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

PETITIONER:
Employer Account No. - 2930611
RENEE MATHEWS
PO BOX 135926
CLERMONT FL 34713-5926

PROTEST OF LIABILITY
DOCKET NO. 2010-14985L

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 December 1, 2009.

After due notice to the parties, a telephone hearing was held on September 24, 2010. The Petitioner's owner appeared and testified at the hearing. The Joined Party appeared and testified on her own behalf. A tax auditor 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 not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals 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 is a sole proprietorship started in April 2007 for the purpose of running a concierge business. The Petitioner is contracted with a homeowner's association to maintain a clubhouse and provide various guest services.

2. The Joined Party provided services for the Petitioner, as a part time clerk, from March 2007, through August 1, 2009. The Joined Party primarily answered telephones and guest questions.

3. The Petitioner and the Joined Party were co-workers with the company that originally provided concierge services to the homeowner's association. The company and the homeowner's association ended the relationship. The Petitioner separated from the company and began providing services for the homeowners association. The Joined Party continued to work for the original company.

4. The homeowner's association required the Petitioner have a concierge on duty Monday through Friday, from 9 to 5. The Petitioner would call the Joined Party to cover the Petitioner's shifts when the Petitioner was unable to work. Both parties considered the relationship to be an independent contractor relationship.

5. The Petitioner did not provide training to the Joined Party. The Petitioner selected the Joined Party because both had worked for the company originally providing concierge services to the homeowner's association. The Joined Party had prior training and experience working for the homeowner's association.

6. The Joined Party had the right to refuse work.

7. The Joined Party was paid $9 per hour. The Petitioner would pay the Joined Party with a personal check for services performed.

8. The Joined Party operated without guidance or supervision from the Petitioner.

9. The homeowner's association insurance covered anyone on the property providing services for the homeowner's association.

10. The Joined Party was allowed to, and did, work for a competitor.

Conclusions of Law:

11. 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.

12. 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).

13. 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).

14. 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.

15. 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.

16. 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.

17. The evidence presented in this case reveals that the Petitioner did not exercise control over the way the Joined Party conducted the work. The nature of the business arrangement between the parties was such that the Petitioner would inform the Joined Party of when the work was available. The Joined Party was free to refuse that work without consequence.

18. The parties did not intend to create a master and servant relationship. The relationship created was intended to be one of casual labor for a sole proprietorship.

19. The Petitioner chose to work with the Joined Party due to their prior relationship and the Joined Party's prior experience and training at the work site.

20. A preponderance of the evidence presented in this case reveals that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated December 1, 2009, be REVERSED.

Respectfully submitted on November 2, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA

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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 REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION