AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2822986

CABLE OPERATIONS CONSTRUCTION INC
3229 49TH ST N
ST PETERSBURG FL 33710-2735

PROTEST OF LIABILITY
DOCKET NO. 2010-26415L

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 the Petitioner filed a timely protest pursuant to Section 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code. Issues also before me are whether services performed for the Petitioner by the Joined Party and other individuals constitute insured employment, whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed an unemployment compensation claim in October 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any others who worked under the same terms and conditions. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to the

Joined Party and any other workers who performed services under the same terms and conditions. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because he had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on July 1, 2010. The Petitioner was represented by an attorney. The Petitioner's President and the Petitioner's President's sister appeared and testified on behalf of the Petitioner. The Respondent was represented by a Department of Revenue consultant. The Joined Party appeared and testified on his own behalf. The Special Deputy issued a Recommended Order on August 10, 2010.

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

1. The Petitioner is a subchapter S corporation, incorporated in October 2006, for the purpose of running a fiber-optic installation business.

2. The Joined Party provided services as a warehouse manager from August 13, 2007, through May 28, 2009. The Joined Party's responsibilities included picking up cable and bringing it to the warehouse, providing stored cable to subcontractors, and maintaining records and an inventory of supplies.

3. The Joined Party was friends with the Petitioner. The Petitioner offered work to the Joined Party. The Joined Party believed that he was hired as an employee.

4. The Joined Party signed a *Contract Agreement*, on July 15, 2008. This agreement was created by the Petitioner and used as a standard contract by the Petitioner. The agreement indicated that the Joined Party was an independent contractor. The agreement went on to require the Joined Party to report to work between 7 and 8 AM unless the Petitioner's client specified a specific time on any given occasion. The agreement includes a non-solicit clause binding for one year after the termination of the work relationship.

5. The Joined Party was provided approximately three weeks of training by the Petitioner.

6. The Joined Party would report to work each morning between 5 and 5:30 AM. The Joined Party reported to a manager. The manager would give the Joined Party instructions covering what needed to be done that day. The Joined Party would then prepare cables for the contractors as instructed by the manager. The Joined Party would pick up any needed cables from the client company and bring them to the warehouse for distribution to the contractors.

7. The Joined Party used his own vehicle to pick up and deliver cable. The Petitioner reimbursed the Joined Party for fuel costs.

8. The Joined Party was paid a weekly salary which was modified if the Joined Party worked less than forty hours in a given week. The Joined Party started out making $700 per week. The Joined Party's pay was increased to $800 per week. The Petitioner began to require the Joined

Party to submit an invoice for hours worked in the Joined Party's second year of work. The Petitioner supplied invoice forms for the Joined Party to use.

9. The Joined Party occasionally had family members or friends assist him with the work. The Joined Party paid these individuals out of his own finances. The Joined Party used the workers as helpers.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated November 25, 2009, be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail postmarked August 24, 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 Petitioner's exceptions request a modification of the Special Deputy's Recommendation on page 4 of the Recommended Order. The Petitioner requests that the Recommendation be modified to

reflect that the Joined Party worked only as a warehouse manager and not as a warehouse/installer as listed on the determination dated November 25, 2009. A review of the record reflects that the all of the parties testified that the Joined Party did not work as a warehouse manager/installer. A review of the record also reflects that the Special Deputy found in Finding of Fact #2 that the Joined Party performed services as a warehouse manager. As a result, the Recommendation is amended to reflect the correct occupation. The Recommendation is amended to say:

Recommendation: It is recommended that the determination dated November 25, 2009, be MODIFIED to reflect that the Joined Party performed services as a warehouse manager and not as a warehouse manager/installer. It is also recommended that the determination be AFFIRMED as modified.

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 are thus adopted in this order. The Special Deputy's amended 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 amended herein.

In consideration thereof, it is ORDERED that the determination dated November 25, 2009, is MODIFIED to reflect that the Joined Party performed services as a warehouse manager and not as a warehouse manager/installer. It is also ORDERED that the determination is AFFIRMED as modified.

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 25, 2009.

After due notice to the parties, a telephone hearing was held on July 1, 2010. An attorney appeared on behalf of the Petitioner. The Petitioner's president and the president's sister appeared and testified. The Joined Party appeared and testified on his own behalf. A revenue consultant appeared on behalf of the Respondent. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law on July 14, 2010.

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 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.

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.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Jurisdictional Issue: ISSUE: Whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 60BB-2.035, Florida Administrative Code. The Florida Department of Revenue mailed a letter of determination to the Petitioner on November 25, 2009. The letter of determination addressed to the Petitioner had an incorrect zip code for the Petitioner. Because the determination was addressed incorrectly, it was not properly mailed to the Petitioner. The Petitioner responded with a protest letter within five days of receipt of the determination on or about December 18, 2009. The Petitioner's protest is deemed timely.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated in October 2006, for the purpose of running a fiber-optic installation business.

2. The Joined Party provided services as a warehouse manager from August 13, 2007, through May 28, 2009. The Joined Party's responsibilities included picking up cable and bringing it to the warehouse, providing stored cable to subcontractors, and maintaining records and an inventory of supplies.

3. The Joined Party was friends with the Petitioner. The Petitioner offered work to the Joined Party. The Joined Party believed that he was hired as an employee.

4. The Joined Party signed a *Contract Agreement*, on July 15, 2008. This agreement was created by the Petitioner and used as a standard contract by the Petitioner. The agreement indicated that the Joined Party was an independent contractor. The agreement went on to require the Joined Party to report to work between 7 and 8 AM unless the Petitioner's client specified a specific time on any given occasion. The agreement includes a non-solicit clause binding for one year after the termination of the work relationship.

5. The Joined Party was provided approximately three weeks of training by the Petitioner.

6. The Joined Party would report to work each morning between 5 and 5:30 AM. The Joined Party reported to a manager. The manager would give the Joined Party instructions covering what needed to be done that day. The Joined Party would then prepare cables for the contractors as instructed by the manager. The Joined Party would pick up any needed cables from the client company and bring them to the warehouse for distribution to the contractors.

7. The Joined Party used his own vehicle to pick up and deliver cable. The Petitioner reimbursed the Joined Party for fuel costs.

8. The Joined Party was paid a weekly salary which was modified if the Joined Party worked less than forty hours in a given week. The Joined Party started out making $700 per week. The Joined Party's pay was increased to $800 per week. The Petitioner began to require the Joined Party to submit an invoice for hours worked in the Joined Party's second year of work. The Petitioner supplied invoice forms for the Joined Party to use.

9. The Joined Party occasionally had family members or friends assist him with the work. The Joined Party paid these individuals out of his own finances. The Joined Party used the workers as helpers.

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 at hearing reveals that the Petitioner exercised supervision and control over the work performed by the Joined Party. The Joined Party received instruction from a

manager as well as contractors retained by the Petitioner. The Joined Party performed services at the Petitioner's facilities as directed by the Petitioner.

17. The Joined Party provided services to the Petitioner for approximately one and a half years. This length of service is indicative of an employer-employee relationship rather than of a temporary independent contractor relationship.

18. The Petitioner presented the Joined Party with a written agreement approximately one year after their work relationship had begun. The agreement was signed by the parties and indicated that the Joined Party was performing services as an independent contractor. The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "while the obvious purpose to be accomplished by this document was 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."

19. The Joined Party was paid a weekly salary which was modified by the Petitioner in the event that the Joined Party worked for fewer than 40 hours per week. This type of pay arrangement is not indicative of an independent contractor agreement.

20. The services performed by the Joined Party, in managing the Petitioner's warehouse and ensuring that the Petitioner's contractors had the materials needed to work, were a part of the normal course of business for the Petitioner's cable installation company.

21. A preponderance of the evidence presented in the hearing reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship.

22. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law on July 14, 2010. The Special Deputy considered the Proposed Findings of Fact and Conclusions of Law. Where those findings comport with the hearing record, they are incorporated into the Recommended Order, where the findings do not comport with the record, they are respectfully rejected.

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

Respectfully submitted on August 10, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals