AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2906875
GOLDEN GATE OF CENTRAL FLORIDA LLC
PO BOX 690401
ORLANDO FL 32869-0401

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

PROTEST OF LIABILITY
DOCKET NO. 2010-137620L

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 3, 2010, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

PETITIONER:
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GOLDEN GATE OF CENTRAL FLORIDA LLC
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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 3, 2010.

After due notice to the parties, a telephone hearing was held on March 29, 2011. The Petitioner, represented by its managing partner, 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 drivers 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, Golden Gate of Central Florida LLC, was formed in early 2009 to operate a business which provides workers to rental car companies to clean the rental cars and to prepare them for the next rental car customer. The Petitioner's managing partner is involved in other related companies that operate similar businesses.
2. In early 2007 the Joined Party was referred to one of the companies operated by the Petitioner's managing partner. On February 7, 2007, the Joined Party signed an *Independent Contractor Agreement for Services* with Golden Gate Operations Corp., one of the companies operated by the Petitioner's managing partner. The Agreement states that the contractor is an independent

contractor who has ultimate control of time, manner, and methods necessary to complete services but that the company retains the right to confirm that the expected standards are met and results achieved as well as to direct correction of any deviation from expected standards or results. The duties of the contractor are to include cleaning cars inside and out, vacuuming, washing, driving in and out of the airport premises, and other related services. The Agreement provides that the contractor is responsible for all expenses associated with performing services under the Agreement. The Agreement provides that the contractor is free to perform services for others or be employed by other clients as long as the other services do not interfere with the satisfactory performance of services under the Agreement. The Agreement provides that the contractor will be paid $6.70 per hour with any hours over forty hours in a week compensated by time-and-one-half.

3. The Joined Party began working under the Agreement in February 2007. Contrary to the Agreement the rate of pay was $7.25 per hour which was established by the company to satisfy minimum wage. The company never paid time-and-one-half for overtime work. The work was simple and did not require extensive training. The lead drivers and supervisors showed the Joined Party how to clean the cars and how to refuel the cars.

4. The Joined Party was provided with a list of safety and/or working rules. The rules were created by the managing partner because he believed that the work had to be performed in a disciplined manner. The rules provide that "Violation to any safety and/or working rule, or disrespect regarding to friends and/or conducting manner can be subject to termination." The rules provide that the contractors must park their personal vehicles in the employees' parking lot, that the contractors must present their drivers' license and sign the daily working sheet prior to starting work each day, and that the contractors are required to report for work fifteen minutes before the designated start time. The contractors are required to leave the resting/eating areas clean after use and are prohibited from using cellular phones, radios, pagers, or similar equipment during work time. The contractors are required to obey the speed limit at all times and are to drive carefully without spinning the wheels. The rules provide that the worker is responsible for any damage.

5. The Joined Party did not have her own business and did not offer services to the general public. The Joined Party did not have an occupational license and did not have liability insurance. Contrary to the Petitioner's rules the Petitioner provided liability insurance and was responsible for any damage caused by the Joined Party. During the time the Joined Party performed services for Golden Gate Operations Corp. and its related entities, the Joined Party never performed services for others. The Joined Party was required to personally perform the work. She was not allowed to hire others to assist her or to perform the work for her. The Joined Party always believed that she was performing services as an employee.

6. The Joined Party did not have any expenses in connection with the work. Contrary to the *Independent Contractor Agreement for Services* all equipment and supplies were provided to the Joined Party.

7. The lead driver provided the Joined Party with a work schedule on the day prior to the scheduled work day. The schedule merely told the Joined Party what time she was to report for work and did not state how long she was required to work. The Joined Party was allowed to take a thirty minute break after working for four hours. The lead driver would tell the Joined Party when to take the break and would tell the Joined Party when she could leave for the day. If the Joined Party was not able to work a scheduled shift she was required to notify the supervisor or the managing partner.

8. The Joined Party was not required to complete a timesheet or record her time. She was required to sign in at the beginning of each work shift. The time that the Joined Party worked was reported to the Petitioner by the rental car company. To the Joined Party's knowledge the time was always reported accurately, however, the Joined Party was never paid time-and-one-half for hours over

forty per week. No payroll taxes were withheld from the Joined Party's pay. With the exception of workers' compensation coverage the Joined Party did not receive any fringe benefits

9. When the Petitioner was created in early 2009 the Joined Party was transferred to the Petitioner. There was no change in the terms and conditions of work and the Joined Party was not aware that there was a transfer.

10. Either party could terminate the relationship at any time without incurring liability. The Joined Party terminated the relationship with the Petitioner in October 2009. At the end of 2009 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

11. The Joined Party filed an initial claim for unemployment compensation benefits effective May 30, 2010, and established a base period consisting of the 2009 calendar year. When the Joined Party did not receive credit for her earnings with Golden Gate of Central Florida LLC a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services for Golden Gate of Central Florida LLC as an employee or as an independent contractor. On August 3, 2010, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for Golden Gate of Central Florida LLC as drivers were the Petitioner's employees retroactive to January 20, 2009. The Petitioner filed a timely protest. The Petitioner ceased operations in approximately May 2010.

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.

18. 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.

19. 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).

20. Although the *Independent Contractor Agreement for Services* between the Joined Party and Golden Gate Operations Corp. states that the Joined Party is an independent contractor the Agreement does not accurately portray the working relationship. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "while the obvious purpose to be accomplished by this document was 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."

21. The Petitioner's business is to provide services to rental car companies involving cleaning the rental cars and preparing the vehicles to be rented to the next customer. The Joined Party's assigned duties were to clean the cars inside and outside and to prepare them for rental. 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 business. The Joined Party did not provide any equipment or supplies and did not have any expenses in connection with the work. The Joined Party was not at risk of suffering a financial loss from services performed.

22. The Joined Party worked under the direction of a lead driver or supervisor. The work performed by the Joined Party was simple and did not require training other than to be shown how to do 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)

23. The Petitioner paid the Joined Party by the hour rather than based on production or by the job. The rate of pay was established by the Petitioner in accordance with minimum wage laws.

Minimum wages laws are not applicable in work performed by independent contractors. The Petitioner also provided workers' compensation coverage. Workers' Compensation is limited to services performed by employees and is not generally provided for independent contractors. The fact that the Petitioner chose not to withhold payroll taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.

24. The Joined Party worked for the Petitioner and related companies for a period of almost three years. Either party could terminate the relationship at any time without incurring liability. 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."

25. The facts of this case reveal that the Petitioner controlled what was to be done, when it was to be done, and how it was to be done. The Petitioner determined the method and rate of pay and controlled the financial aspects of the relationship. 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.

26. The legal entity which is the subject to the determination under protest is the Petitioner, Golden Gate of Central Florida LLC, not Golden Gate Operations Corp. or any of the other related entities. Although the Joined Party performed services for related entities beginning in February 2007 she did not perform services for the Petitioner until early 2009. Therefore, it is concluded that services performed for Golden Gate of Central Florida LLC by the Joined Party and other similarly situated individuals as drivers constitute insured employment retroactive to January 20, 2009.

Recommendation: It is recommended that the determination dated August 3, 2010, be AFFIRMED.

Respectfully submitted on March 30, 2011.

R. O. SMITH, Special Deputy
Office of Appeals