

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250**

PETITIONER:

Employer Account No. – 2445956
SUPERSONIC OF FLORIDA INC
524 W 46TH ST APT 2
NEW YORK NY 10036-7801

**PROTEST OF LIABILITY
DOCKET NO. 0019 3444 25-01**

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

ORDER

This matter comes before me for final Department Order.

The issues before me are whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 73B-10.035, Florida Administrative Code, and whether services performed for the Petitioner by the Joined Party and other individuals performing services as drivers constitute insured employment, and if so, the effective date of liability pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed a reemployment assistance claim in September 2012. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department of Economic Opportunity (the Department) that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue, hereinafter referred to as the Respondent, conducted an investigation to determine whether the Joined Party and other drivers worked for the Petitioner as employees or independent contractors. If the Joined Party worked for the Petitioner as an employee, the Petitioner would owe reemployment assistance taxes on the remuneration it paid to the Joined Party and other drivers. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, the Petitioner would not owe reemployment assistance taxes on the wages it paid to the Joined Party and the other workers. Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party and other drivers were in insured employment.

The Petitioner was required to pay reemployment assistance taxes on wages it paid to the Joined Party and other workers in the same class. The Petitioner filed a protest of the determination. The claimant who requested the investigation was joined as a party because he had an interest in the outcome of the case.

A telephone hearing was held on June 12, 2013. The Petitioner, represented by its corporate secretary, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified. The Joined Party did not participate in the hearing. The Special Deputy issued a recommended order on July 3, 2013.

The Petitioner filed exceptions to the recommended order, and a supplemental hearing was held on December 18, 2013. The Petitioner, represented by its corporate secretary, appeared and testified. The Respondent was represented by a Department of Revenue Tax Specialist. The Joined Party did appear. The Special Deputy issued a second recommended order on June 10, 2014.

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

1. The Florida Department of Revenue conducted an investigation to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.
2. On December 12, 2012, the Tax Specialist who conducted the investigation mailed the determination to the Petitioner's correct address of record, 524 W. 46th St., Apt 2, New York, NY, 10036-7801, holding that the Joined Party and other individuals performing services for the Petitioner as drivers are the Petitioner's employees.
3. The December 12, 2012, determination advises, "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter. If your protest is filed by mail the postmark date will be considered the filing date of your protest."
4. During the latter part of December 2012 the Petitioner moved its office from the second floor of the office building to the first floor. The move was completed on or about January 2, 2013.
5. By letter dated January 28, 2013, the Petitioner's Certified Public Accountant stated that the determination dated December 12, 2012, had been turned over to him by the Petitioner. The Certified Public Accountant protested the December 12, 2012, determination by stating that it was the Petitioner's position that the Joined Party was an independent contractor. The Certified Public Accountant mailed the protest letter to the Department of Revenue by mail postmarked January 29, 2013. The protest letter lists the Petitioner's address as 524 W 46th Street, New York, NY 10036.
6. During the spring of 2013, the Petitioner moved its office to 72-40 60th Lane, Glendale, New York, 11358.
7. On March 27, 2013, the Department of Economic Opportunity mailed an *Order to Show Cause* to the Petitioner's correct mailing address directing the Petitioner to show cause why the Director should not dismiss the Petitioner's protest for lack of jurisdiction. The Petitioner did not respond.

Based on these Findings of Fact, the Special Deputy recommended that Petitioner's protest of the determination dated December 12, 2012, be dismissed due to a lack of jurisdiction.

The Petitioner submitted exceptions by mail on June 23, 2014. 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. Also, 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 portions of the Recommended Order are based on documents that were not properly admitted as an exhibits. The record reflects that the Petitioner was not given an opportunity to object to the admission of the documents. Accordingly, the Department rejects the Special Deputy's Finding of Fact 3. The Department also modifies Finding of Fact 5 as follows:

By letter dated January 28, 2013, the Petitioner's Certified Public Accountant stated that the determination dated December 12, 2012, had been turned over to him by the Petitioner. The Certified Public Accountant protested the December 12, 2012, determination by stating that it was the Petitioner's position that the Joined Party was an independent contractor. The Certified Public Accountant mailed the protest letter to the Department of Revenue by mail postmarked January 29, 2013.

In its exceptions, the Petitioner alleges that the Special Deputy failed to provide the Petitioner an opportunity to rebut evidence as required by rule 73B-10.035(15)(b), Florida Administrative Code. Rule 73B-10.035(15)(b), Florida Administrative Code, provides that the special deputy will preserve the right of each party to rebut the evidence presented. A review of the record reveals that the Petitioner was provided an opportunity to rebut the evidence presented. A review of the record further reveals that the amended 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. As a result, the Department may not further modify or reject the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as modified in this order. Accordingly, the Petitioner's exceptions are respectfully rejected.

A review of the record reveals that the amended 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 amended 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 adopted as written by the Special Deputy.

Having considered the Petitioner's exceptions, the record of this case, and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as modified herein.

Therefore, it is ORDERED that the Petitioner's protest of the determination dated December 12, 2012, is DISMISSED due to a lack of jurisdiction.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this 25th day of August, 2014.



Magnus Hines

Magnus Hines
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Y. Barnes

DEPUTY CLERK

8.26.14

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the 26th day of August, 2014.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

By U.S. Mail:

ANDY MARTINEZ
14052 WILD MAJESTIC ST
ORLANDO FL 32828

SUPERSONIC OF FLORIDA INC
524 W 46TH ST APT 2
NEW YORK NY 10036-7801

CONO J GALLO & COMPANY LLP
233 SEVENTH ST
SUITE 302
GARDEN CITY NY 11530

SUPERSONIC OF FLORIDA INC
72-40 60TH LANE
GLENDALE NY 11358

DEPARTMENT OF REVENUE
WILLA DENNARD
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

MAITLAND TAX
ATTN: GORDON HERGET SUITE 160
2301 MAITLAND CENTER PARKWAY
MAITLAND FL 32751-4192

State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:

Employer Account No. - 2445956
SUPERSONIC OF FLORIDA INC
72-40 60TH LANE
GLENDALE NY 11358

PROTEST OF LIABILITY
DOCKET NO. 0019 3444 25-01

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager ,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated December 12, 2012.

After due notice to the parties, a telephone hearing was held on June 12, 2013. The Petitioner, represented by its corporate secretary, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified. A recommended order was issued recommending that the Petitioner's protest be dismissed due to lack of jurisdiction. The Petitioner filed exceptions and the cause was remanded for a supplemental hearing to allow the Petitioner an opportunity to present additional or rebuttal evidence. After due notice to the parties the supplemental hearing was held on December 18, 2013. The Petitioner, represented by the Petitioner's corporate secretary, appeared and testified. The Respondent was represented by a Department of Revenue Tax Specialist. The Joined Party appeared.

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 services performed for the Petitioner by the Joined Party and other individuals working as drivers constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

ISSUE: Whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Findings of Fact:

1. The Florida Department of Revenue conducted an investigation to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

2. On December 12, 2012, the Tax Specialist who conducted the investigation mailed the determination to the Petitioner's correct address of record, 524 W. 46th St., Apt 2, New York, NY, 10036-7801, holding that the Joined Party and other individuals performing services for the Petitioner as drivers are the Petitioner's employees.
3. The December 12, 2012, determination advises, "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter. If your protest is filed by mail the postmark date will be considered the filing date of your protest."
4. During the latter part of December 2012 the Petitioner moved its office from the second floor of the office building to the first floor. The move was completed on or about January 2, 2013.
5. By letter dated January 28, 2013, the Petitioner's Certified Public Accountant stated that the determination dated December 12, 2012, had been turned over to him by the Petitioner. The Certified Public Accountant protested the December 12, 2012, determination by stating that it was the Petitioner's position that the Joined Party was an independent contractor. The Certified Public Accountant mailed the protest letter to the Department of Revenue by mail postmarked January 29, 2013. The protest letter lists the Petitioner's address as 524 W 46th Street, New York, NY 10036.
6. During the spring of 2013, the Petitioner moved its office to 72-40 60th Lane, Glendale, New York, 11358.
7. On March 27, 2013, the Department of Economic Opportunity mailed an *Order to Show Cause* to the Petitioner's correct mailing address directing the Petitioner to show cause why the Director should not dismiss the Petitioner's protest for lack of jurisdiction. The Petitioner did not respond.

Conclusions of Law:

8. Section 443.141(2), Florida Statutes, provides:
 - (c) *Appeals*. The department and the state agency providing reemployment assistance tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
9. Rule 73B-10.035, Florida Administrative Code provides;
 - (1) Filing a Protest. Protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, DOR will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in DEO for resolution.
10. Rule 73B-10.035, Florida Administrative Code, provides:
 - (5) Timely Protest.
 - (a)1. Determinations issued pursuant to Sections 443.1216, 443.131-1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
 2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.

- (b) If a protest appears to have been filed untimely, DEO may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.
9. Rule 73B-10.023(1), Florida Administrative Code, provides in pertinent part that it is the responsibility of each employing unit to maintain a current address of record with the Department.
 10. Rule 73B-10.022(1), Florida Administrative Code, defines "Address of Record" for the purpose of administering Chapter 443, Florida Statutes, as the mailing address of a claimant, employing unit, or authorized representative, provided in writing to the Department of Economic Opportunity, and to which the Department shall mail correspondence.
 11. The evidence presented in this case reveals that the determination was mailed to the Petitioner's correct address of record on December 12, 2012, was received by the Petitioner, and was provided by the Petitioner to the Petitioner's Certified Public Accountant on an unknown date.
 12. Rule 73B-10.023(1), Florida Administrative Code, provides, in pertinent part that the postmark date will be the filing date of any report, protest, appeal or other document mailed to the Agency or Department. The "postmark date" includes the postmark date affixed by the United States Postal Service or the date on which the document was delivered to an express service or delivery service for delivery to the Department.
 13. The Petitioner's Certified Public Accountant filed the Petitioner's protest by mail postmarked January 29, 2013.
 14. Twenty days from December 12, 2012, is Tuesday, January 1, 2013, New Year's Day.
 15. Rule 73B-10.022, Florida Administrative Code, provides:
 - (5) Computation of time: In computing any period of time prescribed, calendar days are counted; the date of issuance of a notice is not counted. The last day of the period is counted unless it is a Saturday, Sunday, or holiday; in which event the period will run until the end of the next day that is not a Saturday, Sunday, or holiday. Holidays are those dates designated by Section 110.117(1) and (2), F.S., and any other day that the offices of the United States Postal Service are closed.
 16. Section 110.117(1)(a), Florida Statutes, provides that New Year's Day is a holiday which is observed by all state branches and agencies.
 17. Because January 1, 2013, is a holiday which is observed by all state branches and agencies the time for filing the protest is extended to the next day which is not a Saturday, Sunday, or holiday. Thus, the last day to file a timely protest was January 2, 2013.
 18. In Julius James Brown v. Giffen Industries, Inc., 281 So 2d 897 (Fla. 1973), the Florida Supreme Court held that there is a presumption that mail which is properly addressed, stamped, and mailed, is received by the addressee.
 19. No evidence has been presented to show when the Petitioner received the determination. Thus the Petitioner has not submitted competent evidence to rebut the presumption of timely receipt. No evidence has been presented to show when the Petitioner provided the determination to the Certified Public Accountant for filing of the protest.
 20. When the Petitioner did not file a written protest by January 2, 2013, the determination of the Department of Revenue dated December 12, 2012, became final.

Recommendation: It is recommended that the Petitioner's protest of the December 12, 2012, determination be DISMISSED due to lack of jurisdiction.

Respectfully submitted on June 10, 2014.



R. O. Smith, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
June 10, 2014

Copies mailed to:

Petitioner

Respondent

Joined Party

ANDY MARTINEZ
3439 WILLSHIRE WAY RD
ORLANDO FL 32829

DEPARTMENT OF REVENUE
ATTN: GORDON HERGET
2301 MAITLAND CENTER PKWY STE 160
MAITLAND FL 32751-4192

DEPARTMENT OF REVENUE
ATTN: WILLA DENNARD
CCOC BLDG #1 STE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

CONO J GALLO & COMPANY LLP
233 SEVENTH ST STE 302
GARDEN CITY NY 11530

**DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2445956
SUPERSONIC OF FLORIDA INC
524 W 46TH ST APT 2
NEW YORK NY 10036-7801

**PROTEST OF LIABILITY
DOCKET NO. 2013-23706L**

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

REMAND ORDER

This matter comes before me for final Department Order.

An issue before me is whether the Petitioner filed a timely protest pursuant to sections 443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 73B-10.035, Florida Administrative Code. An issue also before me is whether services performed for the Petitioner by the Joined Party and other drivers constitute insured employment, and if so, the effective date of liability pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

A review of the record establishes that procedural error requires remanding of this case. Rule 73B-10.035(15)(b), Florida Administrative Code, provides that the special deputy will “preserve the right of each party” to “rebut the evidence presented.” The record reflects that the Special Deputy did not give the Petitioner an opportunity to present additional or rebuttal testimony during the hearing. When the Special Deputy did not provide this opportunity to the Petitioner, the Special Deputy failed to preserve the Petitioner’s right to rebut the evidence presented as required by rule 73B-10.035(15)(b), Florida Administrative Code.

Accordingly, it is ORDERED that the case is remanded for a supplemental hearing to allow the Petitioner an opportunity to provide additional or rebuttal evidence. Upon the conclusion of the hearing, the Special Deputy shall issue another Recommended Order based on the entire record of the case.

DONE and ORDERED at Tallahassee, Florida, this 27th day of **August, 2013**.



A handwritten signature in black ink, appearing to read "Altemese Smith", written over a horizontal line.

Altemese Smith
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITYDLES

Copies mailed to:

Petitioner
Respondent
Joined Party

ANDY MARTINEZ
3439 WILSHIRE WAY ROAD
ORANDO FL 32829

DEPARTMENT OF REVENUE
ATTN: JODY BURKE - CCOC #1-4866
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

JOHN J GALLO CPA
1822 ROUTE 6
CARMEL NY 10512

MAITLAND TAX
ATTN GORDON HERGET SUITE 160
2301 MAITLAND CENTER PARKWAY
MAITLAND FL 32751-4192

MARCO PUTRE
72-40 60TH LANE
GLENDALE NY 11358

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals**

MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2445956
SUPERSONIC OF FLORIDA INC
524 W 46TH ST APT 2
NEW YORK NY 10036-7801

**PROTEST OF LIABILITY
DOCKET NO. 2013-23706L**

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated December 12, 2012.

After due notice to the parties, a telephone hearing was held on June 12, 2013. The Petitioner, represented by its corporate secretary, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, 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 timely received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as drivers 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 filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Findings of Fact:

1. The Florida Department of Revenue conducted an investigation to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

2. On December 12, 2012, the Tax Specialist who conducted the investigation mailed the determination to the Petitioner's correct address of record, 524 W. 46th St., Apt 2, New York, NY, 10036-7801, holding that the Joined Party and other individuals performing services for the Petitioner as drivers are the Petitioner's employees.
3. The December 12, 2012, determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter. If your protest is filed by mail the postmark date will be considered the filing date of your protest."
4. By letter dated January 28, 2013, the Petitioner's Certified Public Accountant stated that the determination dated December 12, 2012, had been turned over to him by the Petitioner. The Certified Public Accountant protested the December 12, 2012, determination by stating that it was the Petitioner's position that the Joined Party was an independent contractor. The Certified Public Accountant mailed the protest letter to the Department of Revenue by mail postmarked January 29, 2013.
5. On March 27, 2013, the Department of Economic Opportunity mailed an *Order to Show Cause* to the Petitioner's correct mailing address directing the Petitioner to show cause why the Director should not dismiss the Petitioner's protest for lack of jurisdiction. The Petitioner did not respond.

Conclusions of Law:

6. Section 443.141(2), Florida Statutes, provides:
 - (c) *Appeals*.--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
7. Rule 73B-10.035, Florida Administrative Code provides:
 - (1) Filing a Protest. Protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, the Department of Revenue will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in the Agency for Workforce Innovation for resolution.
8. Rule 73B-10.035, Florida Administrative Code, provides:
 - (5) Timely Protest.
 - (a)1. Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
 2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.
 - (b) If a protest appears to have been filed untimely, the Agency may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.

9. Rule 73B-10.023(1), Florida Administrative Code, provides in pertinent part that it is the responsibility of each employing unit to maintain a current address of record with the Department.
10. Rule 73B-10.022(1), Florida Administrative Code, defines "Address of Record" for the purpose of administering Chapter 443, Florida Statutes, as the mailing address of a claimant, employing unit, or authorized representative, provided in writing to the Agency, and to which the Agency shall mail correspondence.
11. The evidence presented in this case reveals that the determination was mailed to the Petitioner's correct address of record on December 12, 2012, and was received by the Petitioner.
12. Rule 73B-10.023(1), Florida Administrative Code, provides, in pertinent part that the postmark date will be the filing date of any report, protest, appeal or other document mailed to the Agency or Department. The "postmark date" includes the postmark date affixed by the United States Postal Service or the date on which the document was delivered to an express service or delivery service for delivery to the Department.
13. The Petitioner's Certified Public Accountant filed the Petitioner's protest by mail postmarked January 29, 2013.
14. Twenty days from December 12, 2012, is Tuesday, January 1, 2013, New Year's Day.
15. Rule 73B-10.022, Florida Administrative Code, provides:
 - (5) Computation of time: In computing any period of time prescribed, calendar days are counted; the date of issuance of a notice is not counted. The last day of the period is counted unless it is a Saturday, Sunday, or holiday; in which event the period will run until the end of the next day that is not a Saturday, Sunday, or holiday. Holidays are those dates designated by Section 110.117(1) and (2), F.S., and any other day that the offices of the United States Postal Service are closed.
16. Section 110.117(1)(a), Florida Statutes, provides that New Year's Day is a holiday which is observed by all state branches and agencies.
17. Because January 1, 2013, is a holiday which is observed by all state branches and agencies the time for filing the protest is extended to the next day which is not a Saturday, Sunday, or holiday. Thus, the last day to file a timely protest was January 2, 2013. When the Petitioner did not file a written protest by January 2, 2013, the determination of the Department of Revenue dated December 12, 2012, became final.
18. The Petitioner submitted a letter and a copy of an email string by mail postmarked June 21, 2013, as proposed findings of fact and conclusions of law in an attempt to show that the Petitioner relocated on or about January 2, 2013. The email string was not previously offered as evidence. Rule 73B-10.035(10)(a), Florida Administrative Code, provides that the parties will have 15 days from the date of the hearing to submit written proposed findings of fact and conclusions of law with supporting reasons. However, no additional evidence will be accepted after the hearing has been closed. Thus, the additional evidence presented by the Petitioner is rejected and has not been considered in this recommended order.

Recommendation: It is recommended that the Petitioner's protest of the December 12, 2012, determination be DISMISSED due to lack of jurisdiction.

Respectfully submitted on July 3, 2013.



R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd ken z jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
July 3, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

ANDY MARTINEZ
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ORANDO FL 32829

DEPARTMENT OF REVENUE
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5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

JOHN J GALLO CPA
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MAITLAND TAX
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