AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2362078
STRATEGIES INC
631 BEVILLE ROAD
SOUTH DAYTONA FL 32119-1935

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

PROTEST OF LIABILITY
DOCKET NO. 2010-106442L

O R D E R

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated May 27, 2010, is REVERSED from January 1, 2009, through December 31, 2009. It is further ORDERED that the determination is AFFIRMED from January 1, 2010.

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. - 2362078
STRATEGIES INC
CHERYL REISER
631 BEVILLE ROAD
SOUTH DAYTONA FL 32119-1935

PROTEST OF LIABILITY
DOCKET NO. 2010-106442L

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 27, 2010.

After due notice to the parties, a telephone hearing was held on January 18, 2011. The Petitioner's president/owner appeared and testified at the hearing. A tax auditor II appeared and testified on behalf of the Respondent. The Joined Party did not appear at the hearing.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were 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 subchapter S corporation, incorporated in January 2000 for the purpose of running a consulting business for applied behavioral analysis.

2. The Petitioner retains consultants that work in the field.

3. The Joined Party performed services for the Petitioner as a behavior support assistant from July 15, 2001, through February 2010. The Joined Party assumed the position of operations manager with the Petitioner in February 2010. The Joined Party was considered an employee in the position of operations manager. The Joined Party was separated from the Petitioner in April 2010.

4. The Joined Party was referred to the Petitioner by a support coordinator.

5. The Petitioner introduced a written independent contractor agreement in 2004. The Joined Party signed the agreement when it was introduced.

6. The Petitioner would receive a referral for a client. The Petitioner would give the contact information to the Joined Party. The Joined Party would contact the client to set up a schedule of meetings to work with the client. The Joined Party was allowed to turn down clients.

7. The Petitioner would supply a behavior program to the Joined Party for each client. The program contained the report of the behavior analyst on the client along with suggested guidelines on how to approach the client's particular needs.

8. The behavior analysts worked for the Petitioner. The behavior analyst would be assigned to the client along with the support analyst. The Joined Party could make suggestions about the program. The behavior analyst had the final say with regards to the behavior program.

9. The Agency for Persons with Disabilities required specific training for all workers in the field.

10. The Joined Party submitted an hour sheet to the Petitioner. The Joined Party submitted Medicaid required reports to the Petitioner.

11. The Joined Party was paid every two weeks. The Joined Party was paid $10 per hour. The rate of pay was set by the Petitioner.

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 hearing reflects that the Joined Party occupied two separate and distinct positions with the Petitioner during the time period covered by the determination. The Joined Party began work as a behavioral support specialist July 15, 2001. The Joined Party assumed a new position as an operations manager on or about February 1, 2010. That the Joined Party worked as an employee of the Petitioner in the position of operations manager is undisputed by the parties.

19. The Petitioner provided clients for the Joined Party. The Joined Party was allowed to negotiate his own schedule of services with the individual clients. While there were some controls over the client, those controls were required by the Agency for Persons with Disabilities guidelines. Those controls required by law are not considered controls exercised by the Petitioner.

20. A preponderance of the evidence presented in this case reveals that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the parties with regards to the position of behavioral support analyst.

Recommendation: It is recommended that the determination dated May 27, 2010, be REVERSED from January 1, 2009, through December 31, 2009, It is recommended that the determination be AFFIRMED from January 1, 2010.

Respectfully submitted on March 11, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals