STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JONATHAN BLEIWEISS,

Petitioner,

vs. Case No. 16-0524

DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by telephone conference call on March 15, 2016, at sites in Tallahassee and Indiantown, Florida.

APPEARANCES

For Petitioner: Jonathan Bleiweiss, pro se
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For Respondent: Joe Thompson, Esquire
Department of Management Services
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STATEMENT OF THE ISSUE

The issue in this proceeding is whether Petitioner was convicted of specified criminal offenses, requiring the forfeiture of all of his rights and benefits under the Florida

Retirement System, except for the return of accumulated contributions.

PRELIMINARY STATEMENT

In a Notice of Action to Forfeit Retirement Rights and Benefits dated November 24, 2015, Respondent Department of Management Services, Division of Retirement, notified Petitioner Jonathan Bleiweiss of its intent to deem his rights and benefits under the Florida Retirement System forfeit as a result of his convictions, in 2015, for armed false imprisonment, a crime committed while he was on duty as a deputy sheriff. Mr. Bleiweiss timely requested a formal hearing to contest this preliminary forfeiture determination, and, on January 29, 2016, the matter was filed with the Division of Administrative Hearings.

The final hearing took place as scheduled on March 15, 2016, with both parties present. Respondent called two witnesses: Mr. Bleiweiss and Kathy Gould, chief of the Bureau of Retirement Calculations. In addition, 12 of Respondent's exhibits, numbered 1, 2, 4 through 11, 13, and 14, were received in evidence. Mr. Bleiweiss testified on his own behalf and presented no other evidence.

The final hearing transcript was filed on April 4, 2016. Each party timely filed a Proposed Recommended Order on or

before the deadline, which had been extended to May 27, 2016, at Mr. Bleiweiss's request.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2015.

FINDINGS OF FACT

1. From 2002 until 2011, including all times relevant to this case, Petitioner Jonathan Bleiweiss ("Bleiweiss") was employed as a deputy sheriff by the Broward Sheriff's Office. As a public employee, he became a member of the Florida Retirement System ("FRS"), which is administered by Respondent Department of Management Services, Division of Retirement ("Division").

2. On February 12, 2015, Bleiweiss pleaded guilty in the Broward County Circuit Court, Seventeenth Judicial Circuit, to 14 counts of armed false imprisonment.[1/] False imprisonment, as defined in section 787.02(1)(a), Florida Statutes, is a felony of the third degree. This crime must be reclassified upward, however, where, as here, "the defendant carrie[d], display[ed], use[d], threaten[ed] to use, or attempt[ed] to use any weapon or firearm" while committing the felony, unless an exception applies, which none did in Bleiweiss's case. See § 775.087(1)(c), Fla. Stat. Accordingly, armed false imprisonment, as charged against Bleiweiss, is a second-degree

felony. Based on Bleiweiss's pleas, the court entered judgments of conviction adjudicating Bleiweiss guilty.[2/]

3. The Amended Information from one of the criminal cases, which is dated October 1, 2009, sets forth the ultimate facts underlying each of the false imprisonment charges to which Bleiweiss entered a plea of guilty, as follows:

> [O]n or between [various dates], in [Broward County, Florida, Bleiweiss] did forcibly, by threat, or secretly confine, abduct, imprison, or restrain [the alleged victim] without lawful authority and against his will, and during the commission thereof Jonathan Bleiweiss carried or displayed a firearm . . . .

By pleading guilty, Bleiweiss admitted the foregoing allegations, which the undersigned accordingly adopts as findings of fact herein.[3/] These facts, however, which closely conform to the elements of the offense, shed little light on what actually happened.

4. At the plea colloquy, Bleiweiss stipulated to a few additional facts, agreeing that if the "cases were to proceed to trial the State would prove that . . . while working as a Broward Sheriff's deputy while dressed in full police uniform and driving a marked police vehicle [Bleiweiss] did forcibly by threat or secretly confine certain individuals whose initials are AL, JM, SG, MP, LS, AP, and JH against their will, and in the course thereof . . . exhibited a firearm." These undisputed

factual grounds for Bleiweiss's plea are adopted as findings, as well.

5. The court sentenced Bleiweiss to five years in prison, to be followed by ten years on probation. As of the final hearing in this case, Bleiweiss was incarcerated.

6. In due course the Division learned of Bleiweiss's pleas and adjudications of guilt. Upon review, the Division determined that Bleiweiss had been convicted of "specified offenses" (a legal term that will be discussed below) and concluded that, consequently, he had forfeited his rights and benefits as a member of the FRS. By letter dated November 24, 2015, the Division notified Bleiweiss of its preliminary decision regarding the forfeiture of his retirement benefits and offered him an opportunity to request a formal administrative proceeding to contest the determination. Bleiweiss timely requested a hearing.

7. Although not directly relevant to the disposition of this dispute, it is a fact that, when he was charged with armed false imprisonment, Bleiweiss was also charged with multiple crimes relating to sexual battery upon various persons in his custody. The government nolle prossed these charges simultaneously with the entry of Bleiweiss's guilty pleas. Therefore, the government never proved that Bleiweiss had

committed any sex crimes, as alleged, and, obviously, he was not convicted of any such crimes.

8. At the final hearing in this proceeding, the Division could have offered nonhearsay evidence——e.g., the testimony of an alleged victim, eyewitness, or Bleiweiss himself——tending to establish that, in the course of committing the acts of false imprisonment for which he was convicted, Bleiweiss additionally committed sexual batteries against the person or persons whom he had unlawfully detained. The Division, however, did not offer any direct, nonhearsay evidence that during the commission of the felonies to which he pleaded guilty, Bleiweiss had sought or secured any personal gain or advantage in the form of sexual gratification or elsewise.[4/] Moreover, when asked at hearing by the Division's counsel whether he had engaged or attempted to engage in sexual activities with any of the persons whom he falsely imprisoned, Bleiweiss testified under oath that he had not.

9. The record contains scant evidence, if any, concerning the actual circumstances surrounding the commission of the crimes to which Bleiweiss pleaded guilty. Bleiweiss testified that it was his understanding that the factual bases for the guilty pleas were that he had conducted traffic stops without probable cause (thereby committing the crime of false imprisonment); conducted searches without probable cause

(committing simple battery); and carried a holstered gun, resulting in the upward reclassification of the false imprisonment charge from a third- to a second-degree felony. Bleiweiss made clear, however, that this was not what actually happened, as a matter of historical fact, but rather that this was what he understood to be the factual predicate for the plea agreement. He believes that, in fact, he did nothing wrong and was not guilty of any crimes.[5/] Although Bleiweiss did not testify about what he actually *did* that resulted in his being (as he sees it) wrongfully charged, prosecuted, convicted, and imprisoned, he declared that he had "no problem with" doing so if the undersigned wanted to know. The undersigned elected to let the Division inquire about this, but the Division did not pursue the matter.

10. The result is that the only facts regarding Bleiweiss's conduct which the undersigned can consider in determining whether he committed a specified offense are those set forth above in paragraphs 3 and 4 (the "Basic Facts"). Because the Division, not Bleiweiss, has the burden of proof in this case, the adverse consequences of insufficient evidence fall on the Division.

11. The Basic Facts do not directly establish that Bleiweiss committed the crimes of false imprisonment with the specific intent to defraud the public or the Broward Sheriff's

Office of the right to receive the faithful performance of his duties as a deputy, which the Division must prove as a condition of forfeiture. There is, indeed, no persuasive direct evidence in the record of Bleiweiss's intent. Because false imprisonment is a general intent crime,[6/] moreover, the commission of this crime does not, without more, give rise to a reasonable inference of fraudulent intent.

12. Here, the Basic Facts establish, in addition to the bare elements of the crime, that Bleiweiss committed false imprisonment while dressed in uniform, carrying a gun, and driving his police car. These facts are not only consistent with the conclusion, but persuasively demonstrate (and it is found), that Bleiweiss used the power of his official position in the commission of these crimes——an additional element that the Division needed to prove. There can be little doubt that Bleiweiss's ability to detain individuals was significantly enhanced, if not dependent upon, the authority of his office, which was literally worn upon his person.

13. Fraudulent intent is another matter. This is because police officers are called upon in the proper exercise of their duties to detain or restrain persons, forcibly or by threat, against their will.[7/] The only fact that necessarily distinguishes a lawful arrest from an act of criminal false imprisonment is the presence of "lawful authority." Thus, a

police officer who makes a traffic stop without reasonable suspicion,[8/] or a warrantless arrest without probable cause,[9/] theoretically could commit the crime of false imprisonment——which, to repeat, is a general intent crime that can be committed without the intent to unlawfully detain the victim——even while intending to perform his official duties faithfully; put differently, the commission of false imprisonment is not necessarily so inconsistent with the faithful performance of a police officer's duties that the commission of the crime inevitably implies an intent to defraud on the perpetrator's part.[10/]

14. The upshot is that while there is a little more here, factually speaking, than the bare elements of false imprisonment to consider, the circumstantial evidence is yet insufficient to persuade the undersigned to find, by inference, that Bleiweiss intended to defraud the public or his employer, so as to make it appear that he was faithfully discharging his duties when he was not. On the instant record, the undersigned can only speculate that this was the case——and that is not enough.

15. The evidence is even weaker on the question of whether Bleiweiss, in committing the crime of false imprisonment, sought or obtained a profit, gain, or advantage for himself or another person, which is something else that the Division must prove. As previously discussed, the record is devoid of evidence

sufficient to establish that Bleiweiss obtained or sought a profit, gain, or advantage for himself in the form of sexual gratification or the fulfillment of some other "untoward intentions." The Division argues that Bleiweiss "gained an *advantage* over the individuals [whom he falsely imprisoned] by employing his uniform, patrol vehicle, firearm, and general status as an officer of the law who must initially be obeyed . . . ." Resp.'s PRO at 11. Such an "advantage," however, was inherent in the power, rights, privileges, and duties of Bleiweiss's position as a deputy sheriff and was something he had whenever he went to work. An advantage a public employee enjoys by virtue of the power, rights, privileges, or duties of his position cannot be the advantage realized or sought as the object of a "specified offense" as defined in section 112.3173(2)(e)6., Florida Statutes, for the obvious reason that, if it could, the "profit, gain, or advantage" element would *always* be met——and thus would be unnecessary. The Division's argument on this point must, therefore, be rejected.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

17. Article II, section 8(d) of the Florida Constitution provides as follows:

> SECTION 8: Ethics in government.--A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
>
> * * *
>
> (d) Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law.

18. Section 112.3173[11/] provides, in pertinent part:

> (1) INTENT.--It is the intent of the Legislature to implement the provisions of s. 8(d), Art. II of the State Constitution.
>
> (2) DEFINITIONS.--As used in this section, unless the context otherwise requires, the term:
>
> (a) "Conviction" and "convicted" mean an adjudication of guilt by a court of competent jurisdiction; a plea of guilty or of nolo contendere; a jury verdict of guilty when adjudication of guilt is withheld and the accused is placed on probation; or a conviction by the Senate of an impeachable offense.
>
> (b) "Court" means any state or federal court of competent jurisdiction which is exercising its jurisdiction to consider a proceeding involving the alleged commission of a specified offense.
>
> (c) "Public officer or employee" means an officer or employee of any public body, political subdivision, or public instrumentality within the state.

> (d) "Public retirement system" means any retirement system or plan to which the provisions of part VII of this chapter apply.
>
> (e) "Specified offense" means:
>
> * * *
>
> 6. The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public or the public agency for which the public officer or employee acts or in which he or she is employed of the right to receive the faithful performance of his or her duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or herself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment position.
>
> (3) FORFEITURE.--Any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his or her admitted commission, aid, or abetment of a specified offense, shall forfeit all rights and benefits under any public retirement system of which he or she is a member, except for the return of his or her accumulated contributions as of the date of termination.

19. As the party asserting that Bleiweiss's rights and benefits under the FRS are forfeit, the Division bears the burden of proof in this proceeding. Rivera v. Bd. of Trs. of Tampa's Gen. Emp't Ret. Fund, 2016 Fla. App. LEXIS 2847, at *5, 41 Fla. L. Weekly D505 (Fla. 2d DCA Feb. 26, 2016).

20. The Division maintains that each act of armed false imprisonment for which Bleiweiss was successfully prosecuted meets the "catch-all" definition of "specified offense" in section 112.3173(2)(e)6. Whether this is so "depends on the way in which the crime was committed" because, under "the plain meaning of the words used in" section 112.3173(2)(e)6., "the term "specified offense" [is defined] by the conduct of the public officer and not by the elements of the crime." Jenne v. Dep't of Mgmt. Servs., Div. of Ret., 36 So. 3d 738, 742 (Fla. 1st DCA 2010).[12/]

21. To be a "specified offense" under "section 112.3173(2)(e)6., the criminal act in question must meet all of the following elements:

> (a) [The crime is] a felony;
>
> (b) [It was] committed by a public employee;
>
> (c) [It was] done willfully and with intent to defraud the public or the employee's public employer of the right to receive the faithful performance of the employee's duty;
>
> (d) [It was] done to obtain a profit, gain or advantage for the employee or some other person; and
>
> (e) [It was] done through the use or attempted use of the power, rights, privileges, duties, or position of Appellant's employment

Bollone v. Dep't of Mgmt. Servs., 100 So. 3d 1276, 1280-81 (Fla. 1st DCA 2012).

22. The Division carried its burden with regard to elements (a), (b), and (e), as the findings of fact above make clear. As detailed above, however, the Division failed to present evidence sufficient to establish the existence of elements (c) and (d). The Division's preliminary decision is not supported by the proven facts and therefore cannot be implemented in a final order.

23. In terms of the failure of proof, this case resembles Rivera v. Board of Trustees of Tampa's General Employment Retirement Fund, supra. That case arose from the City of Tampa's decision to terminate the retirement benefits of a longtime city employee following his conviction on (after pleading guilty to) multiple counts of crimes involving unlawful sexual conduct with underage girls. The crimes clearly constituted "specified offenses" under section 112.3173(2)(e)7.——which unlike the catch-all provision implicated here focuses exclusively on sex crimes against minors——as long as the employee committed them "through the use or attempted use of power, rights, privileges, duties, or position of his or her public office or employment position." Rivera (the employee) argued on appeal that the city had "failed to introduce any proof other than inadmissible hearsay" to demonstrate the

requisite "nexus between [his] position as a City employee and his commission of the offenses." Rivera, 2016 Fla. App. LEXIS 2847 at *9.

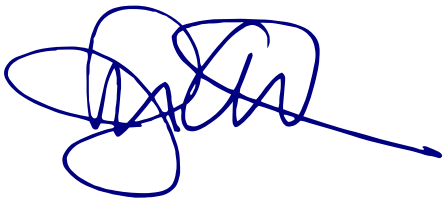
24. The court agreed. Allegedly, Rivera had used the keys provided to him as a city employee to gain access to city property where he allegedly brought his young female victims. These allegations, if proved, would have established the necessary nexus between work and crime. But (as here) none of the victims testified at hearing, and Rivera, who did, denied using city-issued keys to facilitate his criminal conduct (much as Bleiweiss denied having engaged in sex acts with his victims). Id. at *7. The city offered police reports and other records from the criminal prosecution, which contradicted Rivera's testimony, but these were plainly hearsay falling outside of any recognized exception to the hearsay rule. Id. at *11. Even the fact that Rivera had been arrested on city property in the company of an underage girl was insufficient, held the court, because although "Mr. Rivera would almost certainly have used City-issued keys to gain access to the property where he was arrested," no evidence was presented to establish that he had committed a crime *on that date*. Id. at *11-12. The court concluded that the forfeiture order was not supported by competent substantial evidence and hence had to be set aside. Id. at *12-13.

25. Here, the failure of proof does not relate to the work-crime nexus, as in Rivera, but to the elements of fraudulent intent and personal gain (neither of which are elements of the specified offense at issue in Rivera). Still, the similarities are evident. As in Rivera, the proponent of the forfeiture order has failed to present proof of what the employee actually did (in addition to that which he necessarily admitted by pleading guilty to the underlying crimes) sufficient to show that the employee was, in fact, convicted of a specified offense as alleged. Absent such proof there can be no forfeiture of benefits.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Management Services, Division of Retirement, enter a final order restoring to Bleiweiss his rights and benefits under the FRS and providing for payment to him of any past due benefits, together with interest at the statutory rate.

DONE AND ENTERED this 7th day of June, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 7th day of June, 2016.

ENDNOTES

[1/] At the same time, Bleiweiss pleaded guilty to the crimes of simple battery and stalking, both misdemeanors.

[2/] Bleiweiss was the defendant in several separate cases involving the same charges and similar alleged criminal acts.

[3/] See, e.g., Robinson v. State, 373 So. 2d 898, 902 (Fla. 1979)(guilty plea is an in-court confession that not only admits the acts charged but also is itself a conviction).

[4/] The Division argues that Bleiweiss obtained a "gain by forcing his untoward intentions upon [his victims] in the form of unwanted intentional touching and repeated, malicious harassment." Resp.'s PRO at 10. There are multiple problems with this argument, which render it unpersuasive. To begin, and to be as clear as possible, there is NO EVIDENCE IN THIS RECORD that Bleiweiss forced his "untoward intentions" upon anyone. The reference to "untoward intentions" is a transparent attempt to insinuate that Bleiweiss engaged or attempted to engage in sex acts with persons in his custody. Bleiweiss was charged

with crimes involving such despicable conduct, to be sure, and, yes, the fact of his arrest for those crimes implies that probable cause existed to believe that he had committed them. But those accusations were NEVER PROVED, either in the underlying criminal prosecutions or in this proceeding. It would be wrong, to say the least, to rescind Bleiweiss's earned retirement benefits based not upon proven facts but, with a wink and a nod, upon shocking allegations that we "just know" must be true even though we have not seen evidence of them.

Next, the "unwanted intentional touching" in question provided the grounds for convicting Bleiweiss of a separate crime, the misdemeanor offense of simple battery. As a matter of law, misdemeanor battery cannot be a "specified offense" under section 112.3173(2)(e)6., Florida Statutes, because only felonies fall within the relevant definition. The only evidence, moreover, which links the battery convictions to the false imprisonment convictions is Bleiweiss's testimony that he intentionally touched one person while committing the crime of false imprisonment, to search that person for drugs. The Division did not cross-examine Bleiweiss, however, to elicit any details as to how or where he had touched this person, or for what purpose (if not to frisk him for contraband as Bleiweiss claimed). Thus, Bleiweiss merely conceded the bare elements of simple (misdemeanor) battery, see § 784.03(1)(a), Fla. Stat., which do not require that the perpetrator touch another for personal profit, gain, or advantage. Because the record contains no persuasive evidence that Bleiweiss sought or received a benefit from committing such a battery, the "unwanted intentional touching" here cannot lawfully be a basis for forfeiture of his retirement benefits.

Finally, as for the "malicious harassment," this sort of conduct on Bleiweiss's part led to his convictions for stalking. Like simple battery, this crime is a misdemeanor, see § 784.048(2), Fla. Stat., and therefore cannot be a "specified offense" under section 112.3173(2)(e)6. Plus, there is no evidence linking the misdemeanor stalking convictions to the felony false imprisonment convictions, which means that *even if* Bleiweiss obtained some personal benefit from the criminal stalking (and just to be clear there is no evidence that he did), the commission of this misdemeanor still would not be a "specified offense." In short, while "malicious harassment" sounds bad and *is* a crime for which Bleiweiss has been incarcerated, this particular conduct is irrelevant to the instant question of whether Bleiweiss has forfeited his retirement benefits.

[5/] When Bleiweiss pleaded guilty to the crimes at issue, he simultaneously protested his innocence, entering a so-called "Alford plea." Once accepted by a court, however, "the collateral consequences flowing from an *Alford* plea are the same as those flowing from an ordinary plea of guilt," including the "intrinsic admission of each element of the crime" referred to in the plea. Troville v. State, 953 So. 2d 637, 640 n.9 (Fla. 4th DCA 2007). Thus, while Bleiweiss's insistence on his innocence is logically consistent with his Alford plea of guilt, the guilty plea is legally controlling in any event.

[6/] E.g., Delgado v. State, 71 So. 3d 54, 68 n.9 (Fla. 2011). A general intent crime makes unlawful the intentional commission of a specific voluntary act or prohibits something that is substantially certain to result from such an act, without regard to the perpetrator's subjective purpose or conscious object in doing the act. E.g., M.T.A. v. State, 182 So. 3d 689, 692 (Fla. 1st DCA 2015).

[7/] The Division argues (without supporting evidence or authority) that "[f]orcefully or secretly confining multiple individuals, for the purpose of intentionally touching them against their will, was not part of Petitioner's duties." Resp.'s PRO at 8. This statement, aside from being unsupported, is plainly untrue, on two levels. First, there is no evidence that Bleiweiss committed false imprisonment *for the purpose of* intentionally touching any person, much less multiple individuals. Bleiweiss testified that he criminally touched *one person* whom he had falsely imprisoned, for the purpose of searching that individual for drugs. As mentioned previously, the Division did not offer any evidence to rebut or contradict Bleiweiss's assertion, or even cross-examine him about it. Second, it is simply an indisputable, commonly known fact that police officers, in the proper performance of their duties, intentionally touch suspects against their will for the purposes, among others, of forcibly arresting, searching, and frisking them.

[8/] See, e.g., Hilton v. State, 961 So. 2d 284, 290 (Fla. 2007).

[9/] See, e.g., Mathis v. Coats, 24 So. 3d 1284, 1288 (Fla. 2d DCA 2010).

[10/] That said, the undersigned recognizes that false imprisonment by a police officer is conduct which is consistent with an intention to defraud the public of the right to receive the officer's faithful performance. The point above is that

such conduct is equally consistent with other intentions besides the intent to defraud, which weakens the inferences that might reasonably be drawn from proof of such conduct.

[11/] The applicable version of the forfeiture statute is the one that was in effect on the date of the criminal acts. See Warshaw v. City of Miami Firefighters' & Police Officers' Ret. Trust, 885 So. 2d 892, 895 n.7 (Fla. 3rd DCA 2004)(Cope, J., dissenting). Section 112.3173 has not been amended in relevant part during the years since Bleiweiss committed his crimes.

[12/] Because the relevant statutory provisions are clear and unambiguous, there is neither need nor room for interpretation of them. Thus, the Division's invocation of the deference doctrine is misplaced. See Resp.'s PRO at 7. Even if the statute were ambiguous, however, administrative law judges (unlike courts) are under no obligation to defer to an agency's interpretation of any statute or rule, nor should they, given that de novo administrative hearings (unlike judicial proceedings conducted under the constitutional powers of a separate governmental branch) "are designed to give affected parties an opportunity to change the agency's mind." E.g., Couch Constr. Co. v. Dep't of Transp., 361 So. 2d 172, 176 (Fla. 1st DCA 1978). Would an agency to whose legal opinions every judge must yield really be likely to keep an open mind about the correctness of its decisions? The undersigned doesn't think so either. See, e.g., The Public Health Trust of Miami-Dade Cnty. v. Dep't of Health, Case No. 15-3171, 2016 Fla. Div. Adm. Hear. LEXIS 102, 82-85 (Fla. DOAH Feb. 29, 2016).

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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.