

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,

Petitioner,

DOAH Case No. 16-6385
Judge: John G. Van Laningham

vs.

JOSE LOPEZ,

Respondent.
_____ /

FINAL ORDER

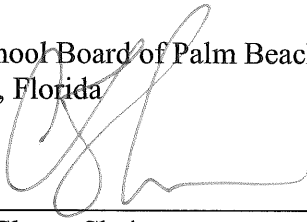
THIS CAUSE, came before The School Board of Palm Beach County, Florida (hereinafter referred to as "SCHOOL BOARD") pursuant to §120.569 and §120.57, Fla. Stat., after an administrative hearing was conducted before the Honorable John G. Van Laningham on January 9, 2017. The Recommended Order was entered by the Honorable John G. Van Laningham on March 16, 2017, recommending that a final order be entered by the Palm Beach County School Board exonerating Jose Lopez of all charges brought against him in this proceeding. Neither party filed exceptions to the Recommended Order.

IT IS ORDERED AND ADJUDGED as follows:

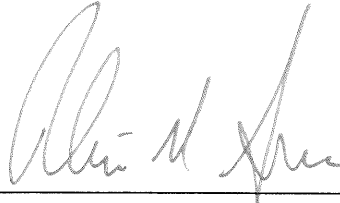
1. That the Board has jurisdiction of this matter pursuant to §120.57, Fla. Stat.
2. That the Board hereby accepts and approves the findings, conclusion and recommendations of the Recommended Order dated March 16, 2017, a copy of which is attached hereto and incorporated herein by reference in its entirety.
4. That this Final Order shall take effect upon being filed with the Clerk of the SCHOOL BOARD.

DONE and ORDERED this 5th day of May, 2017.

The School Board of Palm Beach
County, Florida



Chuck Shaw, Chairman

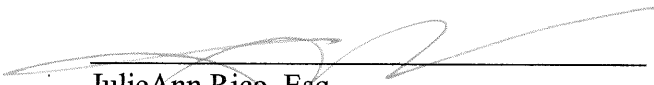


Robert M. Avossa, Ed.D., Superintendent

NOTICE OF RIGHT TO JUDICIAL REVIEW

This Final Order constitutes final agency action. Any party who is adversely affected by this Final Order has the right to seek judicial review of the Final Order pursuant to Section 120.68, Fla. Stat. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the agency clerk of The School Board of Palm Beach County, Florida, and a second copy, accompanied by appropriate filing fees as prescribed by law, with Fourth District Court of Appeals, or with the District Court of Appeal in the Appellate District, where the party resides, if applicable. The notice of appeal must be filed within thirty (30) days of rendition of the Order to be reviewed.

Respectfully submitted this 5th day of May, 2017.




JulieAnn Rico, Esq.
General Counsel for The School Board
of Palm Beach County, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished via U.S. Mail and email to Dedrick D. Straghn, Esq., Dedrick D. Straghn Attorney & Counselor at Law, 26 Southwest 5th Avenue, Delray Beach, FL 33444, email: dstraghn@yahoo.com this May day of ~~April~~, 2017.

THE SCHOOL BOARD OF PALM
BEACH COUNTY, FLORIDA
JulieAnn Rico, Esq.
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3300 Forest Hill Boulevard, Suite C-323
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By: 

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 16-6385

JOSE LOPEZ,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on January 9, 2017, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Helene Kalvin Baxter, Esquire
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For Respondent: Dedrick D. Straghn, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether, as the district school board alleges, Respondent got into a scuffle with a student;

and, if so, whether such conduct constitutes just cause for Petitioner's dismissing Respondent from his position as a bus driver.

PRELIMINARY STATEMENT

At its regular meeting on October 19, 2016, Petitioner Palm Beach County School Board voted to approve the superintendent's recommendation that Respondent José Lopez be terminated from his employment as a school bus driver. The reasons for this action had been spelled out in an Amended Notice of Recommendation for Termination of Employment dated October 10, 2016. In that charging document, Mr. Lopez is accused of having engaged in a physical altercation with a student on March 9, 2016.

Mr. Lopez timely requested a formal administrative hearing to contest Petitioner's intended action. Shortly thereafter, Petitioner forwarded the matter to the Division of Administrative Hearings, which opened a file on October 31, 2016.

At the final hearing, which took place on January 9, 2017, Petitioner called the following witnesses: Mr. Lopez, Pamela Ambrose, Dr. Demetrius Permenter, Michael Clark, Dr. Elvis Epps, and Sue Gorby. Petitioner's Exhibits 1, 3A, 3B, 7, 8, 12, 13, 14, 17, 19, 20, 24, 25A, 25B, 26, and 27 were admitted into evidence.

Respondent testified on his own behalf and did not offer any exhibits.

The final hearing transcript, comprising three volumes, was filed on February 21, 2017. Each party timely filed a Proposed Recommended Order on March 3, 2017, the deadline established at the conclusion of the hearing.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2016, except that all references to statutes or rules defining disciplinable offenses or prescribing penalties for committing such offenses are to the versions that were in effect at the time of the alleged wrongful acts.

FINDINGS OF FACT

1. The Palm Beach County School Board ("School Board" or "District"), Petitioner in this case, is the constitutional entity authorized to operate, control, and supervise the Palm Beach County Public School System.

2. At all relevant times and as of the final hearing, the District employed Respondent José Lopez ("Lopez") as a bus driver, a position he has held since 2008.

3. The events in dispute occurred on the afternoon of March 9, 2016. At the time, Lopez was working as a "spare driver," meaning that, instead of being assigned to a regular route, he drove to different locations as needed. This

particular afternoon, the dispatcher directed Lopez to make a late pickup at Forest Hill Community High School ("Forest Hill") in West Palm Beach because the regular driver's bus had broken down. Lopez had some trepidation about accepting this assignment because he was familiar with the route in question and considered it dangerous due to the behavior of the students. Nevertheless, he proceeded to Forest Hill as instructed.

4. The bus was behind schedule when Lopez arrived at the school, through no fault of his. The other busses already had pulled away, and the students waiting for Lopez's bus were standing in the road (or "bus loop" as it is called). As the bus pulled up, some students began running beside it, creating a potentially dangerous situation. The administrator on bus duty, Dr. Demetrius Permenter, ordered Lopez to drive around the loop again, so that he could get the students out of the road and under control. Lopez complied.

5. On his second approach, Lopez parked the bus and opened the side-entry double doors, which are located at the front of the bus, opposite the driver (to his right when driving). The students jostled and pushed each other as they rushed to board the bus. Again fearing that someone might get hurt, Dr. Permenter told the students to stop boarding and—to prevent others from entering—instructed Lopez to close the doors. Lopez complied. As the doors closed, students continued to dash

in, disobeying Dr. Permenter. The last student to board the bus was Michael Clark, then 17 years old.

6. Although he had bolted inside the bus at the last second, Michael could not proceed to a seat because his arm (or the arm of his jacket) got caught between the doors as they shut, trapping him at the bottom of the interior steps. Fortunately, Michael was not hurt, which was obvious to everyone around, for he began to laugh at the somewhat comical position he had placed himself in. Others, including Dr. Permenter, chuckled too, and Lopez raised his hands, palms forward, in an exaggerated gesture of mock exasperation, before opening the doors, freeing Michael. All told, the student was stuck for about five seconds.

7. To this point, the atmosphere had been one of energetic merriment. The students had been excited, boisterous, and generally in high spirits. But suddenly, the mood changed. As Michael climbed the steps onto the bus, he angrily demanded to know why his arm had been stuck "in the damn door so fucking long."

8. Dr. Permenter clearly heard this disrespectful outburst and knew immediately that "some[thing] was going on." Tr. 96. Lopez thought, "Something is coming. I don't wanna do it." Tr. 335. At hearing, Dr. Permenter testified that Michael's statement could have been perceived as aggressive, Tr. 108, but

he did not view it that way at the time, perhaps, in part, because he could not see Michael's face. Tr. 132.

9. Lopez rose from his seat. Although Michael's belligerent query had not been overtly threatening, it carried an unmistakable whiff of menace—enough, clearly, to put a reasonable person on guard. Sitting behind the wheel placed Lopez in a vulnerable position vis-à-vis Michael. Therefore, rising to his feet sensibly increased Lopez's options for fight or flight, should it come to that, and reduced the risk that he would be set upon by an attacker looming over him, raining down blows. In sum, because Michael had addressed Lopez, not as an authority figure, but (at best) as a peer and possibly as prey, Lopez's decision to stand was reasonable under the circumstances.

10. Lopez, who had stood up next to the right edge of the driver's seat, turned to his right to face Michael, who was drawing near, and asked, "What's your problem, man?" In the blink of an eye, the two began to tussle. The question at the heart of this dispute is: Who initiated the physical altercation? The District alleges that Lopez panicked and lashed out at a student merely for using foul language.^{1/} Lopez claims that he acted reasonably in self-defense after Michael attacked him.

11. Accounts of the next few relevant moments differ sharply, which is par for the course. What is worse, from the fact-finder's perspective, is the thinness of the evidence. The two protagonists were the only witnesses at hearing having personal knowledge of all the relevant facts, and both were relatively inarticulate; they each gave testimony that was neither precise nor explicit. The other eyewitness, Dr. Permenter, described the events with admirable precision, as far as his testimony went, but he did not see everything and could not say whether Lopez or Michael had been the aggressor.

12. Then there are the two surveillance videos ("3A" and "3B"), which together amount to a virtual witness who "testifies" through the sound and images recorded by the cameras mounted on the bus. Yet, while the video evidence is both captivating and seemingly unbiased, it is a mistake to assume casually that the assertive narrative of any given video is objective and unambiguous, for rarely is that true, if ever. Viewers of filmic evidence, including the undersigned, do not somehow become eyewitnesses to past events, for video merely represents, imperfectly, the real events captured on camera. Of necessity, each member of the audience projects onto the images his or her own interpretation of the scenes depicted. As the fact-finder, the undersigned must determine the significance, meaning, and story of the images preserved in videos 3A and 3B

based upon a critical review of the films in conjunction with a careful consideration of all the available evidence.

13. Michael testified that after Lopez stood up, he (Lopez) reached for Michael's neck, which initiated the tussle. Video 3A persuasively rebuts Michael's testimony in this regard. Lopez clearly did not reach for Michael's neck—not right away, anyway. Unfortunately for purposes of this case, however, video 3A does not persuasively describe the entire event, as a result of the static position of the camera.

14. Video 3A was shot by a camera mounted at the front of the bus, over the driver's left shoulder (as he faces forward). The angle of the shot gives the viewer the perspective of looking down, from the left side of the bus, onto the front inside area of the vehicle, which encompasses the driver's seat (closest to the camera); the landing at the head of the center aisle, onto which passengers step after ascending the front steps inside the vehicle; the first few rows of passenger seats; and the side-entry double doors located to the driver's right. The disputed event took place largely within sight of this camera.

15. A major drawback of video 3A is that when Lopez stood up, his body got between the camera and Michael, giving us a good shot of Lopez's back, but blocking our view of Michael.

Thus, we cannot observe which one made the first physical contact.

16. Despite its limitations, video 3A provides much useful information. As mentioned, there is a landing at the head of the center aisle, which is adjacent to the driver's seat. The center aisle is bordered by silver edging trim (also known as transition strips). The passenger seats and the driver's seat are outside these strips. When Lopez stood and turned to face Michael (as Michael climbed the steps and approached), the driver planted his feet mostly on "his" side of the edging trim; only the toes of his shoes touched the landing. Next to his right foot was a waste basket located on the driver's side of the trim, near the driver's seat. Lopez's calves were quite close to his seat. Simply put, when Lopez stood and faced Michael, he occupied his work station. It was Michael who walked across the landing and got into Lopez's face, while Lopez was standing—literally—in his own personal space.

17. Facing each other, the two briefly exchanged words, but the evidence is insufficient to permit the undersigned to make a finding as to what was said. During this short verbal encounter, Lopez's arms remained at his side. Also, Lopez's feet stayed on his side of the driver's area. It should be understood that, at this moment, Lopez was basically standing his ground, for he was effectively trapped. Unlike Michael, who

had the freedom to exit the bus or proceed down the aisle via unobstructed paths, Lopez could not escape except by getting past Michael. For Lopez, retreat meant falling back into his driver's seat, which would have put him at a disadvantage.

18. Video 3A shows that, as the two talked, Lopez abruptly stepped sideways and *backwards* on his right foot, which bumped into the waste basket. Lopez appears to be *reacting* to something, and has perhaps been knocked off balance, but Michael's actions cannot be made out because Lopez's body is in the way. After regaining his footing, Lopez reached forward with his right hand while leaning slightly to the right, as if he were going to embrace Michael, and took a step forward with his left foot, raising his left hand towards Michael's waist in a motion that, again, looks like the start of a hug, except that Michael's right arm would have been pinned against his body had Lopez succeeded in getting his arm around the student.

19. Simultaneously, Michael slipped his left hand under Lopez's right arm and grabbed the driver's left shoulder, while using his right hand to take hold of Lopez's left shirt collar. Here, Michael clearly went on the offensive, driving Lopez forcefully back and pushing him into the driver's seat. Lopez got back to his feet, and Michael slammed him hard into the steering wheel and driver's seat. Lopez used his arms in an

attempt to protect himself, but Michael began to overpower the driver.

20. At about this time, Dr. Permenter entered the bus, and he reached out immediately to restrain Michael. At the same time, Lopez bounced up and managed to push Michael back a step or two, reaching unsuccessfully for his neck. At hearing, Dr. Permenter recalled that Michael seemed to calm down and stop struggling upon the administrator's arrival. Video 3A rebuts this testimony. As it actually happened, Michael advanced on Lopez and pushed the driver backwards, nearly into the steering wheel, as Dr. Permenter tugged on Michael's arm to pull him away from Lopez.

21. In response, Lopez lunged forward and reached again with both hands for Michael's throat. The School Board uses a screenshot from video 3B capturing this moment that appears to show Lopez choking or strangling Michael. But, though arresting, this particular still is misleading because, whereas the screenshot gives the impression that Lopez had locked his hands around the student's neck, the video shows that in real time the driver's hands were actually in that visually dramatic position for just a split second before releasing. In truth, if Lopez even made contact with Michael's throat, it was an extremely brief touch. Lopez, obviously agitated, exclaimed, "Get out of here, motherfucker!"

22. Dr. Permenter stepped between Lopez and Michael, and said, "Uh uh, let him go, let him go." Without hesitating, Dr. Permenter then threw his body into Lopez, and knocked the driver back into his seat, separating Lopez and Michael. Michael was yelling at Lopez and Dr. Permenter, but his words, as recorded on the videos, cannot be understood. With that, the altercation was over. Shortly thereafter, Michael was escorted off the bus.

23. The District alleges that it has just cause to fire Lopez based upon the following allegations of material fact:

As [Michael] was entering the bus, Mr. Lopez closed the bus doors, thereby trapping the [student] in the doors.

* * *

[Later, d]uring the investigation . . . , Mr. Lopez stated that he accidentally closed the bus door on [Michael].

In fact, Michael did become caught in the doors by accident—an accident for which he (Michael), having disobediently boarded the bus knowing that the doors were shutting, was 100% at fault. Lopez, who had closed the doors on Dr. Permenter's order, was blameless in connection with this mishap.

After several seconds, Mr. Lopez opened the door. As [Michael] walked up the steps of the bus, [he] questioned Respondent about being caught in the doors.

In fact, Michael rudely barked, "Why was my arm stuck in the damn door so fucking long?" Michael was, of course, way out of line in making this menacing remark to the driver, who reasonably rose from his seat in a self-protective maneuver.

Respondent is seen [in video 3A] stepping towards the victim and using his body to make contact with [Michael].

In fact, Lopez clearly stood his ground near the driver's seat. It was plainly Michael who moved toward Lopez, not the other way around. Lopez did make contact with Michael, *but it is quite possible that Michael made physical contact with Lopez first.* The evidence is ambiguous as to the question of whether Lopez or Michael struck first.

Mr. Lopez and [Michael] engage[d] in a physical tussle, until they [we]re separated by a school staff member that boarded the bus. Once separated, Mr. Lopez again lunged at [Michael] and made physical contact with the student, which caused a second scuffle. A school staff member got between Respondent and [Michael] and broke up the altercation.

Without a doubt, there was a tussle, but there was not, in fact, a "second scuffle" for which Lopez was somehow primarily responsible. The two combatants, in fact, were not actually "separated" until Dr. Permenter threw himself into Lopez and knocked the driver down. Until then, both individuals had thrust and parried with their arms, hands, and legs. During the struggle, Michael was as, if not more, aggressive than Lopez,

who was, very possibly, merely defending himself, as he maintains.

During the incident, Mr. Lopez used profanity.

Lopez admitted this allegation, which was proved, in any event, by clear and convincing evidence, as he can be heard calling Michael a "motherfucker" in the video. The context, however, is crucial. The bad word or words were uttered by Lopez, not gratuitously, but in the heat of battle, when emotions were high *and Lopez was understandably and justifiably angry at Michael.* In contrast, Michael used profanity gratuitously in the absence of conflict, without justification, when he boarded the bus—far worse conduct.^{2/} Lopez's use of profanity, under the circumstances, was a de minimis infraction, not just cause for dismissal.

24. The upshot is that the District failed to prove by clear and convincing evidence the essential allegation against Lopez, namely that he had initiated and escalated a physical altercation with a student. As far as establishing who the aggressor was, the evidence is ambiguous. Although Lopez did not have the burden to prove his innocence, he presented evidence sufficient to raise the genuine possibility that he had acted in self-defense, not in retaliation, using reasonable force to protect himself from harm while under attack. This

genuine possibility precludes the undersigned from forming a firm belief or conviction, without hesitancy, that Lopez acted in an unjustifiably aggressive or retaliatory fashion, as charged.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 1012.40(2)(c), 120.569, and 120.57(1), Florida Statutes.

26. A district school board employee against whom a disciplinary proceeding has been initiated must be given written notice of the specific charges prior to the hearing. Although the allegations "need not be set forth with the technical nicety or formal exactness required of pleadings in court," Jacker v. School Board of Dade County, 426 So. 2d 1149, 1150 (Fla. 3d DCA 1983), the charging document should "specify the rule the agency alleges has been violated and the *conduct* which occasioned the violation of the rule," id. at 1151 (Jorgenson, J. concurring).

27. Once the school board, in its notice of specific charges, has delineated the offenses alleged to justify suspension or termination, those are the only grounds upon which such action may be taken. See Luskin v. Ag. for Health Care Admin., 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v.

Dep't of Bus. & Prof'l Reg., 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991).

28. In an administrative proceeding to suspend or dismiss an employee, the school board ordinarily bears the burden of proving, by a preponderance of the evidence, each element of the charged offense(s). See, e.g., McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996). If the school board has agreed, through collective bargaining, to a more demanding standard, however, then it must act in accordance with the applicable contract. See Chiles v. United Faculty of Fla., 615 So. 2d 671, 672-73 (Fla. 1993).

29. Article 17, paragraph 1, of the applicable Collective Bargaining Agreement ("CBA") provides that "disciplinary action may not be taken against an employee except for just cause, and this must be substantiated by clear and convincing evidence which supports the recommended disciplinary action." The School Board's burden, accordingly, is to prove the facts alleged as grounds for terminating Lopez's employment by clear and convincing evidence at a hearing before the Division of Administrative Hearings, if timely requested. CBA Art. 17, ¶ 8.

30. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held as follows:

[C]lear 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 in 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.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992) (citation omitted).

31. The educational support employee's guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. Cf. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

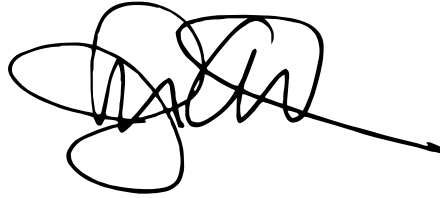
32. The District's basis for dismissing Lopez rests upon the elemental factual allegation that, on March 9, 2016, Lopez committed a battery upon the student, Michael Clark. The District, however, failed to prove this essential allegation by the requisite measure of proof.

33. Thus, all of the charges against Lopez necessarily fail, as a matter of fact. Due to this dispositive failure of proof, it is not necessary to make additional conclusions of law.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Palm Beach County School Board enter a final order exonerating Lopez of all charges brought against him in this proceeding.

DONE AND ENTERED this 16th day of March, 2017, in
Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of March, 2017.

ENDNOTES

^{1/} Evidently it has become commonplace in Palm Beach County schools for students to curse and swear at teachers and other school personnel.

^{2/} The undersigned is aware that the District has different rules for students, whose abusive and profane language is to be tolerated and overlooked as an unfortunate but unavoidable fact of life, like bad weather. This does not change the fact that the difference between Lopez's use of profanity here as compared to Michael's is one of kind and not of degree.

COPIES FURNISHED:

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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.