

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JESSICA ALEX,

Petitioner,

vs.

Case No. 16-1384EXE

AGENCY FOR PERSONS WITH
DISABILITIES,

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 July 20, 2016, by video teleconference sites in Tallahassee and Orlando, Florida.

APPEARANCES

For Petitioner: Jessica Alex, pro se
2615 Corsini Lane
Kissimmee, Florida 34746

For Respondent: Jeannette L. Estes, Esquire
Agency for Persons with Disabilities
Suite 422
200 North Kentucky Avenue
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STATEMENT OF THE ISSUES

The issues in this matter are whether Petitioner has shown, by clear and convincing evidence, that she is rehabilitated from

her disqualifying offense; and, if so, whether Respondent's denial of Petitioner's request for an exemption from disqualification constitutes an abuse of discretion.

PRELIMINARY STATEMENT

Respondent, Agency for Persons with Disabilities (the "Agency"), by correspondence dated February 4, 2016, notified Petitioner, Jessica Alex ("Petitioner"), that it denied her request for an exemption from disqualification pursuant to section 435.07, Florida Statutes.

Petitioner timely requested an administrative hearing challenging the Agency's decision. The Agency referred the matter to the Division of Administrative Hearings ("DOAH") to conduct a hearing pursuant to sections 120.569 and 120.57(1).

The final hearing was conducted on July 20, 2016. Petitioner testified on her own behalf and presented the testimony of Leroy Youmans. The Agency presented the testimony of Michael Sauvé, Deputy Regional Operations Manager. Agency Exhibits 1 through 6 were admitted into evidence.

A court reporter recorded the final hearing. Neither party ordered a transcript. Both parties filed post-hearing submittals which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner seeks employment as a direct service provider for persons with developmental disabilities. Petitioner desires

to work with Central Florida Group Homes, a residential service provider the Agency regulates.

2. The Agency is the state agency responsible for regulating the employment of direct service providers. See §§ 110.1127(2)(c)1. and 393.0655(1), Fla. Stat. A "direct service provider" is a person who has direct contact with and provides services to Agency clients. See § 393.063(11), Fla. Stat.

3. Agency clients are a vulnerable population consisting of those persons who are eligible for services and support for developmental disabilities. See § 393.063, Fla. Stat. Agency clients often have severe deficits in their ability to complete self-care tasks and communicate their needs and wants. Without Agency services, these clients would require institutionalization.

4. Agency clients are at a heightened risk of abuse, exploitation, and neglect because of their developmental disabilities and inability to self-preserve. Consequently, employment as a direct service provider is regarded as a position of special trust.

5. To qualify as a direct service provider, Petitioner must comply with the employment screening requirement established in chapter 435. See § 393.0655(1), Fla. Stat. The Agency relies on the Department of Children and Families, Background Screening Unit (the "Department"), to initially receive and screen requests for

exemption from individuals seeking employment as direct service providers.

6. On or around September 15, 2015, Petitioner submitted a Request for Exemption including an Exemption Questionnaire, various criminal records, character references, and other supporting documentation (the "Exemption Packet") to the Department. The Department forwarded Petitioner's Exemption Packet to the Agency for review.

7. Petitioner's background screening revealed a criminal offense. In September 2005, Petitioner committed the disqualifying offense of Failure to Return Leased Property, a felony of the third degree in violation of section 812.155(3), Florida Statute (2005). Petitioner pled guilty to the crime. The court withheld adjudication. Petitioner was given a suspended jail sentence conditioned upon payment of fines and court costs.

8. At the final hearing, the Agency also produced evidence of three "non-disqualifying offenses" Petitioner committed subsequent to her 2005 disqualifying offense. These non-disqualifying offenses include: an arrest for simple battery in June 2008 (a violation of section 784.03, Florida Statute (2008)); an arrest for criminal mischief in August 2008 (a violation of section 806.13, Florida Statute (2008)); and an arrest in Virginia in June 2010 for fraudulently attempting to sell a car without written consent of the owner (a violation of section 18-2.115,

Code of Virginia, which is similar to section 818.01, Florida Statutes (2010), disposing of personal property under lien).

9. In accordance with section 435.04(2), Petitioner's guilty plea to a felony in violation of section 812.155(3) disqualified her from working as a direct service provider for persons with developmental disabilities. Consequently, in order to be employed in such a capacity, Petitioner submitted to the Agency her request for exemption from her disqualifying offense as provided in section 435.07.

10. On February 4, 2016, the Agency issued a letter notifying Petitioner that it denied her Request for Exemption. The Agency denied Petitioner's application because it did not believe she submitted clear and convincing evidence of her rehabilitation.

11. At the final hearing, Petitioner testified on her own behalf. Petitioner stated that she has a passion for helping people with special needs. She believes her calling is to help people. Petitioner expressed her desire to open a group home for disabled individuals.

12. Regarding her 2005 disqualifying offense, Petitioner testified that this crime involved furniture she had rented from a company called Color Tyme. Petitioner asserted that she paid the furniture off early. Color Tyme, however, never updated its computer system to credit her account. Petitioner explained that

because of her busy work schedule, she had difficulty finding time to settle the dispute with the store. Before she could contact the store to discuss the account, a store manager had forwarded the matter to the state attorney for charges. According to Petitioner, she resolved the issue directly with Color Tyme, and the store did not want to press charges. However, the state attorney had already issued a warrant for her arrest. Therefore, it was too late to stop the criminal proceedings. Consequently, Petitioner pled guilty to the charge because she was afraid of jeopardizing her job, and the judge advised her the offense would not "show on her record or hinder [her] in the future."

13. At the final hearing, the Agency produced two previous requests for exemption that Petitioner submitted in 2006 and 2013. The Agency pointed out that Petitioner presented slightly varying accounts of the circumstances surrounding her failure to return leased property. In the 2006 application, Petitioner wrote that the situation was a "big misunderstanding." Petitioner stated that she was behind in her payments due to a bad car accident. Petitioner contacted Color Tyme and made arrangements to pay the remaining amount due. However, by the time she presented her payment to Color Tyme, the store had already referred her account to the State Attorney's Office, and the arrest warrant had been issued.

14. In her 2013 Request for Exemption, Petitioner wrote that she had already paid for the furniture in full prior to Color Tyme forwarding the matter to the state attorney.

15. Regarding her non-disqualifying offenses, Petitioner explained that her 2008 arrest for battery resulted from an argument with her (future) husband, Leroy Youmans. At the time of the incident, Petitioner and Mr. Youmans were not married. However, she was pregnant with their first child, which made her more emotional. The argument escalated to the point where Petitioner asked Mr. Youmans to leave her home. The two briefly tussled over the keys to Petitioner's car. Mr. Youmans prevailed and drove away. Petitioner pursued him in her other car. At some point, law enforcement corralled the two vehicles and confronted Petitioner and Mr. Youmans. The police report indicated that the officer observed "a lump on the left side of [Mr. Youmans'] forehead." Petitioner was arrested and charged with simple battery. The State Attorney's Office, however, did not prosecute Petitioner because the victim (Mr. Youmans) did not wish to cooperate with the prosecution.

16. At the final hearing, Petitioner disputed the police report's statement that she had injured Mr. Youmans. Petitioner explained that Mr. Youmans might have been harmed at his work the night before when he was required to "take down" an individual. Alternatively, Petitioner expressed that her husband's head is

"just shaped like that. . . . He just has a funny-shaped head. It looks like he has a lump on it."

17. At the final hearing, Mr. Youmans testified on Petitioner's behalf. Mr. Youmans conceded that he and Petitioner had a heated exchange that night, and she was acting "wild." However, he asserted that she did not cause the bump on his head. Mr. Youmans agreed with Petitioner that his head is naturally "lumpy." On the other hand, he relayed that Petitioner did accidentally scratch his face above his eyebrow with the car keys, which drew blood.

18. Regarding her 2008 criminal mischief arrest, Petitioner stated that she was falsely accused of slashing a woman's tires. Petitioner explained that she did not get along with the other woman. The woman, together with a co-worker, contacted the police and fabricated a story that Petitioner was seen vandalizing the woman's car. The witness identified Petitioner as the perpetrator in a photo line-up at the police station. Petitioner was arrested and charged with criminal mischief. Petitioner denied any involvement. She asserted that she was not present when the car was damaged, and the woman and the witness were lying. The State Attorney did not proceed with prosecution due to "witness problems."

19. Regarding the 2010 arrest in Virginia for fraudulent sale of a vehicle, Petitioner explained that when she was living

in Virginia, she purchased a car at a "buy here, pay here" car dealership. Several months later, she decided to move back to Florida and take the car with her. Following her move, Petitioner fell behind on her payments, and the dealership was upset that she had taken the car out of the state. A warrant was issued for her arrest for allegedly attempting to sell a vehicle without the lienholder's consent. She stated that she contacted the dealership and made arrangements to return the car to Virginia and then turn herself in. Petitioner was arrested, but the charges were subsequently dropped.

20. In expressing that she has rehabilitated from her disqualifying offense, Petitioner represented that she takes full responsibility for her past and is trying to move forward. Petitioner asserted that her crime did not harm or injure any victims, and she has never abused anyone in her care. Furthermore, she has had no involvement with law enforcement since 2010.

21. Petitioner also testified that there are no current stressors in her life. Petitioner has not voluntarily sought counselling because no court has ordered her to obtain counselling, and she does not feel like she needs it. Instead, she relies on her family and her faith for guidance and support. Petitioner and her husband participate in ongoing pastoral counseling. In addition, as a wife and a mother, she feels

responsible for being a positive role model. Petitioner has had a stable work history since her disqualifying offense.

22. Mr. Youmans also proclaimed that Petitioner has grown since her criminal offenses. He declared that Petitioner's true character is not what is reflected in the criminal paperwork. Petitioner is very trustworthy, and her heart is pure.

23. Petitioner provided two letters of reference attesting to her good character. The letters were written by persons who have known Petitioner for several years. The letters described Petitioner as dedicated, dependable, hardworking, and kind.

24. At the final hearing, the Agency presented the testimony of Michael Sauvé, Deputy Regional Operations Manager for the Central Region. Mr. Sauvé oversees all services to persons with developmental disabilities in his jurisdiction. Mr. Sauvé's responsibilities include reviewing all requests for exemption from disqualifying offenses submitted in his region. Mr. Sauvé personally reviewed Petitioner's Request for Exemption.

25. Mr. Sauvé described the Agency's process for reviewing exemption requests. The Agency examines the disqualifying offense, the circumstances surrounding the offense, the nature of the harm caused to any victim, the applicant's history since the incident, and the passage of time since the disqualifying incident. In addition, the Agency considers whether the applicant accepts responsibility for the criminal offense, whether the

applicant expresses remorse, and any other evidence indicating that the applicant will not present a danger if employment is allowed.

26. Mr. Sauvé explained that many tasks direct service providers offer Agency clients involve financial, medical, and social necessities. Most Agency clients do not have a voice. Consequently, direct service providers must not exhibit a propensity toward anger and must be extremely aware of their responsibilities. Therefore, the Agency must ensure that direct service providers are detail-oriented and trustworthy. When considering a request for an exemption, the Agency weighs the benefit of the prospective employee against the risk of endangerment to its clients.

27. Regarding Petitioner's application, Mr. Sauvé testified that the Agency distrusted Petitioner's expression of remorse. Mr. Sauvé also opined that Petitioner's acceptance of responsibility for her criminal history did not appear genuine as she minimized any wrongdoing and redirected the blame elsewhere. In addition to Petitioner's 2015 Exemption Packet, the Agency reviewed Petitioner's statements from her prior request for exemptions submitted to the Agency in 2006 and 2013. As detailed above, the Agency noted several inconsistencies in Petitioner's multiple descriptions of the circumstances surrounding her failure to return the leased property. Specifically, Mr. Sauvé commented

that while Petitioner's accounts in 2013 and 2015 appear somewhat similar, the 2006 account (the account most contemporaneous to the event) differed from both. In 2006, Petitioner wrote that she had not paid for the furniture prior to the time the store referred the matter to the State Attorney. She also indicated that a car accident and her temporary unemployment caused her to fall behind in her payments. Further, Petitioner explained that the payment issue was a "big misunderstanding." In 2013 and 2015, Petitioner indicated that the store's mistake caused the dispute. Consequently, Mr. Sauvé was concerned with whether Petitioner was being fully truthful.

28. Mr. Sauvé also commented that just because Florida and Virginia authorities decided not to prosecute Petitioner for her three non-disqualifying offenses did not mean that Petitioner was innocent of the alleged crimes. Petitioner's repeated run-ins with law enforcement reflected a pattern of poor judgment and a propensity toward angry reactions. Further, the inconsistencies in Petitioner's descriptions of the circumstances surrounding the criminal offenses were troubling. To grant an exemption request, the Agency must consider all factors that might place Agency clients at risk. In Petitioner's case, Mr. Sauvé questioned Petitioner's character, honesty, trustworthiness, and fitness to provide services to the vulnerable individuals for which the Agency is responsible.

29. In addition to the criminal offense information, the Agency also examined Petitioner's driving record. Mr. Sauvé advised that a direct service provider will often be tasked to transport clients. Mr. Sauvé noted that Petitioner's driving record reflects a number of moving and non-moving violations since the disqualifying offense. He commented that this record also shows a pattern of questionable judgment by Petitioner.

30. Upon careful consideration of the evidence in the record, the undersigned finds that Petitioner has not demonstrated, by clear and convincing evidence, that she is rehabilitated from her disqualifying offense. While Petitioner has not been convicted of any crimes since 2005, her repeated encounters with law enforcement and the justice system raise serious concerns, and some hesitancy, in finding that she has sufficiently established that she should be employed in a position of special trust with persons with developmental disabilities. Despite the fact that Petitioner's disqualifying and non-disqualifying offenses did not involve abuse or harm to another person, they do demonstrate a failure to exercise good judgment and responsibility that cannot be discounted.

31. Therefore, based on the evidence set forth, Petitioner has not met her burden of demonstrating that she has rehabilitated from her past disqualifying offense or proven that

the Agency should grant her request for exemption from disqualification under sections 393.0655 and 435.07.

CONCLUSIONS OF LAW

32. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 393.0655(4), Florida Statutes.

33. To be employed as a direct service provider for persons with developmental disabilities, Petitioner must comply with certain background screening requirements. As explained in section 393.0655:

(1) MINIMUM STANDARDS.—The agency shall require level 2 employment screening pursuant to chapter 435 for direct service providers who are unrelated to their clients, including support coordinators, and managers and supervisors of residential facilities or comprehensive transitional education programs licensed under this chapter and any other person, including volunteers, who provide care or services, who have access to a client's living areas, or who have access to a client's funds or personal property. Background screening shall include employment history checks as provided in s. 435.03(1) and local criminal records checks through local law enforcement agencies.

* * *

(2) EXEMPTIONS FROM DISQUALIFICATION.—The agency may grant exemptions from disqualification from working with children or adults with developmental disabilities only as provided in s. 435.07.

34. Section 435.04 establishes the level 2 screening standard and states, in pertinent part:

(1) (a) All employees required by law to be screened pursuant to this section must undergo security background investigations as a condition of employment and continued employment which includes, but need not be limited to, fingerprinting for statewide criminal history records checks through the Department of Law Enforcement, and national criminal history records checks through the Federal Bureau of Investigation, and may include local criminal records checks through local law enforcement agencies.

* * *

(2) The security background investigations under this section must ensure that no persons subject to the provisions of this section have been arrested for and are awaiting final disposition of, have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have been adjudicated delinquent and the record has not been sealed or expunged for, any offense prohibited under any of the following provisions of state law or similar law of another jurisdiction:

* * *

(cc) Chapter 812, relating to theft, robbery, and related crimes, if the offense is a felony.

35. Petitioner's criminal history includes a plea of guilty to a charge of failure to return leased property, a third-degree felony in violation of section 812.155(3). Accordingly, Petitioner's 2005 criminal offense is a "disqualifying offense" that prevents her from working as a direct service provider.

Therefore, if Petitioner desires to work with children or adults with developmental disabilities, she must seek an exemption from her disqualifying offense from the Agency under section 435.07. See § 393.0655(2), Fla. Stat.

36. Pursuant to section 435.07(1)(a)1., Petitioner is eligible to seek an exemption from disqualification "for which at least 3 years have elapsed since the applicant for the exemption has completed or been lawfully released from confinement, supervision, or nonmonetary condition imposed by the court for the disqualifying felony." An individual seeking an exemption "must demonstrate by clear and convincing evidence that the employee should not be disqualified from employment." Section 435.07(3)(a) further states that the individual bears "the burden of setting forth clear and convincing evidence of rehabilitation." Section 435.07 states, in pertinent part:

Exemptions from disqualification.—Unless otherwise provided by law, the provisions of this section apply to exemptions from disqualification for disqualifying offenses revealed pursuant to background screenings required under this chapter, regardless of whether those disqualifying offenses are listed in this chapter or other laws.

(1)(a) The head of the appropriate agency may grant to any employee otherwise disqualified from employment an exemption from disqualification for:

1. Felonies for which at least 3 years have elapsed since the applicant for the exemption has completed or been lawfully released from

confinement, supervision, or nonmonetary condition imposed by the court for the disqualifying felony[.]

* * *

For the purposes of this subsection, the term "felonies" means both felonies prohibited under any of the statutes cited in this chapter or under similar statutes of other jurisdictions.

* * *

(3) (a) In order for the head of an agency to grant an exemption to any employee, the employee must demonstrate by clear and convincing evidence that the employee should not be disqualified from employment. Employees seeking an exemption have the burden of setting forth clear and convincing evidence of rehabilitation, including, but not limited to, the circumstances surrounding the criminal incident for which an exemption is sought, the time period that has elapsed since the incident, the nature of the harm caused to the victim, and the history of the employee since the incident, or any other evidence or circumstances indicating that the employee will not present a danger if employment or continued employment is allowed.

(b) The agency may consider as part of its deliberations of the employee's rehabilitation the fact that the employee has, subsequent to the conviction for the disqualifying offense for which the exemption is being sought, been arrested for or convicted of another crime, even if that crime is not a disqualifying offense.

(c) The decision of the head of an agency regarding an exemption may be contested through the hearing procedures set forth in chapter 120. The standard of review by the administrative law judge is whether the

agency's intended action is an abuse of discretion.

37. In reviewing a request for exemption from disqualification, the Administrative Law Judge ("ALJ") is charged with making the factual determination whether, based on the evidence adduced in a de novo hearing conducted pursuant to section 120.57(1), the Petitioner has shown rehabilitation by clear and convincing evidence. See § 435.07(3)(a), Fla. Stat.

38. Clear and convincing evidence is a heightened standard that requires more proof than a mere preponderance of the evidence. Clear and convincing evidence requires that the evidence "must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts at issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

39. If the ALJ finds that Petitioner has met her burden of proving rehabilitation by clear and convincing evidence, the ALJ also determines whether the Agency head's intended action to deny Petitioner's request for exemption constitutes an abuse of

discretion. J.D. v. Dep't of Child. and Fams., 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013); § 435.07(3)(c), Fla. Stat.

40. An agency abuses its discretion "when the . . . action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); See also J.D. v. Dep't of Child. and Fams., 114 So. 3d at 1130 (stating that under the abuse of discretion standard, "[i]f reasonable men could differ as to the propriety of the action taken by the [lower tribunal], then the action is not unreasonable and there can be no finding of an abuse of discretion."). Therefore, if reasonable persons could differ as to the appropriateness of the Agency's decision to deny Petitioner's request for an exemption, the Agency's decision is not unreasonable and, thus, not an abuse of discretion.

41. In determining the ultimate legal issue of whether the agency head's action was an "abuse of discretion," the ALJ is to evaluate that question based on the facts determined from the evidence presented at the de novo, chapter 120 hearing. However, even if the ALJ determines that the agency head's proposed action constitutes an abuse of discretion, the agency is not bound by the ALJ's determination, although the agency's review is

circumscribed by the standards in section 120.57(1)(1). J.D. v. Dep't of Child. and Fams., 114 So. 3d at 1132, 1133.

42. As discussed above, the undersigned determines that Petitioner did not meet her burden of proving, by clear and convincing evidence, that she is rehabilitated from her 2005 disqualifying offense for failure to return leased property. Based on her testimony at the final hearing, Petitioner appears genuine in her attempt to move forward with her life. The undersigned also acknowledges how Petitioner's repeated attempts to obtain an exemption reveal her desire and passion to help those in need.

43. However, for evidence of rehabilitation to rise to the level of clear and convincing, one would expect to see how Petitioner has taken steps to address and correct the behavior that led to her disqualifying offense. In this case, however, instead of staying away from the court system, Petitioner has repeatedly found herself arrested and contesting criminal allegations. Consequently, Petitioner did not set forth sufficient evidence to create in the mind of the undersigned a firm belief, without hesitancy, that the Agency should allow her to be employed as a direct service provider.

44. It is further determined, based on the record evidence, that a "reasonable person" could have reached the Agency's conclusion that Petitioner's Request for Exemption should be

denied. In determining whether an applicant has set forth clear and convincing evidence of rehabilitation, the agency head is to consider matters such as "the circumstances surrounding the criminal incident for which an exemption is sought, the time period that has elapsed since the incident, the nature of the harm caused to the victim, and the history of the employee since the incident, or any other evidence or circumstances indicating that the employee will not present a danger if employment or continued employment is allowed." § 435.07(3)(a), Fla. Stat. In addition, the agency head may consider whether the applicant has been arrested for another crime subsequent to the conviction for the disqualifying offense for which the exemption is being sought, even if the new crime is not a disqualifying offense. § 435.07(3)(b), Fla. Stat.

45. The Agency recognized that Petitioner was not convicted for the three non-disqualifying offenses following her 2005 felony plea. (The charges were dropped in each case.) Section 435.07(3)(b), however, specifically authorizes the agency head to take into account arrests (without convictions) in deliberating whether an applicant is rehabilitated. This provision indicates that the Agency may consider the circumstances surrounding the arrests in determining whether the applicant would present a danger if employed in a position of special trust.

46. The Agency testified that Petitioner's repeated encounters with law enforcement caused it to doubt Petitioner's judgment and general fitness for providing services and support for Agency clients. The undersigned finds that a "reasonable person" could take the Agency's position that Petitioner has not shown sufficient rehabilitation to alleviate the Agency's concerns for the possible risk she may pose to those vulnerable individuals the Agency serves.

47. Therefore, the Agency's conclusion that Petitioner has not achieved sufficient rehabilitation is not unreasonable, and the Agency's action in denying Petitioner's request for exemption from disqualification does not constitute an abuse of discretion. Accordingly, the Agency's denial of Petitioner's request for exemption from disqualification should be upheld.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Agency for Persons with Disabilities, enter a final order denying Petitioner's request for an exemption from disqualification from employment.

DONE AND ENTERED this 18th day of August, 2016, in
Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
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Filed with the Clerk of the
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this 18th day of August, 2016.

ENDNOTE

^{1/} All statutory references are to the 2016 Florida Statutes,
unless otherwise noted.

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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.