AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2265007
AURORE REZK DMD PA
900 VIRGINIA AVE STE 4
FORT PIERCE FL 34982-5882

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

PROTEST OF LIABILITY
DOCKET NO. 2009-113044L

O R D E R

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 determination dated July 13, 2009, is AFFIRMED.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

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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 July 13, 2009.

After due notice to the parties, a telephone hearing was held on October 27, 2009. A general manager and an accountant appeared and testified on behalf of the Petitioner. The Joined Party appeared and testified on her own behalf. A tax specialist and representative appeared for the Respondent. The tax specialist testified on behalf of the Respondent.

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 as dental assistants 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 subchapter S corporation incorporated March 13, 2000, for the purpose of running a dental office.

2. The Joined Party is a certified dental assistant and possesses an x-ray license.

3. The Joined Party contacted the Petitioner when looking for work as a result of the Petitioner's advertisement for a dental assistant. The Joined Party submitted an employment application and resume to the Petitioner and interviewed for the job. The Joined Party was unable to work full-

time so she was retained by the Petitioner as a part-time dental assistant. The Petitioner informed the Joined Party that she would be responsible for paying her own taxes due to the part-time nature of the work. The Joined Party was not in business for herself and considered herself to be an employee of the Petitioner.

4. The Joined Party performed services as a dental assistant from September 6, 2008, through June 10, 2009. The Joined Party's duties included greeting patients, stocking shelves, ordering materials, cleaning the lab area, assisting the doctor, and bringing patients to the treatment rooms. The Petitioner did not consider the Joined Party to be an employee. The Petitioner has one additional dental assistant performing the same duties as the Joined Party whom the Petitioner considers to be an employee. The employee dental assistant is a full-time worker with a set schedule.

5. The Joined Party was scheduled to work Wednesdays and Thursdays from 2 p.m. until approximately 5:30 p.m. The Joined Party was required to arrive at work at 1:45 p.m. in order to prepare for the afternoon and understood that she was required to remain at work until the last patient had left. The Petitioner would contact the Joined Party if there was no work and she should not come to work that day.

6. The Joined Party was expected to clock in each day upon arrival. The Joined Party would then check the schedule and assist with patients. If there was a break in the schedule, the Joined Party would look for other tasks in order to keep busy in accordance with the Petitioner's office rules. The Joined Party's work assisting the doctors was performed under the direction of the doctor.

7. The Petitioner required the Joined Party to follow office rules. These rules included a requirement to call in if she was unable to report to work and a requirement that workers, including the Joined Party, keep busy during the shift.

8. The Joined Party was not allowed to provide services outside of the Petitioner's normal hours of business.

9. The Joined Party was paid an hourly rate determined by the Petitioner. The pay took the form of bi-weekly checks. The Joined Party was paid $1,112.64 in 2008. The Petitioner provided the equipment and supplies needed to perform the work. The Joined Party provided her own lab coat. The Joined Party was covered under the Petitioner's workers' compensation insurance.

10. The Joined Party was allowed to provide services for a competitor. The Joined Party was not allowed to subcontract her services for the Petitioner.

11. Either party could end the relationship without liability.

Conclusions of Law:

12. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals performing services as dental assistants 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.

13. 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).

14. 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).

15. 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.

16. 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.

17. The evidence presented in this case reveals that the Petitioner determined when and where work was to be performed by the Joined Party. The Petitioner provided all of the tools and equipment necessary to perform services with the exception of a lab coat. The Petitioner required the Joined Party to work set hours and to stay busy during her shift by finding tasks to do in the office.

18. The evidence reflects that the Petitioner controlled the financial details of the relationship. The Petitioner determined the method and rate of pay, and the Joined Party was paid by time worked

rather than by the job. The Joined Party was covered under the Petitioner's workers' compensation policy.

19. The relationship was an at-will relationship. Either party could 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."

20. The work performed by the Joined Party as a dental assistant is not an occupation or business that is separate and distinct from the Petitioner's dental office. The Joined Party provided services that enabled the smooth operation of the dental office that is the core of the Petitioner's business. The Joined Party's services were an integral part of the business.

21. A preponderance of the evidence in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated July 13, 2009, be AFFIRMED.

Respectfully submitted on March 8, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals