AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2565790
FATIMAS ESTATE LLC
19616 LIVINGSTON AVE
LUTZ FL 33559-4015

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

PROTEST OF LIABILITY
DOCKET NO. 2010-137619L

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 August 17, 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

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PROTEST OF LIABILITY
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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 August 17, 2010.

After due notice to the parties, a telephone hearing was held on January 12, 2011. The Petitioner, represented by the owner, appeared and testified. 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 and other individuals working as Certified Nurse Assistants constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is a limited liability company which has operated an assisted living facility since 2004. The Petitioner established liability for payment of unemployment tax effective July 1, 2004.
2. The Petitioner employs approximately seven or eight Certified Nurse Assistants to provide personal and nursing care for the residents. Most of the Certified Nurse Assistants are acknowledged by the Petitioner to be the Petitioner's employees.
3. The Joined Party applied for work with the Petitioner as a Certified Nurse Assistant in March 2009. No work was available at that time. In November 2009 the Petitioner contacted the Joined Party concerning part time work, filling in for employees during periods of absence. For

tax purposes only, the Petitioner classified the Joined Party as an independent contractor. The Joined Party signed an *Independent Contractor Agreement* and began work on November 11, 2009.

4. The Petitioner provided an initial orientation for the Joined Party. The Petitioner provided initial and on-going training, including how to administer medications to the residents.
5. The Joined Party worked under the same terms and conditions as the employee Certified Nurse Assistants. The only difference between the employee Certified Nurse Assistants and the Joined Party was that the Petitioner did not withhold any payroll taxes from the Joined Party's pay.
6. The Petitioner scheduled the Joined Party to work based on the needs of the Petitioner. The Petitioner determined the days that the Joined Party was scheduled to work and the times that she was scheduled to work. The Joined Party was required to work her scheduled shifts and she could not come and go as she pleased.
7. The Joined Party was required to personally perform the work. She could not hire others to perform the work for her.
8. The Petitioner provided the place of work and all tools, equipment, and supplies that were needed to perform the work.
9. The Petitioner paid the Joined Party $10 per hour, a pay rate that was determined by the Petitioner. At the end of 2009 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
10. The Joined Party was required to request permission to take time off from work. If the Joined Party was not able to work as scheduled she was required to notify the Petitioner so that the Petitioner could obtain a substitute.
11. Generally, the Joined Party worked on the day shift with other employees. When a permanent, full-time position became available on the night shift the Petitioner offered that position to the Joined Party and the Joined Party accepted. On the night shift the Joined Party was required to work alone.
12. Either party could terminate the relationship at any time without incurring liability for breach of contract. The Petitioner believed that the Joined Party had made a medication error while working on the night shift and placed the Joined Party on probation due to the error. Subsequently, the Petitioner believed that the Joined Party had made a second medication error. The Petitioner did not believe that the Joined Party could work alone and removed the Joined Party from the work schedule on or about May 21, 2010. At the time the Petitioner had no other work available. The Petitioner never contacted the Joined Party concerning other work assignments.

Conclusions of Law:

13. 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.
14. 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).
15. 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).

16. 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.

17. 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.

18. 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.

19. 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.

20. The Petitioner's business provides personal and nursing care for residents at the assisted living facility operated by the Petitioner. The Petitioner hired the Joined Party to provide the personal and nursing care for the residents. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.

21. The Joined Party performed services at the Petitioner's facility. The Petitioner provided everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work and was not at risk of suffering a financial loss from performing services.

22. The Joined Party was paid $10 per hour. The Joined Party was paid by time worked rather than by production or by the Job. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium

other than cash. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

23. The Joined Party performed services for the Petitioner for a period of approximately seven months. Either party could terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. 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."

24. The facts of this case reveal that the Petitioner determined what work was to be performed, where the work was performed, when the work was performed, and how the work was performed. 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. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

25. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals working as Certified Nurse Assistants constitute insured employment.

Recommendation: It is recommended that the determination dated August 17, 2010, be AFFIRMED.

Respectfully submitted on January 21, 2011.

R. O. SMITH, Special Deputy
Office of Appeals