AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2929775

DELMARVA ECONOMIC
RICHARD LEVINE
5533 MARQUESAS CIR
SARASOTA FL 34233-3332

PROTEST OF LIABILITY
DOCKET NO. 2010-3557L

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 by the Joined Party and other individuals working as operations managers constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19); 443.036(21); 443.1216, Florida Statutes.

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 Special Deputy issued the Recommended Order on July 26, 2010. The Petitioner's exceptions to the Recommended Order were received by fax on August 13, 2010. The Petitioner submitted additional exceptions by mail postmarked August 13, 2010. Rule 60BB-2.035(19)(c), Florida Administrative Code, requires that written exceptions be filed within 15 days of the mailing date of the Recommended Order. As a result, the Agency may not consider the Petitioner's exceptions in this order because the exceptions were filed more than 15 days after the mailing date of the Recommended Order. No other submissions were received from any party.

The Petitioner's letter postmarked August 13, 2010, also requests reopening of the proceedings. Rule 60BB-2.035(18), Florida Administrative Code, provides for the reopening of the proceedings by the Petitioner's written request only if the Petitioner did not appear at the hearing for good cause and the special deputy issued a recommended order adverse to the party. Since the Petitioner appeared at the hearing and the proceedings complied with the essential requirements of law pursuant to section 120.57(1)(l), Florida Statutes, the Agency does not have the authority to reopen the case. The Petitioner's request for the reopening of the proceedings is respectfully denied.

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 and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that the determination dated November 19, 2009, is MODIFIED to reflect an effective date of liability of January 1, 2005. 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

PETITIONER:
Employer Account No. - 2929775
DELMARVA ECONOMIC
RICHARD LEVINE
5533 MARQUESAS CIR
SARASOTA FL 34233-3332

PROTEST OF LIABILITY
DOCKET NO. 2010-3557L

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 19, 2009.

After due notice to the parties, a telephone hearing was held on July 21, 2010. Cases involving Potomac Financial Corp, Potomac Continental Inc, and Richard Levine DBA as Delmarva Economic Benefits Company, were consolidated into a single hearing. Richard Levine, president of Potomac Financial Corp, president of Potomac Continental Inc., and sole proprietor of Delmarva Economic Benefits Company, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party 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 by the Joined Party and other individuals working as operations managers 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. Potomac Financial Corp is a Florida corporation which was formed in approximately 1988. The corporate president, Richard Levine, is active in the operation of the business on a full time basis. The business of Potomac Financial Corp is accounting and income tax preparation. Richard

Levine also operates the business of Potomac Continental Inc, a corporation formed in approximately 1986, from the same business location. The business of Potomac Continental Inc is the sale of insurance. Richard Levine is active in the operation of the business as the licensed insurance agent. Richard Levine also operates a sole proprietorship which uses the fictitious name of Delmarva Economic Benefits Company from the same office. Richard Levine sells fixed annuities and other investments through Delmarva Economic Benefits Company.

2. The Joined Party is an individual who was employed by a stock brokerage company for years. Her last title was operations manager. In early 2002 the Joined Party responded to a newspaper help wanted advertisement placed by Richard Levine for the position of office administrator and was interviewed by Richard Levine. Richard Levine informed the Joined Party that the position consisted of answering the telephone and helping with the paperwork for Potomac Financial, Potomac Continental, and Delmarva Economic Benefits Company from 9 AM until 5 PM, Monday through Friday. Richard Levine advised the Joined Party that she would be paid a salary of $26,000 per year payable at a flat rate of $500 per week. In addition to the base salary Richard Levine stated that the Joined Party had the potential to earn incentive bonuses for good work performance. The Joined Party would be provided with two weeks paid vacation per year, paid sick days, paid personal days, and medical expense reimbursement of up to $500 per year. Richard Levine advised the Joined Party that the Joined Party would not be entitled to receive health insurance, life insurance, or retirement benefits, and that the Joined Party would be responsible for paying her own taxes.

3. The Joined Party accepted the Petitioner's offer of work. Richard Levine then presented the Joined Party with a written agreement which states "This Agreement in no way constitutes an employer/employee relationship. The Representative is considered an independent contractor." The agreement provides that the agreement may be terminated by either party with proper notice which is deemed to be ten days. Richard Levine told the Joined Party that the Joined Party was required to sign the agreement and that if she did not sign the agreement she would not be able to work in the employ of the Petitioner. The Joined Party signed the agreement and began work on March 15, 2002.

4. The Petitioner provided the Joined Party with work space in the Petitioner's office. The Petitioner provided a desk, computer, telephones, copy machine, fax machine, postage machine, and all other equipment or supplies that were needed to perform the work. The Joined Party was not required to provide anything and the Joined Party did not have any work related expenses. If the Joined Party purchased supplies for the office, the Petitioner reimbursed the Joined Party.

5. Although the position advertised by the Petitioner was for an office administrator, Richard Levine told the Joined Party that since her prior title was operations manager she could retain that same title. The Petitioner provided the Joined Party with business cards listing the Joined Party's position as operations manager.

6. Although the Joined Party was an experienced office worker it was necessary for the Petitioner to train the Joined Party how to use the Petitioner's computer system and other office equipment such as the postage machine. The Joined Party's duties included answering the telephones and each of the three businesses had a separate telephone. The Petitioner told the Joined Party exactly what to say when answering each of the telephones. The Petitioner showed the Joined Party what to do and gave the Joined Party instructions about how to do it.

7. The Petitioner provided the Joined Party with a key to the office. The Joined Party's duties included, beginning with the very first day of work, opening the office in the morning and closing the office at the end of the day.

8. The Joined Party worked under the direct supervision of Richard Levine and he had to approve everything that the Joined Party did. Richard Levine told the Joined Party what tasks to perform and when to perform the tasks. If Richard Levine was going to be out of the office, he instructed the Joined Party concerning what duties she should perform during his absence.

9. The Petitioner hired other workers to perform office tasks such as answering the telephones and filing. Those workers were paid by the Petitioner, not by the Joined Party. The Petitioner gave the Joined Party the responsibility of training those workers how to answer the telephones and how to do the filing.

10. The Joined Party had a set work schedule and she could not come and go as she pleased. If the Joined Party was not able to work or if she needed to leave work early she had to obtain approval from the Petitioner. She had to obtain the Petitioner's approval to take a vacation or a personal day off from work.

11. In addition to the $500 weekly pay the Petitioner paid the Joined Party incentive bonuses for doing good work. In December 2007 Richard Levine told the Joined Party that she deserved a pay increase. The Petitioner increased the Joined Party's weekly pay to $550 on December 3, 2007.

12. Several years after the Joined Party began working for the Petitioner, Richard Levine encouraged the Joined Party to obtain a license to sell insurance. After the Joined Party obtained the license she sold an insurance policy to a family member of the Joined Party and earned a commission paid by the insurance company. Richard Levine allowed the Joined Party to keep all of the commission which she earned from the sale of the policy to the family member.

13. The Joined Party performed services for all of the three companies during each workday. During the first two years the regularly established payday was on Friday. After the first two years the Petitioner changed the payday from time to time due to the Petitioner's banking activities. During some weeks the Joined Party was paid by a check drawn against Potomac Financial and during other weeks she was paid by checks drawn against Potomac Continental or Delmarva Economic Benefits Company. Richard Levine wrote the checks from whichever account had sufficient funds at the time. The amount of pay which the Joined Party received from each of the bank accounts did not have any relationship to the percentage of work which the Joined Party performed for each individual company. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. At the end of each year Richard Levine reported the amount of the earnings paid to the Joined Party from each of the companies' bank accounts on separate Form 1099-MISC as nonemployee compensation.

14. During 2009 the Joined Party received several checks from the Petitioner which were returned by the bank due to insufficient funds. Although the Petitioner tried to pay the Joined Party for the work which the Joined Party performed, the Petitioner had to discontinue paying the Joined Party because the Petitioner did not have sufficient funds in the bank accounts. The Petitioner also did not have the funds available to reimburse the Joined Party for medical expenses as agreed. The Joined Party could not afford to continue working for the Petitioner because she had to find other employment to support herself and her family. As a result the Joined Party discontinued working for the Petitioner in August 2009.

15. During the time that the Joined Party performed services for Potomac Financial, Potomac Continental, and Richard Levine doing business as Delmarva Economic Benefits Company, she did not have any investment in a business, did not have business liability insurance, did not have a business telephone listing, did not advertise, did not offer services to the general public, and did not perform services for any other business or company. The Joined Party performed services exclusively for Potomac Financial, Potomac Continental, and Richard Levine.

16. The Joined Party filed an initial claim for unemployment compensation benefits effective August 30, 2009. When the Joined Party did not receive credit for her earnings with Potomac Financial, Potomac Continental, and Richard Levine, a *Request for Reconsideration of Monetary Determination* was filed for each entity and three investigations were issued to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.

17. On November 16, 2009, the Department of Revenue issued a determination holding that the persons performing services for Potomac Continental Inc. as operations manager/insurance agent are employees and that Potomac Continental Inc. was liable for payment of unemployment tax retroactive to January 1, 2005. Potomac Continental filed a timely protest.

18. On November 19, 2009, the Department of Revenue issued a determination holding that persons performing services for Richard Levine/Delmarva Economic as operations managers are covered employees and reportable for unemployment tax purposes. The determination did not include an effective date of the tax liability. Richard Levine filed a timely protest.

19. On November 24, 2009, the Department of Revenue issued a determination holding that the Joined Party performing services as operations manager was an employee of Potomac Financial Corp and that the liability for payment of unemployment compensation tax was effective January 1, 2005. Potomac Financial Corp filed a timely protest.

Conclusions of Law:

20. The issue in this case, whether services performed for the sole proprietorship of Richard Levine, doing business as Delmarva Economic Benefits Company, by the Joined Party and other individuals as operations managers 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.

21. 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).

22. 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).

23. 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.

24. 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.

25. 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.

26. 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.

27. The business of Richard Levine, doing business as Delmarva Economic Benefits Company, is the sale of fixed annuities and other investments. The Joined Party worked in the office of Richard Levine as an office administrator to answer the telephone and handle paperwork as instructed by Richard Levine. It was the Joined Party's assigned responsibility to open the office each day. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business.

28. The Petitioner provided the place of work and all equipment and supplies that were needed to perform the work. The Joined Party was not required to provide any equipment or supplies and she did not have any expenses in connection with the work. The Joined Party was not at risk of suffering a financial loss from services performed.

29. The Joined Party was paid by time worked rather than based on production. The Petitioner paid the Joined Party $500 per week from the first week of work in March 2002 until December 2007 when the Petitioner increased the weekly pay to $550. The Petitioner paid the Joined Party incentive bonuses solely at the Petitioner's discretion. These facts reveal that the Petitioner controlled both the method and the rate of pay. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

30. The Petitioner provided fringe benefits including a two week paid vacation, paid sick pay, paid personal days, and medical expense reimbursement of up to $500 per year. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

31. The Joined Party performed services for the Petitioner from March 2002 until August 2009, a period of seven and one-half years. Either party had the right to terminate the relationship at any time without incurring a penalty for breach of contract. These facts reveal the existence of an at will relationship of relative permanence. The relationship ended when the Petitioner ceased paying the Joined Party for work performed, constituting a constructive discharge. 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."

32. At the time of hire in March 2002 the Petitioner required the Joined Party to sign an agreement stating that the Joined Party was considered to be an independent contractor. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "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."

33. The Petitioner controlled what work was performed, where it was performed, when it was performed and how it was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

34. It is concluded that the services performed for Richard Levine by the Joined Party and other individuals working as operations managers constitute employment.

35. Section 443.1215, Florida States, provides:
    (1) Each of the following employing units is an employer subject to this chapter:
        (a) An employing unit that:
            1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
            2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

36. During the 2002 calendar year the Joined Party performed services for Richard Levine during at least twenty different calendar weeks. Therefore, Richard Levine has establsihed liability for payment of unemployment compensation taxes. However, the determination issued by the Department of Revenue does not set forth the effective date of liability.

37. Rule 60BB-2.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which the services were rendered.

38. Although Richard Levine paid wages to the Joined Party beginning in 2002, the Petitioner's liability is limited to a retroactive date of January 1, 2005.

Recommendation: It is recommended that the determination dated November 19, 2009, be MODIFIED to reflect an effective date of liability of January 1, 2005. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on July 26, 2010.

R. O. SMITH, Special Deputy
Office of Appeals