AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2933492
BROOM & HAMMER INC
212 FAIR HOPE PASS
DAVENPORT FL 33897-4714

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

PROTEST OF LIABILITY
DOCKET NO. 2010-31389L

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 29, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 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

PETITIONER:
Employer Account No. - 2933492
BROOM & HAMMER INC
ABELARDO COSSIO
212 FAIR HOPE PASS
DAVENPORT FL 33897-4714

PROTEST OF LIABILITY
DOCKET NO. 2010-31389L

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 29, 2009.

After due notice to the parties, a telephone hearing was held on June 29, 2010. A former corporate officer appeared and provided testimony for the Petitioner. The Joined Party appeared and provided testimony on her own behalf. A representative appeared and provided testimony on behalf of the Respondent. A blocked claims investigator appeared 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 sub-chapter S corporation incorporated February 3, 2006, for the purpose of running a cleaning and maintenance business.

2. The Petitioner was retained by a client resort to clean rental rooms and houses.

3. The Joined Party provided services to the Petitioner from March 2008, through December 15, 2009. The Joined Party contacted the Petitioner while looking for work. The Joined Party was interviewed by the Petitioner and filled out an application with the Petitioner. The Joined Party was informed at the time of hire that she would be reported with a 1099 form.

4. The Joined Party was responsible for cleaning villas, apartments, and houses at the client resort. The work included sweeping, mopping, laundering sheets and towels, and general clean up. The Joined Party would report to work at 10 a.m. each morning to receive assignments for the day from the Petitioner. The Petitioner would open the house or apartment for the Joined Party. The Joined Party would perform the needed cleaning. The Joined Party was required to contact the Petitioner to report any damage found. When the Joined Party finished cleaning, the Joined Party would contact the Petitioner so that the Petitioner could inspect and verify the work before the Joined Party was allowed to leave.

5. The Joined Party was paid bi-weekly. The amount was based upon the number and sizes of cleaning jobs performed.

6. The Petitioner covered minor damages and maintained liability insurance to cover any major damage.

7. The Petitioner provided the supplies and equipment necessary to perform the work. The Joined Party used some of her own supplies in some cases to supplement what the Petitioner provided.

8. Either Party could end the relationship at anytime, without liability.

Conclusions of Law:

9. 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.

10. 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).

11. 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).

12. 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.

13. 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.

14. 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.

15. The evidence presented at the hearing reveals that the Petitioner controlled where, when, and what work was to be performed by the Joined Party.

16. The Petitioner controlled the financial aspects of the relationship insofar as the Petitioner determined the Joined Party's schedule and the amount of pay was based upon the number and size of cleaning jobs performed. The relationship was terminable at will. Both Parties had the right to end the relationship at anytime without liability. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

17. The work was unskilled domestic labor. The work did not require any specialized training or skill in order to perform the necessary duties.

18. The Joined Party's duties as a housekeeper were a part of the normal course of business for the Petitioner's cleaning and maintenance company.

19. A preponderance of the evidence in this case reveals that the Petitioner established 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 29, 2009, be AFFIRMED.

Respectfully submitted on July 29, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals