AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2581409
MITCHELL J BEERS PA
11380 PROSPERITY FARMS RD STE 204
PALM BEACH GARDENS FL 33410-3477

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

PROTEST OF LIABILITY
DOCKET NO. 2010-106444L

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 23, 2010, is MODIFIED to reflect a retroactive date of January 1, 2006. It is also ORDERED that the determination is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 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. - 2581409
MITCHELL J BEERS PA
11380 PROSPERITY FARMS RD STE 204
PALM BEACH GARDENS FL 33410-3477

PROTEST OF LIABILITY
DOCKET NO. 2010-106444L

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 23, 2010.

After due notice to the parties, a telephone hearing was held on May 25, 2011. The Petitioner, represented by its president, appeared and testified. A paralegal and an attorney testified as additional 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 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 professional association which operates the law practice of the Petitioner's president, an attorney. In addition, the Petitioner rents office space in the Petitioner's office to other practicing attorneys.
2. In approximately 2000 the Joined Party was employed as a secretary or legal assistant by one of the attorneys to whom the Petitioner rented office space. The Joined Party's employment ended and the Joined Party was seeking other employment. The Petitioner's president approached the Joined Party and offered the Joined Party a position as a secretary at an hourly rate of pay.

3. The Petitioner has always classified newly hired secretarial and clerical workers as independent contractors and then converted those positions to employment if the workers prove themselves to be satisfactory workers. The Petitioner informed the Joined Party that the Joined Party was being initially classified as an independent contractor and that she would later be classified as an employee of the Petitioner. The parties did not enter into any written agreement or contract and the Joined Party began work in approximately September 2000. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract.

4. The Petitioner provided the Joined Party with a desk in the Petitioner's office, a computer, and a telephone. The Joined Party's responsibilities included, among other things, answering the telephone, typing letters, filing, scheduling appointments, transcribing witness statements, and running errands for the Petitioner. The Petitioner determined the work schedule which was approximately 35 hours per week. The Joined Party worked under the supervision of the Petitioner's president and under the supervision of the Petitioner's paralegal. The Petitioner told the Joined Party what to do and how to do it. The Petitioner told the Joined Party that she was required to personally perform the work and that she could not hire others to perform the work for her.

5. The Petitioner instructed the Joined Party to keep track of the hours she worked and to submit her hours each week in the form of an invoice. On the invoice the Joined Party was required to list her starting and ending times for each day rather than just the total hours for the week. The Petitioner required the Joined Party to list the starting and ending times on the invoice so that the Petitioner could verify if the Joined Party worked the stated hours. The Joined Party was paid weekly and no payroll taxes were withheld from the pay.

6. The Petitioner provided the Joined Party with a key to the Petitioner's office. On some days the Joined Party was required to work late and to close the office and set the alarm at the end of the day. On a few occasions the Petitioner gave the Joined Party additional work and allowed the Joined Party to perform that work after hours from home. The Petitioner discontinued allowing the Joined Party to perform work from home because the Petitioner was concerned about what the Joined Party was doing when working from home. The Petitioner wanted the Joined Party to perform all of the work in the Petitioner's office which was a more structured and controlled environment.

7. The Petitioner never reclassified the Joined Party from independent contractor to employee as indicated at the time of hire. On several occasions the Joined Party requested that her status be changed to employee and that the Petitioner withhold payroll taxes from the pay. The Joined Party's requests were never granted. On one occasion the Petitioner agreed to increase the hourly rate of pay rather than to convert the Joined Party to employment status. On another occasion the Petitioner agreed to give the Joined Party paid time off from work, including sick pay and paid vacations, rather than to convert the Joined Party to employment status.

8. In approximately 2005 the Joined Party was pregnant and the Petitioner granted a maternity leave of absence. After the birth of the Joined Party's child there were occasions when the child was ill and the Joined Party was not able to work as scheduled. There were also childcare problems on occasions when the Joined Party was not able to work. If the Joined Party was not able to work as scheduled she was required to call in to notify the paralegal. On one occasion the Joined Party had car trouble on the way to work and was required to write a letter of explanation.

9. After the birth of the Joined Party's child the Petitioner became dissatisfied with the Joined Party's work performance, work habits, and attendance. There were occasions when the Joined Party was instructed to retype letters that contained spelling errors. The Joined Party was paid for the additional time needed to redo the work.

10. On June 15, 2009, the Petitioner informed the Joined Party that her hours of work were reduced to 17 hours per week. The Petitioner informed the Joined Party that the work schedule was Tuesday through Thursday from 12:30 PM until 5 PM and on Friday from 12:30 PM until 4 PM and that she would perform services for another attorney who rented space from the Petitioner to make up the lost hours. The Joined Party was paid by the other attorney for the work which she performed for that attorney.

11. The Joined Party did not have any expenses in connection with the work she performed for the Petitioner. The Joined Party did not have any financial investment in a business, was not incorporated, did not use a fictitious name, did not have business liability insurance, did not advertise, and did not offer services to the general public. The Joined Party did not perform services for anyone other than the Petitioner and the attorney who rented office space from the Petitioner.

12. On February 12, 2010, the Petitioner notified the Joined Party in writing that, effective immediately, the Joined Party's services were terminated. As a courtesy at the time of termination the Petitioner paid the Joined Party an additional $750. The Petitioner terminated the Joined Party because the Petitioner was not satisfied with the Joined Party's performance.

13. The Joined Party filed an initial claim for unemployment compensation benefits effective April 25, 2010. Her filing on that date established a base period consisting of the calendar year 2009. When the Joined Party did not receive credit for her earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.

14. On June 23, 2010, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to January 1, 2009. The Petitioner filed a timely protest by mail postmarked July 7, 2010.

Conclusions of Law:

15. 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.

16. 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).

17. 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).

18. 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.

19. 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.

20. 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.

21. 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.

22. There was no written agreement between the Parties. The only verbal agreement was that the Joined Party would perform secretarial services as directed by the Petitioner, during the hours required by the Petitioner, and that the Petitioner would pay the Joined Party an hourly rate of pay. The Petitioner told the Joined Party that the Joined Party would initially perform services as an independent contractor and would later be reclassified as an employee. 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). The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), that while the obvious purpose to be accomplished by an agreement is 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.

23. The Petitioner is a law practice and the Joined Party was engaged to perform secretarial services for the Petitioner in the Petitioner's office during the Petitioner's regular business hours. The Petitioner provided the place of work and everything that was needed to perform the work. The Joined Party did not provide any equipment or supplies and had no expenses in connection with the work. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the business.

24. Generally, the work performed by the Joined Party only required clerical skills including typing and filing. It was not shown that any special skill or knowledge was required to perform the work. 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 Petitioner paid the Joined Party by time worked rather than by the job or based on production. Payment by time worked generally indicates employment. In addition, the Petitioner paid the Joined Party for sick days, vacation days, and other personal time off from work. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004). The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

26. The Joined Party performed services for the Petitioner for a period of almost ten years. Either party could terminate the relationship at any time without incurring liability for breach of contract. These facts reveal an at-will relationship of relative permanence. The Petitioner terminated the Joined Party without prior notice. 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."

27. The Petitioner controlled what work was performed, where it was performed, when it was performed, and how it was performed. The Petitioner controlled the financial aspects of the relationship by determining the method and rate of pay and the hours of work. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

28. Based on the evidence presented in this case it is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment. The determination of the Department of Revenue is retroactive to January 1, 2009, however, the Joined Party began performing services for the Petitioner as early as 2000.

29. Rule 60BB-2.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which the services were rendered. Thus, it is concluded that the correct retroactive date is January 1, 2006.

Recommendation: It is recommended that the determination dated June 23, 2010, be MODIFIED to reflect a retroactive date of January 1, 2006. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on June 1, 2011.

R. O. SMITH, Special Deputy
Office of Appeals