AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2924601

AMERICAN CZECH & SLOVAK
CULTURAL CLUB ATTN MARIA SVOBODA
13325 ARCH CREEK RD
NORTH MIAMI FL 33181

PROTEST OF LIABILITY
DOCKET NO. 2009-173264L

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 chefs constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

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 Special Deputy issued the Recommended Order on June 15, 2010. The Petitioner's exceptions to the Recommended Order were received by mail postmarked July 5, 2010. Rule 60BB-2.035(19)(c)**,** Florida Administrative Code, requires that written exceptions be filed within 15 days of the mailing date of the Recommended Order. As a result, the Agency may not consider the Petitioner's exceptions in this order because the exceptions were filed more than 15 days after the mailing date of the Recommended Order. No other submissions were received from any party.

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

Having considered the record of this case and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that the determination dated October 26, 2009, is MODIFIED to reflect a retroactive date of January 1, 2005. It is also ORDERED that the determination is AFFIRMED as modified.

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

_____
TOM CLENDENNING,
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

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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 19, 2010. The Petitioner was represented by its attorney. The Petitioner's 2009 co-president and the Petitioner's 2009 treasurer testified as witnesses. 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 from any party. A post hearing submission titled *Proposal for Decision Relating to Telephonic Hearing Before Special Deputy for and on Behalf of the Agency for Workforce Innovation, Unemployment Compensation Appeal* was received from the Petitioner. The Petitioner's post hearing submission is discussed in the conclusions of law portion of this recommended order. The Joined Party submitted additional evidence after the hearing was closed. The additional evidence is discussed in the conclusions of law portion of the recommended order.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as chefs 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 is a corporation which operates a social club, the purpose of which is to further the Czech and Slovak cultures, customs, traditions, and food in South Florida. The club is governed by a board of directors consisting of eight or nine elected members. Members of the board serve as volunteers and are not compensated by the Petitioner. Other club members also perform various volunteer services for the Petitioner without compensation.

2. The Petitioner serves dinner to its members each Sunday at the Petitioner's clubhouse. In approximately 2003 the Petitioner contacted the Joined Party, an individual with many years experience as a kitchen manager and chef, and offered the Joined Party work as a cook. The Joined Party was employed as a taxi driver at the time and declined the offer. Subsequently, the Joined Party reconsidered and submitted an application for the position of cook. The Petitioner hired the Joined Party on January 3, 2005. The Joined Party was not a member of the club at the time but became a member of the club during 2005.

3. There was no written agreement or contract between the Petitioner and the Joined Party. The verbal agreement was that the Petitioner would pay the Joined Party $200 per week and would provide living quarters at the clubhouse property for the Joined Party and the Joined Party's minor son. The Joined Party would prepare the Sunday dinner and would be responsible for opening and closing the club for all activities during the week. The Joined Party would be responsible for overseeing the club and would be responsible for managing the repairs of the property, accepting deliveries, and bringing in the mail each day.

4. The Joined Party was not required to pay rent to the Petitioner for the living quarters provided by the Petitioner. The Petitioner was responsible for the cost of all utilities.

5. At the time of hire the Petitioner provided the Joined Party with a list of assigned duties. From time to time the Petitioner amended the list of duties by adding additional duties.

6. The Joined Party worked under the direction of the board of directors. The board of directors determined the menu, which was usually the same each week. The Joined Party used his own recipes to prepare the food. If the Petitioner received complaints about the food from members of the club the Petitioner would tell the Joined Party to change the recipe, for instance, add more or less salt. The Joined Party complied with the instructions because the board of directors had the right to tell the Joined Party how to manage the club.

7. The clubhouse has a fully equipped kitchen which the Joined Party used to prepare the meals. The Petitioner reimbursed the Joined Party if the Joined Party had to purchase pots, pans, or utensils for the kitchen. The Joined Party was responsible for purchasing the food and supplies and was reimbursed by the Petitioner. The Petitioner also paid for any materials or supplies that were needed to maintain the property.

8. A lot of maintenance and repairs needed to be done when the Joined Party began working for the Petitioner in 2005. The Joined Party did not have the time available to continue working as a taxi driver and he left that employment in approximately March 2005. The Joined Party did not perform any other services for any company or individual other than the Petitioner after he left his employment as a taxi driver.

9. The Petitioner has a club newsletter. Sometimes the newsletter referred to the Joined Party as the club's chef and other times it referred to the Joined Party as the general manager of the club.

10. $150 of the Joined Party's pay was considered by the Petitioner to be compensation for preparing the Sunday meal and $50 was considered to be compensation for managing the club. The Petitioner paid the Joined Party on a biweekly basis. The Petitioner also rents the clubhouse for weddings and other special occasions. If the Petitioner catered the special events the Joined Party was responsible for preparing the meals. On those occasions the Petitioner paid extra money to

the Joined Party. During the summer of 2008 the Petitioner decided not to serve Sunday meals during the slow summer months of July and August. As a result the Petitioner only paid the Joined Party $50 per week for those months.

11. The Petitioner did not withhold any taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as health insurance. The Petitioner did not report the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC nor on Form W-2.

12. Either party had the right to terminate the relationship at any time without incurring liability.

13. The Petitioner elected a new president for the year of 2009. Although the Joined Party had pet dogs living with him in the clubhouse since January 2005, with the Petitioner's knowledge, the new president believed that the dogs were unsanitary and were causing damage to the property. Therefore, the Petitioner told the Joined Party to get rid of the dogs. The Joined Party's lady friend also moved in with the Joined Party with the Petitioner's knowledge. The Joined Party voluntarily gave money to the Petitioner to cover any additional expense that might result from the lady friend living at the clubhouse. The new president did not approve of the living arrangement. The new president and the Joined Party had verbal confrontations. In 2009 the Petitioner again decided to not serve Sunday dinners for the months of July and August. On June 27, 2009, the Petitioner provided written notice to the Joined Party that his lease was terminated effective immediately due to the poor economy and that he had seven days to vacate the premises.

Conclusions of Law:

14. 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.

15. 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).

16. 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).

17. 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.

18. 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.

19. 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.

20. 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.

21. The Petitioner's business is the operation of a social club. Part of the Petitioner's regular business activity is to serve Sunday dinner for the members. The Petitioner engaged the Joined Party to prepare the Sunday dinner and to manage the club. The Joined Party was responsible for opening and closing the club for all activities, accepting deliveries, managing repairs, and bringing in the mail. 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.

22. The Petitioner provided everything that was needed to prepare the Sunday dinner and everything that was needed to manage the club. The Joined Party did not have any expenses in connection with the work and it was not shown that the Joined Party was at risk of suffering a financial loss from performing services.

23. There was no written agreement. The verbal agreement was that the Petitioner would pay the Joined Party a flat amount each week, a portion of which was for preparing the meal and a portion of which was for managing the club. The Joined Party's compensation included living quarters, including utilities, which were provided by the Petitioner rent free. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

24. Section 443.1217(1), Florida Statutes, provides that the wages subject to the chapter include all remuneration for employment including the cash value of remuneration paid in any medium other than cash.

25. Rule 60BB-2.022, Florida Administrative Code, provides that the cash value of lodging is the amount agreed upon in the contract of hire or the fair market rental value of the property. The value of lodging includes the cost of utilities, such as water, sewer, gas, and electricity.

26. The Joined Party worked for the Petitioner from January 2005 until June 2009, a period of four and one-half years. Either party had the right to terminate the relationship at any time without

incurring liability. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the relationship when the Petitioner evicted the Joined Party from the premises. 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."

27. The "extent of control" referred to in Restatement section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

28. The Petitioner's testimony reveals that the Petitioner had the right to tell the Joined Party how to manage the club and the right to tell the Joined Party how to prepare the meals. The Joined Party recognized that fact and he complied with the Petitioner's instructions. Although the Joined Party was an experienced cook or chef, the Petitioner told the Joined Party to alter the Joined Party's recipes or methods of preparing the food. The evidence reveals that the Petitioner controlled the means used by the Joined Party to perform the work.

29. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment. Although the Joined Party began performing services for the Petitioner in January 2005, the determination is retroactive only to January 2008. It is concluded that the correct retroactive date is January 1, 2005.

30. A post hearing submission titled *Proposal for Decision Relating to Telephonic Hearing Before Special Deputy for and on Behalf of the Agency for Workforce Innovation, Unemployment Compensation Appeal* was received from the Petitioner. In its submission the Petitioner attempts to redefine the legal issues as whether the Joined Party was employed solely by the Petitioner and whether the Joined Party was engaged in a multitude of business activities.

31. The record contains evidence that the Joined Party was employed as a taxi driver when he was initially engaged by the Petitioner. Evidence was also presented that the Joined Party was involved in the formation of two corporations during the time the Joined Party performed services for the Petitioner. The Joined Party's testimony reveals that the corporations never engaged in business. The Petitioner did not pay the corporations for the services provided to the Petitioner by the Joined Party. There was no agreement that prohibited the Joined Party from engaging in outside activities. In fact, the Petitioner was aware at the time of hire that the Joined Party had other employment driving a taxi. Whether the Joined Party engaged in outside activities is not relevant to the legal issue, whether the services performed for the Petitioner by the Joined Party constitute insured employment. The Petitioner's *Proposal for Decision Relating to Telephonic Hearing Before Special Deputy for and on Behalf of the Agency for Workforce Innovation, Unemployment Compensation Appeal* is respectfully rejected.

32. The Joined Party submitted additional documentary evidence after the hearing was closed. Rule 60BB-2.035(19)(a), Florida Administrative Code, provides that no additional evidence will be accepted after the hearing is closed. Thus, the additional evidence submitted by the Joined Party is rejected and has not been included in the recommended order.

Recommendation: It is recommended that the determination dated October 26, 2009, be MODIFIED to reflect a retroactive date of January 1, 2005. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on June 15, 2010.

R. O. SMITH, Special Deputy
Office of Appeals