AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2919722

SURFSIDE REALTY
SCOTT BARR
1298 B 68TH AVENUE W
BRADENTON FL 34207

PROTEST OF LIABILITY
DOCKET NO. 2009-142052L

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 real estate agents 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 July 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 and any other workers who worked under the same terms and conditions. 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 remuneration it paid to the Joined Party and the other workers. 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 and any other real estate agents who worked under the same terms and conditions. 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 April 15, 2010. The Petitioner's Owner appeared and testified at the hearing. The Respondent appeared and was represented by a Department of Revenue representative. A Tax Auditor II appeared and testified on behalf of the Respondent. The Joined Party appeared and testified on her own behalf. The Special Deputy issued a Recommended Order on June 21, 2010.

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

1. The Petitioner is a sole proprietorship established in October 2000 for the purpose of running a real estate sales and property management business.

2. The Joined Party provided services for the Petitioner from March 1, 2008 through June 2009. The Joined Party spoke with the Petitioner's owner's wife about needing work. The Joined Party began working for the Petitioner shortly afterwards.

3. The Joined Party and the Petitioner signed an agreement provided by the Petitioner. The agreement indicated that the Joined Party would be an independent contractor to the Petitioner. The agreement set out that the Joined Party would sell real estate and be paid by commission.

4. The Joined Party began to perform additional services as a property manager for the Petitioner. The Joined Party would meet with owners, write advertisements for properties, take applications, and oversee leases. The Petitioner and the Joined Party signed an additional agreement July 3, 2008. This agreement set forth the amount that the Joined Party would be paid for taking tenant applications, for contracting new management owners, and for procurements paid by procurement owners.

5. The Joined Party set rental rates as a property manager. The Petitioner had the right to have the Joined Party alter a rental rate if the Petitioner felt it was inappropriate. The Joined Party acted without supervision with regards to the daily operations of the property management services.

6. The Petitioner provided office space for the Joined Party to perform services from. The Petitioner provided a telephone, computer, office equipment, and rental equipment to the Joined Party. The Joined Party had no expenses other than fuel consumption, cell phone bills, and private computer bills.

7. The Joined Party was paid $10 per hour in addition to the commissions in the written agreement for property management work. The Joined Party received weekly pay checks.

8. The Joined Party was licensed for real estate sales and property management.

Based on these Findings of Fact, the Special Deputy recommended the determination dated September 18, 2009, be reversed. On June 30, 2010, the Special Deputy granted an extension of time to submit exceptions to the Recommended Order. The time for submitting exceptions was extended until July 21, 2010. The Respondent's exceptions to the Recommended Order were received by mail dated July 6, 2010. The Joined Party's exceptions to the Recommended Order were received by mail dated July 17, 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.

All 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 the second paragraph of the Joined Party's exceptions, the Joined Party's exceptions to Findings of Fact #2-8 and Conclusions of Law #9 and 16-18, portions of the Respondent's exception to the Issue section on the first page of the Recommended Order, Respondent's Exceptions #1-2 and 4, portions of Respondent's Exceptions #3 and 5, the parties propose findings of fact in accord with the Special Deputy's

findings of fact, propose alternative findings of fact and conclusions of law, or attempt to enter additional evidence. 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 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 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 and 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 and Conclusions of Law and accepts the findings of fact and conclusions of law as written by the Special Deputy. Rule 60BB-2.035(19)(a), Florida Administrative Code, prohibits the acceptance of additional evidence after the hearing is closed. The parties' request for the consideration of additional evidence is respectfully denied. All exceptions that propose findings of fact in accord with the Special Deputy's findings of fact, propose alternative findings of fact and conclusions of law, or attempt to enter additional evidence are respectfully rejected.

In the remaining portions of Respondent's Exception #3 and the Respondent's exception to the Issue section on the first page of the Recommended Order, the Respondent argues that section 443.1216(1)(c), Florida Statutes, is applicable to the current case because the claimant performed "mixed services." Section 443.1216(1)(c), Florida Statutes, provides that, if a worker's services during at least one-half of a pay period are considered employment, all of the services provided by the worker during the period will be considered employment. The record reflects that the Special Deputy did not find that the Joined Party worked as an employee at any point during her relationship with the Petitioner; instead, the Special Deputy ruled that the Joined Party performed all of her real estate and property management services as an independent contractor. As a result, section 443.1216(1)(c), Florida Statutes, is not applicable to the determination of the status of the Joined Party. Competent substantial evidence in the record supports the Special Deputy's Findings of Fact. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. The remaining portions of Respondent's Exception #3 and the Respondent's exception to the Issue section on the first page of the Recommended Order are respectfully rejected.

In Respondent's Exception #5, the Respondent cites *Carnes v. Industrial Comm'n*, 73 Ariz. 264, 240 P.2d 536 (1952), in support of the conclusion that it is not necessary for an employer to direct the mode, methods, or details of the work when an individual is professionally qualified within his or her field. The Respondent also cites *Jack B. Dewey, DDS, P.A. (Corp.) v. Florida Dep't of Commerce, Div. of Employment Sec.*, 327 So.2d 237 (Fla. 4th DCA 1976), as reaffirming this principle. In *Jack B. Dewey, DDS, P.A.*, the Fourth District Court of Appeal of Florida entered a per curiam denial for writ of certiorari. *Id*. In *Carnes*, the Supreme Court of Arizona set aside a denial of workmen's compensation claims and held that an employer's right to control the services of a skilled worker can establish employee status regardless of whether or not the employer exercised that control over the worker or provided direction to the worker. 240 P.2d at 539. In the current case, a review of the record shows that the Special Deputy ultimately concluded that the Petitioner's level of control over the Joined Party was not sufficient to establish an employer/employee relationship. The Special Deputy's conclusion is supported by competent substantial evidence and reflects a reasonable application of the law to the facts. Section 120.57(1)(l), Florida Statutes, does not permit rejection of the Special Deputy's Conclusions of Law in this instance. The portion of Respondent's Exception #5 that cites *Carnes* and *Jack B. Dewey, DDS, P.A.* is respectfully rejected.

Also in Respondent's Exception #5, the Petitioner cites *Cantor v. Cochran*, 184 So.2d 173 (Fla. 1966), and offers an alternative analysis using the *Restatement* factors. In *Cantor*, 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. *Id*. at 174. A review of the record demonstrates that the Special Deputy analyzed the facts of the case at hand using the *Restatement* factors and determined that an independent contractor relationship existed between the parties. The Special Deputy's conclusion reflects a reasonable application of the law to the facts and is supported by competent substantial evidence in the record. The Agency may not reject the Special Deputy's conclusion under section 120.57(1)(l), Florida Statutes. The Respondent's request for the consideration of an alternative analysis is respectfully denied. The portion of Respondent's Exception #5 that cites *Cantor* and offers an alternative analysis is respectfully rejected.

Under section (h) of Respondent's Exception #5, the Respondent cites *Justice v. Belford Trucking Co.*, 272 So.2d 131 (Fla. 1972), in support of the conclusion that the parties' beliefs are indicative of an employment relationship in the current case. In *Justice*, 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. *Id*. at 136. In doing so, the court found that the judge "did not

recognize the employment relationship that actually existed." *Id.* The Florida Supreme Court provided guidance on how to properly approach such an analysis of a working relationship in *Keith v. News Sentinel Co*. 667 So.2d 167, 171 (Fla. 1995). 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.* In the case at hand, the Special Deputy found that the parties contracted to create an independent contractor relationship and that the actual conduct of the parties was consistent with an independent contractor relationship based on competent substantial evidence in the record. The Special Deputy's conclusion reflects a reasonable application of the law to the facts. The Respondent has not established a basis for rejecting the Special Deputy's Findings of Fact and Conclusions of Law under section 120.57(1)(l), Florida Statutes. The portion of section (h) of Respondent's Exception #5 that cites *Justice* 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.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by both the Joined Party and the Respondent, 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 September 18, 2009, is REVERSED.

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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107 EAST MADISON STREET
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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 September 18, 2009.

After due notice to the parties, a telephone hearing was held on April 15, 2010. The Petitioner's owner appeared and testified at the hearing. The Joined Party appeared and testified on her own behalf. A representative appeared and a tax auditor 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 not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals as real estate agents 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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a sole proprietorship established in October 2000 for the purpose of running a real estate sales and property management business.

2. The Joined Party provided services for the Petitioner from March 1, 2008 through June 2009. The Joined Party spoke with the Petitioner's owner's wife about needing work. The Joined Party began working for the Petitioner shortly afterwards.

3. The Joined Party and the Petitioner signed an agreement provided by the Petitioner. The agreement indicated that the Joined Party would be an independent contractor to the Petitioner. The agreement set out that the Joined Party would sell real estate and be paid by commission.

4. The Joined Party began to perform additional services as a property manager for the Petitioner. The Joined Party would meet with owners, write advertisements for properties, take applications, and oversee leases. The Petitioner and the Joined Party signed an additional agreement July 3, 2008. This agreement set forth the amount that the Joined Party would be paid for taking tenant applications, for contracting new management owners, and for procurements paid by procurement owners.

5. The Joined Party set rental rates as a property manager. The Petitioner had the right to have the Joined Party alter a rental rate if the Petitioner felt it was inappropriate. The Joined Party acted without supervision with regards to the daily operations of the property management services.

6. The Petitioner provided office space for the Joined Party to perform services from. The Petitioner provided a telephone, computer, office equipment, and rental equipment to the Joined Party. The Joined Party had no expenses other than fuel consumption, cell phone bills, and private computer bills.

7. The Joined Party was paid $10 per hour in addition to the commissions in the written agreement for property management work. The Joined Party received weekly pay checks.

8. The Joined Party was licensed for real estate sales and property management.

Conclusions of Law:

9. 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.

10. 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).

11. 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).

12. 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.

13. 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.

14. 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.

15. The evidence revealed in this case shows that the Joined Party began performing services with the Petitioner as a commission only real estate sales person. Florida Statutes Section 443.1216(13)(n) holds those services performed by an individual as a real estate salesperson if all of the service performed is performed solely for commission. The statute covers the period of service up until the Joined Party and the Petitioner enacted a contract for property management services on July 3, 2008.

16. The record reflects that the Petitioner and the Joined Party entered into an additional contract July 3, 2008. The Joined Party began performing property management services for the Petitioner. The record shows that the Joined Party was paid by commission and by hourly wage for property management services. Florida Statute Section 443.1216(13)(n) does not apply to the period of service in which the Joined Party was paid an hourly wage.

17. The Joined Party, while acting as a property manager, was allowed to set the rental rates for the properties. The Joined Party was able to act without supervision from the Petitioner. While the Petitioner retained the right to alter a rental rate that was deemed unreasonable, the Petitioner did not exercise control over the manner of the work.

18. 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). The preponderance of the evidence in this case reveals that the Petitioner did not establish sufficient control over the Joined Party so as to create an employer-employee relationship between the Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated September 18, 2009, be REVERSED.

Respectfully submitted on June 18, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals