AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2605705

JETLEASE PALM BEACH INC
RUSSELL W DISE
1515 PERIMETER RD STE T-101
WEST PALM BEACH FL 33406-1426

PROTEST OF LIABILITY
DOCKET NO. 2009-91156L

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 as aircraft salespersons 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 March 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 she 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, she 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, she 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 and any others who worked under the same terms and conditions were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to those workers. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because

she 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 September 1, 2009, and October 13, 2009. The Petitioner was represented by its attorney. The Petitioner's president and a jet broker testified as witnesses on behalf of the Petitioner. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified. The Petitioner's former personal assistant and a former aircraft salesperson testified as witnesses for the Joined Party. The Special Deputy issued a Recommended Order on November 5, 2009.

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

1. The Petitioner is a corporation which operates an aircraft brokerage business to sell or lease corporate jets. The Petitioner's president is active in the operation of the business. The Petitioner has one worker, an office manager or personal assistant to the president, who is acknowledged to be the Petitioner's employee. The Petitioner registered with the Florida Department of Revenue for payment of unemployment compensation taxes effective February 28, 2005.
2. The Petitioner has used aircraft salespersons to sell or lease the jets since the inception of the business. Four salespersons reside outside the State of Florida and perform their sales activities outside of Florida. The individuals who work for the Petitioner in Florida work from the Petitioner's office location in West Palm Beach.
3. The Joined Party was a nail technician for twenty-one years. For twenty of those years the Joined Party owned her own nail salon. The Petitioner contacted the Joined Party after a mutual friend told the Petitioner that the Joined Party was a smart business woman. The Petitioner's president requested that the Joined Party meet with him for an interview and the Joined Party agreed.
4. During the interview the Petitioner told the Joined Party that the job involved selling and leasing aircraft, that the hours were flexible, and that the job was commission only. The Joined Party explained that she was a single parent and that she could not work until 5 PM each day because she had to pick up her daughter from school. The Petitioner replied that was not a problem because the Joined Party could work from home. The Petitioner informed the Joined Party that the Petitioner would train her to do the work since the Joined Party did not have any experience with aircraft and did not have sales experience. The Petitioner instructed the Joined Party to report for work at the Petitioner's office on January 2, 2007.
5. The Joined Party reported for work as instructed by the Petitioner. The Petitioner assigned the Joined Party to work at a desk in the Petitioner's office. The Petitioner provided the Joined Party with a computer and a telephone and trained the Joined Party how to use the software programs on the computer. Most of the training was on-the-job training. The Joined Party was required to observe while the Petitioner's president made sales. The Joined Party attended ground school to learn about aircraft and the Petitioner reimbursed the Joined Party for the cost of the school. The Petitioner's personal assistant or office manager taught the Joined Party how to contact prospects and how to obtain leases. The personal assistant assisted the sales representatives with their work and trained the sales representatives how to do sales proposals

and lease agreements. The Joined Party was told that when she answered the telephone she was required to say "Thank you for calling Jetlease."

6. The Petitioner's president told the Joined Party that the Joined Party was not allowed to work for other companies because the Petitioner considered that to be a conflict of interest.

7. The Petitioner provided everything that was needed to perform the work. The Petitioner provided the Joined Party with business cards listing the Petitioner's business name, the Joined Party's name, and the Joined Party's job title as "Aircraft Sales and Leasing." The Petitioner provided the Joined Party with a company email address. The Petitioner provided all office supplies. If the Joined Party purchased anything for the business, the Petitioner reimbursed the Joined Party.

8. The Petitioner provided leads to the sales representatives. The Petitioner's personal assistant disbursed the leads to the sales representatives. The sales representatives were required to contact the leads and to enter the results of the contacts in the Petitioner's computer system. The president's personal assistant tracked the results of the leads.

9. The Joined Party believed that she was hired to be the Petitioner's employee until several months after she started work. At that time the Petitioner gave the Joined Party an independent contractor agreement and told the Joined Party to sign the agreement and to return the signed agreement to the president. The Joined Party read the agreement but did not agree with it. The Joined Party did not sign the agreement and did not return the agreement to the president. The president never confronted the Joined Party about the Joined Party's refusal to sign the agreement.

10. The Joined Party did not complete her first sale until approximately May 1, 2007. Because she was hired as a commission only sales representative she did not have any income until she received her first commission check on May 15, 2007. No taxes were withheld from the pay. The Petitioner paid draws to at least one other sales representative. The Petitioner did not pay any draws to the Joined Party.

11. The Petitioner's president told the Joined Party that the Joined Party was required to be in the office from 9 AM until 5 PM, Monday through Friday. The Joined Party reminded the president that he had told her in the interview that she could work from home and that she was not required to work until 5 PM. The president replied that it would not work for him to allow the Joined Party to work from home and he reiterated that she was required to work in the Petitioner's office from 9 AM until 5 PM.

12. The sales representatives were allowed to take no more than one hour for a lunch break and they were required to take their breaks around noontime. The president verbally reprimanded the sales representatives if they took longer than one hour.

13. On several occasions the Joined Party was late reporting for work. The president asked the Joined Party why she was late and verbally reprimanded her. The president frequently threatened to fire the Joined Party and on two occasions the president told the Joined Party that she was fired. The president rehired the Joined Party on both occasions. On many occasions the Joined Party had to leave early to pick up her daughter from school. The Joined Party always asked permission to leave, however, the president always complained when the Joined Party left early. The Joined Party was required to call the president if the Joined Party was going to be late to work or absent from work. The Joined Party always complied with that requirement.

14. All of the sales representatives in the West Palm Beach office were women. The Petitioner's president told them how to dress, how to wear their hair, and required that they wear makeup in a certain manner. The Petitioner issued several memos to the sales representatives

concerning the Petitioner's dress code. The sales representatives were not allowed to wear flat shoes or sandals. The Petitioner reprimanded a sales representative because she came to work with her hair in a ponytail. The President reprimanded a sales representative because the representative did not have makeup on at work and because she did not wear shoes with heels. The Petitioner allowed the sales representatives to wear blue jeans on Fridays. One of the sales representatives wore a pair of jeans with a tear or hole and the president told her to go home to change. When the sales representative replied that all of her jeans had holes or tears, the president gave the president's personal assistant $100 to take the sales representative shopping to buy jeans that did not have holes or tears.

15. The Petitioner scheduled all of the sales representatives working in the West Palm Beach office to go on "fun trips" with clients or prospective clients. The trips involved flying in private jets to places like Key West or New Orleans for supper. The president told the sales representatives that it was mandatory that they participate in the "fun trips." The Petitioner reprimanded one of the sales representatives because she did not go on one such "fun trip." The Petitioner told the sales representative that she was not a team player.

16. The Petitioner scheduled the sales representatives to attend out of town conventions of the National Business Aviation Association. The Petitioner required that the sales representatives attend the conventions. Air transportation, hotel rooms and meals were provided at no expense to the sales representatives. The Petitioner told the sales representatives how to behave at the conventions.

17. The Petitioner held periodic sales and training meetings. For a period of time the meetings were held every week, however, generally, the meetings were held monthly. The meetings were mandatory and the president threatened to fire the Joined Party if the Joined Party failed to attend. In the meetings the Petitioner provided hints on how to close sales. The Petitioner taught the sales representatives the ins and outs of how to do the work. In the meetings the president constantly told the sales representatives that they were not producing enough sales and threatened that if they could not bring in more work, he would hire someone who could. In one meeting the president changed the required hours of work to 8 AM until 5 PM because the sales representatives were not producing enough sales.

18. The Joined Party was paid only for the commissions which she earned. The Petitioner did not withhold any taxes from the pay. The Petitioner does not provide any fringe benefits for the sales representatives or for the acknowledged employees. At the end of 2007 and 2008 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

19. Either party had the right to terminate the relationship at any time without incurring liability. In July 2008 the Joined Party asked the Petitioner for permission to take Friday, July 18, off from work. The Petitioner gave the Joined Party permission to take the day off from work. On Friday July 18 the Joined Party flew to Mexico with a client or prospective client. When the Petitioner's president learned the reason for the Joined Party's absence he became upset because he did not believe that it was appropriate for a female sales representative to go to Mexico with a client, and because he did not believe that the Joined Party was truthful about the reason for her absence. As a result, the Petitioner discharged the Joined Party. At the time of termination the president told the Joined Party that she was discharged because she failed to report for work on Friday.

Based on these Findings of Fact, the Special Deputy recommended that the determination be modified to hold that the services performed by the Joined Party and other individuals performing services

in Florida as aircraft salespersons constitute insured employment. The Special Deputy also recommended that the determination be modified to reflect a retroactive date of February 28, 2005. The Special Deputy further recommended that the determination be affirmed as modified. The Petitioner's exceptions to the Recommended Order were received by mail postmarked November 20, 2009. 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.

The Petitioner's *General Exceptions* allege that the Special Deputy demonstrated bias against the Petitioner and its president and did not impartially weigh the factors involved in making an appropriate classification of the Joined Party and other aircraft salespersons. Exceptions #1-4 of the *General Exceptions* specify the basis of these allegations and are addressed separately in this order.

In Exception #1 of the *General Exceptions*, the Petitioner takes exception to the Special Deputy's conduct during the hearing held on September 1, 2009. Specifically, the Petitioner takes exception to the Special Deputy making several attempts to contact the Joined Party for the hearing. The record reflects that the Special Deputy made four attempts to reach the Joined Party. The first attempt went to the Joined Party's voicemail, the second attempt disconnected after an unidentified woman answered "Hello," the third attempt went to the Joined Party's voicemail, and the final attempt resulted in the Special Deputy contacting the Joined Party for the hearing. Section 120.57(1)(b), Florida Statutes, requires that each party be provided an opportunity to respond and to present evidence and argument on all issues of the case. When evidence in the record indicates that the Joined Party's failure to appear at the hearing at the scheduled time was potentially the result of technical problems or simple human error, the Special Deputy's good faith efforts to contact the Joined Party for the hearing do not demonstrate bias against the Petitioner and instead reflect an effort to preserve the rights of the Joined Party. The portion of Exception #1 of the *General Exceptions* that takes exception to the Special Deputy's making several attempts to contact the Joined Party for the hearing is rejected.

Also in Exception #1 of the *General Exceptions*, the Petitioner takes exception to the Special Deputy's continuance of the September 1, 2009, hearing. Rule 60BB-2.035(13), Florida Administrative Code, provides that the Special Deputy may continue a hearing for good cause upon the Special Deputy's own motion. Rule 60BB-2.035(9), Florida Administrative Code, requires that the Department of Revenue provide its official records of the case to the Special Deputy and to all parties. Rule 60BB-2.035(15)(e), Florida Administrative Code, further requires that these documents be delivered to each party prior to the telephone hearing and provides that only documents received by the parties will be considered unless the right to view documents is waived. A review of the record reveals that the Joined Party stated first that she was not sure if she received the documents submitted by the Department of Revenue and that she did not recall receiving the documents. At that time, the Joined Party also stated that an Agency representative told her that just her presence was required for the telephone hearing. A review of the record also reveals that, after the Special Deputy described the documents to the Joined Party, she stated that she still did not recall receiving the documents and that she was not comfortable proceeding without the documents. A review of the record further reveals that the Special Deputy continued the hearing over the Petitioner's objection in order to protect the due process rights of the Joined Party. Further examination of the hearing record is required in order to determine if the Special Deputy had good cause for continuing the hearing.

An examination of the record of the case supports the Special Deputy's motion to continue the hearing because no evidence was provided to show that the Department of Revenue sent its documents to

the Joined Party prior to the hearing as required by rules 60BB-2.035(9) and 60BB-2.035(15)(e) of the Florida Administrative Code, and the Joined Party did not waive her right to view the documents pursuant to rule 60BB-2.035(15)(e), Florida Administrative Code. The Special Deputy's motion was also warranted by the possibility that the claimant was misinformed about the hearing procedures by an Agency representative. Based on these considerations, the Special Deputy had good cause to continue the hearing pursuant to rule 60BB-2.035(13), Florida Administrative Code, and did not demonstrate bias toward the Petitioner in granting the continuance. The Petitioner's contention that the Joined Party received the notice of hearing and its accompanying pamphlet at the same address used by the Department of Revenue when mailing its documents is not persuasive because the documents were separately mailed to the Joined Party by the Agency, not the Department of Revenue, and the receipt of the Agency's documents would not necessarily indicate whether the Joined Party received documents from the Department. Additionally, the Petitioner's contention that the Special Deputy used leading questions to determine whether the Joined Party received the documents is not persuasive when a review of the record shows that the Special Deputy asked specific questions necessary to determine whether the Joined Party received the documents and then provided the Joined Party more in-depth information about the documents when she indicated that she was uncertain if she received them. Since the Special Deputy continued the hearing for good cause as is permitted under rule 60BB-2.035(13), Florida Administrative Code, it has been demonstrated that the proceedings complied with the essential requirements of law. As a result, the Petitioner has not provided a basis for rejecting the Special Deputy's findings of fact under section 120.57(1)(1), Florida Statutes. The portion of Exception #1 of the *General Exceptions* that takes exception to the Special Deputy's continuance of the September 1, 2009, hearing is respectfully rejected.

In Exception #2 of the *General Exceptions*, the Petitioner alleges that the Special Deputy did not consider the potential bias and animosity of the Joined Party's witnesses. The Petitioner also alleges that the Special Deputy completely disregarded or ignored portions of the testimony of the Petitioner's witness, Barclay C. Kling, a witness who, according to the Petitioner's exceptions, testified against her own personal interests. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and 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 the essential requirements of law. A review of the record reflects that the Petitioner and the Joined Party presented conflicting testimony and that the Special Deputy made a credibility determination in favor of the Joined Party and the Joined Party's witnesses in Conclusion of Law #36. Conclusion of Law #36 states the factors considered by the Special Deputy in his

resolution of conflicts in testimony were, "the witness' opportunity and capacity to observe the event or act in question; any inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events; and the witness' demeanor." Therefore, the Special Deputy considered the factors suggested by the Petitioner and resolved conflicts in testimony in favor of the Joined Party and the Joined Party's witnesses. Competent substantial evidence in the record supports the Special Deputy's Findings of Fact; thus, the Special Deputy's statement regarding the resolution of conflicts in testimony provided in Conclusion of Law #36 is accepted by the Agency. Exception #2 of the *General Exceptions* is respectfully rejected.

In Exception #3 of the *General Exceptions*, the Petitioner alleges that the Special Deputy based the Recommended Order primarily on the testimony of the Joined Party and argues that the determination dated May 14, 2009, should be modified to apply only to the Joined Party. As previously stated, the Special Deputy is the finder of fact in an administrative hearing, and the Agency may not modify the Special Deputy's Findings of Fact unless the findings are not based on competent substantial evidence in the record pursuant to section 120.57(1)(l), Florida Statutes. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not modify the Special Deputy's Conclusions of Law unless the conclusions of law do not represent a reasonable application of the law to the facts. The record reflects that the Special Deputy resolved conflicts in evidence in favor of the Joined Party and her witnesses in Conclusion of Law #36. The record further reflects that the Joined Party and her witnesses provided testimony that described the duties performed by all aircraft salespersons and that testimony indicated that the other workers performed their services for the Petitioner under the same terms and conditions as the Joined Party, terms and conditions consistent with an employer/employee relationship. The record shows that, based upon evidence in the hearing record, the Special Deputy concluded in Conclusion of Law #35 that the Petitioner "exercised significant and extensive control over the Joined Party and other Florida sales representatives." The record also shows that the Special Deputy recommended in the *Recommendation*, the last full paragraph on page 7 of the Recommended Order, that the determination dated May 14, 2009, be modified to hold that the services performed by the Joined Party and other individuals performing services in Florida as aircraft salespersons constitute insured employment. The Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. Both the Special Deputy's Findings of Fact and Conclusions of Law are accepted by the Agency pursuant to section 120.57(1)(l), Florida Statutes. Exception #3 of the *General Exceptions* is respectfully rejected.

In Exception #4 of the *General Exceptions*, the Petitioner contends the case is similar to *F.L. Enterprises, Inc. v. Unemployment Appeals Comm'n.*, 515 So.2d 1340 (Fla. 5th DCA 1987), a case where the court held that an independent contractor relationship existed between a company and a solicitor of prospects. In making its contention, the Petitioner proposes alternative findings of fact and conclusions of law that conflict with the Special Deputy's Findings of Fact and Conclusions of Law. Based on the Findings of Fact and Conclusions of Law made by the Special Deputy, this case is distinguishable in that, unlike the worker in *F. L. Enterprises*, the Joined Party was not informed at the time of hire that she was being hired as an independent contractor, was not permitted to choose her own shift, was provided direct supervision, was required to attend mandatory meetings, was not allowed to work for another company, and was not subject to an independent contractor's agreement. Thus, the current case is distinguishable in that the Special Deputy found that the Petitioner had the right to control the details of the Joined Party's services as an aircraft salesperson and had more than just the right to control the final product of the work. Since the Special Deputy's Findings of Fact are based on 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 Special Deputy's Findings of Fact and Conclusions of Law are both accepted by the Agency pursuant to section 120.57(1)(l), Florida Statutes. Exception #4 of the *General Exceptions* is respectfully rejected.

Exceptions #2, 4-8, 11-13, 15-18, 28-30, and 32-42 of the Petitioner's *Specific Exceptions to Numbered Paragraphs in Recommended Order* propose alternative findings of fact and conclusions of law and attempt to enter additional evidence. Section 120.57(1)(l), Florida Statutes, does not allow the modification of the Special Deputy's Findings of Fact or Conclusions of Law unless the Agency first determines that the findings are not supported by the competent substantial evidence in the record or that the conclusions 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 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. Rule 60BB-2.035(19)(a), Florida Administrative Code, prohibits the acceptance of evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. Exceptions #2, 4-8, 11-13, 15-18, 28-30, and 32-42 of the Petitioner's *Specific Exceptions to Numbered Paragraphs in Recommended Order* are respectfully rejected.

Exception #9 of the Petitioner's *Specific Exceptions to Numbered Paragraphs in Recommended Order* alleges that the Joined Party's testimony was inconsistent and contradicted by two other witnesses, Ms. Clark and Ms. Kling. The record reflects that the Special Deputy, in his role as finder of fact under section 120.57(1)(l), Florida Statutes, resolved conflicts in evidence in favor of the Joined Party and her witnesses in Conclusion of Law #36. The record also reflects that the Joined Party testified that she was given an independent contract agreement "a couple of months" after she started working for the Petitioner and that the Special Deputy found in Finding of Fact #9 and Conclusion of Law #27 that the Joined Party received the agreement "several months after she started work." While the Special Deputy's Finding of Fact #9 and Conclusion of Law #27 are otherwise supported by competent substantial evidence in the record and the Special Deputy's Conclusions of Law, including Conclusion of Law #27, reflect a reasonable application of the law to the facts, portions of Finding of Fact #9 and Conclusion of Law #27 must be modified to more accurately reflect the Joined Party's testimony. Finding of Fact #9 is amended to say:

> The Joined Party believed that she was hired to be the Petitioner's employee until months after she started work. At that time the Petitioner gave the Joined Party an independent contractor agreement and told the Joined Party to sign the agreement and to return the signed agreement to the president. The Joined Party read the agreement but did not agree with it. The Joined Party did not sign the agreement and did not return the agreement to the president. The president never confronted the Joined Party about the Joined Party's refusal to sign the agreement.

Conclusion of Law #27 is amended to say:

> The agreement of hire between the Petitioner and the Joined Party was verbal. The verbal agreement specified that the Joined Party would work as a commissioned sales representative and that the Petitioner would train the Joined Party. The agreement did not specify that the Joined Party would perform services as an independent contractor. Although the Petitioner told the Joined Party that the Joined Party's work schedule would be flexible and that the Joined Party could perform the work from the Joined Party's home, the Petitioner never allowed the Joined Party to work from her home and the Petitioner required that the Joined Party work the hours as dictated by the Petitioner. After working for the Petitioner for months the Petitioner presented the Joined Party with an independent contractor agreement which the Joined Party refused to sign. Even if the Joined Party had agreed to sign the agreement, a statement in an agreement that the existing relationship is that of independent contractor would not be 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."

Exception #14 of the Petitioner's *Specific Exceptions to Numbered Paragraphs in Recommended Order* proposes alternative findings of fact and conclusions of law. A review of the record establishes that the majority of the Special Deputy's Finding of Fact #14 is supported by competent substantial evidence in the record and that the Special Deputy's Conclusions of Law reflect a reasonable application of the law as required under 120.57(1)(l), Florida Statutes; however, a portion of Finding of Fact #14 must be modified to accurately reflect the testimony of the hearing. A review of the record reveals that no witness testified that a sales representative was told to go home to change by the president. Finding of Fact #14 is amended to say:

> All of the sales representatives in the West Palm Beach office were women. The Petitioner's president told them how to dress, how to wear their hair, and required that they wear makeup in a certain manner. The Petitioner issued several memos to the sales representatives concerning the Petitioner's dress code. The sales representatives were not allowed to wear flat shoes or sandals. The Petitioner reprimanded a sales representative because she came to work with her hair in a ponytail. The President reprimanded a sales representative because the representative did not have makeup on at work and because she did not wear shoes with heels. The Petitioner allowed the sales representatives to wear blue jeans on Fridays. One of the sales representatives wore a pair of jeans with a tear or hole. When the sales representative replied that all of her jeans had holes or tears, the president gave the president's personal assistant $100 to take the sales representative shopping to buy jeans that did not have holes or tears.

Exceptions #19 and #31 of the Petitioner's *Specific Exceptions to Numbered Paragraphs in Recommended Order* propose alternative findings of fact and conclusions of law. A review of the record reveals that the Special Deputy's Finding of Fact #19 is generally supported by competent substantial evidence in the record and that the Special Deputy's Conclusion of Law #31 reflects a reasonable application of the law to the facts in accord with 120.57(1)(l), Florida Statutes. Nonetheless, portions of Finding of Fact #19 and Conclusion of Law #31 must be modified to accurately reflect the testimony of the hearing. A review of the record demonstrates that the Joined Party testified that she could not recall if she was given permission to take the day off from work. Finding of Fact #19 is amended to say:

> Either party had the right to terminate the relationship at any time without incurring liability. In July 2008 the Joined Party asked the Petitioner for permission to take Friday, July 18, off from work. On Friday July 18 the Joined Party flew to Mexico with a client or prospective client. When the Petitioner's president learned the reason for the Joined Party's absence he became upset because he did not believe that it was appropriate for a female sales representative to go to Mexico with a client, and because he did not believe that the Joined Party was truthful about the reason for her absence. As a result, the Petitioner discharged the Joined Party. At the time of termination the president told the Joined Party that she was discharged because she failed to report for work on Friday.

Conclusion of Law #31 is amended to say:

> The Joined Party worked full time exclusively for the Petitioner for approximately one and one-half years. Either party had the right to terminate the relationship at anytime without incurring liability. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner exercised the right to discharge the Joined Party on three occasions; however, the Petitioner rehired the Joined Party following the first two terminations. In July 2008 the Petitioner discharged the Joined Party because the Joined Party took a day off from work. The Joined Party was not rehired. 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."

In Exception #26 of the *Specific Exceptions to Numbered Paragraphs in Recommended Order*, the Petitioner cites *4139 Management, Inc. v. Department of Labor and Employment*, 763 So.2d 514 (Fla. 5th DCA 2000), in support of its contention that the extent of control is the primary factor in determining whether an independent contractor or employee relationship exists. In support of the conclusion that a worker who is subject to control or direction of an owner merely as to the result obtained is an independent contractor, the Petitioner cites again to the *4139 Management, Inc.* case and also cites the following cases: *Gulf Refining Co. v. Wilkinson*, 94 Fla. 664 (Fla. 1927); *Marcoux v. Circle K Stores, Inc.*, 773 So.2d 1270 (Fla. 4th DCA 2000); and *Chase Manhattan Mortg. Corp. v. Scott, Royce, Harris, Bryan, Barra & Jorgensen, P.A.*, 694 So.2d 827 (Fla. 4th DCA 1997). In *4139 Management*, the court held that "if control is confined to results only, there is generally an independent contractor relationship, whereas if control is extended to the means used to achieve the results, there is generally an employer-employee relationship." 4763 So.2d at 517. The court also held that the "employer has the right to inspect the job being performed to determine whether the worker is doing the quality of job he or she was hired to do." *Id*. at 517. The record reflects that the Special Deputy concluded in Conclusion of Law #34 that the Petitioner did not limit its control to control over the results of the Joined Party's work and instead extended its control to the means used by the Joined Party to achieve results, "control[ing] what work was performed, where the work was performed, when the work was performed, and how the work was performed." Evidence in the record supports the conclusion that the Petitioner did not limit itself to merely approving sales or leases, controlling nearly every aspect of how the Joined Party performed her duties as an aircraft salesperson, from the way she dressed to when she came in for work. As a result, the control exerted by the Petitioner in this case amounts to more than a mere right to inspection of the final product of the Joined Party's work as was present in *4139 Management*. The Special Deputy's Findings of Fact and Conclusions of Law do not require modification by Agency since they are supported by

competent substantial evidence in the record and represent a reasonable application of the law to the facts. The portion of the Petitioner's Exception #26 that cites the *4139 Management* is respectfully rejected. The remaining cases cited by the Petitioner also do not require a different result.

The other cases cited in Exception #26 by the Petitioner in support of the conclusion that a worker who is subject to control or direction of an owner merely as to the result obtained is an independent contractor are also distinguishable from the current case. In *Gulf*, the court noted that the method of gas and oil delivery was not addressed in an agreement between a gasoline and oil refining company and a local distributor. 94 Fla. 664 at 668. It was left to the local distributor to determine the method of gas and oil delivery; the gasoline and oil refining company had no control over the means used by local distributor. *Id*. The court in *Marcoux* similarly held that a publisher did not exert control over a carrier when the publisher controlled only the results of the carrier's work and did not control the carrier's work "with regard to the details of his engagement nor his day-to-day activity." 773 So.2d at 1271. Also, the court found in *Chase Manhattan* that a lender was not obligated to enter into any transactions "save for those it willingly undertook" with a purchaser of the lender's home mortgage loans. 694 So. 2d 827 at 833. The court further held that the lender's compliance with the purchaser's lending standards did not demonstrate the purchaser's control over the lender. *Id*. The court noted that the lender "was free to make mortgage loans to anyone on any terms of its own choosing, but if it desired to have" the loans purchased by the purchaser, the lender "would necessarily have to conform such a mortgage to" the purchaser's lending standards. *Id*. at 831. A review of the record establishes that the Special Deputy concluded that the Petitioner exercised control over the means used by the Joined Party on a day-to-day basis and did not restrict its influence to the approval or inspection of sales or leases completed by the Joined Party. Evidence in the record supports the conclusion that the Joined Party was not permitted to complete sales or leases according to terms of her own choosing. The Joined Party was not permitted to perform her job duties at any time she wished, to dress as she liked, to work where she chose, or associate with customers as she wanted. Accordingly, the Special Deputy's conclusion that the Petitioner's control extended to the means used by the Joined Party in completing her work reflects a reasonable application of the law to the facts. The Special Deputy's Findings of Fact are supported by competent substantial evidence in the record as well. Thus, the Agency accepts the Special Deputy's Findings of Fact and Conclusions of Law and respectfully rejects the portion of Exception #26 that cites cases in support of the conclusion that a worker who is subject to control or direction of an owner merely as to the result obtained is an independent contractor.

In Exception #26, the Petitioner cites the following cases as well in support of its argument that a determination of a worker's employment status turns on whether a company exercised control over the details of the work: *Miami-Dade County v. State Dept. of Labor and Employment Sec., Div. of Unemployment Compensation*, 749 So.2d 574 (Fla. 3d DCA 2000); *Eighty Four Lumber v. Bethel*, 544 So.2d 1094 (Fla. 1st DCA 1989); and *Harper ex rel. Daley v. Toler*, 884 So.2d 1124 (Fla. 2d DCA 2004). In the *Miami-Dade* case, the court did not apply the test applied in *Cantor v. Cochran, 184 So.2d 173 (Fla. 1966)*, when determining the employment status of public officers. 749 So.2d 574 at 577. The court concluded that the county poll workers were only subject to supervision by the state as mandated by statute and that the details of their work were not otherwise supervised by the county. *Id*. at 578. In the current case, the Special Deputy was required to apply the *Restatement* test adopted in *Cantor* when determining the employment status of the Joined Party and other aircraft salespersons. 184 So.2d at 174. When applying the *Cantor* test to the facts of the case, the Special Deputy found in Conclusions of Law #33-34 that the Joined Party was directly supervised by the Petitioner and that the Petitioner supervised the details of her work. The Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. The Petitioner has not provided a basis for the rejection of the Special Deputy's Findings of Fact and Conclusions of Law allowed under section 120.57(1)(l), Florida Statutes; therefore, the portion of Exception #26 that cites the *Miami-Dade* case is respectfully rejected.

Similarly, the other two cases cited by the Petitioner in Exception #26 in support of its argument that a determination of a worker's employment status turns on whether a company exercised control over the details of the work do not provide a basis for the rejection of the Special Deputy's Findings of Fact or Conclusions of Law. In *Eighty Four Lumber*, the court held that a garage door installer was "neither supervised by Eighty Four as to the details of his work, nor given instructions as to how to install the doors." 544 So. 2d at 1095. The court further held that the business did not exercise the degree of control over the manner, method, and details of the claimant's work as to indicate an employer/employee relationship. *Id*. at 1096. In *Harper*, the court held that record did "not conclusively show that the Times' right of control over Heller did not extend to the means used by Heller in performing his duties for the Times" as would be consistent with an employer/employee relationship. 884 So. 2d at 1134. The case at hand is distinguishable from both cases in that evidence in the record conclusively shows the Petitioner had the right of control over the means used by the Joined Party in performing her services. The Special Deputy found in Conclusion of Law #33 that the claimant was subject to direct supervision, was provided training, and was required to attend mandatory sales and training meetings. In contrast to the facts of

Eighty Four Lumber, the Joined Party was given specific instructions by the Petitioner on how she should obtain sales and leases. This demonstrates that the Joined Party lacked control over the means she used in obtaining sales and leases as is consistent with an employer/employee relationship. The Special Deputy's Findings of Fact are supported by competent substantial evidence in the record and support the Special Deputy's conclusion that the Petitioner exercised control over the details of the Joined Party's services. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. The Petitioner has not established a basis under section 120.57(1)(l) for the modification or rejection of the Special Deputy's Findings of Fact and Conclusions of Law; therefore, the portion of Exception #26 that cites the *Eighty Four Lumber* and *Harper* cases is respectfully rejected.

After citing the court cases in Exception #26 the *Specific Exceptions to Numbered Paragraphs in Recommended Order*, the Petitioner proposes alternative findings of fact and conclusions of law. As previously stated, a review of the record reveals that the Special Deputy concluded that the Petitioner exercised control over the details of the Joined Party's work as is characteristic of an employee relationship based on evidence in the hearing record. The Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. The Special Deputy's Conclusions of Law, including the Special Deputy's ultimate conclusion that an employment relationship existed between the Petitioner and the Joined Party, reflect a reasonable application of the law to the facts. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not modify the Special Deputy's Findings of Fact and Conclusions of Law. The portion of Exception #26 that proposes alternative findings of fact and conclusions of law is respectfully rejected.

In Exception #27 of the *Specific Exceptions to Numbered Paragraphs in Recommended Order*, the Petitioner proposes alternative findings of fact and conclusions of law. The Petitioner also cites *Keith v. News & Sun Sentinel Co.*, 667 So.2d 167 (Fla. 1995), in support of its contention that the Petitioner's independent contractor agreement should be honored with respect to the Joined Party and other aircraft salespersons and seen as a valid indicator of the status of the working relationship. A review of the record reflects that the Special Deputy, as the finder of fact, found that an agreement did not exist between the Petitioner and the Joined Party in Finding of Fact #10. The *Keith* case provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot otherwise be determined, courts must resort to a fact-specific analysis under the Restatement based on the actual practice of the parties." *Id*. at 171. A review of the record demonstrates that the Special Deputy analyzed the facts of the case based on the *Restatement* factors and determined

that an independent contractor relationship did not exist between the Petitioner and the Joined Party. The Special Deputy's Findings of Fact, including Finding of Fact #10, are supported by competent substantial evidence in the record. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. This includes the Special Deputy's ultimate conclusion that an employment relationship existed between the Petitioner and the Joined Party and those workers who worked under the same terms and conditions as the Joined Party. Section 120.57(1)(l), Florida Statutes, requires that the Special Deputy's Findings of Fact and Conclusions of Law be accepted as written by the Special Deputy. Exception #27 of the *Specific Exceptions to Numbered Paragraphs in Recommended Order* is respectfully rejected.

The amended Findings of Fact support the Special Deputy's ultimate conclusion that the Joined Party was an employee of the Petitioner. As stated earlier, evidence in the record supports the conclusion that the Petitioner exerted control over the services performed by the Joined Party. The Special Deputy's Conclusions of Law represent a reasonable application of law to the facts and are adopted. The Petitioner's request for the adoption of alternative findings of fact and conclusions of law is respectfully denied.

Having fully 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.

Therefore, it is ORDERED that the determination dated January 27, 2009, is MODIFIED to hold that the services performed by the Joined Party and other individuals performing services in Florida as aircraft salespersons constitute insured employment. It is ORDERED that the determination is MODIFIED to reflect a retroactive date of February 28, 2005. It is also ORDERED that the determination is AFFIRMED as modified.

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

_____
TOM CLENDENNING,
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 347 Caldwell Building
107 East Madison Street
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PETITIONER:
Employer Account No. - 2605705
JETLEASE PALM BEACH INC
RUSSELL W DISE
1515 PERIMETER RD STE T-101
WEST PALM BEACH FL 33406-1426

PROTEST OF LIABILITY
DOCKET NO. 2009-91156L

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 May 14, 2009.

After due notice to the parties, a telephone hearing was held on October 13, 2009. The Petitioner was represented by its attorney. The Petitioner's president and a jet broker testified as witnesses. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified. The Petitioner's former office manager and a former aircraft salesperson testified as witnesses for the Joined Party.

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. The proposed findings of fact which are relevant and material and which are supported by competent evidence are incorporated in the recommended order. Proposals which are rejected are discussed in the conclusions of law section of the recommended order.

Issue: Whether services performed for the Petitioner by the Joined Party and other individuals working as aircraft salespersons 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 an aircraft brokerage business to sell or lease corporate jets. The Petitioner's president is active in the operation of the business. The Petitioner has one worker, an office manager or personal assistant to the president, who is acknowledged to be the Petitioner's employee. The Petitioner registered with the Florida Department of Revenue for payment of unemployment compensation taxes effective February 28, 2005.

2. The Petitioner has used aircraft salespersons to sell or lease the jets since the inception of the business. Four salespersons reside outside the State of Florida and perform their sales activities outside of Florida. The individuals who work for the Petitioner in Florida work from the Petitioner's office location in West Palm Beach.

3. The Joined Party was a nail technician for twenty-one years. For twenty of those years the Joined Party owned her own nail salon. The Petitioner contacted the Joined Party after a mutual friend told the Petitioner that the Joined Party was a smart business woman. The Petitioner's president requested that the Joined Party meet with him for an interview and the Joined Party agreed.

4. During the interview the Petitioner told the Joined Party that the job involved selling and leasing aircraft, that the hours were flexible, and that the job was commission only. The Joined Party explained that she was a single parent and that she could not work until 5 PM each day because she had to pick up her daughter from school. The Petitioner replied that was not a problem because the Joined Party could work from home. The Petitioner informed the Joined Party that the Petitioner would train her to do the work since the Joined Party did not have any experience with aircraft and did not have sales experience. The Petitioner instructed the Joined Party to report for work at the Petitioner's office on January 2, 2007.

5. The Joined Party reported for work as instructed by the Petitioner. The Petitioner assigned the Joined Party to work at a desk in the Petitioner's office. The Petitioner provided the Joined Party with a computer and a telephone and trained the Joined Party how to use the software programs on the computer. Most of the training was on-the-job training. The Joined Party was required to observe while the Petitioner's president made sales. The Joined Party attended ground school to learn about aircraft and the Petitioner reimbursed the Joined Party for the cost of the school. The Petitioner's personal assistant or office manager taught the Joined Party how to contact prospects and how to obtain leases. The personal assistant assisted the sales representatives with their work and trained the sales representatives how to do sales proposals and lease agreements. The Joined Party was told that when she answered the telephone she was required to say "Thank you for calling Jetlease."

6. The Petitioner's president told the Joined Party that the Joined Party was not allowed to work for other companies because the Petitioner considered that to be a conflict of interest.

7. The Petitioner provided everything that was needed to perform the work. The Petitioner provided the Joined Party with business cards listing the Petitioner's business name, the Joined Party's name, and the Joined Party's job title as "Aircraft Sales and Leasing." The Petitioner provided the Joined Party with a company email address. The Petitioner provided all office supplies. If the Joined Party purchased anything for the business, the Petitioner reimbursed the Joined Party.

8. The Petitioner provided leads to the sales representatives. The Petitioner's personal assistant disbursed the leads to the sales representatives. The sales representatives were required to contact the leads and to enter the results of the contacts in the Petitioner's computer system. The president's personal assistant tracked the results of the leads.

9. The Joined Party believed that she was hired to be the Petitioner's employee until several months after she started work. At that time the Petitioner gave the Joined Party an independent contractor agreement and told the Joined Party to sign the agreement and to return the signed agreement to

the president. The Joined Party read the agreement but did not agree with it. The Joined Party did not sign the agreement and did not return the agreement to the president. The president never confronted the Joined Party about the Joined Party's refusal to sign the agreement.

10. The Joined Party did not complete her first sale until approximately May 1, 2007. Because she was hired as a commission only sales representative she did not have any income until she received her first commission check on May 15, 2007. No taxes were withheld from the pay. The Petitioner paid draws to at least one other sales representative. The Petitioner did not pay any draws to the Joined Party.

11. The Petitioner's president told the Joined Party that the Joined Party was required to be in the office from 9 AM until 5 PM, Monday through Friday. The Joined Party reminded the president that he had told her in the interview that she could work from home and that she was not required to work until 5 PM. The president replied that it would not work for him to allow the Joined Party to work from home and he reiterated that she was required to work in the Petitioner's office from 9 AM until 5 PM.

12. The sales representatives were allowed to take no more than one hour for a lunch break and they were required to take their breaks around noontime. The president verbally reprimanded the sales representatives if they took longer than one hour.

13. On several occasions the Joined Party was late reporting for work. The president asked the Joined Party why she was late and verbally reprimanded her. The president frequently threatened to fire the Joined Party and on two occasions the president told the Joined Party that she was fired. The president rehired the Joined Party on both occasions. On many occasions the Joined Party had to leave early to pick up her daughter from school. The Joined Party always asked permission to leave, however, the president always complained when the Joined Party left early. The Joined Party was required to call the president if the Joined Party was going to be late to work or absent from work. The Joined Party always complied with that requirement.

14. All of the sales representatives in the West Palm Beach office were women. The Petitioner's president told them how to dress, how to wear their hair, and required that they wear makeup in a certain manner. The Petitioner issued several memos to the sales representatives concerning the Petitioner's dress code. The sales representatives were not allowed to wear flat shoes or sandals. The Petitioner reprimanded a sales representative because she came to work with her hair in a ponytail. The President reprimanded a sales representative because the representative did not have makeup on at work and because she did not wear shoes with heels. The Petitioner allowed the sales representatives to wear blue jeans on Fridays. One of the sales representatives wore a pair of jeans with a tear or hole and the president told her to go home to change. When the sales representative replied that all of her jeans had holes or tears, the president gave the president's personal assistant $100 to take the sales representative shopping to buy jeans that did not have holes or tears.

15. The Petitioner scheduled all of the sales representatives working in the West Palm Beach office to go on "fun trips" with clients or prospective clients. The trips involved flying in private jets to places like Key West or New Orleans for supper. The president told the sales representatives that it was mandatory that they participate in the "fun trips." The Petitioner reprimanded one of the sales representatives because she did not go on one such "fun trip." The Petitioner told the sales representative that she was not a team player.

16. The Petitioner scheduled the sales representatives to attend out of town conventions of the National Business Aviation Association. The Petitioner required that the sales representatives attend the conventions. Air transportation, hotel rooms and meals were provided at no expense to

the sales representatives. The Petitioner told the sales representatives how to behave at the conventions.

17. The Petitioner held periodic sales and training meetings. For a period of time the meetings were held every week, however, generally, the meetings were held monthly. The meetings were mandatory and the president threatened to fire the Joined Party if the Joined Party failed to attend. In the meetings the Petitioner provided hints on how to close sales. The Petitioner taught the sales representatives the ins and outs of how to do the work. In the meetings the president constantly told the sales representatives that they were not producing enough sales and threatened that if they could not bring in more work, he would hire someone who could. In one meeting the president changed the required hours of work to 8 AM until 5 PM because the sales representatives were not producing enough sales.

