

**THE DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2236284

GULF COAST WINDOW CLEANING OF
SARASOTA INC
ATTN: SABRINA CRAIN SWEENEY
526 4TH AVENUE EAST
BRADENTON FL 34208

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-62291L**

ORDER

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

The Department of Revenue conducted an audit of the Petitioner for the 2009 tax year. The auditor determined that the earnings reported by the Petitioner were taxable wages under the Florida unemployment compensation law. As a result, the Petitioner was required to pay additional taxes. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on June 21, 2011. The Petitioner's Owner appeared and testified on the Petitioner's behalf. The Respondent was represented by a Department of Revenue Tax Specialist II. A Tax Auditor II testified as a witness on behalf of the Respondent. The Petitioner submitted proposed findings of fact and conclusions of law by fax dated July 5, 2011. The Respondent did not submit proposed findings of fact and conclusions of law. The Special Deputy issued a recommended order on August 11, 2011.

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

1. The Petitioner is a subchapter S corporation incorporated in 1997 for the purpose of running a window cleaning business.
2. The Florida Department of Revenue issued an Employee Determination Notice on September 21, 2009, which held that the class of workers performing services for the Petitioner as window cleaners were employees.
3. The Petitioner appealed the Employee Determination Notice on September 29, 2009.
4. A hearing was scheduled for and held after proper notice on May 24, 2010. The hearing was styled Docket Number 2009-166883L. The Special Deputy issued a Recommended Order on May 26, 2010 affirming the Employee Determination Notice. The Special Deputy modified the Employee Determination Notice to show an effective date of January 1, 2005. The Final Order, affirming the Employee Determination Notice, was issued on August 3, 2010.
5. The Petitioner filed an appeal of the Final Order with the District Court of Appeals. The Petitioner failed to proceed with the appeal.
6. The Petitioner was selected for an audit covering the period from January 1, 2009, through December 31, 2009, by the Florida Department of Revenue. The audit was performed at the local Department of Revenue office.
7. A Notice of Proposed Assessment was issued on April 20, 2011. The Notice held the Petitioner responsible for unemployment taxes for those workers held to be employees in the Final Order for 2009-166883L.
8. The Petitioner appealed the Notice of Proposed Assessment on April 28, 2011, citing disagreement with the Final Order for 2009-166883L.

Based on these Findings of Fact, the Special Deputy recommended that the determination be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail and fax dated August 26, 2010. 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 proposed findings of fact and conclusions of law and 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.

In the proposed findings of fact and conclusions of law and the exceptions, the Petitioner alleges that procedural errors occurred during the hearing held under Docket Number 2009-166883L. The Petitioner specifically alleges that it was not given the opportunity to present pertinent facts and documents during the hearing held under Docket Number 2009-166883L. Section 120.68(2)(a), Florida Statutes, provides that a party adversely affected by an agency order is entitled to judicial review. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy held in Conclusion of Law #9 that the Special Deputy could not disturb the order dated August 3, 2010, because the order had become final and the Petitioner had not pursued its appeal with the District Court of Appeal. A review of the record also reveals that Conclusion of Law #9 reflects a reasonable application of the law to the facts. Conclusion of Law #9 is therefore accepted by the Agency. Accordingly, the Agency is without jurisdiction to once again address the proceedings previously addressed in the final order dated August 3, 2010, and may not modify the result reached in that prior order. The proposed findings of fact and conclusions of law and the exceptions alleging past procedural errors are respectfully rejected.

The Petitioner also proposes alternative findings of fact and conclusions of law or attempts to enter additional evidence in its exceptions and proposed findings of fact and conclusions of law. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's 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 the essential requirements of law. As previously stated, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts in accord with section 120.57(1)(l), Florida Statutes. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record and that the Special Deputy's Conclusions of Law 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 or 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. Additionally, rule 60BB-2.035(19)(a) of the Florida Administrative Code prohibits the acceptance of evidence after the hearing is closed. A review of the record further reveals that, while the Petitioner's exceptions refer to attachments to the exceptions, the Petitioner did not submit any attachments to the exceptions by mail or by fax. Nevertheless, the Agency is not permitted to consider additional evidence submitted after the hearing pursuant to rule 60BB-2.035(19)(a), Florida Administrative Code. The Petitioner's request for the consideration of additional evidence is respectfully denied. The Petitioner's proposed findings of fact and conclusions of law and 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 considered the record of this case, the Recommended Order of the Special Deputy, the proposed findings of fact and conclusions of law filed by the Petitioner, and the exceptions submitted by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as contained in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated April 20, 2011, is AFFIRMED.

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



TOM CLENDENNING,
Director of Workforce Services
THE DEPARTMENT OF ECONOMIC
OPPORTUNITY

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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Employer Account No. - 2236284
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SARASOTA INC
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BRADENTON FL 34208

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-62291L**

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 April 20, 2011.

After due notice to the parties, a telephone hearing was held on June 21, 2011. The Petitioner's owner appeared and testified at the hearing. A tax specialist II represented the Respondent and called a tax auditor III as a witness.

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 received.

Issue:

Whether services performed for the petitioner constitute insured employment, and if so, the effective date of the petitioners liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a subchapter S corporation incorporated in 1997 for the purpose of running a window cleaning business.
2. The Florida Department of Revenue issued an Employee Determination Notice on September 21, 2009, which held that the class of workers performing services for the Petitioner as window cleaners were employees.
3. The Petitioner appealed the Employee Determination Notice on September 29, 2009.

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5. The Petitioner filed an appeal of the Final Order with the District Court of Appeals. The Petitioner failed to proceed with the appeal.
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7. A Notice of Proposed Assessment was issued on April 20, 2011. The Notice held the Petitioner responsible for unemployment taxes for those workers held to be employees in the Final Order for 2009-166883L.
8. The Petitioner appealed the Notice of Proposed Assessment on April 28, 2011, citing disagreement with the Final Order for 2009-166883L.

Conclusions of Law:

9. The Recommended Order of the Special Deputy in Docket# 2009-166883L became final on August 3, 2010. The Petitioner appealed to the District Court of Appeals but failed to prosecute the appeal. The Final Order covered the time period from January 1, 2005, through August 3, 2010. The audit being appealed in this case covered January 1, 2009, through December 31, 2009. The time period covered by the audit is completely within the time period covered by the Special Deputy's Final Order in 2009-166883L. The prior Final Order held that those workers performing services for the Petitioner as window cleaners were the Petitioner's employees. The issue in the instant case revolves around whether those workers performing services for the Petitioner as window cleaners were the Petitioner's employees. This Special Deputy does not have the authority to overrule and must therefore be bound by the prior decision on this matter. Accordingly, the Respondent's Notice of Proposed Assessment is AFFIRMED.
10. The Petitioner provided Proposed Findings of Fact and Conclusions of Law on July 5, 2011. The Special Deputy reviewed the findings. The findings were primarily procedural in nature and as such are not reflected in this Recommended Order.

Recommendation: It is recommended that the determination dated April 20, 2011, be AFFIRMED.

Respectfully submitted on August 11, 2011.



KRIS LONKANI, Special Deputy
Office of Appeals