AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2792072
MARK L TEVEBAUGH PA
2020 HIGHWAY A1A STE 108
INDIAN HARBOR BEACH FL 32937-3581

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

PROTEST OF LIABILITY
DOCKET NO. 2009-127980L

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 21, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **June, 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 August 21, 2009.

After due notice to the parties, a telephone hearing was held on March 8, 2010. The Petitioner, represented by an Enrolled Agent, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified. Two witnesses testified in the Joined Party's behalf.

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

Findings of Fact:

1. The Petitioner is a financial and estate planning firm specializing in providing services to Christian individuals. The Petitioner registered with the Florida Department of Revenue for payment of unemployment compensation taxes effective the second quarter 2007.
2. The Petitioner's president and the Joined Party attended the same church. The Joined Party was previously employed by an insurance company and was responsible for organizing the office of the insurance company. The Joined Party was licensed to sell property and casualty insurance and life and health insurance. The Petitioner was not licensed to sell insurance. On February 11, 2008, the Petitioner hired the Joined Party to be an administrative assistant to the

Petitioner's president. Although the Petitioner was not licensed to sell insurance, the Petitioner gave the Joined Party the title of "Insurance Director."

3. The parties did not enter into any written agreement or contract. The verbal agreement was that the Petitioner would pay the Joined Party a salary of $21,000 per year, that the Joined Party would work at the Petitioner's office Monday through Friday from 9 AM until 5 PM, and that the Joined Party's responsibilities would be to get the Petitioner's office and filing in order and to follow up on any administrative tasks. It was the Joined Party's understanding that he was hired to be the Petitioner's employee.

4. The Joined Party did not have any experience in financial and estate planning. The Petitioner trained the Joined Party concerning financial and estate planning. The Petitioner sent the Joined Party to Indiana for a week to learn about new products. The Petitioner paid for all of the expenses of the trip. The Petitioner also paid for study materials so that the Joined Party could learn investments and become licensed to sell financial products. The Petitioner provided all equipment and supplies and anything else that was needed to perform the work. The Petitioner provided the Joined Party with business cards.

5. The Joined Party worked in the Petitioner's office under the direction of the president. The president provided the Joined Party with a list of things to do and told the Joined Party what to do each day.

6. The Petitioner told the Joined Party not to hang around with another member of the church who was a competitor of the Petitioner. The Joined Party did not perform services for anyone other than the Petitioner and did not believe that he had the right to do so. The Joined Party did not believe that he had the right to hire others to perform the work for him.

7. The Petitioner paid the Joined Party $403.85 per week, amounting to an annual salary of $21,000. No taxes were withheld from the pay. The Petitioner did not tell the Joined Party that taxes were not been withheld from the pay until the end of 2008. The Joined Party expressed concern. In response the Petitioner's president told the Joined Party that the Petitioner had done the same thing to a former employee, and when the employee became upset at the end of the year because taxes had not been withheld, the Petitioner discharged the employee. The Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation. The Joined Party decided to accept the responsibility of paying his own taxes to stay right with the Internal Revenue Service.

8. The Joined Party was paid for all time that he was absent from work. The Petitioner provided the Joined Party with paid sick time, holiday pay, and paid vacation time.

9. After the Joined Party worked for the Petitioner for a period of time, the president told the Joined Party to sell insurance products to the Petitioner's clients, even though the Petitioner was not licensed to sell insurance products. The Joined Party received commissions from the insurance companies and the Petitioner retained a portion of the commissions. Subsequently, the Petitioner told the Joined Party to discontinue selling insurance products.

10. On March 2, 2009, the Petitioner increased the Joined Party's salary to $26,000 per year, payable at the rate of $500 per week.

11. Either party had the right to terminate the relationship at any time. In July 2009 the Joined Party read reports that the church which the Joined Party and the president attended may have been involved in inappropriate activities. The Joined Party discussed his concerns with the Petitioner's president and informed the president that he felt that he could no longer attend the church. Although there was no agreement of hire requiring the Joined Party to attend the church, on the following day, July 9, 2009, the Petitioner discharged the Joined Party.

Conclusions of Law:

12. 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.

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.

16. 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.

17. 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.

18. 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.

19. The Petitioner hired the Joined Party to be an administrative assistant to the Petitioner's president and to organize the Petitioner's office. There was no agreement that the Joined Party would perform services as an independent contractor. The Petitioner provided everything that was needed to perform the work. The Joined Party performed services exclusively for the Petitioner. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business.

20. The Petitioner told the Joined Party what to do each day and even controlled the Joined Party's outside activities. The Petitioner warned the Joined Party not to associate with a competitor.

21. The Petitioner determined the days and hours of work and the method and rate of pay. The Petitioner provided fringe benefits including paid sick time, paid holidays, and paid vacations. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004). The fact that the Petitioner chose not to withhold payroll taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.

22. The Joined Party worked for the Petitioner for a period of approximately one and one-half years. Either party had the right to terminate the relationship at any time. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the Joined Party after the Joined Party told the president that he could no longer attend a particular church. 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."

23. The Petitioner controlled what work was performed, when it was performed, where 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. Thus, it is concluded that the services performed by the Joined Party for the Petitioner constitute insured employment.

Recommendation: It is recommended that the determination dated August 21, 2009, be AFFIRMED.

Respectfully submitted on March 15, 2010.

R. O. SMITH, Special Deputy
Office of Appeals