AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2923053
CATHY CLEANS
170 FRANKFORD LANE
PALM COAST FL 32137-4422

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

PROTEST OF LIABILITY
DOCKET NO. 2009-159945L

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 October 14, 2009, is AFFIRMED. It is also ORDERED that the Petitioner's request for waiver of penalty and interest is denied.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
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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CATHY VANDERBRINK
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PROTEST OF LIABILITY
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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 October 14, 2009.

After due notice to the parties, a telephone hearing was held on March 16, 2010. The Petitioner was represented by its attorney. The Petitioner appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified. The Joined Party 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 received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as housekeeping cleaners 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 is entitled to a waiver of penalty and interest for delinquent reports pursuant to Section 443.141(1), Florida Statutes and Rule 60BB-2.028(4), Florida Administrative Code.

Findings of Fact:

1. The Petitioner is an individual who attempted to start a construction cleaning business in May 2006. She was not successful cleaning new construction projects and in the middle of March 2007 the Petitioner obtained a contract to clean six condominium units. The Petitioner operates the

residential cleaning business as a sole proprietor. Beginning in March 2007 the Petitioner hired other workers to clean the condominiums. The Petitioner obtained additional contracts to clean condominiums and residences and placed help wanted advertisements in a local newspaper to hire additional individuals to do the cleaning.

2. A friend of the Joined Party did cleaning for the Petitioner and informed the Joined Party that the Petitioner was seeking workers to clean condominiums and residences. The Joined Party contacted the Petitioner and was interviewed. The Petitioner told the Joined Party that the rate of pay was $30 for a two bedroom condominium, $35 for a three bedroom condominium, and $8.50 per hour for residences. The Petitioner told the Joined Party that the Joined Party would be a self contractor paid by a 1099. The Joined Party accepted the offer of work on or about November 30, 2007.

3. The Petitioner provided the Joined Party with a *Sub-contract Information Sheet* which the Joined Party was required to sign. The Petitioner required all of the workers to sign a *Sub-contract Information Sheet. The Sub-contract Information Sheet* states "I understand that the money I earn, working for Cathy Cleans!!!, will be as a sub-contractor, and that I will be responsible for my own federal taxes (no federal withholding, Social Security, or Medicare tax, will be withheld from my pay) and that I, and the IRS, will receive a Form 1099-MISC, from Cathy Cleans!!!, listing the amount of income, that I earned, at the end of the tax year." The Joined Party signed the *Sub-contract Information Sheet* on November 30, 2007.

4. The Joined Party's first two days of work were for training. The Joined Party was trained by the Petitioner and the Petitioner showed the Joined Party how the Petitioner wanted the work to be performed. The Petitioner paid the Joined Party $8.50 per hour during the training period.

5. The Petitioner told the Joined Party to report for work at a meeting point, usually a shopping center parking lot. The Petitioner determined the days of work and the meeting times. The workers would assemble at that place and time and the Petitioner would then assign the workers to ride to the work sites with a supervisor. When the work day was finished the supervisor would contact the Petitioner so that the Petitioner could compute the time worked by the housekeeping cleaners. The cleaners were not required to complete timesheets or keep track of the time worked.

6. The Petitioner provided all of the cleaning supplies and the equipment that was necessary to perform the work. When each condominium or residence was completed it was inspected by the supervisor or by the Petitioner.

7. After the Joined Party worked for the Petitioner for approximately two months, the Petitioner promoted the Joined Party to the position of supervisor. The Petitioner increased the Joined Party's hourly rate of pay to $9.50 per hour.

8. As a supervisor the Joined Party was responsible for transporting the workers, the cleaning supplies, and the equipment in her own car to the work locations. The Joined Party did not have any expenses in connection with the work other than the use of her car to transport the workers, supplies, and equipment.

9. The Petitioner provided the Joined Party with a list of the condominiums and the residences to be cleaned, the order in which they were to be cleaned, and the times that the Joined Party was to arrive at each condominium or residence. The Joined Party was not allowed to deviate from the schedule. If the Joined Party was delayed in arriving at a work location, the Joined Party was responsible for contacting the Petitioner's client. Although the Joined Party was responsible for supervising the work of the cleaners, the Petitioner or the Petitioner's husband also inspected the work after it was inspected by the Joined Party.

10. The Joined Party was responsible for training new housekeeping cleaners. The Joined Party did not usually do cleaning but she was responsible for supervising the workers and checking their

work. The Joined Party did not have the authority to hire new workers and she did not have the authority to discharge workers. The Joined Party could warn a worker and could recommend that the Petitioner discharge the worker. During 2008 the Petitioner had 128 workers, all of whom the Petitioner classified as subcontractors. However, the Petitioner usually only had 12 to 20 workers at a time. Many of the workers were discharged by the Petitioner due to unsatisfactory performance.

11. The Joined Party did not have her own business. She did not have a business license, did not have workers' compensation insurance, did not have business liability insurance, did not advertise, and did not offer services to the general public. While working for the Petitioner the Joined Party did not perform any services for others. The Joined Party was required to personally perform the work for the Petitioner and she could not hire others to perform the work for her.

12. The Petitioner did not withhold any taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as paid holidays, paid vacations, health insurance, or retirement benefits. At the end of 2008 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

13. Either party had the right to terminate the relationship at any time without a breach of contract penalty. The Petitioner warned the Joined Party about her work performance and on December 11, 2008, the Petitioner terminated the Joined Party due to attendance issues.

14. The Joined Party filed a claim for unemployment compensation benefits effective September 6, 2009. When the Joined Party did not receive credit for the earnings which she received from the Petitioner, the Joined Party filed a *Request for Reconsideration of Monetary Determination.* On October 14, 2009, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services as housekeeping cleaners were the Petitioner's employees. Among other things the determination states that even if the Petitioner files a written protest the Petitioner is still required to submit quarterly reports to include those workers covered under the determination and that if the protest results in a ruling in the Petitioner's favor, the Department of Revenue will refund the taxes paid as a result of the determination.

15. The Petitioner filed a written protest which was received by the Department of Revenue on October 29, 2009.

16. The Petitioner did not submit the quarterly reports as required by the October 14, 2009, determination. On November 10, 2009, the Department of Revenue issued a *Notice of Final Assessment* based on an estimate of the taxes that were due. In addition the Department assessed penalties as a result of the Petitioner's failure to file the quarterly reports. On November 30, 2009, through its attorney, the Petitioner protested the *Notice of Final Assessment.* At the hearing held on March 16, 2010, the Petitioner's attorney requested that the special deputy take jurisdiction on the issue of waiver of penalty and interest. As on March 16, 2010, the Petitioner had not filed the quarterly reports.

Conclusions of Law:

17. 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.

18. 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).

19. 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).

20. 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.

21. 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.

22. 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.

23. 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.

24. The Petitioner required the Joined Party to sign a *Sub-contract Information Sheet*, an agreement which states that the Joined Party is a subcontractor. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented

"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."

25. The Petitioner's business is the cleaning of condominiums and residences. Initially, the Joined Party worked for the Petitioner as a cleaner but was later promoted to the position of supervisor over the cleaners. As a supervisor the Joined Party was responsible for supervising the cleaners and checking their work. Whether the Joined Party did the actual cleaning or supervised the other cleaners, her work was an integral and necessary part of the Petitioner's business.

26. The Joined Party performed services exclusively for the Petitioner. She was required to personally perform the work and could not hire others to perform the work for her. Everything that was needed to perform the work, with the exception of transportation, was provided by the Petitioner. The Joined Party was not at risk of suffering a financial loss from performing services. The Joined Party did not have an occupational license, did not have liability insurance, and did not advertise her services. The Joined Party was not involved in a business that was separate and distinct from the Petitioner's business.

27. The Petitioner provided initial training for the Joined Party. The work performed by the Joined Party for the Petitioner did not require any special skill or knowledge. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

28. The Petitioner determined the method and rate of pay. The Petitioner determined the days and hours of work. Although the Petitioner did not withhold payroll taxes from the pay, the lack of payroll tax withholding, standing alone, does not establish an independent contractor relationship.

29. The Joined Party performed services exclusively for the Petitioner for a period of over one year. Either party could terminate the relationship at any time without incurring liability. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the Joined Party due to attendance issues in December 2008. 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."

30. The Joined Party was supervised by the Petitioner. The Petitioner controlled what work was performed, when it was performed, and how it was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

31. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as housekeeping cleaners and or housekeeping cleaner supervisors constitute insured employment.

32. In its proposed conclusions of law the Petitioner cites Chapter 440, Florida Statutes, for the definitions of "employee" and "Independent Contractor." Chapter 440 is the Florida Workers'

Compensation Law and does not govern whether an employing unit is subject to the requirements of the Florida Unemployment Compensation Law, Chapter 443, Florida Statutes. Therefore, the Petitioner's proposed conclusion is respectfully rejected.

33. Section 443.141(2)(c), Florida Statutes, provides:

(c) *Appeals.*--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131. (emphasis supplied)

34. Rule 60BB2.025(1), Florida Administrative Code, provides:

(b) Each quarterly report must:

1. Be filed with the Department of Revenue by the last day of the month following the calendar quarter to which the report applies, except for reports filed by electronic means, which are to be filed as provided in Rule 60BB-2.023, F.A.C. However, an employer reporting for the first time is authorized 15 consecutive calendar days from the notification of liability to submit reports for previous calendar quarters without incurring penalty charges; and

2. Be filed for each calendar quarter during which the employer was liable, even if no contributions are payable. If there was no employment during the calendar quarter to which the report applies, the report must be completed to so reflect.

35. Section 443.141, Florida Statutes provides:

(1) Past Due Contributions and Reimbursements.

(a)Interest. Contributions or reimbursements unpaid on the date due shall bear interest at the rate of 1 percent per month from and after that date until payment plus accrued interest is received by the tax collection service provider, unless the service provider finds that the employing unit has or had good reason for failure to pay the contributions or reimbursements when due. Interest collected under this subsection must be paid into the Special Employment Security Administration Trust Fund.

(b) Penalty for delinquent reports.

1. An employing unit that fails to file any report required by the Agency for Workforce Innovation or its tax collection service provider, in accordance with rules for administering this chapter, shall pay to the tax collection service provider for each delinquent report the sum of $25 for each 30 days or fraction thereof that the employing unit is delinquent, unless the agency or its service provider, whichever required the report, finds that the employing unit has or had good reason for failure to file the report.

36. The determination of October 14, 2009, notified the Petitioner that the Petitioner was required to submit quarterly reports and to pay tax on the wages of the workers, pending the outcome of the written protest. The Petitioner has not complied. Thus, the quarterly tax reports are delinquent and are subject to late filing penalties.

37. Section 443.141(2), Florida Statutes, provides:

(a) *Failure to make reports and pay contributions.*--If an employing unit determined by the tax collection service provider to be an employer subject to this chapter fails to make and file any report as and when required by this chapter or by any rule of the Agency for Workforce Innovation or the state agency providing tax collection services, for the purpose of determining the amount of contributions due by the employer under this chapter, or if any filed report is found by the service provider to be incorrect or insufficient, and the employer, after being notified in writing by the service provider to file the report, or a corrected or sufficient report,

as applicable, fails to file the report within 15 days after the date of the mailing of the notice, the tax collection service provider may:

1. Determine the amount of contributions due from the employer based on the information readily available to it, which determination is deemed to be prima facie correct;

2. Assess the employer the amount of contributions determined to be due; and

3. Immediately notify the employer by registered or certified mail of the determination and assessment including penalties as provided in this chapter, if any, added and assessed, and demand payment together with interest on the amount of contributions from the date that amount was due and payable.

38. Rule 60BB-2.028, Florida Administrative Code, provides in pertinent part:

(4) Waiver of Penalty and Interest. Pursuant to Sections 443.1316 and 443.141(1), F.S., the Department is authorized to waive imposition of interest or penalty when the employer files a written request for waiver establishing that imposition of interest or penalty would be inequitable, however, the Department will not consider a request for waiver of penalty until the employer has filed all reports due for the five years immediately preceding the request for waiver. (emphasis supplied)

Recommendation: It is recommended that the determination dated October 14, 2009, be AFFIRMED. It is recommended that the Petitioner's request for waiver of penalty and interest be denied.

Respectfully submitted on April 19, 2010.

R. O. SMITH, Special Deputy
Office of Appeals