AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2501992
TUFF CUT OF CENTRAL FLORIDA INC
5642 GAYMAR DRIVE
ORLANDO FL 32818-1218

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

PROTEST OF LIABILITY
DOCKET NO. 2009-173254L

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 November 4, 2009, is AFFIRMED.

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

PETITIONER:
Employer Account No. - 2501992
TUFF CUT OF CENTRAL FLORIDA INC
CHARLEY A ROOT JR
5642 GAYMAR DRIVE
ORLANDO FL 32818-1218

PROTEST OF LIABILITY
DOCKET NO. 2009-173254L

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 November 4, 2009.

After due notice to the parties, a telephone hearing was held on April 29, 2010. The Petitioner, represented by its accountant, appeared and testified. The Petitioner's president testified as a witness. A lawn maintenance worker testified as a witness. The Petitioner, 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 working as a landscaper 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 which was formed in 2003 to operate a lawn maintenance and landscape business. The Petitioner established liability for payment of unemployment compensation taxes to the State of Florida in 2003.
2. The Petitioner hired the Joined Party to perform lawn maintenance work using the Petitioner's lawn maintenance equipment beginning April 1, 2006. The parties did not enter into any written agreement. Initially, the Petitioner paid the Joined Party $10 per hour and the Joined Party was scheduled to work twenty to thirty hours per week. Subsequently, the Petitioner changed the pay

to a salary, based on a forty hour work week at $10 per hour. The Petitioner paid the Joined Party $400 per week regardless of the number of hours worked.

3. The Petitioner provided the zero turn radius tractors which the Joined Party used to mow the lawns. The Petitioner provided all other equipment and tools which were needed to perform the work including trimmers, edgers, and blowers. The value of the equipment which the Petitioner provided for the Joined Party's use was in excess of $30,000. The Petitioner was responsible for the fuel, maintenance, and repairs of the equipment. The Joined Party was not required to provide anything to perform the work and he did not have any expenses in connection with the work.
4. The work performed by the Joined Party did not require any special skill or knowledge. The Joined Party knew how to operate a tractor and how to use the edgers, trimmers, and blowers. The Petitioner did not provide any training because training was not necessary.
5. On the morning of each work day the Joined Party would either go by the home of the Petitioner's president or telephone the president to obtain the work assignment for the day. The Joined Party did not complete a timesheet and the Petitioner did not track the actual hours worked. The president went to the work sites and checked on the Joined Party every day. The president was aware of the approximate amount of time that the Joined Party worked each week. If the Joined Party was not able to work on a regular work day, he was required to notify the Petitioner so that the Petitioner could schedule another worker to do the work.
6. The Petitioner usually paid the Joined Party in cash with no deductions for payroll taxes. The Petitioner covered the Joined Party under the Petitioner's workers' compensation insurance policy. The Petitioner paid the Joined Party for a one week vacation each year. The Joined Party never received a Form 1099-MISC or a Form W-2 from the Petitioner although the Petitioner's accountant prepared a Form 1099-MISC each year.
7. The Joined Party was required to personally perform the work. The Joined Party was not allowed to hire others to perform the work for him.
8. The Joined Party did not have any occupational or business license. The Joined Party did not have any investment in a business, did not have business liability insurance, did not offer services to the general public, and did not perform services for any other individual or company while working with the Petitioner.
9. Either party had the right to terminate the relationship at any time without incurring liability. The Petitioner terminated the Joined Party on or about August 13, 2009, because the Joined Party hit a pole with the tractor and the Petitioner suspected that he was under the influence of drugs.
10. The Petitioner never paid unemployment compensation tax on the Joined Party's earnings. Effective December 31, 2007, the Petitioner inactivated its account with the Department of Revenue for the payment of unemployment compensation taxes.
11. The Joined Party filed an initial claim for unemployment compensation benefits effective August 23, 2009. When the Joined Party did not receive credit for his earnings from the Petitioner an investigation was assigned to the Department of Revenue to determine if the Joined Party was entitled to wage credits from the Petitioner.
12. On November 4, 2009, the Department of Revenue issued a determination holding that the Joined Party, performing services for the Petitioner as a landscaper, was the Petitioner's employee retroactive to April 1, 2006. The determination reinstated the Petitioner's unemployment compensation tax account effective January 1, 2008.

Conclusions of Law:

13. 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.

14. 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).

15. 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).

16. 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.

17. 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.

18. 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.

19. 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.

20. The Petitioner's business is lawn maintenance and landscaping. The work which the Joined Party performed for the Petitioner was to maintain the lawns for the Petitioner's customers. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the Petitioner's business.

21. The Petitioner provided everything that was needed to perform the work. The Petitioner provided all of the equipment and was responsible for all of the operating costs. The Joined Party did not have any expenses in connection with the work. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

22. The work performed by the Joined Party was unskilled labor. No training, skill, or special knowledge was required to perform the work. 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) Although the work did not require direct supervision, the Petitioner checked on the Joined Party each day while the work was being performed. That fact reveals that the Petitioner was concerned with how the work was performed by the Joined Party.

23. The Joined Party performed services for the Petitioner for a period in excess of three years. Either party could terminate the relationship at any time without incurring liability. The Petitioner terminated the Joined Party because the Petitioner suspected that the Joined Party was under the influence of drugs. 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."

24. 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).

25. The Petitioner determined what work was performed and when it was performed. The Petitioner checked on the work while it was being performed and the evidence demonstrates that the Petitioner had the right to exercise control over how the work was performed. Thus, it is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

26. Consideration has been given to the Petitioner's testimony that there was a written, unrecorded, equipment lease between the Petitioner and the Joined Party. The Joined Party denies the existence of any such lease, either written or verbal. The Petitioner asserts that the Petitioner deducted $10 per week from the Joined Party's pay as a lease fee for the use of over $30,000 worth of equipment. $520 per year would hardly be a reasonable lease fee for over $30,000 worth of equipment, especially since the Petitioner was responsible for the operating costs including maintenance of the equipment. Section 90.952, Florida Statutes, provides that, "Except as

otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." The Petitioner did not submit any such lease agreement as evidence. Thus, the Petitioner's testimony regarding the lease agreement is rejected.

27. The evidence presented in this case reveals that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the determination dated November 4, 2009, be AFFIRMED.

Respectfully submitted on May 3, 2010.

R. O. SMITH, Special Deputy
Office of Appeals