AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2741781

DIVERSIFIED ENERGY GROUP INC
CANDIE VITANI
140 INTRACOASTAL POINTE DR STE 211
JUPITER FL 33477-5064

PROTEST OF LIABILITY
DOCKET NO. 2009-145230L

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

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

A telephone hearing was held on July 9, 2010. The Petitioner, represented by its President, appeared and testified. The Respondent was represented by a Department of Revenue Tax Specialist II. Another Department of Revenue Tax Specialist II appeared as a witness and testified on behalf of the Respondent. The Joined Party appeared and testified on his own behalf. The Special Deputy issued a Recommended Order on August 26, 2010.

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

1. The Petitioner is a subchapter C corporation incorporated in October 2006 for the purpose of running an energy company.

2. The Joined Party performed services making telephone sales for the Petitioner from February 2008 through October 2008.

3. The Joined Party was previously known by the Petitioner which led to the Joined Party submitting a resume and application to the Petitioner. The Joined Party was retained to make telephone sales of product for the Petitioner. The Joined Party signed a written agreement and was informed at the time of hire that he was working as an independent contractor.

4. The Petitioner provided a contract which the Joined Party signed at the time of hire. The contract was titled *Independent Contractor Agreement.* The contract indicated that the relationship between the parties was an independent contractor relationship. The contract required that the Petitioner had the right to inspect the Joined Party's books and records. The contract set forth that the Joined Party would be responsible for his own supplies, equipment, and office space. The contract contained a non-disclosure clause, as well as covenants not to solicit or recruit customers or employees of the Petitioner. The contract required that the Joined Party follow all of the Petitioner's company policies, rules, and regulations.

5. The Joined Party was not allowed to subcontract or hire assistants.

6. The Joined Party would contact leads provided by the Petitioner in an attempt to make sales. The Joined Party's communication with potential clients was monitored to make certain that no misleading statements were made to the potential client. The Petitioner would correct the Joined Party in the event that there was puffing or a mistaken statement was made.
7. The Petitioner supplied the Joined Party with an office and telephone. The Petitioner provided access to a computer to the Joined Party.

8. The Joined Party reported to work at 8 or 8:30 each morning 5 days per week. While the Joined Party did minor work from home, the bulk of the services were performed at the Petitioner's place of business and within the Petitioner's hours of operation.

9. The Petitioner discharged the Joined Party without notice, due to a problem with one of the Petitioner's employees.

10. The Joined Party was paid a commission for sales made with a draw against the commission.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated September 22, 2009, be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail postmarked September 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.

The Petitioner's exceptions propose alternative findings of fact and conclusions of law and attempt to enter additional evidence. The Petitioner also takes exception to Findings of Fact #3, 6 and 9. 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's Findings of Fact, including Findings of Fact #3, 6 and 9, are supported by competent substantial evidence in the record. A review of the record also reveals that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Agency may not modify the Special Deputy's Findings of Fact 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. Rule 60BB-2.035(19)(a), Florida Administrative Code, prohibits the acceptance of additional evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. All of the Petitioner's exceptions are respectfully rejected.

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

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

In consideration thereof, it is ORDERED that the determination dated September 22, 2009, is AFFIRMED.

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

GREAT SEAL OF THE STATE OF FLORIDA
IN GOD WE TRUST

_____
TOM CLENDENNING,
Assistant Director
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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PROTEST OF LIABILITY
DOCKET NO. 2009-145230L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated September 22, 2009.

After due notice to the parties, a telephone hearing was held on July 9, 2010. The Petitioner's president appeared and provided testimony 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 not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals 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 a subchapter C corporation incorporated in October 2006 for the purpose of running an energy company.

2. The Joined Party performed services making telephone sales for the Petitioner from February 2008 through October 2008.

3. The Joined Party was previously known by the Petitioner which led to the Joined Party submitting a resume and application to the Petitioner. The Joined Party was retained to make telephone sales of product for the Petitioner. The Joined Party signed a written agreement and was informed at the time of hire that he was working as an independent contractor.

4. The Petitioner provided a contract which the Joined Party signed at the time of hire. The contract was titled *Independent Contractor Agreement.* The contract indicated that the relationship between the parties was an independent contractor relationship. The contract required that the Petitioner had the right to inspect the Joined Party's books and records. The contract set forth that the Joined Party would be responsible for his own supplies, equipment, and office space. The contract contained a non-disclosure clause, as well as covenants not to solicit or recruit customers or employees of the Petitioner. The contract required that the Joined Party follow all of the Petitioner's company policies, rules, and regulations.

5. The Joined Party was not allowed to subcontract or hire assistants.

6. The Joined Party would contact leads provided by the Petitioner in an attempt to make sales. The Joined Party's communication with potential clients was monitored to make certain that no misleading statements were made to the potential client. The Petitioner would correct the Joined Party in the event that there was puffing or a mistaken statement was made.
7. The Petitioner supplied the Joined Party with an office and telephone. The Petitioner provided access to a computer to the Joined Party.

8. The Joined Party reported to work at 8 or 8:30 each morning 5 days per week. While the Joined Party did minor work from home, the bulk of the services were performed at the Petitioner's place of business and within the Petitioner's hours of operation.

9. The Petitioner discharged the Joined Party without notice, due to a problem with one of the Petitioner's employees.

10. The Joined Party was paid a commission for sales made with a draw against the commission.

Conclusions of Law:

11. 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.

12. 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).

13. 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).

14. 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.

15. 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.
16. 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.
17. The evidence presented at the hearing revealed that the Petitioner exercised control over how and when the Joined Party performed the work. The Petitioner supervised the sales while they were being made by the Joined Party. The Petitioner maintained the right to step in and correct the Joined Party at any time during the sale if the Joined Party departed from the manner in which the Petitioner wanted the sale to be made. The Joined Party was required to personally perform most of the work at the Petitioner's place of business and during the Petitioner's business hours.
18. The Petitioner provided a contract which the Joined Party signed. The contract specified an independent contractor relationship between the parties. 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."
19. The Petitioner had, and exercised, the right to discharge the Joined Party at anytime and without liability. 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."

20. The preponderance of the evidence revealed in this case demonstrates that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated September 22, 2009, be AFFIRMED.

Respectfully submitted on August 26, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals