AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2930648
STEPHANIE V SINGLETARY
1314 PARKWOOD ST
CLEARWATER FL 33755-2730

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

PROTEST OF LIABILITY
DOCKET NO. 2010-14980L

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 December 1, 2009, is MODIFIED to reflect a retroactive date of February 1, 2006. It is also ORDERED that determination is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 2010**.

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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RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated December 1, 2009.

After due notice to the parties, a telephone hearing was held on June 24, 2010. The Petitioner appeared and testified. The Petitioner's accountant testified as a witness. The Respondent was represented by a Department of Revenue Tax Audit Supervisor. A Tax Auditor III testified as a witness. 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 child care providers 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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is an individual who operates a child care business from her home as a sole proprietor. The Petitioner is licensed to provide care for up to twelve children.
2. The Joined Party is a close friend of the Petitioner. Prior to February 2006 the Joined Party would occasionally help the Petitioner care for the children on an as needed basis. The Joined Party

attended thirty hours of required classroom training and obtained a certificate which allowed her to work as a child care worker. Beginning in February 2006 the Petitioner hired the Joined Party to work for the Petitioner on a full time basis. The verbal agreement was that the Petitioner would pay the Joined Party $1,000 per month. The Petitioner told the Joined Party that the Joined Party would be considered as self employed and that no taxes would be withheld from the pay. The Petitioner and the Joined Party did not enter into any written agreement or contract.

3. The Joined Party's child care certificate allowed the Joined Party to work for a child care provider but did not allow the Joined Party to operate a business as a child care provider. The Joined Party did not have the required license to operate a child care business.

4. The Joined Party performed services exclusively for the Petitioner and did not provide services for others. The Joined Party did not have any investment in a business, did not have business liability insurance, did not advertise, and did not offer services to the general public.

5. Generally, the Joined Party's work schedule was from 8 AM until 5 PM, Monday through Friday. The Petitioner was allowed to care for up to five children by herself. The Petitioner would tell the Joined Party what time to report for work each day based on when the Petitioner expected to have more than five children. The Petitioner would tell the Joined Party when the Joined Party could leave each day based on the number of children who were present. The Joined Party worked between forty to fifty hours per week for the Petitioner.

6. The Petitioner told the Joined Party exactly what to do during the day. In spite of fact that the Petitioner told the Joined Party that the Joined Party was self employed, the Petitioner referred to the Joined Party as an employee. Everything was done according to the Petitioner's rules and regulations. The Joined Party's duties included preparing meals, conducting group time, arts and crafts, and outdoor play. The Petitioner posted the activity schedule on the refrigerator door.

7. All of the work was performed at the Petitioner's home. The Petitioner provided everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work.

8. The Joined Party was required to notify the Petitioner if the Joined Party was not able to work as scheduled. Usually, the Petitioner's daughter would fill in for the Joined Party during the Joined Party's absence. The Joined Party did not pay the Petitioner's daughter.

9. The Joined Party was not required to complete a time sheet or to keep track of the number of hours worked. The Joined Party did not submit a bill or invoice to the Petitioner for the services which the Joined Party performed. The Petitioner paid the Joined Party the monthly salary as agreed. No taxes were withheld from the pay. At the end of each year the Petitioner's accountant reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

10. Either party had the right to terminate the relationship at any time without incurring liability.

11. In 2009 the Petitioner was caring for fewer children and advised the Joined Party to begin seeking another job. The Petitioner had five or fewer children during September 2009. The Joined Party worked through September 30, 2009, at which time the Petitioner informed the Joined Party that her services were no longer needed.

12. The Joined Party filed an initial claim for unemployment compensation benefits effective October 4, 2009. A *Request for Reconsideration of Monetary Determination* was filed when the Joined Party did not receive credit for her earnings with the Petitioner. An investigation was issued to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

13. On December 1, 2009, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as child care providers are the Petitioner's employees retroactive to July 1, 2008. The determination also held the Petitioner liable for payment of unemployment compensation taxes effective July 1, 2008. The Petitioner appealed the determination.

Conclusions of Law:

14. 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.

15. 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).

16. 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).

17. 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.

18. 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.

19. 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.

20. 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.

21. The Petitioner is licensed to operate a home based child care business for up to twelve children. The Joined Party is certified to work for a child care provider; however, the Joined Party is not licensed to operate a child care business. The work which the Joined Party performed was not separate and distinct from the Petitioner's business but was a necessary and integral part of the Petitioner's business.

22. There was no formal agreement between the Petitioner and the Joined Party. According to the testimony of both the Petitioner and the Joined Party, at the time the Petitioner hired the Joined Party for the full time position, the Petitioner "told" the Joined Party that the Joined Party was self employed. 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), that while the obvious purpose to be accomplished by an agreement is 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.

23. The Petitioner provided the place of work and provided everything that was needed to perform the work. The Joined Party was not required to provide anything but her time. The Joined Party did not have any expenses in connection with the work. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services.

24. Although the Joined Party was required to complete thirty hours of classroom training to obtain her child care worker certificate, it was not shown that the job required any special skill or knowledge. 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)

25. The Petitioner paid the Joined Party a monthly salary. The Joined Party's pay was based on time worked rather than on production. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

26. The Joined Party worked full time exclusively for the Petitioner for a period of approximately three and one-half years. Either party could terminate the relationship at any time without incurring liability. 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."

27. The Petitioner controlled what work was performed, where the work was performed, and when the work was performed. The work had to be performed according to the Petitioner's rules. 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.

28. The evidence presented in this case reveals that the Joined Party and other individuals performing services for the Petitioner as child care workers are the Petitioner's employees. Although the Joined Party began performing services for the Petitioner in February 2006, the determination issued by the Department of Revenue is only retroactive to July 1, 2008.

29. Section 443.1215, Florida States, provides:
    (1) Each of the following employing units is an employer subject to this chapter:
        (a) An employing unit that:
            1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
            2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

30. The Joined Party's salary was $1,000 per month. During the first calendar quarter 2006 the Petitioner paid the Joined Party wages for February and March in the total amount of $2,000. Therefore, the Petitioner has established liability for payment of unemployment compensation taxes effective February 1, 2006.

Recommendation: It is recommended that the determination dated December 1, 2009, be MODIFIED to reflect a retroactive date of February 1, 2006. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on June 25, 2010.

R. O. SMITH, Special Deputy
Office of Appeals