AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2948668

RESORT STAFFING LLC
LAURIE JENKS
1200 HAMILTON ESTATES DRIVE
KENNESAW GA 30152

PROTEST OF LIABILITY
DOCKET NO. 2010-62439L

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

O R D E R

This matter comes before me for final Agency Order.

The issues before me are whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 60BB-2.035, Florida Administrative Code, and whether services performed for the Petitioner by the Joined Party and other individuals constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed an unemployment compensation claim in November 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that she worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, she would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, she would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any others who worked under the same terms and conditions. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party and the other housekeepers were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to the Joined Party and any other workers who performed services

under the same terms and conditions. The Petitioner filed a protest of the determination. The claimant who requested the investigation was joined as a party because she had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on September 1, 2010. The Petitioner was represented by its attorney. The Petitioner's Regional Director testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified. The Special Deputy issued a Recommended Order on October 7, 2010.

The Special Deputy's Findings of Fact recite as follows:

1. The Joined Party filed an initial claim for unemployment compensation benefits effective November 8, 2009. The Joined Party did not receive credit for her earnings with the Petitioner. As proof of her earnings the Joined Party submitted a Form 1099-MISC provided to the Joined Party by the Petitioner. The Form 1099 contained the mailing address which the Petitioner uses for payroll purposes. An investigation was issued to the Florida Department of Revenue to determine if the Joined Party performed services as an independent contractor or as an employee.
2. The Petitioner is a Georgia limited liability company. The Petitioner does not have an office in Florida and uses the address of a United Parcel Service drop box as the mailing address. The address of the drop box was the address which the Petitioner placed on Form 1099.
3. The Petitioner was not registered with the Florida Department of Revenue and was not registered to do business in Florida with the Florida Department of State. The Department of Revenue mailed correspondence to the address shown on Form 1099 but did not receive any response.
4. Following completion of the investigation the Department of Revenue issued a determination dated March 12, 2010, holding that the persons performing services for the Petitioner as housekeepers were the Petitioner's employees retroactive to June 20, 2008. The determination mistakenly listed the Petitioner's name as Resort Staffing Inc rather than Resort Staffing LLC.
5. Among other things the determination advised "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter."
6. When United Parcel Service receives mail in the Petitioner's drop box, United Parcel Service sends an email to the Petitioner's Regional Director. The Petitioner's Regional Director picks up the mail and forwards the mail to the Petitioner's Georgia office address.
7. The determination dated March 12, 2010, was received by the Petitioner. The Petitioner provided the determination to the Petitioner's attorney for filing of a protest. The Petitioner's attorney filed the protest by letter dated April 9, 2010.

Based on these Findings of Fact, the Special Deputy recommended that the Petitioner's appeal of the determination dated March 12, 2010, be dismissed due to a lack of jurisdiction. The Petitioner's

exceptions to the Recommended Order were received by fax dated October 22, 2010. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

Exception #1 proposes alternative findings of fact. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. As a result, the Agency may not

modify the Special Deputy's Findings of Fact pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact as written by the Special Deputy. Exception #1 is respectfully rejected.

In Exception #2, the Petitioner takes exception to Conclusion of Law #10 and contends that it is not supported by the Special Deputy's Findings of Fact. In Exception #2, the Petitioner also cites *Leichering v. Unemployment Appeals Comm'n*, 854 So.2d 850 (Fla. 5th DCA 2003), and *Carrigan v. Unemployment Appeals Comm'n*, 615 So.2d 216 (Fla. 5th DCA 1993), in support of its contention that the Special Deputy's Findings of Fact do not support a conclusion that the determination at issue was in fact mailed on March 12, 2010. In Exception #3, the Petitioner also cites the *Leicherberg* case in support of its arguments. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. The record reflects that the Special Deputy concluded in Conclusion of Law #10 that the Department of Revenue mailed the determination to the Petitioner's address of record. The record also reflects that the Special Deputy concluded in Conclusion of Law #11 that the testimony and evidence presented by the Petitioner did not establish when the Petitioner actually received the determination in the mail and was insufficient to rebut the presumption of the timely receipt of the determination. In *Carrigan*, the court held that a mailing date must be established by competent factual evidence, relying on the appellant's firsthand testimony that he did not receive the determination until a few days before the submission of his appeal instead of relying upon the typed mailing date on the determination mailed to him. *Id.* at 217. In *Leichering*, the court stated that the case was "indistinguishable from *Carrigan*" and reached the same result, holding that a typed date on a determination is not sufficient to establish the mailing date of the determination when contradicted by competent firsthand testimony regarding the actual mailing date of the determination. 854 So.2d at 851. Both of the cases are distinguishable from the case in hand. As found by the Special Deputy in Conclusions of Law #10 and 11, the Petitioner's Regional Manager testified that the determination was sent to the Petitioner's address of record and was unable to testify to the exact date when the Petitioner received the determination in the mail. Unlike in *Carrigan* or *Leichering*, the Petitioner's witness could not say with any certainty that the determination was mailed after the date listed on the determination and could not explain why the Petitioner did not file an appeal within the twenty day time limit. As a result, competent substantial evidence in the record supports the Special Deputy's ultimate conclusion that the Petitioner's untimely appeal should be dismissed due to a lack of jurisdiction. All of the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are not rejected by the Agency. The portions of Exceptions #2 and 3 that take exception to Conclusion of Law #10, contend that Conclusion of

Law #10 is not supported by the Findings of Fact, and cite the *Carrigan* and *Leichering* cases are respectfully rejected.

Also in Exception #2, the Petitioner contends that the Petitioner's response to the Order to Show Cause shows that the determination was not timely received and is in further derogation of the presumption of timely mailing. Section 120.269(2)(g), Florida Statutes, provides:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

Section 120.57(1), Florida Statutes, provides:

> ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.--
> (c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Rule 60BB-2.035(15)(c), Florida Administrative Code, provides:

> (c) Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but will not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S.

Pursuant to the cited sections of the statute and rule, the Special Deputy was not permitted to use the Vice President's written statements as evidence of when the Petitioner received the determination as the Vice President did not testify at the hearing and was not present to verify that he had personally written the response to the Order to Show Cause. Since the evidence is considered hearsay and the Petitioner has not demonstrated that the evidence is admissible as a hearsay exception, the Special Deputy's Conclusions of Law continue to reflect a reasonable application of the law to the facts. The Special Deputy's Findings of Fact are also supported by competent substantial evidence in the record. The remaining portion of Exception #2 is respectfully rejected.

In Exception #3, the Petitioner takes exception to Conclusion of Law #11 and argues that the Special Deputy inappositely relied on *Brown v. Giffen Industries, Inc. et al.*, 281 So.2d 897 (Fla. 1973). In *Giffen Industries*, the Florida Supreme Court supported the presumption that "mail properly addressed, stamped and mailed was received by the addressee." *Id*. at 900. A review of the record reveals that the Petitioner did not deny that it received the determination in the mail. As previously stated, the firsthand testimony presented by the Petitioner did not establish exactly when the determination was received or why the Petitioner did not file a timely appeal. As the Petitioner has not met its burden to show that its appeal

was timely filed, the Special Deputy's Conclusions of Law, including Conclusion of Law #11, reflect a reasonable application of the law to the facts. Thus, the Petitioner has not provided a basis for the modification or rejection of the Special Deputy's Conclusions of Law permitted by section 120.57(1)(l), Florida Statutes. As a result, Exception #3 is respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

In consideration thereof, it is ORDERED that the Petitioner's appeal of the determination dated March 12, 2010, is DISMISSED due to a lack of jurisdiction.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **December, 2010.**

_____
TOM CLENDENNING,
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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RESORT STAFFING LLC
LAURIE JENKS
1200 HAMILTON ESTATES DRIVE
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PROTEST OF LIABILITY
DOCKET NO. 2010-62439L

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated March 12, 2010.

After due notice to the parties, a telephone hearing was held on September 1, 2010. The Petitioner was represented by its attorney. The Petitioner's Regional Director testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact:

1. The Joined Party filed an initial claim for unemployment compensation benefits effective November 8, 2009. The Joined Party did not receive credit for her earnings with the

Petitioner. As proof of her earnings the Joined Party submitted a Form 1099-MISC provided to the Joined Party by the Petitioner. The Form 1099 contained the mailing address which the Petitioner uses for payroll purposes. An investigation was issued to the Florida Department of Revenue to determine if the Joined Party performed services as an independent contractor or as an employee.

2. The Petitioner is a Georgia limited liability company. The Petitioner does not have an office in Florida and uses the address of a United Parcel Service drop box as the mailing address. The address of the drop box was the address which the Petitioner placed on Form 1099.
3. The Petitioner was not registered with the Florida Department of Revenue and was not registered to do business in Florida with the Florida Department of State. The Department of Revenue mailed correspondence to the address shown on Form 1099 but did not receive any response.
4. Following completion of the investigation the Department of Revenue issued a determination dated March 12, 2010, holding that the persons performing services for the Petitioner as housekeepers were the Petitioner's employees retroactive to June 20, 2008. The determination mistakenly listed the Petitioner's name as Resort Staffing Inc rather than Resort Staffing LLC.
5. Among other things the determination advised "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter."
6. When United Parcel Service receives mail in the Petitioner's drop box, United Parcel Service sends an email to the Petitioner's Regional Director. The Petitioner's Regional Director picks up the mail and forwards the mail to the Petitioner's Georgia office address.
7. The determination dated March 12, 2010, was received by the Petitioner. The Petitioner provided the determination to the Petitioner's attorney for filing of a protest. The Petitioner's attorney filed the protest by letter dated April 9, 2010.

Conclusions of Law:

8. Section 443.141(2)(c), Florida Statutes, provides:
   (c) *Appeals.*--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
9. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides: Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
10. The determination issued by the Department of Revenue on March 12, 2010, was mailed to the address which the Petitioner uses for payroll purposes. The Petitioner did not register with the Florida Department of Revenue or the Florida Department of State to do business in Florida and did not provide any other address to the State of Florida.
11. A letter that is properly addressed, stamped, and mailed is considered to be received by the addressee. Brown v. Giffen Industries, Inc., et al., 281 So. 2d 897 (Fla. 1973). Although there is no dispute that the letter was received by United Parcel Service, the actual date of receipt is not known. A representative for United Parcel Service did not participate in the hearing and the

Petitioner's witness could not recall the date that she obtained the letter from the drop box. The Petitioner's attorney did not testify concerning the date that the attorney received the determination from the Petitioner nor provide any testimony concerning why the protest was not filed within the twenty day time limit. The Petitioner's evidence is not sufficient to rebut the presumption of timely receipt of the determination.

Recommendation: It is recommended that the Petitioner's appeal of the determination dated March 12, 2010, be DISMISSED due to lack of jurisdiction.

Respectfully submitted on October 7, 2010.

R. O. SMITH, Special Deputy
Office of Appeals