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

PETITIONER:
Employer Account No. - 2687571
AIR CENTRAL SERVICES CORP
ALEXANDRA MIRABEL
580 LA VILLA DRIVE
MIAMI SPRINGS FL 33166-6028

PROTEST OF LIABILITY
DOCKET NO. 2010-31394L

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 November 3, 2010. The Petitioner's owner and the owner's wife appeared and testified at the hearing. The Joined Party appeared and testified on his own behalf. A service center manager appeared on behalf of the respondent and called a tax specialist I as witness.

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 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.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated February 10, 2005, for the purpose of running an appliance service and repair business.

2. The Joined Party contacted the Petitioner after being referred by a friend. The Petitioner interviewed the Joined Party and subsequently hired the Joined Party.

3. The Joined Party performed services as an air conditioner technician from September 15, 2006, through October 23, 2009. The Joined Party was tasked with the installation and repair of air conditioners for the Petitioner's customers.

4. The Joined Party would report to the Petitioner's place of business and receive a list of work for the day. The Petitioner would contact the Joined Party in the event that no work was available. The Joined Party would proceed from assignment to assignment, performing whatever tasks were required by the Petitioner's customers. The Joined Party was required to work from 8:30 am through 4:30 pm.

5. The Joined Party was required to complete the work within time limits established by the Petitioner and the customer.

6. The Joined Party used the Petitioner's vehicle when it was available. The Petitioner paid for fuel if the Joined Party used the Petitioner's vehicle. The Joined Party provided his own hand tools. The Petitioner supplied large or specialized tools.

7. The Joined Party does not speak English. The Joined Party would be required to have the Petitioner translate during interactions with English speaking customers. All customers were scheduled by the Petitioner due to the language barrier.

8. There were no formal disciplinary actions. If the Joined Party did not perform well, the Petitioner would not give work to the Joined Party for a few days as punishment.

9. The Joined Party had a refrigerator technician certificate prior to working for the Petitioner.

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 case reveals that the Petitioner controlled the scheduling and timing of the Joined Party's work. The Petitioner scheduled all of the Joined Party's work and in conjunction with customers set the deadlines the Joined Party was required to work within.
17. The Petitioner provided translation services on behalf of the Joined Party.
18. The Joined Party was required to work between the hours of 8:30 am and 4:30pm by the Petitioner.
19. The work performed by the Joined Party as an air conditioner technician was a part of the regular course of business for the Petitioner's appliance service and repair business.
20. The Petitioner provided testimony that the Joined Party's circumstances were unique due to the language barrier. Therefore, this recommended order will apply only to the Joined Party.
21. A preponderance of the evidence presented in this hearing demonstrates that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated December 29, 2009, be MODIFIED to apply ONLY to the Joined Party. As modified, it is recommended that the determination dated December 29, 2009, be AFFIRMED.

Respectfully submitted on January 3, 2011.

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 December 29, 2009, is MODIFIED to apply to only the Joined Party. It is also ORDERED that the determination is AFFIRMED as modified.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION