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

PETITIONER:
Employer Account No. - 2930412
NEIGHBORHOOD MAINTENANCE SVCS CORP
MAGALY DEL ROSARIO
26105 SW 130 PLACE
HOMESTEAD FL 33032

PROTEST OF LIABILITY
DOCKET NO. 2010-18529L

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 November 25, 2009.

After due notice to the parties, a telephone hearing was held on October 21, 2010. The Petitioner's manager appeared and testified at the hearing. The Joined Party appeared and testified on her own behalf. A tax auditor 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 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 corporation, incorporated in 2005 for the purpose of running a landscaping and janitorial business. The Petitioner has two corporate officers. The corporate officers perform services for the Petitioner. The Petitioner's vice president received payment for services.

2. The Joined Party was referred to the Petitioner by a friend. The Joined Party was interviewed and informed of the requirements of the work. The Joined Party performed janitorial services for the Petitioner from August 4, 2008, through October 7, 2009.

3. The Joined Party was assigned to clean restrooms at a water and sewer department building. The Joined Party was required to perform the services after the building's workers had departed for the day.

4. The Joined Party was covered by the Petitioner's worker's compensation insurance due to requirements for working for the County.

5. The Joined Party did not provide materials, tools, or equipment for the performance of the work with the exception of gloves. The Petitioner provided most tools and equipment as well as the materials needed to perform the work.

6. The Joined Party worked Monday through Friday each week. The Joined Party worked consistently during the period of service. The Joined Party would begin work at 5pm and was required to be finished with the work by 11pm. The Joined Party generally took five or six hours to complete the work.

7. The Joined Party was paid $66 per day. The rate of pay was set by the Petitioner. The Joined Party was paid bi-weekly by the Petitioner.

8. The Joined Party could provide a substitute worker so long as the worker was cleared with the Petitioner. The Petitioner would pay the Joined Party for the work. The Joined Party would be responsible for paying the substitute worker.

9. Either party could end the relationship at anytime without liability.

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. 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 presented in this hearing reveals that the Petitioner exercised control over when and where the Joined Party performed the work. In the instant case the Joined Party was required to perform her services between the hours of 5pm and 11pm due to the requirements of the customer building. The Petitioner did not exercise control over how the work was performed or supervise the Joined Party while the work was being performed.

17. The Petitioner paid the Joined Party $66 per day. The Petitioner determined the amount that the Joined Party was paid. While the pay is framed as a daily amount, it can be construed as being paid by the job for each day the job is performed.

18. The Joined Party was not responsible for providing any of the tools or materials used in the work. With the exception of gloves, either the Petitioner or the customer supplied all materials used.

19. The Joined Party was allowed to subcontract the work. The Joined Party would be paid by the Petitioner and be responsible in turn for paying the substitute worker. The Petitioner did require that any substitute worker be cleared due to the county requirements for working in a county building.

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

Recommendation: It is recommended that the determination dated November 25, 2009, be REVERSED.

Respectfully submitted on December 16, 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 November 25, 2009, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION