

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2808244
GAIL S KIRSCHER
1040 SEMINOLE DRIVE APT 851
FORT LAUDERDALE FL 33304-3235

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2009-123795L**

ORDER

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the Petitioner's appeal is reopened. It is also ORDERED that the determination dated August 26, 2009, is REVERSED.

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



TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

**AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals**

MSC 346 Caldwell Building
107 East Madison Street
Tallahassee FL 32399-4143

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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 August 26, 2009.

After due notice to the parties, a telephone hearing was held on February 25, 2010. The Petitioner, represented by its Certified Public Accountant, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 is entitled to a waiver of penalty and interest for delinquent reports pursuant to Section 443.141(1), Florida Statutes and Rule 60BB-2.028(4), Florida Administrative Code.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

Findings of Fact:

1. The Department of Revenue charged a penalty to the Petitioner due to late filing of the fourth quarter 2008 *Employer's Quarterly Report*. The Petitioner requested waiver asserting that the *Employer's Quarterly Report* was filed before the penalty after date. The Department of Revenue denied the request by determination mailed on or before August 25, 2009.
2. Pursuant to the Petitioner's appeal a telephone hearing was scheduled to be held at 1 PM on January 4, 2010. The special deputy attempted to contact the Petitioner's Certified Public

Accountant for the hearing. The accountant was not at his office and on January 4, 2010, the special deputy recommended that the Petitioner's protest be dismissed.

3. By letter postmarked January 8, 2010, the accountant requested that the appeal be reopened. On January 19, 2010, the case was reassigned to the special deputy to conduct a hearing to determine if the Petitioner had good cause for not appearing at the hearing.
4. At the rescheduled hearing the representative for the Department of Revenue stated that she had just discovered that the fourth quarter *Employer's Quarterly Report* had been timely filed and was received by the Department of Revenue. However, due to an incorrect account number on the *Employer's Quarterly Report* the Department of Revenue posted the tax report to an incorrect account. The Department representative stated that the penalty would be waived.

Conclusions of Law:

5. Rule 60BB-2.035, Florida Administrative Code, provides:
 - (18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.
6. The Petitioner's accountant exercised due diligence in promptly requesting that the appeal be reopened. Thus, good cause has been established.
7. Rule 60BB2.025(1), Florida Administrative Code, provides:
 - (b) Each quarterly report must:
 1. Be filed with the Department of Revenue by the last day of the month following the calendar quarter to which the report applies, except for reports filed by electronic means, which are to be filed as provided in Rule 60BB-2.023, F.A.C. However, an employer reporting for the first time is authorized 15 consecutive calendar days from the notification of liability to submit reports for previous calendar quarters without incurring penalty charges; and
 2. Be filed for each calendar quarter during which the employer was liable, even if no contributions are payable. If there was no employment during the calendar quarter to which the report applies, the report must be completed to so reflect.
8. Section 443.141, Florida Statutes provides:
 - (1) Past Due Contributions and Reimbursements.
 - (a) Interest. Contributions or reimbursements unpaid on the date due shall bear interest at the rate of 1 percent per month from and after that date until payment plus accrued interest is received by the tax collection service provider, unless the service provider finds that the employing unit has or had good reason for failure to pay the contributions or reimbursements when due. Interest collected under this subsection must be paid into the Special Employment Security Administration Trust Fund.
 - (b) Penalty for delinquent reports.

1. An employing unit that fails to file any report required by the Agency for Workforce Innovation or its tax collection service provider, in accordance with rules for administering this chapter, shall pay to the tax collection service provider for each delinquent report the sum of \$25 for each 30 days or fraction thereof that the employing unit is delinquent, unless the agency or its service provider, whichever required the report, finds that the employing unit has or had good reason for failure to file the report.
9. Rule 60BB-2.028, Florida Administrative Code, provides:
 - (4) Waiver of Penalty and Interest. Pursuant to Sections 443.1316 and 443.141(1), F.S., the Department is authorized to waive imposition of interest or penalty when the employer files a written request for waiver establishing that imposition of interest or penalty would be inequitable, however, the Department will not consider a request for waiver of penalty until the employer has filed all reports due for the five years immediately preceding the request for waiver. Examples of inequity include situations where the delinquency was caused by one of the following factors:
 - (a) The required report was addressed or delivered to the wrong state or federal agency.
 - (b) Death or serious illness of the person responsible for the preparation and filing of the report.
 - (c) Destruction of the employer's business records by fire or other casualty.
 - (d) Unscheduled and unavoidable computer down time.
 - (e) Erroneous information provided by the Agency or Department; failure of the Department to furnish proper forms upon a timely request; or inability of the employer to obtain an interview with a representative of the Department. In each case, a diligent attempt to obtain the necessary information or forms must have been made by the employer in sufficient time that prompt action by the Department would have allowed the reports to be filed timely.
10. According to the testimony of the Department of Revenue the Petitioner's fourth quarter 2008 *Employer's Quarterly Report* was timely received but was incorrectly posted due to an incorrect account number. Thus, it is concluded that the imposition of a late filing penalty is inequitable.

Recommendation: It is recommended that the Petitioner's appeal be reopened. It is recommended that the determination dated August 26, 2009, be REVERSED.

Respectfully submitted on February 26, 2010.



R. O. SMITH, Special Deputy
Office of Appeals