AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2236284

GULF COAST WINDOW CLEANING OF
SARASOTA INC SABRINA CRAIN
201 SOUTHEAST 15TH TER STE 213
DEERFIELD BEACH FL 33441-4464

PROTEST OF LIABILITY
DOCKET NO. 2009-166883L

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

O R D E R

This matter comes before me for final Agency Order.

The issues before me include whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18), and whether services performed for the Petitioner by the Joined Party and other individuals working as window cleaners constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed an unemployment compensation claim in July 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any others who worked under the same terms and conditions. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to the

Joined Party and any other workers who performed services under the same terms and conditions. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because he had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on May 24, 2010. The Petitioner, represented by its President, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified on his own behalf. The Special Deputy issued a Recommended Order on May 26, 2010.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a corporation which was formed in 1999 to operate a residential window cleaning business. The Petitioner's president is active in the operation of the business; however, the Petitioner's president is also employed elsewhere on a full time basis. The Petitioner has an employee who answers the telephone and schedules the Petitioner's window cleaning customers. The Petitioner has another employee who does the bookkeeping and who computes the pay earned by the window cleaners. That bookkeeper also does some occasional window cleaning for the Petitioner. The majority of the window cleaning is performed by individuals who are classified by the Petitioner as independent contractors.
2. The Joined Party initially worked for the Petitioner as a window cleaner in 2006 or 2007. The Joined Party had never washed windows before and the Petitioner trained the Joined Party how to wash windows. The Joined Party did not perform services for the Petitioner for a period of time and was then rehired by the Petitioner on October 25, 2007.
3. The Petitioner requires the window cleaners to sign a *Contractor's Affidavit of Insurance and Tax* affirming that the worker is responsible for his own taxes, Social Security, and insurance coverage. The window cleaners are also required to sign an *Affidavit of Independent Contractor Status* attesting that the worker meets the requirements of independent contractor as set forth in Section 440.02(14)(d), Florida Statutes. The Affidavit states that the window cleaner will not hire any other labor. The window cleaners are required to sign a statement that they will clean all windows on the inside and the outside, will clean the window frames and sliding glass door tracks with a damp towel or brush, and that they will remove all dirt, bugs, and cobwebs from window sills and tracks. The window cleaners are required to remove all screens, take the screens outside, and clean the screens with a window mop and hose them off. The window cleaners are required to take their shoes off or wear protective booties when working inside the house. The statement also contains a list of the tools and supplies that the window cleaners will need.
4. The window cleaners are required to sign a *Window Cleaner's Contract/Agreement* and must agree to abide by the Petitioner's rules and regulations. The Agreement provides that the first five days or the first fifteen jobs will be a training period, that the compensation for the training period is $10 per hour, and that the Petitioner will retain the training pay as a security bond. The training pay is to be provided to the window cleaner upon termination, less any deductions which may apply. If the worker leaves with less than a week's notice, the Petitioner will keep the training pay. The Agreement provides that the window cleaners will be paid 50% of the charge for each job performed less a $5.00 fee for each job performed. If

the window cleaner is required to go back to the customer to do a touch up due to customer dissatisfaction, the touch up must be completed within one week. No additional compensation will be provided for the touch up. If the window cleaner has not done the touch up within one week the Petitioner will send out another window cleaner to do the touch up. The window cleaner will be charged $20 per hour for the other window cleaner to perform the work or will be charged the total amount of the Job.

5. The Petitioner schedules the window cleaners. The Agreement requires the window cleaners to give one week notice for time off. The Agreement provides that the window cleaners are not allowed to reschedule any job. They are required to notify the Petitioner's office if they are not able to do a job. The Agreement provides that the Petitioner will not accept "lame excuses" if a job is canceled. "Lame excuses" include giving less than forty-eight hours notice of time off and absences for illness without a doctor's excuse. If a job is canceled the Petitioner will deduct 50% of the price of the job from the window cleaner's pay.

6. The Petitioner requires the window cleaners to sign a *Conflict of Interest Declaration* and a *Covenant Not to Compete.* The Declaration requires the window cleaner to acknowledge that neither the window cleaner, a member of the window cleaner's immediate family, nor any business with which the window cleaner is associated has any conflict between personal affairs and the Petitioner's business interests. The Covenant provides that the window cleaner will act in the Petitioner's best interest at all times and will not compete with the interests of the Petitioner. In the event of termination for any reason the window cleaner may not work for any other business providing window cleaning services and may not own, open, operate, or in any way be connected to a business engaged in providing window cleaning services for a period of eighteen months after termination.

7. The Joined Party was required to provide his own tools, ladder, and supplies. The Joined Party provided his own transportation. The Petitioner did not provide any tools or supplies and did not reimburse the Joined Party for any expenses.

8. The Petitioner scheduled the dates and times that the Joined Party was to perform the work based on the needs of the Petitioner's customers. The Joined Party was required to keep the Petitioner informed of the progress of the work. The Joined Party was required to notify the Petitioner if he was not able to perform the work, if he was not able to complete the work, and was required to notify the Petitioner of any problems. The Joined Party was required to notify the Petitioner when the work was complete. The Joined Party was required to collect the amount owed by the customer and was required to give all of the money to the Petitioner's bookkeeper.

9. The Petitioner's bookkeeper computed the amount of the Joined Party's pay based on the amount of work completed by the Joined Party. No taxes were withheld from the pay. The Petitioner did not provide any fringe benefits to the Joined Party such as health insurance or paid vacations. The Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

10. Either party could terminate the relationship at any time without incurring liability for breach of contract. The Joined Party printed a flyer offering his services as a window cleaner. The Joined Party did not solicit the Petitioner's customers. The Petitioner terminated the Joined Party on May 22, 2008, for attempting to compete with the Petitioner.

11. The Joined Party filed a claim for unemployment compensation benefits effective July 19, 2009. When the Joined Party did not receive credit for his earnings with the Petitioner 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 performed services for the Petitioner as an employee or as an independent contractor.

12. On September 21, 2009, the Department of Revenue determined that the Joined Party and other individuals performing services as windows cleaners were employees of the Petitioner retroactive to January 1, 2008. The Petitioner filed a protest by letter dated September 29, 2009. A telephone hearing was scheduled to be held on April 12, 2010.

13. Prior to April 12 the Petitioner's president provided the telephone number where the president could be contacted for the hearing. At the time of the hearing the Petitioner's president was in a courthouse in association with the president's full time employment. The president was in a hallway expecting to receive the telephone call from the special deputy. The special deputy made several attempts to contact the Petitioner without success and left voice mail messages. When the president left the courthouse several hours later the president contacted the deputy clerk by telephone. On April 13, 2010, the president wrote a letter requesting that the appeal be reopened.

Based on these Findings of Fact, the Special Deputy recommended that good cause be found for reopening the Petitioner's appeal. The Special Deputy also recommended that the determination dated September 21, 2009, be modified to reflect a retroactive date of January 1, 2005. The Special Deputy further recommended that the determination be affirmed as modified. On June 17, 2010, the Special Deputy issued an order extending the time to file exceptions for all parties until June 25, 2010. The Petitioner's exceptions to the Recommended Order were received by fax dated June 24, 2010. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion

> of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

The Petitioner's exceptions, including the Petitioner's exceptions to Findings of Fact #2-5, 8, and 10, are in accord with the Special Deputy's Findings of Fact, propose alternative findings of fact or conclusions of law, or attempt to enter additional evidence. Section 120.57(1)(l), Florida Statutes, provides that the Agency may not reject or modify the Findings of Fact unless the Agency first determines that the findings of fact were not based upon competent substantial evidence in the record. Section 120.57(1)(l), Florida Statutes, also provides that the Agency may not reject or modify the Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact, including Findings of Fact #2-5, 8, and 10, are supported by competent substantial evidence in the record. A review of the record also reveals that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Agency may not modify the Special Deputy's Findings of Fact and Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Rule 60BB-2.035(19)(a), Florida Administrative Code, prohibits the acceptance of additional evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. The Petitioner's exceptions that are in accord with the Special Deputy's Findings of Fact, propose alternative findings of fact and conclusions of law, or attempt to enter additional evidence are respectfully rejected.

The Petitioner's exceptions also request consideration of an alternative theory of law. The Supreme Court of Florida has 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 So2d 1061 (Fla. 2d DCA 1987). *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.

1 Restatement of Law, Agency 2d Section 220 (1958) provides:

> 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.
>
> The following matters of fact, among others, are to be considered:
>
> the extent of control which, by the agreement, the business may exercise over the details of the work;
>
> whether or not the one employed is engaged in a distinct occupation or business;
>
> 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;
>
> the skill required in the particular occupation;
>
> whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> the length of time for which the person is employed;
>
> the method of payment, whether by the time or by the job;
>
> whether or not the work is a part of the regular business of the employer;
>
> whether or not the parties believe they are creating the relation of master and servant;
>
> whether the principal is or is not in business.

In *Department of Health and Rehabilitative Servs. v. Department of Labor & Employment Sec.*, 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 for unemployment compensation tax purposes. However, in citing *La Grande v. B&L Servs., 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. Thus, Florida law does not permit the application of any alternative theory of law. The Petitioner's request for the consideration of an alternative theory of law is respectfully denied. The Petitioner's exceptions that request consideration of an alternative theory of law are respectfully rejected.

Also, the Petitioner's exceptions cite *Department of Health and Rehabilitative Servs. v. Department of Labor & Employment Sec.*, 472 So.2d 1284 (Fla. 1st DCA 1985), and *La Grande v. B & L Servs., Inc.*, 432 So.2d 1364 (Fla. 1st DCA 1983), in support of the Petitioner's contention that independent contractor status must be addressed on a case-by-case basis. In *Department of Health and Rehabilitative Servs.*, the court held that a housekeeper for families eligible for Department of Health and Rehabilitative Services (HRS) benefits was an independent contractor based on several factors that showed HRS's lack of control over the housekeeper's actual conduct. 472 So.2d at 1287. Among these factors, the court considered that the housekeeper was not provided training, her specific techniques were never modified or commented

upon by HRS, she was allowed a flexible schedule, and she could refuse an assignment without risking future employment as factors demonstrative of this lack of control. *Id*. at 1285. In *La Grande*, the court also held that a taxi cab driver was an independent contractor based on several factors that demonstrated a lack of control over the worker's means of completing the work. 432 So.2d at 1366-67. These factors included that the driver was allowed to "'exercise complete discretion' in performing his job duties," was free to determine the days and hours he would work, was not required to respond to dispatches, was not required to comply with concession agreements, and was not required to periodically report his location. *Id*. at 1366-67. The record demonstrates that the Special Deputy noted in Conclusion of Law #23 that the court in *Department of Health and Rehabilitative Servs.* "acknowledged that the question of whether a person is properly classified an employee or independent contractor often cannot be answered by reference to 'hard and fast' rules, but rather must be addressed on a case-by-case basis" when citing *La Grande.* The record further demonstrates that the Special Deputy concluded that the Joined Party worked as an employee based on the specific facts of the case. In the case at hand, the Special Deputy found in Findings of Fact #2-3, 5, and 8 and Conclusion of Law #25 that the Petitioner provided training to the Joined Party, the Petitioner required the Joined Party to sign a statement that he would clean windows in the specific manner required by the Petitioner, the Petitioner scheduled jobs for the Joined Party, the Joined Party was not permitted to refuse work without financial penalty if the Petitioner deemed the Petitioner's reason for refusing work a "lame excuse," and the Joined Party was required to report the progress of his work. Based on these considerations, the current case is distinguishable from both Department *of Health and Rehabilitative Servs.* and *La Grande* in that the Petitioner's control extended beyond a mere right to exert control over the results of the work and amounted to a right to control the means of doing the work as concluded by the Special Deputy in Conclusion of Law #29. The Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. Section 120.57(1)(l), Florida Statutes, does not provide a basis for modification or rejection of the Special Deputy's Findings of Fact and Conclusions of Law in this instance. The Petitioner's exceptions in support of the Petitioner's contention that independent contractor status must be addressed on a case-by-case basis are respectfully rejected.

In the remainder of the Petitioner's exceptions, the Petitioner includes a copy of a Department of Revenue determination dated March 15, 2010, and alleges that the determination was made in regard to an identical circumstance. The determination dated March 15, 2010, applies only to the services performed by the claimant Anthony Butts (XXX-XX-9332) as a window cleaner and holds that Mr. Butts performed services as an independent contractor for the Petitioner. A review of the record reflects that the determination dated March 15, 2010, was not discussed during the hearing and that no testimony was

provided during the hearing regarding the services of Mr. Butts. As previously stated, Rule 60BB-2.035(19)(a), Florida Administrative Code, prohibits the acceptance of additional evidence after the hearing is closed. Since there is no competent evidence in the record to support the Petitioner's claim that Mr. Butts worked under the same terms and conditions as the Joined Party, the Petitioner's exceptions regarding the determination dated March 15, 2010, are respectfully rejected. The Petitioner's request for the consideration of additional evidence is also respectfully denied.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's findings are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

In consideration thereof, it is ORDERED that good cause is found for reopening the Petitioner's appeal. It is also ORDERED that the determination dated September 21, 2009, is MODIFIED to reflect a retroactive date of January 1, 2005. It is further ORDERED that the determination dated September 21, 2009, is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 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:
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PROTEST OF LIABILITY
DOCKET NO. 2009-166883L

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 September 21, 2009.

After due notice to the parties, a telephone hearing was held on May 24, 2010. The Petitioner, represented by the Petitioner's president, appeared and testified. 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 window 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.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

Findings of Fact:

1. The Petitioner is a corporation which was formed in 1999 to operate a residential window cleaning business. The Petitioner's president is active in the operation of the business; however, the Petitioner's president is also employed elsewhere on a full time basis. The Petitioner has an employee who answers the telephone and schedules the Petitioner's window cleaning customers. The Petitioner has another employee who does the bookkeeping and who computes the pay earned by the window cleaners. That bookkeeper also does some occasional

window cleaning for the Petitioner. The majority of the window cleaning is performed by individuals who are classified by the Petitioner as independent contractors.

2. The Joined Party initially worked for the Petitioner as a window cleaner in 2006 or 2007. The Joined Party had never washed windows before and the Petitioner trained the Joined Party how to wash windows. The Joined Party did not perform services for the Petitioner for a period of time and was then rehired by the Petitioner on October 25, 2007.

3. The Petitioner requires the window cleaners to sign a *Contractor's Affidavit of Insurance and Tax* affirming that the worker is responsible for his own taxes, Social Security, and insurance coverage. The window cleaners are also required to sign an *Affidavit of Independent Contractor Status* attesting that the worker meets the requirements of independent contractor as set forth in Section 440.02(14)(d), Florida Statutes. The Affidavit states that the window cleaner will not hire any other labor. The window cleaners are required to sign a statement that they will clean all windows on the inside and the outside, will clean the window frames and sliding glass door tracks with a damp towel or brush, and that they will remove all dirt, bugs, and cobwebs from window sills and tracks. The window cleaners are required to remove all screens, take the screens outside, and clean the screens with a window mop and hose them off. The window cleaners are required to take their shoes off or wear protective booties when working inside the house. The statement also contains a list of the tools and supplies that the window cleaners will need.

4. The window cleaners are required to sign a *Window Cleaner's Contract/Agreement* and must agree to abide by the Petitioner's rules and regulations. The Agreement provides that the first five days or the first fifteen jobs will be a training period, that the compensation for the training period is $10 per hour, and that the Petitioner will retain the training pay as a security bond. The training pay is to be provided to the window cleaner upon termination, less any deductions which may apply. If the worker leaves with less than a week's notice, the Petitioner will keep the training pay. The Agreement provides that the window cleaners will be paid 50% of the charge for each job performed less a $5.00 fee for each job performed. If the window cleaner is required to go back to the customer to do a touch up due to customer dissatisfaction, the touch up must be completed within one week. No additional compensation will be provided for the touch up. If the window cleaner has not done the touch up within one week the Petitioner will send out another window cleaner to do the touch up. The window cleaner will be charged $20 per hour for the other window cleaner to perform the work or will be charged the total amount of the Job.

5. The Petitioner schedules the window cleaners. The Agreement requires the window cleaners to give one week notice for time off. The Agreement provides that the window cleaners are not allowed to reschedule any job. They are required to notify the Petitioner's office if they are not able to do a job. The Agreement provides that the Petitioner will not accept "lame excuses" if a job is canceled. "Lame excuses" include giving less than forty-eight hours notice of time off and absences for illness without a doctor's excuse. If a job is canceled the Petitioner will deduct 50% of the price of the job from the window cleaner's pay.

6. The Petitioner requires the window cleaners to sign a *Conflict of Interest Declaration* and a *Covenant Not to Compete.* The Declaration requires the window cleaner to acknowledge that neither the window cleaner, a member of the window cleaner's immediate family, nor any business with which the window cleaner is associated has any conflict between personal affairs and the Petitioner's business interests. The Covenant provides that the window cleaner will act in the Petitioner's best interest at all times and will not compete with the interests of the Petitioner. In the event of termination for any reason the window cleaner may not work for any other business providing window cleaning services and may not own, open, operate, or in any way be connected to a business engaged in providing window cleaning services for a period of eighteen months after termination.

7. The Joined Party was required to provide his own tools, ladder, and supplies. The Joined Party provided his own transportation. The Petitioner did not provide any tools or supplies and did not reimburse the Joined Party for any expenses.

8. The Petitioner scheduled the dates and times that the Joined Party was to perform the work based on the needs of the Petitioner's customers. The Joined Party was required to keep the Petitioner informed of the progress of the work. The Joined Party was required to notify the Petitioner if he was not able to perform the work, if he was not able to complete the work, and was required to notify the Petitioner of any problems. The Joined Party was required to notify the Petitioner when the work was complete. The Joined Party was required to collect the amount owed by the customer and was required to give all of the money to the Petitioner's bookkeeper.

9. The Petitioner's bookkeeper computed the amount of the Joined Party's pay based on the amount of work completed by the Joined Party. No taxes were withheld from the pay. The Petitioner did not provide any fringe benefits to the Joined Party such as health insurance or paid vacations. The Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

10. Either party could terminate the relationship at any time without incurring liability for breach of contract. The Joined Party printed a flyer offering his services as a window cleaner. The Joined Party did not solicit the Petitioner's customers. The Petitioner terminated the Joined Party on May 22, 2008, for attempting to compete with the Petitioner.

11. The Joined Party filed a claim for unemployment compensation benefits effective July 19, 2009. When the Joined Party did not receive credit for his earnings with the Petitioner 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 performed services for the Petitioner as an employee or as an independent contractor.

12. On September 21, 2009, the Department of Revenue determined that the Joined Party and other individuals performing services as windows cleaners were employees of the Petitioner retroactive to January 1, 2008. The Petitioner filed a protest by letter dated September 29, 2009. A telephone hearing was scheduled to be held on April 12, 2010.

13. Prior to April 12 the Petitioner's president provided the telephone number where the president could be contacted for the hearing. At the time of the hearing the Petitioner's president was in a courthouse in association with the president's full time employment. The president was in a hallway expecting to receive the telephone call from the special deputy. The special deputy made several attempts to contact the Petitioner without success and left voice mail messages. When the president left the courthouse several hours later the president contacted the deputy clerk by telephone. On April 13, 2010, the president wrote a letter requesting that the appeal be reopened.

Conclusions of Law:

14. Rule 60BB-2.035, Florida Administrative Code, provides:

(18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause

exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.

15. Rule 60BB-2.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.

16. The evidence shows that the Petitioner's president provided contact information for the hearing and expected to receive the call. The president exercised due diligence by contacting the deputy clerk when a call was not received and by promptly making a written request to reopen the appeal. Thus good cause has been shown.

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 operates a business which provides residential window cleaning. The Petitioner engaged the Joined Party to clean the windows for the Petitioner's customers and required the Joined Party to personally perform the work. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business. The Joined Party was prohibited from having a separate window cleaning business and was prohibited from having any connection with or performing services for any window cleaning business.

25. The Petitioner provided initial training for the Joined Party and provided written instructions concerning how the windows were to be cleaned. It was not shown that cleaning windows requires 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)

26. The Joined Party provided all of the tools and supplies that were needed to perform the work. It was not shown that the tools and supplies represented a substantial investment in a business.

27. The Joined Party performed services for the Petitioner during two separate periods of time, the last of which was from November 2007 until May 22, 2008, a period of approximately six months. The relationship was not for a single job but was a continuing relationship. 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 because the Joined Party was attempting to compete with the Petitioner. 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."

28. The Petitioner required the Joined Party to sign an *Affidavit of Independent Contractor Status* attesting that the Joined Party met the requirements of Chapter 440, Florida Statutes. Chapter 440 governs workers' compensation insurance in Florida but does not govern unemployment compensation tax. Furthermore, 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). The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "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."

29. The Petitioner had the right to control what work was performed, who performed the work, when the work was performed, and how it was performed. It is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the agreement provides the employer with the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)

30. 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. The Department of Revenue extended the determination to include all window cleaners performing services for the Petitioner. Although the Joined Party and others performed services prior to 2008, the determination is retroactive only to January 1, 2008.

32. 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.

33. The Petitioner has been using window cleaners classified as independent contractors since the inception of the business. Therefore it is concluded that the services performed for the Petitioner by the Joined Party and other individuals as window cleaners constitute insured employment retroactive to January 1, 2005.

Recommendation: It is recommended that good cause be found for reopening the Petitioner's appeal. It is recommended that the determination dated September 21, 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 May 26, 2010.

R. O. SMITH, Special Deputy
Office of Appeals