STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF REVENUE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-1956
	)	
COLORCARS EXPERIENCED AUTOMOBILES, INC., N/K/A EXPERIENCED VEHICLES, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on September 20, 2012, in Sarasota, Florida, before Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John Mika, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: John T. Early, III, esq.[1/]
Colorcars Experienced Auto, Inc.
2311 Tamiami Trail
Nokomis, Florida 34275-3474

Robert Brian Resnick, Esquire[2/]
Post Office Box 1872
Boca Raton, Florida 33429-1872

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent's certificate of registration (Certificate) should be revoked for alleged failures to comply with requirements of chapter 212, Florida Statutes.

PRELIMINARY STATEMENT

On April 24, 2012, the Department of Revenue (Department or Petitioner) issued an administrative complaint (Complaint), alleging that Colorcars Experienced Automobiles, Inc., now known as Experienced Vehicles Inc. (Colorcars or Respondent), violated certain provisions of chapter 212, including the requirement to pay taxes when due. Based on these alleged violations, the Department contended that Colorcars' Certificate should be revoked. Colorcars timely filed a Petition for Formal Administrative Hearing (Petition) to contest the allegations, and the matter was forwarded to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge to conduct the hearing requested by Respondent.

The case was initially assigned to Administrative Law Judge J.D. Parrish, who issued an Initial Order. The parties filed a joint response to the Initial Order, in which they indicated that the final hearing should be held in Sarasota, Florida, and that they would be available for hearing by early August 2012.

On August 2, 2012, a Notice of Hearing and an Order of Pre-Hearing Instructions were issued setting the final hearing for September 20, 2012, and establishing pre-hearing requirements for the orderly and timely preparation of the case in advance of the final hearing.

In accordance with the pre-hearing requirements, on September 11, 2012, the Department filed its unilateral pre-hearing statement, listing its proposed exhibits and witnesses and setting forth its position; the Department confirmed that copies of its proposed exhibits were timely provided to Respondent. No unilateral pre-hearing statement was submitted by Respondent, nor did Respondent file lists disclosing its proposed exhibits or witnesses.

Also on September 11, 2012, the Department filed a motion to allow a Tallahassee-based Department employee to testify from Tallahassee. By Amended Notice of Hearing, arrangements were made for the Department employee to testify at DOAH in Tallahassee, linked by video teleconference with the hearing site in Sarasota.

On September 17, 2012, the case was transferred to the undersigned.

On September 18, 2012, Robert Resnick filed a Notice of Appearance for Respondent and a motion to continue the final hearing. The motion asserted that Mr. Resnick had just been

retained to represent Colorcars, needed additional time to prepare, and wanted to explore settlement with the Department. The motion recited that the Department did not oppose a continuance. Nonetheless, by Order dated September 19, 2012, the motion was denied, because it failed to demonstrate an emergency, per Florida Administrative Code Rule 28-106.210.

On September 19, 2012, Mr. Resnick filed an amended motion to continue the final hearing and to reconsider the order denying a continuance. This motion reiterated the grounds for requesting a continuance from the previous day's motion. In addition, the motion asserted that Mr. Resnick could not be in Sarasota the next morning, because he was obligated to appear in court in Broward County in connection with a capital felony case. The amended motion was denied in a Second Order Denying Continuance of Final Hearing issued on September 19, 2012.

The final hearing, thus, went forward as scheduled, with Respondent represented by John T. Early, III, who was designated as Colorcars' representative in its Petition. The Department presented the testimony of Kenneth Sexton and Mr. Early and offered Petitioner's Exhibits 1 through 9, which were admitted in evidence. Respondent presented the testimony of Mr. Early and Charles Wallace, who testified from Tallahassee by video teleconference. Respondent offered no exhibits in evidence.

Official recognition was taken of DOAH's file in Colorcars Experienced Automobiles, Inc. v. Department of Revenue, DOAH Case No. 08-5442, which was dismissed without an evidentiary hearing by Agreed Dismissal With Prejudice, signed by both parties and filed on February 13, 2009. In addition, official recognition was taken of a tax warrant recorded in the official records of Sarasota County, Florida, on February 20, 2009.

The one-volume Transcript of the final hearing was filed on October 5, 2012. By agreement, the parties were permitted to file their proposed recommended orders (PROs) by November 5, 2012. Petitioner timely filed its PRO. Respondent filed its PRO one day late, on November 6, 2012, but Petitioner did not file a motion to strike, or otherwise object to, the late PRO. Both parties' PROs have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency charged with administering and enforcing Florida's revenue laws, including the laws related to the imposition and collection of sales and use taxes pursuant to chapter 212.

2. Colorcars is a Florida corporation engaged in the retail auto sales business in Nokomis, Florida. Colorcars is a "dealer" within the meaning of section 212.02(6).

3. In order to engage in business as a "dealer," Colorcars was first required to apply for and obtain a Certificate from the Department. Colorcars first obtained its Certificate in 1994.

4. As a "dealer" holding a Certificate, Colorcars is obligated to comply with the sales tax laws, including collecting sales tax from its auto customers, filing returns, and remitting the collected sales tax to the Department.

5. In a prior DOAH proceeding, Colorcars initially requested an administrative hearing to contest a Notice of Proposed Assessment (NOPA) issued in 2005, by which the Department asserted that Colorcars' sales tax payments were deficient in the amount of $185,376.54, based on the results of an audit of Respondent's business for the period from August 1, 2001, through July 31, 2004. With additional penalties and interest claimed by the Department, the total proposed assessment as of June 14, 2005, according to the NOPA, was $245,057.07. Respondent pursued the protest avenues within the Department, but was unsuccessful, and the NOPA was confirmed in the Department's notice of reconsideration dated August 19, 2008. Colorcars was given notice of its rights, and Mr. Early filed a Petition for a Chapter 120 Hearing on Colorcars' behalf. The case was forwarded to DOAH and assigned DOAH Case No. 08-5442.

6. DOAH Case No. 08-5442 was closed without an evidentiary hearing. The parties filed an Agreed Dismissal With Prejudice on

February 13, 2009 (2009 Agreed Dismissal), whereby Colorcars dismissed its petition with prejudice, thereby withdrawing its request for an administrative hearing to contest the NOPA. Mr. Early signed the 2009 Agreed Dismissal as Colorcars' qualified representative in that DOAH proceeding,[3/] on February 13, 2009. The 2009 Agreed Dismissal included the following provisions:

> 4. Colorcars filed this proceeding to contest the sales tax assessment (the "Assessment") arising from audit number 200005030 for the period August 1, 2001 through July 31, 2004, which was final upon issuance of the Department's August 19, 2008 notice of reconsideration.
>
> 5. This proceeding to contest the Assessment is hereby dismissed with prejudice. The Assessment remains final, valid, and effective in its entirety.

The sales tax assessment initially contested by Colorcars in DOAH Case No. 08-5442 will be referred to hereafter as the Final 2008 Assessment.

7. On February 19, 2009, the Department issued a tax warrant in the amount of $319,512.05 to secure the unpaid Final 2008 Assessment. The tax warrant amount reflected the unpaid tax liability, plus penalties, filing fee, and additional interest that had accrued as of that date. The tax warrant was recorded in the official records of Sarasota County on February 20, 2009.

8. No evidence was presented to demonstrate that the tax warrant recorded in Sarasota County was ever withdrawn, amended, invalidated, or satisfied. No evidence was presented to demonstrate that the validity of the tax warrant was ever challenged in any tribunal (except to the extent that Colorcars seeks to question its validity in this proceeding).

9. On February 16, 2010, the Department filed a judgment lien against Colorcars with the Florida Secretary of State to secure the same unpaid Final 2008 Assessment, based on the tax warrant recorded in Sarasota County on February 20, 2009. According to the judgment lien certificate in evidence, as of February 16, 2010, Colorcars' tax liability had mounted to $365,395.84, which was the amount of the filed judgment lien.

10. No evidence was presented to demonstrate that the judgment lien recorded with the Secretary of State was ever withdrawn, amended, invalidated, or satisfied. No evidence was presented to demonstrate that the validity of the judgment lien was ever challenged in any tribunal.

11. Mr. Early admitted that as of September 20, 2012, Colorcars has not made any voluntary payments to reduce the sales tax liability established by the Final 2008 Assessment.

12. In April 2009, the Department froze funds in a Colorcars bank account at Liberty Savings Bank. Over a two-year period, Colorcars fought the Department's effort to levy the

funds in the Liberty Savings Bank account. Following litigation, the validity of the Department's action was ultimately confirmed, and the Department was allowed to levy approximately $64,000.00[4/] to apply to Colorcars' tax liabilities. However, according to the Department's witness, the funds levied were applied to offset other Colorcars tax liabilities, and thus, were not applied to reduce Colorcars' tax liability stemming from the Final 2008 Assessment. Colorcars took issue with this testimony, claiming that the levied bank funds should have been applied to reduce the Final 2008 Assessment.

13. Neither party presented evidence sufficient to resolve this dispute, but it is unnecessary to decide whether the Department has properly applied and accounted for the levied funds for purposes of this proceeding, because the exact amount of Colorcars' remaining tax debt need not be determined. The primary basis for seeking revocation of Colorcars' Certificate is Colorcars' failure to comply with the requirements of chapter 212 by failing to pay the mounting tax liability that Colorcars admitted it owed in February 2009, when it voluntarily dismissed with prejudice its challenge to the Final 2008 Assessment. Colorcars conceded that it has not voluntarily undertaken to pay one dime of the substantial sales tax deficiency attributable to a three-year period of business operations that began more than a decade ago. Colorcars presented no explanation for its failure

to pay this admitted liability, which grows daily with accruing interest; Colorcars only asserted that possibly the Department succeeded in wresting away Colorcars' funds to force a partial payment, which Colorcars fought. Even if the evidence established that the levied bank funds should be applied to reduce the total amounts due from the Final 2008 Assessment, Colorcars would still owe more than $300,000.00 from the Final 2008 Assessment, which would have to be paid for Colorcars to come into compliance with its obligations under chapter 212.

14. As a related, but independent basis for seeking revocation, the Complaint alleged that the Department has issued one or more tax warrants and/or judgment lien certificates, filed in the public records, for collection of Colorcars' sales tax liability resulting from the Final 2008 Assessment. The Department presented proof that both a tax warrant and a judgment lien were issued against Colorcars and duly recorded in the public records.

15. Colorcars acknowledged that a tax warrant was filed, but argued that the tax warrant should be deemed void or invalid because it was issued less than 30 days after the 2009 Agreed Dismissal, which was before the time to appeal had expired.

16. Colorcars did not dispute the Department's evidence of a duly-recorded judgment lien. Colorcars did not present any

evidence or argument questioning the validity of the judgment lien, which was not recorded until February 16, 2010.

17. The Complaint also charged Colorcars with failing to pay sales tax when due after collecting the sales tax from customers, despite filing sales tax returns for December 2011 and January 2012 that established Colorcars' sales tax liability. The total amount of sales tax collected by Colorcars from its customers and not paid over to the Department in those two months was $1,401.16. The Complaint alleged that as of March 5, 2012, an additional $145.93 in penalties and interest was owed in connection with this sales tax liability.

18. Colorcars admitted that it collected sales tax from customers that it has not paid over to the Department for those two months. Colorcars did not dispute the amount of collected sales tax it failed to pay, or the amount of penalties and interest, as alleged in the Complaint.

19. Colorcars claimed that its failure to pay sales tax collected from its customers should be excused because the Department made it impossible for Colorcars to pay. According to Colorcars, the bank account that was frozen by the Department was the one set up to make electronic sales tax payments to the Department. Thus, while Colorcars was required to, and did, timely file its sales tax returns for December 2011 and January 2012, Colorcars contends that it was unable to make the

tax payments admittedly due because it could not do so electronically.

20. Contrary to Colorcars' claim, the evidence established that Colorcars could have made arrangements to pay the sales tax liability some other way besides an electronic payment from the frozen account that had been set up to make electronic payments. The Department's witness testified credibly and without contradiction that Colorcars could have sent payment the old-fashioned way, by mail or delivery to the Department. Colorcars could have made the payments by check from another account, or by tendering cash, cashiers' check, or money order, and such payment would have been accepted by the Department.

21. Mr. Early admitted that the sales taxes collected from customers that should have been paid to the Department were being held "at the office of corporations attorney." Mr. Early admitted that Colorcars never tried to make these tax payments some way other than electronically from the frozen account, such as by offering to write a check to the Department or to pay in cash. Mr. Early admitted that as of the date of the hearing, the sales tax collected from customers that should have been paid over to the Department at the time the December 2011 and January 2012 tax returns were filed, remains unpaid. Mr. Early gave no legitimate explanation for holding these funds, instead of paying them over to the Department.[5/]

22. As a final item, the Complaint charges Colorcars with failing to pay a penalty and a fee, totaling $275.00, assessed because Colorcars allegedly filed its 2009 corporate income tax return late. Colorcars contends that it believes the return was timely filed, but was just received late by the Department.

23. The Department failed to present evidence clearly substantiating its allegation of a late-filed 2009 corporate income tax return.[6/] Colorcars offered no evidence to prove that it timely filed its 2009 corporate income tax return.

24. On November 18, 2011, the Department initiated the process for revocation of Colorcars' Certificate by issuing a notice of revocation conference, requesting Colorcars to appear at an informal conference. The notice informed Colorcars that revocation was being considered because of Colorcars' failure to comply with chapter 212, resulting in a total sales tax liability claimed by the Department of $432,474.52. Colorcars was informed that, at the informal conference, Colorcars would have the opportunity to make payment or present evidence to demonstrate why the Department should not revoke Colorcars' Certificate. The notice advised that the informal conference would be held on January 18, 2012. A handwritten note on the copy of the notice in evidence indicates that it was received on December 14, 2011.

25. Four weeks after the apparent receipt of the notice, on January 11, 2012, Mr. Early wrote a letter, sent by overnight

courier to the Department, requesting that the informal conference be rescheduled because Mr. Early was out of the country. Mr. Early identified two ten-day periods, one in February and one in March, when he would be in Florida and could attend an informal conference; Mr. Early expressed a preference for the latter month, and in particular, for March 7, 2012. Mr. Early indicated that he intended to be represented by counsel at the meeting and was interviewing candidates.

26. The Department agreed to reschedule the informal conference and accommodated Mr. Early by resetting the conference for the date that Mr. Early said he preferred. The Department's January 30, 2012, letter rescheduling the conference warned that "there will be no more change" to the rescheduled revocation conference.

27. Mr. Early attended the March 7, 2012, revocation conference, without counsel. At the final hearing, Mr. Early indicated that despite the warning that there would be no more changes to the rescheduled conference date that Mr. Early had requested, Mr. Early, nonetheless, asked the Department to delay the conference again because he had retained counsel who was not available on March 7, 2012. The Department apparently adhered to its warning and did not agree to another delay of the conference.

28. At the informal conference, the Department and Colorcars apparently came close to reaching a compliance

agreement, a draft of which is in evidence. According to Mr. Early, he refused to sign the draft agreement offered by the Department because he would not agree to personally guarantee the payment schedule agreed to by Colorcars to retire its sales tax liability. Mr. Early suggested that this was a surprise clause added at the last minute. In contrast, the Department's witness testified that it is a standard provision.

29. Mr. Early seemed to suggest that if the Department doubted whether Colorcars could meet the schedule of payments to satisfy its sales tax liability, then the Department should have compromised the debt and agreed to accept less from Colorcars. Collectability is one factor considered by the Department in determining whether to exercise its discretion to compromise a sales tax liability, but it is only one factor.

30. It is unclear whether Mr. Early presented evidence at the informal conference regarding Colorcars' financial status or regarding other factors bearing on the Department's consideration of a possible compromise. It is also unclear whether Mr. Early presented evidence related to Colorcars' sales tax liabilities claimed by the Department in the notice of revocation conference. Other than the draft compliance agreement itself, which is in evidence as the proposed agreement that the Department offered but Mr. Early refused to sign, no credible evidence was presented to establish what was said or what evidence was presented at the

informal conference. However, following the informal conference, the total tax liability claimed by the Department was reduced from the $432,474.52 claimed in the November 18, 2011, revocation conference notice to $375,473.15, the total amount for which repayment was sought in the draft compliance agreement and the total amount set forth in the Complaint. The Complaint was filed after Mr. Early's rejection of the draft compliance agreement offered by the Department.

Claimed Deprivation of Right to Counsel/Qualified Representative

31. In its PRO, Respondent asserted as a "procedural issue" that it was deprived of its right to be represented by counsel or qualified representative at the final hearing. Thus, additional Findings of Fact are made to specifically address this claim.

32. The Complaint was mailed to Respondent on April 25, 2012. In addition to setting forth the charges, the Complaint informed Respondent of its right to an administrative hearing and its right to be represented by counsel or other qualified representative. Respondent was given 21 days in which to request an administrative hearing, and Respondent was informed that if a hearing was requested, Respondent would be given at least 14 days' notice before the hearing would be held. Thus, Respondent was on notice that it needed to act quickly to exercise its right to be represented by counsel or qualified

representative, because the final hearing could be held in very short order.

33. Respondent's timely-filed Petition set forth Respondent's choice of representative as follows: "John T. Early, III, esq. . . . shall be the representative of the Petitioner [sic: Respondent]."

34. Mr. Early clarified at the hearing that he uses the title, "esq.," because he is a lawyer in the state of Connecticut, but he is not admitted to practice in the state of Florida.

35. The Initial Order entered by DOAH on June 1, 2012, referred the parties to the governing procedural statutes and rules and contained a summary of procedures. The summary provided a second notification to Colorcars that it may appear personally or be represented by counsel or other qualified representative. The summary also gave explicit notice that under the governing rules, any requests for continuance of the final hearing must demonstrate good cause and must be filed at least five days before the hearing date, absent extreme emergency.

36. On June 7, 2012, the parties filed a joint response indicating that they were available for a final hearing in early August 2012.

37. On August 2, 2012, a Notice of Hearing was issued, scheduling the final hearing for September 20, 2012. A separate

Order of Pre-Hearing Instructions established various deadlines for the orderly and timely preparation for the final hearing. These deadlines included the following: by September 5, 2012, the parties were required to meet to discuss settlement possibilities, exchange witness lists disclosing all potential witnesses and designating experts as such, exchange all proposed exhibits, and prepare a joint pre-hearing stipulation; by September 10, 2012, the parties were required to file their joint pre-hearing stipulation; and alternatively, if no joint pre-hearing stipulation could be reached, then by September 13, 2012, the parties were required to file separate unilateral pre-hearing statements.

38. From May 30, 2012, when this case first arrived at DOAH, through the close of the entire pre-hearing preparation phase, during which settlement was to be explored, witness and exhibit choices were to be made and disclosed, and pre-hearing stipulations or pre-hearing statements were to be finalized and filed, Mr. Early remained as Respondent's sole designated representative pursuant to its Petition.

39. On September 18, 2012, two days before the final hearing, Robert Resnick filed a Notice of Appearance on behalf of Respondent, along with a motion for continuance. The motion contended that Mr. Resnick had "just been retained" and needed additional time to prepare for hearing and to pursue settlement

with the Department. The motion was denied, because it failed to demonstrate an emergency as required by rule 28-106.210.

40. On September 19, 2012, less than 24 hours before the hearing was supposed to begin, Mr. Resnick filed an amended motion for continuance, disclosing for the first time that he was scheduled to be in court in a criminal matter in Broward County on September 20, 2012, and, thus, was unavailable for the final hearing for which he had just been retained to represent Respondent.

41. As detailed in the Second Order Denying Continuance, the amended motion was found insufficient to demonstrate an emergency. In particular, it was noted that Respondent's failure to retain counsel until the last minute and Respondent's failure to ensure that the counsel retained at the last minute was actually available for the scheduled final hearing, did not constitute emergencies.

42. At the outset of the final hearing, Mr. Early renewed the request for a continuance, but offered nothing by way of additional reasons or explanation that would justify the last-minute nature of his request, why Respondent did not attempt to secure counsel sooner and why Respondent selected a lawyer at the last minute who was not available to appear at the final hearing. Instead, Mr. Early made light of the delay, at one

point characterizing himself as "president of the procrastinators' club."

43. Mr. Early displayed a lack of candor in his effort to delay the hearing by representing that counsel for the Department and Mr. Resnick "had reached an agreement to continue between themselves[.]" Counsel for the Department denied any such agreement, stating that the Department's position was only that it did not oppose Respondent's request for continuance, which was not the same thing as agreeing to a joint motion to continue. Mr. Early then admitted that he had only sent an email to counsel for the Department requesting an agreement, but that counsel for the Department apparently "didn't receive my e-mail last night where I had to ask him that. . . . I don't mean to jump the gun on it."

44. The undersigned finds that Colorcars had full rein to exercise its right to be represented or advised by counsel or qualified representative throughout this administrative process. Colorcars exercised its right by designating Mr. Early as its representative in the Petition. Mr. Early had previously represented Colorcars in a DOAH proceeding in which he requested and attained "qualified representative" status. Mr. Early was capable of serving as Respondent's representative in this proceeding. Even so, Colorcars has retained the right to be advised by counsel throughout these proceedings, and Colorcars

was allowed to have its counsel of record prepare and file Colorcars' PRO, despite not having appeared at the final hearing.

45. The undersigned finds that Colorcars waived its right to change the choice of representative it made in its Petition, so as to be represented by late-appearing counsel at the final hearing, by not attempting to exercise that right in a timely and appropriate manner consistent with the governing procedural rules. Colorcars was on notice of its representation rights for months, just as it was on notice of the limitations on continuances. Colorcars offered no reason why it could not have timely retained an attorney who could be available on the scheduled hearing day.

46. The totality of the circumstances, including the timing of Colorcars' actions, suggests an inappropriate strategic purpose of securing delay. That is particularly true since Colorcars selected an attorney at the last minute who was not available on the scheduled hearing date. Colorcars has demonstrated a pattern of picking different counsel at the last minute in order to attempt to trigger a delay, because the counsel selected has a schedule conflict. Colorcars retained a different lawyer before the March 7, 2012, informal revocation conference, and then asked to delay that hearing because the lawyer was not available that day. In telling fashion, Mr. Early complained that the Department would not agree to a second

postponement of the informal revocation conference when "we had requested--in a similar situation requested an extension of time because counsel couldn't be there that day. Not Mr. Resnick, but a different counsel."[7/]

47. Whether by strategy or by the strangest of coincidences, Colorcars' penchant for last-minute attempts to change its representatives to attorneys with schedule conflicts cannot be countenanced as a way to evade procedural deadlines and requirements imposed on all parties in the interest of the orderly administration of justice in administrative proceedings.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2012).

49. Petitioner has the burden of proving by clear and convincing evidence the allegations in the Complaint on which Petitioner relies to seek revocation of Respondent's Certificate. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996). As stated by the Florida Supreme Court:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy,

> as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 492 So. 2d 797, 800 (Fla. 4th DCA 1983); accord Westinghouse Electric Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991)("Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous.").

50. In the Complaint, the Department invoked sections 212.18(3)(d) and 213.692, Florida Statutes (2011),[8/] as statutory authority to revoke Colorcars' Certificate.

51. Section 212.18(3)(d) provides as follows:

> The department may revoke any dealer's certificate of registration when the dealer fails to comply with this chapter. Prior to revocation of a dealer's certificate of registration, the department must schedule an informal conference at which the dealer may present evidence regarding the department's intended revocation or enter into a compliance agreement with the department. The department must notify the dealer of its intended action and the time, place, and date of the scheduled informal conference by written notification sent by United States mail to the dealer's last known address of record furnished by the dealer on a form prescribed by the department. The dealer is required to attend the informal conference and present evidence refuting the department's intended revocation or enter into a compliance agreement with the department which resolves the dealer's failure to comply with this chapter. The department shall issue an administrative complaint under s. 120.60 if the dealer fails

> to attend the department's informal conference, fails to enter into a compliance agreement with the department resolving the dealer's noncompliance with this chapter, or fails to comply with the executed compliance agreement.

52. Section 213.692 provides in pertinent part:

> (1) If the department files a warrant, notice of lien, or judgment lien certificate against the property of a taxpayer, the department may also revoke all certificates of registration, permits, or licenses issued by the department to that taxpayer.
>
> (a) Before the department may revoke the certificates of registration, permits, or licenses, the department must schedule an informal conference that the taxpayer is required to attend. At the conference, the taxpayer may present evidence regarding the department's intended action or enter into a compliance agreement. The department must provide written notice to the taxpayer of the department's intended action and the time, date, and place of the conference. The department shall issue an administrative complaint to revoke the certificates of registration, permits, or licenses if the taxpayer does not attend the conference, enter into a compliance agreement, or comply with the compliance agreement.

53. Petitioner proved clearly and convincingly that Respondent failed to comply with the requirements of chapter 212, by failing to pay its substantial tax liability stemming from the Final 2008 Assessment. Although Respondent initially challenged the proposed assessment, Respondent did not go forward with its challenge, choosing instead to dismiss its request for an administrative hearing with prejudice.

54. Colorcars' voluntary dismissal with prejudice of its petition challenging the proposed sales tax assessment had the legal effect of rendering final the Department's earlier free-form proposed assessment. See, e.g., RHPC, Inc. v. Dep't of HRS, 509 So. 2d 1267, 1268 (Fla. 1st DCA 1987)(voluntary dismissal of a petition for administrative hearing to challenge the denial of a certificate of need application terminated jurisdiction; dismissal of the petition means that the earlier free-form denial of the application by the agency took force and became final agency action). The 2009 Agreed Dismissal, executed by Mr. Early, as Colorcars' qualified representative, recognized as much by acknowledging that the assessment was final as of the date that reconsideration of the NOPA was denied (August 19, 2008) and that the Final 2008 Assessment remained final, in force, and effective in its entirety.

55. At times during the final hearing and in Colorcars' PRO, Colorcars impermissibly strayed into arguments that seemed to attack or question the validity of the Final 2008 Assessment, despite Colorcars' prior abandonment of its right to challenge that assessment. As made clear at the final hearing, Colorcars is bound by its 2009 Agreed Dismissal, in which it voluntarily gave up its right to challenge the Final 2008 Assessment. Thus, no such arguments were considered.

56. It is undisputed that the Final 2008 Assessment was a determination that Colorcars had failed to comply with its obligations under chapter 212, and as a result, Colorcars owed a substantial sales tax debt to the Department, with penalties and interest.

57. It is undisputed that as of the final hearing date, Colorcars has never voluntarily paid one dime of the substantial debt for sales tax deficiencies per the Final 2008 Assessment, plus penalties and accruing interest.

58. Colorcars conceded this substantial tax liability under chapter 212, but argued that "the Department is making this look much worse than it is." According to Colorcars, its tax liability is not so bad because the sales tax deficiencies were due to a Department determination that Colorcars failed to collect sales tax that it should have collected, as opposed to a determination that Colorcars collected sales tax from customers, but did not pay the collected tax over to the Department. No competent evidence was presented in the record of this case to detail the nature of the tax deficiencies imposed by the Final 2008 Assessment, but that detail is not necessary. The Complaint charges Colorcars with failure to comply with an admitted obligation imposed pursuant to chapter 212, by not paying the Final 2008 Assessment. "The department may revoke any dealer's certificate of registration when the dealer fails to comply with

this chapter." § 212.18(3)(d). Colorcars' argument that this admitted failure to comply with chapter 212 is not so bad is rejected. With all due respect, Colorcars' admitted failure to pay one dime of the Final 2008 Assessment voluntarily in the three and one-half years after Colorcars' withdrew its challenge to the assessment, is certainly not good or compliant.

59. As additional, but related grounds for revocation, the Department relied on its filing of a tax warrant in the Sarasota County official records to secure the Final 2008 Assessment after the 2009 Agreed Dismissal. In addition, the Department relied on its filing in 2010 of a judgment lien with the Secretary of State to secure that same tax liability.

60. Colorcars does not dispute the Department's statutory authority to revoke certificates of registration when the Department has filed tax warrants and judgment liens in the public records. However, Colorcars argued that, in this case, the Department's tax warrant was issued too soon and should be deemed "void ab initio."

61. In advancing this argument, Colorcars relied on section 213.731, which provides as follows:

> In the absence of jeopardy to the revenue, no warrant or other collection action shall be issued or taken until 30 days after issuance to the taxpayer of a notice informing him or her of such impending action or notifying him or her that such action is indicated or authorized in the

> circumstances. The department shall, by rule, provide procedures to afford the taxpayer the opportunity to pay any tax, penalty, or interest on which collection action is sought which is not based on jeopardy, or to protest the circumstances underlying billing notices on which collection action is sought, to the department within 20 days after such notice is issued. Such notice shall inform the taxpayer of these available protest and review rights. This section does not apply to final assessments for which rights to review under s. 72.011 have expired. (emphasis added).

62. There is no question that Colorcars had notice of the proposed assessment stemming from the audit of Colorcars' 2001-2004 operations, or that Colorcars was afforded the right to protest the assessment, seek reconsideration, and then seek review under section 72.011, Florida Statutes. Colorcars was afforded those rights and exercised those rights, at least to the extent of initially seeking review under chapter 120 in DOAH Case No. 08-5442. However, as detailed above, Colorcars abandoned any review of the assessment by voluntarily dismissing its petition with prejudice. In the 2009 Agreed Dismissal, Colorcars acknowledged the finality of the assessment as of August 19, 2008. Colorcars' review rights expired by virtue of Colorcars' dismissal with prejudice.[9/] Thus, according to the last sentence of section 212.731, the statute has no application to the tax warrant issued on February 19, 2009, and duly recorded in the official records of Sarasota County on February 20, 2009. The

tax warrant provides a separate, but related, basis for revoking Respondent's Certificate. However, the primary basis remains the underlying sales tax liability established by the Final 2008 Assessment, as the tax warrant simply was a way to attempt to secure and collect the sales tax liability.

63. Colorcars offered no argument regarding the judgment lien certificate in evidence, which was asserted as a separate basis for revocation. The judgment lien certificate was issued and recorded with the Secretary of State in 2010 to secure Colorcars' tax liability stemming from the Final 2008 Assessment. Pursuant to section 213.692(1), issuance of this judgment lien certificate against Colorcars provides a separate basis for revoking Colorcars' Certificate. As is true for the tax warrant, however, the underlying tax liability remains the primary basis for revocation in that the judgment lien certificate represents another means to secure and attempt to collect on the underlying sales tax liability that was established by the Final 2008 Assessment.

64. The Department proved clearly and convincingly that Colorcars failed to pay sales taxes collected from customers when they were due at the time the December 2011 and January 2012 sales tax returns were filed. As to these unpaid taxes, Colorcars' knowing failure to pay is tantamount to theft of state funds--this is the "bad" kind of sales tax liability described by

Colorcars (when trying to distinguish its liability for the substantial Final 2008 Assessment that remains unpaid). See § 212.15. Here, Colorcars argued that the focus should be on how "minor" the amount is (instead of dwelling on how bad this type of tax liability is). But Colorcars admittedly collected a total of $1,401.16 of sales tax from its customers for the purpose of paying those sales tax dollars over to the Department. These dollars became state funds the moment they were collected, and Colorcars was required to pay them over the moment they were due. § 212.15.

65. Colorcars sought to excuse its admitted failure by claiming impossibility caused by the Department's freeze on a bank account set up for electronic tax payments. Colorcars argued, but failed to prove, that it believed that it could only pay those taxes electronically. Indeed, the evidence was to the contrary. Moreover, Colorcars itself was on notice at least by March 7, 2012, that the Department would accept "certified funds" to pay the sales tax liabilities established by the December 2011 and January 2012 returns. Colorcars never attempted to make payment to the Department, and at least by March 7, 2012, that failure to pay over monies collected from customers, plus penalties and accrued interest, was knowing and in bad faith. These additional violations of Colorcars' obligations under chapter 212 provide additional grounds to revoke its Certificate.

66. The Department did not meet its burden of proof with regard to the claimed failure to pay a penalty and fee assessed for a late-filed corporate tax return. No clear evidence was presented to establish the allegation that the 2009 corporate tax return was filed late. A worksheet summary prepared from undisclosed source information several years after the claimed late filing was insufficient to prove that the 2009 corporate tax return was filed late.

67. The Department complied with the conditions precedent to revoke a certificate of registration, set forth in sections 212.18(3)(d) and 213.692. The Department scheduled an informal conference, of which Colorcars was given notice and told to attend. The Department accommodated Colorcars by delaying the informal conference for two months and resetting the conference for the specific date requested by Colorcars. Colorcars was informed of the Department's intended action and given the opportunity to present evidence.

68. Colorcars offered a myriad of arguments apparently intended to establish that the Department should be compelled to enter into a different, more favorable compliance agreement than offered at the informal conference. Along this vein, Colorcars complained that the Department put an improper personal guarantee clause in the draft compliance agreement, which Mr. Early would not sign. Colorcars asserted in its PRO that the parties had

actually reached a different oral agreement without any personal guarantee (an assertion unsupported by any credible record evidence) and that the alleged oral agreement should prevail. In addition, Colorcars argued that the Department was required to reduce Colorcars' sales tax liability because the debt should have been deemed uncollectable. Colorcars argued in its PRO that the Department should be faulted for not investigating Colorcars' financial status.

69. No competent evidence was presented that would allow a finding to be made as to the reasonableness under the circumstances of the Department's exercise of discretion in crafting the draft compliance agreement that was offered to Colorcars. Colorcars was on notice that the informal conference was its opportunity to present evidence; if evidence was not presented, then Colorcars did not avail itself of the opportunity and cannot point the blame in the Department's direction for not conducting an investigation. See, e.g., Fla. Admin. Code R. 12-3.003 (specifying procedures for requesting compromise based on collectability, including requirement that taxpayer submit audited financial statements to support the request). Moreover, it is far from clear that evidence of a compromised financial condition alone would necessarily lead to an agreement to reduce the debt, as opposed to, for example, asking for a personal guarantee, or, as authorized in section 212.14(4),

requiring the taxpayer to post security in the form of cash deposit, bond, or other security as a condition to retaining its Certificate.

70. The Department exercised its discretion to craft a compliance agreement that made provision for the retirement of Colorcars' tax obligation on an installment basis on terms that were in the state's best interests (i.e., with Mr. Early's personal guarantee). The draft compliance agreement was offered to Colorcars and rejected. Mr. Early's refusal to sign the offered compliance agreement for Colorcars allowed the Department to proceed to issue the Complaint to pursue revocation of Colorcars' Certificate.

71. As a final point of challenge, Colorcars contends that this administrative proceeding violated section 213.015(3), part of the Taxpayers' Bill of Rights,[10/] by depriving Colorcars of its right to counsel at the final hearing. Section 213.015(3) provides that the revenue statutes and Departmental rules guarantee the following to taxpayers:

> The right to be represented or advised by counsel or other qualified representatives at any time in administrative interactions with the department, the right to procedural safeguards with respect to recording of interviews during tax determination or collection processes conducted by the department, the right to be treated in a professional manner by department personnel, and the right to have audits, inspections of records, and interviews conducted at a

> reasonable time and place except in criminal and internal investigations (see ss. 198.06, 199.218, 201.11(1), 203.02, 206.14, 211.125(3), 211.33(3), 212.0305(3), 212.12(5)(a), (6)(a), and (13), 212.13(5), 213.05, 213.21(1)(a) and (c), and 213.34).

This statute does not, by its terms, purport to establish rights of litigants in administrative hearings under chapter 120, but rather, clarifies the rights of taxpayers in their direct dealings with the Department under the referenced statutes.

