STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SERGEY P. SHASHELEV,

Petitioner,

vs. Case No. 15-2543

CIRQUE DU SOLEIL,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016),[1/] on February 2 and 3 and March 2, 2016, in Orlando, Florida.

APPEARANCES

For Petitioner: Jamison Jessup, Qualified Representative
557 Noremac Avenue
Deltona, Florida 32738

For Respondent: Nicole Alexandra Sbert, Esquire
Jackson Lewis LLP
390 North Orange Avenue, Suite 1285
Orlando, Florida 32802

STATEMENT OF THE ISSUE

Whether Petitioner, Sergey P. Shashelev, was subject to an unlawful employment practice by Respondent, Cirque du Soleil,

based on his age and disability in violation of the Florida Civil Rights Act, section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On September 5, 2014, Petitioner, Sergey P. Shashelev ("Petitioner"),[2/] filed a complaint of discrimination with the Florida Commission on Human Relations (the "Commission") alleging that Respondent, Cirque du Soleil ("Cirque"), violated section 760.10, by discriminating against him based on his age and disability.

On March 30, 2015, the Commission issued a Notice of Determination: No Cause, stating that it found no reasonable cause exists to believe that an unlawful employment practice occurred.

On or about April 30, 2015, Petitioner filed a Petition for Relief with the Commission. On May 1, 2015, the Commission transmitted the petition to the Division of Administrative Hearings ("DOAH") and requested assignment of an Administrative Law Judge ("ALJ") to conduct an administrative hearing in this matter.

The final hearing was initially set on September 17 and 18, 2015. Following a motion from Respondent, the final hearing was continued until February 2 and 3, 2016. Petitioner's motion to be represented by a qualified representative was granted pursuant to Florida Administrative Code Rule 28-106.106. Prior to the

final hearing, Petitioner also moved to amend his Petition for Relief, which was granted over Respondent's objection.[3/] In addition, based on Petitioner's request, one deaf interpreter and two certified American Sign Language ("ASL") interpreters were provided at all times during the final hearing.[4/] The final hearing was held on those dates, but not completed. The final hearing was continued on March 1, 2016, on which date the final hearing was concluded.

At the final hearing, Petitioner testified on his own behalf. Respondent presented the testimony of Jolla Biegaj (Assistant Company Manager); Pierre Parisien (Senior Artistic Director); Daniel Ross (Artistic Director); Dave Wallace (Cirque employee); Kristine Cuellar; Shannon Page; and Angela Roth. Respondent's Exhibits 1 through 9, 11, 12, 14 through 20, and 23 were admitted into evidence.

A five-volume Transcript of the final hearing was filed on May 9, 2016. At the close of the hearing, the parties were advised of the ten-day timeframe following DOAH's receipt of the hearing transcript to file post-hearing submittals. The parties, twice, jointly moved for enlargement of time to file proposed recommended orders, which were granted. Thereafter, Petitioner filed an additional unopposed motion to enlarge time, which was also granted. The parties filed Proposed Recommended Orders which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Cirque is a live entertainment company founded in Quebec, Canada, that dedicates itself to creating, producing, and performing artistic works around the world. Cirque currently presents a show called "La Nouba" in Orlando, Florida. La Nouba is a contemporary circus performance featuring acrobats, gymnasts, and other skilled performers, including clowns. La Nouba employs approximately 65 performers.

2. La Nouba is a resident show located at Disney Springs at the Walt Disney World Resort ("Disney") in Orlando. Cirque contracts with Disney to present La Nouba at Disney Springs. La Nouba is housed in a fixed theatre and does not travel. La Nouba has presented ten shows a week at Disney since 1998.

3. Petitioner was born in Russia in 1960. He was born deaf. From the time Petitioner turned eight years old, he knew he wanted to be a clown. During his teens, Petitioner studied miming. He soon became a highly trained artist with a unique skill in pantomime. When Petitioner was 21, he joined the Leningrad Litsedei ("the Jesters") Clown Mime Theater, world renowned clowns and mimes. For the next 15 years, Petitioner toured the world with the Letsedei group performing and developing his clown personality.

4. Because Petitioner has been deaf since birth, he is not able to speak. Petitioner communicates through sign language.

Petitioner is proficient in ASL, Russian Sign Language, and Quebec Sign Language (used in French-speaking parts of Canada). Petitioner considers Russian Sign Language his native tongue. His ability to read and comprehend English text is limited.

5. The parties both described clowning as an art form. Clowns are artists, and each individual clown is unique. The art of clowning comes from the performer's heart. Clowns have different personalities, emotions, rhythm, sensibilities, and style. Even if two clowns performed the same act, the performance would look different.

6. Cirque first hired Petitioner in January 1994. Mr. Gilles St. Croix, Cirque's Creative Guide, hired Petitioner to perform in the Cirque show "Alegria." Cirque hired Petitioner for his miming skills. Based on Petitioner's artistic specialty and clown personality, Cirque chose Petitioner to portray a "down-and-out" clown. Cirque readily agrees that Petitioner is a very talented, "world-class" clown. (Cirque expressed that it would hire no less.) Cirque does not dispute that Petitioner is a master at his craft.

7. When Petitioner's contract with Alegria ended, Mr. St. Croix asked Petitioner to join the cast of a new production Cirque was developing in Orlando that would become La Nouba. Mr. St. Croix was aware that Petitioner was deaf when he hired him. Cirque viewed Petitioner's disability as an asset.

Petitioner's disability became a gift to his performance and creativity. Miming allowed him to communicate with people of many nationalities.

8. Cirque hired Petitioner together with his partner, Michel Deschamps, who went by the clown name "Balto." Petitioner and Balto created five clown acts that were incorporated into La Nouba. The combined acts took up approximately 15 to 18 minutes of show time. From 1998 through 2014, Petitioner performed the same clown act with Balto. Petitioner and Balto were part of La Nouba's original cast and always performed their clown act together.

9. Currently, La Nouba artists and performers report to Daniel Ross, La Nouba's Artistic Director. Mr. Ross became the production's Artistic Director in 2010. Mr. Ross reports to the Senior Artistic Director, Pierre Parisien. Mr. Parisien became the Senior Artistic Director for La Nouba in 2000. Neil Boyd is La Nouba's current Company Manager.

10. Cirque's workforce is diverse. Across its worldwide productions, Cirque employs approximately 1,300 individuals who are 40 or older including four or five clowns. At La Nouba, approximately 70 Cirque employees are over 40.

11. Cirque also employs individuals who have disabilities. Two of these employees are clowns and are also deaf or hard of hearing.

12. Cirque enters into individual written contracts with its artists. The initial Artist Agreement ("Artist Agreement") is for a period of two years. Thereafter, each contract is renewable in one-year increments. Cirque drafted Artist Agreements for a defined period of time because Cirque desired to maintain the flexibility to adjust or change its shows and artists when necessary. Cirque never intended its artists to be permanent performers in a production. Cirque regularly replaces artists and integrates new acts into existing shows. Accordingly, Artist Agreements allow Cirque to terminate an artist at any time.

13. In April 1998, Petitioner and Cirque executed a Letter of Intent whereby Petitioner agreed to begin work for La Nouba. In March 1999, after a negotiation process, Petitioner signed a formal Guest Artist Agreement for La Nouba. Petitioner's initial Artist Agreement ran from October 5, 1998, through December 22, 2000 (notwithstanding the date of Petitioner's signature). Thereafter, Petitioner's Artist Agreement could be renewed every year "upon the mutual consent of both parties" for "additional and consecutive periods of one (1) year each." Petitioner signed the Artist Agreement and initialed every page. Cirque and Petitioner subsequently renewed his Artist Agreement every year from 2000 through 2013 in one-year increments.

14. On August 16, 2013, Petitioner and Cirque signed what was to become Petitioner's final contract extension. The parties agreed to renew Petitioner's Artist Agreement for the period running from January 1, 2014, through December 31, 2014.

15. Petitioner's Artist Agreement was written in English. Petitioner testified that, because he could not read English, he did not comprehend all the contract provisions. He just signed the Artist Agreement and went to work. Petitioner expressed that at the time he executed his initial contract, he believed that his position was permanent until he decided to leave or retire.

16. Petitioner's Artist Agreement did not contain any written provisions stating that Petitioner could stay at La Nouba until he retired from the show. On the contrary, Cirque could terminate Petitioner's Artist Agreement at any time without cause. As stated in Petitioner's Artist Agreement, section 9.3:

> [Cirque du Soleil Orlando, Inc.] shall have the right to terminate this agreement without cause, upon simple notice to the Artist, provided the Producer pays the Artist, as severance compensation, the amount determined in accordance with the calculations mentioned in Schedule D to this agreement.

17. Cirque also prepared a separate annual contract renewal letter which indicates whether an artist receives a raise. In Petitioner's August 16, 2013, renewal letter, Cirque agreed to pay Petitioner $506.66 for each La Nouba performance or approximately $250,000 per year. Cirque highly compensates its

clowns because they are unique and difficult to find. By the end of his employment, Petitioner was one of Cirque's highest paid performing artists.

18. In addition to the Artist Agreement, Cirque employees receive the Cirque Human Resource Artist Rules and Policies Manual ("Rules and Policies Manual").

19. During Petitioner's employment with La Nouba, Cirque voluntarily arranged and paid for Petitioner to use certified ASL interpreters on many occasions to communicate with Cirque's management team and fellow performers. Cirque provided Petitioner with an interpreter for every weekly artist meeting, all annual contract renewal meetings, as well as every annual performance evaluation meeting. No terms in Petitioner's Artist Agreement required Cirque to obtain an interpreter for Petitioner's use during Cirque functions.

20. When Cirque met with Petitioner to execute his initial Artist Agreement, Cirque obtained the services of an interpreter to assist Petitioner. During this meeting, Cirque did not direct the interpreter to translate the full contract terms, word-for-word from English to ASL, for Petitioner. Neither did Petitioner ask the interpreter to interpret every word of his Artist Agreement. Although Cirque provided Petitioner a copy of the Artist Agreement, he did not have someone translate all the provisions of the document for him.

21. Every year when Petitioner and Cirque met to renew Petitioner's Artist Agreement, Cirque arranged for the presence of a certified ASL interpreter during the meeting. As with his initial contract, Cirque allowed Petitioner the opportunity to ask the interpreter questions about the terms of his renewed Artist Agreement. Petitioner never asked the interpreter to interpret every word of his contract. Petitioner signed every contract renewal letter. Cirque provided Petitioner copies of all renewal letters.

22. Mr. Parisien, Cirque's Senior Artistic Director, attended Petitioner's last four contract renewal meetings. At each meeting, Mr. Parisien advised Petitioner that his contract was renewed for only one year. Mr. Parisien never communicated to Petitioner that he had a lifetime employment with La Nouba. Petitioner never complained to Mr. Parisien about the contract terms or renewal process. Neither did Petitioner ever express to Mr. Parisien that he was under the impression that he had a lifetime or permanent employment with La Nouba.

23. La Nouba scheduled weekly artist meetings which were held every Tuesday. At these Tuesday meetings, Cirque relayed announcements or comments that pertained to the artists, La Nouba, or Cirque. At every Tuesday meeting, Cirque provided Petitioner with a certified ASL interpreter. Petitioner was free

to ask questions or raise any concerns through the interpreter at these meetings.

24. Although the Tuesday artist meetings typically lasted 15 minutes, Petitioner's interpreters were hired for two-hour blocks of time. Following the meetings, the interpreters were available for Petitioner's personal use to communicate with Cirque employees for the remainder of the two hours. On occasions, Petitioner took advantage of the interpreters to converse with Cirque management and fellow performers.

25. Cirque also arranged and paid for interpreters to assist Petitioner in other matters including health insurance issues, as well as communications with other La Nouba performers, trainers, costumers, and Cirque employees. Cirque also provided Petitioner the use of interpreters for press events, rehearsals for a special show, a workshop, and several other important meetings including three to four annual company meetings.

26. From 1998 through the end of his employment in 2014, no evidence indicates that Cirque ever denied any request from Petitioner for an interpreter's assistance during a La Nouba event or an employee meeting. Cirque was not aware of any complaints from Petitioner that he could not effectively communicate with Cirque management or fellow performers.

27. In addition to interpreter services, Cirque provided Petitioner with a cell phone/pager to communicate with Cirque

employees. This device allowed Petitioner to communicate, via text, in a simple manner. Petitioner was the only artist Cirque provided with a cell phone/pager.

28. In addition to the interpreters, several Cirque employees knew sign language. These individuals included Balto, Petitioner's partner in his clown act, and David Wallace, a Cirque sound engineer. Cirque occasionally requested Balto or Mr. Wallace to help communicate with Petitioner.

29. At the final hearing, Petitioner testified that Cirque did not provide him the benefit of an interpreter for every show related event or gathering. An interpreter was not present during show rehearsals. Without an interpreter, Petitioner felt that he had a very limited ability to communicate with the other performers or management. Petitioner felt that the lack of an interpreter hindered his creative process. In addition, Petitioner described one La Nouba affair during which Cirque did not provide him an interpreter. This event was La Nouba's 15th anniversary party in December 2013. Mr. Wallace offered some assistance communicating the speeches to Petitioner based on his limited sign language. Petitioner, however, felt left out and was not able to fully participate in the party. Petitioner did not request Cirque provide him an interpreter for the party. The party was not a mandatory event for Cirque employees.

30. Mr. Ross, as La Nouba's Artistic Director, evaluated all artists' performance, including Petitioner. From 2010 to 2013, Mr. Ross prepared an annual performance evaluation for Petitioner. Cirque's Rules and Policies Manual, section 13, stated that performance evaluations were based on several elements including: 1) artistic quality of performance; 2) performance--acrobatic/musical/character; 3) attitude; and 4) health care.

31. Mr. Ross personally presented Petitioner his annual performance evaluation. Each year, Mr. Ross and Petitioner reviewed Petitioner's performance evaluation in the presence of a certified ASL interpreter and another witness. All evaluations were read to Petitioner (through the interpreter). Petitioner signed every evaluation. During these meetings, Petitioner had the opportunity to ask Mr. Ross questions or raise any other issues through the interpreter. Petitioner never asked the interpreter to read the performance evaluation line by line.

32. Every year, Petitioner received overall positive ratings from Mr. Ross. For example, in Petitioner's 2011 performance evaluation, Mr. Ross commented that Petitioner's "clown is very charming and the audience is always touched by his performance." In 2012, Mr. Ross commented that Petitioner "masters his art as a clown" and Petitioner is a "beautiful performer. . . . He is funny and touching." In 2013, Mr. Ross

commented that Petitioner's "experience and talent are unquestionable." According to Petitioner, Mr. Ross always had positive things to say about his clown act. Mr. Ross conveyed to Petitioner that he was a great asset to La Nouba and very pleasant to deal with. At the final hearing, Mr. Ross also expressed that Petitioner was a beautiful performer and an excellent and talented clown.

33. However, over the course of his years supervising Petitioner's act, Mr. Ross observed that Petitioner's act had become routine. Petitioner was not taking risks or evolving his presentation. Mr. Ross noted in Petitioner's performance evaluations that Petitioner's "routine is almost too consistent. He could take more risks and explore further within the routines. As a result, there is very little evolution in [Petitioner's] performance . . . consistency in the performance is such that it can feel too permanent sometimes. I would love to see [Petitioner] take more risks and let the present moment influence his performance more." (August 2011) "Sometimes we would like to see [Petitioner] taking more risks and keeping the performance on the edge; this would help him not to fall into a routine. . . . No significant evolution." (July 2012) Petitioner "sticks to the show material and very rarely explores new avenues. . . . He has to be careful not to let the routine diminish his performance level." (July 2013)

34. Cirque spends up to two years creating a show. Thereafter, to keep up with industry trends, look vibrant, maintain market share, and stay relevant, Cirque adjusts and evolves its shows over time. Changes include altering existing acts, integrating new acts, modifying the costumes, replacing acts and/or artists, transforming the music, and varying the choreography. Introducing new elements and updating shows provides Cirque another opportunity to advertise and market its shows to the public. This step increases the likelihood of repeat customers. Conversely, Cirque believes that if it does not evolve its shows, its sales are negatively impacted.

35. Around 2012, Cirque shows began to experience a decline in sales. Consequently, Cirque's owner, Guy Laliberte, directed that all Cirque shows be changed and upgraded. Mr. Laliberte wanted to increase the quality of the shows and keep them relevant. In the summer of 2013, Mr. Laliberte instructed Mr. Parisien to change La Nouba before the end of 2015. Cirque planned for significant changes to occur to La Nouba from 2013 through 2015.

36. During this time, Disney also expressed a desire for Cirque to revamp La Nouba. La Nouba's contract with Disney was scheduled to expire in December 2017. Mr. Laliberte desired the changes to La Nouba made before Cirque's contract with Disney ended in order to extend the contract.

37. In July 2013, Petitioner's partner, Balto, announced that he was retiring from La Nouba. Balto's retirement was unexpected. Balto asked Mr. Parisien if his last day could be April 19, 2014. Mr. Parisien agreed.

38. Initially, Cirque was uncertain how Balto's retirement would impact Petitioner's position with La Nouba. Losing one half of the clown act would certainly affect Petitioner's routine. Mr. Parisien was open to all possibilities as to how to handle the change.

39. Because Petitioner was scheduled to renew his annual Artist Agreement for 2014 in January 2014, and Balto was not leaving until April 2014, Mr. Parisien decided that Cirque should renew Petitioner's contract with La Nouba for the full year (from January through December 31, 2014). Mr. Parisien met with Petitioner in August 2013 to discuss renewing his Artist Agreement in light of Balto's retirement. Mr. Parisien advised Petitioner that Cirque would agree to renew his contract for all of 2014. Petitioner's renewal letter stated that renewal was under the same terms and conditions as his original Artist Agreement. Cirque obtained an interpreter who was present to assist Petitioner during this meeting.

40. Despite renewing Petitioner's Artist Agreement, Mr. Parisien advised Petitioner that the La Nouba clown act was going to change, but he had not yet determined how.

Mr. Parisien recognized that Balto's retirement provided La Nouba the opportunity to evolve the clown act in compliance with the mandate by Mr. Laliberte and Disney.

41. Mr. Parisien considered three options as to how to change La Nouba's clown act. First, Cirque could find Petitioner another partner. Second, Petitioner could continue as a solo clown act. Or, third, La Nouba could replace Petitioner and Balto's clown act with two different clowns.

42. Mr. Parisien discussed these three options with Mr. Ross, La Nouba's Artistic Director. Mr. Ross had no preference and was open to all options.

43. During the fall of 2013, Mr. Parisien and Mr. Ross met with Petitioner several times to discuss the various options for the clown act. Cirque obtained an interpreter's services for each meeting. Mr. Parisien and Mr. Ross advised Petitioner that they had not decided on which direction to take the clown act. Petitioner acknowledged that Cirque was in the process of changing and upgrading La Nouba. However, Petitioner conveyed to Mr. Parisien and Mr. Ross that he did not want his clown act to change. Petitioner suggested that Cirque hire Maxim Fomitchev ("Max"), a clown performing on the Cirque show, Alegria. Although Petitioner had never worked with Max, Petitioner suggested that he and Max would continue to perform the same

clown act that Petitioner originated with Balto. Mr. Parisien agreed to consider Petitioner's recommendation.

44. During these meetings, Mr. Parisien, and Mr. Ross occasionally spoke in French. (French is their first language.) However, no evidence shows that Mr. Parisien and Mr. Ross ever discussed Petitioner's disability or age in French.

45. In November 2013, Mr. Parisien contacted Mr. St. Croix to discuss the different options regarding La Nouba's clown act. Mr. Parisien, as La Nouba's Senior Artistic Director, was responsible for deciding how to adjust La Nouba's concept and select acts that fit his artistic vision for La Nouba. Mr. Parisien, however, wanted Mr. St. Croix's advice. Mr. St. Croix is the mastermind behind most of Cirque's important shows. Mr. Parisien valued his opinion and artistic vision.

46. Mr. St. Croix recommended that Mr. Parisien bring to La Nouba the clown act of "Pablo and Pablo" from Alegria. (Pablo and Pablo were two clowns whose first names were Pablo.) Alegria was closing in December 2013. The timing was advantageous for a move to La Nouba.

47. Until his conversation with Mr. St. Croix, Mr. Parisien had not considered Pablo and Pablo as an option for La Nouba. Mr. Parisien was familiar with Pablo and Pablo and their clown act. He considered them to be great performers and artists.

48. Mr. Parisien testified that Pablo and Pablo's clown act was different from Petitioner and Balto's clown act. Their clown personalities were also very different. Pablo and Pablo were high energy and colorful, while Petitioner and Balto were more deliberate and poetic. Pablo and Pablo's comedy was more slapstick and physical. Described another way, Petitioner and Balto were like jazz, while Pablo and Pablo were more rock-and-roll. Pablo and Pablo's act and personalities met Mr. Parisien's artistic vision for changing the concept of La Nouba's clown act.

49. In addition, inserting Pablo and Pablo's clown act into La Nouba was the most efficient business decision. Pablo and Pablo had been working together as a successful partnership for years. Cirque would avoid any delay that might result from having to develop a completely new clown act for Petitioner and a new partner. Mr. Parisien commented that it is difficult to establish a partnership in any act because the relationship depends on the performers' chemistry, energy, and rhythm. It was more efficacious and safer for Cirque to use Pablo and Pablo rather than find Petitioner a new partner because Pablo and Pablo could just transfer their act from Alegria to La Nouba. Pablo and Pablo would also introduce new material to La Nouba.

50. In November 2013, Mr. Parisien decided to bring Pablo and Pablo to La Nouba to replace Petitioner and Balto. Mr. Parisien felt that his decision met both Cirque's artistic

and business requirements. This decision would also effectuate Mr. Laliberte's directive to change the concept of the clown act and bring new elements to La Nouba. Unfortunately, bringing Pablo and Pablo to replace Petitioner's act meant that Mr. Parisien had to terminate or non-renew Petitioner's contract. Mr. Parisien ultimately decided to terminate Petitioner's contract on the same date Balto retired.

51. Cirque notified Petitioner that it was terminating his Artist Agreement at a meeting held on January 21, 2014. Mr. Ross, Mr. Boyd (La Nouba's Company Manager), as well as an interpreter were present with Petitioner during the meeting. Although it was Mr. Parisien's decision to terminate Petitioner, Mr. Ross held the meeting because he was located in Orlando.

52. At the meeting, Mr. Ross informed Petitioner that Cirque was terminating his contract as of April 19, 2014. April 19, 2014, was the same day Balto was retiring from the show. Mr. Ross explained to Petitioner that Cirque had decided to change the concept of the La Nouba clown act.

53. Mr. Ross provided Petitioner with a termination letter. The letter stated that "in view of a change in the show concept," Petitioner's Artist Agreement was being "terminated as of April 19, 2014, by virtue of section 9.3." Petitioner was further advised that Cirque would pay him a severance in the amount of $24,218.35.

54. Petitioner was shocked by the Cirque's decision to replace him. Although an interpreter translated the conversation, Petitioner felt lost at times during the meeting due to the rapid exchanges between Mr. Ross and Mr. Boyd. Petitioner did not believe that all communications were adequately interpreted.

55. Mr. Parisien testified that neither Petitioner's age nor disability had any bearing on his decision to terminate Petitioner. Rather, the decision was based solely on the fact that he was compelled to change and update La Nouba. The fact that Balto was retiring from La Nouba as Petitioner's partner opened the door for La Nouba to replace their clown act.

56. Prior to this meeting, Pablo and Pablo agreed to come to La Nouba. Pablo and Pablo are both younger than Petitioner. In addition, neither of them has a disability. Mr. Parisien testified convincingly that he did not hire Pablo and Pablo because they could hear or because they were both younger than Petitioner.

57. During his employment with Cirque, Petitioner never complained to Cirque management that he felt discriminated against. Petitioner never complained about the availability of (or lack of) interpretation services Cirque offered. Petitioner never requested any accommodations beyond what Cirque already provided. Neither did Petitioner ever file an accommodation

request with Cirque's human resources department in accordance with the Cirque Rules and Policies Manual. On the contrary, during his August 2011 performance evaluation, Petitioner relayed that Cirque has "been providing communication through interpreters which is good . . . I love the show and want to stay here for a while."

58. Although Mr. Parisien made the decision to terminate Petitioner's Artist Agreement, Petitioner alleged that Mr. Ross was the only person at Cirque that discriminated against him based on his disability and age.

59. Petitioner continued to perform his clown act with Balto at La Nouba from January 2014 through April 19, 2014. Mr. Ross noticed that Petitioner's performance actually improved after he was informed of his termination.

60. On or about April 11, 2014, Cirque advised Petitioner that, in addition to the severance, Cirque would voluntarily pay him a transition premium of $15,000.00, as well as vacation and leave pay. In total, Petitioner received $53,627.76 after Cirque terminated his employment.

61. Following Petitioner and Balto's last show, Cirque held a celebration party and provided both artists with gifts. Cirque also invited all of the interpreters who had assisted Petitioner throughout the years to watch his last performance and attend the party.

62. Although Cirque determined to replace Petitioner (and Balto) at La Nouba, before his last show Cirque discussed with Petitioner possible jobs at other Cirque productions. To be considered for another Cirque show, Petitioner would have had to update his casting profile with Cirque's casting department. Petitioner met with Cirque's casting department. However, he never provided the casting department with materials to update his profile in order to be considered for other jobs. Petitioner informed Cirque that he did not want to go to a different show. He was not interested in leaving Orlando or touring with another Cirque production. He desired a permanent position until he retired.

63. Pablo and Pablo began performing their clown act at La Nouba immediately after Petitioner and Balto left the show in April 2014. Pablo and Pablo brought their acts from Alegria to La Nouba. Pablo and Pablo's performance included five acts: 1) thieves, 2) motorcycle, 3) airplane, 4) door, and 5) piñata. These acts were different from the acts Petitioner and Balto performed. Although, both acts contain a horse bit, the acts Pablo and Pablo brought were newer and different from the act Petitioner performed at Alegria or La Nouba.

64. Mr. Parisien believed that Pablo and Pablo successfully changed the concept of the clown act because their act, energy, and style were completely different from Petitioner and Balto's.

The new clown act also provided Cirque a new marketing angle to advertise the show and create publicity. Whether coincidental or not, after Pablo and Pablo arrived at La Nouba, ticket sales increased.

65. Mr. Parisien's decision to replace Petitioner and Balto's clown act was not the only change he made to La Nouba. Other changes included replacing the juggler act with a rola-bola balancing act, the skipping act with a street dance act, and the high wire act with an aerial bamboo act. He changed the costumes of the bike act and the music for the flying trapeze act. In addition to Petitioner, Parisien terminated or did not renew approximately seven other artists. In total, approximately 30 to 40 percent of La Nouba changed in response to the Cirque and Disney mandate.

66. To Mr. Parisien's knowledge, none of the other artists terminated from La Nouba had a disability. Some of the artists terminated were younger than Petitioner.

67. Since his employment with Cirque ended, Petitioner has not looked for any other artist jobs with either Cirque or Disney. Petitioner has not worked as a clown since he left La Nouba.

68. Based on the competent substantial evidence presented at the final hearing, Petitioner did not demonstrate, by a preponderance of the evidence, that Cirque discriminated against

him based on his age or his disability in violation of the Florida Civil Rights Act. Rather, Cirque's decision to terminate Petitioner was based on its desire to change and update the concept of the La Nouba production.

CONCLUSIONS OF LAW

69. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause pursuant to sections 120.569, 120.57(1), and 760.11(4)(b). See also Fla. Admin. Code R. 60Y-4.016.

70. Petitioner brings this action alleging that Cirque discriminated against him in violation of the Florida Civil Rights Act of 1992 ("FCRA"). Petitioner claims that Cirque terminated his Artist Agreement based on his age and disability. The FCRA protects employees from both age and disability discrimination in the workplace. See § 760.10-.11, Fla. Stat. Section 760.10 states, in pertinent part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

71. A party who receives a no cause determination from the Commission may request an administrative hearing before DOAH.

Following the hearing, "[i]f the administrative law judge finds that a violation of the [FCRA] has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." See § 760.11(7), Fla. Stat.

72. Petitioner carries the burden of proving, by a preponderance of the evidence, that Cirque committed the unlawful employment practice. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

73. Regarding age discrimination, the FCRA was derived from two federal statutes, Title VII of the Civil Rights Act of 1964 and 1991, 42 U.S.C. § 2000e, et seq., and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623. See Brown Distrib. Co. of W. Palm Beach v. Marcell, 890 So. 2d 1227, 1230 n.1 (Fla. 4th DCA 2005). Florida courts apply federal case law interpreting Title VII and the ADEA to claims arising out of the FCRA. Id.; see also City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008); and Sunbeam TV Corp. v. Mitzel, 83 So. 3d 865, 867 (Fla. 3d DCA 2012).

74. To prevail on an ADEA claim, the employee must prove by a preponderance of the evidence that the employer's adverse employment action would not have occurred "but for" the

employee's age. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180, 129 S. Ct. 2343, 2352, 174 L. Ed. 2d 119 (2009).

75. Regarding disability discrimination, the FCRA is construed in conformity with the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12112(a). Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1175 (11th Cir. 2005) (citing Wimberly v. Secs. Tech. Grp., Inc., 866 So. 2d 146, 147 (Fla. 4th DCA 2004)). FCRA claims are analyzed under the same standards as the ADA. Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1255 (11th Cir. 2007).

76. Employees may prove discrimination by direct, statistical, or circumstantial evidence. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009). Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resorting to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "only the most blatant remarks', whose intent could be nothing other than to discriminate . . ., will constitute direct evidence of discrimination." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999) (citations omitted).

77. Petitioner presented no direct evidence of age or handicap discrimination on the part of Cirque. Similarly, the

record in this proceeding contains no statistical evidence of discrimination related to Cirque's decision to terminate Petitioner.

78. In the absence of direct or statistical evidence of discriminatory intent, Petitioner must rely on circumstantial evidence of age or handicap discrimination to prove his case. For discrimination claims involving circumstantial evidence, Florida courts follow the three-part, burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny. See also Valenzuela, 18 So. 3d at 21-22; and St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458 (Fla. 3d DCA 2011).

79. Under the McDonnell Douglas framework, a petitioner bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. See McDonnell Douglas, 411 U.S. at 802-04; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006). Demonstrating a prima facie case is not difficult, but rather only requires the plaintiff "to establish facts adequate to permit an inference of discrimination." Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

80. To establish a prima facie case of age discrimination, Petitioner must demonstrate that 1) he is a member of a protected class; 2) he was qualified for his position; 3) he was subjected

to an adverse employment action; and 4) his employer treated employees of a different age more favorably than he was treated. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996); Hogan, 986 So. 2d at 641.[5/]

81. Similarly, to state a prima facie claim for disability discrimination, Petitioner must first show that 1) he is disabled; 2) he was a "qualified individual" at the relevant time (meaning that he could perform the essential functions of his job with or without reasonable accommodations); and 3) he was discriminated against because of his disability. See Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001) (citing Reed v. Heil Co., 206 F.3d 1055, 1061 (11th Cir. 2000)). To prove unlawful discrimination in a failure to accommodate claim, Petitioner must show that he was discriminated against as a result of Cirque's failure to provide a reasonable accommodation. Lucas, 257 F.3d at 1255.

82. If the petitioner establishes a prima facie case (for either age or disability discrimination), he creates a presumption of discrimination. At that point, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for taking the adverse employment action. Valenzuela, 18 So. 3d at 22. The reason for the employer's decision should be clear, reasonably specific, and worthy of credence. Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991).

The employer has the burden of production, not persuasion, to demonstrate to the finder of fact that the decision was non-discriminatory. See Wilson v. B/E Aerospace, Inc., 376 F. 3d 1079, 1087 (11th Cir. 2004). This burden of production is "exceedingly light." Holifield, 115 F.3d at 1564. The employer only needs to produce evidence of a reason for its decision. It is not required to persuade the trier of fact that its decision was actually motivated by the reason given. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

83. If the employer meets its burden, the presumption of discrimination disappears. The burden then shifts back to the employee to prove that the employer's proffered reason was not the true reason but merely a "pretext" for discrimination. See Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997); Valenzuela, 18 So. 3d at 25. In order to satisfy this final step of the process, the employee must "show[] 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." Chandler, 582 So. 2d at 1186 (citing Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 252-256 (1981). The proffered explanation is "not worthy of belief" if the employee demonstrates "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for

its action that a reasonable factfinder could find them unworthy of credence." Combs, 106 F.3d at 1538; see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Petitioner "must prove that the reasons articulated were false **and** that the discrimination was the real reason" for the defendant's actions. City of Miami v. Hervis, 65 So. 3d 1110, 1117 (Fla. 3d DCA 2011) (citing St. Mary's Honor Ctr., 509 U.S. at 515 ("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.")).

84. Despite the shifting burdens of proof, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Burdine, 450 U.S. at 253, 101 S. Ct. at 1089, 67 L. Ed. 2d 207; Valenzuela 18 So. 3d at 22.

85. Based on the competent substantial facts in this matter, Petitioner established a prima facie case of age discrimination. Petitioner presented sufficient evidence that: 1) he is a member of a protected class (Petitioner was of a different age (older) than the clowns Cirque retained); 2) he was qualified to hold his position at Cirque (Petitioner was indisputably a "world-class" clown at the time he was terminated); 3) he was subjected to an adverse employment action

(Petitioner was terminated by Cirque); and 4) Cirque treated similarly-situated employees differently or less severely (Cirque retained Pablo and Pablo after Alegria closed and allowed them to continue their clown act at La Nouba).

86. However, despite the fact that Petitioner established a prima facie case of age discrimination, Cirque met its burden of articulating a legitimate, non-discriminatory reason for its decision to discharge Petitioner. Cirque's burden to refute Petitioner's prima facie case is light. Cirque presented credible evidence that its decision to terminate Petitioner was based on its desire to change and evolve the concept of the show in general and the clown act specifically. Cirque management (Mr. Laliberte and Mr. Parisien) believed that a change in the show's concept was needed to keep La Nouba current, relevant, increase its quality, and improve its sales. Cirque also believed that changes would increase the likelihood of repeat customers and extend its contract with Disney. Mr. Parisien testified persuasively that his decision to terminate Petitioner's Artist Agreement was based on Cirque's need to change the acts in La Nouba.

87. Completing the McDonnell Douglas burden-shifting analysis, Petitioner did not prove by a preponderance of the evidence that Cirque's stated reasons for firing him were merely a "pretext" for unlawful discrimination. The record in this

proceeding does not support a finding or legal conclusion that Respondent's proffered explanation was false or not worthy of credence. Beginning around 2012, Cirque faced business and economic pressure to evolve and rejuvenate its 14-year-old show. Mr. Parisien received direct instructions to update La Nouba's concept and performances. The fact that Petitioner's partner announced his retirement, effective April 2014, opened the door for Mr. Parisien to consider replacing Petitioner's act with another clown duo. Pablo and Pablo offered Mr. Parisien an efficient and timely option to change the concept of the clown act while maintaining his artistic vision. Cirque presented persuasive testimony that Pablo and Pablo were hired based on their artistic skill and proven partnership--a legitimate, non-discriminatory business reason wholly unrelated to Petitioner's disability or age.

88. Other facts and circumstances regarding Cirque's efforts to reinvigorate La Nouba also refute Petitioner's claim that Cirque fired him based on his age. Cirque, in its effort to stimulate the show's concept, terminated several other artists who were younger than Petitioner. In addition, Cirque currently employs performers who are older than Petitioner. Finally, the fact that Petitioner's annual performance evaluations for the three years prior to his termination reflected Cirque's sentiment that Petitioner's act was becoming "routine" and contained "no

significant evolution" supports Cirque's expressed, legitimate non-discriminatory reason for terminating his Artist Agreement.

89. Petitioner identified no evidence to show that Cirque's proffered reason was not its true reason or that age discrimination was likely the real reason for Petitioner's termination. Accordingly, Petitioner's claim that Cirque discriminated against him based on his age must fail.

90. Turning to Petitioner's disability discrimination claim, the undersigned concludes that Petitioner failed to establish a prima facie case of discrimination based on his disability. The parties do not dispute that Petitioner is disabled or that he is a "qualified individual." Petitioner, however, did not set forth sufficient evidence that Cirque terminated him because of his disability.

91. While establishing a prima facie case "is not difficult," Petitioner is required to produce facts "adequate to permit an inference of discrimination." The competent substantial facts presented at the final hearing do not create even the inference that Cirque terminated Petitioner based on his disability. Petitioner did not produce evidence or testimony establishing his inability to hear played any role, even remotely, in Cirque's decision to terminate his Artist Agreement. Conversely, Cirque witnesses credibly and persuasively testified that the reason Cirque ended Petitioner's long-running act at

La Nouba was based on a business decision to change and evolve the show.

92. Further, the fact that Cirque was fully aware of Petitioner's disability when it hired him and voluntarily expended its own resources to assist Petitioner during his 15 years with La Nouba, undermines Petitioner's claim that Cirque was motivated to terminate his employment based on his disability. Cirque invited Petitioner to join La Nouba knowing he was deaf. Thereafter, Cirque renewed his Artist Agreement each year for the next 14 years. In addition, prior to Petitioner's last show, Cirque offered him the opportunity to apply for other productions Cirque produced.

93. The evidence in the record also establishes that Cirque's decision to terminate Petitioner was precipitated by Petitioner's partner Balto's announcement that he was retiring, not by some underlying discriminatory animus. Balto's retirement provided Mr. Parisien the opportunity to change the clown act to comply with Cirque and Disney's mandate to remake the show.

94. Furthermore, the evidence in the record does not support Petitioner's claim that Cirque failed to reasonably accommodate his disability. An employer's failure to provide reasonable accommodation for a qualified, disabled employee is discrimination under the ADA. Lucas v. W.W. Grainger, Inc., 257 F.3d at 1255. The ADA requires an employer to make "reasonable

accommodations" to an otherwise qualified employee with a disability, "unless doing so would impose [an] undue hardship." Id.; see also Frazier-White v. Gee, 818 F.3d 1249, 1255 (11th Cir. 2016). An accommodation is "reasonable" and, therefore, required under the ADA, only if it enables the employee to perform the essential functions of the job. LaChance v. Duffy's Draft House, 146 F.3d 832, 835 (11th Cir. 1998). The plaintiff bears the burden of identifying an accommodation and demonstrating that it is reasonable. Lucas, 257 F.3d at 1255-56.

95. A qualified individual is not, however, entitled to the accommodation of his choice, but rather only to a "reasonable" accommodation. Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997). Further, an employer need not accommodate an employee in any manner the employee desires nor reallocate job duties to change the essential functions of the job. Earl v. Mervyns, Inc., 207 F.3d 1361, 1367 (11th Cir. 2000). Similarly, an employer is not required to provide an employee with "the maximum accommodation or every conceivable accommodation possible." Stewart, 117 F.3d at 1285.

