STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DANTE CANDELARIA,

Petitioner,

vs. Case No. 14-4984

CITY OF ORLANDO,

Respondent.
_____/

RECOMMENDED ORDER

This case was heard on March 5 and 6, 2015, by video teleconferencing at sites in Orlando and Tallahassee, Florida, by D.R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether the City of Orlando (City) engaged in an unlawful employment practice by terminating Petitioner because of his age, national origin, and disability.

PRELIMINARY STATEMENT

On May 5, 2014, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) alleging that he was unlawfully terminated from his position as a police officer with the City on account of his age, national origin, and disability in violation of section 760.10(1), Florida Statutes (2014). After the allegations were investigated, on September 23, 2014, the FCHR issued a Notice of Determination: No Cause. On October 21, 2014, a Petition for Relief was filed, and the case was transmitted by FCHR to DOAH requesting that a formal hearing be conducted.

At the final hearing, Petitioner testified on his own behalf and presented the testimony of nine witnesses. Petitioner's Exhibits 1 through 13 and 15 through 36 were accepted in evidence.[1/] The City presented no witnesses. Respondent's Exhibits 1 through 20 were accepted in evidence. Exhibit 20 is the deposition of Dr. Joseph Funk.

There is no transcript of the hearing. The parties filed proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a 42-year-old male of Puerto Rican origin. After working as a paramedic in the Chicago area for several years, Petitioner began employment with the City as a police officer on May 11, 2003. He continued in that capacity until May 9, 2013, when he was terminated for violating three Police Department (Department) regulations. This was two days short of the ten-year vesting period for retirement purposes.

2. Petitioner suffered an on-duty injury to his right foot on December 7, 2007, while attempting to apprehend the driver of a stolen vehicle. On January 2, 2008, the injury was initially diagnosed by Dr. Funk, a podiatric surgeon, as a Lisfranc (midfoot) fracture with minor dislocation and a possible compression injury or bone contusion to the naviculo-cuneiform joint in the right foot.[2/] Based on the results of an MRI, and further review of his records, Dr. Funk concluded Petitioner had suffered a Lisfranc sprain, rather than a fracture. At Petitioner's request, he was temporarily reassigned to alternative duty but returned to regular duty without limitation on March 19, 2008. He was assigned to the gang unit and performed all functions required of a police officer.

3. Petitioner returned to see Dr. Funk in January and December 2009 after feeling pain in his right foot while running. There were no changes in his maximum medical

improvement during either visit and Petitioner was released to work with no restrictions.

4. On September 12, 2010, while chasing on foot a suspect who had burglarized his patrol car parked at his home, Petitioner reinjured his right foot. He was diagnosed with an aggravation of a pre-existing injury, restricted to light duty for one week, and instructed to return to full duty thereafter.[3/]

5. On March 9, 2011, Petitioner was treated by Dr. Funk who added an additional diagnosis of probable mild to moderate degenerative joint disease (DJD), also known as osteoarthritis, which had formed a few centimeters away from the midfoot sprain in his right foot. Two weeks later, Dr. Funk noted that Petitioner "may" be a candidate for fusion of the arthritic area if "pain exceeds his tolerance and conservative measures fail."

6. On April 13, 2011, the City placed Petitioner on alternative duty status/relieved of duty as a result of his arrest on criminal charges (battery and false imprisonment) and his participation in a trial on the charges.

7. While relieved of duty, on August 17, 2011, Petitioner returned to Dr. Funk complaining of continued pain in his mid-right foot. He was again diagnosed with a Lisfranc injury and DJD. At that point, however, Dr. Funk testified that the Lisfranc diagnosis "could easily fall off" leaving only DJD of the naviculo-cuneiform joint. At Petitioner's request, his work

status remained "no limitations." Visits to Dr. Funk in January and February 2012 did not change his work status.

8. On April 27, 2012, Petitioner was found not guilty of the criminal charges and returned to active duty as a police officer. He was initially assigned to a day patrol shift.

9. On May 4, 2012, Petitioner was examined by Dr. Funk after complaining of radiating pain to his right foot and leg. Dr. Funk diagnosed this as possible tarsal tunnel syndrome and placed him on restrictions of no running or climbing.

10. On May 7, 2012, Petitioner submitted a memorandum through the chain of command to the Chief of Police requesting that he be placed on light duty due to his foot injury sustained in December 2007. The memorandum, accompanied by a medical report, stated that Dr. Funk had "placed [him] on light duty until further notice with the restriction of no running or climbing of any kind." Petitioner requested that he remain in his current assignment in Property and Evidence, one that did not require any running or climbing.

11. To reasonably accommodate his injury, the request for light duty was approved, but Petitioner was reassigned to the Innovative Response to Improve Safety (IRIS) unit. IRIS is a video surveillance network in the City designed to deter crime. During a typical shift, no more than four officers sit at two terminals, which display video from cameras located throughout

the City. Because there are no physical demands associated with IRIS, officers on restricted duty are normally assigned to the IRIS unit.

12. The IRIS unit has a day and night shift. Officers cannot make their own schedule, as this depends on the availability of manpower. However, relying on his nine-year seniority, Petitioner requested four ten-hour days per week on the IRIS day shift, which was approved by his supervisor, Sgt. Andrew Brennan.

13. On August 2, 2012, Petitioner sent an email to his supervisor complaining that one of his fellow officers on IRIS duty was "wasting resources" and not doing anything. Six days later, Petitioner was reassigned to the night shift. Although Petitioner says this change was in retaliation for complaining about an officer who was a good friend of Deputy Chief O'Dell, there is insufficient credible evidence to support this claim.

14. Petitioner was displeased with the night shift for several reasons. First, he testified that it disrupted the medication he was taking for his foot. He also stated that it prevented him from adequately caring for his three children and his wife, a former City police officer on a disability pension, who at that time was afflicted with Meniere's Disease. Although Petitioner made at least two requests to change to the day shift, they were not approved.

15. Department protocol requires that officers on restricted duty submit medical updates every 30 days, along with physician reports. In accordance with that requirement, Petitioner timely submitted updates in June, July, and August 2012. They essentially stated that his condition was unchanged and that Dr. Funk was keeping him on light duty with restrictions of no running or climbing.

16. On September 14, 2012, Petitioner visited an urgent care facility complaining of numbness, pain, burning, and loss of motor function in his right foot. He was treated by the on-duty physician, Dr. Carlos, who gave him temporary restrictions of no driving any vehicle, no walking, no standing, and no performing any safety related duties until he saw his treating orthopedist.

17. On the same day, Petitioner submitted a medical update to the Department stating in part that a work status change was necessary in light of "the deteriorating condition of my injured right foot." In the memorandum, he complained of occasional "numbness" in his right foot that spread up to his calf and knee. He also stated that Dr. Carlos had examined him and "restricted me from doing the following: I am not to stand, walk, drive any vehicle, or perform any safety sensitive duties until I am seen by an orthopedic physician." He added: "I am

to stay at home until I have been examined by a new physician." A copy of Dr. Carlos' medical report was attached to the update.

18. Petitioner returned to Dr. Funk on September 24, 2012, and stated that he did not feel safe to drive given the pain in his right foot. Based on Petitioner's subjective complaints, rather than objective medical evidence, Dr. Funk placed him on restrictions of no driving, sit 90 percent of the time, and wear a shoe of choice. Dr. Funk listed the diagnosis as "injury." Notably, Dr. Funk testified that by then he had some concern that Petitioner "was coming in often and it was something -- seemed to be something new every time" and that the different diagnoses "ultimately came back as negative." He added that there was not "a tremendous amount of objective pathology present" even though Petitioner complained of significant discomfort in a "multiplicity of locations."

19. Although he had recommended approval of Petitioner's requests for light duty each month, beginning in May 2012 Deputy Chief O'Dell had doubts that the 2007 foot injury justified continued light duty, especially since Petitioner had been on alternative duty during the entire time he was charged with a crime, and he had never raised the injury issue with the Department.

20. Deputy Chief O'Dell construed the new medical assessment in the September 14, 2012, memorandum as meaning that

Petitioner was unable to report to work. His skepticism of the injury increased as this new restriction coincided with Petitioner's displeasure with being reassigned to the IRIS night shift.

21. Because of his skepticism, and with the Chief of Police's approval, Deputy Chief O'Dell requested that the Metropolitan Bureau of Investigation (MBI), a multi-agency task force, conduct surveillance on Petitioner to confirm whether or not his putative injury was real. Beginning on October 4, 2012, and continuing until November 30, 2012, MBI agents conducted periodic surveillance of Petitioner's home to determine Petitioner's level of activity.

22. During this same time period, Petitioner remained at home on full pay. He submitted medical updates on October 12 and 29 and November 6, 2012, stating that pursuant to physician orders, the following restrictions were put in place for Petitioner: "no driving, sitting 90% of time, and wear shoe of choice for comfort." During the November 6 visit, Dr. Funk told Petitioner that he had nothing else to offer him from a musculoskeletal standpoint and the only option was "good support in his shoe and kind of common sense majors."

23. On November 7, 2012, Petitioner sent an email to the Department stating that he was willing to come back to work in the IRIS unit if the Department provided transportation, as it

had for other officers on restricted duty. He also complained that the midnight shift "caused havoc with sleep and medications," suggesting that he could only work the day shift.

24. On November 27, 2012, at a meeting convened by Deputy Chief O'Dell, Petitioner was asked when he could return to work. Petitioner responded that he was in constant pain, he could not drive, and he had lost motor function in his foot.

25. On November 30, 2012, Petitioner was served at his home with a Return to Duty Notice and instructed to return to the IRIS night shift on December 2, 2012. Petitioner replied by email that he had loss of motor function in his right foot and was not able to drive any motor vehicle. Notably, that same day, he was observed by MBI agents driving his motor vehicle to and from his home. Petitioner also stated that if he sat for long periods of time his foot would go numb, even though one of his medical restrictions required him to sit 90 percent of the time. Petitioner warned the Department that unless it provided him with transportation to and from work, he would be forced to drive himself, and if an accident occurred, he would hold the City responsible for any damages.

26. In response to his email, the Deputy Chief advised Petitioner that the Department was not directing him to drive anywhere, but it was his responsibility to get to work. He was told that he could use public or private transportation, but the

Department did not have the responsibility of providing transportation.

27. Petitioner lives approximately 18 miles from Department headquarters, and he concluded that neither option was practical. Petitioner testified that two officers, Shoemaker and Almeida, who were not called as witnesses, told him they had been provided transportation by the Department when on light duty. However, the Department's response was correct, as providing transportation for officers on restricted duty was contrary to Department policy. This was confirmed at hearing by the then Chief of Police.

28. Sometime in October 2012, MBI agents placed a motion-activated surveillance camera in the yard of Petitioner's neighbor in order to monitor Petitioner's activities. The camera remained at the neighbor's house through the month of November. The surveillance video, as supplemented by visual observations by the MBI agents, shows Petitioner driving his daughter to a nearby school on multiple occasions, driving to a supermarket, walking two large dogs without a limp on a street near his home, rolling trash cans to the curb, using a gas-powered edger in his yard, rotating tires on his vehicle, walking to the gym to work out, and bending over to retrieve items on the ground. At hearing, Petitioner also acknowledged that during this same time period, he twice drove his wife to a

hospital more than twenty miles from his home, as she was unable to drive. According to the physician's report, at least some of these were restricted activities.

29. At the request of Deputy Chief O'Dell, an Internal Affairs investigation was initiated on December 7, 2012, regarding a possible violation by Petitioner of Department Regulation 1000-4, the so-called "truthfulness" regulation, for misrepresenting his medical condition. The regulation states that "[e]mployees are required to be truthful at all times whether under oath or not." Given the evidence produced by MBI, this was a reasonable course of action to take.

30. After a lengthy investigation, Internal Affairs submitted a written report on April 29, 2013. The report concluded that besides violating the truthfulness regulation, Petitioner violated Regulation 300.23, Reporting Sick, which prohibits an officer feigning illness or injury, falsely reporting himself as injured, or otherwise attempting to deceive the Department as to his condition of health. The report also concluded that Petitioner violated Regulation 200-8, Obedience to Laws and Department Procedures, by fraudulently pursuing a workers' compensation claim under section 440.105(4)(b)(2). However, Petitioner was never criminally charged for this violation. The report recommended that Petitioner receive an oral reprimand for violating Regulation 300.23, a 240-hour

suspension for violating Regulation 200-8, and termination for violating the truthfulness regulation. Although Petitioner questioned why two new charges were added by Internal Affairs, it is not unusual for new charges to be added or substituted during the course of an investigation.

31. A Notice of Termination meeting was conducted on May 6, 2013, to allow Petitioner an opportunity to "present any new information or provide clarification that would lessen the degree of discipline presently recommended." By then, Deputy Chief O'Dell had retired. Petitioner and his union representative attended the meeting.

32. On May 9, 2013, Petitioner was terminated for violating the three regulations. According to the Chief of Police, the evidence to support this decision was "overwhelming." The termination decision was agreed upon by every person in the chain of command, including the new Deputy Chief. It was not based on Petitioner's national origin, age, or disability; rather, it was based on the sustained charges in the lengthy Internal Affairs report.

33. Every officer, including those of Hispanic origin, found guilty of violating the truthfulness regulation has been terminated by the Department.

