

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

**PETITIONER:**

Employer Account No. - 3053696  
SPACE OF MIND LLC  
102 N SWINTON AVE  
DELRAY BEACH FL 33444-2634

**RESPONDENT:**

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

**PROTEST OF LIABILITY  
DOCKET NO. 0019 3454 30-01**

**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 Petitioner's protest of the determination dated March 19, 2013, is dismissed due to lack of jurisdiction.

### JUDICIAL REVIEW

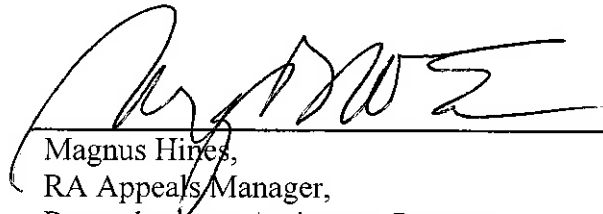
Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed 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 25<sup>th</sup> day of **March, 2014**.



  
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.

  
DEPUTY CLERK

3.26.14  
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 25<sup>th</sup> day of March, 2014.

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

By U.S. Mail:

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

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**PROTEST OF LIABILITY**  
**DOCKET NO. 0019 3454 30-01**  
**(2013-480531)**

**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 to a determination of the Respondent dated March 19, 2013, which held that the Joined Party was the Petitioner's employee, effective September 1, 2011.

After due notice to the parties, a telephone hearing was held on December 4, 2013. The managing director appeared for the Petitioner, with representatives for the Petitioner; the Joined Party appeared, represented by counsel; a Senior Tax Specialist appeared for the Respondent. Proposed Findings of Fact and Conclusions of Law were received from the Petitioner and from the Joined Party. The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

**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. On March 19, 2013 a determination was mailed to the Petitioner at its last-known address of record. Among other things, the determination advised:

This letter is an official notice of the above determination and will become conclusive and binding unless you file written protest to 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.

2. The Petitioner protested this determination in a letter dated April 23, 2013, submitted by fax to the Respondent on April 24, 2013. On June 3, 2013, an *Order to Show Cause* was mailed to the Petitioner, instructing the Petitioner to set forth in writing the reasons why its protest should not be dismissed for lack of jurisdiction. The Petitioner responded on June 15, 2013. An acknowledgement letter was issued on June 17, 2013 stating that a hearing would be scheduled because the Petitioner's response to the *Order to Show Cause* indicated the appeal may have been filed timely.

### Conclusions of Law:

3. Section 443.141(2)(c), Florida Statutes, provides:  
*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.
4. 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 DOR 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.
  - (5) Timely Protest.
    - (a) 1. Determinations issued pursuant to Sections 443.1216, 443.131 and 443.1312, F.S., will become final and binding unless application for review and protest is filed with DOR 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.
5. Rule 73B-10.023(1), Florida Administrative Code, provides:  
Filing date. The postmark date will be the filing date of any report, protest, appeal or other document mailed to the DEO or DOR. The term "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 DEO or DOR. The date of receipt will be the filing date of any report, protest, appeal, or other document faxed to DEO or DOR. It is the responsibility of each employing unit to maintain a current address of record with the Department. It is the responsibility of each claimant to maintain a current address of record with DEO throughout the benefit year or extended benefit period.

6. Section 443.1316 (1), Florida Statutes provides in relevant part:  
Reemployment assistance tax collection services; interagency agreement.—  
(1)The Department of Economic Opportunity shall contract with the Department of Revenue, through an interagency agreement, to perform the duties of the tax collection service provider and provide other reemployment assistance tax collection services under this chapter...
7. Section 443.171 (10) Florida Statutes provides:  
(10) EVIDENCE OF MAILING.—A mailing date on any notice, determination, decision, order, or other document mailed by the department or its tax collection service provider pursuant to this chapter creates a rebuttable presumption that such notice, determination, order, or other document was mailed on the date indicated.
8. The evidence in this case reflects that the determination was mailed to the Petitioner and received at its last-known address. The date on the determination is March 19, 2013. The determination advises that any protest is to be filed within 20 days from the date of the letter. Pursuant to sec.73B-10.035(1), the determination set out the time and manner to file an appeal. The appeal was not filed within 20 days of the date of the letter.
9. Alternatively, the date in the heading of the determination is the mailing date, although it does not expressly use the words, “mailing date.” Section 443.171 (10), Florida Statutes only requires that a mailing date be on the document to give rise to the presumption of mailing; the statutory terms do not require that the mailing date be designated with the express title, “mailing date.”<sup>1</sup>
10. Section 443.171 (10), Fla. Stat. became part of the law as of June 27, 2011, the effective date of that portion of 2011-235, Laws of Florida. Prior to that time, it had been held that the mailing date printed on the determination is not competent evidence that establishes a date of mailing. See, Teater v. Department of Commerce Board of Review, 370 So. 2d 847, 848 (Fla. 3d DCA 1979). However, in Blaisdell v. Fla. Unemployment Appeals Commission, 15 So.3d 806 (Fla. 4<sup>th</sup> DCA 2009), it was found that the employer’s appeal was untimely notwithstanding the referee’s finding that the employer filed its appeal within 20 days of learning of the determination.
11. In Blaisdell, a determination finding the claimant to be qualified for benefits was dated February 22, 2007. The employer’s address on the determination was correct. The employer did receive the determination in the mail, though no specific receipt date was established. The employer received a different document, a notice of charges to the employer’s account (a form called a UCT-1) which was dated April 12, 2007. That notice of charges included information showing that its former employee was receiving benefits. The employer’s CEO contacted the Agency (the Department was called the Agency for Workforce Innovation at that time) as soon as he got the notice of benefits, and an Agency representative told the employer’s CEO he could file an appeal. The appeal was filed May 24, 2007. The 4<sup>th</sup> DCA accepted the date on the determination as the mailing date. The employer admitted that the determination was received in the mail; it just disputed that it was received timely. The 4<sup>th</sup> DCA did not accept the CEO’s statement that he had appealed the determination on May 24, 2007 because it “...had just crossed my desk” as sufficient to rebut the referee’s finding that the determination was mailed on February 22, 2007. Presumably the referee made the inference about the date of mailing based on the date on the determination and the receipt by the employer at the proper address, notwithstanding Teater. Whatever the rationale, the 4<sup>th</sup> DCA did not disturb the referee’s finding. In what can be

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<sup>1</sup> By contrast, where the document contains a date term that is clearly something other than a mailing date no inference would arise. For example, some wage transcripts contain a “date determined,” rather than a date mailed, so the date on the wage transcript would not give rise to any binding inference as to when it was mailed to the claimant.

seen as an alternative holding, the 4<sup>th</sup> DCA noted that the CEO had responded by telephone<sup>2</sup> to a notice of benefits paid. That notice was dated April 12, 2007. The court applied a five day tolling provision to infer that the April 12, 2007 notice had been received as of April 17, 2007, so the court inferred that the CEO had notice of the adverse claim on or about April 17, 2007, at which time he called the Agency. The CEO was on notice at that point that he could or should file an appeal if he disagreed with the claimant receiving benefits, yet the appeal was filed more than a month later. The result of the court's analysis was that the employer's appeal was untimely filed, so the determination favorable to the claimant had become final. The referee didn't have jurisdiction over the merits of the case, so the referee's reversal to disqualify the claimant was overturned.

12. The Petitioner in the current appeal is located in Palm Beach County, which is within the jurisdiction of the 4<sup>th</sup> DCA rather than the 3<sup>rd</sup> DCA. To the extent that there is any conflict between Blaisdell and Teater, the decision in Blaisdell is the controlling precedent in this case due to the Petitioner's geographical location.
13. In the current case, the managing director of the Petitioner admitted that the determination was issued to the proper address. It was received in the mail. Twenty days from March 19, 2013 is April 8, 2013. The Petitioner did not protest this determination until April 23, 2013, at the earliest, when the managing director wrote a letter of protest. The letter was sent by fax on April 24, 2013. The managing director testified that she may have filed the protest both by mail and by fax. Even accepting an appeal date of April 23, 2013 instead of April 24, 2013, the protest was filed after the allowable time limits.
14. The response to the notice to show cause was sufficient to establish that there was reason to hold a hearing, rather than to dismiss the appeal outright, but a finding of sufficient good cause to move forward to a hearing is not the same as finding that an appeal was timely. The provision relating to the showing of good cause does not establish any grounds for extending the time to appeal; it is a way of disposing of cases where a Petitioner has filed a pro forma appeal but does not seriously intend to pursue its protest.
15. The managing director testified that the appeal was delayed because the Joined Party was presenting information suggesting that a lawsuit might be filed in Federal Court, and because there were other distracting circumstances. But the determination did not come from the Joined Party, and protest proceedings relating to the determination would not be in Federal Court. The Petitioner's explanation for a delay in filing the appeal does not establish good grounds for extending the time to file, even assuming that there are good grounds for a late appeal beyond improper mailing of the determination. The evidence presented at the hearing shows that the protest was not filed within the allowable time limit. The determination has thus become final.
16. Both the Petitioner and the Joined Party submitted proposed findings of fact and conclusions of law. Given the recommendation that the determination has become final, the proposed findings and conclusions relating to the merits of case are moot.
17. The proposed findings of the Joined Party relating to the issue of timeliness are consistent with the evidence and the law as set out above, and are thus incorporated into the findings of fact and conclusions of law set out above.
18. The proposed findings of the Petitioner relating to the timeliness or not of the appeal refer on the one hand to the determination letter having been received but not opened until later; and on the

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<sup>2</sup> Appeals have to be in writing, so a telephone call isn't an appeal., see 73B-20.003 (1), Florida Administrative Code; see also, 73B-10.035 (1), FAC.



other hand refer to a response having been filed “immediately upon receiving and learning of the letter” which appears to be inconsistent. The inconsistency disappears if the reference to “learning of the letter” means, ‘learning of the *contents* of the letter after it was opened’. But as set out in the statute and rules, and as in Blaisdell, cited above, it is the receipt of the letter which puts the party on notice of the contents and the time to appeal starts with the mailing date of the determination; otherwise, a person could insulate himself from all deadlines by refusing to open mail that might bring bad news. The proposed finding that the appeal be considered timely because the Department accepted a showing of good cause to move forward is addressed in paragraph 15, above. The proposed findings of the Petitioner that the appeal was filed timely are not consistent with the evidence or the law and are therefore not accepted.

**Recommendation:** It is recommended that the Petitioner’s protest to the March 19, 2013, determination be dismissed due to lack of jurisdiction.

Respectfully submitted on January 7, 2014.




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J. Jackson Houser, 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 anè 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:*  
*January 7, 2014*

Copies mailed to:

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