

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2916270

THE FIRST ACADEMY INC
STEVE WHITAKER
2667 BRUTON BLVD
ORLANDO FL 32805-5726

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2009-145229L**

ORDER

This matter comes before me for final Agency Order.

The issue before me is whether the Petitioner meets liability requirements for Florida unemployment compensation contributions pursuant to §443.036(19); 443.036(21); 443.1215, Florida Statutes.

The Department of Revenue conducted an investigation to determine whether the Petitioner was liable for unemployment compensation contributions. Upon completing the investigation, an auditor at the Department of Revenue determined that the Petitioner met the liability requirements for unemployment tax. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on January 25, 2010. The Petitioner was represented by its attorney. The Petitioner's Headmaster testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Special Deputy issued a Recommended Order on March 12, 2010.

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

1. The Petitioner, First Academy, Inc., is a corporation which was formed on November 14, 2005, to operate an accredited college preparatory school consisting of pre-kindergarten through the twelfth grade. The school is accredited as an academic school through the Southern Association of Colleges and Schools

2. From 1987 until November 14, 2005, the school was part of The First Baptist Church of Orlando, Inc., a church. Prior to November 14, 2005, the church owned, operated, supervised, and controlled the school. The church separated the school from the church to limit liability and to create an avenue for issuance of bond financing.
3. The Petitioner obtained a separate Federal Employer Identification number and a separate 501(c)(3) tax exemption for non-profit organizations.
4. Approximately 1000 students attend the Petitioner's school. The Petitioner has approximately 100 employees including teachers, administrative personnel, and clerical workers.
5. The primary purpose of the school is to prepare students for college, but not for any particular college. The classes provided by the Petitioner are all of the classes that prepare students for college. In addition, the Petitioner provides classes for the study of major world religions. The religious studies are not restricted to the Christian religion or to the Baptist denomination.
6. The church owns the land and the buildings from which the Petitioner operates the school. The Petitioner leases the land and buildings from the church for \$1 per year. The Petitioner's students pay tuition of \$10,000 per year, per student. If it were not for the financial support which the Petitioner receives from the church, the tuition would probably be greater.
7. The First Baptist Church of Orlando, Inc. is the sole voting member of the Petitioner. The Headmaster of the school meets with the Pastor of the church once per week. The church approves the budget for the school, controls the finances, and supervises the activities of the school. The purpose of the church in operating the school is to assist in and to contribute to the growth and development of the ministries of The First Baptist Church of Orlando, Inc.
8. By determination dated August 26, 2009, the Department of Revenue determined that the Petitioner met the liability requirements for unemployment compensation tax effective January 1, 2006. The Petitioner filed an appeal by letter dated September 14, 2009.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated August 26, 2009, be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail dated March 25, 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 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.

Exceptions #1-18 and #21 propose alternative findings of fact, propose alternative conclusions of law, attempt to enter additional evidence, or are in accord with the findings of the Special Deputy. Section 120.57(1)(l), Florida Statutes, does not allow the modification of the Special Deputy's Findings of Fact or Conclusions of Law unless the Agency first determines that the findings are not supported by the competent substantial evidence in the record or that the conclusions do not reflect a reasonable application of the law to the facts. A review of the record reveals that 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 Agency may not modify the Special Deputy's Findings of Fact and 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. Rule 60BB-2.035(19)(a), Florida Administrative Code, prohibits the acceptance of evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. Exceptions #1-18 and #21 are respectfully rejected.

In Exceptions #19 and #20, the Petitioner cites *Peace Lutheran Church v. Unemployment Appeals Comm'n*, 906 So.2d 1197 (Fla. 4th DCA. 2005), and *His Kids Daycare v. Fla. Unemployment Appeals Comm'n*, 904 So.2d 477 (Fla. 1st DCA 2005), in support of its contention that the "primary purpose" language in §443.1216(4)(a)2. refers to the primary purpose of the church which operates, supervises, and controls the school and not the independent purpose of the school. The Petitioner further contends that the Petitioner's primary purpose of educating students is irrelevant to the analysis of the issue. While section 443.1216, Florida Statutes, includes services performed by an individual in the employ of a religious, charitable, educational, or other organization as employment subject to unemployment compensation

taxation if the organization had at least four individuals in employment for some portion of a day in each of 20 different weeks during the current or preceding calendar year, section 443.126(4)(a)1., Florida Statutes, excludes services performed in the employ of an organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or a convention or association of churches. In the current case, the Special Deputy found in Finding of Fact #5 and Conclusions of Law #13-14 that the Petitioner was not operated primarily for religious purposes and was instead primarily operated to provide classes that prepare students for college. An examination of the case law cited by the Petitioner supports the Special Deputy's analysis and does not support the analysis advocated in the Petitioner's exceptions.

In Exceptions #19 and #20, the Petitioner argues that the controlling case law requires an analysis of only the primary purpose of the church and does not require an analysis of the school's purpose. In *Peace Lutheran Church v. Unemployment Appeals Comm'n*, 906 So.2d 1197 (Fla. 4th DCA 2005), the court relied on *St. Martin Evangelical Lutheran Church v. S.D.*, 451 U.S. 772 (U.S. 1981). In *St. Martin*, the Supreme Court held that the Federal Unemployment Tax Act (FUTA) was "phrased entirely in terms of the nature of the employer, not in terms of the work performed or the place at which the employee works." *Id.* at 783. In *Peace*, while recognizing that FUTA was the model for Florida's "unemployment law," the court adopted the analysis set forth in *Martin* and held that a childcare center was operated for religious purposes. 906 So.2d at 1199-1200. When reaching that conclusion, the court specifically examined the primary purpose of the childcare center and not merely the church's purpose in operating the child care center, noting that the undisputed evidence indicated that "the function of the child care center was to take care of children and provide an outreach for the church." *Id.* at 1199. The court also noted that other evidence demonstrated that "religious purposes pervade all aspects of the school/day care center." *Id.* at 1200. In the current case, the Special Deputy considered both the church's purpose in operating the school and the school's purpose of preparing students for college in Findings of Fact #5 and #7 and Conclusions of Law #11 and #13. The Special Deputy's Findings of Fact indicate that the Special Deputy did not find a pervasive religious purpose in all aspects of the Petitioner school. Specifically, in Conclusion of Law #13, the Special Deputy noted that, while religious studies were part of the Petitioner's curriculum, the religious studies were "not directed toward any single religion or creed" and "the religious studies constitute[d] only a minor part of the overall curriculum." As a result, the Special Deputy did not find that that the Petitioner was operated primarily for religious purposes. The current case can be further distinguished from the *Peace* case because the Special Deputy did not conclude that the Petitioner was primarily subsidized by the church, holding instead that the Petitioner was principally supported by tuition payments in Conclusion of Law #12. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency does not have a basis for

modifying the Special Deputy's Findings of Facts or Conclusions of Law because the findings are supported by competent substantial evidence in the record and the conclusions reflect a reasonable application of the law to the facts. Contrary to the recommendations found in the Petitioner's exceptions, the *Peace* case does not require an alternative analysis or result.

Similarly, the second case cited by the Petitioner does not support the method of the analysis suggested in Exceptions #19 and #20. In *His Kids Daycare v. Fla. Unemployment Appeals Comm'n*, 904 So.2d 477 (Fla. 1st DCA 2005), the court, when concluding that an appeals referee's findings of fact were supported by competent substantial evidence in the record, did not specifically restrict the analysis to merely determining the primary purpose of the church in operating the daycare. The court specifically addresses the purpose of the daycare, accepting the appeals referee's findings that the daycare was operated for religious purposes as an outreach ministry and that the daycare was operated and controlled by the church. *Id.* at 479. At no point does the court indicate that the appeals referee did not address the purpose of the daycare or that the appeals referee was restricted from addressing the purpose of the daycare under statute. *Id.* at 477-480. The Special Deputy did not find that the Petitioner was operated for religious purposes as the appeals referee concluded about the daycare in *His Kids*; instead, the Special Deputy concluded in Conclusion of Law #13 that the school's primary purpose was preparing students for college and not a religious purpose as alleged by the Petitioner. Additionally, the case at hand is distinguishable because the Petitioner, unlike the daycare in *His Kids*, obtained a separate Federal Employer Identification Number and was separated from the church for liability purposes and the issuance of bonds as acknowledged by the Special Deputy in Findings of Facts #2-3. In light of these considerations, both cases cited by the Petitioner do not support an alternative analysis of the case. The Petitioner's request for the adoption of an alternative analysis is respectfully rejected. Since the Special Deputy's Findings of Fact are based on competent substantial evidence in the record and the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts, the Agency is prohibited from modifying the findings of fact and conclusions of law under section 120.57(1)(l), Florida Statutes. Exceptions #19 and #20 are respectfully rejected.

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 set forth in the Recommended Order.

Therefore, it is ORDERED that the determination dated August 26, 2009, is AFFIRMED.

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



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. - 2916270
THE FIRST ACADEMY INC
STEVE WHITAKER
2667 BRUTON BLVD
ORLANDO FL 32805-5726

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2009-145229L**

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 August 26, 2009.

After due notice to the parties, a telephone hearing was held on January 25, 2010. The Petitioner was represented by its attorney. The Petitioner's Headmaster testified as a witness. The Petitioner's Director of Finance and an outside auditor appeared on behalf of the Petitioner but did not testify. 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 received from the Petitioner.

Issue: Whether services performed for the Petitioner by the Joined Parties and other individuals constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

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.

Findings of Fact:

1. The Petitioner, First Academy, Inc., is a corporation which was formed on November 14, 2005, to operate an accredited college preparatory school consisting of pre-kindergarten

through the twelfth grade. The school is accredited as an academic school through the Southern Association of Colleges and Schools

2. From 1987 until November 14, 2005, the school was part of The First Baptist Church of Orlando, Inc., a church. Prior to November 14, 2005, the church owned, operated, supervised, and controlled the school. The church separated the school from the church to limit liability and to create an avenue for issuance of bond financing.
3. The Petitioner obtained a separate Federal Employer Identification number and a separate 501(c)(3) tax exemption for non-profit organizations.
4. Approximately 1000 students attend the Petitioner's school. The Petitioner has approximately 100 employees including teachers, administrative personnel, and clerical workers.
5. The primary purpose of the school is to prepare students for college, but not for any particular college. The classes provided by the Petitioner are all of the classes that prepare students for college. In addition, the Petitioner provides classes for the study of major world religions. The religious studies are not restricted to the Christian religion or to the Baptist denomination.
6. The church owns the land and the buildings from which the Petitioner operates the school. The Petitioner leases the land and buildings from the church for \$1 per year. The Petitioner's students pay tuition of \$10,000 per year, per student. If it were not for the financial support which the Petitioner receives from the church, the tuition would probably be greater.
7. The First Baptist Church of Orlando, Inc. is the sole voting member of the Petitioner. The Headmaster of the school meets with the Pastor of the church once per week. The church approves the budget for the school, controls the finances, and supervises the activities of the school. The purpose of the church in operating the school is to assist in and to contribute to the growth and development of the ministries of The First Baptist Church of Orlando, Inc.
8. By determination dated August 26, 2009, the Department of Revenue determined that the Petitioner met the liability requirements for unemployment compensation tax effective January 1, 2006. The Petitioner filed an appeal by letter dated September 14, 2009.

Conclusions of Law:

9. Section 443.1216, Florida Statutes, provides in pertinent part:
 - (1)(a) The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
 1. An officer of a corporation.
 2. An individual who, under the usual common law rules applicable in determining the employer-employee relationship is an employee.
10. 443.1216, Florida Statutes, provides that Employment, as defined in s. [443.036](#), is subject to this chapter under the following conditions:
 - (3) The employment subject to this chapter includes service performed by an individual in the employ of a religious, charitable, educational, or other organization, if:
 - (a) The service is excluded from the definition of "employment" in the Federal Unemployment Tax Act solely by reason of s. 3306(c)(8) of that act; and
 - (b) The organization had at least four individuals in employment for some portion of a day in each of 20 different weeks during the current or preceding calendar year, regardless of

whether the weeks were consecutive and whether the individuals were employed at the same time.

(4) For purposes of subsections (2) and (3), the employment subject to this chapter does not apply to service performed:

(a) In the employ of:

1. A church or a convention or association of churches.
 2. An organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or a convention or association of churches.
11. The evidence presented in this case reveals that the Petitioner, The First Academy, Inc., is an educational organization which was formed to operate an academically accredited school to prepare the students for college. Although the school was owned and operated by a church prior to November 2005, the Petitioner is not a church.
 12. The church provides some financial support for the Petitioner by providing the land and school buildings without significant expense to the school. However, it was not shown that the Petitioner is principally supported by the church. The Petitioner has approximately 1000 students to which the Petitioner charges tuition of \$10,000 for each student, a total of \$10,000,000 per year.
 13. The church approves the budget, controls the finances, and supervises the activities of the school. Although the Petitioner was established to assist in and to contribute to the growth and development of the ministries of The First Baptist Church of Orlando, Inc., it was not shown that the school is operated primarily for religious purposes. The primary purpose of the school is to provide all of the classes that prepare students for college. Although religious studies are a part of the curriculum, the religious studies are not directed toward any single religion or creed and the religious studies constitute only a minor part of the overall curriculum.
 14. The Petitioner is not a church. The Petitioner is not an organization that is operated primarily for religious purposes and that is principally supported by a church. Thus, the Petitioner is not excluded from coverage under the law.
 15. The evidence reveals that the Petitioner has approximately 100 employees including teachers, administrative personnel, and clerical workers. It has been shown that the Petitioner has at least 4 individuals performing services during at least 20 different weeks during a year. Thus, the Petitioner has established liability under the Florida Unemployment Compensation Law.

Recommendation: It is recommended that the determination dated August 26, 2009, be AFFIRMED.

Respectfully submitted on March 12, 2010.



R. O. SMITH, Special Deputy
Office of Appeals