AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2908095
PRI MAR FINANCIAL INC
2700 N MACDILL AVENUE SUITE 215
TAMPA FL 33607

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

PROTEST OF LIABILITY
DOCKET NO. 2009-117466L

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 Petitioner is found to have had good cause for failing to attend the December 3, 2009, hearing. It is ORDERED that the Petitioner's protest is accepted as timely filed. It is also ORDERED that the determination dated July 7, 2009, is MODIFIED to reflect a retroactive date of July 1, 2006. It is ORDERED that the determination holding that the services performed by the Joined Party, by other similarly situated workers, and by corporate officers constitute insured employment is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **April, 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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RESPONDENT:
State of Florida
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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 7, 2009.

After due notice to the parties, a telephone hearing was held on January 13, 2010. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified.

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 constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Whether the Petitioners corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

Findings of Fact:

1. The Petitioner is a subchapter S corporation which was formed in July 2006 to operate a business which provides financial statements and credit reports to its customers. Both the Petitioner's president and vice president have been active in the business on a full time basis since inception of the business. Both officers receive income from the business. The Petitioner has not reported the income for the officers as wages because the Petitioner considers both officers to be independent contractors. In the beginning of the business the Petitioner had as many as six individuals performing sales. The Petitioner also engaged individuals to meet with the Petitioner's customers in the Petitioner's office to prepare the financial statements, and individuals to work at the front desk in the Petitioner's office. All of the workers were classified by the Petitioner as independent contractors.
2. On April 28, 2008, the Petitioner hired the Joined Party to perform sales for the Petitioner. The Petitioner provided the Joined Party with an *Agreement* which states that the Joined Party agrees to get paid every week by commission and that the Petitioner will not withhold any state, provincial, or federal income tax from the payments. The *Agreement* identifies the Joined Party as an independent contractor.
3. The Petitioner provided training to the Joined Party including how the Joined Party was to introduce herself to customers and how to do the work. The Joined Party was considered to be on probation during the first two weeks of work.
4. The Petitioner provided the Joined Party with office space in the Petitioner's office. The Petitioner provided the Joined Party with a desk, a chair, a telephone, a computer, and supplies. Other office equipment was also available for the Joined Party's use. The Joined Party was not required to pay the Petitioner for use of the Petitioner's office, equipment, or supplies.
5. The Petitioner's regular business hours are from 9 AM until 5 PM, Eastern time. Although the Petitioner provided the Joined Party with a key to the office, the Joined Party was not allowed to perform work in the Petitioner's office unless the president or vice president was present.
6. During the first several weeks of work the Petitioner checked the Joined Party's work very closely. The Joined Party notified the Petitioner if the Joined Party located a potential customer. The president then interviewed the potential customers. The president found that the Joined Party learned how to do the work fairly quickly. The Joined Party proved to be a very good and responsible worker.
7. After the Joined Party worked for the Petitioner for approximately two months, the Petitioner decided to increase the Joined Party's responsibilities. The Petitioner taught the Joined Party how to gather income and expense documents from customers. Generally, the Joined Party was responsible for determining the amount of the customer's income per year and the amount of the customer's expenses per year. The Joined Party was then required to divide the amounts by twelve to determine the amount that the customer could afford for items such as a car payment. The Petitioner placed the Joined Party on probation again for a period of two or more weeks. During the second probation period the Petitioner checked the Joined Party's work very closely. The work was easy to perform and did not require any special knowledge or skill. The work did not require the Joined Party to have any license or certification.
8. The Petitioner paid the Joined Party an amount based on the number of customers which the Joined Party served. The Petitioner paid all of its workers, including the Joined Party on Friday of each week. The Petitioner did not withhold any taxes from the pay and did not provide any fringe

benefits such as health insurance to the workers. The Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

9. Either party had the right to terminate the relationship at any time without incurring liability. In December 2008 the Joined Party did not report for work for approximately two weeks. The Petitioner's president went to the Joined Party's home in an attempt to determine why the Joined Party was not working. The Joined Party stated that she was having personal family problems. The president persuaded the Joined Party to return to work.
10. After the Joined Party returned to work the president found that the Joined Party's work was not satisfactory. The president reviewed all of the work performed by the Joined Party and made corrections when necessary. The president brought the errors to the Joined Party's attention; however, the Joined Party continued to make errors. The Petitioner discharged the Joined Party on or about May 18, 2009.
11. The Joined Party filed a claim for unemployment compensation benefits effective May 31, 2009. When the Joined Party did not receive wage credits from her work with the Petitioner she filed a *Request for Reconsideration of Monetary Determination* and an investigation was assigned to the Department of Revenue to determine if the Joined Party was entitled to wage credits.
12. On July 7, 2009, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee. The determination also stated that the Petitioner was liable for payment of unemployment compensation taxes on the Joined Party's wages, and on the wages of any other employees including corporate officers.
13. The Petitioner filed an appeal by letter dated July 22, 2009. The letter of appeal was received by the Department of Revenue. The Department did not date stamp the letter when it was received and did not retain the envelope bearing the postmark date. The Petitioner mailed the appeal letter to the Department of Revenue on July 22, 2009.
14. Pursuant to the appeal filed by the Petitioner a telephone hearing was scheduled to be held on December 3, 2009 at 8:30 AM Eastern time. The *Notice of Telephone Hearing Before Special Deputy* states "Contact the deputy clerk at once to provide the name and telephone number of the person to be contacted for the conference call hearing."
15. The Petitioner did not provide the deputy clerk with contact information for the hearing. The special deputy obtained a telephone number from the file documents and placed a courtesy call to the Petitioner in an attempt to determine if the Petitioner intended to participate in the hearing. The Petitioner did not answer and the special deputy left voice mail messages.
16. On December 3, 2009, a *Recommended Order of Dismissal* was mailed to the Petitioner. On December 7, 2009, the Office of Appeals received a request from the Petitioner to reopen the hearing.
17. The Petitioner did not attend the December 3, 2009, hearing because, although the *Notice of Telephone Hearing Before Special Deputy* states that the hearing will be held at 8:30 AM Eastern time, the Petitioner assumed that the hearing would be held at either 8:30 AM Pacific time or 8:30 AM Central time.

Conclusions of Law:

18. Rule 60BB-2.035, Florida Administrative Code, provides:

    (18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.

19. Rule 60BB-2.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.

20. The Petitioner promptly requested reopening of the appeal after the Petitioner failed to participate in the scheduled hearing. Since the Petitioner's reason for failing to participate in the hearing was due to human error, good cause is established.

21. 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.

22. Rule 60BB-2.035(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.

23. Rule 60BB-2.023(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.

24. Although no evidence is available concerning the postmark date, the Petitioner's testimony establishes that the appeal was filed by mail on July 22, 2009. Thus, the appeal was filed within the twenty day appeal period.

25. 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.

26. 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).

27. 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); Mangarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So2d 1061 (Fla. 2d DCA 1987).

28. 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.

29. 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.

30. 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.

31. 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.

32. The Joined Party performed services for the Petitioner under an *Agreement* which primarily specified that the Petitioner would not withhold taxes from the pay. The *Agreement* does not set forth the services to be provided nor does it set forth the method of compensation. It does not specify a term or conditions under which the *Agreement* may be canceled. Standing alone the lack

of payroll tax withholding does not establish an independent contractor relationship. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

33. The work performed by the Joined Party was not separate and distinct from the Petitioner's business. The Joined Party's duties consisted of locating prospective customers and, once the Petitioner accepted the customers, providing the services offered by the Petitioner to the Petitioner's customers. The work performed by the Joined Party was an integral and necessary part of the Petitioner's business. It was not shown that the Joined Party performed similar services for others.

34. The Petitioner trained the Joined Party how to do the work, even to the point of training the Joined Party how to introduce herself to prospective customers. The nature of the training provided by the Petitioner reveals that the Petitioner had the right to control how the work was performed. The Petitioner closely supervised the Joined Party when the Joined Party was initially hired to do sales, when the Petitioner expanded the Joined Party's job responsibilities, and when the Petitioner became dissatisfied with the Joined Party's work performance.

35. The Joined Party performed services at the Petitioner's business location during the Petitioner's regular business hours. The Petitioner provided everything that was needed to perform the work. It was not shown that the Joined Party had significant business expenses or that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

36. According to the Petitioner the work performed by the Joined Party was simple work. It was not shown that the work required any special knowledge or skill. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

37. The Joined Party performed services for the Petitioner for a period in excess of one year. Either party could terminate the relationship at any time without incurring liability. The Petitioner chose to exercise that right and terminated the Joined Party due to dissatisfaction with the Joined Party's performance. These facts reveal the existence of an at-will relationship of relative permanence. 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."

38. The Petitioner's testimony reveals that the Joined Party was paid a "commission" based on the number of the Petitioner's customers that the Joined Party served. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include commissions.

39. The facts of this case reveal that the Petitioner controlled what work was to be performed, where it was performed, when it was performed, and how it was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right

of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

40. It is concluded that the services performed by the Joined Party and by other similarly situated workers constitute insured employment. Although the Joined Party performed services beginning on April 28, 2008, other similarly situated workers performed services from the inception of the business.

41. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:

    The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:

    1. An officer of a corporation.
    2. An individual who, under the usual common law rules applicable in determining the employer-employee relationship is an employee.

42. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

43. The Petitioner is a corporation. The Petitioner's president and vice president have been active in the operation of the business since the corporation was formed in July 2006. Therefore, the Petitioner's president and vice president are statutory employees of the Petitioner, retroactive to July 2006.

44. Section 443.1215, Florida States, provides:

    (1) Each of the following employing units is an employer subject to this chapter:

    (a) An employing unit that:

    1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or

    2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

45. The Petitioner's president and vice president have performed services for the Petitoner since inception of the business. Those services are sufficient to establish liability based on the fact that the Petitioner employed at least one individual in employment during twenty calendar weeks during the 2006 calendar year. The Petitioner has establsihed liability for unemployment compensation tax effective July 1, 2006.

Recommendation: It is recommended that it be found that the Petitioner had good cause for failing to attend the December 3, 2009, hearing. It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated July 7, 2009, be MODIFIED to reflect a retroactive date of July 1, 2006. As modified it is recommended that the determination holding that the services performed by the Joined Party, by other similarly situated workers, and by corporate officers constitute insured employment be AFFIRMED.

Respectfully submitted on January 19, 2010.

R. O. SMITH, Special Deputy
Office of Appeals