DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2795662

PDQ COOLIDGE FORMAD LLC
984 MERCY DRIVE STE 1
ORLANDO FL 32808-7843

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

PROTEST OF LIABILITY
DOCKET NO. 2011-92490L

O R D E R

This matter comes before me for final Department Order.

The issue before me is whether the Petitioner filed a timely protest pursuant to sections 443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 60BB-2.035, Florida Administrative Code. An issue also before me is whether services performed for the Petitioner by the Joined Party as a maintenance worker constitute insured employment, and if so, the effective date of liability pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed an unemployment compensation claim in August 2010. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department (the Agency for Workforce Innovation and its successor, the Department of Economic Opportunity) that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue, hereinafter referred to as the Respondent, conducted an investigation to determine whether the Joined Party worked for the Petitioner as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes on the remuneration it paid to the Joined Party. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the wages it paid to the Joined Party. Upon completing the investigation, an auditor at the Department of Revenue determined that the services

performed by the Joined Party were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages it paid to the Joined Party. The Petitioner filed a protest of the determination. The claimant who requested the investigation was joined as a party because he 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 29, 2011. The Petitioner, represented by its attorney, appeared and testified. Both the Petitioner's attorney and the Petitioner's Chief Executive Officer testified as witnesses on behalf of the Petitioner. A Department of Revenue representative appeared on behalf of the Respondent. The Joined Party represented himself in the hearing. The Special Deputy issued the Recommended Order on October 18, 2011.

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

> On January 5, 2011 a determination was mailed to the Petitioner at its last-known address of record. 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 a written application to protest this determination, within twenty (20) days from the date of this letter. If your protest is filed by mail, the postmark date will be considered the filing date of your protest.
>
> The Petitioner subsequently protested this determination on May 13, 2011. On August 5, 2011, an *Order to Show Cause* was mailed to the Petitioner, instructing the Petitioner to set forth in writing the reasons why its protest should not be dismissed for lack of jurisdiction. A hearing was scheduled because the Petitioner's response to the *Order to Show Cause* indicated the appeal may have been filed timely. The hearing was scheduled for September 29, 2011. The referee found that the Petitioner's chief executive officer did not receive the notice until on or about April 27, 2011.
>
> The delay was apparently caused by a failure of the worker in charge of incoming mail to deliver the determination to the proper party within the Petitioner's company. The Petitioner's CEO contacted the Petitioner's attorney and forwarded the determination to the attorney. The Petitioner's attorney submitted a letter of protest to the determination on May 13, 2011.

Based on these Findings of Fact, the Special Deputy recommended that the Petitioner's protest of the determination dated January 5, 2011, be dismissed. The Petitioner's motion and exceptions to the Recommended Order were received by mail postmarked November 1, 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 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's motion and exceptions are also addressed below.

Upon review of the record, it was determined that a portion of the fifth paragraph from the bottom of the first page of the Recommended Order must be modified because it does not accurately reflect what was admitted as an exhibit during the hearing. A review of the record reveals that the Special Deputy did not admit the *Order to Show Cause* or the Petitioner's *Exhibits #1-3* as exhibits during the hearing. The paragraph is amended to state:

The record of the case is herewith transmitted.

It was also determined that the paragraph above the Special Deputy's *Recommendation* on the second page of the Recommended Order required modification because it listed an incorrect date. Rule 60BB-2.035, Florida Administrative Code, provides that the Petitioner must file a response to an order to show cause within 15 days of the mailing date of the order to show cause. Rule 60BB-2.022, Florida

Administrative Code, also provides that a Saturday will not be counted as the last day of a time period when computing time, and that the following day that is not a Saturday, Sunday, or holiday will be counted instead as the last day of the time period. In the current case, 15 days after August 5, 2011, the mailing date of the *Order to Show Cause*, would fall on August 20, 2011, a Saturday. Therefore, the Petitioner was permitted to submit a written response until August 22, 2011, the following Monday, under rule 60BB-2.022, Florida Administrative Code. The paragraph is amended to state:

> The evidence in this case reflects that the determination was mailed to the Petitioner at its last-known address on January 5, 2011. The Petitioner did not protest this determination until May 13, 2011, when a letter of protest was submitted by the Petitioner's attorney. In accordance with the above cited sections of the statute and rules, the Petitioner had until August 22, 2011, to provide evidence that the protest was filed timely. Although a response was received, evidence presented at the hearing was not sufficient to establish that the protest was filed within the allowable time limit. The determination has thus become final.

In its *Brief Statement of Facts*, the Petitioner proposes findings of fact in accord with the Special Deputy's Findings of Fact or proposes alternative findings of fact. Pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines from a review of the entire record, and states with particularity in its order, that the findings of fact were not based upon competent substantial evidence. 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 Department 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. The Petitioner's exceptions are respectfully rejected.

In its *Argument*, the Petitioner contends that a deprivation of its due process rights occurred and the Department exceeded its rulemaking authority when the Special Deputy did not address whether the Petitioner had good cause to file an untimely appeal. Section 443.141(2)(c), Florida Statutes, provides that the Department and the Respondent shall adopt rules prescribing how an appeal may be filed by a Petitioner. Rule 60BB-2.035(5), Florida Administrative Code, further provides that a determination will become final 20 days from the date the determination is mailed or, if the determination is not mailed, the determination will become final 20 days from the date the determination is delivered. An examination of the record reveals that the Special Deputy considered the reason that the Petitioner's appeal was untimely, did not explicitly address the possibility of any good cause exception, and held that the Petitioner's protest was untimely in the Recommended Order pursuant to rule 60BB-2.035(5), Florida Administrative Code. Contrary to the Petitioner's contentions, the Special Deputy actions do not represent a violation of the

Petitioner's due process rights and do not result in the Department exceeding its rulemaking authority. Additionally, the court cases cited by the Petitioner do not support its contentions.

The Petitioner relies on several court cases when making its arguments. The Petitioner first relies on *Dumorange v. Florida Unemployment Appeals*, 947 So.2d 472 (Fla. 3d DCA 2006). While the court in *Dumorange* recognized a limited due process exception for untimely appeals, *Dumorange* is distinguishable in that the court found that the appellant was prevented from filing a timely appeal as the result of a hurricane, an emergency and a natural disaster. *Id*. at 475. In *Dumorange*, the court also faced due process concerns about a pro se appellant having the full ability to prove that his appeal was filed in a timely manner. *Id*. The record reflects that the Petitioner's failure to file a timely protest was the result of the actions of one or more employees and not the result of anything approaching an emergency or a natural disaster. The record also reflects that the Petitioner was represented by an attorney in the hearing. Absent similar concerns about due process as were present in *Dumorange*, the Petitioner has not proven that a due process exception should be applicable in the current case. Why such an exception should not be made in this case is further illustrated by an examination of the other cases cited by the Petitioner.

The Petitioner also relies on *Hamilton County Bd. of County Com'rs v. State Dept. of Envtl. Regulation*, 587 So.2d 1378 (Fla. 1st DCA 1991), and *State Dept. of Envtl. Regulation v. Puckett Oil Co., Inc.*, 577 So.2d 988 (Fla. 1st DCA 1991). In both cases, the court recognized that agencies have the discretion to extend the time for submitting a filing despite mandatory language in a rule as to the time requirements for submitting the filing. The court also acknowledged in these cases that a party may waive its right to submit a filing when a failure to file is based on a party delaying for a protracted period of time. 587 So.2d at 1390; 577 So.2d at 993. The filings in both cases involved delays of a day and four days respectively. 587 So.2d at 1389; 577 So.2d at 994. In *Hamilton*, the court held that a party should have been allowed to submit evidence regarding the reason for the failure to file. 587 So.2d at 1390. *Hamilton* and *Puckett* are also distinguishable from the current case upon review of the record.

The facts of the current case are not similar to those addressed in *Hamilton* and *Puckett*. The record reflects that the Petitioner was notified of the 20 day time period in which to file a protest by a determination mailed on January 5, 2011, and did not appeal the determination until May 13, 2011. Thus, the case at hand involves a delay of several months, not merely a few days as occurred in *Hamilton* and *Puckett*. Unlike in the *Hamilton* case, the Petitioner was not deprived of any opportunity to explain why its protest was not filed in a timely manner. A review of the record shows that the Petitioner had the opportunity to present such evidence before and during the hearing and that the Petitioner did not request

an opportunity to submit additional evidence at any time during the hearing. A review of the record further demonstrates that the Petitioner's witnesses testified about why the Petitioner filed an untimely appeal. Assuming that the Department had the discretion to extend the time period for filing a protest as argued by the Petitioner, the Petitioner has not shown that it would be appropriate for the Department to grant such an extension in the current case. A review of the remaining court case cited by the Petitioner confirms that the mandatory language of the rule should be applied to the case at hand.

The Petitioner also cites *Machules v. Dep't of Admin.*, 523 So.2d 1132 (Fla. 1988) in support of its arguments. *Machules* provides for equitable tolling in administrative actions when a party has been misled or lulled into inaction, was prevented from asserting its rights in some extraordinary way, or timely submitted a filing to the wrong forum by mistake. *Id*. at 1134. *Machules* requires that the doctrine of equitable tolling only be applied when a party has not 'slept on [its] rights' and an application of the doctrine would serve the interests of justice. *Id*. at 1135-1136. A review of the record reveals that the Petitioner has not established that the Petitioner was misled or lulled into action, was prevented from asserting its rights in some extraordinary way, or timely filed a protest in the wrong forum by mistake. Even if it assumed that the Department can hold that a good cause exception may be applied to an untimely appeal in some instances, the Special Deputy's Findings of Fact and Conclusions of Law do not support the application of such an exception in this case.

Based on the Special Deputy's Findings of Fact and Conclusions of Law in the Recommended Order, the Special Deputy recommended that the Petitioner's untimely appeal be dismissed due to a lack of jurisdiction. Pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Conclusions of Law unless the Department first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. As previously stated, the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department 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 pursuant to section 120.57(1)(l), Florida Statutes. The Special Deputy's ultimate conclusion that the Petitioner's protest was untimely and should be dismissed pursuant to Rule 60BB-2.035(5), Florida Administrative Code, reflects a reasonable application of the law to the facts. The Special Deputy's Findings of Fact and Conclusions of Law are supported by competent substantial evidence in the record. As a result, the Department may not further modify the Special Deputy's Findings of Fact and Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes. The Special Deputy's Findings of Fact and Conclusions of Law are accepted by the Department as amended herein. The Petitioner's exceptions are respectfully rejected.

In its motion, the Petitioner requests that the hearing be reopened because the Special Deputy did not address whether a good cause exception applied to the timeliness issue. 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.

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 Conclusions of Law as modified herein 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 amended herein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the Petitioner's protest of the determination dated January 5, 2011, is DISMISSED due to a lack of jurisdiction.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this *Order* and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY]* en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt *Lòd* sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _______ day of **March, 2012**.

Altemese Smith,
Assistant Director, Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

DEPUTY CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the ______ day of March, 2012.

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:
PDQ COOLIDGE FORMAD LLC
984 MERCY DRIVE STE 1
ORLANDO FL 32808-7843

COLIN THACKER ESQ
JACKSON LEWIS ATTYS AT LAW
245 RIVERSIDE AVE STE 450
JACKSONVILLE FL 32202

LEONARD M GIBSON
2126 ORANGE CENTER BLVD #29
ORLANDO FL 32805

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

THE DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2795662
PDQ COOLIDGE FORMAD LLC
984 MERCY DRIVE STE 1
ORLANDO FL 32808-7843

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

PROTEST OF LIABILITY
DOCKET NO. 2011-92490L

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
THE DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest to a determination of the Respondent dated January 5, 2011, which held that the Joined Party that was performing services in maintenance was an employee.

The record of the case, consisting of the Special Deputy's *Order to Show Cause*, with three exhibits attached, is herewith transmitted.

Issue: Whether the Petitioner filed a timely protest pursuant to §443.131(3)(h), 443.141(2)(c), or 443.1312, Florida Statutes, and Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact: On January 5, 2011 a determination was mailed to the Petitioner at its last-known address of record. 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 a written application to protest this determination, within twenty (20) days from the date of this letter. If your protest is filed by mail, the postmark date will be considered the filing date of your protest.

The Petitioner subsequently protested this determination on May 13, 2011. On August 5, 2011, an *Order to Show Cause* was mailed to the Petitioner, instructing the Petitioner to set forth in writing the reasons why its protest should not be dismissed for lack of jurisdiction. A hearing was scheduled because the Petitioner's response to the *Order to Show Cause* indicated the appeal may have been filed timely. The

hearing was scheduled for September 29, 2011. The referee found that the Petitioner's chief executive officer did not receive the notice until on or about April 27, 2011.

The delay was apparently caused by a failure of the worker in charge of incoming mail to deliver the determination to the proper party within the Petitioner's company. The Petitioner's CEO contacted the Petitioner's attorney and forwarded the determination to the attorney. The Petitioner's attorney submitted a letter of protest to the determination on May 13, 2011.

Conclusions of Law: Section 443.141(2)(c), Florida Statutes, provides:

> (c) *Appeals.*-- THE DEPARTMENT OF ECONOMIC OPPORTUNITY 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.

Rule 60BB-2.035(5), Florida Administrative Code, provides:

> (5) Timely Protest.
>
> (a)1. 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.
>
> 2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.
>
> (b) If a protest appears to have been filed untimely, the Agency may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.

Rule 60BB-2.023(1), Florida Administrative Code, provides, in pertinent part:

> Filing date. … The date of receipt will be the filing date of any report, protest, appeal, or other document faxed to the Agency or Department…

The evidence in this case reflects that the determination was mailed to the Petitioner at its last-known address on January 5, 2011. The Petitioner did not protest this determination until May 13, 2011, when a letter of protest was submitted by the Petitioner's attorney. In accordance with the above cited sections of the statute and rules, the Petitioner had until August 20, 2011, to provide evidence that the protest was filed timely. Although a response was received, evidence presented at the hearing was not sufficient to establish that the protest was filed within the allowable time limit. The determination has thus become final.

Recommendation: It is recommended that the Petitioner's protest to the January 5, 2011, determination be dismissed due to lack of jurisdiction.

Respectfully submitted on October 18, 2011.

KRIS LONKANI, Special Deputy
THE DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals