AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 0531690

STUART WEB INC
DIANE K HAWKEN
5675 SE GROUPER AVE
STUART FL 34997-3103

PROTEST OF LIABILITY
DOCKET NO. 2010-120172R

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether the Petitioner's tax rates were properly computed pursuant to Section 443.131, Florida Statutes; Rules 60BB-2.026; 2.031, Florida Administrative Code. An issue also before me is whether the Petitioner's liability for unemployment compensation contributions was properly determined pursuant to sections 443.1215; 443.1216; 443.1217; 443.131, Florida Statutes.

The Department of Revenue, hereinafter referred to as the Respondent, issued a determination notifying the Petitioner of the mandatory transfer of the tax rate of its predecessor account. The Respondent based its determination on the Petitioner's acquisition of the predecessor's workforce. In the determination, the Respondent also concluded that common ownership, management, or control existed between the two companies at the time of the transfer. As a result of the determination, the Petitioner was required to pay additional taxes. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on January 20, 2011. The Petitioner, represented by the Petitioner's Certified Public Accountant, appeared and testified. The Respondent, represented by a Department of Revenue Tax Auditor III, appeared and testified. The Special Deputy issued a Recommended Order on January 28, 2011.

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

1. The Petitioner, Stuart Web, Inc., is a corporation which operates a commercial printing business. The Petitioner prints several newspapers, tabloids, and booklets for numerous publishing companies. The Petitioner is owned and operated by Thomas Hawken, his wife Diane Hawken, and his son Kevin Hawken.

2. One of the clients of Stuart Web, Inc. was Flashes, Inc., a corporation which operated a shoppers newspaper. Flashes, Inc. sold the advertising and arranged the advertisements in the order that was to be published. Flashes, Inc. contracted with Stuart Web, Inc. to print the newspaper which was published by Flashes, Inc. Flashes, Inc. then distributed the newspaper. Flashes, Inc. was owned and operated by Gary Hawken, brother of Thomas Hawken.

3. The business of Flashes, Inc. had declined and in 2008 Gary Hawken decided to close the business. The Petitioner felt that the business operated by Flashes, Inc. could be revived and made an offer to purchase the right to publish the newspaper. A limited liability company by the name of Flashes Publishing LLC was created on July 30, 2008, to purchase the business. Flashes Publishing LLC is owned and operated by Kevin Hawken, Thomas Hawken, and Diane Hawken.

4. On August 1, 2008, Flashes Publishing LLC purchased the right to publish the Flashes Newspaper and the intangible assets of Flashes, Inc. Beginning on August 1, 2008, Stuart Web, Inc. began publishing the newspaper and all of the employees of Flashes, Inc. were transferred to Stuart Web, Inc.

5. The Department of Revenue identified, based on the Employer's Quarterly Reports submitted by Flashes, Inc. and Stuart Web, Inc., that the former employees of Flashes, Inc. were reported as employees of Stuart Web, Inc. as of August 1, 2008. Further investigation revealed that Gary Hawken and Thomas Hawken are brothers.

6. On July 28, 2010, the Department of Revenue issued a determination holding that, based on a review of the Department's records, it appeared that Stuart Web, Inc. acquired the business of Flashes, Inc. and that at the time of the transfer there was common ownership, management, or control of the two businesses. The Department of Revenue transferred the unemployment experience attributable to Flashes, Inc. to Stuart Web, Inc. resulting in an increased tax rate for Stuart Web, Inc. effective October 1, 2008. The Petitioner filed a timely protest.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated July 28, 2010, be reversed. On February 14, 2011, the Special Deputy issued an order extending the time for filing exceptions to the Recommended Order until March 1, 2011. The Respondent's exceptions were received by fax on March 1, 2011. 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 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. All exceptions are addressed below.

In Exceptions #1 and 2, the Respondent proposes findings of fact in accord with the Special Deputy's Findings of Fact. Section 120.57(1)(l), Florida Statutes, provides that the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines that the findings of fact were not based upon competent substantial evidence in the record. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. As a result, the Agency is not permitted to modify the findings of fact and accepts the findings of fact as written by the Special Deputy. The portions of Exceptions #1 and 2 that propose alternative findings of fact are respectfully rejected.

In Exceptions #1, 3, and 4, the Respondent takes exception to the Special Deputy's Conclusions of Law. The Respondent specifically takes exception to Conclusion of Law #10. The Respondent argues that the Special Deputy did not interpret the law correctly when he concluded that a common relationship did not exist between the Petitioner and its predecessor. The Respondent maintains that a common relationship existed between the Petitioner and its predecessor at the time of the transfer and that the Petitioner should be subject to a mandatory transfer of its predecessor's tax rate as a result. A review of the record and the

applicable law demonstrates that, while the Respondent's interpretation of the rule 60BB-2.031(3)(j) of the Florida Administrative Code may be more reasonable than the Special Deputy's interpretation, the Special Deputy's ultimate conclusion that common ownership, management, or control did not exist at the time of the transfer continues to reflect a reasonable application of the law to the facts.

An application of the law to the Special Deputy's Findings of Fact requires an examination of the relationship between the Petitioner and its predecessor. Section 443.131(3)(g), Florida Statutes, requires that unemployment experience be transferred between businesses that share any common ownership, management, or control at the time of a transfer of a trade or business or a portion of a trade or business between the businesses. The statute does not define "common ownership," "common management," or "common control." Instead, rule 60BB-2.031(3), Florida Administrative Code, provides:

> (a) The term "ownership" means any proprietary interest in a business, including, but not limited to, shares of stock in a corporation, partnership interest in a partnership or membership interest in a Limited Liability Company (LLC).
>
> (b) "Common ownership" exists when a person has ownership in two or more businesses.
>
> (c) A person in "management" includes any officer or director of a corporation, owner of a sole proprietorship, partner in a partnership, manager of an LLC, or person with the ability to direct the activities of an employing unit, either individually or in concert with others.
>
> (d) "Common management" exists when a person concurrently occupies management positions in two or more businesses.
>
> (e) A person in "control" of a business includes any officer or director of a corporation, owner of a sole proprietorship, partner in a partnership, manager of an LLC, or other person with the ability, directly or indirectly, individually or in concert with others, to influence or direct management, activities or policies of the business through ownership of stock, voting rights, contract, or other means. Control exists when an employee leasing company dictates or specifies the businesses with which a client company must contract.
>
> (f) "Common control" exists when a person or group of persons has control of two or more businesses.
>
> (g) The phrase "transfer or acquisition" encompasses any and all types of transfers and acquisitions including, but not limited to, assignments, changes in legal identity or form, consolidations, conveyances, mergers, name changes, purchase and sale agreements, reorganizations, stock transfers and successions.
>
> (h) The phrase "trade or business or a portion thereof" includes but is not limited to assets, customers, management, organization and workforce.
>
> (i) For the purpose of determining issues relating to the transfer of employment records upon transfer or acquisition of a business, the term "person" has the meaning set forth in Section 7701(a)(1) of the Internal Revenue Code.
>
> (j) In determining whether common management, ownership, or control exists, the Department may consider common relationships between owners or persons who exert control over or occupy management positions in the businesses under consideration. For purposes of this rule, a common relationship exists when persons are related to each other by marriage, step-relationships, direct

> line blood relationships such as grandchild, child, parent, grandparent (lineal consanguinity) or adoption. A common relationship is also deemed to exist between affiliated groups as defined by Section 199.023(8), F.S. and between affiliated corporations as defined in Section 1504(a) of the Internal Revenue Code.

A review of the record shows that the Special Deputy concluded in Conclusion of Law #10 that the relationship between the principals in this case did not satisfy the requirements of rule 60BB-2.031(3)(j), Florida Administrative Code. In Conclusion of Law #10, the Special Deputy concluded that no common ownership, management, or control existed between the Petitioner and its predecessor because of their relationship's failure to meet the requirements of rule 60BB-2.031(3)(j), Florida Administrative Code. In the Recommended Order, the Special Deputy recommended that the Petitioner should not be subject to a mandatory transfer of unemployment experience due to the lack of common ownership, management, or control between the businesses at the time of the transfer. The Special Deputy's Conclusions of Law are based on the Special Deputy's interpretation of the requirements of rule 60BB-2.031(3)(j), Florida Administrative Code.

As previously stated, the Special Deputy was required to comply with rule 60BB-2.031(3)(j), Florida Administrative Code, when determining whether common ownership, management, or control existed between the businesses at the time of the transfer. Rule 60BB-2.031(3)(j), Florida Administrative Code, provides that "a common relationship exists when persons are related to each other by marriage, step-relationships, direct line blood relationships such as grandchild, child, parent, grandparent (lineal consanguinity) or adoption." The rule does not specifically address whether brothers who share a common ancestor have a common relationship. Also, the rule does not state that the examples of common relationships listed in the rule 60BB-2.031(3)(j), Florida Administrative Code, are the sole and exclusive examples of common relationships. As noted earlier, the Special Deputy held that a common relationship did not exist between the principals in this case, and consequently, the Special Deputy also held that common ownership, management, or control did not exist between the companies at the time of the workforce transfer. In Conclusion of Law #10, the Special Deputy further held that a common relationship did not exist due to the lack of "lineal consanguinity," a direct line blood relationship. The Special Deputy provided the definition of lineal consanguinity in the Recommended Order.

The Special Deputy relied on two court cases to define lineal consanguinity. In Conclusion of Law #10, the Special Deputy cited *Rothery v. State*, 757 So.2d 1256, 1259 (Fla. 5th DCA 2000), to define both "consanguinity" and "affinity." In *Rothery*, the court defined consanguinity as being related by blood and affinity as being related by marriage. *Id.* Also in Conclusion of Law #10, the Special Deputy cited *In re*

Estate Angeleri, 575 So.2d 794, 794 n.1 (Fla. 2d DCA 1990), to define "lineal consanguinity." In the case, the Second District Court of Appeal quoted *Black's Law Dictionary* 275 (5th ed. 1979), and defined "lineal consanguinity" as a blood relationship between direct line descendents. *Id*. The court also provided that lineal consanguinity exists between child, parent, and grandparent in a "direct ascending line." *Id*. On the other hand, collateral consanguinity exists between relatives who share a common ancestor and do not ascend or descend from each other according to *In re Estate Angeleri*. *Id*. When relying on these definitions, the Special Deputy concluded in Conclusion of Law #10 that the Hawken brothers had a relationship of collateral consanguinity because they shared a common ancestor and did not descend from each other. While the Special Deputy may be correct in concluding that lineal consanguinity did not exist between the owner and operators of the Petitioner and its predecessor, the Special Deputy erred when also concluding that the relationship between the principals did not otherwise satisfy the requirements of rule 60BB-2.031(3)(j), Florida Administrative Code. The Special Deputy's interpretation of the rule requires that lineal consanguinity exist between the principals in this case and that the absence of such a relationship requires the ultimate conclusion that no common ownership, management, or control existed at the time of the transfer. The Respondent contends that the absence of lineal consanguinity does not preclude a conclusion that common ownership, management, or control otherwise existed at the time of the transfer under rule 60BB-2.031(3)(j), Florida Administrative Code. The Agency is persuaded by the Respondent's contention.

Adopting the interpretation of the rule offered by the Special Deputy would not reflect a reasonable interpretation of the rule and leads to an illogical result. When following the Special Deputy's interpretation of rule 60BB-2.031(3)(j), Florida Administrative Code, a common relationship would not exist between brothers with the same ancestor but would exist between adopted brothers. As the Respondent maintains, it does not make sense that brothers who are only related through adoption would share a common relationship while brothers with a common ancestor would not share a common relationship. The Second District Court of Appeal in *In re Estate Angeleri* rejected a similarly illogical interpretation of a statute. 575 So.2d at 794. The case was cited by the Special Deputy in Conclusion of Law #10. In the case, the court rejected the interpretation of the statute because it excluded a spouse's brother from service as a nonresident estate administrator and yet allowed a child of a spouse's brother to serve as a nonresident estate administrator. *Id*. The court found that it did not make sense to exclude the spouse's brother from service as a nonresident estate administrator, a person expected "to be closer in the chain of relationships with the decedent than a child of a spouse's brother." *Id*. In its exceptions, the Respondent similarly concludes that excluding brothers related by blood from sharing a common

relationship and including adopted brothers as sharing a common relationship in this case leads to an "absurd result." As a result, the Agency does not accept the Special Deputy's interpretation.

The Agency regards the Respondent's interpretation of the rule 60BB-2.031(3)(j), Florida Administrative Code, as more reasonable than that of the Special Deputy. Section 120.57(1)(l), Florida Statutes, provides that 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. When rejecting conclusions of law contained in a recommended order, the Agency must state with particularity why the conclusions of law are being rejected and make a finding that its substituted conclusions of law are as reasonable as or more reasonable than the conclusions of law being modified or rejected. *Prysi v. Dep't of Health*, 823 So.2d 823, 825 (Fla. 1st DCA 2002). In light of all of the considerations listed above, the Special Deputy's Conclusion of Law #10 does not represent a reasonable application of the law to the facts. The portion of the Conclusion of Law #10 that holds that a common relationship did not exist is rejected. The portions of Exceptions #1, 3, and 4 that hold that a common relationship existed between the parties under rule 60BB-2.031(3)(j), Florida Administrative Code, are accepted by the Agency as they reflect a more reasonable application of the law to the facts. Accordingly, Conclusion of Law #10 is amended to say:

> The Petitioner, Stuart Web, Inc., acquired the workforce and intangible assests of Flashes, Inc. and continued to operate the business formerly operated by Flashes, Inc. Although Gary Hawken is the brother of Thomas Hawken, the brother-in-law of Dianne Hawken, and the uncle of Kevin Hawken, it was not shown that at the time of the transfer there was common ownership, management, or control. There is no direct line blood relationship (lineal consanguinity) between Gary Hawken and Thomas Hawken, Diane Hawken, or Kevin Hawken. The term "consanguinity" means related by blood; its antonym is "affinity," which means related by marriage. See Rothery v. State, 757 So. 2d 1256, 1259 (Fla. 5th DCA 2000) ("Family relationships are of two types: those of consanguinity (blood) and affinity (marriage)."). "'**[**L]ineal consanguinity is that [blood relationship] which subsists between persons of whom one is descended in a direct line from the other, as between son, father, grandfather, and so upwards in the direct ascending line; or between son, grandson, great-grandson, and so downwards in the direct descending line.'" In re Estate of Angeleri, 575 So. 2d 794, 794 n.1 (Fla. 2d DCA 1990) (quoting *Black's Law Dictionary* 275 (5th ed. 1979)). Collateral consanguinity is that relationship "'which subsists between persons who have the same ancestors, but who do not descend (or ascend) one from the other [such as uncle and niece].'" *Id*. (quoting *Black's*). Gary Hawken and Thomas Hawken are descendants of the same common ancestor, but not from each other. The relationship of between Gary Hawken and Thomas Hawken, Diane Hawken or Kevin Hawken is collateral consanguinity, not lineal consanguinity.

While the Respondent may be correct in concluding that a common relationship existed between the Hawken brothers, the Respondent incorrectly equates the presence of a common relationship with a finding

that common ownership, management, or control was present at the time of the transfer. The absence or presence of a common relationship is not determinative of whether common ownership, management, or control existed at the time of the transfer. As previously noted, section 443.131(3)(g), Florida Statutes, does not define "common ownership, management, or control." Rule 60BB-2.031(3)(j), Florida Administrative Code, provides that the Respondent "*may* consider common relationships between owners or persons who exert control over or occupy management positions in businesses under consideration" when "determining whether common management, ownership, or control exists" (emphasis added). Therefore, the Special Deputy was not required by the statute or rule to find that common ownership, management, or control was present even if a common relationship existed between the principals. Competent substantial evidence in the record continues to support the Special Deputy's ultimate conclusion that common ownership, management, or control was not present at the time of the transfer. The portion of Exception #3 that maintains that the common relationship between the principals in this case demonstrates common ownership, management, or control sufficient to subject the Petitioner a mandatory transfer of its predecessor's tax rate is respectfully rejected. The Special Deputy's ultimate conclusion that common ownership, management, or control was not present at the time of the transfer is accepted by the Agency.

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 amended Conclusions of Law reflect a reasonable application of the law to the facts and are adopted in this order.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Respondent, I hereby adopt the Findings of Fact as set forth in the Recommended Order. I adopt the Conclusions of Law as modified above. I also adopt the Special Deputy's Recommendation that the Respondent's determination be reversed. I respectfully reject the Special Deputy's conclusion that a common relationship did not exist at the time of the workforce transfer.

Therefore, it is ORDERED that the determination dated July 28, 2010, is REVERSED.

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

_____
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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DIANE K HAWKEN
5675 SE GROUPER AVE
STUART FL 34997-3103

PROTEST OF LIABILITY
DOCKET NO. 2010-120172R

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 July 28, 2010.

After due notice to the parties, a telephone hearing was held on January 20, 2011. The Petitioner, represented by the Petitioner's Certified Public Accountant, appeared and testified. The Respondent, represented by a Department of Revenue Tax Auditor III, 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's tax rates were properly computed, pursuant to Section 443.131, Florida Statutes; Rules 60BB-2.026; 2.031, Florida Administrative Code.

Whether the Petitioner's liability for unemployment compensation contributions was properly determined pursuant to Sections 443.1215, 1216, 1217; 443.131, Florida Statutes.

Findings of Fact:

1. The Petitioner, Stuart Web, Inc., is a corporation which operates a commercial printing business. The Petitioner prints several newspapers, tabloids, and booklets for numerous publishing companies. The Petitioner is owned and operated by Thomas Hawken, his wife Diane Hawken, and his son Kevin Hawken.

2. One of the clients of Stuart Web, Inc. was Flashes, Inc., a corporation which operated a shoppers newspaper. Flashes, Inc. sold the advertising and arranged the advertisements in the order that was to be published. Flashes, Inc. contracted with Stuart Web, Inc. to print the newspaper which was published by Flashes, Inc. Flashes, Inc. then distributed the newspaper. Flashes, Inc. was owned and operated by Gary Hawken, brother of Thomas Hawken.

3. The business of Flashes, Inc. had declined and in 2008 Gary Hawken decided to close the business. The Petitioner felt that the business operated by Flashes, Inc. could be revived and made an offer to purchase the right to publish the newspaper. A limited liability company by the name of Flashes Publishing LLC was created on July 30, 2008, to purchase the business. Flashes Publishing LLC is owned and operated by Kevin Hawken, Thomas Hawken, and Diane Hawken.

4. On August 1, 2008, Flashes Publishing LLC purchased the right to publish the Flashes Newspaper and the intangible assets of Flashes, Inc. Beginning on August 1, 2008, Stuart Web, Inc. began publishing the newspaper and all of the employees of Flashes, Inc. were transferred to Stuart Web, Inc.

5. The Department of Revenue identified, based on the Employer's Quarterly Reports submitted by Flashes, Inc. and Stuart Web, Inc., that the former employees of Flashes, Inc. were reported as employees of Stuart Web, Inc. as of August 1, 2008. Further investigation revealed that Gary Hawken and Thomas Hawken are brothers.

6. On July 28, 2010, the Department of Revenue issued a determination holding that, based on a review of the Department's records, it appeared that Stuart Web, Inc. acquired the business of Flashes, Inc. and that at the time of the transfer there was common ownership, management, or control of the two businesses. The Department of Revenue transferred the unemployment experience attributable to Flashes, Inc. to Stuart Web, Inc. resulting in an increased tax rate for Stuart Web, Inc. effective October 1, 2008. The Petitioner filed a timely protest.

Conclusions of Law:

7. Section 443.131(3), Florida Statutes, (2006) provides:
   (g) *Transfer of unemployment experience upon transfer or acquisition of a business.*-- Notwithstanding any other provision of law, upon transfer or acquisition of a business, the following conditions apply to the assignment of rates and to transfers of unemployment experience:
   1.a. If an employer transfers its trade or business, or a portion thereof, to another employer and, at the time of the transfer, there is any common ownership, management, or control of the two employers, the unemployment experience attributable to the transferred trade or business shall be transferred to the employer to whom the business is so transferred. The rates of both employers shall be recalculated and made effective as of the beginning of the calendar quarter immediately following the date of the transfer of the trade or business unless the transfer occurred on the first day of a calendar quarter, in which case the rate shall be recalculated as of that date.

8. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.

9. Rule 60BB-2.031(3), Florida Administrative Code, provides in pertinent part that for the purpose of implementing Section 443.131(3)(g), F.S.:
   (a) The term "ownership" means any proprietary interest in a business, including, but not limited to, shares of stock in a corporation, partnership interest in a partnership or membership interest in a Limited Liability Company (LLC).
   (b) "Common ownership" exists when a person has ownership in two or more businesses.
   (c) A person in "management" includes any officer or director of a corporation, owner of a sole

proprietorship, partner in a partnership, manager of an LLC, or person with the ability to direct the activities of an employing unit, either individually or in concert with others.

(d) "Common management" exists when a person concurrently occupies management positions in two or more businesses.

(e) A person in "control" of a business includes any officer or director of a corporation, owner of a sole proprietorship, partner in a partnership, manager of an LLC, or other person with the ability, directly or indirectly, individually or in concert with others, to influence or direct management, activities or policies of the business through ownership of stock, voting rights, contract, or other means. Control exists when an employee leasing company dictates or specifies the businesses with which a client company must contract.

(f) "Common control" exists when a person or group of persons has control of two or more businesses.

(g) The phrase "transfer or acquisition" encompasses any and all types of transfers and acquisitions including, but not limited to, assignments, changes in legal identity or form, consolidations, conveyances, mergers, name changes, purchase and sale agreements, reorganizations, stock transfers and successions.

(h) The phrase "trade or business or a portion thereof" includes but is not limited to assets, customers, management, organization and workforce.

(i) For the purpose of determining issues relating to the transfer of employment records upon transfer or acquisition of a business, the term "person" has the meaning set forth in Section 7701(a)(1) of the Internal Revenue Code.

(j) In determining whether common management, ownership, or control exists, the Department may consider common relationships between owners or persons who exert control over or occupy management positions in the businesses under consideration. For purposes of this rule, a common relationship exists when persons are related to each other by marriage, step-relationships, direct line blood relationships such as grandchild, child, parent, grandparent (lineal consanguinity) or adoption. A common relationship is also deemed to exist between affiliated groups as defined by Section 199.023(8), F.S. and between affiliated corporations as defined in Section 1504(a) of the Internal Revenue Code. (Emphasis supplied)

10. The Petitioner, Stuart Web, Inc., acquired the workforce and intangible assests of Flashes, Inc. and continued to operate the business formerly operated by Flashes, Inc. Although Gary Hawken is the brother of Thomas Hawken, the brother-in-law of Dianne Hawken, and the uncle of Kevin Hawken, it was not shown that at the time of the transfer there was common ownership, management, or control. The relationship between the principals does not satisfy the requirements of 60BB-2.031(3)(j), Florida Administrative Code. There is no direct line blood relationship (lineal consanguinity) between Gary Hawken and Thomas Hawken, Diane Hawken, or Kevin Hawken. The term "**consanguinity**" means related by blood; its antonym is "affinity," which means related by marriage. See Rothery v. State, 757 So. 2d 1256, 1259 (Fla. 5th DCA 2000) ("Family relationships are of two types: those of **consanguinity** (blood) and affinity (marriage)."). "'[**L]ineal consanguinity** is that [blood relationship] which subsists between persons of whom one is descended in a direct line from the other, as between son, father, grandfather, and so upwards in the direct ascending line; or between son, grandson, great-grandson, and so downwards in the direct descending line.'" In re Estate of Angeleri, 575 So. 2d 794, 794 n.1 (Fla. 2d DCA 1990) (quoting *Black's Law Dictionary* 275 (5th ed. 1979)). Collateral **consanguinity** is that relationship "'which subsists between persons who have the same ancestors, but who do not descend (or ascend) one from the other [such as uncle and niece].'" *Id*. (quoting *Black's*). Gary Hawken and Thomas Hawken are descendants of the same common ancestor, but not from each other. The relationship of between Gary Hawken and Thomas Hawken, Diane Hawken or Kevin Hawken is collateral consanguinity, not lineal consanguinity.

11. It is concluded that since there was no common ownership, management, or control between

Flashes, Inc. and Stuart Web, Inc. at the time of the transfer, the Petitioner is not subject to a mandatory transfer of unemployment experience.

Recommendation: It is recommended that the determination dated July 28, 2010, be REVERSED.

Respectfully submitted on January 28, 2011.

R. O. SMITH, Special Deputy
Office of Appeals