AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2515704
ABB FASHION LLC
6815 BISCAYNE BLVDS STE 212
MIAMI FL 33138-6292

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

PROTEST OF LIABILITY
DOCKET NO. 2010-105687L

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 June 10, 2010, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

PETITIONER:
Employer Account No. - 2515704
ABB FASHION LLC
JOSEPH SILIGATO
6815 BISCAYNE BLVDS STE 212
MIAMI FL 33138-6292

PROTEST OF LIABILITY
DOCKET NO. 2010-105687L

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 June 10, 2010.

After due notice to the parties, a telephone hearing was held on January 11, 2011. The Petitioner's manager and an accountant appeared and testified on behalf of the Petitioner. The Joined Party did not appear at the hearing. A tax specialist II appeared and testified on behalf of the Respondent.

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 by the Joined Party constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a limited liability company, created in October 2003, for the purpose of running a salon.

2. The Petitioner retains three waxing specialists in addition to the Joined Party. The Petitioner considers all waxing specialists to be independent contractors.

3. The Joined Party provided services for the Petitioner as a waxing specialist from October 28, 2008, through March 19, 2010.

4. The Joined Party signed a *Contractor Retention Agreement & Covenant* at the time of hire. The document stipulates that the Joined Party is working as an independent contractor. The document requires that the Joined Party follow the Petitioner's "rules, guidelines, and policies." The document prohibits the Joined Party from keeping any customer worked with while working for the Petitioner and from being involved in any way with a competing business within 7 miles for a two year period.

5. The Joined Party would provide the Petitioner with a schedule of available dates each month. The Joined Party was required to work within the Petitioners normal hours of business.

6. The Joined Party was paid a 30% commission for services performed. The commission rate was established by the Petitioner. The Joined Party could receive tips. The Petitioner set the charges for the services.

7. The Joined Party was required to have either a cosmetology license or a full specialist license. The Joined Party possessed a cosmetology license.

8. The Petitioner provided the wax and heating equipment necessary to perform the work. The Joined Party normally brought her own hand tools. The Petitioner maintained a set of tools for instances when the Joined Party did not bring her own tools. The Petitioner provided scrubs for the Joined Party if she chose to wear them.

9. The Joined Party was required to perform the services personally.

10. Either party could end the relationship at anytime and without liability.

11. The Joined Party could work for a competitor that was farther than seven miles from the Petitioner's location.

Conclusions of Law:

12. 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.

13. 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).

14. 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).

15. 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.

16. 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.

17. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

18. The evidence presented in this case reveals that the Petitioner exercised control over the pay, scheduling, and materials used by the Joined Party. The Petitioner established the fees charged to customers as well as the commission rate paid to the Joined Party. The Petitioner did the majority of the scheduling of clients. The Petitioner supplied all of the materials and equipment needed to perform the work. The Joined Party supplied her own hand tools.

19. The Petitioner required the Joined Party to follow the Petitioner's "rules, guidelines, and policies." While the Petitioner may have been lax in the enforcement of this provision, the Petitioner had the ability to increase the enforcement at any time.

20. The Petitioner controlled the Joined Party's ability to work for a competitor. The Joined Party was not allowed to work for a competitor within a seven mile radius of the Petitioner's business location. This control extended for two years after the termination of the work relationship.

21. The work performed by the Joined Party was not distinct or separate from that of the Petitioner and was in fact a part of the normal course of business for the Petitioner.

22. A preponderance of the evidence presented in this case reveals that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated June 10, 2010, be AFFIRMED.

Respectfully submitted on March 10, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals