AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 0660395
GARDNERS SUPERMARKETS INC #6
18001 OLD CUTLER RD STE 362
VILLAGE OF PALMETTO BAY FL 33157-6433

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

PROTEST OF LIABILITY
DOCKET NO. 2009-165510L

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 July 20, 2009, is AFFIRMED.

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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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 July 20, 2009.

After due notice to the parties, a telephone hearing was held on March 9, 2010. The Petitioner, represented by its president/general counsel, appeared and testified. The Petitioner's Human Resource Manager testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 not received.

Issue: Whether services performed for the Petitioner by the Joined Party and other individuals working as mechanics/laborers 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. Farm Stores Corporation is a corporation which currently operates thirty-eight small drive-through stores which primarily sell dairy products. In approximately November 2006 Farm Stores Corporation purchased a chain of gourmet or fine food supermarkets by the name of Gardner's Supermarkets. Each supermarket was incorporated separately. Farm Stores Corporation continues to operate the supermarkets as separate corporations. Farm Stores Corporation currently operates five Gardner's Supermarkets.
2. The Joined Party, Domingo Castillo, heard that Farm Stores was looking for maintenance help and applied for work in approximately 1999. The Joined Party was interviewed and hired by the

owners. There was no discussion concerning whether the Joined Party was hired to be an employee or whether he was hired as a self employed contractor. At the time Farm Stores Corporation operated approximately seventy stores and the Joined Party's duties were to do whatever Farm Stores Corporation needed the Joined Party to do at any of the store locations. The person who was in charge of store maintenance told the Joined Party what to do and how to do the work. One of the Joined Party's primary responsibilities was to repair refrigeration equipment. The Joined Party was not licensed to operate a business to perform refrigeration repair work.

3. The Joined Party's work schedule was Monday through Friday. The Joined Party also worked on Saturday if he was called in due to an emergency repair. The Joined Party reported to the corporate office and was then sent to the individual stores. The Joined Party was instructed as to what needed to be done and how to do it by the maintenance supervisor. The Joined Party worked eight to ten hours per day and from forty to sixty hours during a typical work week.

4. Farm Stores Corporation paid the Joined Party by the hour at an hourly rate of pay determined by Farm Stores. Farm Stores never formally put the Joined Party on the payroll and did not withhold taxes from the Joined Party's pay. Farm Stores did not provide any fringe benefits such as paid holidays, paid vacations, paid sick time, bonuses, health insurance, or retirement benefits. Farm Stores reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

5. The Joined Party used his own car while working. Farm Stores provided the Joined Party with a sign, bearing the name and logo of Farm Stores, which the Joined Party was required to have on his car while working. Farm Stores reimbursed the Joined Party for his mileage while driving from store to store. The mileage reimbursement rate was determined by Farm Stores.

6. The Joined Party used his own hand tools; however, Farm Stores provided any equipment that was needed to perform the work. The Joined Party was reimbursed by Farm Stores if he had to purchase any materials or supplies. Farm Stores provided the Joined Party with a helper. The Joined Party was responsible for supervising the work performed by the helper. The Joined Party never hired and paid others to perform the work for him.

7. It was the belief of the Joined Party that he was an employee of Farm Stores Corporation and he never performed work for others. The Joined Party did everything that he was told to do by Farm Stores Corporation and he never refused any work assignment. If the Joined Party needed to take time off from work he always asked for permission. If the Joined Party was absent from work, such as due to illness, he always called in and reported his absence.

8. The maintenance supervisor retired and was not replaced by Farm Stores. After the supervisor's retirement the Joined Party received his work assignments directly from the store managers of Farm Stores and Gardner's Supermarkets. Each store manager would complete paperwork showing what time the Joined Party arrived at the store and what time he left the store. Both the store manager and the Joined Party signed the paperwork. The paperwork was submitted to the corporate office by the store manager. Because the Joined Party was performing services for six separate corporations, Farm Stores Corporation and five separate Gardner's Supermarket corporations including Gardner's Supermarkets Inc #1 and Gardner's Supermarkets Inc #6, the Joined Party was paid from six separate accounts. At the end of each year the Joined Party received a Form 1099-MISC from each corporation from which he received earnings during the year.

9. Either party had the right to terminate the relationship without incurring liability. On March 9, 2009, Farm Stores Corporation changed the manner in which the maintenance work was performed for Farm Stores and Gardner's Supermarkets. Farm Stores made the decision to use employees to perform the maintenance work rather than workers who were not on the formal payroll. As a result the Joined Party was informed that there was no more work available and that he was to go home.

10. The Joined Party filed a claim for unemployment compensation benefits effective March 29, 2009. His filing on that date established a base period from October 1, 2007, through September 30, 2008. The Joined Party was notified that he did not have any wage credits from Farm Stores Corporation or from Gardner's Supermarkets during the base period of the claim. The Joined Party filed a *Request for Reconsideration of Monetary Determination* and an investigation was assigned to the Department of Revenue to determine if the Joined Party was entitled to wage credits.

11. The Department of Revenue issued three separate determinations. On July 20, 2009, the Department of Revenue determined that the Joined Party and other individuals performing services as mechanics/laborers were employees of Gardner's Supermarket Inc #6 effective January 1, 2008. On July 27, 2009, the Department of Revenue determined that the Joined Party was an employee of Farm Stores Corporation effective January 1, 2008. On July 27, 2009, the Department of Revenue determined that the Joined Party was an employee of Gardner's Supermarkets Inc #1 effective January 1, 2008. Farm Stores Corporation appealed all three determinations by mail postmarked August 7, 2009.

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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

19. The evidence presented in this case reveals that there was no discussion or agreement between the parties that the Joined Party would perform services for Farm Stores Corporation as an independent contractor. He worked full time and did not perform services for others or offer his services to the general public. It was always the belief of the Joined Party that he was an employee. He worked under the direction of a maintenance supervisor who instructed the Joined Party what to do and how to do it. The Joined Party's only work expense was providing hand tools. Farm Stores Corporation provided any equipment that was required and all materials and supplies. Although the Joined Party provided his own transportation, Farm Stores Corporation reimbursed the Joined Party for work related mileage and required the Joined Party to have a sign on his vehicle bearing the logo and name of Farm Stores.

20. Farm Stores Corporation determined the days and hours of work. If the Joined Party wanted to take time off from work, he had to ask for permission. He had to report his absences from work. The Joined Party was paid by the hour at a pay rate determined by Farm Stores. The mileage reimbursement rate was determined by Farm Stores. Farm Stores Corporation controlled the financial aspects of the relationship.

21. Farm Stores Corporation chose not to withhold taxes from the Joined Party's pay and chose not to provide employee fringe benefits. The lack of payroll tax withholding and employee fringe benefits, standing alone, does not establish an independent contractor relationship.

22. The Joined Party performed services for Farm Stores Corporation and Gardner's Supermarkets for approximately ten years. 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. The Joined Party was terminated by Farm Stores and Gardner's Supermarkets as a result of a corporate decision to change the way maintenance was performed. 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 "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).

24. The evidence presented in this case reveals that Farm Stores Corporation and Gardner's Supermarkets controlled what work was performed, when it was performed, where 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. 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.

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.

26. Although Farm Stores Corporation purchased Gardner's Supermarkets Inc #6 in approximately November 2006, there is no evidence that the Joined Party received earnings from Gardner's Supermarket Inc #6 prior to 2008. Therefore, the retroactive date of liability as determined by the Department of Revenue has not been shown to be in error.

Recommendation: It is recommended that the determination dated July 20, 2009, be AFFIRMED.

Respectfully submitted on March 22, 2010.

R. O. SMITH, Special Deputy
Office of Appeals