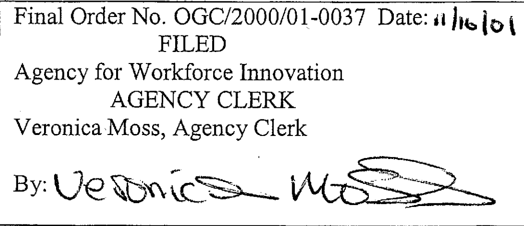

Final Order No. OGC/2000/01-0037 Date: 11/16/01
FILED
Agency for Workforce Innovation
AGENCY CLERK
Veronica Moss, Agency Clerk
By: Veronica Moss

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OLIVER WALKER	)	
	)	
Petitioner,	)	
	)	DOAH Case No. 01-3123
vs.	)	
	)	
AGENCY FOR WORKFORCE INNOVATION,	)	
	)	
Respondent.	)	
______________________________	)	

FINAL AGENCY ORDER

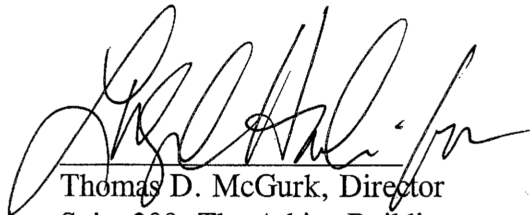
THIS CAUSE IS BEFORE ME, the Director of the Agency for Workforce Innovations, as a result of a recommended order dated October 31, 2001, that was issued by the Administrative Law Judge assigned to the case by the Division of Administrative Hearings (DOAH).

The recommended order concludes that in as much as the Petitioner is not an "employer," his business falls outside the definitional scope of the agency's job service as established by the federal regulations governing the states receipt of grant money for the employment services program. The Administrative Law Judge concluded that, therefore, the agency had a valid reason for rejecting the job order of the Petitioner. Thus, the Administrative Law Judge recommended that the agency issue a final order rejecting the job service order submitted by the Petitioner on behalf of his business, Babe-A-Maid.

Neither party filed exceptions. Consequently, I accept the findings of fact and the conclusions of law in the recommended order, which is attached to this final order and incorporated herein by reference.

Accordingly, it is ORDERED that the findings of fact and the conclusions of law in the recommended order in DOAH Case No. 01-3123 are approved and adopted, and that the decision of the agency not to accept the job order filed on behalf of Babe-A-Maid is affirmed.

DONE and ORDERED this 16th day of November 2001, Tallahassee, Leon County, Florida.



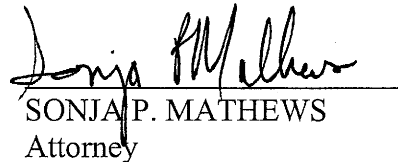
Thomas D. McGurk, Director
Suite 300, The Atkins Building
1320 Executive Center Drive
Tallahassee, Florida 32399-2250
PH: 850/488-7228

RIGHT TO APPEAL

This order constitutes final agency action and may be appealed by petitioner pursuant to section 120.68, Florida Statutes, and rule 9.110, Florida Rules of Appellate Procedure, by filing a Notice of Appeal conforming to the requirements of Rule 9.110(D), Florida Rules of Appeal with Veronica N. Moss, the agency clerk for the Agency for Workforce Innovation, within thirty (30) days of the date of this order and by filing a copy of the Notice accompanied with the appropriate filing fee as prescribed by law with the clerk of the appellate court in the district where the agency maintains it's headquarters or where the appellant resides or as otherwise provided by law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon Oliver Walker, Babe-A-Maid, P.O. Box 1933, Kenosha, Wisconsin, 53141, by via Certified Mail this 16th day of November 2001.



SONJA P. MATHEWS
Attorney

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OLIVER WALKER, Petitioner, vs. AGENCY FOR WORKFORCE INNOVATION, Respondent.	)	Case No. 01-3123

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 26, 2001, in St. Petersburg, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. Petitioner and counsel for Respondent appeared via teleconference from Kenosha, Wisconsin, and Tallahassee, Florida, respectively.

APPEARANCES

For Petitioner: Oliver Walker, pro se
Babe-A-Maid
Post Office Box 1933
Kenosha, Wisconsin 53141

For Respondent: Sonja P. Mathews, Esquire
Agency for Workforce Innovation
Atkins Building, Third Floor
1320 Executive Center Drive
Tallahassee, Florida 32399-2250

STATEMENT OF THE ISSUE

Whether Respondent acted properly in refusing to post a job order for Petitioner's business, an "adult maid service."

PRELIMINARY STATEMENT

The Wagner-Peyser Act, codified at 29 U.S.C. section 49 et seq., established a nationwide public employment service via federally funded operations at the state level. Among the services provided is a system of "One Stop Career Centers" that attempts to match prospective employers with workers. The Agency for Workforce Innovation ("AWI") is the federal grant recipient responsible for operation of the program in Florida. AWI was established in 2000 and is ultimately responsible for the functions of the local One Stop Career Centers located throughout the state.

Petitioner, Oliver Walker, owns and operates a business called Babe-A-Maid, an "adult maid service." In April 2001, Mr. Walker attempted to list his business at an AWI office in St. Petersburg, so that potential workers could be directed to Babe-A-Maid. The job order form submitted by Mr. Walker stated that the specific duties and responsibilities of potential Babe-A-Maid workers included "dusting, vacuuming, dishes or dancing in various forms of undress." The state job service declined to accept the job order.

Among the Wagner-Peyser Act's implementing rules is 20 C.F.R., Part 658, Subpart E, requiring each state receiving federal funds to establish a "Job Service Complaint System" pursuant to which potential employers or employees may request a hearing regarding alleged actions or omissions of the job

service. Mr. Walker exercised his right to invoke the complaint process. After an unsuccessful attempt to compromise the matter, AWI forwarded Mr. Walker's complaint to the Division of Administrative Hearings on August 9, 2001. The matter was originally set for hearing on September 21, 2001, then continued and rescheduled for September 26, 2001, when the hearing was held.

At the hearing, AWI presented the testimony of Pat Landers, the AWI employee who handled the agency's initial contacts with Mr. Walker, and of Robert Bradner, the AWI manager who made the decision to reject Mr. Walker's job listing. AWI's Exhibits 7 through 11 and 13 through 15 were admitted into evidence. Mr. Walker testified on his own behalf and presented the testimony of Thomas McKone, the operations manager of the Worknet Pinellas office in which Mr. Walker attempted to file his job listing, and Robert Phillips, a veterans' employment representative for AWI who works in the Worknet Pinellas office. Mr. Walker's Composite Exhibit 1 was admitted into evidence.

No transcript was ordered. AWI timely filed a Proposed Recommended Order on October 10, 2001. Mr. Walker did not file a proposed recommended order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Mr. Walker is a sole proprietor doing business under the name Babe-A-Maid, which advertises as an "adult maid service." Babe-A-Maid's advertising makes plain that it is in the business of adult entertainment. A customer may browse Babe-A-Maid's web site and select a "maid" who will be transported to the customer's location to perform topless or nude dancing.

2. No evidence was presented that Babe-A-Maid's services go beyond dancing to acts of prostitution. Mr. Walker personally screens potential customers, and pays to provide security to dancers who are sent to perform for groups of people. Babe-A-Maid's "Subcontractor Agreement" with its dancers provides that it is not an escort agency.

3. Babe-A-Maid has operated in Mr. Walker's native Kenosha, Wisconsin for a number of years. Babe-A-Maid has been accepted for listing by the Wisconsin equivalent of AWI.

4. On April 26, 2001, Mr. Walker submitted a job order to the Florida job service office in St. Petersburg, announcing the availability of positions with Babe-A-Maid.

5. By letter dated July 25, 2001, AWI's complaint specialist Jim Cadwallader informed Mr. Walker that his job order would not be accepted for posting. Mr. Cadwallader's letter stated:

> I have found that the activities described in your job order include conduct, e.g., nude dancing, which has detrimental secondary effects that are harmful to the public health, safety and welfare. Therefore, it has been determined that it is not in the

best interest of the State or its citizens to assist in promoting your industry.

6. Mr. Walker requested clarification as to the meaning of "detrimental secondary effects." By letter dated July 31, 2001, Mr. Cadwallader responded as follows:

> The job order that you wish to place would secondarily impact and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to, among other things, violence, sexual harassment, public intoxication, prostitution and the attendant health risks.
>
> As previously stated, this decision is designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication. The decision not to place your job order on the job services web-site does not adversely affect other reasonable alternative avenues of advertisement that are available.

7. Mr. Walker conceded that the placement of advertisements in newspapers and other sources yielded approximately 800 responses from prospective dancers in the St. Petersburg area. However, he testified that his experience in Wisconsin showed him that the state job service listings provide an even-flow of employees, lessening the need for paid advertising.

8. Robert Bradner, the AWI employee who actually made the decision to reject Mr. Walker's job order, testified that the state was not attempting to regulate Mr. Walker's admittedly legal business. Rather, the problem was a perceived linkage that a job listing would create between the state and Babe-A-Maid.

Mr. Bradner did not want to establish a public perception that the state was endorsing Babe-A-Maid.

9. Mr. Bradner conceded that Babe-A-Maid's was the only rejection of which he was aware since AWI's creation in 2000. Mr. Bradner also conceded that his decision was not based on any written statute, rule or guideline.

10. AWI provided a second reason for its rejection of Mr. Walker's job order: that he is not an "employer" as contemplated by the Wagner-Peyser Act and its implementing rules. Mr. Walker conceded that the dancers who work for him are independent contractors who are paid only for the hours they are actually out on a dancing job.

11. Babe-A-Maid applicants must sign a "Subcontractor Agreement" that states, in relevant part:

> I, [name of Subcontractor], hereinafter referred to as the Subcontractor, enter into an agreement, with Babe-A-Maid. We do hereby agree that for good and valuable consideration, the Subcontractor shall provide services to Babe-A-Maid as outlined below, pursuant to the terms and conditions contained herein.
>
> Babe-A-Maid is a referral agency for persons seeking cleaning/entertainment services, hereinafter referred to as Clients.
>
> * * *
>
> The parties agree that the Subcontractor shall be treated as a Subcontractor, responsible for all Federal, state, and local law purposes [sic]. The terms of this agreement shall not be deemed to be an employment contract, nor shall the Subcontractor be deemed an employee of Babe-

> A-Maid for any purpose. The Subcontractor shall be responsible for paying all Federal, State and local taxes, and acquiring all licenses or other permits in the locale associated with providing services and receiving compensation for the provision of entertainment services.
>
> * * *
>
> The Subcontractor shall have neither actual nor apparent authority to bind Babe-A-Maid in contract nor shall Babe-A-Maid assume any responsibility for the acts of the Subcontractor. The Subcontractor agrees to indemnify Babe-A-Maid for all damages, fines, attorney fees, and cost imposed upon it for acts committed by the Subcontractor.
>
> The Subcontractor hereby warrants the information he or she has provided to Babe-A-Maid regarding his or her identification is true and current. The Subcontractor also warrants that the tax identification number provided at the bottom of this agreement is the number that the United States government has properly assigned to the Subcontractor.

12. The evidence established that Babe-A-Maid does not employ its dancers. The dancers are subcontractors who inform Babe-A-Maid of the days and times they are available to go out on calls. Aside from general instructions by Babe-A-Maid, such as dressing appropriately and not using illegal drugs or drinking "excessive" amounts of alcohol during their shows, the dancers control the manner of their performance.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 120.569 and

Subsection 120.57(1), Florida Statutes, and 20 C.F.R. section 658.417.

14. Mr. Walker contended that his job order should be accepted by AWI because the agency failed to put forward any governing statute or rule granting it the discretion to reject a lawful employer. Were this the only ground for AWI's rejection of his application, Mr. Walker would be correct. AWI offered no state or federal statute, rule, or guideline that authorizes the state job service agency to reject a job order because of the "detrimental secondary effects" associated with nude dancing.

15. AWI relies on a line of United States Supreme Court decisions upholding the regulation of adult businesses such as nude dancing establishments or adult motion picture theaters. See, e.g., City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). It is unnecessary to discuss the details of these decisions because AWI's reliance on them is misdirected at the threshold. Each of these cases addresses the constitutionality of the legislative enactments of an elected body, either a city council or a state legislature.

16. AWI is an executive branch agency, and as such lacks the inherent power to pass an ordinance or statute regulating the activities of an adult business. Administrative agencies are creatures of statute, and possess only such powers as are

enumerated therein. Mathis v. Department of Corrections, 726 So. 2d 389, 391 n. 4 (Fla. 1st DCA 1999); Board of Trustees of the Internal Improvement Trust Fund v. Lost Tree Village Corp., 600 So. 2d 1240, 1243 (Fla. 1st DCA 1992); Department of Environmental Regulation v. Puckett Oil Co., 577 So. 2d 988, 991 (Fla. 1st DCA 1991); Grove Isle, Ltd. v. Department of Environmental Regulation, 454 So. 2d 571, 573 (Fla. 1st DCA 1984). AWI has no statutory authority to reject an employer's job order on essentially moral grounds.

17. However, AWI has set forth a second ground for its rejection of Mr. Walker's job order. AWI notes that the Wagner-Peyser Act focuses on providing employment services, and that its implementing regulations make clear that the employer-employee relationship is at the core of its mission:

> "Employer" means a person, firm, corporation or other association or organization (1) which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a worker at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises and otherwise controls the work of such employee. . . .

20 C.F.R. section 651.10.

18. As noted in the findings of fact above, Mr. Walker has gone to some lengths not to establish an "employer relationship" with his dancers. The dancers are required to sign a "Subcontractor Agreement" that expressly disavows the creation of

any employment relationship. The dancers are responsible for payment of all applicable taxes and acquisition of any needed licenses or permits. The dancers are not paid a regular wage. The dancers are not directly supervised in their work by Mr. Walker; they are given general directions and left to their own discretion in performing their work. Long-established case law holds that, while there are many factors to be considered in determining whether a person is an employee or independent contractor, the primary factor to be considered is the degree of control over the mode or details of the work. Freedom Labor Contractors of Florida, Inc. v. Division of Unemployment Compensation, 779 So. 2d 663, 664 (Fla. 3d DCA 2001). Further, neither party disputed that the dancers' relationship with Babe-A-Maid is that of independent contractor.

19. Because Mr. Walker is not an "employer," his business falls outside the definitional scope of AWI's job service as established by the federal regulations governing the state's receipt of grant money for its program. Thus, AWI had a valid reason for rejecting Mr. Walker's job order.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered rejecting the job service order submitted by Oliver Walker on behalf of his business, Babe-A-Maid.

DONE AND ENTERED this 31st day of October, 2001, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of October, 2001.

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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.