AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2689332
MIAMI DREAM HOMES INVESTMENT GROUP
5801 NW 151ST STREET SUITE 101
MIAMI LAKES FL 33014

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

PROTEST OF LIABILITY
DOCKET NO. 2009-113043L

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals as laborers constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

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 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 any others who worked under the same terms and conditions. Upon completing the investigation, an auditor at the Department of Revenue determined the services performed by the Joined Party and any others who worked under the same terms and conditions were in insured employment. The Petitioner was required to pay unemployment compensation taxes on those workers. 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 September 24, 2009. The Petitioner was represented by its secretary-treasurer. The secretary-treasurer, a partner, and a subcontractor provided testimony on behalf of the Petitioner. The Joined Party appeared and testified. The Respondent did not appear for the hearing. The Special Deputy issued a Recommended Order on February 10, 2010.

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

1. The Petitioner is a Florida subchapter S corporation founded in 2005 for the purpose of land development. The Petitioner has three corporate officers and reports no employees to the Florida Department of Revenue.

2. The Joined Party performed services as a laborer for the Petitioner from March 2007 through July 2008. The Joined Party, while looking for work, contacted the Petitioner. The Petitioner had other laborers performing services for the Petitioner. The number of workers performing services for the Petitioner upon any particular day varied and was dependent upon the work and workers available.

3. The Joined Party was not in business for himself and believed himself to be employed by the Petitioner. There was no specific agreement between the parties that the Joined Party would provide services as a self-employed independent contractor.

4. The Joined Party would maintain and clean up property as well as perform general labor on the Petitioner's property and construction sites. The Joined Party's duties included such tasks as cleaning debris from and mowing the property. The Joined Party was instructed in what work needed to be done by the Petitioner. The Joined Party was expected to report to the worksite at 7 or 8 a.m., Monday through Saturday. The Joined Party was expected to work until 3 p.m. each day.

5. The Petitioner inspected the Joined Party's work to ensure it was done properly. The Petitioner provided various tools and equipment for the Joined Party. The Joined Party was given keys to the houses the Petitioner was working on. The Joined Party was responsible for making certain that the houses were locked up each day and opened each morning. The Petitioner's other laborers were not key holders for the Petitioner and were not responsible for the opening and closing of properties.

6. The Joined Party was paid $7 per hour. The Joined Party was given a raise to $9 per hour in late 2007. The Joined Party was paid weekly. The Petitioner determined the rate of pay. The Joined Party was paid $1,508 in 2007 and $8,464 in 2008 by the Petitioner.

7. The Petitioner instructed the Joined Party that he could not associate with individuals as dictated by the Petitioner. The Petitioner did not want the Joined Party to associate with individuals with poor reputations that might cause the public to lose trust with the Petitioner.

8. Both parties had the right to end the relationship at any time without liability.

Based on these Findings of Fact, the Special Deputy recommended that the determination be modified to apply only to the Joined Party and not the entire class of workers performing services as

laborers. The Special Deputy also recommended that the determination be affirmed as modified. Exceptions to the Recommended Order were not 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.

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.

A review of the record reveals that the Special Deputy concluded in Conclusion of Law #19 that the Recommended Order should only apply to the Joined Party and should not apply to other laborers performing services for the Petitioner. Evidence in the record supports the conclusion that the Joined Party did not work under the same terms and conditions as the class of workers described in the determination dated July 28, 2009. As a result, the determination is modified to apply only to the Joined Party and does not apply to any other laborers performing services for the Petitioner.

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 July 28, 2009, is MODIFIED to apply only to the Joined Party. It is also ORDERED that the determination is AFFIRMED as modified.

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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MIAMI DREAM HOMES INVESTMENT GROUP
FRANCISCO J ABELLA
5801 NW 151ST STREET SUITE 101
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RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

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 July 28, 2009.

After due notice to the parties, a telephone hearing was held on September 24, 2009. The Petitioner's secretary-treasurer, a partner, and a subcontractor appeared and provided testimony on behalf of the Petitioner. The Joined Party appeared and testified on his own behalf. The Respondent did not appear at the hearing.

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 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.

Findings of Fact:

1. The Petitioner is a Florida subchapter S corporation founded in 2005 for the purpose of land development. The Petitioner has three corporate officers and reports no employees to the Florida Department of Revenue.

2. The Joined Party performed services as a laborer for the Petitioner from March 2007 through July 2008. The Joined Party, while looking for work, contacted the Petitioner. The Petitioner had other laborers performing services for the Petitioner. The number of workers performing

services for the Petitioner upon any particular day varied and was dependent upon the work and workers available.

3. The Joined Party was not in business for himself and believed himself to be employed by the Petitioner. There was no specific agreement between the parties that the Joined Party would provide services as a self-employed independent contractor.

4. The Joined Party would maintain and clean up property as well as perform general labor on the Petitioner's property and construction sites. The Joined Party's duties included such tasks as cleaning debris from and mowing the property. The Joined Party was instructed in what work needed to be done by the Petitioner. The Joined Party was expected to report to the worksite at 7 or 8 a.m., Monday through Saturday. The Joined Party was expected to work until 3 p.m. each day.

5. The Petitioner inspected the Joined Party's work to ensure it was done properly. The Petitioner provided various tools and equipment for the Joined Party. The Joined Party was given keys to the houses the Petitioner was working on. The Joined Party was responsible for making certain that the houses were locked up each day and opened each morning. The Petitioner's other laborers were not key holders for the Petitioner and were not responsible for the opening and closing of properties.

6. The Joined Party was paid $7 per hour. The Joined Party was given a raise to $9 per hour in late 2007. The Joined Party was paid weekly. The Petitioner determined the rate of pay. The Joined Party was paid $1,508 in 2007 and $8,464 in 2008 by the Petitioner.

7. The Petitioner instructed the Joined Party that he could not associate with individuals as dictated by the Petitioner. The Petitioner did not want the Joined Party to associate with individuals with poor reputations that might cause the public to lose trust with the Petitioner.

8. Both parties had the right to end the relationship at any time without liability.

Conclusions of Law:

9. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

10. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).

11. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987).

12. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging

whether a relationship is an employment relationship or an independent contractor relationship.

1 Restatement of Law, Agency 2d Section 220 (1958) provides:

(1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

(2) The following matters of fact, among others, are to be considered:

(a) the extent of control which, by the agreement, the business may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant;
(j) whether the principal is or is not in business.

13. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

14. In this case, the Joined Party sought employment from the Petitioner rather than making his services available to the public and allowing the Petitioner to seek out the Joined Party's services. This suggests an employee relationship. The Joined Party did not have his own business. There was no specific agreement that the Joined Party would perform services for the Petitioner as a self-employed independent contractor. The Joined Party believed himself to be an employee of the Petitioner.

15. The Petitioner determined the rate of pay and controlled the financial aspects of the relationship. The Petitioner directed the Joined Party as to where and what work needed to be performed. The Petitioner reviewed the Joined Party's work. The Joined Party's duties did not require any particular skill or training and consisted primarily of mowing and cleaning up debris. The Joined Party was entrusted with keys to the Petitioner's properties and was responsible for opening them in the mornings and securing them at the end of the work day.

16. Either party had the right to terminate the relationship at any time without incurring liability. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete

the project contracted for and to treat any attempt to prevent completion as a breach of contract."

17. The Petitioner controlled who the Joined Party could associate with. The exercise of control over a worker's choice of associates in order to protect the reputation of the Petitioner strongly suggests the control necessary for an employer-employee relationship.

18. The work performed by the Joined Party as a laborer is not an occupation or business that is separate and distinct from the Petitioner's land development property. The Joined Party's services in securing and maintaining the Petitioner's properties were a necessary part of the operation of the Petitioner's land development company. The Joined Party's assigned duties were an integral part of the normal course of business for the Petitioner.

19. A preponderance of the evidence in this case reveals that the Petitioner established sufficient control over the means and manner of performing the work as to create an employer-employee relationship between the Petitioner and the Joined Party. The evidence at hearing indicated that the Joined Party's relationship with the Petitioner was unique and different from the relationship between other laborers and the Petitioner. Therefore, this Order applies only to the Joined Party.

Recommendation: It is recommended that the determination dated July 28, 2009, be AFFIRMED.

Respectfully submitted on February 10, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals