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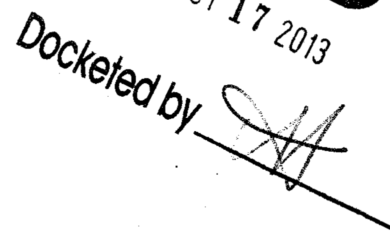
DIVISION OF
ADMINISTRATIVE
HEARINGS

CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA



IN THE MATTER OF

CUSTOM GRANITE KITCHENS & BATHS, LLC /

Case No. 12-292-1A-WC

FINAL ORDER

THIS CAUSE came on for consideration of and final agency action on the Recommended Order (attached as Exhibit A) entered by Administrative Law Judge F. Scott Boyd ("ALJ") after a formal hearing conducted pursuant to section 120.57(1), Florida Statutes. Both parties filed proposed recommended orders. Petitioner Department of Financial Services ("Department") filed exceptions to the recommended order and Respondent Custom Granite Kitchens & Baths, LLC ("CGKB" or "LLC") filed a response to the Department's exceptions. The Recommended Order, the transcript of the hearing, the exhibits admitted into evidence, and the filings by the parties have been considered during the preparation of this Final Order.

Rulings on the Petitioner's Exceptions

The Department's first exception is directed to paragraph 19 of the Recommended Order. The Department argues that there is no competent and substantial evidence to indicate that "the business card was for Mr. Yarbrough's sole proprietorship rather than the LLC."

This exception is rejected. An 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." § 120.57(1)(l), Fla. Stat. Here, the ALJ's finding is supported by competent substantial

evidence. The ALJ found that Galindo gave the business card to the Department's investigator. *See* Recommended Order at 9. The ALJ found that Galindo was an employer of Mr. Yarbrough and not of the LLC. *See* Recommended Order at 13, 15. Based on a finding that an employee of Mr. Yarbrough, and not an employee of the LLC, gave the business card to the Department's investigator, it is permissible for the ALJ to infer that the business card was that of the sole proprietorship and not of the LLC. *See Goin v. Commission on Ethics*, 658 So. 2d 1131, 1139 (Fla. 1st DCA 1995)(explaining that a hearing officer may "consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence").

The Department's second exception is directed toward paragraph 56 of the Recommended Order. The Department argues that "no competent substantial evidence supports the indication in paragraph 56 in the Findings of Fact that the LLC employed neither Mr. Chapman nor Mr. Tucker."

This exception is rejected. The ALJ found that on ASM Enrollment Paperwork forms, the worksite employer of Chapman and Tucker was "Custom Granite Kitchens and Bath." *See* Recommended Order at 9. In contrast, the ALJ found that another employee, Johnson, was employed by the LLC based on an enrollment paperwork form listing the worksite employer as "Custom Granite Kitchens and Baths, LLC." *See* Recommended Order at 8, 25. The ALJ cited a letter to Tucker from the employee leasing company explaining that the contract between the leasing company and "Sherman Yarbrough dba Custom Kitchens has ended," Recommended Order at 18, as evidence that Tucker worked for Yarbrough and not the LLC. The ALJ found that the "single reference to the LLC in the paperwork of Mr. Tucker or Mr. Chapman" was added to

a form by an employee of the leasing company "without specific direction to do so." Recommended Order at 26. The Department cites other evidence from which one could easily draw a different conclusion, but the Department cannot reject factual findings if they are supported by any competent substantial evidence. Based on this evidence, the ALJ could arguably infer that Tucker and Chapman were employees of Mr. Yarbrough and not employees of the LLC.

The Department also directs this exception to the ALJ's finding that the "Department did not prove that Mr. Chapman or Mr. Tucker were employees of the LLC." The Department argues that such a finding in a conclusion of law and not a finding of fact. Based on the facts cited above, the ALJ could reasonably conclude that Chapman and Tucker were employees of Yarbrough and not employees of the LLC. The Department does not cite to policy considerations that require a different result.

In its third exception, the Department argues that because the LLC employed Calvin Johnson, the definition of employer in section 440.02(16)(a), Florida Statutes, makes Yarbrough the same employer as the LLC. Section 440.02(16)(a), Florida Statutes, states:

> "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. "Employer" also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. *If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of ss. 440.105, 440.106, and 440.107.* (emphasis added).

The Department contends that because Yarbrough is a party in actual control of the LLC, the employees of Yarbrough's sole proprietorship are considered employees of the LLC.

This exception is rejected. The emphasized language allows parties in actual control of the corporation to be treated as employers for purposes of section 440.107, Florida Statutes. This would allow the Department to take an action to enforce compliance with section 440.107, Florida Statutes, individually against a party in actual control of the corporation in addition to taking action against the corporation. It does not mean that employees in separate legal entities become employees of the same legal entity because an officer in the corporation also has a sole proprietorship.

In its fourth exception, the Department asks that endnote 2 be removed from the final order. The Department is concerned that endnote 2 could be read to state that section 440.02(16)(a), Florida Statutes, does not apply to limited liability companies. However, in this case, the ALJ assumed that the statute applies to limited liability companies and applied it. The endnote specifically states that a limited liability company is not considered a corporation in "another context" and does not say that the statute at issue here does not apply to limited liability companies. Further, Respondent does not assert as a defense, in either its proposed recommended order or its response to the exceptions filed by the Department, that it is exempt from requirements of chapter 440, Florida Statutes, because it is a limited liability company. Respondent argued that it had no employees and that the employees at issue in this case were employees of Yarbrough. Further, Respondent specifically asked that the ALJ's recommended order be adopted. This exception is rejected.

In its fifth exception, the Department argues the LLC and CGKB were "one in the same entity" and that "no substantial competent evidence indicates separation between them."

Accordingly, the Department argues that the ALJ's finding that the "LLC and CGKB existed at the same time" is incorrect.

This exception is rejected. Competent substantial evidence supports the finding that CGKB and the LLC were two separate legal entities. CGKB was a sole proprietorship. A sole proprietorship is a distinct legal entity. *See* 18 Am. Jur. 2d. Corporations § 6 ("The sole proprietorship form of doing business encompasses the complete identity of the business entity with the proprietor himself or herself; thus a sole proprietorship has not legal existence apart from its owner"). A limited liability company is also a distinct legal entity. It has the "same powers as an individual to do all things necessary to carry out its business and affairs." § 608.404, Fla. Stat. Single-member limited liability companies are allowed in Florida. *See* § 608.405, Fla. Stat. "LLCs are separate and distinct from the natural persons who serve as their managers or who are their members by virtue of economic investment." *Franzone v. State*, 58 So. 2d 329, 333 (Fla. 2d DCA 2011). "In other words, an LLC is a distinct entity that operates independently from its individual members." *Olmstead v. F.T.C.*, 44 So. 3d 76, 85 (Fla. 2010)(Lewis, J., dissenting). As noted above, the ALJ made specific findings that on ASM Enrollment Paperwork forms, the worksite employer of Chapman and Tucker was "Custom Granite Kitchens and Bath." In contrast, the ALJ found that Johnson was employed by the LLC based on an enrollment paperwork form listing the worksite employer as "Custom Granite Kitchens and Baths, LLC." The ALJ cited a letter to Tucker from the employee leasing company explaining that the contract between the leasing company and "Sherman Yarbrough dba Custom Kitchens has ended" as evidence that Tucker worked for Yarbrough and not the LLC. The ALJ found that the "single reference to the LLC in the paperwork of Mr. Tucker or Mr. Chapman"

was added to a form by an employee of the leasing company "without specific direction to do so." This evidence can support the finding that the LLC and the Yarbrough were distinct entities operating at the same time. The Department cites conflicting and credible evidence to the contrary, but an agency is not allowed to reweigh conflicting evidence in a final order. *See* § 120.57(1)(l), Fla. Stat.; *Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277 (Fla. 1st DCA 1985).

The Department further argues that any error in naming the LLC as the respondent in this action instead of naming Yarbrough or CGKB is harmless. This exception is rejected. The ALJ found CGKB and the Respondent are two distinct legal entities. In *Gray v. Executive Drywall, Inc.*, 520 So. 2d 619 (Fla. 2d DCA 1988), the court found no error when the trial court found two entities were distinct notwithstanding common ownership of stock, common representation at the job site, the fact that the two entities were located in the same office building, the fact that the same person signed contracts, the use by both entities of a common attorney, and both entities having the same insurance carrier. Here, there is competent substantial evidence adequate to support the ALJ's finding that the LLC and CGKB were distinct entities.

In Exception 6, the Department argues that the LLC never produced business records so payroll must be imputed for employees Tucker and Chapman. This exception is rejected. The ALJ found that Tucker and Chapman were employees of CGKB and found that CGKB did not meet its responsibility to secure workers' compensation coverage. However, this action is against the LLC and not CGKB, so no penalty can be imposed against Respondent for the failure of CGKB to comply with the law.

The remainder of the Department's argument relating to exception 6 cites facts to show that Tucker and Chapman were employees of the LLC. As previously discussed, the ALJ's findings that Tucker and Chapman are employees of CGKB are supported by competent substantial evidence and is not contested by Respondent. This exception is rejected.

In Exception 7, the Department argues that because Laws was acting as an agent of the LLC, her designation of Chapman and Tucker as employees of the LLC is binding. This exception is rejected. The Department argues that because "Ms. Laws... was compensated by Mr. Yarbrough to effect the transition of his business to a LLC, Ms. Laws is an agent of the LLC." The ALJ found that Yarbrough did not take any action to transfer CKGB employees to the LLC, *see* Recommended Order at 12, and found that Yarbrough did not tell Laws that Tucker was an employee of the LLC. *See* Recommended Order at 14. The ALJ found that Laws did not designate Chapman as an employee of the LLC. *See* Recommended Order at 14. The ALJ's findings of fact do not support the Department's assertion that Mr. Yarbrough hired Laws to "effect the transition of his business to a LLC." The Department will not substitute new findings of fact for those found by the ALJ.

In exceptions 8 11, and 12, the Department argues that the LLC conducted "business operations" when Yarbrough prepared and executed the lease-purchase agreement. In exceptions 8 and 11, the Department argues that entering into the lease-purchase agreement was "business operations" pursuant to statute. In exception 12, the Department disputes the ALJ's findings that provisions of the agreement did not violate the stop-work order. These exceptions are rejected. The preparation and signing of documents necessary to sell a company do not, under the facts of this case, constitute "business operations" pursuant to section 440.107, Florida Statutes.

In its exception 9, the Department argues that endnote 4 should be modified because Florida Administrative Code Rule 69L-6.031 does not relate to determining what constitutes business operations. The Department is correct that the rule does not control. However, as noted by the Department, the ALJ conceded as much by noting the rule was not "directly applicable." It is clear from the text of the recommended order that the ALJ did believe the rule was controlling. The endnote need not be modified.

The Department's exception 10 is directed to paragraph 83 of the Recommended Order. The Department argues that section 440.107(7)(b), Florida Statutes, does not support the ALJ's finding that the LLC was not conducting business operations in violation of the stop-work order. In light of the finding that preparing and executing the lease purchase agreement was not business operations, paragraph 83 is not necessary and is deleted. This conclusion of law is as or more reasonable than the one it replaces.

In exception 13, the Department argues that the ALJ's findings in endnote 6 show that Respondent violated the stop-work order by admitting to painting after the order was issued. The ALJ found that admissions "of conduct different than was alleged by the Petitioner, taking place at different times than alleged by Petitioner, do not constitute clear and convincing evidence of the allegation in this case." The ALJ also found that while Johnson testified that he worked after the stop-work order was issued, "credible" evidence showed that work on the property ended before the stop-work order. Given the ambiguity in the evidence and the general rule that a finding of a statutory violation is a finding of fact, the ALJ's finding should not be disturbed. This exception is rejected.

The Department's exception 14 is rejected. As previously discussed, Yarbrough's actions preparing a lease purchase agreement do not constitute business operations so the LLC did not violate the stop-work order.

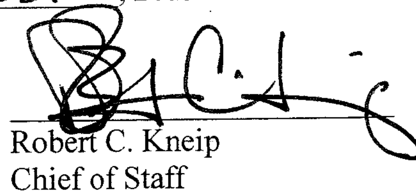
The Department's exception 15 is rejected and the ALJ's recommendation is adopted. However, as the ALJ found there to be two separate legal entities in this case, the Department is not precluded from charging CGKB with violations of chapter 440, Florida Statutes.

NOW, THEREFORE, after review of the transcript of the proceedings, the exhibits introduced into evidence, the Recommended Order, and the written submissions by the parties, and being otherwise fully apprised,

IT IS HEREBY ORDERED that the Findings of Fact of the Hearing Officer are adopted in full as the Department's Findings of Fact, and the Conclusions of Law, as modified by this order, reached by the Hearing Officer are adopted as the Department's Conclusions of Law.

IT IS HEREBY FURTHER ORDERED that the Recommendation made by the Hearing Officer is adopted by the Department and that a total penalty assessment of $1,000 is imposed against Respondent.

DONE and ORDERED this 17th day of October, 2013.



Robert C. Kneip
Chief of Staff

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a petition or notice of appeal with Julie Jones, DFS Agency Clerk, at 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0390, and a copy of the same with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

Copies furnished to:

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