AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2718591

GREEN PROVENCE CORPORATION
ATTN MICHAEL SHEEHAN
3343 N UNIVERSITY DR
HOLLYWOOD FL 33024-2297

PROTEST OF LIABILITY
DOCKET NO. 2009-131182L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals as telemarketers constitute insured employment pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of liability.

The Joined Party filed an unemployment compensation claim in January 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any others who worked under the same terms and conditions. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party and the other telemarketers were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to the Joined Party and any other workers who performed services under the same terms and conditions. The Petitioner filed a protest of the determination. The claimant

who requested the investigation was joined as a party because he had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on August 9, 2010. The Petitioner was represented by its attorney. A chemical broker and the Petitioner's Vice President of Operations testified as witnesses in behalf of the Petitioner. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified. The Special Deputy issued a Recommended Order on September 1, 2010.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner, Green Provence Corporation, is a corporation which operates a telemarketing business to sell industrial chemicals and supplies.

2. The Petitioner's Vice President of Operations deals with manufacturers, oversees the processing of orders, and is involved in the purchase, leasing, and maintenance of real estate property. The Vice President of Operations is not directly involved with the telemarketing operations and has only limited communications with the telemarketers.

3. The Joined Party was in prison for ten years until March 2006. Following his release he obtained employment as a telemarketer doing appointment setting. In May 2006 the Joined Party read a newspaper help wanted advertisement placed by the Petitioner for the position of telemarketer. He responded to the advertisement and was interviewed by the Petitioner's Training Manager. The Training Manager gave the Joined Party a script and asked the Joined Party to read the script as if he were making a sales presentation. After the Joined Party read the script the Training Manager told the Joined Party what the hours of work would be and the potential earnings. The Training Manager told the Joined Party that the base pay was $475 per week and that the Joined Party would receive additional commissions if the earned commissions exceeded $475. The Joined Party accepted the offer of work and the Joined Party was scheduled to attend training.

4. The Training Manager gave the Joined Party paperwork to sign including a paper printed on the letterhead of Goldstar Products Inc. entitled *Tax Form*. The *Tax Form* states that the company does not withhold taxes from the pay and that the salesperson is responsible for the payment of taxes. The Tax Form states that the salesperson is not entitled to employee fringe benefits and that by signing the agreement the salesperson realizes that the salesperson is an independent contractor responsible for paying his own taxes.

5. The Joined Party was informed that he would be on probation during an initial period of either 90 days or 180 days. During the training period the Training Manager provided the Joined Party with a script and informed the Joined Party that he was required to read or recite the script verbatim and that he was not allowed to deviate from the script at any time.

6. The Petitioner provided the Joined Party with an assigned work space containing a desk and a telephone. The Petitioner provided all equipment and supplies that were needed to perform the

work. The Joined Party did not have to provide anything to perform the work and he did not have any expenses in connection with the work.

7. The Petitioner determined the sales prices. The Joined Party could not deviate from the Petitioner's price list.

8. Initially, the Joined Party's assigned work schedule was from 8 AM until 4:30 PM from Monday through Thursday and from 8 AM until 12:30 PM on Friday. The Joined Party was allowed to take two fifteen minute breaks during the day and a forty-five minute lunch break. All of the telemarketers were required to take the lunch break at the same time, from 12 PM until 12:45 PM. Only two telemarketers were allowed to take a fifteen minute break at the same time. The Joined Party's assigned break times were from 10 AM until 10:15 AM and from 2 PM until 2:15 PM. At some point in time after the Joined Party began work the Petitioner changed the work schedule to 7:30 AM until 4 PM.

9. Initially, the Joined Party's base pay was $475 per week which was based on $13 per hour. The Joined Party was required to work thirty-six and one-half hours during each weekly pay period. If the Joined Party was absent from work during the pay period the rate of pay was reduced to reflect the hours which the Joined Party worked. The regularly scheduled payday was on Friday of each week. No taxes were withheld from the pay.

10. After the Joined Party completed the probationary period the Petitioner paid the Joined Party for holidays as long as the Joined Party was not absent during the holiday week. If the Joined Party was absent for a portion of a day during the holiday week the Petitioner deducted the number of hours that the Joined Party was absent from the amount of the holiday pay.

11. The Petitioner did not provide any fringe benefits other than the holiday pay. The Joined Party did not receive health insurance, life insurance, paid vacations, or retirement benefits.

12. At the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

13. The Joined Party's immediate supervisor was the Sales Manager. The Joined Party was required to bring life to the sales pitch without deviating from the required script. In an attempt to bring life to the script the Joined Party occasionally deviated from the script. The Sales Manager monitored the Joined Party's work performance and warned the Joined Party many times that he was not to deviate from the script. The Sales Manager told the Joined Party that if he continued to deviate from the script the Joined Party would be terminated.

14. The Petitioner provided the Joined Party with sales leads to contact. All of the calls placed by the Joined Party were the result of the provided leads.

15. In order to motivate the telemarketers the Sales Manager used several different games. The games involved providing cash bonuses or spiffs for making certain sales during specified times. The telemarketers could also earn bonuses for achieving certain sales levels. The Petitioner also increased or decreased a telemarketer's base pay in an attempt to motivate the telemarketer. The Joined Party's base pay was increased to $500 per week after the Joined Party sold his first drum of chemicals. During one period of time the Petitioner reduced the Joined Party’s base pay to $300 for a period of two weeks.

16. Either the Petitioner or the telemarketers could terminate the relationship at any time without incurring liability for breach of contract. The Joined Party observed that there was a frequent turnover of telemarketers. The Sales Manager would discharge telemarketers only to rehire the telemarketers two weeks later. The Sales Manager discharged the Joined Party during the fourth calendar quarter 2007. The Joined Party found work as a day laborer for one day and then contacted the Sales Manager and asked for his job back. The Joined Party was rehired by the Petitioner after approximately two weeks. In October 2008 the Joined Party was arrested and was in jail for a period of thirty days. Upon his release in early November the Joined Party returned to work. On December 30, 2008, the Petitioner informed the Joined Party that the Petitioner had eliminated the Joined Party's base pay. The Joined Party interpreted that action to mean that he was no longer working for the Petitioner.

17. During the time that the Joined Party worked for the Petitioner he did not have an occupational license, did not have liability insurance, did not advertise, and did not offer services to the general public. The Joined Party did not perform services for any other company other than the one day as a day laborer during the fourth quarter 2007. During the time that the Joined Party worked for the Petitioner the Joined Party believed that he was the Petitioner's employee.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated March 19, 2009, be affirmed. The Petitioner's exceptions to the Recommended Order were received by fax dated September 16, 2010. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

Exceptions #1-6, 8-11, 13-17, 26-28, and 30-36 and a portion of exception #29 propose alternative findings of fact or conclusions of law. Specifically, the Petitioner takes exception to Findings of Fact #1-6, 8-13, and 15-17 and Conclusions of Law #26-36. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. Further review of the record also reveals that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Agency may not modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Exceptions #1-6, 8-11, 13-17, 26-28, and 30-36 and a portion of exception #29 are respectfully rejected because they propose alternative findings of fact or conclusions of law.

In Exception #29, the Petitioner also cites *Keith v. News & Sun Sentinel Co.*, 667 So.2d 167 (Fla. 1995), in support of its contention that the signed *Tax Form* is evidence of the parties' intent to form an independent contractor relationship and that the document, along with other factors, establishes that the Joined Party was an independent contractor. In *Keith*, the Florida Supreme Court provided guidance on how to approach an analysis of employment status. *Id*. at 171. The court held that the lack of an express agreement or clear evidence of the intent of the parties requires "a fact-specific analysis under the Restatement based on the actual practice of the parties." *Id*. However, when an agreement does exist between the parties, the court held that the courts should first look to the agreement and honor it "unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status." *Id*. As a result, the analysis in this case would not stop at an examination of the written agreement between the parties.

A complete analysis would examine whether the agreement and the other provisions of the agreement were consistent with the actual practice of the parties. If a conflict is present, *Keith* provides further guidance. *Id*. In *Keith*, the court concluded that the actual practice and relationship of the parties should control when the "other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties." *Id*. For example, in *Justice v. Belford Trucking Co*., 272 So.2d 131, 136 (Fla. 1972), the Florida Supreme Court held that the Judge of Industrial Claims erred when relying solely on the language of a contract instead of considering all aspects of the parties' working relationship. In doing so, the court found that the judge "did not recognize the employment relationship that actually existed." *Id*. at 136. Therefore, the mere existence of an independent contractor agreement and the specific terms of such an agreement would not be conclusive regarding the issue of the Joined Party's status. Although the Special Deputy concluded that the parties had a written agreement regarding the Joined Party's independent contractor status, the working relationship as described by the Special Deputy in the Findings of Fact would still merit the conclusion that an employment relationship existed. Contrary to the result in *Keith*, the Special Deputy did not find that the behavior of the parties was consistent with an independent contractor status and did not find the Petitioner's right to control the Joined Party was limited to merely a right to control the results of the Joined Party's work. Competent substantial evidence in the record supports the Special Deputy's ultimate conclusion that the Petitioner controlled the way the Joined Party performed his services in a manner characteristic of an employment relationship. Thus, the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are not rejected by the Agency. The remaining portions of Exception #29 are respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated March 19, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **October, 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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PROTEST OF LIABILITY
DOCKET NO. 2009-131182L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated March 19, 2009.

After due notice to the parties, a telephone hearing was held on August 9, 2010. The Petitioner was represented by its attorney. A chemical broker and the Petitioner's Vice President of Operations testified as witnesses. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party 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 received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as telemarketers 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, Green Provence Corporation, is a corporation which operates a telemarketing business to sell industrial chemicals and supplies.
2. The Petitioner's Vice President of Operations deals with manufacturers, oversees the processing of orders, and is involved in the purchase, leasing, and maintenance of real estate property. The Vice President of Operations is not directly involved with the telemarketing operations and has only limited communications with the telemarketers.

3. The Joined Party was in prison for ten years until March 2006. Following his release he obtained employment as a telemarketer doing appointment setting. In May 2006 the Joined Party read a newspaper help wanted advertisement placed by the Petitioner for the position of telemarketer. He responded to the advertisement and was interviewed by the Petitioner's Training Manager. The Training Manager gave the Joined Party a script and asked the Joined Party to read the script as if he were making a sales presentation. After the Joined Party read the script the Training Manager told the Joined Party what the hours of work would be and the potential earnings. The Training Manager told the Joined Party that the base pay was $475 per week and that the Joined Party would receive additional commissions if the earned commissions exceeded $475. The Joined Party accepted the offer of work and the Joined Party was scheduled to attend training.

4. The Training Manager gave the Joined Party paperwork to sign including a paper printed on the letterhead of Goldstar Products Inc. entitled *Tax Form*. The *Tax Form* states that the company does not withhold taxes from the pay and that the salesperson is responsible for the payment of taxes. The Tax Form states that the salesperson is not entitled to employee fringe benefits and that by signing the agreement the salesperson realizes that the salesperson is an independent contractor responsible for paying his own taxes.

5. The Joined Party was informed that he would be on probation during an initial period of either 90 days or 180 days. During the training period the Training Manager provided the Joined Party with a script and informed the Joined Party that he was required to read or recite the script verbatim and that he was not allowed to deviate from the script at any time.

6. The Petitioner provided the Joined Party with an assigned work space containing a desk and a telephone. The Petitioner provided all equipment and supplies that were needed to perform the work. The Joined Party did not have to provide anything to perform the work and he did not have any expenses in connection with the work.

7. The Petitioner determined the sales prices. The Joined Party could not deviate from the Petitioner's price list.

8. Initially, the Joined Party's assigned work schedule was from 8 AM until 4:30 PM from Monday through Thursday and from 8 AM until 12:30 PM on Friday. The Joined Party was allowed to take two fifteen minute breaks during the day and a forty-five minute lunch break. All of the telemarketers were required to take the lunch break at the same time, from 12 PM until 12:45 PM. Only two telemarketers were allowed to take a fifteen minute break at the same time. The Joined Party's assigned break times were from 10 AM until 10:15 AM and from 2 PM until 2:15 PM. At some point in time after the Joined Party began work the Petitioner changed the work schedule to 7:30 AM until 4 PM.

9. Initially, the Joined Party's base pay was $475 per week which was based on $13 per hour. The Joined Party was required to work thirty-six and one-half hours during each weekly pay period. If the Joined Party was absent from work during the pay period the rate of pay was reduced to reflect the hours which the Joined Party worked. The regularly scheduled payday was on Friday of each week. No taxes were withheld from the pay.

10. After the Joined Party completed the probationary period the Petitioner paid the Joined Party for holidays as long as the Joined Party was not absent during the holiday week. If the Joined Party was absent for a portion of a day during the holiday week the Petitioner deducted the number of hours that the Joined Party was absent from the amount of the holiday pay.

11. The Petitioner did not provide any fringe benefits other than the holiday pay. The Joined Party did not receive health insurance, life insurance, paid vacations, or retirement benefits.

12. At the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

13. The Joined Party's immediate supervisor was the Sales Manager. The Joined Party was required to bring life to the sales pitch without deviating from the required script. In an attempt to bring life to the script the Joined Party occasionally deviated from the script. The Sales Manager monitored the Joined Party's work performance and warned the Joined Party many times that he was not to deviate from the script. The Sales Manager told the Joined Party that if he continued to deviate from the script the Joined Party would be terminated.

14. The Petitioner provided the Joined Party with sales leads to contact. All of the calls placed by the Joined Party were the result of the provided leads.

15. In order to motivate the telemarketers the Sales Manager used several different games. The games involved providing cash bonuses or spiffs for making certain sales during specified times. The telemarketers could also earn bonuses for achieving certain sales levels. The Petitioner also increased or decreased a telemarketer's base pay in an attempt to motivate the telemarketer. The Joined Party's base pay was increased to $500 per week after the Joined Party sold his first drum of chemicals. During one period of time the Petitioner reduced the Joined Party's base pay to $300 for a period of two weeks.

16. Either the Petitioner or the telemarketers could terminate the relationship at any time without incurring liability for breach of contract. The Joined Party observed that there was a frequent turnover of telemarketers. The Sales Manager would discharge telemarketers only to rehire the telemarketers two weeks later. The Sales Manager discharged the Joined Party during the fourth calendar quarter 2007. The Joined Party found work as a day laborer for one day and then contacted the Sales Manager and asked for his job back. The Joined Party was rehired by the Petitioner after approximately two weeks. In October 2008 the Joined Party was arrested and was in jail for a period of thirty days. Upon his release in early November the Joined Party returned to work. On December 30, 2008, the Petitioner informed the Joined Party that the Petitioner had eliminated the Joined Party's base pay. The Joined Party interpreted that action to mean that he was no longer working for the Petitioner.

17. During the time that the Joined Party worked for the Petitioner he did not have an occupational license, did not have liability insurance, did not advertise, and did not offer services to the general public. The Joined Party did not perform services for any other company other than the one day as a day laborer during the fourth quarter 2007. During the time that the Joined Party worked for the Petitioner the Joined Party believed that he was the Petitioner's employee.

Conclusions of Law:

18. 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.

19. 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).

20. 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).

21. 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.

22. 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.

23. 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.

24. 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.

25. The Petitioner's business is the sale of industrial chemicals and supplies. The work performed by the Joined Party was the sale of the Petitioner's products. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the Petitioner's business.

26. The Petitioner provided the place of work and all equipment and supplies that were needed to perform the work. The Joined Party did not have any expenses in connection with the work. The Joined Party did not have an investment in a business and it was not shown that the Joined Party was at risk of suffering a financial loss from performing services.

27. It was not shown that the Joined Party possessed any special skill or knowledge which was used in performing the work. When the Petitioner interviewed and hired the Joined Party the Joined Party was only required to demonstrate that he was capable of reading a script. The Petitioner trained

the Joined Party. 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)

28. The Petitioner paid the Joined Party a base salary plus commissions if the commissions exceeded the amount of the base salary. The Petitioner unilaterally changed the amount of the base salary from time to time. The Petitioner determined the commission rate and, at the Petitioner's discretion, paid spiffs and bonuses. These facts reveal that the Petitioner controlled the financial aspects of the relationship.

29. The Petitioner required the Joined Party to sign an agreement titled *Tax Form* which specifies that the Petitioner does not withhold taxes from the pay and that, by signing the agreement the Joined Party realizes that the Joined Party is an independent contractor responsible for his own taxes. 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." The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

30. The Petitioner provided holiday pay after the Joined Party successfully completed the probationary period. Holiday pay is a benefit normally reserved for employees. 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).

31. The Joined Party worked for the Petitioner for a period of two and one-half years. With the exception of one day in the fourth quarter 2007 the Joined Party worked exclusively for the Petitioner. 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. 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."

32. The Joined Party was required to satisfactorily complete a probationary period and he was directly supervised by a sales manager. He was required to adhere to a prepared script and he was not allowed to deviate from the Petitioner's price list. The sales manager monitored the sales calls and warned the Joined Party for deviating from the prepared script. These facts reveal that the Petitioner controlled how the work was performed. The Petitioner set the work schedule even to the point of controlling when the Joined Party could take breaks and the duration of the breaks. The Petitioner controlled where the work was performed.

33. The Petitioner exercised significant control over where the work was performed, when the work was performed, and how the work 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.

34. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals working as telemarketers constitute insured employment. In reaching that conclusion the special deputy has weighed the testimony of the Vice President of Operations and the Joined Party. The Petitioner's Vice President of Operations testified that she is not directly involved with the telemarketing operations and has only limited communications with the telemarketers. The testimony of the Vice President of Operations concerning the Joined Party and the other telemarketers is hearsay.

35. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.

36. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error. The Petitioner has not satisfied the necessary burden of proof.

Recommendation: It is recommended that the determination dated March 19, 2009, be AFFIRMED.

Respectfully submitted on September 1, 2010.

R. O. SMITH, Special Deputy
Office of Appeals