

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2980525

FRADYN SUAREZ INSURANCE AGENCY INC

PO BOX 140277

CORAL GABLES FL 33114-0277

RESPONDENT:

State of Florida

Agency for Workforce Innovation

c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2011-62293R**

ORDER

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 issued a determination notifying the Petitioner of the partial transfer of the tax rate of its predecessor account. The Respondent based its determination on the Petitioner's acquisition of part 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 and interest. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on July 21, 2011. The Petitioner, represented by a Certified Public Accountant, appeared and testified. The Petitioner's President, an accountant for Estrella Insurance Inc., and the Senior Vice President of Estrella Insurance, Inc., also testified as witnesses for the Petitioner. The Respondent, represented by a Department of Revenue Tax Auditor III, appeared and testified. The Special Deputy issued a Recommended Order on July 22, 2011.

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

1. Estrella Insurance, Inc. is a corporation which operated an insurance agency from several different office locations. The managers of each of the office locations were vice presidents of the corporation.
2. Fradyn Suarez was one of the managers and was a vice president of Estrella Insurance, Inc. Fradyn Suarez attended management meetings during which the managers discussed problems with the business. Estrella Insurance Inc. made management decisions based on the information provided by the managers who attended the management meetings.
3. Fradyn Suarez did not own any of the stock of Estrella Insurance, Inc.
4. Estrella Insurance, Inc. decided to sell its business by selling each of the separate insurance office locations and allowing the buyers to operate those businesses as a franchise.
5. In May 2008, Fradyn Suarez formed a corporation, Fradyn Suarez Insurance Agency Inc, in anticipation of purchasing one or more units of business from the Petitioner. Fradyn Suarez is the president of Fradyn Suarez Insurance Agency Inc.
6. Effective October 1, 2010, the Petitioner, Fradyn Suarez Insurance Agency Inc, purchased two units of business from Estrella Insurance, Inc. The purchase included the assets of the two units of business including all furniture, fixtures, equipment, accounts, inventory, licenses and permits, intellectual property, software and contracts related to the units of business, all clients, customer accounts, customer records, telephone numbers of the business as well as yellow pages or other advertising which refer to the telephone numbers, and goodwill. As of October 1, 2010, Fradyn Suarez was still a vice president of Estrella Insurance, Inc.
7. Fradyn Suarez Insurance Agency Inc retained the five employees who worked at one of the units of business. The other unit of business had two employees, neither of which were retained by the Petitioner.
8. The Petitioner submitted an *Application to Collect and/or Report Tax in Florida* to the Department of Revenue to register for the payment of unemployment compensation tax on the wages of the employees. On the Application the Petitioner disclosed that it had purchased a portion of the business of Estrella Insurance, Inc. on October 1, 2010, and that at the time of the transfer there was either common ownership, common management, or common control.
9. The Department of Revenue assigned the initial tax rate that is assigned to all new employers, .0270. The Department of Revenue then contacted the Petitioner and explained that since the Petitioner had acquired part of the workforce of Estrella Insurance, Inc., and since it appeared that there was common ownership, management, or control between the Petitioner and Estrella Insurance, Inc. at the time of the transfer, the Petitioner was required to supply the Department of Revenue with a list of all employees who worked in the transferred units of business during the fourteen calendar quarters prior to the transfer. The Petitioner complied by submitting a list of seventeen employees.
10. The Department of Revenue transferred, from Estrella Insurance, Inc. to the Petitioner, the unemployment experience attributable to the seventeen employees on the list supplied by the Petitioner. By determination mailed on or before April 25, 2011, the Department of Revenue notified the Petitioner that the Department had processed a partial tax rate transfer from the predecessor business, Estrella Insurance, Inc., resulting in an increase in the tax rate from .0270 to .0455 for 2010 and to .0540 for 2011. The Petitioner filed a timely protest.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated April 25, 2011, be affirmed. The Petitioner's exceptions were received by mail postmarked August 4, 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 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 the exceptions, including the *Comments to Findings of Fact* #1-2 and 6-9 and sections A.-F., the Petitioner proposes alternative findings of fact or conclusions of law or attempts to enter additional evidence not provided at the hearing. The Petitioner also specifically takes exception to Findings of Fact #1-2 and 6-9 and Conclusion of Law #13. Section 120.57(1)(l), Florida Statutes, does not allow the modification or rejection 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, including Findings of Fact #1-2 and 6-9, are

supported by competent substantial evidence in the record. A review of the record also reveals that the Special Deputy's Conclusions of Law, including Conclusion of Law #13, 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, provides that additional evidence will not be accepted after the close of the hearing. The Petitioner's request for the consideration of additional evidence is respectfully denied. The Petitioner's exceptions are respectfully rejected.

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 Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

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 April 25, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this ____ day of **September, 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:

Employer Account No. - 2980525
FRADYN SUAREZ INSURANCE AGENCY INC
PO BOX 140277
CORAL GABLES FL 33114-0277

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-62293R**

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 April 25, 2011.

After due notice to the parties, a telephone hearing was held on July 21, 2011. The Petitioner, represented by a Certified Public Accountant, appeared and testified. The Petitioner's President, an individual who is employed as a accountant for Estrella Insurance Inc., and the Senior Vice President of Estrella Insurance, Inc., also testified as witnesses for the Petitioner. 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. Estrella Insurance, Inc. is a corporation which operated an insurance agency from several different office locations. The managers of each of the office locations were vice presidents of the corporation.
2. Fradyn Suarez was one of the managers and was a vice president of Estrella Insurance, Inc. Fradyn Suarez attended management meetings during which the managers discussed problems

with the business. Estrella Insurance Inc. made management decisions based on the information provided by the managers who attended the management meetings.

3. Fradyn Suarez did not own any of the stock of Estrella Insurance, Inc.
4. Estrella Insurance, Inc. decided to sell its business by selling each of the separate insurance office locations and allowing the buyers to operate those businesses as a franchise.
5. In May 2008, Fradyn Suarez formed a corporation, Fradyn Suarez Insurance Agency Inc, in anticipation of purchasing one or more units of business from the Petitioner. Fradyn Suarez is the president of Fradyn Suarez Insurance Agency Inc.
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10. The Department of Revenue transferred, from Estrella Insurance, Inc. to the Petitioner, the unemployment experience attributable to the seventeen employees on the list supplied by the Petitioner. By determination mailed on or before April 25, 2011, the Department of Revenue notified the Petitioner that the Department had processed a partial tax rate transfer from the predecessor business, Estrella Insurance, Inc., resulting in an increase in the tax rate from .0270 to .0455 for 2010 and to .0540 for 2011. The Petitioner filed a timely protest.

Conclusions of Law:

11. 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.

12. Section 443.131(3)(g)7.a., Florida Statutes, provides that "trade or business" includes the employer's workforce.
13. 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.
14. The Petitioner purchased a portion of the business operated by Estrella Insurance, Inc., effective October 1, 2010. At the time of the transfer of the portion of business to the Petitioner, the Petitioner's president, Fradyn Suarez, was a corporate vice president of Estrella Insurance, Inc. The evidence reveals that, as a vice president and manager of Estrella Insurance, Inc., Fradyn Suarez had the ability to direct the activities of Estrella Insurance, Inc. in concert with others.
15. The law requires that the unemployment experience attributable to an acquired portion of business must be transferred to the employer to whom the business is so transferred if there is any common management between the two employers. Fradyn Suarez is president of Fradyn Suarez Insurance Agency Inc and at the time of the transfer Fradyn Suarez was vice president of Estrella Insurance, Inc. Thus, there was common management at the time of the transfer.

Recommendation: It is recommended that the determination dated April 25, 2011, be AFFIRMED.

Respectfully submitted on July 22, 2011.



R. O. SMITH, Special Deputy
Office of Appeals