AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2572542
THE AVALON SCHOOL AND MUSIC CENTER INC
11333 LAKE UNDERHILL RD #104
ORLANDO FL 32825-5004

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

PROTEST OF LIABILITY
DOCKET NO. 2009-91160L

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 April 16, 2009, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 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 April 16, 2009.

After due notice to the parties, a telephone hearing was held on May 12, 2010. The Petitioner, represented by the Petitioner's president, appeared and testified. Two piano teachers testified as witnesses. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as piano teachers 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 was formed in 2005 to operate a private school to teach music to the students. The students are taught on the Petitioner's premises by music teachers who are classified by the Petitioner as independent contractors. All of the teachers are paid at the same hourly rate of pay. Many of the teachers have taught music at other private schools where they were classified by those schools as independent contractors. Some of the teachers concurrently

work at other private music schools in the area while teaching at the Petitioner's school. Some of the teachers also have their own private students.

2. The Joined Party is an individual who has taught piano and voice at other schools as an independent contractor. The Joined Party also has her own private piano and voice students. In approximately August 2007 the Joined Party applied for employment with the Petitioner for the position of full time manager of the Petitioner's school. The Petitioner hired the Joined Party for the position of school manager. At the time of hire the Joined Party informed the Petitioner that it was her goal to transition from her employment as school manager to become an independent contractor providing music lessons to the Petitioner's students.

3. The Petitioner trained the Joined Party for the position of school manager. The training included training on how to deal with students and how to compute the teachers' pay. The Petitioner paid the Joined Party by the hour worked and withheld payroll taxes from the pay. At the end of each year the Petitioner reported the Joined Party's wages on Form W-2. The Petitioner paid unemployment compensation tax to the State of Florida on the Joined Party's wages.

4. Each teacher notifies the Petitioner at the time of hire of the days and hours the teacher is available to teach. As manager it was the Joined Party's responsibility to match the students to the teachers and to fill each teacher's schedule during each teacher's dates and times of availability. The Joined Party was responsible for advertising the Petitioner's school, for enrolling students, meeting with parents, and computing the pay earned by the teachers. The Joined Party was aware that all of the teachers were hired to be independent contractors.

5. In addition to her duties as school manager the Joined Party provided music lessons for some of the Petitioner's students. The Joined Party signed a written independent contractor agreement on October 11, 2007, for the services performed as a teacher. The Petitioner paid the Joined Party at the same music lesson rate of pay as was paid to all of the other teachers. The Petitioner did not withhold any payroll taxes from the Joined Party's earnings as a teacher because, like all of the other teachers, the Joined Party was classified as an independent teacher. The Petitioner did not pay unemployment compensation tax on the Joined Party's earnings from teaching. At the end of the year the Petitioner reported the Joined Party's earnings from teaching on Form 1099-MISC as nonemployee compensation.

6. The Joined Party gradually took on more and more students. Also, the Joined Party continued to teach her own private students who were not associated with the Petitioner's school. On July 31, 2008, the Joined Party chose to resign from her position as school manager to fulfill her goal of transitioning to performing services just as a teacher.

7. The Petitioner does not provide any training for the music teachers. The Petitioner does not provide sheet music, lesson plans, or music books for the students and teachers. The teachers determine how to teach the students and what materials to use. The Petitioner does not provide the musical instruments with the exception that the Petitioner provides the pianos for the piano and voice students.

8. The Petitioner provides the teachers with a shirt bearing the Petitioner's name and logo. The teachers are required to wear either the shirt provided by the Petitioner or other fashionable, conservative, clothing. The Petitioner requests that the teachers not wear faded blue jeans, torn or ripped clothes, T-shirts, or clothing that is not appropriate for a family environment. The Joined Party did not always wear the shirt provided by the Petitioner. The Petitioner did not tell the Joined Party that she had to wear the shirt and she was never reprimanded for not wearing the shirt.

9. The Petitioner requests that the teachers plan the lessons in advance to avoid interruptions during the lessons. The teachers should not talk on a cell phone during a lesson and should not eat during

a lesson. The teachers should not take time from one student's lesson time to meet with the parents of another student. The lesson time is to be used only for teaching the student who has paid for the lesson. The Petitioner requests that the teachers arrive at the school fifteen minutes before the scheduled time for the first student to ensure that the lessons begin on time and that the students receive the full lessons which the students/parents have paid for.

10. The Petitioner requires the students/parents to prepay for the music lessons. Each music teacher is paid on a monthly basis, based on the number of lessons scheduled for the teacher during the month. The Petitioner does not provide any fringe benefits for the teachers such as health insurance or paid vacations.

11. The school schedules recitals, concerts, and music festivals at which the students perform. The music teachers are required to participate in the recitals, concerts, and music festivals. The teachers do not receive extra pay for participating because the recitals, concerts, and music festivals are considered to be a regular part of the music lessons.

12. The teachers are not required to personally perform the work. If a teacher is unable to teach a lesson as scheduled, the teacher may obtain another teacher to teach the lesson. If the teacher is unable to obtain a substitute, the teacher is required to notify the Petitioner and the Petitioner will schedule a substitute. The teacher is responsible for paying the substitute teacher.

13. The Joined Party was frequently late arriving for her scheduled students. Although the Joined Party extended the lessons to make up for the missed time, the Petitioner received complaints from students/parents. As a result the Petitioner notified the Joined Party on February 11, 2009, that effective immediately the Joined Party was no longer a contracted music teacher at the school.

Conclusions of Law:

14. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

15. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).

16. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987).

17. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

18. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:

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

    (2) The following matters of fact, among others, are to be considered:

(a) the extent of control which, by the agreement, the business may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant;

(j) whether the principal is or is not in business.

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

20. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

21. It is undisputed that the services performed by the Joined Party as school manager were performed in covered employment. The dispute involves whether the services performed by the Joined Party as a piano and voice teacher were performed as an employee or as an independent contractor.

22. The Joined Party previously worked for other schools as a music teacher and was classified by those schools as an independent contractor. Other teachers who performed services for the Petitioner also worked at other schools as independent contractors. Some of the teachers, including the Joined Party, had their own private students. These facts reveal that, in the locality of the Petitioner's school, music lessons are usually provided by specialists without supervision, or in other words, by independent contractors.

23. There was a clear understanding between the Petitioner and the Joined Party that the Joined Party would perform services as an independent contractor. The Joined Party entered into a written independent contractor agreement for her services as a teacher. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

24. The Joined Party is a skilled musician and music teacher. The Petitioner did not provide any training to the Joined Party concerning how to teach the students. 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)

25. 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).
26. The Petitioner did not exert any control over how the Joined Party taught the students. The Joined Party determined, without interference from the Petitioner, how to teach the students and what music to teach to the students. The Joined Party used her own methods to teach the students rather than methods dictated by the Petitioner. The Petitioner merely required the Joined Party to provide the lessons at the scheduled times so that the students received the lessons for which the students paid. The control exercised by the Petitioner was focused on results rather than means.
27. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as piano teachers do not constitute insured employment.

Recommendation: It is recommended that the determination dated April 16, 2009, be REVERSED.

Respectfully submitted on June 16, 2010.

R. O. SMITH, Special Deputy
Office of Appeals