

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 09-5890PL
)
ARIF ZAHEER AND VISTA HORIZON)
REALTY, INC.,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 19, 2010, in Orlando, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jennifer Leigh Blakeman, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N-801
Orlando, Florida 32801

For Respondent Arif Zaheer:

Daniel Villazon, Esquire
Daniel Villazon, P.A.
1420 Celebration Boulevard, Suite 200
Celebration, Florida 34747

For Respondent Vista Horizon Realty, Inc.:

(No appearance)

STATEMENT OF THE ISSUES

The issues in this case are whether Respondents, Arif Zaheer and Vista Horizon Realty, Inc., violated Subsections 475.25(1)(b), 475.25(1)(d)1., 475.25(1)(e), and 475.25(1)(k), Florida Statutes (2007),¹ and Florida Administrative Code Rule 61J2-14.011; whether Respondent Arif Zaheer violated Subsection 455.227(1)(n), Florida Statutes, and Florida Administrative Code Rule 61J2-14.009; and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On July 14, 2009, Petitioner, Department of Business and Professional Regulation, Division of Real Estate (Department), filed administrative complaints against Respondents, Arif Zaheer (Mr. Zaheer) and Vista Horizon Realty, Inc. (Vista Horizon Realty), and Martin W. Burnstein (Mr. Burnstein). The cases were forwarded to the Division of Administrative Hearings on October 26, 2009, for assignment to an Administrative Law Judge to conduct the final hearing.

The cases were consolidated for final hearing. The Department and Mr. Burnstein settled the complaint against Mr. Burnstein, and the file of the Division of Administrative Hearings involving Mr. Burnstein was closed.

At the final hearing, official recognition was taken of Subsections 455.227(1)(n), 475.25(1)(b), 475.25(1)(d)1., 475.25(1)(e), 475.25(1)(k), and 475.15(1)(u), Florida Statutes, and Florida Administrative Code Rules 61J2-14.009, 61J2-14.010, and 61J2-14.011.

At the final hearing, the Department called the following witnesses: Nimisha Patel, Martin Burnstein, Rajendra N. Patel, Arif Zaheer, and Vinay N. Patel. Petitioner's Exhibits 1 through 28 were admitted in evidence. Mr. Zaheer testified in his own behalf. Respondent Zaheer's Composite Exhibit 1 and Exhibit 2 were admitted in evidence. Respondent Vista Horizon Realty did not present any witnesses or submit any exhibits.

The two-volume Transcript was filed on March 10, 2010. At the final hearing, the Department and Mr. Zaheer agreed to file their proposed recommended orders within 20 days of the filing of the Transcript. The Department and Mr. Zaheer timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order. No post-hearing submission was filed by Vista Horizon Realty.

FINDINGS OF FACT

1. The Department is the state agency charged with the responsibility and duty to prosecute administrative complaints against licensed real estate brokers and broker associates in

Florida pursuant to Section 20.165 and Chapters 120, 455, and 475, Florida Statutes.

2. On June 13, 2003, Vista Horizon Realty, trading as Re/Max Vista,² became licensed as a Florida real estate brokerage, having been issued license CQ-1016846. The license is current through September 30, 2011.

3. Mr. Burnstein was the qualifying licensed broker for Vista Horizon Realty at all times material to this proceeding.

4. Mr. Zaheer was issued broker license BK-3049559 and, at all times material to this proceeding, was a broker sales associate for and part owner of Vista Horizon Realty.

5. In September 2007, Raj Patel was working as a sales associate at Vista Horizon Realty. His brother, Dr. Vinay Patel (Dr. Patel), and sister-in-law, Nimisha Patel (Ms. Patel), were looking for some investment property in Florida. Raj Patel found a shopping center located at 1310 Ridgewood Avenue, Daytona Beach, Florida, that was for sale and advised Dr. Patel of the availability of the property. Dr. and Ms. Patel (the Patels) expressed an interest in the Ridgewood Avenue property.

6. Because Raj Patel had little experience in commercial property transactions, Mr. Zaheer became involved and was the broker for the transaction.

7. On September 20, 2007, the Patels submitted an offer to purchase the Ridgewood Avenue property for \$1,750,000. The

offer provided that two deposits of \$25,000 each would be required. On September 20, 2007, the Patels wired \$50,000 to Vista Horizon Realty's bank account ending in 4599, which is an operating account. The \$50,000 represented a deposit on the Ridgewood Avenue property. The Patels were under the impression that the \$50,000 would be placed in an escrow account. The \$50,000 was never placed in an escrow account.

8. On October 2, 2007, the Patels and Ridgewood Retail Shoppes, LLC (the Seller), executed a commercial contract for the purchase of the Ridgewood Avenue property for \$1,750,000. The contract called for a \$25,000 deposit, which was to be held in escrow by the listing broker, Prudential CRES Commercial Real Estate. The contract also called for another deposit of \$62,500, which was to be made at an unspecified later date. The contract showed that part of the purchase price would come from mortgages in the amount of \$1,312,500. The balance to close was listed as \$350,000.

9. On October 11, 2007, the Patels made an application for a loan of \$1,575,000 to finance the purchase of the Ridgewood Avenue property. The loan application indicated that Mr. Zaheer was the interviewer for the application and that he took the information by telephone.

10. On November 1, 2007, Ms. Patel sent a check to Vista Horizon Realty for \$37,500. The Patels thought that this money

was to be placed in escrow. However, the money was used to pay costs associated with processing the loan application.

11. On November 1, 2007, the Patels and the Seller entered into another contract for the purchase of the Ridgewood Avenue property. The total purchase price was \$1,750,000. The contract called for a \$25,000 deposit, which was to be held in escrow by Vista Horizon Realty. An additional deposit of \$62,500 was to be made within 46 days of the effective date of the contract. The amount of the purchase price to be financed was \$1,312,500, and the amount to close was listed as \$350,000. The difference between the contract amount and the amount to be financed was \$437,500.

12. On November 26, 2007, Ms. Patel sent a check to Vista Horizon Realty for \$25,000 as a deposit on the Ridgewood Avenue Property. The Patels thought that this money would be placed in an escrow account.

13. Mr. Zaheer sent a letter dated December 29, 2007, on letterhead of Vista Horizon Realty, stating, "I would like to thank you for choosing me to be your personal REALTOR®. I appreciate the opportunity to be of service to you." Mr. Zaheer also enclosed his business card, showing that he was a broker/owner of Vista Horizon Realty.

14. In January 2008, Mr. Zaheer told the Patels that the bank wanted to see the remainder of the cash money that the

Patels would be using to pay for the Ridgewood Avenue property. On January 9, 2008, the Patels wired \$325,000 to the account of Vista Horizon Realty. It was the Patels' understanding that the \$325,000 would be placed in an escrow account.

15. The deposits which the Patels made from September 2007 through January 2008 totaled \$437,000. Based on the November 1, 2007, contract, the amount of cash that the Patels would need for the purchase of the Ridgewood Avenue property was \$437,000. The rest of the purchase price was to be financed.

16. In January 2008, the Patels became concerned that they did not have a receipt for the moneys which they had placed with Vista Horizon Realty and requested Mr. Zaheer to give them something in writing showing that the money had been received for the purchase of the property. On January 23, 2008, an email was sent from the email address of Arif Zaheer to the Patels. The email stated that the email came from Mr. Zaheer.

17. The email stated that the purchase price was \$1,850,000 plus an additional \$74,000, which would stay with Vista Horizon Realty to run the building, bringing the total price at closing to \$1,998,000. The email further showed that the amount of money to be borrowed was \$1,240,000 from Lehman and \$140,000 from the Seller. Further, the email stated that the following amounts had been received by Vista Horizon Realty: \$50,000; \$37,500; \$25,000; and \$325,000. These amounts total

\$437,000. The email stated that the cash balance needed to close was \$180,000. No explanation was given at the final hearing why the purchase price and the amount to be financed had changed from the amounts stated in the November 2007 contract.

18. On March 19, 2008, the Seller and the Patels entered into an addendum to the contract dated November 1, 2007. The addendum provided that the \$25,000 deposit was non-refundable; changed the purchase price to \$1,600,000; showed the total mortgages at \$1,280,000; and showed the balance needed to close as \$295,000.

19. Sometime in May 2008, Mr. Zaheer and Mr. Burnstein discovered that the \$25,000 which the Patels deposited with Vista Horizon Realty in November 2007 had not been placed in the escrow account. Based on this discovery, \$25,000 was transferred to the escrow account. Mr. Burnstein was unaware the \$25,000, as well as the other deposits, had been received by Vista Horizon Realty.

20. On June 11, 2008, Vista Horizon Realty sent a check for the \$25,000 deposit to the Seller. The Patels had failed to secure financing within the time frames set forth in the addendum to the purchase contract. The Patels were not advised that the deposit had been sent to the Seller.