18. The Joined Party was paid only for the commissions which she earned. The Petitioner did not withhold any taxes from the pay. The Petitioner does not provide any fringe benefits for the sales representatives or for the acknowledged employees. At the end of 2007 and 2008 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

19. Either party had the right to terminate the relationship at any time without incurring liability. In July 2008 the Joined Party asked the Petitioner for permission to take Friday, July 18, off from work. The Petitioner gave the Joined Party permission to take the day off from work. On Friday July 18 the Joined Party flew to Mexico with a client or prospective client. When the Petitioner's president learned the reason for the Joined Party's absence he became upset because he did not believe that it was appropriate for a female sales representative to go to Mexico with a client, and because he did not believe that the Joined Party was truthful about the reason for her absence. As a result, the Petitioner discharged the Joined Party. At the time of termination the president told the Joined Party that she was discharged because she failed to report for work on Friday.

Conclusions of Law:

20. 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.

21. 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).

22. 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); Mangarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So2d 1061 (Fla. 2d DCA 1987).

23. 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.

24. 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.

25. 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.

26. 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.

27. The agreement of hire between the Petitioner and the Joined Party was verbal. The verbal agreement specified that the Joined Party would work as a commissioned sales representative and that the Petitioner would train the Joined Party. The agreement did not specify that the Joined Party would perform services as an independent contractor. Although the Petitioner told the Joined Party that the Joined Party's work schedule would be flexible and that the Joined Party could perform the work from the Joined Party's home, the Petitioner never allowed the Joined Party to work from her home and the Petitioner required that the Joined Party work the hours as dictated by the Petitioner. After working for the Petitioner for several months the Petitioner presented the Joined Party with an independent contractor agreement which the Joined Party refused to sign. Even if the Joined Party had agreed to sign the agreement, a statement in an agreement that the existing relationship is that of independent contractor would not be 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."

28. It is the Petitioner's business to broker the sales and leasing of corporate jet aircraft. The work performed by the Joined Party and the other sales representative was the selling and leasing of the aircraft for the Petitioner's clients. The Petitioner prohibited the Joined Party from working for other companies. 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 Petitioner's business. The Petitioner provided everything that was needed to perform the work and reimbursed the Joined Party for any expenses which the Joined Party may have had. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

29. The Petitioner provided both initial training and on-going training. It was not shown that the work required any particular skill or special knowledge. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

30. The Joined Party was paid solely by way of commission. The Joined Party's earnings were based on the Joined Party's production rather than by time worked. Section 443.036(16), Florida Statutes defines earned income as including commissions and bonuses. The fact that the Petitioner chose not to withhold payroll taxes from the Joined Party's earnings does not, standing alone, establish an independent relationship. Although the Petitioner did not provide any fringe benefits normally associated with employment relationships to the sales representatives, the Petitioner did not provide any fringe benefits to the acknowledged employee either.

31. The Joined Party worked full time exclusively for the Petitioner for approximately one and one-half years. Either party had the right to terminate the relationship at anytime without incurring liability. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner exercised the right to discharge the Joined Party on three occasions; however, the Petitioner rehired the Joined Party following the first two terminations. In July 2008 the Petitioner discharged the Joined Party because the Joined Party took a day off from work after the Joined Party received permission from the Petitioner to take the day off. The Joined Party was not rehired. 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."

32. The Petitioner controlled what work was performed through the assignment of leads and tracking of the leads. The Petitioner required the Joined Party to perform the work from the Petitioner's business location thereby controlling where the work was performed. The Petitioner determined the days and hours of work even to the point of allowing only one hour for a lunch break. The Joined Party had to request time off, had to request permission to leave work early, and had to notify the Petitioner if she was going to be late to work or absent from work. Thus, the Petitioner controlled when the work was performed.

33. The Petitioner controlled how the work was performed through training, mandatory sales meetings, and direct supervision. The Petitioner controlled how the Joined Party dressed, how she wore her hair, and how she applied makeup. The Petitioner controlled how the Joined Party behaved at conventions.

34. The Petitioner controlled what work was performed, where the work was performed, when the work was performed, and how the work was performed. 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).

35. The evidence presented in this case reveals that the Petitioner exercised significant and extensive control over the Joined Party and the other Florida sales representatives. Thus, it is concluded that the services performed for the Petitioner by the Joined Party and the other Florida sales representatives constitute insured employment.

36. 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, the Petitioner's former sales representative, and the Petitioner's former personal assistant to the president to be more credible.

37. The Petitioner's proposed finding of fact #2 compares the Petitioner's aircraft brokerage business with the real estate brokerage business. Section 443.1216(13)(n), Florida Statutes, provides that service performed as a real estate salesperson or agent is exempt from coverage by the law if all of the remuneration is paid solely by way of commission. The law does not contain any similar exemption for aircraft salespersons. The Petitioner's proposal is respectfully rejected.

38. The Petitioner's proposed finding of fact #4 states that the Petitioner has independent brokers located throughout the United States and that some of the brokers operate individually while the others operate through their own business entity. Proposed finding of fact #4 is not supported by the evidence and is rejected.

39. A portion of proposed finding #9 states that the salespersons are not reimbursed for expenses. That portion of the proposed finding is not supported by the evidence and is rejected.

40. The Petitioner's proposed findings of fact #11, 12, and 14 are recitation of testimony rather than proposed facts. A portion of proposed finding of fact #13 is recitation of testimony but also contains a proposed fact that the salesperson are not required to work any specific hours. That proposed finding is not supported by the evidence. Proposed findings of fact #11, 12, 13, and 14 are respectfully rejected.

41. The Petitioner's proposed finding of fact #15 states that the salespersons do not have fixed hours. The proposed finding is not supported by the evidence and is rejected.

42. The Petitioner's proposed finding of fact #16 states that the Petitioner does not train, direct, or supervise the sales persons. The proposed finding is not supported by the evidence and is rejected.

Recommendation: It is recommended that the determination dated May 14, 2009, be MODIFIED to hold that the services performed by the Joined Party and other individuals performing services in Florida as aircraft salespersons constitute insured employment. It is recommended that the determination be

MODIFIED to reflect a retroactive date of February 28, 2005. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on November 5, 2009.

R. O. SMITH, Special Deputy
Office of Appeals