AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2924368
SUNAMERICA DBA JETAMERICA
P O BOX 300
PALM HARBOR FL 34682

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

PROTEST OF LIABILITY
DOCKET NO. 2009-173263L

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 October 26, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _______ day of **August, 2010**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2924368
SUNAMERICA DBA JETAMERICA
STEVE SCHOEN
P O BOX 300
PALM HARBOR FL 34682

PROTEST OF LIABILITY
DOCKET NO. 2009-173263L

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 October 26, 2009.

After due notice to the parties, a telephone hearing was held on May 25, 2010. The Petitioner, represented by the Petitioner's Chairman of the Board, appeared and testified. The Petitioner's former bookkeeper and the Petitioner's former Vice President of Airline Services appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as reservation specialists 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.

Whether the Petitioners corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a corporation which was formed on July 30, 2008, to operate a business as a charter airline. The Petitioner began preliminary operations on March 1, 2009. The preliminary operations included scheduling flights and taking reservations from passengers. Although the Petitioner had flights scheduled no flights ever occurred and the Petitioner ceased operations on or about August 1, 2009.
2. Three of the Petitioner's corporate officers were active in the operation of the business and were paid wages by the Petitioner. The Petitioner's Vice President of Airline Services received a salary of $3,600 per month beginning in March 2009.
3. The Joined Party responded to an employment advertisement for the position of Reservation Specialist and was interviewed and hired by the Petitioner. The Joined Party began work on March 2, 2009. At the time of hire the Joined Party was required to complete *Form I-9, Employment Eligibility Verification* and *Form W-4, Employee's Withholding Allowance Certificate.* The Joined Party was required to sign a *Job Description* and an *Employment Agreement for Confidential Employees.* The Petitioner provided the Joined Party with the Petitioner's *Employee Personnel Policies* which the Joined Party was required to read and sign.
4. The Petitioner classified all employees as either regular employees or temporary employees. The Petitioner defined a regular employee as an employee who is hired without a specific termination date. Temporary employees were defined by the Petitioner as employees whose position at the time of hire was for a short-term period. Regular full time employees worked forty hours per week and were entitled to all fringe benefits including holiday pay, paid vacations, and medical benefits after six months of employment. The Joined Party was hired to be a full time employee without a specific termination date. The Petitioner assigned the Joined Party to work Tuesday through Saturday from 8 AM until 4 PM with a thirty minute unpaid lunch break. The Joined Party's beginning rate of pay was $8.00 per hour.
5. The Employment Agreement required the Joined Party to devote all of the Joined Party's time, attention, and energies to the business interests of the Petitioner and prohibited the Joined Party from performing services for any other business entity as an employee, contractor, consultant, advisor, officer, or director if those services would interfere with the Joined Party's ability to competently perform services for the Petitioner.
6. The Joined Party's first four days of work were for training. The Petitioner paid the Joined Party $8.00 per hour during the training period.
7. The Joined Party was required to complete a timesheet recording the times that she reported for work each day and the times that she left work each day.
8. The Joined Party worked at the Petitioner's business office location. The Petitioner provided the workspace and all equipment and supplies needed to perform the work including a computer and telephone. The Joined Party was not required to provide anything in order to perform the work.
9. The Joined Party's primary responsibility as a Reservation Specialist was to handle and execute in-coming calls for reservations and bookings and to make out-going calls to notify passengers of schedule changes and cancellations. In addition to the Joined Party the Petitioner hired approximately eight other Reservation Specialists.
10. The Petitioner's *Employee Personnel Policies* provide that the Petitioner will conduct a formal performance review of all new employees in the sixth month of their employment and annual performance reviews thereafter. The Policies provide for an employee appeal process to resolve disputes.

11. The Joined Party was paid on a bi-weekly basis with the payday on every other Friday. Initially, the rate of pay was $8.00 per hour. Subsequently, the Petitioner increased the pay rate to $9.00 per hour and in July 2009 the Petitioner increased the rate of pay to $10.00 per hour. The Joined Party's paychecks did not show whether or not any taxes were withheld. The Joined Party multiplied the number of hours worked by the hourly rate of pay and determined that the Petitioner had paid her for all of the hours worked without any deductions. On several occasions the Joined Party asked the bookkeepers and accountants who were on the premises about her pay and about whether the amount she received was a net amount after taxes or whether the Petitioner had failed to withhold taxes. The Joined Party never received any answers to her questions.
12. The Petitioner did not withhold payroll taxes from the pay of the employees because the Petitioner believed that the Petitioner's future was uncertain until such time as the Petitioner began transporting passengers. The Petitioner intended to withhold payroll taxes beginning with the date the Petitioner transported passengers. The Petitioner did not register with the Florida Department of Revenue for payment of unemployment compensation taxes.
13. Either party could terminate the relationship for any reason at any time. The Employment Agreement provides that if the Petitioner terminates the Joined Party the Petitioner will provide two weeks written notice or will pay the Joined Party two weeks base salary in lieu of notice. The Petitioner terminated the Joined Party on or about August 1, 2009, when the Petitioner ceased operations.
14. At the end of 2009 the Petitioner reported the Joined Party's wages to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
15. The Joined Party filed a claim for unemployment compensation benefits effective August 9, 2009. The Joined Party did not receive credit for her wages from the Petitioner and filed a *Request for Reconsideration of Monetary Determination.* An investigation was assigned to the Department of Revenue to determine if the Joined Party was entitled to credit for her wages received from the Petitioner. On October 26, 2009, the Department of Revenue issued a determination holding that Reservation Specialists, including the Joined Party, performing services for the Petitioner are the Petitioner's employees retroactive to January 1, 2009. The determination also held that corporate officers are statutory employees of the Petitioner, and as such, their wages are reportable. The Petitioner filed a timely protest.

Conclusions of Law:

16. 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.
17. 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).
18. 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).

19. 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.

20. 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.

21. 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.

22. 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.

23. The Petitioner does not contend that the Joined Party and other individuals who performed services for the Petitioner as Reservation Specialists were self employed independent contractors. In fact, the Petitioner's Chairman of the Board testified that the *Employment Agreement for Confidential Employees* was a valid Agreement that speaks for itself. The words found in a contract are to be given meaning and are the best possible evidence of the intent of the contracting parties. Jacobs v. Petrino, 351 So.2d 1036 (Fla. 4th DCA 1976). The Agreement clearly establishes an employer/employee relationship.

24. The Joined Party's services as a Reservation Specialist were not separate and distinct from the Petitioner's business but were an integral and necessary part of the business. The Petitioner provided everything that was needed to perform the work including the place of work, a computer, and telephones. The Petitioner trained the Joined Party even though the work did

not require any special skill or knowledge. The Petitioner determined the rate and method of pay. The Joined Party was paid by time worked rather than by production or by the job. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish a nonemployee relationship. The Petitioner required the Joined Party to devote her full time, attention, and energies to the Petitioner's business and prohibited the Joined Party from performing services for others.

25. The Petitioner determined what work was performed, when it was performed, where it was performed, and how it was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. 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. Thus it is concluded that the services performed for the Petitioner by the Joined Party and other individuals as Reservation Specialists constitute insured employment.

26. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.

27. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

28. The Petitioner is a corporation. Three corporate officers, including the Chairman of the Board and the Vice President of Airline Services, were active in the operation of the business and were compensated for their services. The corporate officers are stautory employees of the Petitioner and the Petitioner is liable for payment of unemployment compensation taxes on their earnings.

29. Section 443.1215, Florida States, provides:
    (1) Each of the following employing units is an employer subject to this chapter:
        (a) An employing unit that:
            1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
            2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

30. The Vice President of Airline Services testified that his salary from the Petitioner was $3,600 per month beginning in March 2009. The Vice President's salary for the first calendar quarter 2009 is in excess of $1,500 and is sufficient to establish the Petitioner's liability for payment of unemployment compensation taxes on all of the Petitioner's employees.

Recommendation: It is recommended that the determination dated October 26, 2009, be AFFIRMED.

Respectfully submitted on June 17, 2010.

R. O. SMITH, Special Deputy
Office of Appeals