AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2897631
NORTH STAR DEVELOPMENT INC
10273 GULF BLVD
TREASURE ISLAND FL 33706-4810

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

PROTEST OF LIABILITY
DOCKET NO. 2009-76224L

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 May 1, 2009, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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Unemployment Compensation Appeals
MSC 346 Caldwell Building
107 East Madison Street
Tallahassee FL 32399-4143

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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 May 1, 2009.

After due notice to the parties, a telephone hearing was held on September 8, 2009. The Petitioner's Owner appeared and testified at the hearing. The Joined Party and the Joined Party's Attorney appeared at the hearing. The Joined Party testified. A Tax Specialist for the Respondent appeared and testified at the hearing.

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. Proposed Findings of Fact and Conclusions of Law were received from the Petitioner. The Proposed Findings of Fact were considered by the Special Deputy, and those findings that comport with the evidence found in the hearing were incorporated into the Special Deputy's Recommended Order.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals as housekeepers/general managers 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 acts as a development company, purchasing and renting properties. The Petitioner was incorporated on April 23, 1998 and has reported no employees to the Florida Department of Revenue. The Petitioner acquired and operated a hotel.

2. The Joined Party performed services for the Petitioner from June 12, 2006 through February 19, 2009. The Joined Party sought work with the Petitioner after seeing an advertisement for work. The Joined Party completed an application with the Petitioner and was hired as a housekeeper.

3. The Joined Party worked as a housekeeper and became an assistant manager September 2, 2006. The Joined Party was promoted to general manager in 2007.

4. The Joined Party began performing housekeeping services. At the time of hire, the Joined Party was informed that the office opened at 8 a.m. and that she was to report to work at that time.

5. The Joined Party's responsibilities as a housekeeper included cleaning the rooms, hotel grounds, and cleaning the hotel laundry room. The Joined Party performed housekeeping services under a manager.

6. The Joined Party was promoted by the Petitioner on or about September 2, 2006 to housekeeping and assistant manager duties. The Joined Party maintained her former housekeeping duties and added managerial duties to her responsibilities. The new duties included resolving guest problems and making reservations for guests.

7. The Joined Party was given at least one *Personnel Review* by the Petitioner. The Joined Party was provided training by the Petitioner before the Joined Party's promotion to general manager. The review listed areas of improvement that the Joined Party needed to work on. The review also suggested times and methods for the Joined Party to practice her skills. The review indicated that the Joined Party could be promoted to general manager in the future.

8. The Joined Party was promoted to general manager in 2007 and made responsible for registering guests at the hotel and taking telephone calls. The Joined Party also acted as a liaison between the guests and the hotel and performed various services in connection with the running of the hotel. These tasks included dealing with vendors and exterior maintenance for the hotel as well as being available for check-outs at 11 a.m. and check-ins at 3 p.m. The Joined Party was required to make certain that the rooms were cleaned and ready for incoming guests. The Joined Party was on call to deal with any situations at all times including when the Joined Party was not on the worksite or outside of the Joined Party's normal work hours. The Joined Party was required by the Petitioner to work at the hotel at least 45 hours per week.

9. The Joined Party was able to hire a temporary agency for cleaning the hotel. The temporary agency was paid by the Petitioner.

10. The Joined Party was paid $8.00 per hour while performing housekeeping duties and $9.00 per hour as an assistant manager. The Joined Party was paid a $500 weekly salary for performing services as a manager. The Joined Party was paid in the form of weekly checks. The pay rate was determined by the Petitioner.

11. The Joined Party did not own her own business.

12. The Petitioner advertised the hotel office as opening at 8 a.m. The Petitioner provided various office supplies and a laptop computer to the Joined Party. The Petitioner provided a cellular telephone for the Joined Party to use in taking reservations while she was not at the work site. The Joined Party had control over the petty cash fund and could use the fund for supplies.

13. Both parties had the right to terminate the relationship at anytime without liability. The relationship between the Joined Party and the Petitioner ended because the Joined Party chose to end the relationship.

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.

    1 Restatement of Law, Agency 2d Section 220 (1958) provides:

    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

    (2) The following matters of fact, among others, are to be considered:
    (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
    (b) whether or not the one employed is engaged in a distinct occupation or business;
    (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
    (d) the skill required in the particular occupation;
    (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
    (f) the length of time for which the person is employed;
    (g) the method of payment, whether by the time or by the job;
    (h) whether or not the work is a part of the regular business of the employer;
    (i) whether or not the parties believe they are creating the relation of master and servant;
    (j) whether the principal is or is not in business.

18. Comments in the Restatement explain that the word “servant” does not exclusively connote manual labor, and the word “employee” has largely replaced “servant” in statutes dealing with various aspects of the working relationship between two parties. 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.

19. The evidence presented in this case reveals that the Petitioner informed the Joined Party at the time of hire of the duties of the job, the hours of work, and the rate of pay. The Joined Party was directly supervised by a manager of the Petitioner. The manager provided a performance review with instructions on further training. The Joined Party was promoted, first to assistant manager, and finally to manager by the Petitioner. The evidence reveals that the Petitioner had control over where, when, and how the work was to be done. The degree of control exercised by a business over a worker is the principal consideration in determining employment status. If the business is only concerned with the results and exerts no control over the manner of doing the work, then the worker is an independent contractor. United States Telephone Company v. Department of Labor and Employment Security, 410 So.2d 1002 (Fla. 3rd DCA 1982); Cosmo Personnel Agency of Ft. Lauderdale, Inc. v. Department of Labor and Employment Security, 407 So.2d 249 (Fla. 4th DCA 1981).

20. The work performed by the Joined Party as a housekeeper, assistant manager, and manager are not occupations or businesses that are separate and distinct from the Petitioner's hotel business. The Joined Party's services both as a contact person for the hotel guests and in ensuring the efficient operation of the hotel were a necessary part of the normal course of business.

21. The evidence reflects that the Petitioner controlled the financial details of the relationship. The Petitioner determined the method and rate of pay. The Joined Party was paid by time worked, hourly at first and later in the form of a salary, rather than by the job. The Petitioner changed the Joined Party's rate of pay on two occasions due to promotions.

22. The relationship was an at-will relationship. Either party could terminate the relationship at any time without incurring liability. 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 Petitioner introduced documents including an independent contractor agreement not signed by the Joined Party and a notarized statement from a former manager indicating that the Joined Party signed an identical independent contractor agreement at the time of hire. The Petitioner's representative testified that he was not present for the Joined Party's hire and took considerable efforts to acquire the notarized statement as a result. The Joined Party denied signing an independent contractor agreement.

24. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Section 90.801(1)(c), Florida Statutes, defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

25. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. §120.57(1)(c), Fla. Statutes.

26. Had the Petitioner provided a copy of the independent contractor agreement signed by the Joined Party, this document would not in and of itself be dispositive. Regardless of any written agreement, the actual relationship between the parties must be the basis for a determination of employment. 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."

27. Based upon the preponderance of the evidence presented in this case, it is concluded that in the performance of her duties for the Petitioner, the Joined Party was an employee of the Petitioner.

28. The Petitioner provided Proposed Findings of Fact and Conclusions of Law. The Petitioner's submission consisted of a four page typed letter. The submission is further organized into numbered points. The Petitioner's Proposed Findings of Fact and Conclusions of Law were considered by the Special Deputy and those Proposed Findings of Fact and Conclusions of Law that comport with the evidence presented in the record were incorporated into this recommended order. Those Findings of Fact and Conclusions of Law that did not comport with the evidence presented in the record or which attempted to provide new or additional evidence were respectfully rejected.

Recommendation: It is recommended that the determination dated May 1, 2009, be AFFIRMED.

Respectfully submitted on June 3, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals