AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2708848
GOLDEN FLORIDA MANAGEMENT INC
115 MAITLAND AVE
ALTAMONE SPRINGS FL 32701-4901

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

PROTEST OF LIABILITY
DOCKET NO. 2010-24072L

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 22, 2009, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **October, 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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RESPONDENT:
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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 December 22, 2009.

After due notice to the parties, a telephone hearing was held on July 15, 2010. The Petitioner's president appeared and provided testimony at the hearing. A tax auditor II appeared and testified on behalf of the Respondent. The Joined Party did not appear at the hearing.

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 subchapter C corporation, incorporated in January 1997, for the purpose of running a subdivision development business. The corporation became inactive on or about April 1, 2009. The corporation had no earnings or workers after April 1, 2009.

2. The Petitioner needed help organizing files as part of the closing of the business. The Petitioner knew the Joined Party. The Petitioner contacted the Joined Party to see if the Joined Party would be interested in sorting files. The Petitioner informed the Joined Party at the time of hire that the Joined Party would not be an employee.

3. The Joined Party performed services for the Petitioner from April 30, 2009, through August 28, 2009. The Joined Party would stack files into piles based upon which subdivision the file pertained to.

4. The Petitioner had an accountant draw up a contract for the Joined Party. The Petitioner never read the contract and the contract did not accurately reflect the work conditions.

5. The Joined Party was free to work whenever the Petitioner was present at the place of business.

6. The Joined Party was paid $320 per week. The amount was pro-rated if the Joined Party missed full days of work.

7. The Joined Party was allowed to work for a competitor.

8. The Joined Party was hired to perform a specific task; the service was to end upon completion of that task. Either party could terminate the relationship at any time without liability.

9. The Petitioner did not supervise or oversee the Joined Party except when initially explaining the task to be performed by the Joined Party.

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. In this case, the Petitioner contacted the Joined Party in order to hire the Joined Party to perform a specific task. The Petitioner hired the Joined Party to sort files into piles based upon what the file covered. This work was not a part of the day to day normal course of business for the Petitioner.

17. The Petitioner did not direct the Joined Party in how the work should be performed. The Petitioner did exercise some control over the time and the location of the work. The Petitioner controlled the time in requiring that the Joined Party not work except when the Petitioner was present at the place of business. The location of the work was determined by the location of the stacks of files that required sorting. Neither of these factors indicates control over the Joined Party by the Petitioner.

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

Recommendation: It is recommended that the determination dated December 22, 2009, be REVERSED.

Respectfully submitted on August 26, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals