AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2670038
AUDIO-VISION RECORDING STUDIOS INC
13385 W DIXIE HWY
NORTH MIAMI FL 33161-4134

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

PROTEST OF LIABILITY
DOCKET NO. 2010-146115L

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 14, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **May, 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. - 2670038
AUDIO-VISION RECORDING STUDIOS INC
ATTN: HOWARD ALBERT
13385 W DIXIE HWY
NORTH MIAMI FL 33161-4134

PROTEST OF LIABILITY
DOCKET NO. 2010-146115L

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 September 14, 2010.

After due notice to the parties, a telephone hearing was held on March 16, 2011. The Petitioner, represented by the Petitioner's Treasurer, 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 working as a recording engineer 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 corporation which owns a recording studio. The Petitioner rents the recording studio to various record companies and artists. Sometimes the record companies or recording artists request that the Petitioner provide a recording sound engineer as part of the rental agreement.

2. The Joined Party is a recording sound engineer who performs services for various recording studios including the Petitioner. Sometimes the Joined Party is paid by the record companies or artists and sometimes he is paid by the recording studios. He was first paid for services by the Petitioner in approximately September 2006.

3. When a client requests that the Petitioner provide the recording sound engineer the Petitioner contacts a recording sound engineer and offers the work assignment to the engineer. The engineers have the right to refuse any work that is offered. The engineers bill the Petitioner for the services at an hourly rate that is the standard established rate for the recording industry.

4. Whenever the Petitioner contacted the Joined Party with work assignments the Petitioner would tell the Joined Party the date of the assignment and the type of music that would be recorded. The Petitioner never told the Joined Party how to perform the work, did not supervise the Joined Party, and never provided any training for the Joined Party. The Petitioner did not reimburse the Joined Party for any expenses in connection with the work.

5. The Joined Party submitted invoices to the Petitioner for the services which he performed for the Petitioner. No taxes were withheld from the pay and no fringe benefits were provided. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

6. The Joined Party always considered himself to be a self employed freelance recording sound engineer and never considered himself to be an employee of the Petitioner.

7. The Joined Party filed his income tax return as a self employed individual and he deducted his business expenses from his earnings. The Joined Party paid his Federal income tax and incorrectly assumed that the payment of taxes entitled him to receive unemployment compensation benefits. The Joined Party filed a claim for unemployment compensation benefits effective August 1, 2010, during a time that he was not working.

8. The Joined Party did not have any wage credits upon which to base a claim for benefits and the Agency for Workforce Innovation issued an investigation to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.

9. Forms were mailed to the Petitioner for completion. The Petitioner completed one of the forms listing the amounts paid to the Joined Party during each quarter of the base period of the claim. The Petitioner incorrectly stated on that form that the Petitioner had reported the Joined Party's earnings to the State of Florida on Form W-2. Based on the evidence received the Department of Revenue concluded that the Joined Party performed services for the Petitioner as an employee. The Petitioner filed a timely protest.

Conclusions of Law:

10. 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.

11. 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).

12. 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).

13. 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.

14. 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.

15. 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.

16. 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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

17. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

18. The Petitioner did not exercise any control over what work was performed or how it was performed. The Petitioner merely rented the recording studio to the Petitioner's clients. The clients were in control of what work was performed and when it was performed. The Joined Party was in control of how the work was performed.

19. In Kearns v. Dept. of Labor and Employment Security, 680 So. 2d 619 (Fla. 3rd DCA 1996) the court held that a secretary who worked in the office of an attorney was an independent contractor.

The court placed emphasis on the fact that there was an express understanding between the parties that the secretary was an independent contractor. The court further noted that the secretary had the right to determine when or if she worked, and was free to perform work for others. Thus, as in Kearns, it is concluded that the Joined Party was an independent contractor while performing services for the Petitioner.

Recommendation: It is recommended that the determination dated September 14, 2010, be REVERSED.

Respectfully submitted on March 17, 2011.

R. O. SMITH, Special Deputy
Office of Appeals