AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2651598
TINKER GRAPHICS & PROMOTIONS
112-A NEW YORK AVE
DELAND FL 32724

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

PROTEST OF LIABILITY
DOCKET NO. 2009-125310L

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 August 17, 2009, is REVERSED.

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

PETITIONER:
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TINKER GRAPHICS & PROMOTIONS
SHIRLEY A LAMONTHE
112-A NEW YORK AVE
DELAND FL 32724

PROTEST OF LIABILITY
DOCKET NO. 2009-125310L

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 August 17, 2009.

After due notice to the parties, a telephone hearing was held on November 3, 2009. Two Partners appeared and testified on behalf of the Petitioner. The Joined Party appeared and testified on his own behalf. A Tax Specialist II appeared and 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 website designers 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 partnership established in 1998 for the purpose of website development. The Petitioner reports no employees to the Florida Department of Revenue.

2. The Joined Party provided services for the Petitioner from January 2008 through June 2008. The Joined Party performed routine website maintenance and updated and edited websites for the Petitioner.

3. The Petitioner met the Joined Party through a college internship program in the Petitioner's area. The Petitioner placed an advertisement for freelance workers. The Joined Party answered the Petitioner's advertisement. The Joined Party had previously completed an internship with the Petitioner.

4. The Petitioner hired freelance workers or companies when the amount of work available warranted it. The Petitioner and the Joined Party both considered the Joined Party to be a freelance worker. There was no written agreement between the Petitioner and the Joined Party.

5. The Joined Party was allowed to perform services for a competitor. The Joined Party was allowed to subcontract the work.

6. The Joined Party was not covered under the Petitioner's workers' compensation insurance. The Joined Party did not receive any insurance or retirement benefits from the Petitioner.

7. The Joined Party kept track of the hours he worked and turned those hours in to the Petitioner. The Petitioner paid the Joined Party $8 per hour with a weekly check. The Joined Party's pay was not contingent upon payment from the client company. The Joined Party was paid $4,354 by the Petitioner in 2008. The Petitioner did not withhold any taxes from the Joined Party's pay.

8. The Petitioner allowed the Joined Party to use office space and a computer. The Joined Party provided services at the Petitioner's workplace and could set his own hours within the Petitioner's business hours. While the Joined Party was free to work at home, the Joined Party used the Petitioner's office space due to problems with the Joined Party's equipment.

9. The client would provide a list of instructions to the Petitioner. The Petitioner would add suggestions and input to the instructions and pass the instructions to the Joined Party. The Joined Party and the Petitioner would have collaborative discussions about ongoing projects. After the Joined Party had completed the assignment, the Petitioner would test the website, review the work with the client company, and then let the Joined Party know what corrections or changes needed to be made. Errors made by the Joined Party were corrected without additional compensation.

10. As jobs came in to the Petitioner, the Petitioner would assign the work to the Joined Party. The Petitioner would give the client company's instructions to the Joined Party. The Joined Party would perform the work, and then the client company would review the Joined Party's work with the Petitioner. If there were any questions or problems, the Petitioner would instruct the Joined Party on any further work. For large tasks other than routine maintenance, the Petitioner would review the work before submitting it to the client company.

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

Conclusions of Law:

1. 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.

2. 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).

3. 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).

4. 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.

5. 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.

6. 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.

7. The evidence presented in this case reveals that both parties understood the relationship between the parties to be a freelance relationship. Neither party considered the relationship to be an employer-employee relationship. There was clearly a meeting of the minds between the parties as to the nature of the relationship.

8. The Petitioner did not control the time, place or manner of the work performed by the Joined Party. While the Joined Party did use the Petitioner’s office space and equipment during the Petitioner’s business hours, it was because of the Joined Party’s equipment problems. The Petitioner reviewed the final results of the Joined Party’s work and informed the Joined Party of

any needed corrections. While there were ongoing discussions between the Joined Party and the Petitioner about the tasks being performed by the Joined Party, these discussions were collaborative in nature rather than supervisory.

9. A preponderance of the evidence in this case reveals that the Petitioner did not establish 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.

Recommendation: It is recommended that the determination dated August 17, 2009, be REVERSED.

Respectfully submitted on April 9, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals