AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2980251
MICHAEL L COGAN DDS PA
1717 N BAYSHORE DR STE 209
MIAMI FL 33132-1196

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

PROTEST OF LIABILITY
DOCKET NO. 2010-142085L

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 September 2, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **March, 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

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RESPONDENT:
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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 September 2, 2010.

After due notice to the parties, a telephone hearing was held on January 27, 2011. The Petitioner, represented by its president, 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 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, formed on September 21, 2009, which operates a dental practice. The Petitioner's president is the dentist involved in the practice. Prior to September 2009 the Petitioner's president operated the practice as a sole proprietorship. The Petitioner has contracted with an employee leasing company to provide the payroll for the president and other employees of the practice.
2. The Joined Party is an individual who has been employed as a dental assistant for thirty years. In 2009 the Joined Party was hired by a dentist as a dental assistant for a four month period of time to fill in for a dental assistant who was on maternity leave. The dentist told the Joined Party at the time of the interview that she would be responsible for paying her own taxes. That four month

period of time was the only time that the Joined Party was classified as an independent contractor. The Joined Party does not have an occupational license, does not have liability insurance, does not advertise her services, does not have a financial investment in a business, and does not provide services to the general public.

3. Several years ago the Joined Party registered with a dental staffing company. In approximately March 2010 the staffing company contacted the Joined Party and referred her to the Petitioner for a position as a dental assistant. The Joined Party contacted the Petitioner's president who told the Joined Party that the rate of pay was between $14 and $15 per hour. The rate of pay was less than what the Joined Party was accustomed to; however, she needed a job and accepted the offer. The Petitioner informed the Joined Party that she would be entitled to health insurance and vacation time after three months of work. No other information was provided to the Joined Party by the Petitioner at the time of the offer. There was no written contract or agreement between the parties.
4. The Joined Party began work on April 2, 2010. She was informed by the Petitioner's president and the Petitioner's office manager that the required work schedule was Monday through Friday from 9 AM until 6:30 PM. The Joined Party was not allowed to come and go as she pleased.
5. The Petitioner provided all of the tools, equipment, and supplies. The Joined Party did not have any expenses in connection with the work.
6. The Joined Party was an experienced dental assistant. It was not necessary for the Petitioner to provide any training. The Joined Party's main responsibility was to assist the president. The Joined Party worked alongside the president and was directly supervised by the president. The Petitioner determined the sequence of the work and gave the Joined Party instructions about how to do the work.
7. The Joined Party turned in her hours of work each week and the Petitioner paid her by check. The Joined Party was not paid through the employing leasing company and she was not paid by the staffing company. The Petitioner paid the Joined Party on a weekly basis and did not withhold taxes from the pay. When the Joined Party received her paychecks she inquired if taxes were being withheld from the pay. The Petitioner advised the Joined Party that everything was taken care of.
8. Either party had the right to terminate the relationship at any time without incurring liability. On May 26, 2010, the Petitioner terminated the Joined Party.

Conclusions of Law:

9. 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.
10. 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).
11. 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).
12. 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.

13. 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.

14. 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.

15. 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.

16. The evidence reveals that there was no written or verbal agreement concerning whether the Joined Party was engaged to perform services as an employee or as an independent contractor. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

17. The Petitioner operates a dental office. The Joined Party was engaged to assist the dentist. 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.

18. The Petitioner provided all equipment, tools, and supplies that were needed to perform the work. The Joined Party did not have any expenses in connection with the work. The Joined Party was not at risk of suffering a financial loss from performing services.

19. The Petitioner paid the Joined Party by time worked at a pay rate determined by the Petitioner rather than by production or by the job. The Petitioner informed the Joined Party that health insurance and vacations would be provided when the Joined Party completed three months of work. The Petitioner chose not to withhold payroll taxes from the pay. The fact that payroll taxes were not withheld, standing alone, does not establish an independent contractor relationship.

20. The Joined Party only worked for the Petitioner for a period of less than two months. The Joined Party was not hired to work for a specific period of time. The fact that the Petitioner offered fringe benefits that were to be provided after the completion of three months of work reveals the intent to create a long-term or permanent relationship. The Joined Party was discharged by the Petitioner. 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."

21. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

22. The Petitioner determined what work was to be performed, where it was to be performed, when it was to be performed, and how it was to be performed. Thus, the facts reveal that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the determination dated September 2, 2010, be AFFIRMED.

Respectfully submitted on January 28, 2011.

R. O. SMITH, Special Deputy
Office of Appeals