

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2908717

COASTLINE ENGINEERING &
CONSTRUCTION INC
ATTN ROBERT N GARRETT
13305 PANAMA CITY BEACH PKWY
PANAMA CITY BEACH FL 32407-2844

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-69499R**

O R D E R

This matter comes before me for final Agency 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 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 the predecessor's workforce. In the determination, the Respondent also concluded that common ownership, management, or control existed between the two companies 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 July 26, 2011. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Auditor III, appeared and testified. The Special Deputy issued a Recommended Order on July 27, 2011.

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

1. Carr Engineering & Construction, Inc. was a corporation which operated an engineering and construction business. Michael Carr, a professional engineer, owned the corporation and was an officer of the corporation.
2. Robert Garrett was the Construction Manager for Carr Engineering & Construction, Inc. Robert Garrett was not an officer of the corporation and he did not own any of the stock of the corporation.
3. Michael Carr decided to start the process of retiring and offered to sell the business to Robert Garrett since Robert Garrett was Construction Manager. In June 2009, Robert Garrett formed Garrett Engineering & Construction, Inc. to purchase the business of Carr Engineering & Construction, Inc. effective July 1, 2009. Robert Garrett is the owner of the corporation and at the time of formation was the only officer of the corporation.
4. Garrett Engineering & Construction, Inc. purchased the assets of Carr Engineering & Construction, Inc. and began operating the business on July 1, 2009. The assets that were purchased included the customers of Carr Engineering & Construction, Inc. and the workforce. Carr Engineering & Construction, Inc. had a couple of government jobs in progress at the time of the transfer of the business that could not, by law, be transferred to another company. Carr Engineering & Construction, Inc. continued in business until those jobs were complete.
5. On or about July 20, 2009, Robert Garrett learned that the name of the corporation could not contain an individual's name unless the individual was an engineer. Robert Garrett is not an engineer. Therefore, on July 20, 2009, Robert Garrett amended the Articles of Incorporation to change the name of the corporation to Coastline Engineering & Construction, Inc.
6. Michael Carr performed engineering services for the Petitioner, Coastline Engineering & Construction, Inc., from the date that the business was transferred, July 1, 2009. In September 2009 the Petitioner learned that the Board of Professional Engineers requires that any engineer who serves as engineer for a corporation must be an officer of the corporation. On September 22, 2009, Robert Garrett amended the Articles of Incorporation and added Michael Carr as an officer of the corporation.
7. Coastline Engineering & Construction, Inc. registered for payment of unemployment compensation tax effective July 1, 2009. The Department of Revenue assigned the initial tax rate of .0270.
8. At the end of the third quarter 2009 both Carr Engineering & Construction, Inc. and Coastline Engineering & Construction, Inc. filed Employers Quarterly Reports to report and pay tax on the wages of employees. During the third quarter 2009 both corporations reported wages paid to the same twenty-two employees, including Robert Garrett and Michael Carr. During the fourth quarter 2009 Carr Engineering & Construction, Inc. reported three employees and reported that it had ceased business activity as of November 30, 2009.
9. Through a computer program designed to identify employees who are transferred from one employer to another employer, the Department of Revenue learned that the workforce of Carr Engineering & Construction, Inc. was transferred to Coastline Engineering & Construction, Inc. Since Carr Engineering & Construction, Inc. had notified the Department of Revenue that it had ceased payroll activity effective November 30, 2009, the Department of Revenue concluded that the transfer occurred on December 1, 2009. Through Secretary of State records the Department of Revenue learned that on December 1, 2009, Michael Carr was an officer of both Carr Engineering & Construction, Inc. and Coastline Engineering & Construction, Inc.

As a result the Department of Revenue transferred the unemployment experience attributable to Carr Engineering & Construction, Inc. to Coastline Engineering & Construction, Inc.

10. On May 13, 2011, the Department of Revenue issued a "*Common Ownership Notice*" notifying the Petitioner that based on a review of the Department's records it appeared that Coastline Engineering & Construction, Inc. had acquired the workforce of Carr Engineering & Construction, Inc. on or about December 1, 2009, and that at the time of the transfer there was common ownership, management, or control of the two businesses and, as a result, the Petitioner's tax rate was increased to .0540 for 2010 and 2011. The Petitioner filed a timely protest.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated May 13, 2011, be modified to reflect an effective date of July 1, 2009. The Special Deputy also recommended that the determination be affirmed as modified. The Petitioner's exceptions were received by mail postmarked August 8, 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.

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.

The Petitioner takes exception to Findings of Fact #8 and 10 and Conclusions of Law #15-16. Additionally, the exceptions propose alternative findings of fact or conclusions of law or attempt to enter additional evidence not provided at the hearing. Section 120.57(1)(l), Florida Statutes, does not allow the modification or rejection of the Special Deputy's Findings of Fact or Conclusions of Law unless the Agency first determines that the findings are not supported by the competent substantial evidence in the record or that the conclusions do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact, including Findings of Fact #8 and 10, are supported by competent substantial evidence in the record. A review of the record also reveals that the Special Deputy's Conclusions of Law, including Conclusions of Law #15-16, reflect a reasonable application of the law to the facts. As a result, the Agency may not modify the Special Deputy's Findings of Fact and Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Rule 60BB-2.035(19)(a), Florida Administrative Code, provides that additional evidence will not be accepted after the close of the hearing. The Petitioner's request for the consideration of additional evidence is respectfully denied. The Petitioner's exceptions are respectfully rejected.

A review of the record reveals that the Findings of Fact 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 fully 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.

Therefore, it is ORDERED that the determination dated May 13, 2011, is MODIFIED to reflect an effective date of July 1, 2009. It is further ORDERED that the determination is AFFIRMED as modified.

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



TOM CLENNING,
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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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 13, 2011.

After due notice to the parties, a telephone hearing was held on July 26, 2011. The Petitioner, represented by its President, appeared and testified. The Petitioner's Vice President of Engineering also appeared but did not testify. 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. Carr Engineering & Construction, Inc. was a corporation which operated an engineering and construction business. Michael Carr, a professional engineer, owned the corporation and was an officer of the corporation.

2. Robert Garrett was the Construction Manager for Carr Engineering & Construction, Inc. Robert Garrett was not an officer of the corporation and he did not own any of the stock of the corporation.
3. Michael Carr decided to start the process of retiring and offered to sell the business to Robert Garrett since Robert Garrett was Construction Manager. In June 2009, Robert Garrett formed Garrett Engineering & Construction, Inc. to purchase the business of Carr Engineering & Construction, Inc. effective July 1, 2009. Robert Garrett is the owner of the corporation and at the time of formation was the only officer of the corporation.
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6. Michael Carr performed engineering services for the Petitioner, Coastline Engineering & Construction, Inc., from the date that the business was transferred, July 1, 2009. In September 2009 the Petitioner learned that the Board of Professional Engineers requires that any engineer who serves as engineer for a corporation must be an officer of the corporation. On September 22, 2009, Robert Garrett amended the Articles of Incorporation and added Michael Carr as an officer of the corporation.
7. Coastline Engineering & Construction, Inc. registered for payment of unemployment compensation tax effective July 1, 2009. The Department of Revenue assigned the initial tax rate of .0270.
8. At the end of the third quarter 2009 both Carr Engineering & Construction, Inc. and Coastline Engineering & Construction, Inc. filed Employers Quarterly Reports to report and pay tax on the wages of employees. During the third quarter 2009 both corporations reported wages paid to the same twenty-two employees, including Robert Garrett and Michael Carr. During the fourth quarter 2009 Carr Engineering & Construction, Inc. reported three employees and reported that it had ceased business activity as of November 30, 2009.
9. Through a computer program designed to identify employees who are transferred from one employer to another employer, the Department of Revenue learned that the workforce of Carr Engineering & Construction, Inc. was transferred to Coastline Engineering & Construction, Inc. Since Carr Engineering & Construction, Inc. had notified the Department of Revenue that it had ceased payroll activity effective November 30, 2009, the Department of Revenue concluded that the transfer occurred on December 1, 2009. Through Secretary of State records the Department of Revenue learned that on December 1, 2009, Michael Carr was an officer of both Carr Engineering & Construction, Inc. and Coastline Engineering & Construction, Inc. As a result the Department of Revenue transferred the unemployment experience attributable to Carr Engineering & Construction, Inc. to Coastline Engineering & Construction, Inc.
10. On May 13, 2011, the Department of Revenue issued a "*Common Ownership Notice*" notifying the Petitioner that based on a review of the Department's records it appeared that Coastline Engineering & Construction, Inc. had acquired the workforce of Carr Engineering & Construction, Inc. on or about December 1, 2009, and that at the time of the transfer there was common

ownership, management, or control of the two businesses and, as a result, the Petitioner's tax rate was increased to .0540 for 2010 and 2011. The Petitioner filed a timely protest.

Conclusions of Law:

11. 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.
12. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.
13. 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.
14. The Petitioner's testimony reveals that on July 1, 2009, the Petitioner acquired all of the trade and business of Carr Engineering & Construction, Inc. with the exception of the government jobs that were in progress and which, by law, could not be transferred. The Petitioner acquired all of the workforce of Carr Engineering & Construction, Inc. on July 1, 2009, although the workforce worked concurrently for both companies.

15. There has never been any common ownership of the Petitioner and Carr Engineering & Construction, Inc. as inferred by the "*Common Ownership Notice*." However, the evidence supports a conclusion that there was common management or common control of the two businesses. On July 1, 2009, Robert Garrett was the president of the Petitioner and was the Construction Manager of Carr Engineering & Construction, Inc. Although Robert Garrett was not an officer of Carr Engineering & Construction, Inc., he occupied a management position. As Construction Manager he had the ability to direct the activities of the business, either individually or in concert with other individuals.
16. It is concluded that at the time of the transfer, July 1, 2009, Robert Garrett concurrently occupied management positions in Carr Engineering & Construction, Inc. and Coastline Engineering & Construction, Inc. Thus, the law requires that the unemployment experience attributable to Carr Engineering & Construction, Inc. be transferred to the Petitioner effective as of the first day of the calendar quarter, July 1, 2009.

Recommendation: It is recommended that the determination dated May 13, 2011, be MODIFIED to reflect an effective date of July 1, 2009. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on July 27, 2011.



R. O. SMITH, Special Deputy
Office of Appeals