

**AGENCY FOR WORKFORCE INNOVATION  
TALLAHASSEE, FLORIDA**

**PETITIONER:**

Employer Account No. - 2768053  
FIRST RATE PAINTING INC  
1851 LYONS ROAD APT 308  
COCONUT CREEK FL 33063-9617

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2009-155794L**

**ORDER**

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 determinations dated September 17, 2009, are AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **May, 2010**.



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**TOM CLENDENNING**  
Director, Unemployment Compensation Services  
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. - 2768053  
FIRST RATE PAINTING INC  
PHILIP ROBERTS  
1851 LYONS ROAD APT 308  
COCONUT CREEK FL 33063-9617



**PROTEST OF LIABILITY  
DOCKET NO. 2009-155794L**

**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Director, Unemployment Compensation Services  
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated September 17, 2009.

After due notice to the parties, a telephone hearing was held on February 17, 2010. The Petitioner, represented by its accountant, appeared and testified. The Petitioner's president testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist, 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 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.

Whether the Petitioner is entitled to a waiver of penalty and interest for delinquent reports pursuant to Section 443.141(1), Florida Statutes and Rule 60BB-2.028(4), Florida Administrative Code.

**Findings of Fact:**

1. The Petitioner is a corporation which began business as a painting contractor in 2006. The Petitioner's only compensated employee is the Petitioner's president.
2. At the inception of business in 2006 the Petitioner engaged an accountant. The accountant engaged a payroll service to file the quarterly unemployment compensation tax reports with the Florida Department of Revenue.

3. The Petitioner's president has a bad back and from time to time he is not able to work. On or about April 3, 2008, the Petitioner received a fax from the payroll service requesting that the Petitioner wire funds to the payroll service to cover the taxes for the first quarter 2008. The Petitioner's accountant contacted the payroll service and advised the payroll service that the Petitioner did not have any payroll during the quarter.
4. At some point in time the payroll service canceled the contract with the Petitioner. Neither the Petitioner nor the accountant were aware that the contract with the payroll service was canceled.
5. The payroll service did not file the Petitioner's unemployment compensation tax reports for the second, third, and fourth quarters 2008 and the first quarter 2009.
6. The quarterly tax reports became delinquent when the Department of Revenue did not receive the tax reports by the end of the month following each calendar quarter. The Department of Revenue mailed at least three delinquency notices for each quarter to the Petitioner at the address of the payroll service.
7. The Petitioner received a letter from the Department of Revenue in approximately June or July 2009 listing the penalties and taxes assessed by the Department of Revenue for the delinquent quarters. The Petitioner took the letter to the Petitioner's accountant.
8. The Petitioner's accountant contacted the payroll service and was informed that the payroll service had canceled the account with the Petitioner. The Petitioner's accountant filed the four delinquent tax reports by mail postmarked July 15, 2009. Each of the tax reports were filed showing that there was no payroll during the quarter and that no taxes were due.
9. The Petitioner's president wrote a letter to the Department of Revenue requesting that the penalties be waived. By determinations dated September 9, 2009, indicated to be mailed on or before September 17, 2009, the Department of Revenue denied the request.
10. Among other things each determination states "This letter is an official notice of the above determination and will become conclusive and binding unless you file a written application of protest within twenty (20) days from the 'mailed on or before' date shown above. If your protest is filed by mail, the postmark date will be considered the filing date of your protest."
11. The Petitioner's president wrote a letter of protest dated October 7, 2009. The president mailed the letter on October 7, 2009. The letter was received by the Department of Revenue, however, the envelope bearing the postmark was not retained as evidence.

### **Conclusions of Law:**

12. 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.
13. 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.
14. Rule 60BB-2.023(1), Florida Administrative Code, provides, in pertinent part:

Filing date. The postmark date will be the filing date of any report, protest, appeal or other document mailed to the Agency or Department. The "postmark date" includes the

postmark date affixed by the United States Postal Service or the date on which the document was delivered to an express service or delivery service for delivery to the Department.

15. Although the postmark date is not available, the Petitioner's testimony that the letter of protest was mailed on October 7, 2009, is sufficient to establish that the appeal was filed within the twenty day appeal period.
16. Rule 60BB2.025(1), Florida Administrative Code, provides:
  - (b) Each quarterly report must:
    1. Be filed with the Department of Revenue by the last day of the month following the calendar quarter to which the report applies, except for reports filed by electronic means, which are to be filed as provided in Rule 60BB-2.023, F.A.C. However, an employer reporting for the first time is authorized 15 consecutive calendar days from the notification of liability to submit reports for previous calendar quarters without incurring penalty charges; and
    2. Be filed for each calendar quarter during which the employer was liable, even if no contributions are payable. If there was no employment during the calendar quarter to which the report applies, the report must be completed to so reflect.
17. Section 443.141, Florida Statutes provides:
  - (1) Past Due Contributions and Reimbursements.
    - (a) Interest. Contributions or reimbursements unpaid on the date due shall bear interest at the rate of 1 percent per month from and after that date until payment plus accrued interest is received by the tax collection service provider, unless the service provider finds that the employing unit has or had good reason for failure to pay the contributions or reimbursements when due. Interest collected under this subsection must be paid into the Special Employment Security Administration Trust Fund.
    - (b) Penalty for delinquent reports.
      1. An employing unit that fails to file any report required by the Agency for Workforce Innovation or its tax collection service provider, in accordance with rules for administering this chapter, shall pay to the tax collection service provider for each delinquent report the sum of \$25 for each 30 days or fraction thereof that the employing unit is delinquent, unless the agency or its service provider, whichever required the report, finds that the employing unit has or had good reason for failure to file the report.
18. Rule 60BB-2.028, Florida Administrative Code, provides:
  - (4) Waiver of Penalty and Interest. Pursuant to Sections 443.1316 and 443.141(1), F.S., the Department is authorized to waive imposition of interest or penalty when the employer files a written request for waiver establishing that imposition of interest or penalty would be inequitable, however, the Department will not consider a request for waiver of penalty until the employer has filed all reports due for the five years immediately preceding the request for waiver. Examples of inequity include situations where the delinquency was caused by one of the following factors:
    - (a) The required report was addressed or delivered to the wrong state or federal agency.
    - (b) Death or serious illness of the person responsible for the preparation and filing of the report.
    - (c) Destruction of the employer's business records by fire or other casualty.
    - (d) Unscheduled and unavoidable computer down time.
    - (e) Erroneous information provided by the Agency or Department; failure of the Department to furnish proper forms upon a timely request; or inability of the employer to obtain an interview with a representative of the Department. In each case, a diligent attempt to obtain the necessary information or forms must have been made by the employer in sufficient time that prompt action by

the Department would have allowed the reports to be filed timely.

19. Although an employer may choose to contract with a third party to prepare and file the quarterly tax reports, the responsibility for filing the tax reports still rests with the employer. In this case the payroll service did not participate in the hearing. No competent evidence was presented to show the reason the payroll service did not file the tax reports. The testimony of the accountant that the tax reports were not filed because the payroll service terminated the contract is hearsay. Section 90.801(1)(c), Florida Statutes, defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”
20. The evidence reveals that the Department of Revenue correctly computed the penalties at the rate of \$25.00 for each thirty days or fraction thereof that the tax reports were delinquent.
21. 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. It was not shown that the imposition of penalties in this case was inequitable.

**Recommendation:** It is recommended that the determinations dated September 17, 2009, be AFFIRMED.

Respectfully submitted on February 22, 2010.



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R. O. SMITH, Special Deputy  
Office of Appeals