21. In August 2008, the Patels, who thought that the sale of the Ridgewood Avenue property was still active, contacted

Vista Horizon Realty to find out why they had not gotten any information on the transaction. The Patels were advised that the Ridgewood Avenue property had been sold to another buyer.

22. The Patels requested that their money be returned, and Mr. Zaheer advised them that they would need to sign a Release and Cancellation of Contract for Sale and Purchase prior to the release of the escrow amount to the Patels. On August 22, 2008, the Patels signed a Release and Cancellation of Contract for Sale and Purchase, releasing the Seller, Prudential CRES Commercial Real Estate, and Vista Horizon Realty from all liability and instructing the escrow agent to disburse "all escrow" to Divany Patel.

23. Mr. Zaheer and Vista Horizon Realty returned \$20,000 of the money which the Patels had given them. To date none of the other moneys which the Patels sent to Vista Horizon Realty at the request of Mr. Zaheer have been returned. None of the funds, other than the \$25,000 deposit made in November 2007, were ever placed in an escrow account.

24. Mr. Zaheer readily admits that the Patels are owed money, but Mr. Zaheer contends that the Patels gave him the money as part of an investment scheme or that the Patels loaned him or Vista Horizon Realty the money. Mr. Zaheer's testimony is not credible. There is no contract showing that Mr. Zaheer and the Patels were trying to form a business or that the Patels

loaned him or Vista Horizon Realty the money. Mr. Zaheer used the money to operate Vista Horizon Realty, which is owned by Mr. Zaheer and his wife.

25. The \$437,000, which the Patels sent to Vista Horizon Realty at the request of Mr. Zaheer, was for the down payment on the Ridgewood Avenue property. The Patels got an equity line of credit on their home in order to get the needed funds. Additionally, Mr. Patel collected funds from his retirement account and other accounts to fund the downpayment.

26. The cost of investigation for the investigation of the case relating to Mr. Zaheer is \$775.50. The cost for the investigation of the case relating to Vista Horizon Realty is \$181.50.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

28. The Department has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

29. The Department has alleged that both Respondents violated the following subsections of Subsection 475.25(1), Florida Statutes:

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed \$5,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant:

* * *

(b) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon her or him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the licensee or was an identified member of the general public.

* * *

(d)1. Has failed to account or deliver to any person, including a licensee under this chapter, at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery, any personal property such as money, fund, deposit, check, draft, abstract of title, mortgage, conveyance, lease, or other document or thing of value, including a share of a real estate commission if a civil judgment relating to the practice of the licensee's profession has been obtained against the licensee and said judgment has not been satisfied in accordance with the terms of the judgment within a reasonable time, or any secret or illegal profit, or any divisible share or portion thereof, which has come into the licensee's hands and which is not the licensee's property or which the licensee is not in law or equity entitled to retain under the circumstances. However, if the licensee, in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon the licensee for the escrowed property, which property she or he still maintains in her or his escrow or trust account, the licensee shall promptly notify the commission of such doubts or conflicting demands and shall promptly:

a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;

b. With the consent of all parties, submit the matter to arbitration;

c. By interpleader or otherwise, seek adjudication of the matter by a court; or

d. With the written consent of all parties, submit the matter to mediation. The department may conduct mediation or may contract with public or private entities for

mediation services. However, the mediation process must be successfully completed within 90 days following the last demand or the licensee shall promptly employ one of the other escape procedures contained in this section. Payment for mediation will be as agreed to in writing by the parties. The department may adopt rules to implement this section.

If the licensee promptly employs one of the escape procedures contained herein and abides by the order or judgment resulting therefrom, no administrative complaint may be filed against the licensee for failure to account for, deliver, or maintain the escrowed property. Under certain circumstances, which the commission shall set forth by rule, a licensee may disburse property from the licensee's escrow account without notifying the commission or employing one of the procedures listed in sub-subparagraphs a.-d. If the buyer of a residential condominium unit delivers to a licensee written notice of the buyer's intent to cancel the contract for sale and purchase, as authorized by s. 718.503, or if the buyer of real property in good faith fails to satisfy the terms in the financing clause of a contract for sale and purchase, the licensee may return the escrowed property to the purchaser without notifying the commission or initiating any of the procedures listed in sub-subparagraphs a.-d.

* * *

(e) Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.

* * *

(k) Has failed, if a broker, to immediately place, upon receipt, any money, fund, deposit, check, or draft entrusted to her or

him by any person dealing with her or him as a broker in escrow with a title company, banking institution, credit union, or savings and loan association located and doing business in this state, or to deposit such funds in a trust or escrow account maintained by her or him with some bank, credit union, or savings and loan association located and doing business in this state, wherein the funds shall be kept until disbursement thereof is properly authorized; or has failed, if a sales associate, to immediately place with her or his registered employer any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or him as agent of the registered employer. The commission shall establish rules to provide for records to be maintained by the broker and the manner in which such deposits shall be made. A broker may place and maintain up to \$5,000 of personal or brokerage funds in the broker's property management escrow account and up to \$1,000 of personal or brokerage funds in the broker's sales escrow account. A broker shall be provided a reasonable amount of time to correct escrow errors if there is no shortage of funds and such errors pose no significant threat to economically harm the public. It is the intent of the Legislature that, in the event of legal proceedings concerning a broker's escrow account, the disbursement of escrowed funds not be delayed due to any dispute over the personal or brokerage funds that may be present in the escrow account.

30. The Department has alleged that both Respondents violated Florida Administrative Code Rule 61J2-14.011, which provides:

A broker who receives a deposit shall not have any right to or lien upon said deposit, except upon the written agreement or order of the depositor so long as the depositor or

depositor's legal representative has sole control of said deposit, until the transaction involved has been closed, and no person has any claim except the party ultimately to receive the same, in which case the broker may deduct the agreed commission unless the amount or time of payment is disputed. In case of a dispute as to the amount of the commission, or the time of payment, the broker may retain only the amount of the claim in said account and in trust, until the dispute is settled by agreement, arbitration, mediation or court proceedings, as provided in Section 475.25(1)(d)1., Florida Statutes. A depositor has the right to demand return of a deposit until such time as another party has acquired some interest or equity, subject to the right to make an express agreement to compensate the broker for time and expense incurred prior to a demand for the return of the deposit; and such right to demand return of the deposit shall again accrue upon a breach by the other party to the contract or agreement under which it is held, or the expiration of the time fixed or a reasonable time, for performance of the things necessary to establish the exclusive right of such other party to said deposit. A broker shall not deliver the deposit to the other party to the transaction until such transaction is closed, except as otherwise directed or agreed to specifically by the depositor. The interested parties involved, other than the broker, may by express agreement, alter the disposal of the deposit, but the burden shall be on the broker to establish good faith in the matter if such agreement is to the broker's advantage. The broker shall recognize and comply with the joint directions of said parties in such cases, except where the parties act in bad faith with intent to deprive the broker of a commission, in which case the broker shall proceed as provided in Section 475.25(1)(d)1., Florida Statutes.

31. The Department has alleged that Mr. Zaheer violated Subsection 455.227(1)(n), Florida Statutes, which provides that "exercising influence on the patient or client for the purpose of financial gain of the licensee or a third party" subjects a licensee to disciplinary action.

32. The Department has alleged that Mr. Zaheer has violated Florida Administrative Code Rule 61J2-14.009, which provides:

Every sales associate who receives any deposit, as defined in Rule 61J2-14.008, Florida Administrative Code, shall deliver the same to the broker or employer no later than the end of the next business day following receipt of the item to be deposited. Saturday, Sundays and legal holidays shall not be construed as business days. Receipt by a sales associate or any other representative of the brokerage firm constitutes receipt by the broker for purposes of paragraph 61J2-14.008(1)(d), Florida Administrative Code

33. The Department has established by clear and convincing evidence that Mr. Zaheer and Vista Horizon Realty violated Subsection 475.25(1)(b), Florida Statutes, by committing fraud and a breach of trust. Mr. Zaheer, as broker and owner of Vista Horizon Realty, requested that the Patels deposit money for payment of the purchase price of the Ridgewood Avenue property, when Mr. Zaheer had no intention of placing the money in an escrow account to be used toward the purchase of the Ridgewood

Avenue property. Mr. Zaheer and Vista Horizon Realty used the money to operate Vista Horizon Realty.

34. The Department has established by clear and convincing evidence that Mr. Zaheer and Vista Horizon Realty violated Subsection 475.25(1)(d)1., Florida Statutes. The Patels requested that their deposit money be returned, and Mr. Zaheer and Vista Horizon Realty, with the exception of \$20,000, failed to return the money to them. No evidence was presented that there is a dispute as to the amount owed and none of the actions set forth in Subsection 475.25(1)(d)1.a. through d., Florida Statutes, have been taken to determine the amount of money in dispute. Mr. Zaheer readily admits that the Patels are owed money but disputes that the money owed was involved in the Ridgewood Avenue property transaction.

35. The Department has established by clear and convincing evidence that both Respondents violated Florida Administrative Code Rule 61J2-14.009 and, therefore, violated Subsection 475.25(1)(e), Florida Statutes. Mr. Zaheer and Vista Horizon Realty received money from the Patels which was to be used for the purchase of the Ridgewood Avenue property. Mr. Zaheer and Vista Horizon Realty used a portion of the money from the Patels to pay the operating expenses of Vista Horizon Realty without the consent of the Patels.

36. The Department has established by clear and convincing evidence that both Respondents violated Subsection 475.25(1)(k), Florida Statutes. The \$25,000 deposit which the Patels sent to Vista Horizon Realty was not placed in an escrow account until May 2008. Mr. Zaheer directed the Patels to send the remainder of the money to secure the financing for the purchase of the Ridgewood Avenue property as a show of good faith to the lending institution. The remainder of the money which the Patels sent to Vista Horizon Realty was never placed in an escrow account, and Mr. Zaheer never intended that the funds be placed in an escrow account.

37. The Department has established that Mr. Zaheer violated Subsection 455.227(1)(n), Florida Statutes, by exercising his influence over the Patels to get them to send money to Vista Horizon Realty. He used the money for his personal gain, to operate his realty company. The Patels trusted him as their broker to put the deposits that were made into an escrow account and to use the money for the purchase of the Ridgewood Avenue property.

38. The Department has established by clear and convincing evidence that Mr. Zaheer violated Florida Administrative Code Rule 61J2-14.009 by failing to have the Patel's deposits, other than the \$25,000 deposit, put in an escrow account. Although Mr. Zaheer was not physically handed a deposit check, he knew

that the deposits were coming to Vista Horizon Realty and should have been put in an escrow account. He instructed the Patels to wire money to Vista Horizon Realty's account; thus, he knew that the money was going to be sent to the operating account.

Mr. Burnstein, the qualifying broker, was not made aware that the Patels had made any deposits other than the \$25,000 deposit; therefore, he would not have known that the remainder of the deposits should have been placed in escrow. Mr. Zaheer knew that the money had been received by Vista Horizon Realty, but never intended that the money be put in escrow, other than the \$25,000 deposit.

39. Florida Administrative Code Rule 61J2-24.001 sets forth the disciplinary guidelines to impose for violations of Chapters 455 and 475, Florida Statutes. Florida Administrative Code Rule 61J2-24.001(3)(c) provides that the recommended penalty for a violation of Subsection 475.25(1)(b), Florida Statutes, involving fraud is revocation, and the penalty for breach of trust is an administrative fine not to exceed \$5,000 and up to a one-year suspension. Discipline for a violation of Subsection 475.25(1)(d), Florida Statutes, ranges from a fine not to exceed \$5,000 and up to a five-year suspension. The penalty for a violation of Subsection 475.25(1)(e) is an eight-year suspension to revocation and an administrative fine not to exceed \$5,000. The penalty for a violation of Subsection

475.25(1)(k), Florida Statutes, is an administrative fine not to exceed \$5,000 and a 90-day suspension to revocation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Mr. Zaheer violated Subsections 475.25(1)(b), 475.25(1)(d)1., 475.25(1)(e), 475.25(1)(k), and 455.227(1)(n), Florida Statutes, and Florida Administrative Code Rules 61J2-14.009 and 61J2-14.011; revoking his license; imposing a \$5,000 administrative fine; and requiring the payment of costs in the amount of \$775.50.

It is RECOMMENDED that a final order be entered finding that Vista Horizon Realty violated Subsections 475.25(1)(b), 475.25(1)(d)1., 475.25(1)(e), and 475.25(1)(k), Florida Statutes, and Florida Administrative Code Rule 61J2-14.011; revoking its license; imposing an administrative fine of \$5,000; and requiring the payment of costs in the amount of \$181.50.

DONE AND ENTERED this 13th day of April, 2010, in
Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of April, 2010.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2007 version.

^{2/} Some of the exhibits and testimony refer to Re/Max Vista and some of the exhibits and testimony refer to Vista Horizon Realty. They are the same entity, and, for ease of reference, this Recommended order will refer to Vista Horizon Realty.

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.