72. By a different statute, parties to administrative proceedings are afforded the right to be self-represented or represented by counsel or qualified representative. § 120.57(1)(b). There is no guaranteed right of counsel in administrative proceedings. See, e.g., Thompson v. Dep't of Prof'l Reg., 488 So. 2d 103, 105 (Fla. 1st DCA 1986) (constitutional guarantee of right to counsel is not applicable to administrative proceedings involving the revocation of licenses issued by the state to those engaged in regulated businesses and professions); accord Santacroce v. State, Dep't of Banking and Fin., 608 So. 2d 134, 136 (Fla. 4th DCA 1992).

73. Once informed of its right to represent itself or to obtain representation by counsel or a qualified representative, a party to an administrative proceeding may be held to its election. Id. In other words, these rights, as is true for other rights, are subject to being waived, including by the

failure to exercise one's rights in a timely manner with due consideration for the orderly conduct and administration of the proceeding in question.

75. In this case, Colorcars was given multiple notices of its right to be self-represented or represented by counsel or qualified representative. Colorcars made its election in its Petition and then maintained that election throughout the entire pre-hearing preparation phase. Colorcars was informed of the limitations on continuances. Colorcars waived its right to change its election by not timely seeking to change the election and having no legitimate excuse for its last-minute request.

76. Rule 28-106.210 provides appropriate parameters for DOAH Administrative Law Judges (ALJ) to exercise their discretion in ruling on motions for continuance. See Milanick v. Osborne, 6 So. 3d 729 (Fla. 5th DCA 2009) In that case, in a DOAH administrative proceeding, a former mayor was awarded attorney's fees and costs for having to defend himself against an ethics complaint filed against him by Alexander Milanick. Milanick appealed the Final Order issued by an ALJ that assessed attorney's fees and costs against him. One point argued on appeal was that it was an abuse of discretion for the ALJ to deny his motion for continuance to retain counsel.[11/] The court affirmed the denial of Milanik's motion for continuance, finding no abuse of discretion:

> A motion for continuance is addressed to the sound judicial discretion of the trial court and absent abuse of that discretion its decision will not be reversed on appeal. . . . The same discretion is vested in the ALJ. Fla. Admin. Code R. 28-106.210.

77. Factors to be considered in exercising discretion on a motion for continuance include whether the cause of the request for continuance was unforeseeable and not the result of dilatory practices. See, e.g., Krock v. Rozinsky, 78 So. 3d 38, 41 (Fla. 4th DCA 2012); Cole v. Cole, 838 So. 2d 1237, 1238 (Fla. 5th DCA 2003). As such, last-minute requests for continuance to retain or change counsel have been rejected, absent proof that the last-minute nature of the request is caused by some kind of emergency. For example, in Cole, the court affirmed the denial of a request to continue a trial where appellants' original lawyer was granted leave to withdraw shortly before the trial was scheduled. When new counsel appeared of record and moved for continuance, the court denied the motion. On appeal, the court affirmed, noting that "appellants must certainly have known that a trial was coming, yet they took no action to secure new counsel until the last moment." Id.

78. In Ryan v. Ryan, 927 So. 2d 109, 111-112 (Fla. 4th DCA 2006), the court held that a last-minute motion for continuance because of new counsel should be held to a standard that requires

proof of an emergency that is not one of the party's own creation:

> It was the former wife who made the decision to terminate her attorney. The need to find a new lawyer was not caused by the illness, death, or disability of her prior lawyer or of a critical trial witness. . . . These are the circumstances under which trial courts have been found to have abused their discretion; not when the emergency is of the client's creation. (emphasis added).

79. It is appropriate, in considering a last-minute motion for continuance, whether parties were informed in a pre-trial order that such motions are required to adhere to specified terms. Taylor v. Mazda Motor of Am., Inc., 934 So. 2d 518, 521 (Fla. 3d DCA 2005) (it was within the trial judge's discretion to deny a motion for continuance, in accordance with the terms of the pre-trial order limiting such motions.).

80. The right to counsel is not unbridled, even in criminal cases, and may be limited in appropriate circumstances. Thus, in Evans v. State, 741 So. 2d 1190 (Fla. 4th DCA 1999), the court affirmed the judgment and sentence against a criminal defendant, rejecting the argument that the trial court reversibly erred by denying a motion for continuance on the day of trial, when the public defender informed the judge that the defendant no longer wished to be represented by him, and the family wanted to retain a private attorney. The court held:

> [T]he defendant's right to select his own private attorney is not unbridled and may be limited in favor of considerations of judicial administration, or if made in bad faith for the sake of arbitrary delay or to otherwise subvert judicial proceedings. . . . The freedom to have counsel of one's own choosing may not be used for purposes of delay[.] . . . Last minute requests are disfavored.

Id. at 1191 (internal citations, quotation marks omitted).

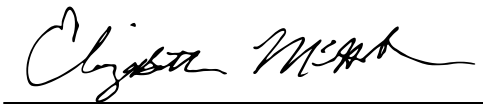
81. As set forth in the Findings of Fact, Respondent's belated attempt to add counsel was not due to a bona fide emergency, such as an unforeseeable hospitalization, death, or incapacity. Instead, it was situation of Respondent's own making, despite ample notice of the limitations on last-minute continuances. Respondent waived its right to timely and appropriately exercise its right to add counsel. The request to delay the final hearing because of the last-minute appearance filed by Mr. Resnick, after the pre-hearing preparation phase was closed and all deadlines had passed, whose first and only activity of record was to file a motion for continuance because counsel had a schedule conflict making him unavailable for the hearing he was just retained for, must be rejected as a transparent attempt by Respondent to secure delay.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue revoke the

Certificate of Registration held by Respondent, Colorcars Experienced Automobiles, Inc., now known as Experienced Vehicles, Inc.

DONE AND ENTERED this 13th day of December, 2012, in Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of December, 2012.

ENDNOTES

[1/] John T. Early, III, uses the suffix "esq." to indicate that he is an attorney licensed to practice in another state, but he is not licensed to practice in Florida. Mr. Early prepared and signed the Petition for Formal Administrative Hearing in which he represented that "John T. Early, III, esq. . . . shall be the representative of the [Respondent]."

