

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 9764484
BARBARA SILVERMAN
22260 MORNING GLORY TERRACE
BOCA RATON FL 33433-4812

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-82781L**

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 determination dated May 13, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **December, 2010**.



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:

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**PROTEST OF LIABILITY
DOCKET NO. 2010-82781L**

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, 2010.

After due notice to the parties, a telephone hearing was held on September 15, 2010. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 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 an individual who is registered for payment of unemployment compensation tax on the earnings paid to domestic employees. The Employers Quarterly Reports are prepared by the Petitioner’s Certified Public Accountant and are provided to the Petitioner to file and to pay any tax that is due.
2. The Petitioner has a long history of filing the Employers Quarterly Reports late. Whenever the Petitioner failed to file Employers Quarterly Reports before the deadline the Department of Revenue mailed delinquency notices to the Petitioner and assessed penalties to be paid by the Petitioner.
3. As of September 2009 the Employers Quarterly Reports for eight prior quarters were delinquent. Those prior quarters and the amounts of the assessed penalties are September 30, 2006, \$300; June 30, 2007, \$300; September 30, 2007, \$300; March 31, 2008, \$300; June 30, 2008, \$300; September 30, 2008, \$275; December 31, 2008, \$200; and March 31, 2009, \$125. The

Department of Revenue also filed a tax lien and charged the Petitioner fees for the tax lien filing and other collection fees authorized by law.

4. Although the Certified Public Accountant had previously prepared the Employers Quarterly Reports for the Petitioner to file, the Petitioner had not filed them. The Certified Public Accountant prepared duplicates and the Petitioner filed the duplicates and paid the tax.
5. The Certified Public Accountant prepared the Petitioner's Employers Quarterly Report for the quarter ending December 31, 2009, and provided that tax report to the Petitioner to file. The Petitioner did not file the tax report prior to the penalty after date.
6. By letter dated February 5, 2010, the Petitioner's Certified Public Accountant requested that the total penalties be reduced to \$150. The letter was mailed to the Tallahassee office of the Department of Revenue rather than to the local service center of the Department of Revenue. On May 13, 2010, the Department of Revenue issued a determination denying the Petitioner's request for a waiver or reduction of the penalties.
7. The Petitioner's Certified Public Accountant file a protest by letter dated May 28, 2010.
8. As of June 10, 2010, all delinquent Employers Quarterly Reports have been filed by the Petitioner.

Conclusions of Law:

9. 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.
10. 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.
11. 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.
12. The evidence reveals that, based on the due dates and the filing dates for each delinquent quarter, the Department of Revenue correctly computed the penalty amounts at \$25 for each thirty days, or fraction thereof, that the tax reports were delinquent up to a maximum of \$300 per quarter.
 13. As of February 5, 2010, when the Petitioner's Certified Public Accountant requested that the penalties be waived or reduced, all of the Employers Quarterly Reports due for the previous five years had not been filed because the tax report for the December 31, 2009, quarter was delinquent. As stated in Rule 60BB-2.028(4), Florida Administrative Code, the Department of Revenue will not consider a request for waiver unless all tax reports due for the five years immediately preceding the request for waiver have been filed.
 14. The Petitioner's witness, the Petitioner's Certified Public Accountant, testified that the Employers Quarterly Reports were timely prepared so that the Petitioner could file the tax reports and pay the tax by the due dates. The Certified Public Accountant does not know why the Petitioner failed to file the Employers Quarterly Reports in a timely manner.
 15. 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.
 16. The Petitioner has failed to establish that the determination of May 13, 2010, is in error.
 17. The Petitioner's evidence does not show that the Petitioner had a good reason for failing to file the Employers Quarterly Reports in a timely manner as required by Section 443.141(1)(b), Florida Statutes. Thus, the penalties cannot be reduced or waived.

Recommendation: It is recommended that the determination dated May 13, 2010, be AFFIRMED.

Respectfully submitted on September 16, 2010.



R. O. SMITH, Special Deputy
Office of Appeals