

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 2818303
THE LAW OFFICES OF
CHRISTOPHER G O'BRIEN PA
ATTN: CHRISTOPHER G O'BRIEN
P O BOX 970
FT MYERS FL 33902-0970

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-75917L**

ORDER

This matter comes before me for final Department 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 determination dated June 6, 2012, is AFFIRMED.

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 _____ day of November, 2012.



Altemese Smith,
Assistant Director,
Reemployment Assistance Services
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

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 _____ day of November, 2012.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

THE LAW OFFICES OF
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FT MYERS FL 33902-0970

DEPARTMENT OF REVENUE
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TALLAHASSEE FL 32399

FLORIDA DEPARTMENT OF REVENUE
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
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Reemployment Assistance Appeals**

MSC 347 CALDWELL BUILDING
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RESPONDENT:

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**PROTEST OF LIABILITY
DOCKET NO. 2012-75917L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated June 6, 2012.

After due notice to the parties, a telephone hearing was held on October 4, 2012. The Petitioner, represented by its president, appeared and testified. The Respondent was represented by a Tax Auditor. A Revenue Specialist II testified as a witness.

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 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.

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 73B-10.028(4), Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a Florida profit corporation which was formed in December 2005 to operate the law practice of the Petitioner's president.
2. On February 8, 2008, the Petitioner's president signed and submitted an *Application to Collect and/or Report Tax in Florida* to register for the payment of Florida unemployment tax. On the Application the Petitioner reported that the first date that it employed a worker was December 1, 2007, and that it anticipated gross payroll of \$10,000 for each calendar quarter during 2008.

3. The Petitioner engaged a third party, Paychex, Inc. to prepare the payroll and to prepare the payroll tax reports including the unemployment tax reports.
4. In approximately March 2009 the Petitioner hired a paralegal whose duties included preparing the quarterly reports for unemployment tax. In September 2009 the paralegal left her employment with the Petitioner.
5. For some time after the paralegal left her employment the Petitioner attempted to hire a replacement. The Petitioner was not able to locate an acceptable replacement and, as a result, the Petitioner's president had to perform the duties of the paralegal in addition to his own duties.
6. In 2010 the Petitioner discontinued using the services of Paychex, Inc. because Paychex neglected to prepare the payroll for a pay period which included payment to the Petitioner's president.
7. The Petitioner did not prepare and submit the third quarter 2009 quarterly tax report to the Department of Revenue for payment of unemployment tax. On December 15, 2009, the Department of Revenue mailed an *Employer's Quarterly or Annual Reports(s) Notice of Delinquency* to the Petitioner advising the Petitioner that the *Employer's Quarterly Report* for the quarter ending September 30, 2009, was delinquent. The Notice advised the Petitioner that the Petitioner was required to file the report even if the Petitioner had no employees or tax due. The Notice also advised the Petitioner that if it had permanently discontinued employment the Petitioner should provide the last date of employment. The Petitioner's president completed the form and notified the Department of Revenue that the Petitioner had permanently discontinued employment on September 18, 2009. The Petitioner did not submit the third quarter *Employer's Quarterly Report* at that time.
8. The Department of Revenue continued in its attempts to obtain the delinquent tax report and in November 2011 an employee of the Department of Revenue discovered that the Petitioner was still active and in business. After the employee personally contacted the Petitioner's president the Petitioner submitted the tax reports for the third and fourth quarters 2009, all four quarters 2010 and the first, second, and third quarters 2011 on February 16, 2012.
9. Based on the date that the tax reports were filed by the Petitioner the Department of Revenue assessed penalties for each delinquent tax report and interest on the delinquent taxes.
10. By letter dated May 15, 2012, the Petitioner requested that the penalties and interest be abated because payment of the penalties and interest would cause a hardship for the Petitioner, because the Petitioner's president did realize that the tax reports were due because they were previously prepared by a former employee, and because the Petitioner's office was in turmoil due to the incompetence of the former employee and due to the Petitioner's inability to hire a replacement paralegal.
11. By determinations dated June 6, 2012, the Department of Revenue notified the Petitioner that its request for waiver of penalty and interest for the third and fourth quarters 2009, all four quarters 2010, and the first, second, and third quarters 2011, was denied. The Petitioner filed a timely protest by mail on June 26, 2012. The protest letter was received by the Department of Revenue on June 27, 2012; however, the postmark date on the envelope was not legible.

Conclusions of Law:

12. Section 443.141(2)(c), 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.
13. Rule 73B-10.035(5)(a)1., Florida Administrative Code, provides:

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.

14. Rule 73B-10.023(1), Florida Administrative Code, provides, in pertinent part:

Filing date. 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.

15. The evidence presented in this case affirmatively establishes that the Petitioner's protest was filed within twenty days of the mailing date of the determinations. Thus, the protest was timely filed.

16. Section 443.141, Florida Statutes provides:

(1) Past Due Contributions and Reimbursements; Delinquent, Erroneous, Incomplete, or Insufficient Reports.-

(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 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 Department of Economic Opportunity 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 good reason for failure to file the report. The department or its service provider may assess penalties only through the date of the issuance of the final assessment notice. However, additional penalties accrue if the delinquent report is subsequently filed.

1. Rule 73B-10.025(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 73B-10.023, 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.

2. Rule 73B-10.028, 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.
17. The Petitioner argues that the sudden resignation of the former employee is analogous to the death or serious illness of the person responsible for the preparation and filing of the tax report, as referred to in Rule 73B-10.028(4)(b), Florida Administrative Code. The Petitioner's testimony reveals that the former paralegal only worked for the Petitioner for a period of six months. The tax reports were apparently prepared prior to her employment by Paychex. The Petitioner testified that the Petitioner continued to use the services of Paychex until sometime in 2010. The evidence establishes that the Petitioner was aware of the Petitioner's obligation to file the quarterly unemployment tax reports because the Petitioner's president signed the Application to register for payment of unemployment tax and because the Petitioner's president received the Notice of Delinquency for the third quarter 2009 and returned the form with the erroneous information that the Petitioner had permanently discontinued employment.
18. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
19. It has not been shown that the Petitioner had a good reason for failing to file the tax reports when due. The evidence does not establish that the Petitioner made a diligent attempt to file the tax reports even though the Petitioner received a written delinquency notice.

Recommendation: It is recommended that the determination dated June 6, 2012, be AFFIRMED.

Respectfully submitted on October 5, 2012.



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:
October 5, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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