AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1531083
AF AGENCIES INC
200 NW 6TH AVE
HALLANDALE BEACH FL 33009-4022

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

PROTEST OF LIABILITY
DOCKET NO. 2009-164780L

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 September 9, 2009, is REVERSED.

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

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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 9, 2009.

After due notice to the parties, a telephone hearing was held on July 14, 2010. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 not received.

Issue:

Whether services performed for the Petitioner by the Joined Party as a floor restoration and janitorial worker constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation, formed in 1992, which operates a floor polishing and restoration business in South Florida. The Petitioner's president is active in the operation of the business as the business manager.
2. On or about September 1, 2004, the president hired the Joined Party as an independent contractor to polish floors using the Petitioner's equipment. The cost of the polishing machine is approximately $20,000. The Petitioner's president does not know how to operate the machine and the Joined Party informed the president that the Joined Party was an experienced operator.

3. Because of the high cost of the equipment it is customary for subcontractors to use the contractor's equipment to polish floors in South Florida.
4. There was no written agreement or contract between the Petitioner and the Joined Party.
5. The president bid on floor restoration jobs. In submitting an estimate the president would determine how many days it would take to polish the floor. The job would then be offered to the Joined Party based on a daily pay rate. If the Petitioner estimated that the job would take three days to complete and the Joined Party was able to complete the job in two days, the Petitioner paid the Joined Party for three days.
6. The Petitioner's president inspected the completed work. If the Petitioner determined that the work was not performed properly by the Joined Party the Joined Party was required to redo the work without additional pay.
7. The Petitioner did not withhold any payroll taxes from the pay. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
8. The Joined Party was allowed to work for other floor polishing companies. The Joined Party was allowed to hire others to perform the work for him at his own expense. The Joined Party told the Petitioner's president that he performed work for other floor polishing companies.
9. The Joined Party would periodically contact the Petitioner to see if work was available. Sometimes, the Petitioner would not hear from the Joined Party for weeks at a time.
10. The Petitioner found the Joined Party to be a good worker. The Petitioner wanted the Joined Party to work for the Petitioner as a full time employee and offered to put the Joined Party on the payroll. Each time that the Petitioner made that offer the Joined Party declined and stated that he wanted to work as an independent contractor.
11. The Joined Party worked for the Petitioner until December 2008.

Conclusions of Law:

12. 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.
13. 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).
14. 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).
15. 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.
16. 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.

17. 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.

18. 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.

19. Although the Petitioner and the Joined Party did not enter into any written agreement or contract the testimony of the Petitioner and the statements made to the Petitioner by the Joined Party clearly indicate that it was the intent of the parties to establish and maintain an independent contractor relationship.

20. Although the Petitioner provided the equipment, the Petitioner's testimony reveals that it is customary for contractors to provide the floor polishing equipment to subcontractors because of the high cost of the equipment.

21. The Joined Party was paid by the job rather than by actual time worked. No payroll taxes were withheld from the pay. At the end of each year the Joined Party's earnings were reported to the Internal Revenue Service as nonemployee compensation.

22. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the

extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

23. The testimony of the Petitioner's president reveals that the Petitioner was only concerned with the finished product rather than the methods used to perform the work. Thus, it is concluded that the services performed for the Petitioner by the Joined Party do not constitute insured employment.

Recommendation: It is recommended that the determination dated September 9, 2009, be REVERSED.

Respectfully submitted on July 20, 2010.

R. O. SMITH, Special Deputy
Office of Appeals