

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALIETTE L. OLIVA,

Petitioner,

vs.

Case No. 16-4409

OFFICE OF FINANCIAL REGULATION,

Respondent.

_____ /

RECOMMENDED ORDER

This matter was heard before Robert L. Kilbride, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH") on October 31, 2016, by video teleconference with sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Paul Drake, Esquire
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For Respondent: Melinda Hilton Butler, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner has carried her burden of proving that her application for licensure in Florida as a loan originator should be granted.

PRELIMINARY STATEMENT

On or about May 25, 2016, Respondent denied Petitioner's application for licensure, and Petitioner timely requested a formal hearing.

On July 11, 2016, Respondent entered an order granting an informal hearing pursuant to section 120.57(2), Florida Statutes. On July 20, 2016, Petitioner filed an Objection to Hearing Not Involving Disputed Issues of Fact and Renewed Petition for Hearing Involving Disputed Issues of Fact.

On August 2, 2016, Respondent referred the matter to DOAH. A Notice of Hearing was entered on August 16, 2016, setting the matter for hearing on October 10, 2016.

On October 4, 2016, Petitioner filed an Emergency Motion for Continuance of Final Hearing. The emergency motion was granted, and the hearing was re-scheduled for October 31, 2016.

On October 28, 2016, Respondent filed a Motion in Limine to exclude testimony regarding mitigating factors listed on pages 4 and 5 of Petitioner's Petition for Hearing Involving Disputed Issues of Material Fact.

The matter proceeded to a final hearing on October 31, 2016. Respondent's Motion in Limine was granted, in part, and denied, in part.

Petitioner testified on her own behalf and presented the testimony of three witnesses. Two of the witnesses, Edward Geraghty and Marina Greenfield, appeared via video teleconference from West Palm Beach, Florida. Elio Oliva, Petitioner's husband, and Petitioner appeared in person at the hearing in Tallahassee. Petitioner's Exhibits numbered 4, 6, 8, 11 through 15, 17, 18, and 20 through 28 were admitted into evidence. Respondent presented the testimony of Jason Booth. Additionally, Respondent's Exhibits numbered 1 through 6 were admitted into evidence.

On November 17, 2016, the parties filed a Joint Motion to Reschedule Proposed Recommended Orders Due Date. On November 17, 2016, the joint motion was granted, giving the parties leave to file their proposed recommended orders with DOAH on or before December 7, 2016, or ten days after the filing of the transcript of the final hearing with DOAH, or whichever is later.

A Transcript of the final hearing was filed in two volumes with DOAH on November 21, 2016. Both parties timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order.

References to Florida Statutes are to the 2015 version, unless otherwise indicated.

FINDINGS OF FACT

The undersigned makes the following findings of material and relevant facts:

1. The Office of Financial Regulation ("Respondent," "Office," or "OFR") has regulatory jurisdiction over loan originators and is responsible for the administration and enforcement of the provisions of chapter 494, Florida Statutes, which includes the approval or denial of applications for licensure as loan originators.

2. Aliette Oliva ("Petitioner" or "Oliva") applied for a license as a loan originator and is the party that is affected by the decision of Respondent to deny her application for licensure as a loan originator. Petitioner's address of record is 13525 Southwest 83rd Avenue, Pinecrest, Florida 33156.

3. On or about May 25, 2016, Respondent issued Petitioner a Notice of Intent to Deny Application for Loan Originator License, which denied Petitioner's application for licensure on the basis that Petitioner had a license, or the equivalent of such license, to practice any profession or occupation revoked or otherwise acted against by the State of Florida, citing provisions of chapter 494, particularly section 494.00255.

4. The license in question, that had been permanently revoked, was Petitioner's real estate salesperson license with the Department of Business and Professional Regulation, Florida Real Estate Commission ("FREC"), revoked in Final Order No. BPR-2003-02017. The Final Order incorporated an Administrative Complaint issued by the FREC against Petitioner, Case No. 200181619. The Final Order also incorporated an Affidavit for the Voluntary Surrender of License, Registration, Certificate/Permit for Permanent Revocation, which was voluntarily signed by Petitioner on April 30, 2003, with input and counsel from her attorney. Resp. Ex. 3.

