT IS FURTHER ORDERED that judgment for restitution, disgorgement, and civil monetary penalties shall be entered in favor of the Commission and against Defendants World-Wide, Spiva[]k, and Morris, for which Defendants shall be jointly and severally liable for the following:

A. Restitution for injured investors in the amount of \$1,092,880.60, which includes pre-judgment interest, plus any post-judgment interest which accrues following the entry of this Order. The judgment amount for restitution represents the monies received by Defendants from customers less any refunds or other payments received by customers from Defendants or customer funds that have been frozen pursuant to the asset freeze.

C. [sic] Civil Penalties in an amount to be determined following an evidentiary hearing and upon due notice to the Defendants. The judgment amount for civil monetary penalties shall be payable only upon full satisfaction[] of judgments for restitution.



6. An Order Assessing Civil Monetary Penalties was subsequently issued in the case on January 4, 2005. It provided, in pertinent part, as follows:

ORDERED AND ADJUDGED:

1. The plaintiff's motion for assessment of civil monetary penalties is GRANTED.

2. A civil monetary penalty in the amount of \$4,331,658.90 is here entered against defendant World[-]Wide Currency Services Corporation.

2. A civil monetary penalty in the amount of \$1,361,700.00 is here entered against defendant Genady Spiva[]k a/k/a George Spiva[]k.

\* \* \*

7. Petitioner has not paid any of the court-ordered restitution in Civil Action No. 03-80032, notwithstanding that in 2005 and 2006, his annual income was approximately \$110,000.00 and \$98,000.00, respectively.<sup>4</sup>

8. Petitioner ended his association with World-Wide Currency Services Corp. in February 2004.

9. From March 2004 through August 2008, Petitioner was employed as a "loan originator" for Alliance Home Mortgage (March 2004, through January 2007), United Home Mortgage (February 2007, through April 2008), and United Capital Lenders (April 2008, through August 2008). Petitioner is unaware of

there having been any client complaints lodged against him during the time he worked as a "loan originator."<sup>5</sup>

10. On June 11, 2008, Petitioner filed his original Application for Licensure as a Mortgage Broker (Original Application) with the Office. On his Original Application, he falsely answered "No" to the each of the following questions:

10C. Have you had a license, or the equivalent, to practice any profession or occupation denied, revoked, suspended, or otherwise acted against?

10F. Has a final judgment been entered against you in a civil action upon grounds of fraud, embezzlement, misrepresentation, or deceit?

11. On June 26, 2008, after having been told during a telephone conversation with Tonya Knight, a Financial Examiner/Analyst II with the Office, "that there was a problem" with his answer to Question 10C. on the Original Application,<sup>6</sup> Petitioner filed an amended Application for Licensure as a Mortgage Broker (Amended Application) with the Office. On the Amended Application, Petitioner correctly answered "Yes" to Question 10C.; however, in answering Question 10F., he continued to maintain that a "final judgment [had not] been entered against [him] in a civil action upon grounds of fraud, embezzlement, misrepresentation, or deceit," even though he knew that this was not true.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

13. Petitioner has applied to the Office to become licensed in Florida as a mortgage broker.

14. Pursuant to Section 494.0033(2), Florida Statutes, any "natural person" is qualified to be issued such a license if that person:

(a) Is at least 18 years of age and has a high school diploma or its equivalent.

(b) Has passed a written test adopted and administered by the [O]ffice, or has passed an electronic test adopted and administered by the [O]ffice or a third party approved by the [O]ffice, which is designed to determine competency in primary and subordinate mortgage financing transactions as well as to test knowledge of ss. 494.001-494.0077 and the rules adopted pursuant thereto. . . .

(c) Has submitted a completed application and a nonrefundable application fee of \$195.

(d) Has filed a complete set of fingerprints for submission by the [O]ffice to the Department of Law Enforcement or the Federal Bureau of Investigation for processing.

Additionally, the applicant "must have completed 24 hours of classroom education on primary and subordinate financing

transactions and the laws and rules of ss. 494.001-494.0077 to be eligible for licensure." § 494.0033(3), Fla. Stat.

15. An applicant who meets the foregoing qualifications for licensure may nonetheless be denied licensure pursuant to Section 494.0033(4), Florida Statutes, "if the applicant has committed any violation specified in ss. 494.001-494.0077 or has pending against her or him any criminal prosecution or administrative enforcement action, in any jurisdiction, which involves fraud, dishonest dealing, or any other act of moral turpitude."

16. Furthermore, Section 494.0041, Florida Statutes, provides, in pertinent part, as follows:

(1) Whenever the [O]ffice finds a person in violation of an act specified in subsection (2), it may enter an order imposing one or more of the following penalties against the person:

\* \* \*

(f) Denial of a license or registration.

(2) Each of the following acts constitutes a ground for which the disciplinary actions specified in subsection (1) may be taken:

\* \* \*

(c) A material misstatement of fact on an initial or renewal application.

\* \* \*

(q) Commission of fraud, misrepresentation, concealment, dishonest dealing by trick,

scheme, or device, culpable negligence, or breach of trust in any business transaction in any state, nation, or territory; or aiding, assisting, or conspiring with any other person engaged in any such misconduct and in furtherance thereof.

\* \* \*

(t) Having a final judgment entered against the applicant . . . in a civil action upon grounds of fraud, embezzlement, misrepresentation, or deceit.

(u)1. Having been the subject of any decision, finding, injunction, suspension, prohibition, revocation, denial, judgment, or administrative order by any court of competent jurisdiction, administrative law judge, state or federal agency, national securities exchange, national commodities exchange, national option exchange, national securities association, national commodities association, or national option association involving a violation of any federal or state securities or commodities law or rule or regulation adopted under such law or involving a violation of any rule or regulation of any national securities, commodities, or options exchange or association.

\* \* \*

17. In the instant case, the Office preliminarily denied Petitioner's application for licensure based on the action taken against him by the NASD on September 2, 1999 (which the Office alleged constituted grounds for denial pursuant to Section 494.0041(2)(q) and (u)1., Florida Statutes); the action taken against him by the State of Washington Department of Financial Institutions Securities Division on September 26, 2001 (which

the Office alleged constituted grounds for denial pursuant to Section 494.0041(2)(q) and (u)1., Florida Statutes); the final judgment entered in Commodity Futures Trading Commission v. World-Wide Currency Services Corp, Genady Spivak a/k/a George Spivak and Ellison Kent Morrison, United States District Court for the Southern District of Florida Civil Action No. 03-80032 (which the Office alleged constituted grounds for denial pursuant to Section 494.0041(2)(q) and (t), Florida Statutes); and his making a "material misstatement" in his response to Question 10F. on his application for licensure (which the Office alleged constituted grounds for denial pursuant to Section 494.0041(2)(c), Florida Statutes).

18. Petitioner was granted a hearing before a DOAH administrative law judge to challenge this preliminary determination.

19. At the hearing, it was the Office's burden to prove by a preponderance of the evidence the foregoing "violations" alleged in its Notice of Denial. See M. H. v. Department of Children and Family Services, 977 So. 2d 755, 762-63 (Fla. 2d DCA 2008)("[I]f the licensing agency proposes to deny the requested license based on specific acts of misconduct, then the agency assumes the burden of proving the specific acts of misconduct that it claims demonstrate the applicant's lack of fitness to be licensed. . . . The only issue before the ALJ was

DCF's stated reason for denying the application for the renewal of their foster care license, i.e., whether 'C. S., while in [the Foster Parents'] care, suffered an injury that required significant pulling force and [that] could not be considered accidental.' . . . This issue involved a charge of specific misconduct upon which DCF relied as its sole reason for the denial of the Foster Parents' application for the renewal of their foster care license. Accordingly, DCF had the burden of proving this charge of specific misconduct by a preponderance of the evidence." ).

20. Through its evidentiary presentation at hearing, the Office established by a preponderance of the evidence that Petitioner's application for licensure is subject to denial pursuant to Section 494.0041(2)(u)1., Florida Statutes, based on the action taken against him by the NASD on September 2, 1999, and the action taken against him by the State of Washington Department of Financial Institutions Securities Division on September 26, 2001, as alleged in the Notice of Denial; that it is subject to denial pursuant to Section 494.0041(2)(t), Florida Statutes, based on the final judgment entered in Commodity Futures Trading Commission v. World-Wide Currency Services Corp, Genady Spivak a/k/a George Spivak and Ellison Kent Morrison, United States District Court for the Southern District of Florida Civil Action No. 03-80032, as alleged in the Notice of

Denial; and that it is subject to denial pursuant to Section 494.0041(2)(c), Florida Statutes, based on his having made a material misstatement of fact in his response to Question 10F. on his application for licensure.<sup>7</sup>

21. The evidentiary record reveals no reason why the Office should decline to exercise its authority to deny Petitioner's application for licensure pursuant to Section 494.0041(2)(c), (t) and (u)1., Florida Statutes. While Petitioner has asserted that "he has been rehabilitated<sup>[8]</sup> and is entitled to the grant of his mortgage broker's license," the record evidence simply does not support this claim.<sup>9</sup>

22. In view of foregoing, Petitioner's application for licensure should be denied.

#### RECOMMENDATION

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

RECOMMENDED that the Office of Financial Regulation issue a Final Order denying Petitioner's application for licensure as a mortgage broker.



DONE AND ENTERED this 9th day of June, 2009, in  
Tallahassee, Leon County, Florida.



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STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of June, 2009.

ENDNOTES

- <sup>1</sup> In its Proposed Recommended Order, the Office announced that it was abandoning this ground for denial.
- <sup>2</sup> Petitioner was represented by counsel in this civil litigation.
- <sup>3</sup> The Notice of Denial erroneously alleged that the Judgment had been entered on January 1, 2003.
- <sup>4</sup> Petitioner "lives in a single-family home in a gated . . . up-scale neighborhood." He testified at hearing that the money he made in 2005 and 2006 was "not a lot of money to [him]" and it was just enough to enable him to keep "paying [his] bills."
- <sup>5</sup> No one other than Petitioner testified at the final hearing concerning Petitioner's work record as a "loan originator."
- <sup>6</sup> Prior to speaking with Ms. Knight, Petitioner had received a letter from her, dated June 18, 2008, which read, in pertinent part, as follows:

The State of Florida, Office of Financial  
Regulation ("Office") is in receipt of your

application for Mortgage Broker license on June 11, 2008.

In order for the application to be deemed complete, it will be necessary for you to provide this office with the following:

\* \* \*

- Please provide an explanation as to why you answered "No" to Question . . . 10C . . . . According to the Financial Industry Regulatory Authority's (FINRA) CRD report . . . you were barred from association with any broker or dealer. If applicable, please amend your application on the Real System. Please provide copies of all documents pertaining to each unrelated event referred to in Question . . . 10C . . . . Such documentation includes, but is not limited to, certified copies of all documents supporting the charges that were filed against you and the disposition of each charge. If you assert that you have been rehabilitated, submit copies of all documents in support of your rehabilitation. . . .
  
- Provide proof of fines or restitution paid including amount and date paid.

\* \* \*

The Office must receive a response resolving all deficiencies by September 16, 2008. Failure to provide all the requested information by the deadline is deemed by the Office as grounds for denial of the application.

\* \* \*

<sup>7</sup> No "violation" of Section 494.0041(2)(q), Florida Statutes, was proven, however. Cf. Williams v. Castor, 613 So. 2d 97, 99 (Fla. 1st DCA 1993)("The law is well established that a judgment

of conviction of a criminal offense . . . is not admissible in a subsequent civil proceeding as proof of the facts on which it is based. Thus, proof of the fact of Appellant's conviction by a copy of the criminal judgment was not legally sufficient to prove that Appellant was guilty of violating any of the statutes or rules the EPC found him guilty of violating, other than section 231.28(1)(e).") (citations omitted); Estate of Wallace v. Fisher, 567 So. 2d 505, 508 (Fla. 5th DCA 1990) ("Florida courts have consistently held that a judgment of conviction in a criminal prosecution is not admissible in a civil action as evidence of the facts upon which it is based."); Nunez v. Gonzalez, 456 So. 2d 1336, 1338 (Fla. 2d DCA 1984) ("It is well settled that a judgment of conviction in a criminal prosecution cannot be introduced into evidence in a civil action to establish the truth of the facts upon which it was rendered."); and Nell v. International Union of Operating Engineers, Local # 675, 427 So. 2d 798, 800 (Fla. 4th DCA 1983) ("[C]ollateral estoppel, or estoppel by judgment, requires identity of parties in both actions. . . . [I]ssues common to civil and criminal proceedings, directly determined in the prior criminal proceeding, would have to be tried anew in the civil action.").

<sup>8</sup> Petitioner bore the burden at hearing of proving his rehabilitation. See Beshore v. Department of Financial Services, 928 So. 2d 411, 414 (Fla. 1st DCA 2006) ("As a general rule, the burden of proof is on the party asserting the affirmative of an issue."); and Espinoza v. Department of Business and Professional Regulation, Florida Board of Professional Engineers, 739 So. 2d 1250, 1251 (Fla. 3d DCA 1999) ("The general rule is that, apart from statute, the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal.").

<sup>9</sup> That Petitioner's most recent "violation" (his falsification of his licensure application) occurred less than a year ago and that he has not paid any of the court-ordered restitution in Civil Action No. 03-80032 are among the factors weighing against a finding of rehabilitation in the instant case. See Hester v. Department of Financial Services, Office of Financial Regulation, No. 05-2107, 2005 Fla. Div. Adm. Hear. LEXIS 1311 \*31 (Fla. DOAH September 12, 2005) (Recommended Order) ("[I]t is the repeated unwillingness of the Petitioner to be forthcoming in the application process that demonstrates Petitioner's lack of appreciation for truthfulness, honesty and integrity. The continuation of such behavior also undermines any argument that

he has been rehabilitated from the events providing grounds for denial in this case."); Comas v. Department of Financial Services, Office of Financial Regulation, No. 03-1738, slip op. at 9 (Fla. DOAH September 30, 2003)(Recommended Order)("One element of rehabilitation is making restitution to one's victims."); Fonseca v. Department of Juvenile Justice, No. 99-3931, 2000 Fla. Div. Adm. Hear. LEXIS 5071 \*9 (Fla. DOAH April 27, 2000)(Recommended Order)("By his dishonesty in applying for employment with the Department, Fonseca has shown that he is not rehabilitated and is not entitled to an exemption from disqualification from employment."); and Goings v. Secretary of State, Division of Licensing, No. 80-2062S, 1981 Fla. Div. Adm. Hear. LEXIS 4353 \*5 (Fla. DOAH January 7, 1981)(Recommended Order)("The undersigned is not persuaded by Petitioner's position at the hearing in this cause that his criminal record constitutes mistakes made in his past and that he is entitled to begin life anew. While it has been three years since the Petitioner's last conviction, and while the passage of time may well indicate a reformed intent to abide by and respect the laws of the state, Petitioner has failed to demonstrate rehabilitation when he continues to rely upon dishonesty when he deems it appropriate.").

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.