

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEON RAWNER, M.D.,

Petitioner,

vs.

Case No. 13-4651

BOARD OF MEDICINE,

Respondent.

_____ /

RECOMMENDED ORDER

This case is before Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings pursuant to the parties' Joint Motion to Cancel Hearing and Set Date to File Proposed Recommended Orders. Consistent with the joint motion of the parties, the case was submitted for decision based upon a stipulated record.

APPEARANCES

For Petitioner: Amy W. Schrader, Esquire
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For Respondent: Donna C. McNulty, Esquire
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STATEMENT OF THE ISSUES

The issues to be determined are whether Petitioner meets the requirements for licensure by endorsement pursuant to section 458.313, Florida Statutes (2013), and whether the Board's interpretation of section 458.311(3), Florida Statutes, is an unadopted rule in violation of section 120.54(1), Florida Statutes (2013).

PRELIMINARY STATEMENT

On October 22, 2013, the Respondent, Florida Board of Medicine (the Board), entered an Amended Notice of Intent to Deny Licensure to Petitioner, Leon Rawner, M.D. (Dr. Rawner), based on the Board's determination that Dr. Rawner failed to meet the requirements for licensure. Petitioner filed a Petition for Administrative Hearing on November 15, 2013, and on November 27, 2013, the case was referred to the Division of Administrative Hearings for the assignment of an administrative law judge.

The case was originally noticed for hearing to commence on January 27, 2014. On January 21, 2014, the parties filed a Joint Motion to Cancel Hearing and Set Date to File Proposed Recommended Orders or in the Alternative to Continue Hearing. In the motion, the parties indicated that they believed there are no disputed issues of material fact, and requested that the parties be permitted to submit proposed recommended orders or motions as directed by the administrative law judge. In the event that the

motion was denied, the parties requested that the hearing be continued.

The hearing was canceled by Order Canceling Hearing and Setting Schedule entered on January 22, 2014. Consistent with the January 21, 2014, motion, the Order canceled the hearing and directed the parties to file a Joint Stipulation no later than February 10, and proposed recommended orders no later than February 17, 2014. The Joint Stipulation and the Proposed Recommended Orders were timely filed and have been carefully considered in the preparation of this Recommended Order and the stipulated facts, where relevant, have been included in the findings of fact below. Joint Exhibits 1-6 were also filed with the Division on February 17, 2014. Joint Exhibit 6, comprising over 1,000 pages of legislative materials, was the subject of a Motion for Official Recognition filed January 16, 2014. Given the parties' designation of these same materials as Joint Exhibit 6, the Motion for Official Recognition is denied as moot.

FINDINGS OF FACT

Based upon the stipulations of the parties and the documentary evidence presented, the following facts are found:

1. Petitioner, Leon Rawner, M.D., is a licensed medical doctor in the state of Wisconsin and an applicant for licensure as a medical doctor by endorsement in Florida.

2. The Florida Board of Medicine is the agency charged with the licensing and regulation of allopathic medical doctors pursuant to section 20.43 and chapters 456 and 458, Florida Statutes. Applicants for licensure by endorsement must meet the requirements specified in section 458.313. Those requirements include meeting the qualifications identified in section 458.311(1)(b)-(g) (alternative one) or section 458.311(1)(b)-(e), (g), and (3) (alternative two).

3. Petitioner is over 21 years of age, and has submitted a set of fingerprints on a form and under procedures specified by the Department of Health, along with a payment in an amount equal to the costs incurred by the Department of Health. Petitioner has successfully passed the required criminal background screening.

4. Petitioner's application for licensure by endorsement demonstrates that he is licensed to practice medicine in another jurisdiction, the state of Wisconsin, and that he has been active in the practice of medicine for at least two of the four years immediately preceding the application.

5. Petitioner has a clean record in his current medical practice in Wisconsin and is not under any investigation in any jurisdiction for an act or offense which would constitute a violation under section 458.331, and has not committed any act or

offense in any jurisdiction which would constitute the basis for disciplining a physician pursuant to section 458.331.

6. Petitioner has completed the equivalent of two academic years of pre-professional, postsecondary education, as determined by rule of the Board, which included, at a minimum, courses in anatomy, biology, and chemistry prior to entering medical school.

7. Petitioner received a bachelor's degree from Brandeis University, an accredited United States university.

8. Petitioner has passed the appropriate medical licensure examinations, the United States Medical Licensing Examination, Step-1, Step-2, and Step-3.

9. Petitioner holds an active, valid certificate issued by the Educational Commission for Foreign Medical Graduates (ECFMG) and has passed the examination used by the Commission.

10. In 2006, Petitioner graduated with a degree of Doctor of Medicine from American University of the Caribbean School of Medicine.

11. Petitioner graduated from an allopathic foreign medical school (American University of the Caribbean School of Medicine) which is recognized by the World Health Organization.

12. Petitioner completed all of the formal requirements for graduation from American University of the Caribbean School of Medicine.

13. Petitioner's application for licensure demonstrates that he has completed the academic year of supervised medical training prior to graduation as required under section 458.311(3)(d).

14. Petitioner did not graduate from an allopathic medical school or allopathic college recognized and approved by an accrediting agency recognized by the United States Office of Education.

15. Petitioner did not graduate from an allopathic medical school or allopathic college within a territorial jurisdiction of the United States recognized by the accrediting agency of the governmental body of that jurisdiction.

16. Petitioner is not a graduate of an allopathic foreign medical school registered with the World Health Organization and certified pursuant to section 458.314, Florida Statutes, as having met the standards required to accredit medical schools in the United States or reasonably comparable standards.

17. Petitioner has not completed an approved residency or fellowship of at least two years in one specialty area.

18. Petitioner's application for licensure demonstrates that he does not meet the postgraduate training requirements under section 458.311(1)(f)3.

19. Petitioner completed one year of residency training in the Internal Medicine Program at Mt. Sinai-Elmhurst Hospital Center, Queens, New York.

20. Besides the residency training program at Mt. Sinai-Elmhurst Hospital Center, Queens, New York, Petitioner has not completed any other residency or fellowship training.

21. Petitioner does not have two years of any residency or fellowship training which can be counted toward regular or subspecialty certification by a board recognized and certified by the American Board of Medical Specialties.

22. Since January 24, 2011, Dr. Rawner has been practicing medicine in Wausau, Wisconsin, as a staff physician with Knee Pain Solutions Center. Accordingly, he has been in the active practice of medicine for the two years preceding his Florida application.

23. Dr. Rawner submitted his application for licensure by endorsement on March 13, 2013.

24. Supplemental documentation was filed with the Board by letter dated March 18, 2013. In that letter, Dr. Rawner expressly stated that he was relying on the second alternative for establishing licensure by endorsement, which does not include the requirements identified in subsection 458.311(1)(f).

25. On April 3, 2013, the Board requested additional information, and in response, Dr. Rawner provided a copy of his

undergraduate degree and information related to his one year of supervised medical training.

26. Other information requested in the April 3, 2013, letter was sent directly to the Board office by the appropriate agencies, including an official United States medical examination transcript, indicating that Dr. Rawner passed USMLE Steps I, II, and III; a letter from the residency program director, indicating that Dr. Rawner completed one year of residency training; confirmation from the Wisconsin Medical Board confirming his current, valid medical license in the state of Wisconsin; an American Medical Association (AMA) profile letter; and Dr. Rawner's fingerprints and clear background check.

27. Program Operations Administrator Chandra Prine notified Dr. Rawner by letter dated June 26, 2013, that he was required to appear before the Credentials Committee of the Board. The purpose of the appearance was to discuss:

- Failure to meet the training requirement pursuant to section 458.313(1)(a), 458.311(1)(f)3.c., Florida Statutes.
- Failure to complete an academic year of supervised clinical training pursuant to section 458.311(3)(d), Florida Statutes.

28. Dr. Rawner appeared before the credentials committee of the Board of Medicine on August 1, 2013. The committee recommended that his license be denied.

29. On August 22, 2013, the Board of Medicine issued a Notice of Intent to Deny Licensure, stating that it intended to deny Dr. Rawner's application because Dr. Rawner did not meet the requirements of section 458.313(1), which requires an applicant to meet the qualifications outlined in either section 458.311(1)(b)-(g) (alternative one), or in section 458.311(1)(b)-(e), (g) and (3) (alternative two). The notice stated that with respect to alternative one, Dr. Rawner did not meet the requirements of section 458.311(1)(f)3., because he had not completed an approved residency or fellowship of at least two years in one specialty area. With respect to alternative two, the Board determined that Dr. Rawner did not meet the requirements of section 458.311(3)(c) because, in the Board's view, the section was inapplicable to Dr. Rawner because he had completed all requirements of the foreign medical school, with none outstanding, and did not meet the requirement of (3)(d) because he had not completed an academic year of supervised clinical training in a hospital affiliated with a medical school approved by the Council on Medical Education of the American Medical Association.

30. Dr. Rawner filed a Petition for Administrative Hearing with respect to the Notice of Intent to Deny, and the matter was reconsidered at the credentials committee's meeting on October 3,

2013. The credentials committee voted to reconsider the application based on the issues presented in the Petition.

31. On October 22, 2013, the Board issued an Amended Notice of Intent to Deny Licensure. With respect to alternative two, in the Amended Notice, the Board stated:

[t]he application file reveals that Dr. Rawner fails to meet subsection (3) for the reasons set forth below. Subsection (3) provides:

Notwithstanding the provisions of subparagraph (1)(f)3., a graduate of a foreign medical school need not present the certificate issued by the Educational Commission for Foreign Medical Graduates or pass the examination utilized by that commission if the graduate:

- (a) Has received a bachelor's degree from an accredited United States college or university.
- (b) Has studied at a medical school which is recognized by the World Health Organization.
- (c) Has completed all of the formal requirements of the foreign medical school, except the internship or social science requirements, and has passed part I of the National Board of Medical Examiners examination or the Educational Commission for Foreign Medical Graduates examination equivalent.
- (d) Has completed an academic year of supervised clinical training in a hospital affiliated with a medical school approved by the Council on Medical Education of the American Medical Association and upon completion has passed part II of the National

Board of Medical Examiners
examination or the Educational
Commission for Foreign Medical
Graduates examination equivalent.

Subpart (3)(c) provides in relevant part all of the formal requirements of the foreign medical school, except the internship or social service requirements, and has passed certain examinations. A plain reading of this subpart is that the foreign medical school has an internship or social service requirement and that the internship or social service requirement has not been completed. The application file demonstrates that Dr. Rawner graduated in June, 2006, with a degree of Doctor of Medicine from the American University of the Caribbean School of Medicine. Thus, subpart (3)(c) is inapplicable to Dr. Rawner, because the application file reveals that he completed *all of the formal requirements* of the foreign medical school and there are no outstanding or pending internship or social service requirements.

Based on the foregoing, the Board finds that the Applicant has not demonstrated that he meets the requirements for licensure by endorsement set forth in Section 458.313(1)(a), Florida Statutes.

The Amended Notice no longer listed failure to complete an academic year of supervised clinical training as a basis for the denial of Dr. Rawner's application.

32. There is no persuasive evidence presented that Respondent's interpretation of the requirements of section 458.311, Florida Statutes, as it applies to this case, is a statement of general applicability.

CONCLUSIONS OF LAW

33. The Division has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 120.60, Florida Statutes.

34. Dr. Rawner is applying for licensure as a medical doctor in the State of Florida. As an applicant, he has the burden of proving that he meets the requirements of licensure by a preponderance of the evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Espinoza v. Dep't of Bus. & Prof'l Reg., 739 So. 2d 1250 (Fla. 3d DCA 1999); § 120.57(1)(k), Fla. Stat.

