AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1546112
SUPERPET GROOMERS INC
1007 W STATE ROAD 84
FORT LAUDERDALE FL 33315-2433

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

PROTEST OF LIABILITY
DOCKET NO. 2009-163933L

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 15, 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 **June, 2010**.

TOM CLENDENNING
Director, Unemployment Compensation Services
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. - 1546112
SUPERPET GROOMERS INC
DIANE MATTHEW
1007 W STATE ROAD 84
FORT LAUDERDALE FL 33315-2433

PROTEST OF LIABILITY
DOCKET NO. 2009-163933L

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 15, 2009.

After due notice to the parties, a telephone hearing was held on March 24, 2010. The Petitioner, represented by the Petitioner's president, appeared and testified. A pet groomer testified as a witness. The Respondent was represented by a Department of Revenue Tax Specialist II.

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 working as groomers/bathers 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 corporation which was formed in approximately 1995 to operate a pet grooming business. The Petitioner registered for payment of unemployment compensation taxes effective October 1, 1997.
2. The Petitioner's president is active in the operation in the business and is the Petitioner's only acknowledged employee. The Petitioner's president grooms the dogs for the business. In addition, the Petitioner has used other individuals to bathe the dogs and to groom dogs since the inception

of the business. The Petitioner is not interested in taking out taxes from the pay of the groomers and bathers because she does not want to deal with the paperwork. The Petitioner has classified all other workers, including the Joined Party, as independent contractors.

3. The Joined Party walked into the Petitioner's shop in March 2008 and asked for a job. At the time the Petitioner needed a bather and interviewed the Joined Party. The president asked the Joined Party if she was afraid of dogs and the Joined Party told the president that she had previous employment as a dog bather. The president did not feel that it was necessary to tell the Joined Party anything else about the job because bathing dogs is not "rocket science." The Petitioner offered the job to the Joined Party and the Joined Party accepted. The Petitioner and the Joined Party did not enter into any written agreement or contract.

4. The Joined Party began work on March 8, 2008. The hours of work were 8 AM until there were no more dogs to be bathed. The Petitioner kept track of the hours worked by the Joined Party and paid the Joined Party by the hour. The hourly rate of pay was determined by the Petitioner. The Petitioner paid the Joined Party on a weekly basis and did not withhold any taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits to the Joined Party. If the Joined Party washed a specified number of dogs in a day, the Petitioner paid a bonus to the Joined Party.

5. The Joined Party performed the work in the Petitioner's shop. The shop is small and the Joined Party worked approximately six feet from the president. The president and the Joined Party could see customers as the customers entered the shop, however, the Joined Party did not generally have any contact with the customers. The Joined Party did not have the authority to determine the amount of the customer charges and did not have authority to call the customers to tell the customers that the dogs were ready to pick up.

6. The Petitioner provided everything that was needed to perform the work. The Petitioner provided all of the tools, equipment, and supplies that were needed to perform the work. The Joined Party did not pay the Petitioner for use of the facilities, equipment, tools, or supplies.

7. The Petitioner determined the sequence in which the dogs were to be bathed. The Joined Party was required to inform the Petitioner when she completed bathing each dog.

8. The work performed by the Joined Party did not require any special skill or knowledge. The Petitioner's president worked alongside the Joined Party and observed the Joined Party as the Joined Party performed the work. The President also evaluated how well the Joined Party had bathed the dogs. The president found the Joined Party's work to be satisfactory and gave the Joined Party a pay increase. The Petitioner trained the Joined Party how to groom dogs. Generally, the Petitioner hires individuals to bathe dogs and subsequently trains the individuals to groom the dogs for the Petitioner.

9. Either party could terminate the relationship at any time without incurring liability. In August 2008 the Petitioner decided to give the Joined Party a pay raise because the Joined Party had completed training provided by the Petitioner. The Petitioner was going to tell the Joined Party about the pay raise on August 2, 2008, however, the Joined Party never returned to work.

10. The Joined Party filed an initial claim for unemployment compensation benefits effective July 5, 2009. A determination was issued holding that the Joined Party did not have wage credits from services performed for the Petitioner and the Joined Party filed a *Request for Reconsideration of Monetary Determination*. An investigation was conducted by the Department of Revenue and on October 15, 2009, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as groomers were the Petitioner's employees retroactive to April 1, 2008. The Petitioner filed a timely protest.

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.

17. 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.

18. The only agreement between the parties in this case was a verbal agreement that the Joined Party would bathe dogs for the Petitioner. No evidence was presented to show the existence of an agreement that the Joined Party would perform services as an independent contractor. However, even if the parties had a verbal agreement to that effect, a statement in an agreement that the 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). The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), that while the obvious purpose to be accomplished by an agreement is 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's business is the grooming of dogs. The work performed for the Petitioner by the Joined Party, the bathing of dogs, was not separate and distinct from the Petitioner's business but was a necessary and integral part of the business. The Petitioner provided the place of work and all equipment, tools, and supplies that were needed to perform the work. The Joined Party did not generally have contact with the dog owners, the Petitioner's customers. The Petitioner determined the amounts charged to the dog owners for the bathing and grooming of the dogs.

20. The Petitioner supervised the Joined Party's work and determined the sequence that the dogs were to be bathed. The Petitioner unilaterally determined the method and rate of pay. Based on the Petitioner's evaluation of the Joined Party's performance, the Petitioner increased the hourly rate of pay. The Petitioner was also going to increase the pay in August 2008 even though the Joined Party was never informed of that decision. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

21. Bathing dogs is not "rocket science" and does not require any special knowledge or skill. 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)

22. The working relationship between the Petitioner and the Joined Party was a continuing relationship rather than for a specified period of time. The Joined Party worked every week for a period of approximately five months. Either party had the right to terminate the relationship at any time without incurring liability. These facts reveal the existence of an at-will relationship of relative permanence. 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."

23. The Petitioner controlled what work was performed, where it was performed, when it was performed, and how it was performed. The Petitioner controlled the financial aspects of the relationship. 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.

24. The facts of this case reveal that the services performed for the Petitioner by the Joined Party and other individuals as groomers/bathers constitute insured employment. The determination of the Department of Revenue contains a retroactive date of April 1, 2008, even though the Joined Party began work prior to April 1, 2008. In addition, the Petitioner's testimony reveals that the Petitioner has employed groomers/bathers since the inception of the business in 1995.

25. Rule 60BB-2.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which the services were rendered. Thus, the Petitioner's liability for payment of unemployment compensation taxes on the earnings of its groomers/bathers is limited to a retroactive date of January 1, 2005.

Recommendation: It is recommended that the determination dated October 15, 2009, be MODIFIED to reflect a retroactive date of January 1, 2005. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on April 19, 2010.

R. O. SMITH, Special Deputy
Office of Appeals