AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2198890

BOB'S CONTRACTING COMPANY INC
ROBERT DELLAGATTA
13203 BLISSFIELD ROAD
ODESSA FL 33556-3501

PROTEST OF LIABILITY
DOCKET NO. 2010-143569L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is 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.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion

of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Special Deputy issued the Recommended Order on May 23, 2011. The Petitioner's exceptions to the Recommended Order were submitted on June 9, 2011. Rule 60BB-2.035(19)(c)**,** Florida Administrative Code, requires that written exceptions be filed within 15 days of the mailing date of the Recommended Order. As a result, the Agency may not consider the Petitioner's exceptions in this order because the exceptions were filed more than 15 days after the mailing date of the Recommended Order. No other submissions were received from any party.

Having considered the Special Deputy's Recommended Order and the record of the case and in the absence of any timely 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.

Therefore, it is ORDERED that the determination dated September 9, 2010, is AFFIRMED.

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

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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 9, 2010.

After due notice to the parties, a telephone hearing was held on March 9, 2011. An attorney appeared on behalf of the Petitioner; the Petitioner's attorney called the Petitioner's owner as a witness. The Joined Party appeared and testified on her own behalf. A tax specialist II appeared and testified on behalf of the Respondent.

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 received. The Petitioner requested an extension of time to submit Proposed Findings of Fact and Conclusions of law. The Petitioner's request was granted and the new deadline for Proposed Findings of Fact and Conclusions of Law was set at April 1, 2011. The Petitioner provided Proposed Findings of Fact and Conclusions of Law on March 31, 2011.

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 subchapter S corporation, incorporated in 1990, for the purpose of running a general contracting and cleaning business. The Petitioner provides services for banks and real estate companies. All workers are considered independent contractors by the Petitioner.
2. The Joined Party provided services for the Petitioner from 2007 through July 29, 2009. The Joined Party took a 4 to 5 month break due to pregnancy. The Joined Party did foreclosure cleanups.

3. The Joined Party was expected to arrive at work at 6:45. The Joined Party worked Monday through Friday. The Joined Party worked some Saturdays. The Joined Party would be informed where and what work would be performed each day. The Petitioner would provide a GPS with the work site location. The Joined Party was expected to remove everything from the work site.

4. The Joined Party generally worked unsupervised. The Joined Party was required to document the progress of the work. The Joined Party was expected to keep the Petitioner apprised of the progress of the work.

5. The Petitioner provided a vehicle and trailer for the work. The Petitioner provided all tools and materials needed to perform the work. The Petitioner provided company business cards. The Petitioner provided shirts with the company logo. The Petitioner provided a camera and GPS system.

6. The Joined Party would occasionally replace broken equipment. The Petitioner would reimburse the Joined Party for any such expenditure.

7. The Petitioner instructed the Joined Party in how certain lawn equipment was to be used.

8. The Joined Party started out being paid $60 per day. The rate of pay was established by the Petitioner. The Petitioner increased the Joined Party's rate of pay at the Petitioner's discretion.

9. The Joined Party received paid holidays for a portion of the period of service.

10. The Joined Party was required to take before and after photographs of the work site.

11. The Joined Party does not have an occupational license. The Joined Party does not have her own business.

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. 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.

18. The evidence presented in this hearing reveals that the Petitioner exercised control over where and when the work was to be performed. The Joined Party was required to report to the Petitioner's place of business at 6:45 each morning and await assignment. The Joined Party would be directed as to where the work was to be performed.

19. The Joined Party was required to document the progress of the work. The Joined Party was required to photograph the work site before and after the work was completed.

20. The Petitioner provided all tools, equipment, and materials needed to perform the work. The Petitioner provided shirts with the company logo, a camera, and a GPS system for the work. The Joined Party would at times pay to replace broken equipment but was subsequently reimbursed by the Petitioner. The Joined Party had no expenses in conjunction with the work.

21. The Joined Party was paid by the day. The rate of pay was unilaterally determined by the Petitioner.

22. The foreclosure cleaning work performed by the Joined Party was an integral part of the regular course of business of the Petitioner's general contracting and cleaning business.
23. A preponderance of the evidence in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.
24. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law on March 31, 2011. Where those proposals conform to the record, they are incorporated into this recommended order. Where the proposals do not comport with the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated September 9, 2010, be AFFIRMED.

Respectfully submitted on May 23, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals