**AGENCY FOR WORKFORCE INNOVATION**
**TALLAHASSEE, FLORIDA**

**PETITIONER:**
Employer Account No. - 2145095
MATTHEWS AND GARDENER INC
1250 TAMIAMI TRAIL N STE 111
NAPLES FL 34102-5267

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

**PROTEST OF LIABILITY**
**DOCKET NO. 2009-120674L**

**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 June 9, 2009, is REVERSED.

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

TOM CLENDENNING
Assistant Director
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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MATTHEWS AND GARDNER INC
FRED GARDNER
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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 June 9, 2009.

After due notice to the parties, a telephone hearing was held on December 22, 2009. An owner and an accountant appeared and provided testimony for the Petitioner. A tax specialist appeared on behalf of the Respondent. The Joined Party did not appear.

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 received from the Petitioner January 6, 2010. The Referee considered the Proposed Findings of Fact and, where they are supported by the record, incorporated them into the Recommended Order.

**Issue:**

Whether services performed for the Petitioner by the Joined Party and other individuals as catering helpers 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.

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.

**Jurisdictional Issue:** Whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 60BB-2.035, Florida Administrative Code. The record shows that the Notice of Determination issued by the Respondent, Florida Department of Revenue was dated June 9, 2009. The record reflects that the Petitioner mailed a letter of protest on June 22, 2009. No

evidence was presented to indicate a lack of timeliness on the part of the Petitioner. Therefore, the Petitioner's protest is timely.

**Findings of Fact:**

1. The Petitioner is a subchapter S corporation incorporated in 1998 for the purpose of food preparation. The Petitioner prepared food for pick-up and delivery, as well as providing some catering services.

2. The Joined Party contacted the Petitioner for work after being referred to the Petitioner by one of the Petitioner's workers. The Joined Party was placed on a call list for bartenders and servers for catered events. The Joined Party performed services for the Petitioner from 2007 through December 18, 2009.

3. The Petitioner presented the Joined Party with a standardized *Independent Contractor Agreement* at the time of hire. The written agreement stipulated that the Joined Party was responsible for providing her own supplies, paying her own taxes, and not disclosing information about the Petitioner or clients. The written agreement indicated that the Joined Party was not an employee of the Petitioner.

4. The Petitioner would contact the Joined Party when a job became available. The Petitioner would inform the Joined Party of the date, expected hours, and pay for a given assignment. The Joined Party was paid by the job. The Joined Party would accept or reject the offer of work at her discretion. Other than refusing to take the job, there was no negotiation as to the rate of pay for the work. The Joined Party would then be informed of the address and name of the client for the job in question.

5. The Petitioner would send food to the worksite. The Joined Party was expected to report to the worksite at the specified time, wearing the uniform required by the Petitioner. The required uniform consisted of a white tuxedo shirt, black pants, and black shoes. The Joined Party was responsible for providing her own uniform. The required uniform was considered the industry standard. The client supervised the set up and catering at the worksite, the Petitioner did not have any work site managers or supervisors.

6. The Joined Party was paid $14,842.64 in 2008 by the Petitioner.

7. The Joined Party was allowed to subcontract a replacement.

8. Either party was able to end the relationship 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 cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

14. The evidence revealed in this case reveals that the Petitioner did not control the manner of work performed by the Joined Party. The Petitioner indicated to the Joined Party when and where work was available, but did not insist that the Joined Party attend any particular event. Once the Joined Party arrived at a worksite, the Joined Party was expected to conduct herself as a knowledgeable professional and was not supervised by the Petitioner.

15. The Petitioner and the Joined Party had a written agreement. The agreement stipulated that the Joined Party's services were those of an independent contractor. While an agreement is not dispositive of the issue at hand, it does reflect the intentions of the parties at the start of the working relationship.

16. The Joined Party was required to follow a dress code. The dress code was a reflection of the local industry standards for persons working at a catering event.

**17.** A preponderance of the evidence revealed in this case shows that the Petitioner did not exercise sufficient control over the Joined Party to establish an employer-employee relationship between the Joined Party and the Petitioner.

**Recommendation:** It is recommended that the determination dated June 9, 2009, be REVERSED.

Respectfully submitted on June 4, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals