

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:

Employer Account No. - 1565406
ZENUN GROUP INC
21399 MARINA COVE CIR # M-13
MIAMI FL 33180-4029

PROTEST OF LIABILITY
DOCKET NO. 0019 3453 95-01

RESPONDENT:

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

ORDER

This matter comes before me for final Department Order.

The issues before me are whether there is good cause for proceeding with an additional hearing pursuant to rule 73B-10.035(18), Florida Administrative Code, and whether services performed for the Petitioner by the Joined Party and other individuals working as tennis instructors 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 a reemployment assistance claim in January 2013. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department of Economic Opportunity (the Department) 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 and other individuals working as tennis instructors performed services for the Petitioner as employees or independent contractors. If the Joined Party worked for the Petitioner as an employee, he would qualify for reemployment assistance benefits, and the Petitioner would owe reemployment assistance taxes on the remuneration it paid to the Joined Party and any other workers who performed services under the same terms and conditions. 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 reemployment assistance taxes on the wages it paid to the Joined Party and any other individuals performing services as

tennis instructors. Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party and other workers performing services under the same terms and conditions were in insured employment. The Petitioner was required to pay reemployment assistance taxes on wages it paid to the Joined Party and other individuals working as tennis instructors. The Petitioner filed a timely 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 January 9, 2014. The Petitioner was represented by its attorney. The Respondent was represented by a Department of Revenue Tax Specialist II. The Joined Party appeared and testified regarding his failure to appear at the June 12, 2013, hearing. The Special Deputy issued a recommended order on May 9, 2014.

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

1. The Department of Revenue issued a determination dated March 14, 2013, holding that the Joined Party was the Petitioner's employee. The Petitioner appealed that determination.
2. On May 10, 2013, the Joined Party was notified that he had been joined as a party to the hearing because the result of the Petitioner's protest may affect the Joined Party's reemployment assistance claim.
3. After due notice to the parties a telephone hearing was scheduled to be held on June 12, 2013, at 8:30 AM. The *Notice of Telephone Hearing Before Special Deputy* was mailed to the Joined Party's correct address and was received. In response to an instruction on the Notice the Joined Party provided the telephone number at which he could be contacted for the hearing.
4. An information bulletin was enclosed with the *Notice of Telephone Hearing Before Special Deputy*. Among other things the information bulletin states that the hearing was scheduled because the determination issued by the Department of Revenue was appealed, that the Final Order resulting from this hearing will replace the determination that was appealed, that only one hearing level is provided by law, and to protect your rights you should participate even if another party filed the appeal. The information bulletin also advises that if the Petitioner appears the hearing will be conducted with the parties who attend, that the result will be based on the hearing record, that the Joined Party may receive an unfavorable ruling if he does not participate in the hearing, and that the Joined Party would have to repay any reemployment benefits which should not have been paid. The Joined Party received the information bulletin, read the bulletin, and understood the risk of not participating in the hearing.
5. Prior to June 12, 2013, the Petitioner requested a continuance due to a conflict in the attorney's schedule on the morning of June 12, 2013. In response to the request for a continuance the deputy clerk contacted the parties in an attempt to reschedule the hearing for 1:30 PM on June 12, 2013. All parties, including the Joined Party, agreed to participate in the hearing at 1:30 PM instead of at 8:30 AM.

6. Prior to 1:30 PM on June 12, 2013, the Joined Party decided not to participate in the hearing even though the Joined Party was aware that his failure to participate in the hearing could result in a ruling in favor of the Petitioner.
7. At 1:30 PM the special deputy contacted the Petitioner's representative and the Respondent's representative and attempted to contact the Joined Party. When the Joined Party did not answer the telephone the special deputy left a voice mail message that she would call back in a few minutes. Before the special deputy placed the second call to the Joined Party, the Joined Party contacted the deputy clerk and stated that he had decided not to participate in the hearing. The deputy clerk notified the special deputy that the Joined Party had called and stated that he had chosen not to participate. The special deputy placed a second call to the Joined Party and when the Joined Party did not answer the special deputy proceeded with the hearing without the Joined Party's participation.
8. The recommended order of the special deputy was mailed to all parties on July 8, 2013, recommending that the determination dated March 14, 2013, be reversed. The Joined Party filed exceptions to the recommended order. In his exceptions the Joined Party did not request rehearing and did not state why he had failed to participate in the hearing.
9. On July 19, 2013, the case was remanded for an additional hearing to determine if the Joined Party had good cause for not appearing at the June 12, 2013, hearing, and if good cause is established at the hearing to reopen the case.

Based on these Findings of Fact, the Special Deputy recommended that the recommended order dated July 8, 2013, be reinstated, and that the determination dated March 14, 2013, be reversed. The Joined Party's exceptions were received by mail postmarked May 19, 2014. 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 Joined Party's exceptions are addressed below. Also, 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 Joined Party takes exception to the Special Deputy's Findings of Fact and proposes alternative conclusions of law. 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 that the findings of fact were not based upon competent substantial evidence. Also 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. A review of the record reveals that the the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. A review of the record also reveals that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Department may not modify or 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. The Joined Party's exceptions are respectfully rejected.

The Joined Party also requests the consideration of additional evidence not presented during the hearing. Rule 73B-10.035(19)(a), Florida Administrative Code, provides that additional evidence will not be accepted after the close of the hearing. Accordingly, the Joined Party's request for the consideration of additional evidence is respectfully denied.

Having considered the Joined Party's exceptions, the record of this case, and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law as set forth in the Recommended Order.

Therefore, it is ORDERED that the recommended order dated July 8, 2013 is REINSTATED. The determination dated March 14, 2013, is REVERSED.

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 the 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 19 day of **June, 2014**.



Magnus Hines

Magnus Hines,
RA Appeals Manager,
Reemployment Assistance Program
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.

Shanendra Y. Barnes

DEPUTY CLERK

6.20.14

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 20th day of June, 2014.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

By U.S. Mail:

ZENUN GROUP INC
21399 MARINA COVE CIR # M-13
MIAMI FL 33180-4029

ELDON JONES
430 NW 87TH RD APT 102
PLANTATION FL 33324-6583

DEPARTMENT OF REVENUE
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TALLAHASSEE FL 32399

LAW OFFICE OF NEIL FLAXMAN PA
BRICKELL BAYVIEW CENTRE
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STE 3100
MIAMI FL 33130-3004

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
PO BOX 6417
TALLAHASSEE FL 32314-6417

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

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RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated March 14, 2013.

After due notice to the parties, a telephone hearing was held on January 9, 2014. The Petitioner was represented by its attorney. The Respondent was represented by a Department of Revenue Tax Specialist II. The Joined Party appeared and testified concerning his failure to appear at the hearing held on June 12, 2013.

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 timely received from the Joined Party.

ISSUES:

Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 73B-10.035(18).

Whether services performed for the Petitioner by the Joined Party and other individuals constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Department of Revenue issued a determination dated March 14, 2013, holding that the Joined Party was the Petitioner's employee. The Petitioner appealed that determination.
2. On May 10, 2013, the Joined Party was notified that he had been joined as a party to the hearing because the result of the Petitioner's protest may affect the Joined Party's reemployment assistance claim.

3. After due notice to the parties a telephone hearing was scheduled to be held on June 12, 2013, at 8:30 AM. The *Notice of Telephone Hearing Before Special Deputy* was mailed to the Joined Party's correct address and was received. In response to an instruction on the Notice the Joined Party provided the telephone number at which he could be contacted for the hearing.
4. An information bulletin was enclosed with the *Notice of Telephone Hearing Before Special Deputy*. Among other things the information bulletin states that the hearing was scheduled because the determination issued by the Department of Revenue was appealed, that the Final Order resulting from this hearing will replace the determination that was appealed, that only one hearing level is provided by law, and to protect your rights you should participate even if another party filed the appeal. The information bulletin also advises that if the Petitioner appears the hearing will be conducted with the parties who attend, that the result will be based on the hearing record, that the Joined Party may receive an unfavorable ruling if he does not participate in the hearing, and that the Joined Party would have to repay any reemployment benefits which should not have been paid. The Joined Party received the information bulletin, read the bulletin, and understood the risk of not participating in the hearing.
5. Prior to June 12, 2013, the Petitioner requested a continuance due to a conflict in the attorney's schedule on the morning of June 12, 2013. In response to the request for a continuance the deputy clerk contacted the parties in an attempt to reschedule the hearing for 1:30 PM on June 12, 2013. All parties, including the Joined Party, agreed to participate in the hearing at 1:30 PM instead of at 8:30 AM.
6. Prior to 1:30 PM on June 12, 2013, the Joined Party decided not to participate in the hearing even though the Joined Party was aware that his failure to participate in the hearing could result in a ruling in favor of the Petitioner.
7. At 1:30 PM the special deputy contacted the Petitioner's representative and the Respondent's representative and attempted to contact the Joined Party. When the Joined Party did not answer the telephone the special deputy left a voice mail message that she would call back in a few minutes. Before the special deputy placed the second call to the Joined Party, the Joined Party contacted the deputy clerk and stated that he had decided not to participate in the hearing. The deputy clerk notified the special deputy that the Joined Party had called and stated that he had chosen not to participate. The special deputy placed a second call to the Joined Party and when the Joined Party did not answer the special deputy proceeded with the hearing without the Joined Party's participation.
8. The recommended order of the special deputy was mailed to all parties on July 8, 2013, recommending that the determination dated March 14, 2013, be reversed. The Joined Party filed exceptions to the recommended order. In his exceptions the Joined Party did not request rehearing and did not state why he had failed to participate in the hearing.
9. On July 19, 2013, the case was remanded for an additional hearing to determine if the Joined Party had good cause for not appearing at the June 12, 2013, hearing, and if good cause is established at the hearing to reopen the case.

Conclusions of Law:

10. Rule 73B-10.035, Florida Administrative Code, provides:
 - (18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to

the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.

11. Rule 73B-10.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.
12. The Joined Party timely filed exceptions to the recommended order which was mailed to the parties on July 8, 2013. Although the Joined Party did not specifically request another opportunity to participate in a hearing, the exceptions were viewed as a request for reopening.
13. The claimant's testimony reveals that he received the *Notice of Telephone Hearing Before Special Deputy*, and subsequently agreed to a change of hearing time from 8:30 AM to 1:30 PM. The Joined Party was available to participate in the 1:30 PM hearing but made a conscious, informed decision not to participate. The Joined Party was aware that the scheduled hearing was the only hearing that would be held, that the Final Order resulting from the hearing would replace the determination under appeal, and that his failure to participate in the hearing could produce a result that would require the repayment of reemployment assistance benefits. The Joined Party was fully informed of the date and time of the hearing and was fully informed of his rights and responsibilities regarding the hearing. He was not prevented from participating in the hearing by any extraordinary means but chose not to participate with full knowledge of the possible consequences. Thus, good cause has not been established for the Joined Party's failure to attend the June 12, 2013, hearing. Thus, the recommended order of the special deputy dated July 8, 2013, is reinstated.

Recommendation: It is recommended that the recommended order of the special deputy dated July 8, 2013, recommending that the determination dated March 14, 2013, be reversed, be reinstated.

Respectfully submitted on May 9, 2014.



A handwritten signature in dark ink, appearing to read "R. O. Smith".

R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

May 9, 2014

Copies mailed to:

Petitioner

Respondent

Joined Party

ELDON JONES
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PLANTATION FL 33324-6583

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