35. Dr. Rawner is applying for licensure by endorsement pursuant to section 458.313. This section states in pertinent part:

(1) The department shall issue a license by endorsement to any applicant who, upon applying to the department on forms furnished by the department and remitting a fee set by the board not to exceed \$500, the board certifies:

(a) Has met the qualifications for licensure in s. 458.311(1)(b)-(g) or in s. 458.311(1)(b)-(e) and (g) and (3);

(b) Prior to January 1, 2000, has obtained a passing score, as established by rule of the board, on the licensure examination of the Federation of State Medical Boards of the United States, Inc. (FLEX), on the United States Medical Licensing Examination (USMLE), or on the examination of the National Board of Medical Examiners, or on a

combination thereof, and on or after January 1, 2000, has obtained a passing score on the United States Medical Licensing Examination (USMLE); and

(c) Has submitted evidence of the active licensed practice of medicine in another jurisdiction, for at least two of the immediately preceding 4 years, or evidence of successful completion of either a board-approved postgraduate training program within 2 years preceding filing of an application or a board-approved clinical competency examination within the year preceding the filing of an application for licensure. For purposes of this paragraph, "active licensed practice of medicine" means that practice of medicine by physicians, including those employed by any governmental entity in community or public health, as defined by this chapter, medical directors under s. 641.495(11) who are practicing medicine, and those on the active teaching faculty of an accredited medical school. (Emphasis added.)

36. Section 458.311, referenced in section 458.313(1)(a), identifies the qualifications for a person applying to become licensed as a medical doctor by examination. It provides in pertinent part:

(1) Any person desiring to be licensed as a physician, who does not hold a valid license in any state, shall apply to the department on forms furnished by the department. The department shall license each applicant who the board certifies:

(a) Has completed the application form and remitted a nonrefundable application fee not to exceed \$500.

(b) Is at least 21 years of age.

(c) Is of good moral character.

(d) Has not committed any act or offense in this or any other jurisdiction which would constitute the basis for disciplining a physician pursuant to s. 458.331.

(e) For any applicant who has graduated from medical school after October 1, 1992, has completed the equivalent of 2 academic years of preprofessional, postsecondary education, as determined by rule of the board, which shall include, at a minimum, courses in such fields as anatomy, biology, and chemistry prior to entering medical school.

(f) Meets one of the following medical education and postgraduate training requirements:

1.a. Is a graduate of an allopathic medical school or allopathic college recognized and approved by an accrediting agency recognized by the United States Office of Education or is a graduate of an allopathic medical school or allopathic college within a territorial jurisdiction of the United States recognized by the accrediting agency of the governmental body of that jurisdiction;

b. If the language of instruction of the medical school is other than English, has demonstrated competency in English through presentation of a satisfactory grade on the Test of Spoken English of the Educational Testing Service or a similar test approved by rule of the board; and

c. Has completed an approved residency of at least 1 year.

2.a. Is a graduate of an allopathic foreign medical school registered with the World Health Organization and certified pursuant to s. 458.314 as having met the standards required to accredit medical schools in the United States or reasonably comparable standards;

b. If the language of instruction of the foreign medical school is other than English, has demonstrated competency in English through presentation of the Educational Commission for Foreign Medical Graduates English proficiency certificate or by a satisfactory grade on the Test of Spoken English of the Educational Testing Service or a similar test approved by rule of the board; and

c. Has completed an approved residency of at least 1 year.

3.a. Is a graduate of an allopathic foreign medical school which has not been certified pursuant to s. 458.314;

b. Has had his or her medical credentials evaluated by the Educational Commission for Foreign Medical Graduates, holds an active, valid certificate issued by that commission, and has passed the examination utilized by that commission; and

c. Has completed an approved residency of at least 1 year; however, after October 1, 1992, the applicant shall have completed an approved residency or fellowship of at least 2 years in one specialty area. However, to be acceptable, the fellowship experience and training must be counted toward regular or subspecialty certification by a board recognized and certified by the American Board of Medical Specialties.

(g) Has submitted to the department a set of fingerprints on a form and under procedures specified by the department, along with a payment in an amount equal to the costs incurred by the Department of Health for the criminal background check of the applicant.

* * *

(3) Notwithstanding the provisions of subparagraph (1)(f)3., a graduate of a foreign medical school need not present the certificate issued by the Educational Commission for Foreign Medical Graduates or

pass the examination utilized by that commission if the graduate:

(a) Has received a bachelor's degree from an accredited United States college or university.

(b) Has studied at a medical school which is recognized by the World Health Organization.

(c) Has completed all of the formal requirements of the foreign medical school, except the internship or social service requirements, and has passed part I of the National Board of Medical Examiners examination or the Educational Commission for Foreign Medical Graduates examination equivalent.

(d) Has completed an academic year of supervised clinical training in a hospital affiliated with a medical school approved by the Council on Medical Education of the American Medical Association and upon completion has passed part II of the National Board of Medical Examiners examination or the Educational Commission for Foreign Medical Graduates examination equivalent. (Emphasis added.)

37. The parties have stipulated that Dr. Rawner does not meet the qualifications for licensure under alternative one, i.e., the requirements identified in section 458.311(1)(b)-(g), because he does not meet the postgraduate training requirements in subsection (f). Dr. Rawner has stated consistently that he was seeking licensure under alternative two, however, which requires meeting the qualifications in subsection 458.311(3), instead of those listed in subsection 458.311(1)(f).

38. Dr. Rawner has received a bachelor's degree from Brandeis University, an accredited United States college or university. Dr. Rawner has met the qualification specified in subsection 458.311(3) (a).

39. Dr. Rawner has studied at American University of the Caribbean Medical School, a medical school recognized by the World Health Organization. Dr. Rawner has met the qualification specified in subsection 458.311(3) (b).

40. Dr. Rawner completed all of the formal requirements of American University of the Caribbean Medical School and graduated. He has also passed the appropriate examination. Therefore, he has met the qualification specified in subsection 458.311(3) (c).

41. Dr. Rawner has completed an academic year of supervised clinical training at an appropriate hospital. He has met the qualification specified in subsection 458.311(3) (d).

42. The Amended Notice of Intent to Deny states that section 458.311(3) is inapplicable to Dr. Rawner because he graduated from medical school in 2006, thus completing all of the formal requirements of the medical school. This reading of the statute ignores the fact that section 458.311(3) specifically speaks in terms of the graduate of a foreign medical school. The statute clearly contemplates that all applicants using this avenue for licensure must graduate in order to qualify.

43. Moreover, section 458.313(1)(a) requires that applicants for licensure by endorsement satisfy all "qualifications" for licensure. "Qualification" means "the possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible for a position or office, or to perform a public duty or function." Blacks Law Dictionary (9th edition). The fact that a particular applicant may exceed the specific requirements identified does not nullify the fact that he or she meets those requirements.

44. The Board takes the position that the school must have internship or social service requirements in order for a graduate to be considered for licensure. Section 458.311(3) simply does not include that requirement. Section 458.311(3)(b) requires that the graduate have studied "at a medical school which is recognized by the World Health Organization." To add the requirement that the school have internship and residency requirements, as advocated by the Board, means adding a requirement for the medical school that the Legislature has not included. Gaudet v. Fla. Bd. of Prof'l Eng'rs, 900 So. 2d 574, 581 (Fla. 1st DCA 2005); Indiaan v. Dep't of Prof'l Reg., Bd. of Chiropractic, 695 So. 2d 709 (Fla. 1st DCA 1995); Dep't of Prof'l Reg. v. Sherman College of Straight Chiropractic, 682 So. 2d 559 (Fla. 1st DCA 1995).

45. In Gaudet, the Board of Professional Engineers considered a licensure application from an engineer trained and

licensed in Pennsylvania. The Board determined that the applicant was not eligible for licensure because he did not receive a degree from a board-approved engineering program, and that because at the time of his Pennsylvania licensure, Pennsylvania did not require accreditation from the Board of Engineering and Technology (ABET), Pennsylvania's engineering licensure requirements were not substantially the same as Florida's. Section 471.015(3) (b) provided that an applicant could be licensed as an engineer when the applicant, in addition to other qualifications, "holds a valid license to practice engineering issued in another state or territory of the United States, if the criteria for issuance of the license were substantially the same as the licensure criteria that existed in this state at the time the license was issued." The Board of Professional Engineers adopted a rule that essentially limited "board approved engineering programs" to those accredited by ABET.

46. The First District reversed the Board's denial of Gaudet's application and stated,

This court is not at liberty to re-write the legislative enactment by adding the words "in lieu of" that are simply not there Therefore, this court holds that section 471.013(1) (a) requires that the Board promulgate rules to review schools and courses of study and that the adoption of rules providing for the acceptance of the approval and accreditation of schools and courses of study by a nationally accepted accreditation organization does not relieve

the Board of the duty to adopt the required rules.

If the Board is of the opinion that the interests of the citizens of this state would best be served by allowing only graduates of ABET accredited schools to become engineers, it can seek a legislative amendment that creates such a requirement However, the legislature did not include such a requirement in the statute in question, and therefore, the Board's creation of such a requirement exceeds the legislature's statutory delegation of authority. See Dep't of Prof'l Regulation v. Sherman Coll. of Straight Chiropractic, 682 So. 2d 559, 561 (Fla. 1st DCA 1995).

Gaudet, 900 So. 3d at 580-581.

47. The same can be said here. Had the legislature intended that graduates of foreign medical schools could only be eligible if the school had internship or social services requirements, it could have provided that the graduate "has studied at a medical school which is recognized by the World Health Organization and that requires internships or social service for graduation." It did not do so.

48. The Board urges that the "plain meaning" of subsection (3)(c) is that the foreign medical school must have requirements for internships or social service. Actually, the plain meaning of the provision is that an applicant need complete all of the formal requirements of the school except internship and social service requirements. It is a limitation on the requirements of the school that the applicant must meet, not an expansion of the

programs that the medical school must require. To say that an applicant is ineligible because his or her medical school did not require a program or course that he or she was not required to complete for licensure is illogical at best.

49. The parties submitted as a Joint Exhibit the legislative history related to section 458.311. While the undersigned has reviewed all of the lengthy material submitted, nothing in the legislative history sheds light on the choice of the specific language actually contained in section 458.311(3) (b) or (c).

50. The Notice of Intent to Deny also states that the second alternative is unavailable to Petitioner because he actually has a certificate from the ECFMG. Section 458.313 gives applicants two alternatives. It does not limit the applicability of the second alternative to those applicants who have no ECFMG certificate. Further, it must be noted that subsection 458.311(3) is part of the statute governing licensure by examination, and is cross-referenced in section 458.313. The ECFMG certificate is a requirement under section 458.311(1) (f) 3.b. for applicants for licensure by examination, and examination applicants are not given the choice of the two alternatives afforded applicants for licensure by endorsement. Given the Legislature's express direction in section 458.313 that an applicant for endorsement may meet the requirements in section 458.311(1) (b)-(g) or section 458.311(1) (b)-(e), (g) and (3), there is nothing in section

458.311 or section 458.313 to indicate that holding the ECFMG certification referenced in alternative one would render an applicant ineligible for alternative two.

51. Petitioner also contends that the Board's interpretation of section 458.311(3) is an unadopted rule. A rule is an "agency statement of general applicability that implements, interprets, or prescribes law or policy." § 120.52(16), Fla. Stat. Here, there is insufficient evidence to show that the interpretation meets the definition of a rule, as there is little, if anything, to demonstrate that the Board's interpretation is one of general applicability. Petitioner requests that both a recommended order and a final order be issued in order to address this issue. However, Dr. Rawner's Petition for Administrative Hearing does not reference section 120.56(4). It makes reference only to section 120.57(1)(e) and alleges that the Board is attempting to make "new non-rule policy preventing graduates of certain foreign medical schools from qualifying for licensure by endorsement, contrary to section 120.57(1)(e)." No agency action recommended in this Recommend Order relies on an unadopted rule. Given that Dr. Rawner has not filed a petition seeking relief pursuant to section 120.56(4), and has not asked for the remedies provided in section 120.56(4)(c)-(e), the undersigned has concluded that no final order is appropriate.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Board of Medicine enter a Final Order approving Leon Rawner, M.D.'s application for licensure by endorsement.

DONE AND ENTERED this 28th day of April, 2014, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of April, 2014.

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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.