**AGENCY FOR WORKFORCE INNOVATION**
**TALLAHASSEE, FLORIDA**

**PETITIONER:**
Employer Account No. - 0252355
METRO ELECTRIC SERVICE INC
15050 NE 20TH AVENUE
NORTH MIAMI FL 33181-1123

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

**PROTEST OF LIABILITY**
**DOCKET NO. 2010-45091L**

**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 29, 2010, is AFFIRMED.

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

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. - 0252355
METRO ELECTRIC SERVICE INC
DOUGLAS SARROW
15050 NE 20TH AVENUE
NORTH MIAMI FL 33181-1123

**PROTEST OF LIABILITY**
**DOCKET NO. 2010-45091L**

**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 29, 2010.

After due notice to the parties, a telephone hearing was held on March 3, 2011. A manager and an office secretary appeared and testified for the Petitioner. The Joined Party did not appear at the hearing. A tax specialist II appeared and testified 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 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 in 1974 for the purpose of running a commercial and industrial electrical work business.

2. Agency records indicate that the Joined Party performed services for the Petitioner as an electrician helper from November 10, 2007, through November 13, 2009.

3. The Petitioner reportedly performed whatever tasks were needed by the Petitioner as directed by the Petitioner.

4. The Petitioner determined the start time for each days work based upon the requirements of the client.

5. The Joined Party was reportedly paid 10 dollars per hour at the start of the relationship. The Joined Party's pay was reportedly increased to 12 dollars per hour during the relationship. The Joined Party was required to turn in a time sheet to the Petitioner to keep track of hours worked.

6. The Petitioner reportedly supervised the Joined Party for some jobs. The Petitioner reportedly allowed the Joined Party to work on his own for simple work. The Joined Party was expected to perform the work within the time constraints set by the Petitioner.

7. The Petitioner reportedly disciplined the Joined Party on one or two occasions for reported poor quality work.

8. The Joined Party reportedly provided his own hand tools.

**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. Florida Rule 60BB-2.035(7) states that the burden of proof is on the Petitioner to establish by a preponderance of the evidence that the determination was in error. The evidence presented by the Petitioner was consisted largely of hearsay evidence, as it was the testimony of both of the Petitioner's witnesses that they did not work with the Joined Party or know of his work conditions beyond when the Joined Party would come in to pick up his pay check. Florida Rule 60BB-2.035(15)(c) holds that "Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but will not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S." The evidence presented by the Petitioner failed to meet the burden of proof; therefore, the determination will be AFFIRMED.

16. It is further noted that, even should the Petitioner's testimony be accepted as competent substantial evidence; the evidence would show that the Petitioner exercised control over where, when, and how the Joined Party performed the work. The Petitioner provided the assignment to the Joined Party. The Petitioner set the start time for work each day and the time frame in which the work must be completed. The Petitioner supervised the work performed by the Joined Party when the Petitioner felt it was necessary. The Petitioner retained the right to discipline the Joined Party for short comings in the work.

17. The evidence would show that the Joined Party was paid an hourly rate as opposed to being paid by the job as is more typical of an independent contractor relationship.

18. The evidence would show that the work performed by the Joined Party as an electrician helper was a part of the normal course of business for the Petitioner's electrical work business.

19. The evidence would show that 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 parties.

**Recommendation:** It is recommended that the determination dated January 29, 2010, be AFFIRMED.

Respectfully submitted on May 4, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals