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

PETITIONER:
Employer Account No. - 2233562
JOHN FRAIOLI INC
SUNCOAST SECURITY
5651 HARBORAGE DR
FORT MYERS FL 33908-4531

PROTEST OF LIABILITY
DOCKET NO. 2010-100200L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
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 17, 2010.

After due notice to the parties, a telephone hearing was held on November 24, 2010. The Petitioner, represented by its attorney, appeared and testified. The Petitioner's President testified as a witness. The Respondent was represented by a Department of Revenue Senior Tax Specialist. A Tax Auditor testified as a witness.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which has operated a commercial security guard agency since approximately 2001. The corporate President is active in the operation of the business. The wife of the President is the corporate Treasurer and performs services as bookkeeper for the Petitioner.
2. The Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's books and records for the 2008 tax year to ensure compliance with the Florida Unemployment Compensation Law. The audit was extended to the 2009 tax year.

3. The Petitioner did not report any wages for the Petitioner's President or the Petitioner's Treasurer during 2008 or 2009. The Petitioner reported the earnings of the Treasurer to the Internal Revenue Service on Form 1099-MISC in the amount of $12,592.88 for 2008 and in the amount of $13,732.50 for 2009. All of the Petitioner's income was allocated to the Petitioner's President on Schedule K-1 of Form 1120S, *U.S. Income Tax Return for an S Corporation.*

4. The Tax Auditor examined all of the W-2 forms which the Petitioner issued to the Petitioner's employees and examined all of the 1099-forms issued to workers which the Petitioner classified as casual labor or contract labor. The Tax Auditor discovered that some employees who received a Form W-2 also received a Form 1009-MISC. Some of the W-2 employees received additional money which was not included on the W-2 forms and was not reported on a Form 1099-MISC.

5. In addition to the security guards whom the Petitioner provides for its regular customers, the Petitioner provides security guards for special events such as concerts and sporting events. Although some of the Petitioner's full time employees work at special events, most of the security guards who work the special events are part time or temporary workers.

6. The Petitioner withheld payroll taxes from the pay of the full time employees and reported their wages on Form W-2. The Petitioner did not withhold payroll taxes from the earnings of the part time or temporary security guards and their earnings were reported by the Petitioner on Form 1099-MISC.

7. All of the part time or temporary security guards were hired by the Petitioner's President. The President interviewed each part time or temporary security guard to determine the background and experience of each worker. There was no written agreement or contract with the security guards. The Petitioner provided each security guard with a T-shirt bearing the Petitioner's logo. The security guards were required to wear the shirt while performing security services and were required to return the shirt to the Petitioner upon completion of the work assignment. The security guards did not have any known expenses in connection with the work.

8. The Petitioner paid the part time or temporary security guards at an hourly rate of pay determined by the Petitioner. The security guards did not submit a bill or invoice to the Petitioner. The security guards were required to report their hours of work to the Petitioner and the Petitioner paid the security guards on a weekly basis.

9. It the Petitioner's President was satisfied with the work performance of a security guard the Petitioner would continue to provide work assignments to that security guard. If the Petitioner's President was not satisfied with the work performance of a security guard the Petitioner would not provide additional work assignments to that security guard. On occasion the Petitioner paid bonuses to security guards for good work performance. The security guards were free to quit working for the Petitioner at any time.

10. Some of the part time or temporary security guards had other employment. The security guards were free to work for other security companies. The security guards were required to personally perform the work and were not allowed to hire others to perform the work for them.

11. The Petitioner is required to collect sales tax from the Petitioner's customers for the security services which the Petitioner provides and is required to remit the sales tax to the Department of Revenue. The Petitioner did not pay sales tax to the security guards for the security services which the security guards provided for the Petitioner.

12. The Tax Auditor determined that the part time or temporary security guards were the Petitioner's employees rather than independent contractors, that the additional unreported payments made to employees were wages, that the earnings reflected on Form 1099-MISC issued to employees who received a Form W-2 were additional wages, that the Treasurer was an employee with wages in the amount shown on the Form 1099-MISC, and that the President received wages of $7,000 per year for services performed for the Petitioner.

13. The Petitioner was notified of the conclusions of the Tax Auditor and was notified that the Petitioner had the right to request a conference with the Tax Auditor and the Tax Auditor's supervisor. The Petitioner requested the conference. At the conference the Petitioner was informed that the Petitioner had thirty days from the date of the conference to submit additional evidence to show that the conclusions of the Tax Auditor were in error. The Petitioner did not submit additional evidence.

14. A *Notice of Proposed Assessment* was mailed to the Petitioner on or before May 17, 2010, notifying the Petitioner of the additional tax that was due as a result of the audit. Among other things the *Notice of Proposed Assessment* advises "If you do not agree with the proposed assessment in this Notice, you may seek a review of the assessment with the Department of Revenue Compliance Support Process, at the address listed below. Your protest must be filed with the Department within 20 days of the 'Mailed on or Before' date shown above."

15. The Petitioner's attorney filed a written protest by letter dated June 7, 2010. The protest letter was mailed on June 7, 2010, however, the postmark date on the envelope is not legible. The protest letter was received by the Department of Revenue on June 15, 2010.

Conclusions of Law:

16. Section 443.141(2)(c), Florida Statutes, provides:
    (c) *Appeals.*--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.

17. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides:
    Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.

18. Rule 60BB-2.023(1), Florida Administrative Code, provides, in pertinent part:
    Filing date. The postmark date will be the filing date of any report, protest, appeal or other document mailed to the Agency or Department. The "postmark date" includes the postmark date affixed by the United States Postal Service or the date on which the document was delivered to an express service or delivery service for delivery to the Department.

19. Although no evidence is available concerning the postmark date, the testimony of the Petitioner's attorney establishes that the appeal was filed by mail on June 7, 2010. Thus, the appeal was filed within the twenty day appeal period.

20. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.

21. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

22. Rule 60BB-2.023, Florida Administrative Code, provides:
    (3) Reporting Wages Paid. Wages are considered paid when:
        (a) Actually received by the worker; or;
        (b) Made available to be drawn upon by the worker; or
        (c) Brought within the worker's control and disposition, even if not possessed by the worker.

23. In Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9th Cir. 1990), the court determined that dividends paid by an S corporation to an officer of the corporation who performed services for the business, were wages subject to federal employment taxes, including federal unemployment compensation taxes. The court relied upon federal regulations which provide that the "form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment."

24. Both the Petitioner's President and the Petitioner's Treasurer are statutory employees of the Petitioner. The President and the Treasurer performed substantial services for the Petitioner. The Petitioner reported the Treasurer's earnings on Form 1099-MISC as an independent contractor but did not report any earnings for the President other than the pass through profits of the corporation. The earnings reported for the Treasurer on Form 1099-MISC are wages. It was not shown that $7,000 was an excessive annual wage for the services performed by the President.

25. The issue of whether the services performed for the Petitioner by the security guards 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.

26. 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).

27. 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).

28. 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.

29. 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.

30. 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.

31. 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.

32. The testimony of the President reveals that the primary difference between the security guards who are acknowledged to be employees and the security guards who are classified by the Petitioner as independent contractors is that the employees work full time while the security guards in dispute generally work on a part time or temporary basis. The Unemployment Compensation Law does not discriminate between full time and part time workers or between permanent and temporary workers. The fact that a worker is part time or temporary is not dispositive of whether the worker is an employee or an independent contractor.

33. The evidence reveals that there were no written agreements between the Petitioner and the security guards. No evidence was presented to show the substance of any verbal agreement other than the security guards performed services as specified by the Petitioner and that the security guards were paid an hourly amount, determined by the Petitioner, for the services. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court 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 be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

34. The Petitioner provides security services for the Petitioner's customers. The part time security guards provide the security services which the Petitioner contracts to provide. The services performed by the security guards are not separate and distinct from the Petitioner's business but are an integral and necessary part of the Petitioner's business. It was not shown that the security guards have any expenses in connection with the work or that the security guards are at risk of suffering a financial loss from performing services.

35. It was not shown that any skill or special knowledge is needed to work as a security guard. 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)

36. The Petitioner pays the security guards by time worked rather than by production or by the job. The Petitioner pays discretionary bonuses for good work performance. The fact that the Petitioner chose not to withhold payroll taxes does not establish an independent contractor relationship.

37. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant.

38. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error.

39. The evidence reveals that the Petitioner exercises significant control over the security guards, including the requirement that they personally perform the work and the requirement that they wear a uniform shirt bearing the Petitioner's logo. The Petitioner controls the method and rate of pay. The Petitioner has failed to show that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the protest of the determination dated May 17, 2010, be accepted as timely filed. It is recommended that the determination dated May 17, 2010, be AFFIRMED.

Respectfully submitted on December 14, 2010.

R. O. SMITH, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

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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 Petitioner's protest of the determination dated May 17, 2010, is accepted as timely filed. It is also ORDERED that the determination dated May 17, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **February, 2011**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION