

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2905251

RODERICK PEART

14804 92ND CT N

PALM BEACH GARDENS FL 33412-1736

RESPONDENT:

State of Florida

Agency for Workforce Innovation

c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2010-66220L**

ORDER

This matter comes before me for final Agency Order.

The issues before me are whether an appeal, motion, or request for review was filed by a party entitled to notice of an adverse determination within thirty days after the mailing of the Final Order to the address of record or, in the absence of mailing, within thirty days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(22), whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(5), and whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code. An issue also before me is whether services performed for the Petitioner by the Joined Party and other individuals as inspectors 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.

The Joined Party filed an unemployment compensation claim in May 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 he 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, he 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, he 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 inspectors 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 he 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 August 18, 2010. The Petitioner appeared and testified. The Petitioner's wife testified as a witness. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Revenue Specialist was present as a witness. The Joined Party appeared. The Special Deputy issued a Recommended Order on August 18, 2010.

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

1. The Department of Revenue issued a determination on June 10, 2009, holding that the Joined Party and other persons performing services as inspectors are the Petitioner's employees. The Petitioner filed a protest by letter dated July 22, 2009.
2. On August 31, 2009, an *Order to Show Cause* was mailed to the Petitioner's correct mailing address and was received by the Petitioner. The *Order to Show Cause* directed the Petitioner to file a written statement within fifteen calendar days of the mailing date of the Order, explaining why the protest should not be dismissed for lack of jurisdiction.
3. The Petitioner did not respond in writing to the *Order to Show Cause*.
4. On October 2, 2009, the Director of the Agency for Workforce Innovation mailed an Order to the Petitioner's correct mailing address. The Order dismissed the Petitioner's protest of the June 10, 2009, determination due to lack of jurisdiction.
5. The Petitioner did not receive the Order mailed on October 2, 2009.
6. On March 3, 2010, the Petitioner filed a written request to re-open the case.
7. On May 21, 2010, the Agency for Workforce Innovation replied to the Petitioner in writing and advised the Petitioner that a hearing would be scheduled to determine if the Petitioner filed a timely appeal, motion, or request for review in response to the Final Order and whether the Petitioner filed a timely response to the *Order to Show Cause*. The Agency's letter states "If the Petitioner fails to establish that a timely appeal, motion, or request for review was filed in response to the Final Order, does not show that the Petitioner filed a timely response to the Order to Show Cause, or fails to demonstrate that the Petitioner's appeal to the determination dated June 10, 2009 was timely, the Special Deputy will not re-open the record regarding the June 10, 2009, determination, and will instead reinstate the Order dated October 2, 2009."

Based on these Findings of Fact, the Special Deputy recommended that the Order dated October 2, 2009, be reinstated. The Petitioner's exceptions to the Recommended Order were received by fax dated August 18, 2010. The Petitioner submitted additional exceptions by mail postmarked August 30, 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.

The Petitioner's exceptions allege that the Petitioner filed a written response to the Order to Show Cause. Pursuant to rule 60BB-2.035(5)2.(b), Florida Administrative Code, the Agency may issue an Order to Show Cause requesting a written response from the Petitioner that explains why the Petitioner's appeal should be accepted as timely if the appeal appears to have been filed untimely. Also pursuant to 60BB-2.035(5)2.(b), Florida Administrative Code, the Agency must dismiss the appeal if the Petitioner does not

provide written evidence that the appeal is timely within 15 days after the mailing date of the Order to Show Cause. A review of the record reveals that the Petitioner's wife testified during the hearing that she filed a written response to the Order to Show Cause and that she did not know when she filed the response. Accordingly, portions of the Recommended Order must be modified to accurately reflect the evidence presented at the hearing. Finding of Fact #3 is amended to say:

The Petitioner responded in writing to the *Order to Show Cause*.

Conclusion of Law #8 is also amended to say:

The Petitioner's evidence shows that the *Order to Show Cause* was mailed to the Petitioner's correct mailing address and was received by the Petitioner.

The amended Findings of Fact and Conclusions of Law continue to support the Special Deputy's ultimate conclusion that the Petitioner's protest should be dismissed due to a lack of jurisdiction. While the Petitioner may have established that the Petitioner responded in writing to the Order to Show Cause, the Petitioner did not establish that the response was filed within 15 days of the mailing date of the Order to Show Cause. The Petitioner has not demonstrated that a timely response to the Order to Show Cause was filed. As a result, the Special Deputy's amended Conclusions of Law reflect a reasonable application of the law to the facts and are adopted by the Agency.

The Petitioner's exceptions also attempt to enter evidence that was not presented at the hearing. 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 portions of the Petitioner's exceptions that attempt to enter additional evidence are respectfully rejected.

A review of the record reveals that the Findings of Fact as amended herein 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 amended findings of fact are thus adopted in this order. The Special Deputy's amended Conclusions of Law reflect a reasonable application of the law to the facts and are 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 Special Deputy's Findings of Fact and Conclusions of Law as amended herein.

In consideration thereof, it is ORDERED that the Final Order dated October 2, 2009, is REINSTATED. The Petitioner's protest of the determination dated June 10, 2009, is DISMISSED due to a lack of jurisdiction.

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



TOM CLENNING,
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. - 2905251
RODERICK PEART
14804 92ND CT N
PALM BEACH GARDENS FL 33412-1736

**PROTEST OF LIABILITY
DOCKET NO. 2010-66220L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner’s protest of the Respondent’s determination dated June 10, 2009.

After due notice to the parties, a telephone hearing was held on August 18, 2010. The Petitioner appeared and testified. The Petitioner's wife testified as a witness. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Revenue Specialist was present as a witness. 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:

TIMELINESS: Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(5).

TIMELINESS: Whether an appeal, motion, or request for review was filed by a party entitled to notice of an adverse determination within thirty days after the mailing of the Final Order to the address of record or, in the absence of mailing, within thirty days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(22).

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 filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact:

1. The Department of Revenue issued a determination on June 10, 2009, holding that the Joined Party and other persons performing services as inspectors are the Petitioner's employees. The Petitioner filed a protest by letter dated July 22, 2009.
2. On August 31, 2009, an *Order to Show Cause* was mailed to the Petitioner's correct mailing address and was received by the Petitioner. The *Order to Show Cause* directed the Petitioner to file a written statement within fifteen calendar days of the mailing date of the Order, explaining why the protest should not be dismissed for lack of jurisdiction.
3. The Petitioner did not respond in writing to the *Order to Show Cause*.
4. On October 2, 2009, the Director of the Agency for Workforce Innovation mailed an Order to the Petitioner's correct mailing address. The Order dismissed the Petitioner's protest of the June 10, 2009, determination due to lack of jurisdiction.
5. The Petitioner did not receive the Order mailed on October 2, 2009.
6. On March 3, 2010, the Petitioner filed a written request to re-open the case.
7. On May 21, 2010, the Agency for Workforce Innovation replied to the Petitioner in writing and advised the Petitioner that a hearing would be scheduled to determine if the Petitioner filed a timely appeal, motion, or request for review in response to the Final Order and whether the Petitioner filed a timely response to the *Order to Show Cause*. The Agency's letter states "If the Petitioner fails to establish that a timely appeal, motion, or request for review was filed in response to the Final Order, does not show that the Petitioner filed a timely response to the Order to Show Cause, or fails to demonstrate that the Petitioner's appeal to the determination dated June 10, 2009 was timely, the Special Deputy will not re-open the record regarding the June 10, 2009, determination, and will instead reinstate the Order dated October 2, 2009."

Conclusions of Law:

8. The Petitioner's evidence shows that the *Order to Show Cause* was mailed to the Petitioner's correct mailing address and was received by the Petitioner. The Petitioner has failed to show that the Petitioner responded to the *Order to Show Cause* in writing to explain why the Petitioner's protest should not be dismissed due to lack of jurisdiction.
9. As stated in the letter dated May 21, 2010, the special deputy is without jurisdiction to re-open the record.

Recommendation: It is recommended that the Order dated October 2, 2009, be reinstated.

Respectfully submitted on August 18, 2010.



R. O. SMITH, Special Deputy
Office of Appeals



Charlie Crist
Governor

Cynthia R. Lorenzo
Director

May 21, 2010

RODERICK PEART
14804 92ND CT N
PALM BEACH GARDENS FL 33412-1736

Re: Docket Number: 2009-112194L

Dear Mr. Peart:

This is in reply to your request for reopening of the above referenced case.

The request alleges that the Petitioner filed a timely appeal, motion, or request for review in response to the Final Order, that the Petitioner filed a timely response to the Order to Show Cause, and that the Petitioner's response to the Order to Show Cause showed that the Petitioner filed a timely appeal to the determination issued by the Department of Revenue on June 10, 2009. A hearing will be scheduled to provide you with an opportunity to show that the case should not be dismissed due to a lack of jurisdiction.

If it is shown that the Petitioner filed a timely appeal, motion, or request for review in response to the Final Order, the Special Deputy will proceed to determine if the Petitioner filed a timely response to the Order to Show Cause. If it is shown that the Petitioner filed a timely response to the Order to Show Cause, the Special Deputy will then proceed to determine if the Petitioner's appeal to the determination dated June 10, 2009, was timely filed. If it is established that the Petitioner filed timely appeal, motion, or request for review in response to the Final Order, that the Petitioner filed a timely response to the Order to Show Cause, and that the Petitioner filed a timely appeal to the determination dated June 10, 2009, the Special Deputy will then take testimony on whether the Joined Party was an employee or independent contractor.

If the Petitioner fails to establish that a timely appeal, motion, or request for review was filed in response to the Final Order, does not show that the Petitioner filed a timely response to the Order to Show Cause, or fails to demonstrate that the Petitioner's appeal to the determination dated June 10, 2009 was timely, the Special Deputy will not re-open the record regarding the June 10, 2009, determination, and will instead reinstate the Order dated October 2, 2009.

This case will be re-assigned to the Special Deputy, and another hearing will be scheduled. You will be notified of the date and time of the telephone hearing.

Sincerely,

Dorothy Johnson
Manager, Unemployment Compensation Appeals

Copies mailed to:
DOR Protest Coordinator
Wage Determination Unit
Petitioner

Joined Party:

YANUARIO D MARTINEZ
4454 URQUHART STREET
LAKE WORTH FL 33461

DEPARTMENT OF REVENUE
ATTN: DENNIS FINKEY - BUILDING G
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399-0100

SARASOTA TAX
WALT BROWDER
1991 MAIN STREET SUITE 240
SARASOTA FL 34236-5934

DEPARTMENT OF REVENUE
ATTN: JIM WROBLEWSKI
2295 VICTORIA AVENUE
FT MYERS FL 33901

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

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RESPONDENT:

State of Florida
AGENCY FOR WORKFORCE INNOVATION
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2009-112194L**

ORDER

This matter comes before me for final Agency Order.

An *Order to Show Cause* mailed to the Petitioner on August 31, 2009, provided fifteen (15) calendar days for the Petitioner to explain why its protest filed July 22, 2009, should be considered a timely appeal to the determination dated June 10, 2009. Since no evidence of timely filing was received, the Petitioner's protest is dismissed pursuant to Rule BB-2.035(3)(b), Florida Administrative Code.

In consideration thereof, it is ORDERED that the Petitioner's protest of the determination dated June 10, 2009, is dismissed due to lack of jurisdiction.

DONE and ORDERED at Tallahassee, Florida, this ____ day of **October, 2009**.



TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 347 CALDWELL BUILDING
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**PROTEST OF LIABILITY
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RESPONDENT:

State of Florida
AGENCY FOR WORKFORCE INNOVATION
c/o Department of Revenue

ORDER TO SHOW CAUSE

The Petitioner is directed to show cause why the Director should not dismiss the petition for lack of jurisdiction pursuant to Section 443.141(2)(c), Florida Statutes, and Rules 60BB-2.035(5) and 60BB-2.022(5), Florida Administrative Code.

The Petitioner is directed to file a written statement within fifteen (15) calendar days of the mailing date of this Order, explaining why the protest should not be dismissed for lack of jurisdiction. The statement should specifically address whether the protest was filed within the time allowed by law.

The following documents are attached for consideration by the Petitioner:

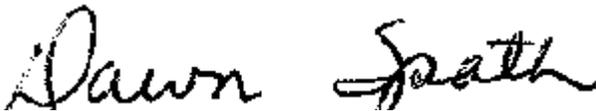
1. Letter of determination dated June 10, 2009, and
2. Letter of protest dated/postmarked July 22, 2009.

Done and ordered on August 31, 2009 at Tallahassee, FL.

This is to certify that this *Order to Show Cause* was sent to the last known address of each interested party on or before August 31, 2009.

DOROTHY JOHNSON, Manager

**Unemployment Compensation
Appeals**



DAWN SPATH, Special Deputy Clerk

FAX: (850) 921-3594

Copies mailed to:

Petitioner

Respondent: DOR Protest Coordinator
Wage Determination Unit

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4454 URQUHART STREET
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DEPARTMENT OF REVENUE
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