[2/] Mr. Resnick filed a Notice of Appearance on behalf of Respondent on September 18, 2012. Mr. Resnick did not appear at the final hearing on September 20, 2012, on Respondent's behalf. Instead, Respondent was represented by Mr. Early, Respondent's previously designated representative. Notwithstanding Mr. Resnick's failure to appear at the hearing, Mr. Early was informed that Mr. Resnick was still considered an attorney of record for Respondent and that Mr. Resnick could prepare and submit the post-hearing proposed recommended order on Respondent's behalf. Mr. Resnick has not moved to withdraw, and

thus, still appears as attorney of record for Respondent. Mr. Resnick's signature does not appear on Respondent's proposed recommended order; it is unknown whether Mr. Resnick prepared or assisted in the preparation of the post-hearing filing, as he was permitted to do. Mr. Early represented at the final hearing that Mr. Resnick would remain active in the case despite not appearing on September 20, 2012.

[3/] Included in the DOAH file for Case No. 08-5442 is a request filed by Mr. Early to be recognized as a qualified representative for Colorcars and an affidavit executed and filed by Mr. Early in support of his request. An Order was entered accepting Mr. Early as qualified representative in that proceeding based on a determination that "it appears Early is qualified to appear in this administrative proceeding."

[4/] The Department's witness testified that the amount levied was just over $62,000.00. Mr. Early testified that $64,000.00 was levied. No evidence was offered to pinpoint the precise amount, but as explained below, it is unnecessary to do so for purposes of resolving the issues presented in this proceeding.

[5/] The testimony by the Department's witness that Colorcars would have been allowed to pay the collected sales taxes by some means other than electronically was corroborated by the draft compliance agreement in evidence offered by the Department to Colorcars at the informal conference held on March 7, 2012, which is discussed in greater detail below. The draft compliance agreement included a requirement that "Mr. Early will pay outstanding liabilities for sales and use tax 12/2011 and 1/2012 by close of business 12 March 2012 in certified funds." (emphasis added). Thus, at least by the informal conference held on March 7, 2012, Mr. Early knew that the Department would accept a certified check or other form of certified funds to satisfy Colorcars' outstanding sales tax liabilities for December 2011 and January 2012.

[6/] The Department's witness testified that he created a worksheet on March 5, 2012, to summarize Colorcars' tax liabilities. He explained the entry on the last worksheet page as a penalty assessed because Colorcars' 2009 corporate income tax return was filed late. However, the witness did not describe the sources of information he used to enter this worksheet item. Thus, it is unclear whether he relied on information conveyed to him by others or whether he personally reviewed documentation showing the transmission date and receipt date of the 2009 corporate income tax return. In the face of Colorcars' belief that the

return was timely transmitted, the Department's summary document was insufficient to clearly and convincingly prove the charge. In contrast, even though the underlying documents establishing the unpaid sales taxes due with the December 2011 and January 2012 returns were not offered in evidence, the Department's proof sufficed, in large part, because Colorcars did not dispute the fact or amounts of its liability, admitting that these taxes remained unpaid as of the hearing date.

[7/] Mr. Early was attempting to explain the problems he had with the draft compliance agreement, when he brought up the fact that he retained another lawyer to represent Colorcars at the rescheduled March 7, 2012, informal conference, and then asked to postpone the conference because the newly-retained lawyer was not available that day. Mr. Early explained that he had a problem with a clause in the draft compliance agreement because, according to Mr. Early, it stated that each party was advised by counsel, when that was not true because Colorcars could not be represented by counsel that day. However, the clause that Mr. Early referred to actually said that the parties "have had the opportunity to consult with counsel prior to executing this agreement." Just as Colorcars and Mr. Early had every opportunity in this DOAH proceeding to consult with and be represented by counsel, Colorcars and Mr. Early had the opportunity to consult with counsel at the informal conference, but chose not to retain one who was available on the rescheduled conference date selected by Mr. Early two months in advance. Rights and opportunities can be waived and squandered when they are not timely or appropriately exercised.

[8/] Unless otherwise specified, references herein to the Florida Statutes are to the 2011 codification, as the law in effect when the Department initiated the revocation process, and when the alleged violations occurred (with the exception of the tax deficiency assessment rendered final in August 2008 by Colorcars' dismissal of its administrative hearing request).

[9/] Colorcars argues in its PRO that DOAH Case No. 08-5442 resulted in a "judgment," which was subject to a 30-day window to appeal. To the contrary, the administrative proceeding was closed by an Order Closing File after the 2009 Agreed Dismissal was filed. As recognized by RHPC, supra, the legal effect of Colorcars' voluntary dismissal with prejudice was to divest jurisdiction and render the proposed agency action (dated August 19, 2008) final. Colorcars voluntarily abandoned its review rights.

[10/] The Taxpayers' Bill of Rights, codified in section 213.015, was enacted pursuant to the Florida Constitution, Article 1, section 25, which provides as follows: "By general law the legislature shall prescribe and adopt a Taxpayers' Bill of Rights that, in clear and concise language, sets forth taxpayers' rights and responsibilities and government's responsibilities to deal fairly with taxpayers under the laws of this state."

[11/] A review of the DOAH docket in the underlying administrative case shows that the motion for continuance was filed four days before the final hearing was scheduled to take evidence on the amount of attorney's fees and costs, which were in dispute. See Osborne v. Milanick, DOAH Case No. 07-3045FE (Emergency Motion to Continue, September 24, 2007; Hearing held September 28, 2007).

COPIES FURNISHED:

Marshall Stranburg,
Interim Executive Director
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668

Nancy Terrel, General Counsel
Department of Revenue
Post Office Box 6668
Tallahassee, Florida 32314-6668

John Mika, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Robert Brian Resnick, Esquire
Post Office Box 1872
Boca Raton, Florida 33429-1872

John T. Early, III
Colorcars Experienced Auto, Inc.
2311 Tamiami Trail
Nokomis, Florida 34275-3474

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.