5. The certified copy of the Administrative Complaint in question, moved into evidence by Respondent, is missing page three. Resp. Ex. 3.^{1/}

6. It was stipulated by the parties that Oliva had an active mortgage broker license with Respondent, license number MB0859332, from April 6, 1998, until December 31, 2010.

7. Oliva attempted to modify the terms of the revocation of her real estate license by filing a Motion for Modification of Terms of Revocation, filed with the FREC. This motion was denied by the FREC in their Order Denying Reconsideration dated January 12, 2016.

8. Jason Booth, a supervisor in the Bureau of Finance Regulation, OFR, made the recommendation to deny Oliva's

application for licensure as a loan originator that is the subject of this proceeding. Booth then forwarded his recommendation to the legal staff and to the director of OFR, who ultimately denied the license to Oliva.

9. The allegations of fraud in the 2003 Administrative Complaint filed by the FREC were significant factors supporting Booth's recommendation to deny Oliva's application for licensure. In Booth's opinion, "Fraud is the most egregious type of violation that someone in the industry would be held accountable for."

10. In further support of his recommendation to deny Oliva's application for licensure, Booth testified that Count 37 in the Administrative Complaint was also a factor. Booth testified that Count 37 alleges that this would be the second time that Oliva had been found guilty of conduct or misconduct that warranted the suspension of her license.

11. Booth also testified that another factor in support of his recommendation to deny Oliva's application for licensure was that Oliva's Motion for Modification of Terms of Revocation filed with the FREC on or about October 9, 2015, was denied on January 12, 2016, as per a FREC order, an order that was not appealed or contested. In addition, Booth explained that the importance of the motion and the FREC order was that the FREC did

not wish to revisit its prior action, which also supported Respondent's recommendation to deny Oliva's license application.

12. When asked by counsel for Petitioner if Respondent must automatically deny an application if the applicant has had a license from another agency previously revoked, Booth answered "maybe."

13. Regarding the determination of whether to approve or deny applications where the applicant has had a license previously revoked, Booth was asked if Respondent has any reasoning or criteria it uses to determine whether an application for a loan originator license should be approved or denied. Booth responded by stating that there is "no criteria" and that those determinations are made on a "case-by-case basis."

14. Other than the allegation in Count 37 regarding Petitioner "having been found guilty a second time of any misconduct that warrants his [sic] suspension," there was no evidence presented to explain or confirm the details of this allegation. Similarly, despite questions to Booth about any results from the Federal Bureau of Investigation or the Florida Department of Law Enforcement criminal background checks, there was no evidence presented revealing any criminal convictions or criminal conduct by Oliva.

15. There was also no evidence presented to explain why the FREC denied Oliva's Motion for Modification of Terms of Revocation, or its reasoning.

16. Edward Geraghty, branch manager for ResMac, the company for which Oliva is currently employed, is licensed with the Respondent as a loan originator. His license number is 320745.

17. Geraghty stated that Oliva has worked as a loan coordinator and processor for Geraghty's branch since December of 2015. Oliva assists loan officers and Geraghty's processing team in obtaining mortgages for ResMac's applicants, as well as processing loans. Geraghty hired Oliva because of her experience and her knowledge about products and about guidelines, which he stated is very hard to find in his industry.

18. As an employee, Geraghty described Oliva as very knowledgeable, proactive, and helpful in the ResMac office, and stated that she uses her experience to assist some of ResMac's less-experienced loan officers. Geraghty has no concerns over her honesty and trustworthiness and had never seen anything that would give him any doubt about Oliva's honesty and trustworthiness. Finally, Geraghty stated that he and his office have seen nothing in any of Oliva's files or tasks that has given them any questions about her abilities.

19. Marina Greenfield has been a friend of Petitioner for ten years. Greenfield trusts Oliva explicitly and stated that

she is a great person. Greenfield testified that during a period of economic misfortune for her family, she, her husband, and her two children were practically homeless. Oliva allowed them to stay at her home with her family. Greenfield testified that, if it had not been for Oliva, she would have been in a very bad place and that she cannot speak any more highly of her.

20. During the hearing, the undersigned admitted deposition transcripts of three witnesses: Carlos Cabezas, Mayra Alderete, and Octavio Diaz, without objection, all of which have been reviewed by the undersigned.

21. Cabezas works for ACC Mortgage as an account executive, has known Oliva for 15 years in a professional context, and has worked with Oliva intermittently during those 15 years. Cabezas described Oliva as very professional, with very high ethical standards and very strong work ethics.

22. Alderete has known Oliva for 15 or 16 years as a former client and as a friend. Alderete described Oliva as honest, that she has integrity and good character, helps everyone that needs it, and stated that she is professional.

23. Diaz, a Florida licensed real estate broker for Midtown Realty International, Inc., testified that Oliva worked with him from 2000 to 2003 as an associate realtor. Diaz wrote a letter of support for Oliva and described Oliva as very professional and truthful.

24. Petitioner also offered 13 letters of support, which were admitted into evidence. These letters corroborated and supplemented the testimony given by the character witnesses present at the hearing. The letters of support were written by friends; members of the community; professionals in the community, including several who are licensed with Respondent; and a family member.

25. The letters of support collectively confirm that Oliva is a woman of good moral character, is honest and trustworthy, has integrity, is a model citizen, and contributes a substantial amount of her time to charity and community service.

26. Elio Oliva, Petitioner's husband, is a police officer. He began his career working for the City of Hialeah Police Department from 1988 to 1998. From 1999 to 2003, Elio Oliva was detached to the Drug Enforcement Agency ("DEA") and worked as a "Task Force Agent."

27. During the period the subject FREC Administrative Complaint was opened and pending against Oliva, and when her real estate license was revoked, Elio Oliva had been working to infiltrate a Colombian drug cartel money laundering organization. He worked undercover for a year and a half in this role. The extent of his involvement in this undercover operation is explained in United States v. Puche, 350 F.3d 1137 (11th Cir.

2003). A copy of this case was admitted into evidence as Petitioner's Exhibit 4.

28. Elio Oliva testified that his undercover work and infiltration of the drug cartel was very dangerous. He testified that, if the cartel knew he was an undercover DEA agent, they may have stopped dealing with him or killed him. Elio Oliva performed his undercover operations in Miami and was allowed to go home to his actual residence. After the Puche trial, Elio Oliva had local police and U.S. Marshals surveilling his house for protection.

29. Elio Oliva testified that during the time the FREC fraud case against Petitioner was active and pending, Oliva shared with him that her identity had been stolen. After having a discussion with his wife about who would have access to her personal information, he testified that they concluded that the people who stole Oliva's identity were Igor and Harold Kuntz, two brothers that were involved in the real estate office where Oliva had been working from 1999 to 2000.

30. The undersigned found it significant that, other than this evidence from Elio Oliva and Petitioner, there was no independent evidence offered to corroborate or prove that Oliva's identity had been stolen. For instance, there were no police, law enforcement, or other investigative reports to show that any

identity theft had been reported by Oliva, investigated by law enforcement, or had, in fact, occurred.

31. At the time the FREC Administrative Complaint was filed against Petitioner, their son was an infant. Elio Oliva explained that Petitioner was "going through a lot" and that he was not home much because of his undercover work. Elio Oliva testified that Petitioner was told by her attorney at the time to sign the Voluntary Relinquishment so the Administrative Complaint could "go away." Elio Oliva stated that Petitioner was advised to "do the wrong thing."

32. Oliva expressed to her husband that she did not want their name out there and did not want people finding out who Elio Oliva was.^{2/} Elio Oliva stated that Petitioner voluntarily relinquished her real estate license for the safety of the family.

33. Elio Oliva has been married to Petitioner for 25 years. He described her as an extraordinary human being, a giver, and unselfish. Elio Oliva testified that his wife never committed fraud, misrepresentations, or concealment. Elio Oliva stated that Oliva is "a victim" and that, because of his law enforcement experience, he knows that "bad things happen to good people."

34. Alluding to the alleged theft of Oliva's identity and the resulting revocation of her real estate license, he testified that "in this case, that is what happened to her."

35. During Petitioner's testimony, she explained her employment with several mortgage and real estate companies: Raurell Investment Corporation; Fidelity Plus; Capital Mortgage Providers; Millennium 2000; and Midtown Realty International, Inc. Oliva currently works for ResMac, where she works with the loan originators to get their files ready for underwriting and works in tandem with the loan processors, who perform the final review of the file.

36. Regarding the FREC Administrative Complaint, her voluntary relinquishment of her license, and FREC's Final Order revoking her real estate license, Oliva testified that she was unaware that she had a Final Order entered against her. She testified that she never received a copy of the Final Order. Oliva surrendered her license at the direction and on the advice of her attorney.

37. The Certificate of Service section of the FREC Final Order shows that a copy of the Final Order was sent to the same attorney in Miami, Florida, who had notarized Petitioner's signature on the affidavit which voluntarily relinquished her license, and the senior attorney for the Department of Business and Professional Regulation ("DBPR").

38. Despite signing the affidavit marked as Respondent's Exhibit 3, page 4, and voluntarily relinquishing her real estate license in response to the FREC 37-count Administrative

Complaint, Oliva testified that she is not the person who committed the actions alleged in the FREC Administrative Complaint. Oliva stated she believed that her identity had been stolen by Igor and Harold Kuntz. She testified that, after one of the people Oliva suspected of stealing her identity died, no additional illicit transactions under her real estate license occurred.

39. As support for her claim that she was not the culpable party identified in the FREC fraud complaint, Oliva testified that she could not have committed *one of* the fraud transactions alleged in the Administrative Complaint because she was caring for her infant son at the time, in February 2001.^{3/}

40. Because of Elio Oliva's undercover activity, and because Elio Oliva had been involved in two police shootings in 1991 and 1997, Oliva testified that she was not doing well mentally at the time she relinquished her real estate license. In addition, Elio Oliva had not yet been cleared by the state attorney for a shooting incident in 1997 during the time the FREC Administrative Complaint was filed, which also was difficult for her.

41. Oliva's counsel in the fraud case told her that it would be nearly impossible to prove that her identity had been stolen because of the nature of the identity theft and that it would cost a lot of money to contest the allegations. Her

counsel also told her that everything was going to go away after she signed the Voluntary Relinquishment form.

42. She claimed that the personal security provided to the family by the police and the U.S. Marshals, the fear of retaliation by the drug cartel against whom Elio Oliva had just testified in Puche, the safety and health concerns of her family, her desire to protect her family, and the pressure from her counsel at the time all factored into her decision to voluntarily relinquish her real estate license.

43. Oliva applied for a loan originator license because of financial concerns, as her family has two children in college, with one more about to go to college, and her husband is retiring soon. Oliva believes she is qualified, that she is a good person, and that she has lived her life in a way that allows her to be an example for her family, friends, and clients.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to sections 120.57(1) and 120.60, Florida Statutes (2016). Administrative proceedings under chapter 120, Florida Statutes (2016), are conducted as a de novo review. § 120.57(1)(k), Fla. Stat. (2016).

45. Respondent denied Petitioner's loan originator license application on the sole basis that Petitioner had her prior

license to practice a profession or occupation as a real estate agent revoked or otherwise acted against by the State of Florida.^{4/}

46. Section 494.00255(1) (o) expressly authorizes the Office to deny a chapter 494 loan originator license to any applicant who previously had a license to practice any profession or occupation revoked, suspended, or otherwise acted against.

47. In the same manner, section 494.00255(2) (d) grants the Office the discretion to deny Petitioner's application for a loan originator license due to the Final Order issued by DBPR, Division of Real Estate, permanently revoking her real estate license. In particular, the DBPR Final Order in question alleged that Oliva was responsible for seven separate instances of fraud. These violations were characterized as the most egregious type for someone in the industry.

48. By imposing permanent revocation, an extreme penalty, DBPR expressed its strong disapproval of Oliva's repeated and ongoing fraudulent misconduct. Further, DBPR's order denying Petitioner's motion to modify the terms of the Final Order underscored the agency's determination that Petitioner's permanent revocation should not be changed and that the agency's order permanently revoking Petitioner's real estate salesperson license should remain final.

49. The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

50. Thus, Oliva had the burden to present evidence of her fitness for licensure. Similarly, the Office had the burden of presenting evidence that Oliva was subject to disqualification because she had had a previous license revoked. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996).

51. Other legal principles are applicable as well. An applicant for licensure bears the burden of ultimate persuasion at each and every step of the licensure proceedings, regardless of which party bears the burden of presenting certain evidence. The burden of producing evidence may shift between the parties in an application dispute proceeding. However, the burden of persuasion always remains with the applicant to prove his or her entitlement to the license, by a preponderance of the evidence. Osborne, supra.

52. Notable, as well, is the Florida Supreme Court's reminder that an agency has particularly broad discretion in determining the fitness of applicants who seek to engage in an occupation, the conduct of which is a privilege rather than a right. Id.

53. In a license application proceeding, the agency has the burden of proving specific acts of misconduct by a preponderance of the evidence if it seeks to deny a license application on that ground. M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 761 (Fla. 2d DCA 2008) ("[I]f the licensing agency proposes to deny the requested license based on specific acts of misconduct, then the agency assumes the burden of proving the specific acts of misconduct that it claims demonstrate the applicant's lack of fitness to be licensed."). Here, OFR had the burden to prove that Petitioner's application was subject to denial due to a previous revocation of another license she held.

54. With this legal backdrop in mind, and considering the respective burdens of proof, the undersigned draws several conclusions from the evidence adduced at the hearing.

55. The more persuasive and credible evidence shows that Petitioner knew or should have known that by signing the Affidavit voluntarily relinquishing her real estate license, it would result in a permanent revocation of her license. She was represented and advised by counsel throughout the process. The Affidavit clearly informed her that a final order of permanent revocation would be "rendered in accordance with the provisions of this Affidavit." A permanent revocation of her real estate license was specifically mentioned in several other sections of the Affidavit as well.

56. The Affidavit she signed was witnessed and notarized by her attorney.^{5/}

57. The Office carried its burden of proving that Oliva signed the Affidavit relinquishing her real estate license and had her real estate license revoked. M.H., supra. This implicated the provisions of section 494.00255(1)(o) and authorized OFR to deny her application under section 494.00255(2)(d).

58. Keeping in mind that Oliva had the ultimate burden of persuasion throughout the application dispute to demonstrate entitlement to the license by a preponderance of the evidence, the undersigned was not persuaded that Oliva did not commit the fraud events outlined in the FREC Administrative Complaint, or that the outcome of that case should be revisited.

59. In reaching this conclusion, several items are noted. She did not appeal or seek a prompt rehearing of the FREC Final Order.

60. There was no evidence presented at this hearing by Petitioner to contest, explain, or respond to allegations of the Administrative Complaint that Petitioner was interviewed by investigators and admitted certain facts specifically related to the fraud counts. See Admin. Complaint, paras. 34, 40, 47, and 59.

61. Finally, the undersigned ruled at the hearing that it would be improper to revisit or allow the parties to relitigate the question of Oliva's guilt settled by the DBPR Final Order dated May 21, 2003. See Castleman v. Off. of the Comptroller, Dep't of Banking & Fin., 538 So. 2d 1365 (Fla. 1st DCA 1989); and McGraw v. Dep't of State, Div. of Licensing, 491 So. 2d 1193 (Fla. 1st DCA 1986).

62. However, the undersigned also ruled that the parties were entitled to present evidence of mitigation or aggravation surrounding the relinquishment of her real estate license.

63. The evidence of mitigation presented by Oliva to explain why and under what circumstances she voluntarily relinquished her license was informative. Regardless, the family or psychological factors which may have influenced her decision to relinquish her license in the face of a written warning that permanent revocation of her real estate license was imminent do not change the following:

(a) A state agency, charged with regulating licensed real estate agents, undertook a formal and extensive forensic investigation, including interviews of Petitioner. Several admissions by Petitioner were noted and alleged in the complaint.

(b) The agency formally charged Petitioner with seven separate incidents of real estate fraud.

(c) In response to the charges, Petitioner, upon advice of counsel, signed a sworn Affidavit agreeing to an "informal hearing" under section 120.57(2), Florida Statutes (2003).

(d) The effect of this request was to acknowledge that there were no material facts in dispute regarding the allegations raised in the Administrative Complaint, including, importantly, her identity as the perpetrator.

(e) The undersigned was not presented with any reports or other evidence from Petitioner issued by DBPR during the investigation which questioned, or tended to question, her identity as the person who committed the fraud alleged. Nor did Petitioner provide evidence that she reported her stolen identity to DBPR.

(f) Further, Petitioner presented no evidence and called no witnesses, participants at the disputed real estate closings, or buyers or sellers related to the seven fraud counts to shed any light on her purported lack of involvement or misidentification as the perpetrator.

64. The cases are clear that "[w]hen a party waives the right to challenge the factual allegations of an administrative complaint, . . . the facts of the complaint are deemed to be admitted." Nicks v. Dep't of Bus. & Prof'l Reg., 957 So. 2d 65, 67 n.1 (Fla. 5th DCA 2007) ("When a party waives the right to challenge the factual allegations of an administrative complaint,

either by requesting an informal hearing pursuant to section 120.57(2), Florida Statutes, or by failing to respond to the complaint at all, the facts of the complaint are deemed to be admitted."); See also Trisha's One Stop, Inc. v. Off. of Fin. Reg., 130 So. 3d 285 (Fla. 1st DCA 2014).

65. Petitioner's failure to request a formal hearing and her concession to the entry of a permanent revocation was a "green light" for the agency to decide the case on the basis of the facts alleged in the complaint, and to impose the appropriate penalty. Trisha's One Stop, supra, at 287.

66. Furthermore, choosing a section 120.57(2) informal hearing in a license-related proceeding is similar to pleading guilty to the facts alleged in the administrative complaint, because they are not disputed. See generally, Autoworld of Am. Corp. v. Dep't of High. Saf., 754 So. 2d 76 (Fla. 3d DCA 2000).

67. Under these circumstances, Petitioner cannot now be heard to contest the factual allegations, nor persuasively dispute her identity as the person who committed the fraudulent acts outlined in the FREC Administrative Complaint.

68. Because the law affords broad discretion to an agency to determine the fitness of an applicant for licensure under Osborne, and denial of the application by the Office is authorized under section 494.00255(2)(d), the undersigned has no compelling legal or factual basis to make a recommendation to the

agency to change its preliminary decision to deny the application of Petitioner.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of law, it is RECOMMENDED that the Office of Financial Regulation enter a final order denying Aliette Oliva's application for a loan originator license.

DONE AND ENTERED this 4th day of January, 2017, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of January, 2017.

ENDNOTES

^{1/} Both parties agreed that they were unable to retrieve and present page three despite the undersigned's request at the hearing.

^{2/} It was unclear how the allegations of the FREC Administrative Complaint or investigation against Petitioner would have implicated or put her husband in the public spotlight or domain. The allegations of the FREC Administrative Compliant made no mention of any involvement by Elio Oliva.

^{3/} The undersigned notes, however, that the other six fraud events attributed to Petitioner were alleged to have occurred in the year 2000. See Admin. Complaint allegations.

^{4/} There was no evidence to suggest that Petitioner was unqualified, or did not meet other requirements for licensure as a loan originator in Florida.

^{5/} This attorney was the same attorney who was copied with the FREC Final Order in Case No. 200181619, and it is reasonable to infer that he represented Oliva in the FREC proceedings.

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.