AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1039357

EXECUTIVE INC HOMES CONDOS &
INVESTMENTS ELIZABETH C SEITHER
801 NORTH FORT HARRISION
CLEARWATER FL 33755

PROTEST OF LIABILITY
DOCKET NO. 2009-134860L

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 issues before me include whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18), and whether services performed for the Petitioner by the Joined Party working as a broker assistant constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

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 Special Deputy issued the Recommended Order on May 13, 2010. The Petitioner's exceptions to the Recommended Order were received by fax dated May 31, 2010. Rule 60BB-2.035(19)(c)**,** Florida Administrative Code, requires that written exceptions be filed within 15 days of the mailing date of the Recommended Order. As a result, the Agency may not consider the Petitioner's exceptions in this order because the exceptions were filed by fax more than 15 days after the mailing date of the Recommended Order. No other submissions were received from any party.

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.

Having considered the record of this case and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that good cause is found concerning the Petitioner's failure to attend the March 4, 2010, hearing. It is also ORDERED that the determination dated August 26, 2009, is AFFIRMED.

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

_____
TOM CLENDENNING,
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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RESPONDENT:
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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 26, 2009.

After due notice to the parties, a telephone hearing was held on April 19, 2010. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 not received.

Issue:

Whether services performed for the Petitioner by the Joined Party working as a broker assistant constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

Findings of Fact:

1. The Petitioner is a corporation which operates a real estate sales business. The Petitioner registered for payment of unemployment compensation taxes effective January 1994. The Petitioner's president is the licensed broker, however, over the last three or four years the president has been frequently absent from the business due to poor health.

2. The Joined Party began performing services for the Petitioner as a broker's assistant on September 28, 2008. The Petitioner provided the Joined Party with a key to the Petitioner's office.

3. The Petitioner provided the Joined Party with workspace in the Petitioner's office and provided all of the equipment and supplies needed to perform the work. The Joined Party also was in poor health and the Petitioner allowed the Joined Party to perform most of the work from the Joined Party's home. When the Joined Party worked from home, the Joined Party used her own computer. The Petitioner provided any supplies such as paper and ink that the Joined Party needed to perform the work from home.

4. The Petitioner provided work assignments to the Joined Party by telephone and by email when the Joined Party worked from home.

5. During the time that the Joined Party performed services for the Petitioner, the Joined Party was not allowed to perform services for a competitor as a broker's assistant or in any other capacity. The Joined Party was required to personally perform the work for the Petitioner and could not subcontract the work or hire others to perform the work for her.

6. The Joined Party previously held a real estate sales license. The Petitioner did not verify whether or not the Joined Party had an active real estate sales license while performing services for the Petitioner. The Joined Party never sold any real estate for the Petitioner and the Petitioner never paid any commissions to the Joined Party. The Petitioner paid the Joined Party $12.50 per hour for the work which the Joined Party performed. The Petitioner paid the Joined Party weekly and did not withhold any taxes from the pay. At the end of 2008 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service as nonemployee compensation in the amount of $3,215.15.

7. During the time that the Joined Party performed services for the Petitioner, the Petitioner was in the process of closing out the business. The Petitioner notified the Florida Department of Revenue that the Petitioner did not have any employees and the Petitioner's unemployment compensation tax account was inactivated effective December 31, 2008. The Joined Party continued working for the Petitioner until on or about March 14, 2009. The Petitioner issued the Joined Party's final pay check on April 14, 2009.

8. The Joined Party filed an initial claim for unemployment compensation benefits effective May 3, 2009. When the Joined Party did not receive credit for her earnings with the Petitioner, the Joined Party filed a *Request for Reconsideration of Monetary Determination* and an investigation was assigned to the Department of Revenue to determine if the Joined Party was entitled to wage credits.

9. The investigation was assigned to a Tax Specialist II. The Tax Specialist II issued a determination holding that the Joined Party performing services as a broker's assistant was the Petitioner's employee. The determination also changed the Petitioner's inactive date from December 31, 2008, to April 23, 2009. The Petitioner filed a timely protest.

10. Pursuant to the Petitioner's protest a telephone hearing was scheduled to be held on March 4, 2010, at 8:30 AM. The Petitioner's president underwent a medical procedure on March 3, 2010, and the president's daughter turned off the telephone ringer so that the president would not be disturbed. As a result the president did not receive the call for the hearing and a recommended order was issued recommending that the appeal be dismissed. The Petitioner's president requested that the appeal be reopened in writing on March 8, 2010.

Conclusions of Law:

11. Rule 60BB-2.035, Florida Administrative Code, provides:

(18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.

12. Rule 60BB-2.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.

13. The Petitioner promptly requested reopening of the appeal after the Petitioner failed to participate in the scheduled hearing. Since the Petitioner's reason for failing to participate in the hearing was due to human error, good cause is established.

14. 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.

15. 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).

16. 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).

17. 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.

18. 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.

19. 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.

20. 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.

21. The Petitioner's business is real estate sales and the Petitioner's president is the broker for the business. The Joined Party performed services as a broker's assistant. The work performed for the Petitioner by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business. The Petitioner paid the Joined Party by the hour worked on a regularly established weekly payday rather than by the job or by work completed. The fact that the Petitioner did not withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

22. The Petitioner provided the Joined Party with a key to the Petitioner's office. The Petitioner provided the workspace and everything that was needed to perform the work. The Petitioner allowed the Joined Party to perform most of the work from the Joined Party's home due to extenuating circumstances. The Petitioner continued to provide the Joined Party with all of the supplies that were needed to perform the work from home. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

23. It is noted that the Petitioner testified that the Joined Party was a licensed real estate sales person. The Petitioner never verified whether or not the Joined Party was licensed to sell real estate. The Department of revenue witness testified that according to the Florida Department of Business Regulation the Joined Party's real estate sales license expired in 2007 and has not been renewed.

24. The Petitioner asserts that the Joined Party was exempt from coverage under the unemployment compensation law because the Joined Party was a licensed real estate sales person. Although no competent evidence has been presented to show whether or not the Joined Party performed services as a licensed real estate sales person, that evidence is not critical to the resolution of this case. Section 443.1216(13)(n), Florida Statutes, provides that service performed for a person by an individual as a real estate salesperson or agent, if all of the service performed by the individual for that person is performed for remuneration solely by way of commission, is exempt from coverage under the chapter. The Joined Party never sold any real estate for the Petitioner and the Petitioner paid the Joined Party by the hour worked, not solely by way of commission. Therefore, the Joined Party's earnings are not excluded from coverage under the law.

25. The "extent of control" referred to in Restatement section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).
26. Although the Petitioner allowed significant freedom concerning the work schedule, the Petitioner exercised control over the Joined Party and the manner of performing the work. The Petitioner required the Joined Party to personally perform the work. The Joined Party did not have the independence to hire others to perform the work for her and she was not allowed to perform services for other real estate companies.
27. 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.
28. The Petitioner has failed to satisfy the necessary burden of proof to show that the determination of the Department of revenue is in error.

Recommendation: It is recommended that good cause be found concerning the Petitioner's failure to attend the March 4, 2010, hearing. It is recommended that the determination dated August 26, 2009, be AFFIRMED.

Respectfully submitted on May 13, 2010.

R. O. SMITH, Special Deputy
Office of Appeals