AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2913053
LEAPFROG ONLINE
807 GREENWOOD ST
EVANSTON IL 60201-4311

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

PROTEST OF LIABILITY
DOCKET NO. 2009-134862L

O R D E R

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated August 31, 2009, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

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RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated August 31, 2009.

After due notice to the parties, a telephone hearing was held on November 18, 2009. The Petitioner's executive vice president appeared and provided testimony at the hearing. The Petitioner was represented by an attorney at the hearing. The Joined Party appeared and provided testimony on his own behalf. A tax specialist II appeared and testified on behalf of the Respondent.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were received. The Petitioner filed a request for an extension of time for the submission of Proposed Findings of Fact and Conclusions of Law. The Special Deputy granted the request and extended the deadline for proposals to December 17, 2009. The Petitioner and the Joined Party submitted Proposed Findings of Fact and Conclusions of Law on December 16, 2009.

The Petitioner filed a motion to strike the Joined Party's Proposed Findings of Fact and Conclusions of Law December 22, 2009. The Joined Party submitted a request to deny the Petitioner's motion on December 29, 2009. The Joined Party submitted additional clarifications and challenges to the Petitioner's Proposed Findings of Fact and Conclusions of Law on December 30, 2009. The Petitioner's motion and all other post-hearing submissions will be addressed within this Order.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals as Director of Media Alliances and Development constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is an out of state limited liability corporation established in 1995 for the purpose of online marketing. The Petitioner contracted with client companies to have the Petitioner increase the client's subscription rates. The Petitioner dealt with media properties in order to place various advertisements on behalf of the client companies. The Petitioner has had no other workers in the State of Florida.

2. The Joined Party responded to an advertisement posted by the Petitioner. The Joined Party took part in two telephone interviews with the Petitioner. The Joined Party was then brought in by the Petitioner to meet with and be evaluated by the management team.

3. The Joined Party was not willing to relocate as the position advertised by the Petitioner would require. The Joined Party and the Petitioner negotiated a new position for the Joined Party to fill that would not require him to relocate.

4. The Petitioner initially gave the Joined Party the title Director of Media Alliances and Development. The title was the result of a negotiation between the Joined Party and the Petitioner.

5. The Joined Party performed services for the Petitioner from October 2004, through March 2009. The Joined Party sold and negotiated agreements for partnership marketing.

6. The Petitioner considered the Joined Party to be an independent contractor.

7. The Joined Party represented himself as having his own business to the Petitioner. The Petitioner's checks and 1099 forms were made out in the Joined Party's name.

8. The Petitioner provided a contract to the Joined Party based upon the results of negotiations between the parties. The Joined Party signed the contract on October 11, 2004. The contract was renewed each year with both parties signing a new contract. Each contract specified that the Joined Party would perform services as an independent contractor.

9. Either party had the right to end the relationship. The Petitioner was required to pay one half of the remaining amount due in the event that the Petitioner ended the relationship without cause during the first six months of the contracted period.

10. The contract required the Joined Party to work 120 hours per month. The contract included a confidentiality clause and a non-compete provision. The non-compete provision prohibited the Joined Party from working with any of the Petitioner's clients unless the Joined Party had a pre-existing relationship with the client. The non-compete provision also prohibited the Joined Party from any work which competed with the Petitioner in the fields of telecommunications, cable, automotive, or the credit card industry for one year after the termination of the relationship.

11. The Joined Party was not allowed to perform services for a competitor.

12. The Joined Party was allowed to subcontract his work so long as the subcontractors met with the terms of the contract.

13. The Joined Party was not covered under the Petitioner's workers' compensation policy.

14. The Joined Party would submit a monthly invoice to the Petitioner. The Petitioner would send a check within thirty days. The Joined Party was paid $10,000 per month. The Joined Party was paid $116,714.07 in 2007 and $111,634.75 in 2008 by the Petitioner. The Petitioner paid the Joined Party's travel expenses including airfare, hotel, and meals.

15. The contract set up a schedule for the Joined Party to travel to the Petitioner's place of business for meetings and to become familiar with the Petitioner's business. The Joined Party was required to make weekly scheduled calls to the Petitioner so that both parties could keep each other appraised of what media properties the Joined Party was working with. The Petitioner required that the Joined Party begin work at 9 a.m. each work day in 2007.

16. The Petitioner provided the Joined Party with a laptop computer and a telephone for use in his work. The Petitioner provided a company email address and business cards with the company logo to the Joined Party.

17. The Joined Party performed services primarily from his home.

18. The Petitioner provided services increasing subscription rates for client companies. The Joined Party negotiated with media properties to provide advertisements on behalf of the client companies with the intention of increasing the subscription rates of the client companies. The media properties were selected by the Petitioner and the Joined Party. The Petitioner had the ultimate authority as to which media properties agreements would be signed. The Joined Party was required to remain in contact with the Petitioner so that they could inform him of what he could be selling or negotiating at any given time.

19. The relationship was terminated by the Petitioner as a result of diminishing work for the Joined Party. The Petitioner complied with the terms of the contract with regards to the separation.

20. The Petitioner did not require that the Joined Party seek approval for time off or vacation time.

Conclusions of Law:

1. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.
2. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).
3. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987).
4. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

5. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
   (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.
   (2) The following matters of fact, among others, are to be considered:
      (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
      (b) whether or not the one employed is engaged in a distinct occupation or business;
      (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
      (d) the skill required in the particular occupation;
      (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
      (f) the length of time for which the person is employed;
      (g) the method of payment, whether by the time or by the job;
      (h) whether or not the work is a part of the regular business of the employer;
      (i) whether or not the parties believe they are creating the relation of master and servant;
      (j) whether the principal is or is not in business.
6. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.
7. The evidence presented in this case reveals that the Joined Party originally applied for employment with the Petitioner. The Joined Party was unwilling to relocate for the position offered by the Petitioner. The Joined Party and the Petitioner negotiated the creation of a new position for the Joined Party to fill. The Joined Party and the Petitioner negotiated a written agreement which specified that the Joined Party would perform services as an independent contractor. This agreement was signed by both parties for each year of the work relationship. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).
8. The Petitioner was not free to discharge the Joined Party at anytime and without liability. The written agreement negotiated by the parties stipulated the details of how either party could terminate the relationship as well as what penalties existed for such a decision.
9. The Joined Party was hired as a skilled professional to perform work requiring sales and negotiations abilities on the part of the Joined Party. While the Petitioner maintained some control over the scope and final disposition of agreements, the Joined Party was free to perform his services as he saw fit in his best professional judgment.
10. The record reflects that the Joined Party was hired as a professional and operated with little or no supervision from the Petitioner. The Petitioner retained ultimate control over any contracts

negotiated by the Joined Party but otherwise allowed the Joined Party to perform at his own discretion.

11. Based upon the evidence presented in this case, it is concluded that in the performance of his duties for the Petitioner, the Joined Party was an independent contractor. While there were some elements of control present in the relationship between the parties, the written agreement demonstrates the clear intent of the parties. A preponderance of the evidence shows that the Petitioner did not establish sufficient control over the Joined Party to create an employer-employee relationship.

12. The Petitioner filed a request for an extension of time to file Proposed Findings of Fact/Conclusions of Law. The request was granted and the deadline for proposals was extended to December 17, 2009. The Petitioner and the Joined Party provided proposed findings of fact/conclusions of law December 16, 2009. The Petitioner filed a motion to strike the Joined Party's Proposed Findings of Fact/Conclusions of Law on December 22, 2009. The Joined Party filed a request to deny the Petitioner's motion December 29, 2009. The Joined Party filed a document of challenges and clarifications to the Petitioner's Proposed Findings of Fact/Conclusions of Law December 30, 2009. Those documents and proposals submitted after December 17, 2009, are respectfully rejected by the Special Deputy as untimely filed Proposed Findings of Fact/Conclusions of Law under Rule 60BB-2.035(19)(a). The Florida Administrative Code states, "The Parties will have 15 days from the date of the close of testimony to submit written proposed findings of fact and conclusions of law with supporting reasons." Rule 60BB-2.035(19)(a) The Code does not specify that such proposals must meet any particular criteria or format in order to be considered by the Special Deputy save that no new evidence can be introduced into the record. The Code does not provide for the striking of Proposed Findings of Fact/Conclusions of Law upon the motion of a party. Therefore, the Petitioner's Motion to strike the Joined Party's Proposed Findings of Fact/Conclusions of Law is denied. All other timely submitted Proposed Findings of Fact/Conclusions of Law were considered by the Special Deputy and those Proposed Findings of Fact and Conclusions of Law that comport with the evidence presented in the record were incorporated into the Recommended Order. Those Findings of Fact and Conclusions of Law that did not comport with the evidence presented in the record or which attempted to provide new or additional evidence were respectfully rejected.

Recommendation: It is recommended that the determination dated August 31, 2009, be REVERSED.

Respectfully submitted on June 14, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals