AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2411988

AA MASTERS MECHANICAL AIR MOVING
JESUS GUERRA
3970 12TH AVENUE SE
NAPLES FL 34117-9178

PROTEST OF LIABILITY
DOCKET NO. 2010-24073L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner constitute insured employment pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of liability.

The Department of Revenue conducted an audit of the Petitioner for the 2008 tax year. The auditor determined that the earnings reported by the Petitioner were taxable wages for unemployment compensation purposes. As a result, the Petitioner was required to pay additional taxes. The Petitioner filed a timely protest of the determination. A telephone hearing was held on August 24, 2010. The Petitioner, represented by its president, appeared and testified. The Special Deputy issued a Recommended Order on September 1, 2010.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a corporation which buys and resells used restaurant equipment.
2. The Department of Revenue conducted an audit of the Petitioner's books and records for the 2008 tax year to ensure compliance with the Florida Unemployment Compensation Law. As part of the audit the Petitioner submitted its 2008 U. S. Corporation Income Tax Form and its 2008 Amended U. S. Corporation Income Tax Return showing gross sales of $382,247 and merchandise purchased for resale in the amount of $191,921.
3. The Tax Auditor examined ten Form 1099-MISCs which the Petitioner had filed with the Internal Revenue Service for the 2008 tax year. The Tax Auditor concluded that the earnings reported on the forms were sales commissions based on information provided by the

Petitioner's president on an Audit Information Sheet. The Tax Auditor concluded that the earnings reported on the forms were taxable wages for unemployment compensation purposes.

4. On November 23, 2009, the Tax Auditor issued a Notice of Proposed Assessment showing an additional tax due of $1,776.87. The Petitioner filed a written protest by letter dated December 12, 2009. In its letter of protest the Petitioner stated that the Petitioner did not have any workers because the business was closed during 2007 and 2008.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated November 23, 2009, be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail postmarked September 7, 2010. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

The exceptions propose alternative findings of fact and conclusions of law and attempt to enter evidence that was not provided at the hearing. Pursuant to section 120.57(1)(l), Florida Statutes, the

Special Deputy is the finder of fact in an administrative hearing, and the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in its order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. Further review of the record also reveals that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Agency may not modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Rule 60BB-2.035(19)(a), Florida Administrative Code, prohibits the acceptance of additional evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. The exceptions are respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated November 23, 2009, is AFFIRMED.

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

_____
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

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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 23, 2009.

After due notice to the parties, a telephone hearing was held on August 24, 2010. The Petitioner, represented by the Petitioner's president, 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 constitute insured employment, and if so, the effective date of the petitioners liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation which buys and resells used restaurant equipment.
2. The Department of Revenue conducted an audit of the Petitioner's books and records for the 2008 tax year to ensure compliance with the Florida Unemployment Compensation Law. As part of the audit the Petitioner submitted its 2008 U. S. Corporation Income Tax Form and its 2008 Amended U. S. Corporation Income Tax Return showing gross sales of $382,247 and merchandise purchased for resale in the amount of $191,921.
3. The Tax Auditor examined ten Form 1099-MISCs which the Petitioner had filed with the Internal Revenue Service for the 2008 tax year. The Tax Auditor concluded that the earnings reported on the forms were sales commissions based on information provided by the Petitioner's president on

an Audit Information Sheet. The Tax Auditor concluded that the earnings reported on the forms were taxable wages for unemployment compensation purposes.

4. On November 23, 2009, the Tax Auditor issued a Notice of Proposed Assessment showing an additional tax due of $1,776.87. The Petitioner filed a written protest by letter dated December 12, 2009. In its letter of protest the Petitioner stated that the Petitioner did not have any workers because the business was closed during 2007 and 2008.

Conclusions of Law:

5. 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.

6. 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).

7. 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).

8. 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.

9. 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.

10. 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.

11. 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.

12. The Petitioner testified that amounts listed on eight of the ten Form 1099-MISCs were for purchases of merchandise for resale. The total of those eight forms is $21,619.95. The Petitioner testified that the remaining two forms were issued to family members to show the amounts loaned to the family members in the total amount of $4,455. The president testified that he was advised by the accountant to issue Form 1099-MISCs for the purchase of merchandise for resale. The Petitioner's testimony is in conflict with the Petitioner's U. S. Corporation Income Tax Return showing purchases for resale of $191,921. The information on the Petitioner's U. S. Corporation Income Tax Return, filed with the Internal Revenue Service under penalties of perjury, is accepted as more credible than the testimony of the Petitioner's president.

13. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error.

14. The Petitioner's evidence is not sufficient to establish that the determination is in error.

Recommendation: It is recommended that the determination dated November 23, 2009, be AFFIRMED.

Respectfully submitted on August 25, 2010.

R. O. SMITH, Special Deputy
Office of Appeals