

**AGENCY FOR WORKFORCE INNOVATION  
TALLAHASSEE, FLORIDA**

**PETITIONER:**

Employer Account No. - 2929910

COGIC DEVELOPMENTAL CHILD CARE INC  
CHARLES DAVIS  
6414 N 30TH ST  
TAMPA FL 33610-1420

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 2010-3562L**

**ORDER**

This matter comes before me for final Agency Order.

The issues before me are whether services performed for the Petitioner by the Joined Party and other individuals constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes, and 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.

The Joined Party filed an unemployment compensation claim in November 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that she worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, she would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any other workers who worked under the same terms and conditions. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, she would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party and the other workers. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay

unemployment compensation taxes on the wages it paid to the Joined Party and any other daycare/teacher's aides who worked under the same terms and conditions. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because she 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 June 2, 2010. The Petitioner was represented by its attorney. The Pastor of College Hill Church of God in Christ testified as a witness. The Petitioner's Certified Public Accountant testified as a witness. The Respondent was represented by a Department of Revenue Service Center Manager. A Tax Specialist I testified as a witness. The Joined Party did not appear at the hearing. The Special Deputy issued a Recommended Order on June 22, 2010.

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

1. College Hill Church of God in Christ is a church located in Tampa, Florida. The church is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. Beginning in 1990 the church operated a childcare center under the same exemption. In 1999 the Church created a separate corporation, COGIC Development Childcare, Inc., to operate the childcare center. COGIC Development Childcare, Inc., the Petitioner in this case, is a licensed childcare agency authorized to care for a maximum of eighty children.
2. The Petitioner has a separate Federal Employer Identification number from the Church and in approximately 2000 the Church applied to the Internal Revenue Service for a group 501(c)(3) exemption to include the Petitioner. The Internal Revenue Service did not issue the group exemption at that time.
3. On August 6, 2003, the pastor of the Church resubmitted information to the Internal Revenue Service in order to obtain a group exemption. The pastor provided a detailed description of the Petitioner's purpose and activities. In his letter the pastor stated "The purpose of this program is to provide education, developmental training, and day care services for children. Educational programs are designed to prepare children for entry into first grade by developing basic learning skill while the children are away from their homes. Substantially all of the care provided by the organization is for the purposes of enabling individuals to be gainfully employed, and the services provided by the organization are available to the general public." The pastor also provided a description of the Petitioner's receipts and expenditures by stating "The sources of income consist primarily of Title XX day care subsidies for families, private day care fees paid by families and church in-kind contributions. Expenditures consist of ordinary and necessary operational expenses such as salaries, supplies, food and repair and maintenance and other occupancy cost." On November 20, 2003, the Internal Revenue Service granted the group exemption.
4. The childcare center is located on Church owned property which is also used by the Church for Church purposes. The Church does not charge the Petitioner for use of the property. Although the Petitioner charges the families for the daycare services, the fees charged by the Petitioner would be higher if the church did not allow the childcare center to use the Church property rent free.
5. All of the Petitioner's activities are supervised by a Daycare Director, who is the pastor's wife. The Daycare Director reports to the Petitioner's Board of Directors. The individuals on the

- Petitioner's Board of Directors are the same individuals who serve on the Church Board of Directors.
6. The childcare center is open all year. The Petitioner tries to always have more than the required minimum number of staff members each day. Although the staffing may vary from week to week, during the last five years the childcare center had at least six employees providing day care services each day. Some of the staff members are full time and some of the staff members are part time.
  7. The Joined Party was employed by the Petitioner from January 1, 2009, until September 30, 2009. The Joined Party filed a claim for unemployment compensation benefits effective October 4, 2009. A *Request for Reconsideration of Monetary Determination* was filed when the Joined Party did not receive credit for her wages with the Petitioner. An investigation was assigned to the Department of Revenue to determine if the Joined Party earned wages in covered employment.
  8. On November 10, 2009, the Department of Revenue issued a determination holding the Petitioner liable under the Unemployment Compensation Law effective January 1, 2005. The Petitioner filed a protest on November 30, 2009.

Based on these Findings of Fact, the Special Deputy recommended the determination dated November 10, 2009, be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail postmarked July 6, 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.

In Exceptions #1-7, the Petitioner proposes findings of fact or conclusions of law in accord with the Special Deputy's Findings of Fact and Conclusions of Law, proposes alternative findings of fact and conclusions of law, or attempts to enter additional evidence. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and 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 the essential requirements of law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the 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'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 and Conclusions of Law 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 additional evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. The Petitioner's exceptions that propose findings of fact or conclusions of law in accord with the Special Deputy's Findings of Fact and Conclusions of Law, propose alternative findings of fact and conclusions of law, or attempt to enter additional evidence are respectfully rejected.

Also in Exception #1, the Petitioner cites *His Kids Daycare v. Fla. Unemployment Appeals Comm'n*, 904 So.2d 477 (Fla. 1st DCA 2005), and *Peace Lutheran Church v. Unemployment Appeals Comm'n*, 906 So.2d 1197 (Fla. 4th DCA 2005), in support of its contention that its educational purpose and purpose of using the childcare center as an outreach program are not mutually exclusive. The Petitioner contends that its curriculum is faith-based and Bible-based. 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. of 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 *His Kids*, the court held that the Unemployment Appeals Commission wrongfully rejected an appeals referee's finding that a daycare was operated for religious purposes. 904 So.2d at 480. In *Peace Lutheran*, the court also upheld an appeals referee's finding that a child care center was operated primarily for religious purposes. 906 So.2d at 1200. A review of the record reveals that the Special Deputy found in Conclusion of Law #13 that the Petitioner was not operated primarily for religious purposes and was instead primarily operated to "provide education, developmental training, and day care services for children in order to prepare children for entry into first grade by developing basic learning skills." The current case is also distinguishable from both cases upon an examination of the legal identity of the employers. In *His Kids*, the daycare center had the same Federal Employer Identification Number (FEIN) as the church that operated it. 904 So.2d at 479. In *Peace Lutheran*, the child care center was originally operated under a separate corporation, and it was later operated by the church when the separate corporation dissolved. 906 So.2d at 1198. In the case at hand, the Special Deputy found that the Petitioner was a separate corporation from the church that operated it and the Petitioner obtained a separate FEIN in Findings of Fact #2-3. Contrary to what the Petitioner maintains in its exceptions, the Special Deputy's Findings of Fact are supported by 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 Petitioner has not provided a basis for modifying or rejecting the Special Deputy's Findings of Fact and Conclusions of Law that is permitted under section 120.57(1)(l), Florida Statutes. Exception #1 is respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order 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 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, 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.

In consideration thereof, it is ORDERED that the determination dated November 10, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this \_\_\_\_\_ day of **September, 2010.**



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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:**

Employer Account No. - 2929910  
COGIC DEVELOPMENTAL CHILD CARE INC  
CHARLES DAVIS  
6414 N 30TH ST  
TAMPA FL 33610-1420

**PROTEST OF LIABILITY  
DOCKET NO. 2010-3562L**

**RESPONDENT:**

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

**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 November 10, 2009.

After due notice to the parties, a telephone hearing was held on June 2, 2010. The Petitioner was represented by its attorney. The pastor of College Hill Church of God in Christ testified as a witness. The Petitioner's Certified Public Accountant testified as a witness. The Respondent was represented by a Department of Revenue Service Center Manager. A Tax Specialist I testified 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 from the Petitioner. The Petitioner's proposals are discussed in the conclusions of law portion of this recommended order.

**Issue:**

Whether services performed for the Petitioner by the Joined Party 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.

**Findings of Fact:**

1. College Hill Church of God in Christ is a church located in Tampa, Florida. The church is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code.

Beginning in 1990 the church operated a childcare center under the same exemption. In 1999 the Church created a separate corporation, COGIC Development Childcare, Inc., to operate the childcare center. COGIC Development Childcare, Inc., the Petitioner in this case, is a licensed childcare agency authorized to care for a maximum of eighty children.

2. The Petitioner has a separate Federal Employer Identification number from the Church and in approximately 2000 the Church applied to the Internal Revenue Service for a group 501(c)(3) exemption to include the Petitioner. The Internal Revenue Service did not issue the group exemption at that time.
3. On August 6, 2003, the pastor of the Church resubmitted information to the Internal Revenue Service in order to obtain a group exemption. The pastor provided a detailed description of the Petitioner's purpose and activities. In his letter the pastor stated "The purpose of this program is to provide education, developmental training, and day care services for children. Educational programs are designed to prepare children for entry into first grade by developing basic learning skill while the children are away from their homes. Substantially all of the care provided by the organization is for the purposes of enabling individuals to be gainfully employed, and the services provided by the organization are available to the general public." The pastor also provided a description of the Petitioner's receipts and expenditures by stating "The sources of income consist primarily of Title XX day care subsidies for families, private day care fees paid by families and church in-kind contributions. Expenditures consist of ordinary and necessary operational expenses such as salaries, supplies, food and repair and maintenance and other occupancy cost." On November 20, 2003, the Internal Revenue Service granted the group exemption.
4. The childcare center is located on Church owned property which is also used by the Church for Church purposes. The Church does not charge the Petitioner for use of the property. Although the Petitioner charges the families for the daycare services, the fees charged by the Petitioner would be higher if the church did not allow the childcare center to use the Church property rent free.
5. All of the Petitioner's activities are supervised by a Daycare Director, who is the pastor's wife. The Daycare Director reports to the Petitioner's Board of Directors. The individuals on the Petitioner's Board of Directors are the same individuals who serve on the Church Board of Directors.
6. The childcare center is open all year. The Petitioner tries to always have more than the required minimum number of staff members each day. Although the staffing may vary from week to week, during the last five years the childcare center had at least six employees providing day care services each day. Some of the staff members are full time and some of the staff members are part time.
7. The Joined Party was employed by the Petitioner from January 1, 2009, until September 30, 2009. The Joined Party filed a claim for unemployment compensation benefits effective October 4, 2009. A *Request for Reconsideration of Monetary Determination* was filed when the Joined Party did not receive credit for her wages with the Petitioner. An investigation was assigned to the Department of Revenue to determine if the Joined Party earned wages in covered employment.
8. On November 10, 2009, the Department of Revenue issued a determination holding the Petitioner liable under the Unemployment Compensation Law effective January 1, 2005. The Petitioner filed a protest on November 30, 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. The Petitioner does not dispute the fact that the individuals who perform services for the Petitioner are the Petitioner's employees.
11. Section 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.
12. The Petitioner, COGIC Development Childcare, Inc., is a nonprofit corporation which was formed to operate a childcare center. The Petitioner is not a church nor a convention or association of churches.
13. Although the Petitioner is operated, supervised, and controlled by College Hill Church of God in Christ, the evidence does not support a conclusion that the childcare center is operated primarily for religious purposes. As stated by the pastor when the Petitioner applied for the 501(c)(3) exemption the primary purpose of the childcare center is to provide education, developmental training, and day care services for children in order to prepare children for entry into first grade by developing basic learning skills.
14. The Petitioner's evidence establishes that the childcare center is operated year around and that the Petitioner has had at least four employees during each week of each year for at least the last five years. The Petitioner has had at least four individuals in employment during at least twenty weeks during a calendar year and has established liability for coverage under the Unemployment Compensation Law.
15. The Petitioner's proposed conclusion of law #7 asserts that the burden of proof in this case is on the Joined Party, Carletta Goss, because the investigation conducted by the Department of Revenue was initiated by a claim for unemployment compensation benefits. In advancing that argument the Petitioner relies upon His Kids Daycare v. Unemployment Appeals Commission, 904 So2d 477 (2005). In that case the court held that to be eligible for unemployment compensation benefits the claimant has the burden to prove that the claimant has met the eligibility requirements of the law. The Petitioner's reliance is misplaced. The issue in this matter is not Carletta Goss's eligibility to receive unemployment compensation benefits. The clearly stated issue is whether COGIC Developmental Child Care, Inc. is liable for payment of unemployment compensation tax. The Petitioner is the protesting party. The burden of proof is

on the protesting party to establish by a preponderance of the evidence that the determination is in error. Rule 60BB-2.035(7), Florida Administrative Code Rules, Florida Unemployment Compensation Tax. Proposed conclusion of law #7 is respectfully rejected.

16. In proposed conclusion of law #9 the Petitioner relies upon Peace Lutheran Church v. Unemployment Appeals Commission, 906 So 2d 1197 (2005), a case involving a claimant's right to receive unemployment compensation benefits in which the claimant was the appelland and had the burden of proof. The court held that the record did not contain competent, substantial evidence that the Church was a liable employer. In the instant case the evidence submitted by the Petitioner, the August 3, 2006, letter to the Internal Revenue Service for the purpose of obtaining the 501(c)(3) exemption, the Petitioner states that the primary purpose of the day care center is to provide education, developmental training, and day care services for children designed to prepare children for entry into first grade by developing basic learning skills while the children are away from their homes. Although the childcare center may have been established as a mission of the Church, the evidence does not support a conclusion that the Petitioner is an organization established primarily for religious purposes. The Petitioner's proposed conclusion of law #9 is respectfully rejected.

**Recommendation:** It is recommended that the determination dated November 10, 2009, be AFFIRMED.

Respectfully submitted on June 22, 2010.



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R. O. SMITH, Special Deputy  
Office of Appeals