96. The evidence in the record demonstrates that during Petitioner's employment with La Nouba, Cirque provided him with accommodations that were both reasonable and effective. Cirque voluntarily obtained the services of a certified ASL interpreter

to personally assist Petitioner on numerous occasions, including (1) every weekly artist meeting; (2) every contract renewal meeting; (3) every annual performance evaluation meeting; (4) workshops and training sessions; (5) press events; and (6) communications with fellow La Nouba employees, performers, and production directors. In addition, Cirque provided Petitioner with a cell phone/pager to communicate with Cirque employees and management.

97. Cirque, by continually providing Petitioner interpreters and other means of communication for company functions, enabled Petitioner to perform the essential functions of his job during his 15 years at La Nouba. On the stage, Petitioner performed at the highest level of his craft. Behind the curtains, Cirque uniformly praised Petitioner's performances in his annual performance evaluations.

98. Further, Petitioner did not show that Cirque ever denied his request for an interpreter or any other type of accommodation. Nor, did Petitioner ever complain to Cirque that his accommodations were inadequate. "The duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made." Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363 (11th Cir. 1999). Thus, Petitioner's failure to request a reasonable

accommodation is fatal to his prima facie case for failure to reasonably accommodate.

99. At the final hearing, Petitioner detailed only one specific instance of Cirque's alleged failure to accommodate. Petitioner complained that Cirque did not provide him the use of an interpreter during Cirque's 15th anniversary party. This incident, however, does not establish that Cirque legally failed to accommodate Petitioner's disability. Petitioner did not request an interpreter for this party. In addition, the party was a voluntary social gathering and was not part of Petitioner's essential job functions.

100. Petitioner did not show that Cirque terminated his employment based on his disability. Cirque complied with the FCRA by providing Petitioner with reasonable accommodations for his disability. Consequently, Petitioner did not establish a claim of disability discrimination against Cirque.

101. As a final point of analysis, it appears that Petitioner's primary contention with Cirque's decision to terminate him is based on his belief that Cirque had no sensible reason to replace him in La Nouba. At the time Cirque decided to part ways with Petitioner, the testimony indisputably describes Petitioner as an exceptional performer and an integral part of the show. Therefore, Petitioner challenges whether Cirque's

decision to terminate him was appropriate based on the fact that he was willing to reinvent his clown act.

102. In a proceeding under the FCRA, however, the court is "not in the business of adjudging whether employment decisions are prudent or fair. Instead, [the court's] sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d at 1361. Not everything that makes an employee unhappy is an actionable adverse action. Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1238 (11th Cir. 2001). An employer may fire an employee "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). Moreover, it has been consistently held that in reviewing employers' decisions, the court's role is to prevent unlawful employment practices and "not to act as a super personnel department that second-guesses employers' business judgments." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1092 (11th Cir. 2004). An employee cannot succeed by simply quarreling with the wisdom of the employer's reasons. Chapman v. AI Transp., 229 F.3d 1012 (l1th Cir. 2000); see also Alexander v. Fulton Cnty., Ga., 207 F.3d 1303, 1341 (11th Cir. 2000) ("[I]t is not the

court's role to second-guess the wisdom of an employer's decisions as long as the decisions are not racially motivated.").

103. In sum, while Petitioner was undisputedly a master at the craft of clowning on the date he was terminated, the competent substantial evidence in the record does not support Petitioner's claim that Cirque fired him from La Nouba based on his age or disability. Cirque's desire to change and evolve La Nouba's performances provided a legally sufficient basis for Cirque to discharge Petitioner as long, as its action was not for a discriminatory reason--which Petitioner did not establish. No credible evidence shows that Cirque's stated reason for Petitioner's termination was a "pretext" for age or handicap discrimination. Therefore, because Petitioner failed to put forth sufficient evidence that Cirque had some discriminatory reason for its decision to terminate him, his petition must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Respondent, Cirque du Soleil, did not commit an unlawful employment practice as to Petitioner, Sergey P. Shashelev, and dismiss Petitioner's Petition for Relief from an Unlawful Employment Practice.

DONE AND ENTERED this 11th day of October, 2016, in Tallahassee, Leon County, Florida.

J. BRUCE CULPEPPER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of October, 2016.

ENDNOTES

[1/] All statutory references are to the 2016 Florida Statutes, unless otherwise noted.

[2/] In the documentary evidence, Petitioner's name is spelled in several variations including "Sergey P. Shashelev" and "Serguei Chachelev."

[3/] Petitioner's Amended Petition for Relief did not allege additional facts, but did assert an additional legal theory of relief based on Cirque's alleged failure to accommodate Petitioner's disability. Accordingly, the undersigned allowed Petitioner to present an additional claim alleging that Cirque failed to accommodate his disability.

[4/] At the final hearing, the interpreters were duly sworn to relay the truth of what they understood pursuant to sections 90.606 and 90.6063, Fla. Stat.

[5/] While the federal ADEA (on which the FCRA is modeled) specifically protects employees aged 40 and older, the FCRA does not set a minimum age for a classification of persons protected thereunder. The Commission has determined that the age "40" has no significance in interpreting the FCRA. Accordingly, the

fourth element for establishing a prima facie case of age discrimination under the FCRA is a showing that individuals similarly-situated of a "different" age, as opposed to a "younger" age, were treated more favorably. See Downs v. Shear Express, Inc., Case No. 05-2061 (Fla. DOAH March 14, 2006), modified, Order No. 06-036 (Fla. FCHR May 24, 2006); Boles v. Santa Rosa Cnty. Sheriff's Off., Case No. 07-3263 (Fla. DOAH December 5, 2007), modified, Order No. 08-013 (Fla. FCHR Feb. 8, 2008); Ellis v. Am. Aluminum, Case No. 14-5355, modified, Order No. 15-059 (Fla. FCHR Sep. 17, 2015). Florida case law is silent on the matter.

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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.