34. Petitioner does not dispute what the video shows. He testified that the driving activities were short trips of no

more than a mile or so from his home that were necessary because his young daughter and sick wife were unable to drive. He admitted that while it was unsafe, he always drove with his left foot rather than with the injured right foot. Petitioner contends that none of the activities in the video were inconsistent with the doctor's restrictions, as he was always allowed to perform "routine functions around home." However, this explanation has not been accepted, as many of these activities are not consistent with his treatment plan.

35. Petitioner admits that many of his difficulties at the Department were due to "running his mouth," which gained him no favors from his superiors and resulted in very little career advancement. He contended that other officers, especially those who played on the Department softball team with Deputy Chief O'Dell, were given more favorable treatment, but no credible evidence to support this contention was submitted.

36. On May 7, 2013, or two days before he was terminated, Petitioner filed an application for a line-of-duty disability, which would allow him to retire because of a disability suffered in the line of duty. This application was denied by the Board of Trustees of the City of Orlando Pension Trust Fund on December 5, 2013, on the ground Petitioner never filed a completed application package, a mandatory requirement. However, his contested application for unemployment benefits was

approved, and he continues to receive benefits under an open workers' compensation case. On June 30, 2014, Dr. Funk operated on Petitioner's right foot, fusing two joints, due to arthritic changes and his subjective complaints. The cost was covered by the City under Petitioner's open workers' compensation case.

37. Petitioner is presently employed as a life guard at Disney World, not because of his 2007 injury, but because he says the City's action makes it impossible for him to find a job in law enforcement or even to work as a security guard. He expressed a desire to return to law enforcement work if he prevails in this matter.

CONCLUSIONS OF LAW

38. Petitioner has the burden of proving by a preponderance of the evidence that the City committed an unlawful employment practice. See § 120.57(1)(j), Fla. Stat.

39. Section 760.10(1) states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of age, national origin, or disability.

40. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of section 760.10. See, e.g., Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009).

41. Complainants alleging unlawful discrimination may prove their case using direct or circumstantial evidence of discriminatory intent. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001). Only the most blatant remarks, whose intent would be nothing more than to discriminate on the basis of some impermissible factor, constitute direct evidence of discrimination. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004). No direct proof was presented by Petitioner.

42. When no direct proof of discrimination exists, the employee may attempt to establish a prima facie case circumstantially through the burden-shifting framework articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802-805 (1973). Failure to establish a prima facie case of discrimination ends the inquiry. See Kidd v. Mando Am. Corp., 731 F.3d 1196, 1202 (11th Cir. 2013). If, however, the employee succeeds in making a prima facie case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its complained-of conduct. Id. This intermediate burden of persuasion is "exceedingly light." Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 769-70 (11th Cir. 2005). Should the employer meet this burden, the employee must then establish

that the proffered reason was not the true reason for the employment decision, but rather a pretext for discrimination. Kidd, 731 F.3d at 1202. The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly, by showing that the proffered reason for the employment decision is not worthy of belief. Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991). The claimant must show not merely that the employer's employment decisions were mistaken, but that they were in fact motivated by discriminatory animus. Wilson, 376 F.3d at 1092. Notwithstanding these shifts in the burden of production, the ultimate burden of persuasion remains at all times with the employee. Byrd v. BT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007).

43. To establish a prima facie case of age discrimination with circumstantial evidence, Petitioner must show that (a) he was a member of a protected age group; (b) he was qualified for the job; (c) he was subject to an adverse employment action; and (d) he was replaced by someone of a different age, or, in the case of disparate treatment, he must show that other similarly situated employees of a different age were treated more favorably. Andrade v. Morse Operations, Inc., 946 F. Supp. 979 (M.D. Fla. 1996). In cases under section 760.10(1)(a), however, the FCHR has concluded that unlike cases brought under the

federal Age Discrimination in Employment Act, the age of 40 has no significance in the interpretation of the Florida Civil Rights Act of 1992. See, e.g., Grasso v. AHCA, Case No. 14-2523 (Fla. DOAH Sept. 9, 2014; FCHR Jan. 14, 2015). To satisfy the last element of a prima facie case of age discrimination under Florida law, it is sufficient for Petitioner to show that he was treated less favorably than similarly situated individuals of a "different" age as opposed to a "younger" age.

44. Petitioner has shown that he is a member of a protected age group and was subject to an adverse employment action. However, he failed to prove that other similarly situated officers were treated differently. The evidence shows that every officer found guilty of violating the truthfulness regulation has been discharged, regardless of their age. Even assuming that Petitioner established a prima facie case, the City articulated a legitimate, non-discriminatory reason for its action, namely, that Petitioner was discharged because of violations of Department policies and procedures that require officers to be truthful, obey laws, and report changes to medical status to supervisors without misrepresentation or deception. Petitioner did not prove that the articulated reason was a pretext.

45. To establish a prima facie case of discrimination based on his national origin, Petitioner must show that he

belongs to a protected group; he was subjected to an adverse employment action; his employer treated similarly situated employees outside the protected group differently or more favorably; and he was qualified to do the job. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

46. While Petitioner established that he is a member of a protected class (Hispanic) and was subjected to an adverse employment action, he failed to prove that the City treated similarly situated employees outside his protected class more favorably. Specifically, Petitioner failed to present any evidence that the City allowed non-Hispanic police officers to violate its policy regarding truthfulness, obeying laws, and misrepresenting medical conditions to superiors without being terminated.

47. Even if a prima facie case were shown, the City articulated legitimate, non-discriminatory reasons for Petitioner's discharge. Petitioner failed to present any evidence that would allow a reasonable person to conclude that the City's explanation for his discharge is false.

48. To state a prima facie case of discrimination based on a disability, a complainant must prove that (a) he has a disability; (b) he is a qualified individual with a disability; and (c) he was subjected to unlawful discrimination because of

his disability. Morisky v. Broward Cnty., 80 F.3d 445, 447 (11th Cir. 1996).

49. To establish the first prong of the test, Petitioner was required to prove by a preponderance of the evidence that (1) he had a physical disability that substantially limited one or more of the major life activities; (2) he had a record of such impairment; or (3) he was regarded by the City as having an impairment. See 42 U.S.C. § 12102(1)(A)-(C).

50. Driving is not a major life activity. Carlson v. Liberty Mut. Ins. Co., 237 Fed. Appx. 446 (M.D. Fla. 2007); Delgado v. Sears Holdings Corp., 2008 U.S. Dist. LEXIS 44393 (N.D. Ill. June 5, 2008). Thus, an inability to drive to and from work is not an impairment of a major life activity within the meaning of the law. See Chenoweth v. Hillsborough Cnty., 250 F.3d 1328, 1330 (11th Cir. 2001)(claimant's inability to drive to work for at least six months did not qualify as an impairment). See also Burgos v. Chertoff, 274 Fed. Appx. 839 (11th Cir. 2008)(a homeland security officer's inability to drive was determined not to be a major life activity that would qualify him as being disabled). Even assuming arguendo that driving were a major life activity, an impairment's minor interference in major life activities does not qualify as a disability. Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002). The impairment's impact must be permanent

or long-term. Id. Intermittent, episodic impairments are not disabilities. Vande Zande v. Wisc. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995). Here, the evidence shows that Petitioner's impairment was not permanent, and at best was intermittent or episodic. Petitioner has failed to establish that he had a physical disability that substantially limited a major life activity within the meaning of the law.

51. While medical records can serve as a basis for demonstrating a disability, Petitioner must prove from his records that he actually suffered a physical impairment in the past that substantially limited his major life activities. Cribbs v. City of Altamonte Springs, 2000 U.S. Dist. LEXIS 20084 (M.D. Fla. Oct. 18, 2000). As previously found, the medical records do not show that Petitioner suffered a physical impairment that substantially limited a major life activity.

52. Finally, the City did not regard Petitioner as being disabled. To the contrary, the City always believed that he was capable of working with the temporary restrictions assigned. Petitioner has failed to make a prima facie case for discrimination based on a disability, and the inquiry on this issue must necessarily end. Kidd, 731 F.3d at 1202.

53. Assuming arguendo that Petitioner made out a prima facie case, the City articulated a non-discriminatory reason for the adverse employment decision. Insufficient evidence was

presented to support a conclusion that the reasons given by the City were not the real reasons for the employment decision.

54. Given the foregoing considerations, the Petition for Relief should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing, with prejudice, the Petition for Relief.

DONE AND ENTERED this 21st day of April, 2015, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of April, 2015.

ENDNOTES

[1/] Petitioner's Exhibits 2 through 13 duplicate exhibits offered by the City. For the sake of efficiency, Petitioner only submitted copies of Exhibits 1 and 15 through 36.

[2/] The parties submitted literally hundreds of pages of medical records dating back to 2007. Rather than describing the records in minute detail, the undersigned has summarized the salient points necessary to resolve this dispute.

[3/] In general terms, an officer on alternative duty is assigned administrative tasks, while an officer on light duty is assigned non-administrative work. However, the terms were often used interchangeably during the hearing. A more precise description of the two could have been found in the record, had a transcript been provided. Under the Agreement between the City and the Fraternal Order of Police, both are considered restricted duty. See Respondent's Ex. 13, p. 40.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.