

**THE DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2595124

21ST CENTURY CONCEPTS INC
BRENDA SMYTH ROSS
406 43RD ST W
BRADENTON FL 34209-2952

RESPONDENT:

State of Florida
THE DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2011-21003R**

ORDER

This matter comes before me for final Department Order.

The issue before me is whether the Petitioner's tax rates were properly computed pursuant to Section 443.131, Florida Statutes; Rules 60BB-2.026; 2.031, Florida Administrative Code. An issue also before me is whether the Petitioner's liability for unemployment compensation contributions was properly determined pursuant to sections 443.1215; 443.1216; 443.1217; 443.131, Florida Statutes.

The Department of Revenue, hereinafter referred to as the Respondent, issued a determination notifying the Petitioner of the mandatory transfer of the tax rate of its predecessor account. The Respondent based its determination on the Petitioner's acquisition of part of the predecessor's workforce. In the determination, the Respondent also concluded that common ownership, management, or control existed between the two businesses at the time of the transfer. As a result of the determination, the Petitioner was required to pay additional taxes and interest. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on June 13, 2011. The Petitioner was represented by the Assistant Director of Government Regulations of TALX Corporation. The Chief Executive Officer of Four Corners of Excellence, Inc., the Petitioner's parent company, testified as a witness. The Respondent, represented by a Department of Revenue Tax Auditor III, appeared and testified. The Special Deputy issued a Recommended Order on August 1, 2011.

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

1. The Petitioner, 21st Century Concepts, Inc., is a corporation which operates an employee leasing company. The parent company, Four Corners of Excellence, Inc., also owns other related corporations which operate employee leasing companies under the same employee leasing company license. One of those corporations is Administrative Concepts 2000 Corporation. 21st Century Concepts, Inc. and Administrative Concepts 2000 Corporation have common management.
2. Administrative Concepts 2000 Corporation and 21st Century Concepts, Inc. have separate accounts for payment of unemployment compensation tax to the State of Florida.
3. The Department of Revenue has a computer program which identifies workers who are transferred from one employer to another employer. The computer program identified, by social security number, employees who were reported by Administrative Concepts 2000 Corporation in the first calendar quarter 2008 and were reported by 21st Century Concepts, Inc. for the second calendar quarter 2008. It appeared to the Department of Revenue that the employees had been transferred from the payroll of Administrative Concepts 2000 Corporation to the payroll of 21st Century Concepts, Inc. on or about April 1, 2008.
4. The Department of Revenue requested information from the Petitioner concerning the employees who appeared to have been transferred on or about April 1, 2008. The Petitioner provided some information; however, the information did not show to the satisfaction of the Department of Revenue that the employees were not transferred or that there was no common ownership, management or control of the two corporations at the time of the transfer.
5. On December 16, 2010, the Department of Revenue issued a determination notifying the Petitioner that the Department of Revenue had processed a partial tax rate transfer from Administrative Concepts 2000 Corporation resulting in an increase in the tax rate of the Petitioner. The Petitioner filed a timely protest.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated December 16, 2010, be affirmed. The Petitioner's motions were received by mail postmarked September 1, 2011. The Respondent's response to the motions was received by fax on September 7, 2011. 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.

In its Motion for Leave to Reopen the Hearing, the Petitioner requests that the hearing be reopened because its former representative, the TALX Corporation, did not advise the Petitioner of the requirement to present direct evidence. Rule 60BB-2.035(18), Florida Administrative Code, provides that a special deputy may rescind a recommended order for good cause and reopen the proceedings if a party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. Because the Petitioner has failed to demonstrate good cause for reopening the hearing, this motion is respectfully denied.

The Petitioner also moved for an extension of time for the filing of exceptions. Rule 60BB-2.035(19)(c), Florida Administrative Code, requires that written exceptions be filed within 15 days of the mailing date of the Recommended Order. Rule 60BB-2.035(20), Florida Administrative Code, provides that a written application for an extension of time for the filing of exceptions must be received prior to the expiration of the time period allowed for filing exceptions. The record shows that the Petitioner did not submit any exceptions prior to September 1, 2011. The record also shows that the Petitioner's motion for an extension of time was received more than 15 days after the mailing date of the Recommended Order. Thus, the Petitioner has not established that it filed timely exceptions or a timely extension request pursuant to rule 60BB-2.035, Florida Administrative Code, and this motion is respectfully denied.

Having considered the Special Deputy's Recommended Order and the record of the case and in the absence of any timely exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

Therefore, it is ORDERED that the determination dated December 16, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **January, 2012**.



TOM CLENDENNING,
Director of Workforce Services
THE DEPARTMENT OF ECONOMIC
OPPORTUNITY

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2595124
21ST CENTURY CONCEPTS INC
BRENDA SMYTH ROSS
406 43RD ST W
BRADENTON FL 34209-2952

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-21003R**

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 December 16, 2010.

After due notice to the parties, a telephone hearing was held on June 13, 2011. The Petitioner was represented by the Assistant Director of Government Regulations of TALX Corporation. The Chief Executive Officer of Four Corners of Excellence, Inc., the Petitioner's parent company, testified as a witness. The Respondent, represented by a Department of Revenue Tax Auditor III, 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 the Petitioner's tax rates were properly computed, pursuant to Section 443.131, Florida Statutes; Rules 60BB-2.026; 2.031, Florida Administrative Code.

Whether the Petitioner's liability for unemployment compensation contributions was properly determined pursuant to Sections 443.1215, 1216, 1217; 443.131, Florida Statutes.

Findings of Fact:

1. The Petitioner, 21st Century Concepts, Inc., is a corporation which operates an employee leasing company. The parent company, Four Corners of Excellence, Inc., also owns other related corporations which operate employee leasing companies under the same employee leasing company license. One of those corporations is Administrative Concepts 2000

Corporation. 21st Century Concepts, Inc. and Administrative Concepts 2000 Corporation have common management.

2. Administrative Concepts 2000 Corporation and 21st Century Concepts, Inc. have separate accounts for payment of unemployment compensation tax to the State of Florida.
3. The Department of Revenue has a computer program which identifies workers who are transferred from one employer to another employer. The computer program identified, by social security number, employees who were reported by Administrative Concepts 2000 Corporation in the first calendar quarter 2008 and were reported by 21st Century Concepts, Inc. for the second calendar quarter 2008. It appeared to the Department of Revenue that the employees had been transferred from the payroll of Administrative Concepts 2000 Corporation to the payroll of 21st Century Concepts, Inc. on or about April 1, 2008.
4. The Department of Revenue requested information from the Petitioner concerning the employees who appeared to have been transferred on or about April 1, 2008. The Petitioner provided some information; however, the information did not show to the satisfaction of the Department of Revenue that the employees were not transferred or that there was no common ownership, management or control of the two corporations at the time of the transfer.
5. On December 16, 2010, the Department of Revenue issued a determination notifying the Petitioner that the Department of Revenue had processed a partial tax rate transfer from Administrative Concepts 2000 Corporation resulting in an increase in the tax rate of the Petitioner. The Petitioner filed a timely protest.

Conclusions of Law:

6. Section 443.131(3), Florida Statutes, (2006) provides:
 - (g) *Transfer of unemployment experience upon transfer or acquisition of a business.--* Notwithstanding any other provision of law, upon transfer or acquisition of a business, the following conditions apply to the assignment of rates and to transfers of unemployment experience:
 - 1.a. If an employer transfers its trade or business, or a portion thereof, to another employer and, at the time of the transfer, there is any common ownership, management, or control of the two employers, the unemployment experience attributable to the transferred trade or business shall be transferred to the employer to whom the business is so transferred. The rates of both employers shall be recalculated and made effective as of the beginning of the calendar quarter immediately following the date of the transfer of the trade or business unless the transfer occurred on the first day of a calendar quarter, in which case the rate shall be recalculated as of that date.
7. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.
8. Rule 60BB-2.031(3), Florida Administrative Code, provides in pertinent part that for the purpose of implementing Section 443.131(3)(g), F.S.:
 - (a) The term "ownership" means any proprietary interest in a business, including, but not limited to, shares of stock in a corporation, partnership interest in a partnership or membership interest in a Limited Liability Company (LLC).
 - (b) "Common ownership" exists when a person has ownership in two or more businesses.
 - (c) A person in "management" includes any officer or director of a corporation, owner of a sole proprietorship, partner in a partnership, manager of an LLC, or person with the ability to direct the activities of an employing unit, either individually or in concert with others.
 - (d) "Common management" exists when a person concurrently occupies management positions in

- two or more businesses.
- (e) A person in “control” of a business includes any officer or director of a corporation, owner of a sole proprietorship, partner in a partnership, manager of an LLC, or other person with the ability, directly or indirectly, individually or in concert with others, to influence or direct management, activities or policies of the business through ownership of stock, voting rights, contract, or other means. Control exists when an employee leasing company dictates or specifies the businesses with which a client company must contract.
 - (f) “Common control” exists when a person or group of persons has control of two or more businesses.
 - (g) The phrase “transfer or acquisition” encompasses any and all types of transfers and acquisitions including, but not limited to, assignments, changes in legal identity or form, consolidations, conveyances, mergers, name changes, purchase and sale agreements, reorganizations, stock transfers and successions.
 - (h) The phrase “trade or business or a portion thereof” includes but is not limited to assets, customers, management, organization and workforce.
9. The evidence presented in this case reveals that Administrative Concepts 2000 Corporation and 21st Century Concepts, Inc. have common ownership and common management.
 10. A portion of the workforce of of Administrative Concepts 2000 Corporation became a portion of the workforce of 21st Century Concepts, Inc. on or about April 1, 2008, leading to the conclusion that there was a partial transfer of trade or business since an employer's trade or business includes the workforce.
 11. Since there was common ownership, management, or control of the two corporations the Department of Revenue determined that the unemployment experience attributable to the transferred trade or business was required to be transferred to the Petitioner.
 12. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
 13. The Petitioner has failed to establish by a preponderance of competent evidence that the determination of the Department of Revenue is in error.
 14. The Petitioner argues that the best evidence in support of the information which the Petitioner's representative asserts to be true is the testimony of the Petitioner's witness, the CEO of the Petitioner's parent company. The Petitioner's representative submitted listings of certain employees with explanations concerning the reasons that the employees were reported by Administrative Concepts 2000 Corporation prior to April 1, 2008, and by 21st Century Concepts, Inc. beginning on or about April 1, 2008. The CEO testified that he did not personally prepare the listings, that he did not know who had prepared the listings, and that it was his belief that the listings were not submitted directly to the Department of Revenue by the Petitioner but that the listings were submitted to the Department of Revenue by the Petitioner's representative. The CEO testified that he is responsible for making sure that all of the subsidiaries of the parent company are operating smoothly. He testified that he does not perform the actual work of the subsidiary companies and is not involved in the preparation of paperwork. He testified that the Petitioner's position in this matter is based on appearances, possibilities, and assumptions.
 15. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of

itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.

16. Section 90.802(6)(a), Florida Statutes, provides that certain business records qualify as an exception to the hearsay rule. The law provides that a memorandum, report, record, or data compilation of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, is admissible.
17. It has not been shown that the employee listings submitted by the Petitioner's representative qualify as a business record exception to the hearsay rule. Although the CEO testified concerning his understanding of the Petitioner's business practices, the testimony of the CEO is not competent to establish that the movement of employees from Administrative Concepts 2000 Corporation to 21st Century Concepts, Inc. occurred under circumstances that would not constitute a transfer of trade or business.

Recommendation: It is recommended that the determination dated December 16, 2010, be AFFIRMED.

Respectfully submitted on August 1, 2011.



R. O. SMITH, Special Deputy
Office of Appeals