AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2574270
THE DIGITAL OFFICE CORP
307 CRANES ROOST BLVD
ALTAMONTE SPRINGS FL 32701

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

PROTEST OF LIABILITY
DOCKET NO. 2009-159946L

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 9, 2009, is MODIFIED to reflect a retroactive date of January 1, 2005. It is also ORDERED that the determination is AFFIRMED as modified.

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

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

PETITIONER:
Employer Account No. - 2574270
THE DIGITAL OFFICE CORP
PEDRO GONZALEZ
307 CRANES ROOST BLVD
ALTAMONTE SPRINGS FL 32701

PROTEST OF LIABILITY
DOCKET NO. 2009-159946L

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 9, 2009.

After due notice to the parties, a telephone hearing was held on April 14, 2010. The Petitioner's owner appeared and testified. The Joined Party appeared and testified on his own behalf. A tax specialist 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 sales agent/account managers 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 was a subchapter S corporation incorporated in November 2004 for the purpose of running a sales company. The Petitioner contracted with a client company to make sales on behalf of the client company. The Petitioner has employed account managers since January 1, 2005.

2. The Joined Party provided services as an account manager from March 15, 2007, through December 31, 2008. The Petitioner contacted the Joined Party after receiving a copy of the Joined Party's resume. The Joined Party interviewed with the Petitioner and was hired for the job.

3. The Joined Party signed a job offer provided by the Petitioner. The Joined Party was provided a written job description by the Petitioner.

4. The Petitioner provided training required by the client company to the Joined Party. The initial training was a 4 day course. The Petitioner paid for the Joined Party's fuel and hotel expenses during the training.

5. The Joined Party was expected to report to work at the Petitioner's place of business between 8:30 and 9:00 A.M. Monday through Friday. The Joined Party was expected to work until 5:00 P.M. The Joined Party would spend the first part of the day going over his customer lists and paperwork. The Joined Party would travel during the day to meet with customers. The Joined Party was a key-holder for the Petitioner's place of business and allowed to work outside of the normal business hours.

6. The Joined Party worked under the supervision of the Petitioner. The Petitioner instructed the Joined Party in how to do the work and what requirements should be met.

7. The Joined Party was paid a monthly salary along with a commission. The starting monthly salary for the Joined Party was $1250. The starting commission was 45% of profit on sales. The Joined Party was also provided $1,600 warranty commission for the first two months of employment. The Petitioner unilaterally changed the rate of pay several times during the relationship for economic and performance reasons. The final agreement eliminated the salary and paid a base 40% commission on profits. The Joined Party was paid $23,658.65 in 2008.

8. The Joined Party was free to quit at anytime without liability. The Joined Party was separated from the Petitioner when the Petitioner decided to shut down the business on December 31, 2008.

9. The Petitioner provided office space, computer, telephone, and equipment necessary for the Joined Party to perform his duties. The Petitioner also paid a sum to compensate the Joined Party for the use of the Joined Party's vehicle and fuel when meeting with clients. The Joined Party had no expenses in connection with the work. The Petitioner paid the Joined Party occasional bonuses.

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 the hearing revealed that the Petitioner controlled the time, manner, and location the Joined Party performed the work. The Petitioner provided training to the Joined Party as well as regular monitoring and guidance in the performance of the Joined Party's duties.

8. The relationship was terminable at will. Either party had the right to end the relationship at anytime without liability. The Joined Party was discharged by the Petitioner when the Petitioner closed his business. 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."

9. The Petitioner provided the office space and all equipment necessary to perform the work. The Petitioner compensated the Joined Party for the use of fuel when meeting with clients. The Joined Party had no expenses in conjunction with the work.

10. The Petitioner controlled the financial aspects of the relationship. The Petitioner changed the rate of pay from that offered at the time of hire on more than one occasion. The Petitioner altered the method for determining pay for the Joined Party from salary plus commission to commission only.

11. A preponderance of the evidence in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

12. The determination issued by the Department of Revenue holds that the Joined Party and other persons performing services for the Petitioner as sales agents/account managers are the Petitioner's employees retroactive to March 1, 2007. However, the Petitioner had individuals performing services as sales agents/account managers beginning January 1, 2005. Therefore, the correct retroactive date is January 1, 2005.

Recommendation: It is recommended that the determination dated October 9, 2009, be MODIFIED to reflect a correct retroactive date of January 1, 2005. As Modified, it is recommended that the determination be AFFIRMED

Respectfully submitted on June 14, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals