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

PETITIONER:
Employer Account No. - 2935202
MATLACHA HOLDINGS LLC
JAY R JOHNSON
2258 DIXIE LEE COURT
ST JAMES CITY FL 33956-2000

PROTEST OF LIABILITY
DOCKET NO. 2010-39283L

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 January 11, 2010.

After due notice to the parties, a telephone hearing was held on October 18, 2010. The Petitioner, represented by the Managing Partner, appeared and testified. Another partner testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified. The Joined Party's sister and the Joined Party's fiancé testified as witnesses.

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 Florida limited liability company that was formed in approximately October 2004 to purchase and manage a six unit motel.
2. The Petitioner hired the Joined Party on January 7, 2009, to manage the motel. The previous manager trained the Joined Party over the course of four days. The training included how to check guests in and out, how to clean rooms, how to take care of the yard, how to answer the telephone, how to fill out the monthly report, and when to work.
3. On January 30, 2009, the Petitioner provided the Joined Party with a *Management Agreement* for the Joined Party's signature. The *Management Agreement* is a generic agreement and is not an

agreement that was written specifically for the Joined Party. Although the Joined Party is a female the *Management Agreement* refers to the Joined Party as a male. The Joined Party signed the Agreement on January 30, 2009. The Agreement provides that the Joined Party is retained by the Petitioner as an independent contractor. The Agreement states that the Joined Party will devote such time as is necessary and will use the Joined Party's best efforts to manage and operate the motel in a manner deemed appropriate in the Joined Party's sole judgment and discretion. The Agreement sets forth the management and operation responsibilities as including, but not limited to, reservations, rental of rooms, general repairs, cleaning, grounds keeping, and guest relations. The Agreement provides that the Petitioner will pay the Joined Party $500 per month with the payments made on the first and the fifteenth of each month in the amount of $250. The Agreement requires the Joined Party to live on the premises and provides that the Petitioner will furnish the living accommodations for the Joined Party including utilities deemed by the Petitioner to be within reason. The Agreement provides that the Joined Party will be eligible to earn a bonus each month if the monthly revenue exceeds the adjusted monthly revenue from the previous year. The Agreement provides that the Agreement may be terminated by either party with thirty days written notice but that the Petitioner may terminate the Agreement without notice for breach of the Agreement, violation of any laws, or wrongful conduct.

4. The Petitioner gave verbal instructions to the Joined Party concerning what the Joined Party was required to do. The Petitioner had established rates for the rooms and the Petitioner told the Joined Party that she was not supposed to deviate from the room rates. The Petitioner established other policies including requiring guests to check out by 11 AM. The Petitioner's policies allowed guests to have pets but required that the guests pay $20 for each pet. The Petitioner told the Joined Party that the rooms must be cleaned before 3 PM each day and that the Joined Party was not allowed to leave the premises between the hours of 3 PM and 10 PM because that was generally when guests checked in. The Petitioner told the Joined Party that if she needed time off from work she was required to obtain someone else to perform the duties for her at her own expense. The Petitioner told the Joined Party that she was required to attend the monthly Chamber of Commerce breakfast and other business functions.

5. The Petitioner provided the equipment for maintaining the grounds, and the vacuum cleaners, brooms, mops, and supplies for cleaning the rooms. The existing sheets and blankets were soiled. The Joined Party went to a second hand store and purchased sheets and blankets to replace the soiled sheets and blankets at her own expense. The Joined Party considered mowing the grass to be a task that was too heavy for her to perform. The Joined Party's fiancé usually mowed the grass for the Joined Party without compensation. The Joined Party paid for the gas used by the mower. The Joined Party's fiancé also did some of the repairs at the motel and watched the front desk during the Joined Party's absence without compensation.

6. The Petitioner's Managing Partner usually visited the motel each day. The Managing Partner told the Joined Party when to water the grass, when to mow the grass, when to prune bushes, when to pull weeds, and when to paint. The Managing Partner told the Joined Party that if she did not do tasks as assigned the Joined Party would be fired.

7. The Joined Party complained to the Managing Partner that the Petitioner's room rates were too high and that the Petitioner was losing business. The Managing Partner gave the Joined Party permission to use the Joined Party's discretion to lower the room rates if necessary. The Joined Party used her discretion to lower the room rates. When the Managing Partner learned that the Joined Party had rented a room for less than the Petitioner's established rate, the Managing Partner became angry and warned the Joined Party that she was not to lower room rates again.

8. On one occasion the Joined Party asked a friend to watch the office because the Joined Party felt that she needed to have a day off from work. When the Managing Partner learned that the Joined Party had hired someone else to watch the office, he became angry. The Managing Partner told the Joined Party that she was not to do it again without his permission.

9. The Joined Party was friends with the owner of another motel. That motel owner was looking to hire a manager and approached the Joined Party. The motel owner only needed someone to answer the telephone and to check guests in and out. The Joined Party felt that between herself and her fiancé that she could manage both motels. The Joined Party mentioned the offer to the Petitioner's Managing Partner. The Managing Partner told the Joined Party to decline the offer and the Joined Party complied.

10. No payroll taxes were withheld from the Joined Party's pay. The Petitioner did not provide any fringe benefits to the Joined Party. At the end of 2009 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

11. On many occasions the Managing Partner warned the Joined Party about work performance issues. On one occasion the Joined Party had a friend from out of town stay with her in her room without the Petitioner's permission. The Managing Partner believed that the Joined Party was allowing guests to stay at the motel without charging the guests. The Petitioner was also dissatisfied because revenues were down. On November 9, 2009, the Petitioner discharged the Joined Party without notice.

Conclusions of Law:

12. 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.

13. 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).

14. 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).

15. 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.

16. 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.

17. 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.

18. 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.

19. The *Management Agreement* entered into by the parties states that the Joined Party is an independent contractor and that the Joined Party will manage the motel using the Joined Party's sole judgment and discretion. 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."

20. The Petitioner's Managing Partner testified that the business of the Petitioner is motel management, specifically management of the motel owned by the Petitioner. The Joined Party was engaged by the Petitioner to manage the Petitioner's motel. 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. The Petitioner provided substantially everything that was needed to perform the work. The Joined Party performed services exclusively for the Petitioner and was told by the Managing Partner that she should not perform similar services for another motel. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

21. It was not shown that the services performed for the Petitioner by the Joined Party required any special knowledge or skill. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

22. The Petitioner paid the Joined Party $500 per month for managing the motel and required that the Joined Party live on the premises. The Petitioner provided the living accommodations as part of the compensation package and provided the utilities as long as the Petitioner determined the cost of the utilities to be within reason. The Joined Party also had the ability to earn a bonus during any month if the revenue of the motel exceeded the adjusted revenue for the previous year. The amount of pay and the method of pay were determined by the Petitioner. The Joined Party did not have the discretion to determine the room rates and the majority of the Joined Party's earnings were based on the $500 per month payment rather than on work production. The fact that payroll

taxes were not withheld from the pay does not, standing alone, create an independent contractor relationship.

23. The Joined Party managed the Petitioner's motel for a period of approximately ten months until the Petitioner terminated the relationship without notice. 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."

24. The evidence reveals that the Petitioner exercised significant control over the Joined Party and the manner in which the Joined Party managed the motel. In spite of the wording in the Management Agreement the Petitioner would not allow the Joined Party to use her own judgment and discretion to manage the motel. The Petitioner determined the room rates and determined the motel policies. The Joined Party could not hire others to perform the work without the Petitioner's approval. The Petitioner required the Joined Party to be on the premises during specified hours and required that certain task be completed during specific times. The Petitioner told the Joined Party when to water the grass, when to mow the grass, when to prune bushes, when to pull weeds, and when to perform other maintenance duties. The Petitioner trained the Joined Party how to perform the work. Training is a method of control because it specifies how a task is to be performed. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

25. The special deputy was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. Factors considered in resolving evidentiary conflicts include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the special deputy finds the testimony of the Joined Party to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the Joined Party.

26. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the determination dated January 11, 2010, be AFFIRMED.

Respectfully submitted on October 21, 2010.

R. O. SMITH, 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 January 11, 2010, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION