**AGENCY FOR WORKFORCE INNOVATION**
**TALLAHASSEE, FLORIDA**

**PETITIONER:**
Employer Account No. - 2924578

TWIN TOWERS TRADING INC
DONALD K PORGES
180 N CONGRESS AVE STE 215
BOYNTON BEACH FL 33426

**PROTEST OF LIABILITY**
**DOCKET NO. 2009-173261L**

**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 issue before me is whether services performed for the Petitioner by the Joined Party and other individuals working as salesperson/demonstrators 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 September 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 27, 2010. The Petitioner was represented by counsel and co-counsel. The Petitioner's Corporate Secretary/Chief Financial Officer appeared and testified. The Petitioner's Operations Manager appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified. The Special Deputy issued a Recommended Order on June 25, 2010.

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

1. The Petitioner, Twin Towers Trading, Inc., is a corporation which sells products in retail stores throughout the United States. The products are sold by individuals engaged by the Petitioner as product demonstrators. The Petitioner's products include knives, cookware, and jewelry.
2. In 1996 the Joined Party was living in Arkansas. He worked as a product demonstrator for a Texas company and was classified by that company as an independent contractor. In approximately 2003 the Joined Party worked for another company as a product demonstrator and was classified by that company as an employee. In 2004 the Joined Party worked for a different company as a product demonstrator and was classified as an employee. After that employment ended the Joined Party was employed for a period of time as a semi-truck driver. In January 2007 the Joined Party was living in the Tampa Bay area of Florida and was seeking employment. He read a help wanted advertisement placed by the Petitioner in a local newspaper for the position of product demonstrator. The Joined Party called the telephone number in the advertisement and spoke to the Petitioner's president. The Petitioner's president interviewed the Joined Party and informed the Joined Party that the Petitioner would train the Joined Party for the position of product demonstrator.
3. Before the Joined Party could begin training the Petitioner required the Joined Party to go to a local Sam's Club to watch one of the Petitioner's product demonstrators demonstrate and sell knives. The Petitioner then sent page one of the Petitioner's script that was used to demonstrate the knives. The Joined Party was required to memorize the page after which the Joined Party was required to contact the Petitioner and recite the page from memory. When the Joined Party successfully recited page one the Petitioner sent page two for the Joined Party to memorize. The Joined Party was then required to recite pages one and two from memory. This training process continued until the Joined Party was able to recite all four pages of the script from memory. The Joined Party successfully memorized the script. During the last week of February 2007 the Petitioner flew the Joined Party to New Jersey for a week of training in the Petitioner's corporate headquarters. The Petitioner paid all of the expenses of the trip.
4. During the first three days in New Jersey a trainer taught the Joined Party how to demonstrate the knives. The trainer taught the Joined Party how to slice produce while the Joined Party recited the script. The trainer critiqued the Joined Party and taught the Joined Party how to use facial expressions and body motions. The trainer told the Joined Party how to make announcements and how to draw shoppers to the demonstrations. The trainer told the Joined Party that he was not allowed to deviate from the script and must recite it word for word while demonstrating the product. The Petitioner told the Joined Party that the dress code was business casual. The Joined Party was not allowed to wear shorts, tank tops, or t-shirts.

5. After the three days of in-office training the trainer took the Joined Party to a Sam's Club located in Scranton, Pennsylvania. The Joined Party demonstrated the knives at the Sam's Club under the supervision of the trainer.
6. During the week of training the Petitioner told the Joined Party that the Petitioner provided all of the tools, equipment, supplies and materials for the product demonstrators. The Petitioner told the Joined Party that the Petitioner would schedule the Joined Party to demonstrate the knives at various Sam's Club locations in the Tampa Bay area. If the Petitioner scheduled the Joined Party at a location outside of the Tampa Bay area which required overnight travel, the Petitioner would pay one-half of the motel bill. While the Joined Party was still in training in New Jersey the Petitioner scheduled the Joined Party to begin work at a store located near the Joined Party's home during the following week.
7. At the end of the one week of training the Petitioner presented the Joined Party with a document titled *Agreement Between Independent Contractor and Twin Towers Trading, Inc.* Prior to the time that the Petitioner presented the Agreement to the Joined Party for the Joined Party's signature, no one had indicated in any way to the Joined Party that the Joined Party would be classified as an independent contractor. The Joined Party verbally objected to the Agreement for several reasons including the fact that the Agreement stated that it was the responsibility of the independent contractor to supply all equipment, tools, materials, and supplies. The Petitioner assured the Joined Party that, in spite of the wording in the Agreement, the Petitioner would supply all equipment, tools, materials, and supplies. The Joined Party needed a job and he believed that nothing in the Agreement was true and that the Agreement was not worth the paper that it was written on. The Joined Party signed the Agreement because the Petitioner would not allow him to demonstrate the Petitioner's products unless he signed the agreement. After the Joined Party signed the Agreement the Petitioner paid the Joined Party a "training bonus" and paid the Joined Party for the sales he had made at the Scranton store. The Joined Party would not have been paid for the training which he had completed unless he signed the Agreement.
8. The Petitioner's Operations Manager is responsible for scheduling the product demonstrators in various retail store locations. The Joined Party had the right to request that the Operations Manager schedule the Joined Party to work in certain stores and the right to request that he not be scheduled to work in certain stores. The Operations Manager would attempt to obtain permission from the stores requested by the Joined Party. If the Operations Manager was not successful in obtaining permission, the Operations Manager would schedule the Joined Party to work in a store other than the ones requested by the Joined Party. Some of those stores were located more than one hundred miles from the Tampa Bay area. The Joined Party requested that he not be scheduled to work at a particular store because of a conflict with the store manager. The Joined Party's request was denied and the Petitioner told the Joined Party that he had to work at that store.
9. The Joined Party objected to being scheduled to work in stores located a long distance from the Joined Party's home. On one occasion the Operations Manager scheduled the Joined Party to work in a store located in Port St Lucie. After the Joined Party objected the Petitioner paid the Joined Party $80 to cover the gas for the Joined Party's car. On another occasion the Petitioner scheduled the Joined Party to work in Daytona Beach during the July Fourth race week. The Joined Party objected because he could not find a reasonably priced motel. The Petitioner then made reservations for the Joined Party at a motel located fifty miles away. The Petitioner reimbursed the Joined Party for the entire motel bill.
10. The Petitioner provided the Joined Party with the demonstration booth and the knives to be used for demonstration purposes. The Petitioner provided a cheap hammer which was used to demonstrate that the Petitioner's knives would cut the hammer. The Joined Party was instructed to bring a dull knife from home and that if he did not have a dull knife at home to

purchase one and the Petitioner would reimburse the Joined Party. The dull knife was used to demonstrate that the Petitioner's knives were sharper and cut produce more easily. The Petitioner provided all of the produce and other food that was used to demonstrate the knives. The Joined Party was required to give a free knife to any potential customer who watched the entire demonstration. The Petitioner provided the knives that were given away by the Joined Party. The Petitioner either provided the equipment, tools, supplies, and materials used by the Joined Party or reimbursed the Joined Party for any items purchased by the Joined Party.

