AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2541695

HOMETOWN BAGEL INC
11800 NW 102ND RD STE 6
MEDLEY FL 33178-1030

PROTEST OF LIABILITY
DOCKET NO. 2010-8713R

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.

The Department of Revenue (Department) issued a determination notifying the Petitioner of the mandatory transfer of the tax rate of its predecessor account to its account. The Department based its determination on the Petitioner's acquisition of the predecessor's workforce. The Department did not find that the Petitioner had intent to lower its tax rate by acquiring the workforce of the predecessor. In the determination, the Department also concluded that common ownership, management, or control existed between the two companies. As a result of the determination, the Petitioner was required to pay additional taxes and interest. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on June 10, 2010. The Petitioner, represented by the Petitioner's Chief Financial Officer, 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 June 15, 2010.

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

1. The Petitioner, Hometown Bagel, Inc. is a corporation that operates a bakery which primarily produces bagels and sells the bakery products on the wholesale market. The Petitioner uses the registered trade name of Bagelmania. The Petitioner established liability for payment of unemployment compensation taxes to Florida effective January 1, 2003.
2. Arrowhead Bagel, Inc. is a corporation which operated a small retail store and delicatessen. Arrowhead Bagel, Inc. sold the Petitioner's bakery products on the retail market. Arrowhead Bagel, Inc. also used the registered trade name of Bagelmania. Arrowhead Bagel, Inc. established liability for payment of Florida unemployment compensation tax effective January 1, 1999.
3. In 2005 Hometown Bagel, Inc. and Arrowhead Bagel, Inc. were both owned by Gary Schwartzberg. Gary Schwartzberg was the registered agent for both corporations and the sole corporate officer of both corporations. Jack Milarsky was the Chief Financial Officer of both corporations.
4. In 2005 Gary Schwartzberg decided to close the retail store and delicatessen effective December 31, 2005. Arrowhead Bagel, Inc. had approximately thirty-five employees. All of the employees were considered to be good and faithful employees. The employees were informed that they would have employment with Hometown Bagel, Inc. if they wished to accept employment with Hometown Bagel, Inc.
5. Effective January 1, 2006, the Petitioner acquired thirty-three employees who formerly worked for Arrowhead Bagel, Inc.
6. On or before November 28, 2009, the Department of Revenue issued a determination notifying the Petitioner that the unemployment experience attributable to Arrowhead Bagels, Inc. had been transferred to the Petitioner retroactive to January 1, 2006, because the Petitioner had acquired the workforce of Arrowhead Bagels, Inc.
7. In making its determination the Department of Revenue recognized that, by acquiring the workforce of Arrowhead Bagels, Inc., it was not the intent of the Petitioner to obtain a reduced liability for unemployment compensation contributions.
8. The Petitioner filed a protest by mail postmarked December 3, 2009.

Based on these Findings of Fact, the Special Deputy recommended the determination dated June 15, 2010, be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail dated June 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.

All 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.

Upon review of the record, it was determined that a portion of Finding of Fact #1 must be modified because it provides the incorrect effective date for the Petitioner's liability. The record reflects that the Respondent's representative and sole witness testified that the Petitioner established liability for the payment of unemployment compensation taxes to Florida effective November 1, 2003. As a result, Finding of Fact #1 is amended to say:

> The Petitioner, Hometown Bagel, Inc. is a corporation that operates a bakery which primarily produces bagels and sells the bakery products on the wholesale market. The Petitioner uses the registered trade name of Bagelmania. The Petitioner established liability for payment of unemployment compensation taxes to Florida.

The *Issue* and the *Summary* sections of the Petitioner's exceptions and Exceptions #1-16 and 18-20 propose findings of fact in accord with the Special Deputy's findings of fact, propose alternative findings of fact and conclusions of law, provide duplicate copies of documents already admitted as evidence, or attempt to enter additional evidence. 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. Section 120.57(1)(l), Florida Statutes, also 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. 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 further modify the Special Deputy's Findings of Fact and Conclusions of Law. The Agency accepts the findings of fact and conclusions of law as amended in this order. 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 exceptions contained in the Petitioner's *Issue* and *Summary* sections and Exceptions #1-16 and 18-20 are respectfully rejected.

In Exception #21, the Petitioner argues that the Department failed to provide a prompt notification of the Petitioner's contribution rate under section 443.131(3)(i)1., Florida Statutes. The Petitioner also proposes alternative findings of fact in support of its contention in Exception #21. Section 443.131(3)(i)1., Florida Statutes, provides that the Department must provide prompt notification of an employer's contribution rate as determined for any calendar year, and that a determination of an employer's contribution rate is conclusive and binding on the employer unless the employer files an application for review and redetermination setting forth the grounds for review within 20 days of the mailing of the determination notice to the employer's last known address or within 20 days of the delivery of the notice in the absence of mailing. Section 443.131(3)(i)2., Florida Statutes, also provides that once the determination of the employer's contribution rate becomes conclusive and binding on the employer and the 20 day time period has passed, the employer's contribution rate may not be redetermined until the following calendar year absent a computational error. Rule 60BB-2.031(3)(l), Florida Administrative Code, further provides that the Department will issue a determination upon determining that conditions requiring mandatory transfer of employment records exist and that such determinations, including determinations that change an employer's tax rate, will be effective as of the beginning of the calendar quarter immediately following the date of the transfer unless the transfer occurred on the first day of a calendar quarter. If a transfer occurred on the first day of a calendar quarter, rule 60BB-2.031(3)(l), Florida Administrative Code, requires that the rate will be recalculated as of the date of the first day of the calendar quarter. A review of the record shows that it was not established that the Department issued a redetermination of the Petitioner's contribution rate within the same calendar year that the Department issued another contribution rate determination binding on the Petitioner. A review of the record further demonstrates that the Petitioner's workforce transfer occurred on January 1, 2006, and that the Special Deputy held that the Petitioner was subject to a mandatory rate transfer as of that date. Since the Department issued a determination of the Petitioner's

contribution rate within the time allowed under the law and the Special Deputy held that the Petitioner was subject to mandatory rate transfer effective as of the first day of the calendar quarter as the transfer occurred on the first day of a calendar quarter, the Petitioner has not shown that the Department was not in compliance with section 443.131(3)(i)1., Florida Statutes. The Agency does not reject the Special Deputy's Findings of Fact and Conclusions of Law because the Special Deputy's findings of fact as amended herein are supported by competent substantial evidence in the record and the Special Deputy's conclusions of law reflect as reasonable application of the law to the facts. Exception #21 is respectfully rejected.

The amended Findings of Fact support the Special Deputy's ultimate conclusion that the Petitioner is subject to a mandatory rate transfer. The Special Deputy's Conclusions of Law represent a reasonable application of law to the facts and are adopted. The Petitioner's request for the adoption of alternative findings of fact and conclusions of law is respectfully denied.

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 amended herein.

In consideration thereof, it is ORDERED that the determination dated November 28, 2009, is AFFIRMED.

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

_____
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

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HOMETOWN BAGEL INC
JACK MILARSKY
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MEDLEY FL 33178-1030

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DOCKET NO. 2010-8713R

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 28, 2009.

After due notice to the parties, a telephone hearing was held on June 10, 2010. The Petitioner, represented by the Petitioner's Chief Financial Officer, 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.

Findings of Fact:

1. The Petitioner, Hometown Bagel, Inc. is a corporation that operates a bakery which primarily produces bagels and sells the bakery products on the wholesale market. The Petitioner uses the registered trade name of Bagelmania. The Petitioner established liability for payment of unemployment compensation taxes to Florida effective January 1, 2003.
2. Arrowhead Bagel, Inc. is a corporation which operated a small retail store and delicatessen. Arrowhead Bagel, Inc. sold the Petitioner's bakery products on the retail market. Arrowhead

Bagel, Inc. also used the registered trade name of Bagelmania. Arrowhead Bagel, Inc. established liability for payment of Florida unemployment compensation tax effective January 1, 1999.

3. In 2005 Hometown Bagel, Inc. and Arrowhead Bagel, Inc. were both owned by Gary Schwartzberg. Gary Schwartzberg was the registered agent for both corporations and the sole corporate officer of both corporations. Jack Milarsky was the Chief Financial Officer of both corporations.
4. In 2005 Gary Schwartzberg decided to close the retail store and delicatessen effective December 31, 2005. Arrowhead Bagel, Inc. had approximately thirty-five employees. All of the employees were considered to be good and faithful employees. The employees were informed that they would have employment with Hometown Bagel, Inc. if they wished to accept employment with Hometown Bagel, Inc.
5. Effective January 1, 2006, the Petitioner acquired thirty-three employees who formerly worked for Arrowhead Bagel, Inc.
6. On or before November 28, 2009, the Department of Revenue issued a determination notifying the Petitioner that the unemployment experience attributable to Arrowhead Bagels, Inc. had been transferred to the Petitioner retroactive to January 1, 2006, because the Petitioner had acquired the workforce of Arrowhead Bagels, Inc.
7. In making its determination the Department of Revenue recognized that, by acquiring the workforce of Arrowhead Bagels, Inc., it was not the intent of the Petitioner to obtain a reduced liability for unemployment compensation contributions.
8. The Petitioner filed a protest by mail postmarked December 3, 2009.

Conclusions of Law:

9. 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.
10. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.
11. Rule 60BB-2.031(3)(h), Florida Administrative Code, provides that the phrase "trade or business or a portion thereof" includes but is not limited to assets, customers, management, organization, and workforce.
12. The evidence presented in this case reveals that Hometown Bagels, Inc. and Arrowhead Bagels, Inc. had common ownership, management, and control. Although Arrowhead Bagels, Inc. ceased business activity, Hometown Bagels, Inc. acquired a portion of the trade or business of Arrowhead

Bagels, Inc. The portion of the trade or business acquired by the Petitioner was all, or substantially all, of the workforce of Arrowhead Bagels, Inc.

13. The Petitioner is subject to a mandatory rate transfer from Arrowhead Bagels, Inc. effective January 1, 2006.

Recommendation: It is recommended that the determination dated November 28, 2009, be AFFIRMED.

Respectfully submitted on June 15, 2010.

R. O. SMITH, Special Deputy
Office of Appeals