AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1148855
B & S UPHOLSTERY
884 N MIRAMAR AVE
INDIALANTIC FL 32903-3054

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

PROTEST OF LIABILITY
DOCKET NO. 2009-174809L

O R D E R

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated November 19, 2009, is AFFIRMED.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
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. - 1148855
B & S UPHOLSTERY
SHIRLEY BURNETTE
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INDIALANTIC FL 32903-3054

PROTEST OF LIABILITY
DOCKET NO. 2009-174809L

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 19, 2009.

After due notice to the parties, a telephone hearing was held on February 2, 2010. The Petitioner, represented by the owner, appeared and testified. The Respondent was represented by a Department of Revenue Tax Specialist II. 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 working as upholsterers 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 an individual who has operated a residential upholstery and drapery business as a sole proprietor since 1974. The Petitioner has registered for payment of unemployment compensation taxes on the wages paid to acknowledged employees.
2. The Joined Party is an individual who was employed as an upholsterer years ago before accepting work in a factory. The Joined Party never worked as a self employed upholsterer. In early 2008 the Joined Party was unemployed and was seeking employment. During the course of his work search he contacted the Petitioner and other upholstery businesses to see if work was available. At

the time of the contact the Petitioner did not have any work available. Subsequently, the Joined Party found employment in another city. In early May 2008 the Petitioner contacted the Joined Party to see if the Joined Party was available to work for a few weeks while the Petitioner's full time upholsterer was out of town. The Petitioner told the Joined Party that she would pay him $15 per hour and the Joined Party accepted the offer. The Petitioner told the Joined Party that he would have to pay his own taxes because the Petitioner could not afford to pay the taxes. The Petitioner and the Joined Party did not enter into any written agreement or contract.

3. The Petitioner observed the Joined Party during the first week or two of work and considered that period of time to be a trial period. The Petitioner recognized that the Joined Party was a skilled upholsterer and she decided to pay the Joined Party $20 per hour for the second week. The Petitioner informed the Joined Party that she had learned that the full time upholsterer would not be returning to work and the Petitioner offered the position to the Joined Party. The Joined Party accepted the offer because the Petitioner's shop was closer to the Joined Party's residence than the Joined Party's out of town employment.

4. The Petitioner's hours of operation are 8 AM until 4:30 PM. The Petitioner told the Joined Party that he was expected to report for work each day unless the Petitioner notified him that no work was available. The Petitioner told the Joined Party that he was expected to report for work at 8 AM unless told otherwise, and that he was expected to work until 4:30 PM unless the Petitioner told him to go home early. The Petitioner did not provide the Joined Party with a key and the Joined Party was not allowed to remove any of the work items from the Petitioner's shop. The Joined Party was required to perform the work in the Petitioner's shop during the Petitioner's regular hours of operation. The Joined Party was not allowed to hire others to perform the work for him. The Petitioner warned the Joined Party that the Joined Party would be discharged if he did any upholstery work that was not through the Petitioner's business.

5. The Joined Party had a few hand tools in a tool box. He brought the tool box to work with him and left the tools in the Petitioner's shop during the entire time he performed services for the Petitioner. The Joined Party also used some of the Petitioner's hand tools. The Petitioner provided the work space and all equipment, including an air powered stapler, and supplies needed to perform the work. The Joined Party also delivered some of the reupholstered furniture using the Petitioner's vehicle. The Joined Party did not have any expenses in connection with the work.

6. The upholstery work was performed for the Petitioner's customers. The Petitioner would tell the customer the amount that the Petitioner would charge the customer to reupholster an item. When providing the estimate to the customer, the Petitioner would estimate the amount of labor involved and the cost of the labor. The Joined Party did not determine the amount of the customer charge.

7. The Petitioner determined the order in which the Joined Party was required to perform the work. Occasionally, the Petitioner told the Joined Party that the Petitioner preferred the work to be completed in a different manner. On those occasions the Joined Party adhered to the Petitioner's methods. If the Joined Party had to redo any work, the Joined Party was paid for the additional time.

8. The Petitioner knew roughly how many hours the Joined Party worked each week. At the end of each week the Petitioner would ask the Joined Party how many hours he had worked during the week. The Petitioner would then pay the Joined Party according to the number of hours reported by the Joined Party. No taxes were withheld from the pay. The Petitioner does not provide any fringe benefits to any of the Petitioner's employees. No fringe benefits were provided to the Joined Party.

9. At the end of 2008 the Petitioner's accountant prepared a Form 1099-MISC for the Joined Party, reporting the Joined Party's earnings as nonemployee compensation. In early 2009 the Joined Party took the form to his tax preparer so that he could file his income tax return. The Joined

Party did not have an occupational license, he did not have business liability insurance, he did not advertise or offer his services to the general public, and he did not have a business location. The tax preparer told the Joined Party that the Joined Party should have received Form W-2 from the Petitioner. The Joined Party notified the Petitioner of the comments made by the tax preparer. The Petitioner told the Joined Party that if he wanted to keep his job he would have to pay his own taxes.

10. Either party had the right to terminate the relationship at any time without incurring liability. The Joined Party worked until August 6, 2009. The relationship ended when the Petitioner and the Joined Party had a difference of opinion over the method and the amount of pay.

Conclusions of Law:

11. 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.

12. 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).

13. 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).

14. 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.

15. 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.

16. 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.

17. 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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

18. The agreement between the parties in this case was verbal. The agreement did not specify that the Joined Party would perform services as a self employed independent contractor; however, the Petitioner did tell the Joined Party that he would be responsible for paying his own taxes. Although it may have been the Petitioner's intent to establish an independent relationship, the Joined Party was under the impression that he was hired to be the Petitioner's employee. Furthermore, a statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "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."

19. The Petitioner provided the place of work and all supplies and equipment needed to perform the work. The Joined Party did not have any expenses in connection with the work. The Joined Party was not at risk of suffering a financial loss from performing services for the Petitioner.

20. The customers were the Petitioner's customers. The Joined Party did not determine the amounts which the Petitioner charged the Petitioner's customers. The Joined Party did not have an occupational license, did not have liability insurance, did not advertise, and did not have a separate business location. In fact, the Petitioner prohibited the Joined Party from performing services for others. The work performed by the Joined Party was an integral and necessary part of the Petitioner's business rather than separate and distinct from the Petitioner's business.

21. The Petitioner determined the method and rate of pay. The Petitioner paid the Joined Party by time worked rather than by production or by the job. The Petitioner chose not to withhold payroll taxes from the Joined Party's pay. The failure to withhold payroll taxes does not, standing alone, establish an independent contractor relationship.

22. The Joined Party performed services for the Petitioner for a period of fifteen months. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. 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."

23. 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).

24. The Petitioner controlled the sequence in which the work was performed. The Petitioner controlled what work was performed, when the work was performed and where the work was performed. The Joined Party was required to personally perform the work and could not hire others to perform the work for him. All of these facts reveal that the Petitioner controlled the means and manner of performing the work. Thus, it is concluded that the services performed for the Petitioner by the Joined Party and other individuals working as upholsterers constitute insured employment.

25. The special deputy was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. Factors considered in resolving evidentiary conflicts include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the special deputy finds the testimony of the Joined Party to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the Joined Party.

Recommendation: It is recommended that the determination dated November 19, 2009, be AFFIRMED.

Respectfully submitted on February 22, 2010.

R. O. SMITH, Special Deputy
Office of Appeals