11. The Petitioner provided the knives that were sold by the Joined Party. The Petitioner shipped the knives to the stores where the Petitioner scheduled the Joined Party to work. The Petitioner paid the cost of shipping. The Petitioner determined the sales price of the knives and the Joined Party was not allowed to deviate from that price without prior permission. In Sam's Club the knife sales were rung up at the register and Sam's Club was responsible for collecting the sales tax. Sam's Club reported the amount of the knife sales to the Petitioner.
12. The Joined Party was required to take an inventory of the merchandise. The Joined Party was not required to reimburse the Petitioner for any lost or stolen merchandise or any inventory shortages. After each two week assignment the Joined Party would take the remaining merchandise to the next store. If the merchandise was too bulky the Petitioner paid to ship the merchandise to the next store. The Petitioner determined the amount of merchandise to ship to the Joined Party based on the Joined Party's remaining inventory.
13. The Joined Party was not allowed to sell the knives outside of a Sam's Club without the Petitioner's prior approval. The Joined Party could not sell the knives at a flea market nor sell the knives on EBay. On one occasion the Joined Party was eating supper in a restaurant when the restaurant owner approached him. The restaurant owner had purchased a knife set from the Joined Party at a Sam's Club and the owner wanted to purchase three more sets. The Joined Party contacted the Petitioner and obtained permission to sell three sets of knives to the owner. The Petitioner told the Joined Party how much to charge the owner for the knives.
14. On one occasion when the Joined Party was selling knives a customer wanted to purchase several sets and requested a volume discount. On another occasion a customer wanted to purchase ten sets of cookware and requested a volume discount. The price of a cookware set was $288. On both occasions the Joined Party contacted the Petitioner and the Petitioner denied both requests.
15. The Petitioner assigned the Joined Party to work two consecutive weeks in each location. The Joined Party was required to contact the Petitioner's Operations Manager to obtain the work assignments and the work schedule.
16. The Joined Party's assigned days of work were Thursday through Monday with Tuesday and Wednesday as days off. The Joined Party was required to report to the assigned store location thirty minutes before the store opened to set up. Throughout the day the Joined Party was required to make announcements on the store public address system and was required to read the announcements from a script which the Petitioner provided to the Joined Party. The Joined Party was required to make three announcements before each demonstration. Generally, the Joined Party gave demonstrations every forty-five minutes. Most of the product demonstrators do at least ten product demonstrations per day.
17. The Joined Party worked full time demonstrating products for the Petitioner. The Joined Party did not demonstrate products for other companies or perform services for any other companies during the time he performed services for the Petitioner.
18. The Petitioner does not set sales quotas for the product demonstrators. The Operations Manager monitors the sales made by each product demonstrator and compares the sales to the average sales made by the product demonstrators. If the Petitioner considers the amount of a product demonstrator's sales to be unsatisfactory the Petitioner requires the product demonstrator to be retrained by the Petitioner.

19. The Operations Manager handles complaints about the product demonstrators and handles other day-to-day issues involving the product demonstrators. The demonstrators are required to recite the script from memory for each demonstration and they are not allowed to paraphrase or deviate from the script. The Operations Manager does not personally observe the product demonstrators to determine if the demonstrators are deviating from the script. If a product demonstrator has any problems in a store the product demonstrator is required to notify the Petitioner. The Petitioner contacts the store to resolve any problems.
20. Generally, the Petitioner paid the Joined Party a commission of $6.00 per knife set for the first 149 knife sets sold during each two week assignment. The Petitioner paid the Joined Party $7.00 per knife set for sales if the Joined Party sold 150 or more knife sets during each two week assignment. However, on occasion the Petitioner deviated from the established commission schedule. The Petitioner paid the Joined Party by direct deposit to the Joined Party's bank account. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as health insurance or paid vacations. At the end of the year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
21. If the Petitioner determines that a demonstrator's sales are not satisfactory, the Petitioner will cancel the demonstrator's schedule and require that the demonstrator complete retraining. On several occasions the Petitioner scheduled the Joined Party to be retrained. In addition to the knives the Petitioner sells cookware at Sam's Club and sells jewelry at Kmart. The Petitioner took the Joined Party off of selling the knives and trained him to sell jewelry. Subsequently, the Petitioner took the Joined Party off of selling jewelry and trained him to sell cookware. Whether the Joined Party sold knives, jewelry, or cookware he was required to memorize a script and was not allowed to deviate from the script. The Petitioner determines which product line is sold by the demonstrator.
22. The Petitioner shipped the jewelry directly to the Joined Party's home. Inside each jewelry box was a tag identifying the jewelry as made in Taiwan. The Joined Party was required to remove the tag from each piece of jewelry because the Petitioner did not want the customers to know that the Jewelry was made in Taiwan.
23. In the Kmart stores the Joined Party was required to walk around the store and hand out raffle tickets to shoppers. The Joined Party was required to explain that he would be demonstrating the jewelry and if the shopper would bring the ticket to him at the time of the demonstration the shopper could win a free item of jewelry. The Joined Party was also required to read a script when making announcements over the public address system. When the Joined Party sold jewelry the sales were not rung up through the Kmart registers. The Joined Party personally accepted the cash, checks, or credit cards for the jewelry sales. The Petitioner provided the Joined Party with a credit card machine. The Joined Party collected sales tax on the sales and turned over all of the receipts to the Petitioner. The Petitioner remitted the sales tax to the Florida Department of Revenue.
24. The Petitioner provided the merchandise including the jewelry which the Joined Party gave away. The Petitioner paid the Joined Party a commission on the jewelry sales.
25. The Petitioner was not satisfied with the Joined Party's jewelry sales and retrained the Joined Party to sell the cookware. The cookware sets sold for $288 each and the Joined Party had difficulty making sales because of the high cost of the cookware. Although the Joined Party adhered to the script the Petitioner accused the Joined Party of deviating from the script. The Petitioner sent a trainer to the store to observe the Joined Party. After the trainer observed the Joined Party unannounced the trainer made changes to the script which had previously been provided to the Joined Party. The trainer provided the Joined Party with the new script. The Joined Party was required to go to a condominium owned by the trainer for an additional two

days of one-on-one training. The training was on the Joined Party's days off and the Petitioner did not pay the Joined Party to attend the training.

26. On numerous occasions the Petitioner contacted the Joined Party by telephone and critiqued and counseled the Joined Party concerning the Joined Party's sales. The Petitioner accused the Joined Party of deviating from the script. The Joined Party did not deviate from the script and advised the Petitioner that he was adhering to the script.
27. On one occasion the Joined Party asked that he not be required to work the second week of a two week cookware assignment at a Sarasota store. The Joined Party's request was denied. The Joined Party was told that he was required to work the second week of the assignment.
28. During the time that the Joined Party worked for the Petitioner the Joined Party only refused to work an assigned store one time. The Joined Party was assigned to sell cookware at a Sarasota store. The Joined Party refused because the cookware sales were so slow that it cost the Joined Party more to go to Sarasota than what he earned in commissions.
29. Either party had the right to terminate the relationship at any time without incurring liability. Shortly after the Joined Party refused to go to the Sarasota store the Petitioner took the Joined Party's name off of the work schedule. The Petitioner told the Joined Party that the Joined Party had failed at knife sales, failed at jewelry sales, and was failing at cookware sales. The Petitioner again required the Joined Party to be retrained and sent the Joined Party page one of the knife script. Although the Joined Party attempted to contact the Operations Manager to obtain his work schedule, the Petitioner never scheduled the Joined Party to return to work.
30. The Joined Party filed a claim for unemployment compensation benefits effective September 20, 2009. His filing on that date established a base period from April 1, 2008, through March 31, 2009. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed. An investigation was issued to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.
31. On October 27, 2009, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to January 1, 2008. On November 9, 2009, the Department of Revenue issued a determination indicated to be an affirmation of the October 27, 2009, determination. The November 9, 2010 determination extended the liability to other individuals performing services as salespersons/demonstrators retroactive to January 1, 2008. The Petitioner filed a written protest by letter dated November 18, 2009.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated November 9, 2009, be modified to reflect a retroactive date of March 1, 2007. The Special Deputy further recommended that the determination be affirmed as modified. The Petitioner’s exceptions to the Recommended Order were received by mail dated July 9, 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.

In portions of the *Introduction* and *Sections A-D*, including the exceptions to Findings of Fact #16-7 and 21, the Petitioner proposes alternative findings of fact or conclusions of law. 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 #16-7 and 21, 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. The portions of the *Introduction* and *Sections A-D,* including the exceptions to Findings of Fact #16-7 and 21, that propose alternative findings of fact and conclusions of law are respectfully rejected.

In portions of the *Introduction* and *Section A*, the Petitioner alleges that the Special Deputy did not allow full cross-examination of the Joined Party. The Petitioner also maintains that it was prevented from showing that the Joined Party controlled whether or not he would accept assignments as he simultaneously filed for unemployment compensation and did not seek further assignments from the Petitioner at the time of his job separation. Rule 60BB-2.035(15)(b), Florida Administrative Code, provides that "the special deputy will prescribe the order in which testimony will be taken and preserve the right of each party to present evidence relevant to the issues, cross-examine opposing witnesses, impeach any witness, and rebut the evidence presented." Rule 60BB-2.035(15)(b), Florida Administrative Code, further provides that "the special deputy will restrict the inquiry of each witness to the scope of the proceedings." A review of the record demonstrates that the Special Deputy limited the Petitioner's cross-examination of the Joined Party when the Petitioner attempted to question the Joined Party regarding when the Joined Party filed for unemployment compensation, whether the Joined Party had sought work since September 2009, whether the Joined Party was studying for the bar exam, and whether the Joined Party was available for work. A review of the record further demonstrates that the Special Deputy's jurisdiction was limited to the sole issue of the Petitioner's unemployment compensation tax liability, and questions that were not relevant to that issue were not permitted by the Special Deputy. The Special Deputy did not have jurisdiction to discuss any other issues related to the Joined Party's eligibility or disqualification from unemployment compensation benefits; it was not the appropriate forum for the Petitioner to request an investigation or determination of those issues. This establishes that the Special Deputy restricted the Petitioner's cross-examination to the scope of the proceedings and did not deprive the parties of any opportunity to conduct appropriate cross-examination or rebut any evidence. Contrary to what the Petitioner contends in its exceptions, the Petitioner was not prevented from asking any questions related to whether the Petitioner controlled the Joined Party's assignments by unilaterally removing him from its roster of workers and forcing him to retrain. The Petitioner has also failed to establish that the Petitioner was prevented from questioning the Joined Party concerning whether he controlled if he would accept assignments or why he did not seek further assignments. Thus, the Petitioner has failed to demonstrate that the proceedings did not comply with the substantial requirements of the law as required under section 120.57(1)(l), Florida Statutes. The portions of the Petitioner's exceptions that allege that the Special Deputy did not allow full cross-examination of the Joined Party and that the Petitioner was prevented from showing that the Joined Party controlled whether or not he would accept assignments are respectfully rejected.

In portions of the *Introduction* and *Section A*, the Petitioner also alleges that the Special Deputy did not consider evidence contrary to the Joined Party's testimony concerning the Joined Party's removal from the list of available workers and as a result, the Special Deputy's conduct wrongly prevented the

Petitioner from showing that the Joined Party's testimony was not credible. Section 120.57(1)(l), Florida Statutes, provides that the Special Deputy is the finder of fact in an administrative hearing, and that 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 particularly in its order, that the Findings of Fact were not based on competent substantial evidence in the record or that the proceedings on which the findings were based did not comply with the essential requirements of law. The record reflects that the Special Deputy found in Finding of Fact #29 that the Joined Party was not scheduled for another assignment although he had made attempts to contact the Petitioner for another assignment. The record also reflects that the Operations Manager testified that the Petitioner took the Joined Party off the schedule because the Joined Party was not requesting clubs. In his role as finder of fact, the Special Deputy made findings of fact with the support of competent substantial evidence in the record and made conclusions of law that reflect a reasonable application of the law to the facts. Even if the Special Deputy had found that the Joined Party failed to contact the Petitioner for further assignments as alleged by the Petitioner, the nature of the Joined Party's job separation would only be one of several factors that the Special Deputy would consider when determining the Joined Party's status. Other factors of control are present in the working relationship that are indicative of an employment relationship; thus, evidence in the record continues to support the Special Deputy's ultimate conclusion that the Joined Party worked for the Petitioner as an employee. Therefore, the Agency may not modify or reject the Special Deputy's Findings of Fact and Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes. The portions of the Petitioner's exceptions that allege that the Special Deputy did not consider evidence contrary to the Joined Party's testimony and prevented the Petitioner from showing that the Joined Party's testimony was not credible are respectfully rejected.

Also in portions of the *Introduction* and *Section A*, the Petitioner takes exception to Finding of Fact #29, argues that the Joined Party's failure to request assignments for extended periods indicates that the Joined Party did not consider himself unemployed, and maintains that the Joined Party did not seek unemployment compensation as a result of that belief. In support of its arguments, the Petitioner relies on alternative findings of fact regarding whether the Joined Party was free to accept or reject assignments, whether Joined Party sought additional assignments from the Petitioner, when the Joined Party filed for unemployment compensation benefits, and whether the Joined Party believed that he was unemployed. The record demonstrates that the Special Deputy found in Finding of Fact #29 that the Joined Party attempted to contact the Petitioner for additional assignments, found in Finding of Fact #30 that the Joined Party filed a claim for unemployment compensation benefits effective September 20, 2009, and found in Finding of Fact #8 that the Joined Party's request to not be scheduled at a specific store was denied by the Petitioner. The record also reflects that the Special Deputy did not make a finding that the Joined Party did

not believe that he was unemployed. The Special Deputy's Findings of Fact, including Findings of Fact #8, 29, and 30, are supported by competent substantial evidence in the record and are accepted by the Agency. Contrary to what the Petitioner argues in its exceptions, the date the Joined Party filed for unemployment compensation benefits is not necessarily proof of the Joined Party's belief about his employment status because no worker is required to file for unemployment compensation benefits when unemployed. Even if it were true that the Joined Party's failure to file for unemployment compensation benefits was consistent with his belief that he was not unemployed, evidence in the record remains that supports the Special Deputy's ultimate conclusion that the Petitioner had the right to control the Joined Party as is consistent with an employment relationship. The Special Deputy's Conclusions of Law represent a reasonable application of the law to the facts and are also accepted by the Agency. The portions of the *Introduction* and *Section A* that take exception to Finding of Fact #29, argue that the Joined Party did not consider himself unemployed, and propose alternative findings of fact are respectfully rejected. This result is consistent with prevailing case law.

In *Magarian v. Southern Fruit Distributors*, 1 So.2d 858, 861 (Fla. 1941), the Florida Supreme Court held that the parties' beliefs were not determinative of independent contractor status in light of the other factors of control present in the working relationship. The court commented, "The parties evidently thought they did not stand in the relation of master and servant but if, as a matter of law, they did so stand, their mistake in this regard would not change the status." *Id*. Thus, the appropriate analysis of a worker's employment status would require an examination of all relevant aspects of the working relationship. In *Keith v. News Sentinel Co*. case. 667 So.2d 167 (Fla. 1995), the Florida Supreme Court provided guidance on how to approach such an analysis. *Id*. at 171. The court held that the lack of an express agreement or clear evidence of the intent of the parties requires "a fact-specific analysis under the Restatement based on the actual practice of the parties." *Id*. As a result, the analysis in this case would not stop at an examination of the intent of the parties.

A complete analysis would examine the actual practice of the parties and determine whether it was consistent with an independent contractor or an employment relationship. If a conflict is present, *Keith* provides further guidance. *Id*. In *Keith*, the court concluded that the actual practice and relationship of the parties should control when the "other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties." *Id*. For example, in *Justice v. Belford Trucking Co*., 272 So.2d 131, 136 (Fla. 1972), the Florida Supreme Court held that the Judge of Industrial Claims erred when relying solely on the language of a contract instead of considering all aspects of the parties' working relationship. In doing so, the court found that the judge "did not recognize the employment

relationship that actually existed." *Id*. at 136. Therefore, the parties' belief that an independent contractor relationship existed between the parties would not be conclusive regarding the issue of the Joined Party's status. Competent substantial evidence in the record supports the conclusion that the Petitioner controlled the way the Joined Party performed his services in a manner characteristic of an employment relationship. The Agency does not reject the Special Deputy's Conclusions of Law because the conclusions reflect a reasonable application of the law to the facts. The Petitioner's request for an alternative legal analysis is respectfully denied.

In portions of *Section A*, the Petitioner cites *Edwards v. Caufield*, 560 So.2d 364, 369 (Fla. 1st DCA 1990), and *Roberts v. Gator Freightways, Inc.*, 538 So.2d 55 (Fla. 1st DCA 1989), *approved*, 550 So.2d 1117 (Fla. 1989), in support of its contention that the Joined Party's power to accept or reject assignments is the most important factor supporting the Joined Party's status as an independent contractor and that this factor was wrongly disregarded in the Recommended Order. The Petitioner also proposes alternative findings of fact in support of its contention. When analyzing the employment status of a real estate agent in *Edwards*, the court held that the worker was an independent contractor in light of her "complete control over the details of her work" and the lack of "a requirement that the work be done on any particular manner." 560 So.2d at 371. The worker in *Edwards* was "always in control of work hours and days," and "[s]he could come and go as she pleased." *Id*. Additionally, the worker "was responsible for all her expenses." *Id*. In *Roberts*, the court held that employment status is established by the control exerted over a worker and determined by "who has the right to direct what shall be done, and when, where, and how it shall be done." 538 So.2d at 56. When concluding that an independent contractor relationship existed between an owner and operator of a tractor-trailer and a trucking company, the court considered in *Roberts* that the owner and operator could "set his own schedule for work." *Id*. at 57. Although the Petitioner contends that the Joined Party had the right to accept or refuse assignments, a review of the record reflects that the Special Deputy did not find that Joined Party was free to work when he wished. The Special Deputy also did not find that the Joined Party was responsible for all expenses associated with the work. In Findings of Fact #7-8, the Special Deputy found that the Joined Party's request not to be scheduled at a specific store was denied and that the Petitioner assured the Joined Party that he would not be required to pay all expenses associated with the work. Even if the Joined Party was free to accept or refuse assignments as alleged by the Petitioner, other factors of control present in the relationship would remain that demonstrate that the Petitioner exerted control over the manner in which the Joined Party performed his services. Competent substantial evidence in the record continues to support the Special Deputy's ultimate conclusion that the Petitioner exerted control over the Joined Party as is characteristic of an employer/employee relationship. Since the Special Deputy's Findings of Fact, including Findings of Fact

#7-8, are supported by competent substantial evidence in the record and the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts, the Petitioner has not established a basis for the modification or rejection of the Special Deputy's findings of fact and conclusions of law under section 120.57(1)(l), Florida Statutes. The portions of the Petitioner's exceptions that cite *Edwards* and *Roberts* are respectfully rejected.

In portions of *Section A*, the Petitioner takes exception to Findings of Fact #27-8. A review of the record reveals that the Joined Party testified that he refused a Sarasota cookware assignment on one occasion due to slow sales. The record further reveals that the Joined Party testified that his request that he not work the second week in a south Tampa store was denied. Finding of Fact #28 is supported by competent substantial evidence in the record. While the Special Deputy may have been mistaken as to which assignment the Joined Party was referring to in his testimony, the remainder of Finding of Fact #27 is supported by competent substantial evidence in the record. In order to accurately reflect the evidence presented at the hearing, Finding of Fact #27 is amended to say:

> On one occasion the Joined Party asked that he not be required to work the second week of an assignment at a store. The Joined Party's request was denied. The Joined Party was told that he was required to work the second week of the assignment.

In portions of *Section C*, the Petitioner contends that the Recommended Order exaggerates the legal importance of assigned work days, the wearing of business casual clothing, when the product demonstrators were to report for work, and the number of demonstrations to be performed. Also, the Petitioner cites *F. L. Enterprises, Inc. v. Unemployment Appeals Com.*, 515 So.2d 1340 (Fla. 5th DCA 1987), in support of its argument that expecting someone to be present at a particular time and place does not render the person an employee. The Petitioner also cites the *F. L. Enterprises, Inc.* case in support of the conclusion that the absence of fringe benefits, the lack of the withholding of taxes, payment by commission, and the existence of an independent contractor agreement establish that an independent contractor relationship existed between the Petitioner and the Joined Party. In *F. L. Enterprises*, the court held that a referee's determination that a company controlled the final product of a solicitor's work was erroneous because the solicitor worked without direct supervision and the company had no control over the details of the solicitor's work. *Id*. at 1342. The case at hand is distinguishable in that the Special Deputy concluded in Conclusion of Law #47 that Petitioner exerted control over the details of the Joined Party's work. While the Special Deputy found in Findings of Fact #7 and 20 that the Joined Party did not receive benefits, taxes were not withheld from the Joined Party's pay, the Joined Party was paid by commission, and the Joined Party signed an independent contractor agreement, finding factors in common with the

solicitor in *F. L. Enterprises*, the Special Deputy ultimately concluded that the Petitioner had the right to control the Joined Party's work. Although it is the case, as the Petitioner argues in its exceptions, that merely expecting someone to be present at a particular time and place is not determinative of employment status, the Special Deputy did not base his conclusion that Joined Party worked as an employee solely on this factor. While some factors of independence were present in this case as were also present in *F. L. Enterprises*, factors of control were also present that support the conclusion that the Joined Party worked as an employee. The Special Deputy's Findings of Fact, including Findings of Fact #7 and 20, are supported by competent substantial evidence in the record and may not be modified by the Agency. Also, the Special Deputy's ultimate conclusion that an employment relationship existed between the parties reflects a reasonable application of the law to the facts; consequently, the Agency is not permitted to reject the Special Deputy's conclusion. The portions of the Petitioner's exceptions in *Section C* that cite *F. L. Enterprises* and propose alternative conclusions of law are respectfully rejected.

In portions of *Section C*, the Petitioner also cites *Sarasota County Chamber of Commerce v. State, Dept. of Labor and Employment Secur.*, 463 So.2d 461, 462 (Fla. 2d DCA 1985), and *Collins v. Federated Mut. Implement & Hardware Contractors Ins. Co.*, 247 So.2d 461 (Fla. 4th DCA), *cert. denied*, 249 So.2d 689 (Fla. 1971), in support of its contention that a worker subject to control or direction as to only the results of the work is an independent contractor. The court in *Sarasota County Chamber of Commerce* held that salespersons were independent contractors because the workers were not monitored during the performance of their duties, they were not subject to direct supervision, they were free to set their own schedules, they paid their own expenses, they dressed as they liked, and the county chamber of commerce had control as to only the results of the salespersons' work. *Id*. at 462-63. The court noted that the salespersons were "free to solicit prospects in whatever manner they deem[ed] effective." *Id*. at 462. In contrast, the court in *Collins* concluded that a driver was an employee as he was always subject to the control and direction of the company he worked for in regards to the details of his work. 247 So.2d at 464. The Special Deputy did not conclude in the current case that the Petitioner's right to control the Joined Party's work was limited to a mere right to control the results of the Joined Party's work. Section 120.57(1)(l) does not allow the Agency to adopt any alternative conclusions of law in this instance as the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. The portions of the exceptions that cite *Sarasota County Chamber of Commerce* and *Collins* are respectfully rejected.

Also in portions of *Section C*, the Petitioner cites the following cases as examples of when the courts have concluded that a worker is an independent contractor when only subject to control or direction as to the results of their work and reversed administrative findings of employer-employee relationships

even where a company provided resources to facilitate the work: *VIP Tours of Orlando, Inc. v. State, Dept. of Labor & Employment Secur.*, 449 So.2d 1307 (Fla. 5th DCA 1984); *United States Tel. Co. v. State*, 410 So.2d 1002 (Fla. 3d DCA 1981); and *Cosmo Pers. Agency v. State*, 407 So.2d 249 (Fla. 4th DCA 1981). In *VIP Tours*, the court determined that an independent contractor relationship existed between a company and its tour guides when the company's right of control was limited to requiring the guides to report to a specific place and specific time wearing the company's uniform and traveling by transportation provided by the company. 449 So.2d at 1310. According to the court, the company exhibited "little interest in the details of the guides' work." *Id*. Similarly, in *United States Tel. Co.*, the court recognized the existence of an independent contractor relationship even though a telephone company provided office space, telephone service, and secretarial and clerical assistance at no charge to its sales personnel. 410 So.2d at 1003. The court noted that the telephone company was "concerned with profits and exerted no effective control over the salesmen." *Id*. The case is further distinguishable from the current case in that the salesmen had no set schedule. *Id*. A similar result also occurred in the *Cosmo Pers. Agency* case. In *Cosmo Pers. Agency*, the court held that an independent contractor relationship existed between an employment agency and employment counselors. 407 So.2d at 250. The court based its holding on several factors. *Id*. These factors included that the counselors paid for the secretarial help, office space, and telephone service provided by the employment agency, that the employment agency only provided supervisory assistance upon the counselor's request, and the counselors set their own schedules. *Id.* The cases cited by the Petitioner are clearly distinguishable from the case at hand and do not warrant any alternative result.

In the current case, the Special Deputy did not find that the Petitioner limited its right to control the Joined Party to a mere right to control the Joined Party's work; instead, the Special Deputy concluded in Conclusion of Law #47 that "the Petitioner exercised significant control over the Joined Party concerning how the work was performed." The Special Deputy also found that the Petitioner's act of providing resources to the Joined Party was consistent with an employment relationship and a part of that relationship. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are not rejected pursuant to section 120.57(1)(l), Florida Statutes. The portions of the Petitioner's exceptions in *Section C* that cite several cases as examples of when the courts have concluded that a worker subject to control or direction as to only the results of the work is an independent contractor and reversed administrative findings of employer-employee relationships even where a company provided resources to facilitate the work are respectfully rejected.

All of the amended Findings of Fact and Conclusions of Law support the Special Deputy's ultimate conclusion that an employer/employee relationship existed between the Petitioner and the product

demonstrators. The Special Deputy's conclusion that that the factors of control in this case are representative of an employment relationship is supported by evidence in the record. The Special Deputy's conclusion reflects a reasonable application of the law to the facts and is adopted.

A review of the record reveals that the amended Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings of fact were based complied with the essential requirements of the law. The amended Findings of Fact 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 amended herein.

In consideration thereof, it is ORDERED that the determination dated November 9, 2009, is MODIFIED to reflect a retroactive date of March 1, 2007. It is further ORDERED that the determination is AFFIRMED as modified.

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

**PETITIONER:**
Employer Account No. - 2924578
TWIN TOWERS TRADING INC
DONALD K PORGES
180 N CONGRESS AVE STE 215
BOYNTON BEACH FL 33426

**PROTEST OF LIABILITY**
**DOCKET NO. 2009-173261L**

**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 9, 2009.

After due notice to the parties, a telephone hearing was held on May 27, 2010. The Petitioner was represented by counsel and co-counsel. The Petitioner's corporate secretary/Chief Financial Officer appeared and testified. The Petitioner's Operations Manager 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 received from the Petitioner.

**Issue:**

Whether services performed for the Petitioner by the Joined Party and other individuals 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, Twin Towers Trading, Inc., is a corporation which sells products in retail stores throughout the United States. The products are sold by individuals engaged by the Petitioner as product demonstrators. The Petitioner's products include knives, cookware, and jewelry.
2. In 1996 the Joined Party was living in Arkansas. He worked as a product demonstrator for a Texas company and was classified by that company as an independent contractor. In approximately 2003 the Joined Party worked for another company as a product demonstrator and

was classified by that company as an employee. In 2004 the Joined Party worked for a different company as a product demonstrator and was classified as an employee. After that employment ended the Joined Party was employed for a period of time as a semi-truck driver. In January 2007 the Joined Party was living in the Tampa Bay area of Florida and was seeking employment. He read a help wanted advertisement placed by the Petitioner in a local newspaper for the position of product demonstrator. The Joined Party called the telephone number in the advertisement and spoke to the Petitioner's president. The Petitioner's president interviewed the Joined Party and informed the Joined Party that the Petitioner would train the Joined Party for the position of product demonstrator.

3. Before the Joined Party could begin training the Petitioner required the Joined Party to go to a local Sam's Club to watch one of the Petitioner's product demonstrators demonstrate and sell knives. The Petitioner then sent page one of the Petitioner's script that was used to demonstrate the knives. The Joined Party was required to memorize the page after which the Joined Party was required to contact the Petitioner and recite the page from memory. When the Joined Party successfully recited page one the Petitioner sent page two for the Joined Party to memorize. The Joined Party was then required to recite pages one and two from memory. This training process continued until the Joined Party was able to recite all four pages of the script from memory. The Joined Party successfully memorized the script. During the last week of February 2007 the Petitioner flew the Joined Party to New Jersey for a week of training in the Petitioner's corporate headquarters. The Petitioner paid all of the expenses of the trip.

4. During the first three days in New Jersey a trainer taught the Joined Party how to demonstrate the knives. The trainer taught the Joined Party how to slice produce while the Joined Party recited the script. The trainer critiqued the Joined Party and taught the Joined Party how to use facial expressions and body motions. The trainer told the Joined Party how to make announcements and how to draw shoppers to the demonstrations. The trainer told the Joined Party that he was not allowed to deviate from the script and must recite it word for word while demonstrating the product. The Petitioner told the Joined Party that the dress code was business casual. The Joined Party was not allowed to wear shorts, tank tops, or t-shirts.

5. After the three days of in-office training the trainer took the Joined Party to a Sam's Club located in Scranton, Pennsylvania. The Joined Party demonstrated the knives at the Sam's Club under the supervision of the trainer.

6. During the week of training the Petitioner told the Joined Party that the Petitioner provided all of the tools, equipment, supplies and materials for the product demonstrators. The Petitioner told the Joined Party that the Petitioner would schedule the Joined Party to demonstrate the knives at various Sam's Club locations in the Tampa Bay area. If the Petitioner scheduled the Joined Party at a location outside of the Tampa Bay area which required overnight travel, the Petitioner would pay one-half of the motel bill. While the Joined Party was still in training in New Jersey the Petitioner scheduled the Joined Party to begin work at a store located near the Joined Party's home during the following week.

7. At the end of the one week of training the Petitioner presented the Joined Party with a document titled *Agreement Between Independent Contractor and Twin Towers Trading, Inc.* Prior to the time that the Petitioner presented the Agreement to the Joined Party for the Joined Party's signature, no one had indicated in any way to the Joined Party that the Joined Party would be classified as an independent contractor. The Joined Party verbally objected to the Agreement for several reasons including the fact that the Agreement stated that it was the responsibility of the independent contractor to supply all equipment, tools, materials, and supplies. The Petitioner assured the Joined Party that, in spite of the wording in the Agreement, the Petitioner would supply all equipment, tools, materials, and supplies. The Joined Party needed a job and he

believed that nothing in the Agreement was true and that the Agreement was not worth the paper that it was written on. The Joined Party signed the Agreement because the Petitioner would not allow him to demonstrate the Petitioner's products unless he signed the agreement. After the Joined Party signed the Agreement the Petitioner paid the Joined Party a "training bonus" and paid the Joined Party for the sales he had made at the Scranton store. The Joined Party would not have been paid for the training which he had completed unless he signed the Agreement.

8. The Petitioner's Operations Manager is responsible for scheduling the product demonstrators in various retail store locations. The Joined Party had the right to request that the Operations Manager schedule the Joined Party to work in certain stores and the right to request that he not be scheduled to work in certain stores. The Operations Manager would attempt to obtain permission from the stores requested by the Joined Party. If the Operations Manager was not successful in obtaining permission, the Operations Manager would schedule the Joined Party to work in a store other than the ones requested by the Joined Party. Some of those stores were located more than one hundred miles from the Tampa Bay area. The Joined Party requested that he not be scheduled to work at a particular store because of a conflict with the store manager. The Joined Party's request was denied and the Petitioner told the Joined Party that he had to work at that store.

9. The Joined Party objected to being scheduled to work in stores located a long distance from the Joined Party's home. On one occasion the Operations Manager scheduled the Joined Party to work in a store located in Port St Lucie. After the Joined Party objected the Petitioner paid the Joined Party $80 to cover the gas for the Joined Party's car. On another occasion the Petitioner scheduled the Joined Party to work in Daytona Beach during the July Fourth race week. The Joined Party objected because he could not find a reasonably priced motel. The Petitioner then made reservations for the Joined Party at a motel located fifty miles away. The Petitioner reimbursed the Joined Party for the entire motel bill.

10. The Petitioner provided the Joined Party with the demonstration booth and the knives to be used for demonstration purposes. The Petitioner provided a cheap hammer which was used to demonstrate that the Petitioner's knives would cut the hammer. The Joined Party was instructed to bring a dull knife from home and that if he did not have a dull knife at home to purchase one and the Petitioner would reimburse the Joined Party. The dull knife was used to demonstrate that the Petitioner's knives were sharper and cut produce more easily. The Petitioner provided all of the produce and other food that was used to demonstrate the knives. The Joined Party was required to give a free knife to any potential customer who watched the entire demonstration. The Petitioner provided the knives that were given away by the Joined Party. The Petitioner either provided the equipment, tools, supplies, and materials used by the Joined Party or reimbursed the Joined Party for any items purchased by the Joined Party.

11. The Petitioner provided the knives that were sold by the Joined Party. The Petitioner shipped the knives to the stores where the Petitioner scheduled the Joined Party to work. The Petitioner paid the cost of shipping. The Petitioner determined the sales price of the knives and the Joined Party was not allowed to deviate from that price without prior permission. In Sam's Club the knife sales were rung up at the register and Sam's Club was responsible for collecting the sales tax. Sam's Club reported the amount of the knife sales to the Petitioner.

12. The Joined Party was required to take an inventory of the merchandise. The Joined Party was not required to reimburse the Petitioner for any lost or stolen merchandise or any inventory shortages. After each two week assignment the Joined Party would take the remaining merchandise to the next store. If the merchandise was too bulky the Petitioner paid to ship the merchandise to the next store. The Petitioner determined the amount of merchandise to ship to the Joined Party based on the Joined Party's remaining inventory.

13. The Joined Party was not allowed to sell the knives outside of a Sam's Club without the Petitioner's prior approval. The Joined Party could not sell the knives at a flea market nor sell the knives on EBay. On one occasion the Joined Party was eating supper in a restaurant when the restaurant owner approached him. The restaurant owner had purchased a knife set from the Joined Party at a Sam's Club and the owner wanted to purchase three more sets. The Joined Party contacted the Petitioner and obtained permission to sell three sets of knives to the owner. The Petitioner told the Joined Party how much to charge the owner for the knives.

14. On one occasion when the Joined Party was selling knives a customer wanted to purchase several sets and requested a volume discount. On another occasion a customer wanted to purchase ten sets of cookware and requested a volume discount. The price of a cookware set was $288. On both occasions the Joined Party contacted the Petitioner and the Petitioner denied both requests.

15. The Petitioner assigned the Joined Party to work two consecutive weeks in each location. The Joined Party was required to contact the Petitioner's Operations Manager to obtain the work assignments and the work schedule.

16. The Joined Party's assigned days of work were Thursday through Monday with Tuesday and Wednesday as days off. The Joined Party was required to report to the assigned store location thirty minutes before the store opened to set up. Throughout the day the Joined Party was required to make announcements on the store public address system and was required to read the announcements from a script which the Petitioner provided to the Joined Party. The Joined Party was required to make three announcements before each demonstration. Generally, the Joined Party gave demonstrations every forty-five minutes. Most of the product demonstrators do at least ten product demonstrations per day.

17. The Joined Party worked full time demonstrating products for the Petitioner. The Joined Party did not demonstrate products for other companies or perform services for any other companies during the time he performed services for the Petitioner.

18. The Petitioner does not set sales quotas for the product demonstrators. The Operations Manager monitors the sales made by each product demonstrator and compares the sales to the average sales made by the product demonstrators. If the Petitioner considers the amount of a product demonstrator's sales to be unsatisfactory the Petitioner requires the product demonstrator to be retrained by the Petitioner.

19. The Operations Manager handles complaints about the product demonstrators and handles other day-to-day issues involving the product demonstrators. The demonstrators are required to recite the script from memory for each demonstration and they are not allowed to paraphrase or deviate from the script. The Operations Manager does not personally observe the product demonstrators to determine if the demonstrators are deviating from the script. If a product demonstrator has any problems in a store the product demonstrator is required to notify the Petitioner. The Petitioner contacts the store to resolve any problems.

20. Generally, the Petitioner paid the Joined Party a commission of $6.00 per knife set for the first 149 knife sets sold during each two week assignment. The Petitioner paid the Joined Party $7.00 per knife set for sales if the Joined Party sold 150 or more knife sets during each two week assignment. However, on occasion the Petitioner deviated from the established commission schedule. The Petitioner paid the Joined Party by direct deposit to the Joined Party's bank account. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as health insurance or paid vacations. At the end of the year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

21. If the Petitioner determines that a demonstrator's sales are not satisfactory, the Petitioner will cancel the demonstrator's schedule and require that the demonstrator complete retraining. On several occasions the Petitioner scheduled the Joined Party to be retrained. In addition to the knives the Petitioner sells cookware at Sam's Club and sells jewelry at Kmart. The Petitioner took the Joined Party off of selling the knives and trained him to sell jewelry. Subsequently, the Petitioner took the Joined Party off of selling jewelry and trained him to sell cookware. Whether the Joined Party sold knives, jewelry, or cookware he was required to memorize a script and was not allowed to deviate from the script. The Petitioner determines which product line is sold by the demonstrator.

22. The Petitioner shipped the jewelry directly to the Joined Party's home. Inside each jewelry box was a tag identifying the jewelry as made in Taiwan. The Joined Party was required to remove the tag from each piece of jewelry because the Petitioner did not want the customers to know that the Jewelry was made in Taiwan.

23. In the Kmart stores the Joined Party was required to walk around the store and hand out raffle tickets to shoppers. The Joined Party was required to explain that he would be demonstrating the jewelry and if the shopper would bring the ticket to him at the time of the demonstration the shopper could win a free item of jewelry. The Joined Party was also required to read a script when making announcements over the public address system. When the Joined Party sold jewelry the sales were not rung up through the Kmart registers. The Joined Party personally accepted the cash, checks, or credit cards for the jewelry sales. The Petitioner provided the Joined Party with a credit card machine. The Joined Party collected sales tax on the sales and turned over all of the receipts to the Petitioner. The Petitioner remitted the sales tax to the Florida Department of Revenue.

24. The Petitioner provided the merchandise including the jewelry which the Joined Party gave away. The Petitioner paid the Joined Party a commission on the jewelry sales.

25. The Petitioner was not satisfied with the Joined Party's jewelry sales and retrained the Joined Party to sell the cookware. The cookware sets sold for $288 each and the Joined Party had difficulty making sales because of the high cost of the cookware. Although the Joined Party adhered to the script the Petitioner accused the Joined Party of deviating from the script. The Petitioner sent a trainer to the store to observe the Joined Party. After the trainer observed the Joined Party unannounced the trainer made changes to the script which had previously been provided to the Joined Party. The trainer provided the Joined Party with the new script. The Joined Party was required to go to a condominium owned by the trainer for an additional two days of one-on-one training. The training was on the Joined Party's days off and the Petitioner did not pay the Joined Party to attend the training.

26. On numerous occasions the Petitioner contacted the Joined Party by telephone and critiqued and counseled the Joined Party concerning the Joined Party's sales. The Petitioner accused the Joined Party of deviating from the script. The Joined Party did not deviate from the script and advised the Petitioner that he was adhering to the script.

27. On one occasion the Joined Party asked that he not be required to work the second week of a two week cookware assignment at a Sarasota store. The Joined Party's request was denied. The Joined Party was told that he was required to work the second week of the assignment.

28. During the time that the Joined Party worked for the Petitioner the Joined Party only refused to work an assigned store one time. The Joined Party was assigned to sell cookware at a Sarasota store. The Joined Party refused because the cookware sales were so slow that it cost the Joined Party more to go to Sarasota than what he earned in commissions.

29. Either party had the right to terminate the relationship at any time without incurring liability. Shortly after the Joined Party refused to go to the Sarasota store the Petitioner took the Joined Party's name off of the work schedule. The Petitioner told the Joined Party that the Joined Party had failed at knife sales, failed at jewelry sales, and was failing at cookware sales. The Petitioner again required the Joined Party to be retrained and sent the Joined Party page one of the knife script. Although the Joined Party attempted to contact the Operations Manager to obtain his work schedule, the Petitioner never scheduled the Joined Party to return to work.

30. The Joined Party filed a claim for unemployment compensation benefits effective September 20, 2009. His filing on that date established a base period from April 1, 2008, through March 31, 2009. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed. An investigation was issued to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.

31. On October 27, 2009, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to January 1, 2008. On November 9, 2009, the Department of Revenue issued a determination indicated to be an affirmation of the October 27, 2009, determination. The November 9, 2010 determination extended the liability to other individuals performing services as salespersons/demonstrators retroactive to January 1, 2008. The Petitioner filed a written protest by letter dated November 18, 2009.

**Conclusions of Law:**

32. 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.

33. 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).

34. 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).

35. 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.

36. 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.

37. 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.

38. 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.

39. The Petitioner's business activity is the sale of knives, cookware, and jewelry in retail stores through the use of product demonstrations. The Joined Party was responsible for travelling to various retail stores as assigned by the Petitioner for the purpose of demonstrating and selling the Petitioner's products. 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 business.

40. The evidence presented by both the Petitioner and the Joined Party show that the *Agreement Between Independent Contractor and Twin Towers Trading, Inc.* does not accurately set forth the terms and conditions under which services were performed. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

41. The *Agreement Between Independent Contractor and Twin Towers Trading, Inc.* provides that the Joined Party was an independent contractor. 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."

42. The Petitioner provided the place of work through the Petitioner's contracts, agreements, and negotiations with the retail stores. The Petitioner provided the merchandise, shipping expenses, display booths, and all items used in demonstrating the products. The Petitioner paid a portion of the travel expense. In particular, the Petitioner paid 50% of the motel bill and on occasion the Petitioner paid the entire motel bill and paid automobile expenses.

43. The Petitioner paid the Joined Party a commission on each sale. The Petitioner determined the commission rate. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment, including commissions.

44. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. The fact that the Petitioner chose not to withhold payroll taxes does not, standing alone, establish an independent contractor relationship.

45. The Joined Party performed services exclusively for the Petitioner on a full time basis for a period of approximately two 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. 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."

46. 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.

47. The evidence reveals that the Petitioner exercised significant control over the Joined Party concerning how the work was performed. The Petitioner required the Joined Party to perform the work in a specified manner. The Joined Party was trained and retrained by the Petitioner. Training is a method of control because it specifies how the work is to be performed. The Joined Party was required to memorize scripts and he was not allowed to devite from the scripts when making his sales presentations.

48. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as product demonstrator salespersons constitute insured employment. However, the determination of the Department of Revenue is retroactive only to January 1, 2008. The Joined Party began performing services for the Petitioner on or about March 1, 2007. Therefore, the correct retroactive date is March 1, 2007.

49. The Petitioner's proposed findings of fact # 6 and #26 and the Petitioner's proposed conclusion of law #27 refer to the contents of the agreements between the Petitioner and the retail stores. The agreements were not offered into evidence. 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." Thus, proposed findings of fact #6 and #26 and proposed conclusion of law #27 are not supported by competent evidence.

**Recommendation:** It is recommended that the determination dated November 9, 2009, be MODIFIED to reflect a retroactive date of March 1, 2007. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on June 25, 2010.

R. O. SMITH, Special Deputy
Office of Appeals