AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2698765

BARBIZON USA LLC
PAYROLL
4950 W KENNEDY BLVD STE 200
TAMPA FL 33609-1829

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

PROTEST OF LIABILITY
DOCKET NO. 2009-134859L

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 as sales 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.

The Joined Party filed an unemployment compensation claim in April 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 she 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, she would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes on the remuneration it paid to the Joined Party. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, she would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the wages it paid to the Joined Party. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay unemployment compensation taxes on the wages it paid to the Joined Party. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party

because she 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 February 2, 2010. The Petitioner was represented by an attorney. The Petitioner's Chief Financial Officer and Vice President appeared and provided testimony for the Petitioner. The Joined Party appeared and testified on her own behalf. A Tax Specialist II appeared and testified on behalf of the Respondent. The Special Deputy issued a Recommended Order on June 15, 2010.

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

1. The Petitioner is a limited liability corporation incorporated in May 2006 for the purpose of operating a modeling and acting school. The corporation existed under a different corporate identity prior to incorporation in its present identity. The Petitioner's sole means of gaining students is through the lead process.

2. The Joined Party was hired as a sales director responsible for recruiting new students for the Petitioner. The Joined Party provided services from February 2008, through October 2008. The Joined Party had been previously employed by the Petitioner as an employee sales director. The Joined Party received training from the Petitioner in her prior position. The training included scripts for making contact with recruits, telephone skills, etiquette, enthusiasm, interviewing skills and paperwork handling.

3. The Joined Party contacted the Petitioner to ask about work available. The Joined Party asked to be allowed to work from home due to childcare issues. The Petitioner informed the Joined Party that she would be an independent contractor.

4. The Petitioner has multiple sales directors within the company. The Petitioner considers some of the sales directors to be employees and others independent contractors. The contract workers are not required to work in the Petitioner's office. The employee workers are required to attend two model searches per month. The employee workers are expected to be in the office during the required business hours. Available leads are given to employees before contract workers. Contract workers are not required to accept work. Contract workers and employees receive the same base pay. Employee workers are eligible for additional bonuses. Employee workers have their schedules determined over one year ahead of time. Employee workers are only allowed to take vacations during the Petitioner's authorized vacation period. The Petitioner conducts a criminal background check on all sales directors. The Petitioner examines the record for prior arrests and convictions.

5. The Joined Party was eligible to receive incentive bonuses for reaching set sales levels as determined by the Petitioner.

6. The Petitioner holds two model searches per month. Leads are used to contact potential students in the area of the search. The leads are provided to the Joined Party by the Petitioner. The potential students are then informed of the date of an information day if they are interested

in receiving more information about the school and training program. The sales directors would meet with the students at the information days.

7. The information day consisted of an initial presentation given by a manager that was followed by interviews of the recruits and their families conducted by the sales director that invited them to the event. The information days were held in hotels in the target city. The Petitioner set up the arrangements with the hotel. After the event the sales director would be responsible for contacting students deemed appropriate for the school and enrolling the prospective student in the class.

8. The Petitioner creates a lead pack for a given area prior to a search. The lead pack indicates how many sales directors that the search can support. The lead pack includes contact information for all of the potential students in the area of the search. The leads would be handed out by the Petitioner to sales directors. Each sales director is given an equal cross section of the leads in the lead pack. The leads were given to the sales directors approximately two weeks before the information day for the area.

9. The Joined Party was paid a commission based upon the number of students recruited by the Joined Party who paid tuition for the school. The Joined Party received an escalating financial bonus for meeting certain minimum recruitment levels. The bonuses began when twenty students were recruited and increased with every five students after that. The rate of pay and bonuses were determined by the Petitioner. The Joined Party was paid $12,075 in 2008 by the Petitioner. The Petitioner reported the Joined Party's income to the Internal Revenue Service using a 1099 form.

10. The Petitioner reserved the right to determine on a case by case basis if the Joined Party would be allowed to perform similar services for a competitor.

11. A telephone with long distance was required for the work. The Joined Party was required to provide her own telephone and long distance service.

12. The sales directors are required to make nightly telephone calls to the Petitioner to keep the Petitioner informed as to how many appointments have been scheduled. This requirement is for a six night period of the two week search cycle. The Petitioner requires this in order to make certain that all of the leads are being worked and any excess leads can be reallocated to make certain that they are worked.

13. The Petitioner had a program of "Director's Invitationals" meetings for the sales directors. All workers were invited to the meetings which were intended to educate the workers about the Petitioner's company. The Petitioner considered the meetings to be mandatory but did not penalize a worker who did not attend.

14. Customer complaints would be forwarded to a manager who would investigate the complaint. The Petitioner would use verbal or written write-ups to correct issues with the sales directors.

15. Either party could end the relationship at anytime, without liability.

16. The Petitioner required the Joined Party represent herself as an admissions director for the Petitioner.

17. The Joined Party received no benefits from the Petitioner during the 2008 period.

18. The Joined Party primarily worked from her home for making calls. The Joined Party was required to travel to the Petitioner's place of business in order to pick up leads and drop off paperwork. The Joined Party would sometimes be asked to remain at the place of business if the Petitioner was short-handed. The Joined Party was informed that she should begin making appointments at 3 p.m. and continue until 9 p.m. if she wished to be successful in the business.

19. The Joined Party reported to the meeting room at 9 a.m. during the searches. The manager would present informational seminars at 10:30 a.m., 1:30 p.m., and 4:30 p.m. after each of which the Joined Party would interview the attendees invited by the Joined Party. The manager set the times for the seminars. The Joined Party controlled her interview schedule within the seminar schedule.

20. The Joined Party received a monetary per diem to cover expenses for searches. The Petitioner provided office supplies and paperwork for the Joined Party's use. The Petitioner provided air fare for the Joined Party. The Joined Party was reimbursed for parking expenses. The Joined Party provided her own telephone service and fax machine.

21. The Joined Party requested and received time off the weekend of June 14, 2008. The Petitioner did not provide work to the Joined Party for the remainder of June and the entire month of July.

22. The Joined Party was required to fix errors. The Joined Party was not given additional pay, beyond her commission, for the time required to fix the errors.

23. The Joined Party did not have her own business.

Based on these Findings of Fact, the Special Deputy recommended the determination dated June 16, 2009, be affirmed. On June 30, 2010, the Special Deputy issued an order extending the time to file exceptions for all parties until July 15, 2010. The Petitioner's exceptions to the Recommended Order were received by mail postmarked July 9, 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.

In Exception #1, the Petitioner contends that the Special Deputy departed from the law when he ruled that no valid independent contractor agreement existed between the parties and that Conclusion of Law #13 is not supported by evidence in the record. The Petitioner also proposes alternative findings of fact in support of its contentions in Exception #1. Section 120.57(1)(l), Florida Statutes, provides that the Agency may not reject or modify the Findings of Fact unless the Agency first determines that the findings of fact were not based upon competent substantial evidence in the record. Section 120.57(1)(l), Florida Statutes, also provides that the Agency may not reject or modify the 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 ruled that a verbal independent contractor agreement existed between the parties in both Finding of Fact #3 and Conclusion of Law #13 and did not rule that the agreement was not a valid agreement. A review of the record further reveals that the claimant testified that she was told that she would be hired by the Petitioner as an independent contractor. The Special Deputy's Findings of Fact, including Finding of Fact #3, are supported by competent substantial evidence in the record. The Special Deputy's Conclusions of Law, including Conclusion of Law #13, also 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 and 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. The portions of Exception #1 that contend that the Special Deputy departed from the law when he ruled that no valid independent contractor agreement existed between the parties, claim that Conclusion of Law #13 is not supported by evidence in the record, and propose alternative findings of fact are respectfully rejected.

Although the Petitioner argues in Exception #1 that the existence of a verbal independent contractor agreement requires the alternative conclusion that the Joined Party worked as an independent contractor for the Petitioner, the law does not require that conclusion in this case. In *Cantor v. Cochran*, 184 So.2d 173, 174 (Fla. 1966), the Florida Supreme Court commented that employment status "depends not on the statements of the parties but upon all the circumstances of their dealings with each other." Thus, employment status is a matter of law to be decided based on the entire working relationship between the parties, and it need not be determined solely by an agreement between the parties regarding such status. In *Cantor*, the court found the existence of an employment relationship even when presented with a signed written statement from the worker indicating an independent status. *Id*. at 174. The court's conclusion was based on the other aspects of the working relationship that demonstrated factors of control uncharacteristic of an independent contractor status. *Id*. at 174-75. The court in *Cantor* allowed the consideration of the parties' beliefs about the type of working relationship that was being formed as well as an analysis of the specific terms of the written agreement. *Id*. at 175. Therefore, the law does not support the Petitioner's contention that the existence of a verbal independent contractor agreement between the parties should solely determine the Joined Party's employment status.

Also in *Magarian v. Southern Fruit Distributors*, 1 So.2d 858, 861 (Fla. 1941), the Florida Supreme Court held that the parties' beliefs were not determinative of independent contractor status in light of the other factors of control present in the working relationship. The court commented, "The parties evidently thought they did not stand in the relation of master and servant but if, as a matter of law, they did so stand, their mistake in this regard would not change the status." *Id*. Thus, the appropriate analysis of a worker's employment status would require an examination of all relevant aspects of the working relationship. In *Keith v. News Sentinel Co*. case. 667 So.2d 167 (Fla. 1995), the Florida Supreme Court provided guidance on how to approach such an analysis. *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 verbal 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 ruled that the parties made a verbal 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. Competent substantial evidence in the record supports the conclusion that the Petitioner controlled the way the Joined Party performed her services in a manner characteristic of an employment relationship. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. The Petitioner's request for the adoption of an alternative legal analysis in Exception #1 is respectfully rejected.

Also in Exception #1, the Petitioner argues that the Special Deputy departed from the law when he applied the holding of *Justice v. Belford Trucking Co., Inc.*, 272 So.2d 131 (Fla. 1972), to the case at hand because the section quoted by the Special Deputy refers to a document, the case is not on point, and the case has no relevant application. As mentioned previously, *Justice* is applicable to the current case because the court held that an agreement between the parties is not dispositive of a worker's status. *Id*. at 136. In *Justice*, the court determined that an employment relationship existed between a carrier and a truck driver based on the control the carrier exerted over the driver. *Id*. at 135-36. Along with other factors, the court considered the carrier's ability to direct when the driver would complete the work as demonstrative of that control. *Id*. at 133. In Exception #1, the Petitioner attempts to distinguish *Justice* because the truck driver in the case was "continuously subject to call or dispatch." *Id*. at 135. A review of the record reflects that the Special Deputy found in Finding of Fact #18 that the "Joined Party would sometimes be asked to remain at the place of business if the Petitioner was short-handed." Contrary to what is asserted in Exception #1, testimony during the hearing indicated that the Joined Party could be required to work by the Petitioner when the Petitioner deemed it necessary. The Petitioner also attempts to distinguish *Justice* on the basis that the Petitioner did not make any workers' compensation deductions from the Joined Party's pay, did not provide workers' compensation for the Joined Party, did not issue a W-2 form for the Joined Party, and did not withhold any income taxes or social security from the Joined Party's pay. These proposed findings of fact are in accord with Special Deputy's Findings of Fact or represent an attempt to

propose alternative findings of fact. Section 120.57(1)(l), Florida Statutes, does not permit modification of the Special Deputy's Findings of Fact or Conclusions of Law because the findings are based on competent substantial evidence in the record and the conclusions reflect a reasonable application of the law to the facts. The portions of Exception #1 that take exception the application of the *Justice* case are respectfully rejected.

In Exception #2, the Petitioner maintains that the Special Deputy did not apply the *Restatement* factors listed under Conclusion of Law #5 properly and failed to analyze the facts of the case on a case-by-case basis as required under the law. The Petitioner cites both *Department of Health and Rehabilitative Servs. v. Department of Labor & Employment Sec.*, 472 So.2d 1284 (Fla. 1st DCA 1985), and *La Grande v. B & L Servs., Inc.*, 432 So.2d 1364 (Fla. 1st DCA 1983), in support of the need for independent contractor status to be addressed on a case-by-case basis. A review of the record reveals that the Special Deputy also cited these cases in Conclusion of Law #6 for the same reason, acknowledging that independent contractor status must be addressed on a case-by-case basis. In *Department of Health and Rehabilitative Servs.*, the court held that a housekeeper for families eligible for Department of Health and Rehabilitative Services (HRS) benefits was an independent contractor based on several factors that demonstrated HRS's lack of control over the housekeeper's actual conduct. 472 So.2d at 1287. Among these factors, the court considered that the housekeeper was not provided training, she was not supervised as to the means she used to complete the work, she was not reimbursed for any expenses, she was allowed a flexible schedule, and she could refuse an assignment without risking future employment as factors that exhibited this lack of control. *Id*. at 1285-86. In *La Grande*, the court held that a taxi cab driver was an independent contractor because the degree of control exercised by the taxi cab company over the driver did not "pierce the independent contractor status contemplated by the parties in their taxi cab service agreement." 432 So.2d at 1368. The court also based its holding on a number of factors that showed a lack of control over the worker's means of completing the work. *Id*. at 1366-67. These factors included that the driver was allowed to "'exercise complete discretion' in performing his job duties," was free to determine the days and hours he would work, was free to ignore dispatches, and was not required to comply with concession agreements. *Id*. A review of the record reveals that the Special Deputy concluded that the Joined Party worked as an employee based on the specific facts of the case at hand. In the current case, the Special Deputy found in Findings of Fact # 2-3, 9-10, 18, and 20 and Conclusions of Law #8-10, and 14 that the Petitioner provided training to the Joined Party, exercised unilateral control over the financial aspects of the relationship, exerted control over the Joined Party's right to work for a competitor, required the Joined Party to work at the Petitioner's place of business when the Petitioner was shorthanded, provided a per diem for searches, and reimbursed airfare and parking expenses. Based on these considerations, the current

case is distinguishable from both *Department of Health and Rehabilitative Servs.* and *La Grande* in that the Petitioner's control extended beyond a mere right to exert control over the results of the work and amounted to a right to control the means of doing the work as concluded by the Special Deputy in Conclusion of Law #14. The Special Deputy ultimately concluded that, unlike the circumstances present in *La Grande*, the control exerted by the Petitioner over the Joined Party was inconsistent with the independent contractor status contemplated by the parties in their verbal agreement. The Special Deputy's Findings of Fact are supported by competent substantial evidence in the record, and the Special Deputy's Conclusions of Law, including Conclusion of Law #5, reflect a reasonable application of the law to the facts. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject the Special Deputy's Findings of Fact or Conclusions of Law. The alternative conclusions of law proposed by the Petitioner are respectfully rejected. The portions of Exception #2 that maintain that the Special Deputy did not apply the *Restatement* factors listed under Conclusion of Law #5 properly and failed to analyze the facts of the case on a case-by-case basis as required under the law are also respectfully rejected.

In Exception #2, the Petitioner also provides an alternative analysis of the case under the *Restatement* factors. The Petitioner addresses each *Restatement* factor separately in Exception #2. When requesting the adoption of an alternative analysis, the Petitioner relies on findings of fact in accord with the Special Deputy's Findings of Fact or proposes alternative findings of fact in sections *(a)-(c)*, *(e)-(g)*, and *(j)*. The Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. Section 120.57(1)(l), Florida Statutes, does not provide a basis for modification or rejection of the Special Deputy's Findings of Fact and Conclusions of Law in this case. Sections *(a)-(c)*, *(e)-(g)*, and *(j)* of Exception #2 are respectfully rejected. The remaining sections of Exception #2 are addressed below.

In section *(d)* of Exception #2, the Petitioner contends that the Joined Party had extensive sales experience and required no training for her position of sales director. The Petitioner refers to Conclusion of Law #8 in support of its contention. The Petitioner further contends that the Joined Party's level of skill and special knowledge are indicative of an independent contractor relationship. In section *(d)*, the Petitioner proposes findings of fact and conclusions of law in accord with the Special Deputy's Findings of Fact and Conclusions of Law or proposes findings of fact or conclusions of law that were not contained in the Special Deputy's Recommended Order. The Petitioner also cites *Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec.*, 386 So.2d 259 (Fla. 2d DCA 1980), in support of the conclusion that, the greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be an independent contractor relationship. In *Florida Gulf Coast Symphony*,

the court held that musicians were independent contractors and relied on a number of factors that were indicative of their independent status. *Id.* at 263-64. The case is distinguishable from the case at hand in that the musicians were able to negotiate their rate of remuneration, the symphony did not exert control over the musicians during the majority of the time the musicians spent performing their job duties, and the musicians were free to seek other jobs within the same field at their discretion. *Id.* In the current case, the Joined Party did not control the financial aspects of the working relationship, was required to work when the Petitioner deemed it necessary, and was not free to work for a competitor without consulting the Petitioner. While the Joined Party, like the musicians in *Florida Gulf Coast Symphony*, may also be considered a highly skilled worker or in possession of specialized knowledge, the Special Deputy's ultimate conclusion that the Joined Party was an employee of the Petitioner continues to reflect a reasonable application of the law to the facts because other factors in the case indicate that she was not free to perform her services as she wished and that she was subject to the Petitioner's control in the performance of her job duties. Competent substantial evidence in the record supports the Special Deputy's Findings of Fact. All of the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. Both the Special Deputy's Findings of Fact and Conclusions of Law are accepted by the Agency without modification. Section *(d)* of Exception #2 is respectfully rejected.

In section *(h)* of Exception #2, the Petitioner argues that the Joined Party's services as a sales director were not part of the regular business of the Petitioner. The record reflects that the Special Deputy held that the Petitioner operated a modeling and acting school in Finding of Fact #1. The record further reflects that the Special Deputy held in Finding of Fact #2 that the Joined Party was responsible for recruiting new students for the Petitioner. Based on the evidence in the record, it is clear that the Joined Party's services as a sales director were not outside the sphere of the Petitioner's regular business of operating a modeling and acting school because recruiting new students was a part of the operation of the school. Competent substantial evidence in the record supports the Special Deputy's ultimate conclusion that an employer/employee relationship existed between the parties. The Special Deputy's Findings of Fact are accepted by the Agency because the findings are supported by competent substantial evidence in the record. Also, the Special Deputy's Conclusions of Law are accepted by the Agency because the conclusions reflect a reasonable application of the law to the facts. *Section (h)* of Exception #2 is respectfully rejected.

In section *(i)* of Exception #2, the Petitioner maintains that the parties believed that they were creating an independent contractor relationship. In support of its contention, the Petitioner proposes findings of fact in accord with the Special Deputy's Findings of Fact or relies on findings of fact the

Special Deputy did not make in the Recommended Order. As previously stated, the court in *Keith* held 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." 667 So.2d at 171. In the case at hand, the Special Deputy concluded that the Petitioner exercised a degree of control over the Joined Party that was inconsistent with the independent contractor status created by the parties in their verbal agreement. The Special Deputy's conclusion is based on competent substantial evidence in the record and reflects a reasonable application of the law to the facts. The Agency may not reject the Special Deputy's Findings of Fact and Conclusions of Law because the findings are based on competent substantial evidence in the record and the conclusions reflect a reasonable application of the law to the facts. The Agency accepts the Special Deputy's Findings of Fact and Conclusions of Law as written in the Recommended Order. Section *(i)* of Exception #2 is 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 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. The Petitioner's request for the adoption of an alternative legal analysis is respectfully denied.

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 June 16, 2009, is AFFIRMED.

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

____

TOM CLENDENNING,
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
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PETITIONER:
Employer Account No. - 2698765
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TAMPA FL 33609-1829

PROTEST OF LIABILITY
DOCKET NO. 2009-134859L

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 June 16, 2009.

After due notice to the parties, a telephone hearing was held on February 2, 2010. A chief financial officer and a vice president appeared and provided testimony for the Petitioner. The Petitioner was represented by an attorney. The Joined Party appeared and testified on her 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 received. The Petitioner requested an extension of time to submit proposed findings of fact on February 10, 2010. The Special Deputy granted the request and extended the time limit to submit proposed findings of fact to March 4, 2010. The Petitioner submitted proposed findings of fact on March 4, 2010.

Issue:

Whether services performed for the Petitioner by the Joined Party as a sales 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:

24. The Petitioner is a limited liability corporation incorporated in May 2006 for the purpose of operating a modeling and acting school. The corporation existed under a different corporate identity prior to incorporation in its present identity. The Petitioner's sole means of gaining students is through the lead process.

25. The Joined Party was hired as a sales director responsible for recruiting new students for the Petitioner. The Joined Party provided services from February 2008, through October 2008. The Joined Party had been previously employed by the Petitioner as an employee sales director. The Joined Party received training from the Petitioner in her prior position. The training included scripts for making contact with recruits, telephone skills, etiquette, enthusiasm, interviewing skills and paperwork handling.

26. The Joined Party contacted the Petitioner to ask about work available. The Joined Party asked to be allowed to work from home due to childcare issues. The Petitioner informed the Joined Party that she would be an independent contractor.

27. The Petitioner has multiple sales directors within the company. The Petitioner considers some of the sales directors to be employees and others independent contractors. The contract workers are not required to work in the Petitioner's office. The employee workers are required to attend two model searches per month. The employee workers are expected to be in the office during the required business hours. Available leads are given to employees before contract workers. Contract workers are not required to accept work. Contract workers and employees receive the same base pay. Employee workers are eligible for additional bonuses. Employee workers have their schedules determined over one year ahead of time. Employee workers are only allowed to take vacations during the Petitioner's authorized vacation period. The Petitioner conducts a criminal background check on all sales directors. The Petitioner examines the record for prior arrests and convictions.

28. The Joined Party was eligible to receive incentive bonuses for reaching set sales levels as determined by the Petitioner.

29. The Petitioner holds two model searches per month. Leads are used to contact potential students in the area of the search. The leads are provided to the Joined Party by the Petitioner. The potential students are then informed of the date of an information day if they are interested in receiving more information about the school and training program. The sales directors would meet with the students at the information days.

30. The information day consisted of an initial presentation given by a manager that was followed by interviews of the recruits and their families conducted by the sales director that invited them to the event. The information days were held in hotels in the target city. The Petitioner set up the arrangements with the hotel. After the event the sales director would be responsible for contacting students deemed appropriate for the school and enrolling the prospective student in the class.

31. The Petitioner creates a lead pack for a given area prior to a search. The lead pack indicates how many sales directors that the search can support. The lead pack includes contact information for all of the potential students in the area of the search. The leads would be handed out by the Petitioner to sales directors. Each sales director is given an equal cross section of the leads in the lead pack. The leads were given to the sales directors approximately two weeks before the information day for the area.

32. The Joined Party was paid a commission based upon the number of students recruited by the Joined Party who paid tuition for the school. The Joined Party received an escalating financial bonus for meeting certain minimum recruitment levels. The bonuses began when twenty students were recruited and increased with every five students after that. The rate of pay and bonuses were determined by the Petitioner. The Joined Party was paid $12,075 in 2008 by the Petitioner. The Petitioner reported the Joined Party's income to the Internal Revenue Service using a 1099 form.

33. The Petitioner reserved the right to determine on a case by case basis if the Joined Party would be allowed to perform similar services for a competitor.

34. A telephone with long distance was required for the work. The Joined Party was required to provide her own telephone and long distance service.

35. The sales directors are required to make nightly telephone calls to the Petitioner to keep the Petitioner informed as to how many appointments have been scheduled. This requirement is for a six night period of the two week search cycle. The Petitioner requires this in order to make certain that all of the leads are being worked and any excess leads can be reallocated to make certain that they are worked.

36. The Petitioner had a program of "Director's Invitationals" meetings for the sales directors. All workers were invited to the meetings which were intended to educate the workers about the Petitioner's company. The Petitioner considered the meetings to be mandatory but did not penalize a worker who did not attend.

37. Customer complaints would be forwarded to a manager who would investigate the complaint. The Petitioner would use verbal or written write-ups to correct issues with the sales directors.

38. Either party could end the relationship at anytime, without liability.

39. The Petitioner required the Joined Party represent herself as an admissions director for the Petitioner.

40. The Joined Party received no benefits from the Petitioner during the 2008 period.

41. The Joined Party primarily worked from her home for making calls. The Joined Party was required to travel to the Petitioner's place of business in order to pick up leads and drop off paperwork. The Joined Party would sometimes be asked to remain at the place of business if the Petitioner was short-handed. The Joined Party was informed that she should begin making appointments at 3 p.m. and continue until 9 p.m. if she wished to be successful in the business.

42. The Joined Party reported to the meeting room at 9 a.m. during the searches. The manager would present informational seminars at 10:30 a.m., 1:30 p.m., and 4:30 p.m. after each of which the Joined Party would interview the attendees invited by the Joined Party. The manager set the times for the seminars. The Joined Party controlled her interview schedule within the seminar schedule.

43. The Joined Party received a monetary per diem to cover expenses for searches. The Petitioner provided office supplies and paperwork for the Joined Party's use. The Petitioner provided air fare for the Joined Party. The Joined Party was reimbursed for parking expenses. The Joined Party provided her own telephone service and fax machine.

44. The Joined Party requested and received time off the weekend of June 14, 2008. The Petitioner did not provide work to the Joined Party for the remainder of June and the entire month of July.

45. The Joined Party was required to fix errors. The Joined Party was not given additional pay, beyond her commission, for the time required to fix the errors.

46. The Joined Party did not have her own business.

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 hearing indicated that the Petitioner had both employees and workers considered contractors performing the role of sales directors. The employee workers received retirement and health benefits which the contractor workers did not receive. The duties of the two types of workers were fundamentally the same. The contractor workers could refuse work while the employee workers did not have the liberty of taking time off of work. The degree of control exercised by a business over a worker is the principal consideration in determining employment status. If the business is only concerned with the results and exerts no control over the manner of doing the work, then the worker is an independent contractor. United States Telephone Company v. Department of Labor and Employment Security, 410 So.2d 1002 (Fla. 3rd DCA 1982); Cosmo Personnel Agency of Ft. Lauderdale, Inc. v. Department of Labor and Employment Security, 407 So.2d 249 (Fla. 4th DCA 1981).

8. The Petitioner provided training in how to perform the work to the Joined Party in a prior term of work in which the Joined Party was considered an employee worker. The Petitioner did not provide additional training to the Joined Party when she began performing services for the Petitioner the second time.
9. The Petitioner maintained control over the Joined Party's right to provide services for a competitor, which is a factor indicating employment.
10. The Petitioner had unilateral control over the financial aspects of the relationship in that the Petitioner set a commission rate as well as a plan for incentive bonuses for meeting performance goals.

11. The relationship was terminable at will by either party without liability. The Joined Party was discharged by the Petitioner. 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."

12. The Joined Party was not in business for herself.

13. There was a verbal agreement between the parties. The verbal agreement included a statement from the Petitioner that the Joined Party would be working as an independent contractor. The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "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."

14. A preponderance of the evidence in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

15. The Petitioner provided Proposed Findings of Fact and Conclusions of Law. The Findings were considered by the Special Deputy and those Findings that comport with the evidence presented in the record were incorporated into this recommended order. Those Findings that did not comport with the evidence presented in the record were respectfully rejected.

Recommendation: It is recommended that the determination dated June 16, 2009, be AFFIRMED.

Respectfully submitted on June 15, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals