AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2818401
TOGETHER FOREVER LLC
3839 NW BOCA RATON BLVD
BOCA RATON FL 33431

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

PROTEST OF LIABILITY
DOCKET NO. 2010-106446L

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 AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **March, 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. - 2818401
TOGETHER FOREVER LLC
SHERYL BRESS
3839 NW BOCA RATON BLVD
BOCA RATON FL 33431

PROTEST OF LIABILITY
DOCKET NO. 2010-106446L

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 December 1, 2010. A managing member of the Petitioner appeared and testified at the hearing. A representative appeared on behalf of the Respondent who called a tax auditor III 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 petitioners liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

TIMELINESS: Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(5).

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.

Jurisdictional Issue: TIMELINESS: Whether a response was filed by a party entitled to notice of an adverse determination within fifteen days after the mailing of the Order to Show Cause to the address of

record or, in the absence of mailing, within fifteen days after delivery of the order, pursuant to Florida Administrative Code Rule 60BB-2.035(5).
An Order to Show Cause was mailed to the Petitioner on August 14, 2010. The Petitioner responded to the Order to Show Cause on September 1, 2010. The Petitioner's response was within 15 days of the mailing of the Order to Show Cause and was thus timely.

Jurisdictional Issue: TIMELINESS: 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.
A Notice of Proposed Assessment was mailed to the Petitioner on June 23, 2010. The Petitioner contacted the Florida Department of Revenue to request additional time to prepare the protest letter. The Department allowed the Petitioner additional time. The Petitioner submitted a protest letter July 14, 2010. The due date for a protest letter, as established by the Notice of Proposed Assessment, was July 13, 2010. The Department did not issue a revised notice in order to grant the Petitioner additional time as a matter of law. The Petitioner acted with due diligence to contact the Department and believed that he had properly secured an extension of time, therefore, the Petitioner's protest is deemed timely and the hearing may proceed.

Findings of Fact:

1. A tax auditor III performed an audit upon the Petitioner at the Petitioner's place of business on April 21, 2010. The Petitioner's director of administration represented the Petitioner for the audit.

2. The tax auditor III scheduled an appointment for the audit with the Petitioner. The Petitioner provided records to the tax auditor. Additional records were requested by the tax auditor. The Petitioner and the tax auditor III maintained contact after the audit with several follow up emails and faxes.

3. The audit covered the period from January 1, 2009, through December 31, 2009.

4. The tax auditor concluded that four individuals listed as contractors by the Petitioner should be considered employees. The workers considered employees by the auditor were Edgar Herrera, Frank Merklein, Irving Goldman, Mark Rosen, and Steve Silbert. The workers were divided into two classes of workers; Marketing consultants and Production consultants.

5. An informal conference was held on June 21, 2010. The tax auditor III, the tax auditor's manager, the Petitioner's director of administration, and a managing member of the Petitioner participated in the informal conference. The tax auditor determined that the audit results would stand.

6. The Petitioner is a limited liability corporation founded in 2007 for the purpose of running a business specializing in turning photographs into framed paintings.

7. The Petitioner retains marketing consultants to review markets, bring in business for the Petitioner and make sales.

8. The consultants are expected to sign a written contract at the time of hire. The contract is a standard form with potential variance in the pay ceiling and hourly rate.

9. The consultants were expected to sign a confidentiality agreement and were not allowed to perform work for a competitor.

10. The marketing consultants were issued a distributor handbook. The handbook covered how to make presentations and what the consultants should say in a presentation.

11. The marketing consultants were covered under the Petitioner's workmen's compensation insurance.

12. The Petitioner had the right to discharge the marketing consultants at anytime and without liability. The Petitioner discharged one of the marketing consultants due to the consultant being involved in a law suit and being a convicted felon. Marketing consultants could quit without liability at any time.

13. Consultants were paid an hourly rate with a ceiling on the amount of money that could be earned per pay period. The consultants were not paid for hours worked in excess of the ceiling. The consultants were instructed by the Petitioner not to exceed the ceiling hours.

14. The Marketing consultant Frank Merklein was provided an office with a computer by the Petitioner. Merklein was paid an additional commission on sales. The price of the sales was set by the Petitioner. Marketing consultants were provided with samples for use in securing new customers. The Petitioner provided business cards with the Petitioner's company logo and whatever title the consultant held if any.

15. The Petitioner established a $100 profit margin for retailers.

16. Marketing consultants could not subcontract their work.

17. Consultants could receive paid time off.

18. Production consultants were involved with the creation of the final product and the creation of the software used in the creation process.

19. Irving Goldman and Edgar Herrera were production consultants.

20. Herrera was called in when there was business. Herrera was given instructions in what needed to be done along with any special instructions. Herrera was required to use the Petitioner's software and equipment to complete the work.

21. Herrera was required to perform the work at the Petitioner's place of business.

22. Herrera was compensated for time spent fixing errors.

23. Herrera was provided training by the Petitioner.

24. The Petitioner had an employee with fundamentally similar work relationship with the Petitioner as Herrera.

25. Goldman was required to develop and maintain the software used by the Petitioner for the creation of the final products.

26. Goldman was expected to provide training for other production consultants.

27. The Petitioner provided Goldman with an office.

Conclusions of Law:

28. 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.

29. 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).

30. 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).

31. 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.

32. 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.

33. 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.

34. The evidence presented in this case reveals that the Petitioner exercised control over the class of production consultants and the class of marketing consultants.

35. The consultants were expected to sign confidentiality agreements and standardized contracts provided by the Petitioner. The contracts set forth the hourly pay to be received by the worker as well as the maximum pay ceiling for each pay period for the worker. The confidentiality agreements prohibited work for a competitor of the Petitioner.

36. The marketing consultants were issued a distributor handbook. This handbook instructed the worker in how to make presentations to potential customers and what the consultant should say during the presentation. The Petitioner further exercised control over the marketing negotiations in the form of setting the prices for the product as well as the profit margin for any retailers.

37. The Petitioner provided business cards with the company logo and whatever title the consultant held to the marketing consultants.

38. The production consultant Goldman was provided with an office and was expected to create and maintain the software critical to the Petitioner's business. Goldman was also expected to train workers in production.

39. Herrera created the final products for the Petitioner. Herrera was trained by the Petitioner. Herrera was told when to come in, and what work should be performed. The Petitioner had an employee performing the same work as Herrera with no substantial difference in the work relationships with the Petitioner.

40. A preponderance of the evidence presented in this hearing reveals that the Petitioner established sufficient control over those workers, named in the June 23, 2010 Notice of Proposed Assessment, as to create an employer-employee relationship between the Petitioner and the workers.

Recommendation: It is recommended that the determination dated June 23, 2010, be AFFIRMED.

Respectfully submitted on February 15, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals