AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2645076
HEALTH IMPROVEMENT SYSTEMS INC
1170 NW CLEVELAND STREET
CLEARWATER FL 33755-4836

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

PROTEST OF LIABILITY
DOCKET NO. 2011-69498R

O R D E R

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any 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.

In consideration thereof, it is ORDERED that the determination dated May 5, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 2011**.

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

PETITIONER:
Employer Account No. - 2645076
HEALTH IMPROVEMENT SYSTEMS INC
ATTN: PAUL CHALUPSKY
1170 NW CLEVELAND STREET
CLEARWATER FL 33755-4836

PROTEST OF LIABILITY
DOCKET NO. 2011-69498R

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 May 5, 2011.

After due notice to the parties, a telephone hearing was held on August 9, 2011. The Petitioner, represented by the Finance Director, appeared and testified. 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 not received.

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. Professional Enhancement Systems, Inc. was a corporation which operated a business involved in educational training. Professional Enhancement Systems, Inc. registered for payment of unemployment tax on its employees effective the third quarter 2004.
2. The Petitioner, Health Improvement Systems, Inc. is a corporation that operates an educational training business. The Petitioner registered for payment of unemployment tax on its employees effective the fourth quarter 2005.

3. Effective July 4, 2009, Professional Enhancement Systems, Inc. merged into Health Improvement Systems, Inc. at which time the workforce was transferred. The Petitioner is the surviving corporation and Professional Enhancement Systems, Inc. ceased business activity effective July 3, 2009.
4. At the time of the merger Lynn Irons, Arte Maren, Freddie Ulan, and Robin Burness were officers and/or directors of both Professional Enhancement Systems, Inc. and Health Improvement Systems, Inc.
5. The Department of Revenue discovered that the workforce of Professional Enhancement Systems, Inc. was transferred to Health Improvement Systems, Inc. on or about July 4, 2009, and that at the time of the transfer common ownership, common management, or common control existed between the two corporations. As a result the Department of Revenue transferred the unemployment experience attributable to Professional Enhancement Systems, Inc. to Health Improvement Systems, Inc.
6. By determination mailed on or before May 6, 2011, the Department of Revenue notified the Petitioner that the unemployment experience had been transferred resulting in an increase in the tax rate of Health Improvement Systems, Inc. effective October 1, 2009. The Petitioner filed a timely protest.

Conclusions of Law:

7. 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.
8. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.
9. 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.

10. The Petitioner's representative does not dispute the fact that the trade or business of Professional Enhancement Systems, Inc. was transferred to the Petitioner on July 4, 2009, and does not dispute the fact that at the time of the merger there was common ownership, management, or control. The representative questions the method used to compute the tax rate.

11. Section 443.131(3)(b), Florida Statutes, provides:

    1. As used in this paragraph, the term "annual payroll" means the calendar quarter taxable payroll reported to the tax collection service provider for the quarters used in computing the benefit ratio. The term does not include a penalty resulting from the untimely filing of required wage and tax reports. All of the taxable payroll reported to the tax collection service provider by the end of the quarter preceding the quarter for which the contribution rate is to be computed must be used in the computation.

    2. For each calendar year, the tax collection service provider shall compute a benefit ratio for each employer whose employment record was chargeable for benefits during the 12 consecutive quarters ending June 30 of the calendar year preceding the calendar year for which the benefit ratio is computed. An employer's benefit ratio is the quotient obtained by dividing the total benefits charged to the employer's employment record during the 3-year period ending June 30 of the preceding calendar year by the total of the employer's annual payroll for the 3-year period ending June 30 of the preceding calendar year. The benefit ratio shall be computed to the fifth decimal place and rounded to the fourth decimal place.

    3. The tax collection service provider shall compute a benefit ratio for each employer who was not previously eligible under subparagraph 2., whose contribution rate is set at the initial contribution rate in paragraph (2)(a), and whose employment record was chargeable for benefits during at least 8 calendar quarters immediately preceding the calendar quarter for which the benefit ratio is computed. The employer's benefit ratio is the quotient obtained by dividing the total benefits charged to the employer's employment record during the first 6 of the 8 completed calendar quarters immediately preceding the calendar quarter for which the benefit ratio is computed by the total of the employer's annual payroll during the first 7 of the 9 completed calendar quarters immediately preceding the calendar quarter for which the benefit ratio is computed. The benefit ratio shall be computed to the fifth decimal place and rounded to the fourth decimal place and applies for the remainder of the calendar year. The employer must subsequently be rated on an annual basis using up to 12 calendar quarters of benefits charged and up to 12 calendar quarters of annual payroll. That employer's benefit ratio is the quotient obtained by dividing the total benefits charged to the employer's employment record by the total of the employer's annual payroll during the quarters used in his or her first computation plus the subsequent quarters reported through June 30 of the preceding calendar year. Each subsequent calendar year, the rate shall be computed under subparagraph 2. The tax collection service provider shall assign a variation from the standard rate of contributions in paragraph (c) on a quarterly basis to each eligible employer in the same manner as an assignment for a calendar year under paragraph (e).

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 preponderence of the evidence that the determination was in error.
13. No evidence was presented by the Petitioner to show that the Department of Revenue incorrectly computed the Petitioner's tax rate following the merger.

Recommendation: It is recommended that the determination dated May 5, 2011, be AFFIRMED.

Respectfully submitted on August 10, 2011.

R. O. SMITH, Special Deputy
Office of Appeals