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

PETITIONER:
Employer Account No. - 2517259
ALL BUILDING CLEANING CORP
MIKE CASTRO
8567 CORAL WAY #271
MIAMI FL 33155-2335

PROTEST OF LIABILITY
DOCKET NO. 2010-45739L

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 February 2, 2010.

After due notice to the parties, a telephone hearing was held on September 30, 2010. The Petitioner, represented by its president, appeared and testified. The Respondent was represented by a Department of Revenue Tax Auditor Supervisor.

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 constitute insured employment, and if so, the effective date of the Petitioners liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation which was formed in approximately 2000 to operate a commercial cleaning and maintenance business.
2. The Petitioner was selected by the Department of Revenue for an audit of the Petitioner's books and records for the 2008 tax year to ensure compliance with the Florida Unemployment Compensation Law. The audit was conducted at the location of the Petitioner's accountant.
3. The Tax Auditor examined the Form 1099-MISCs which were issued to workers who performed the janitorial services. The Tax Auditor concluded that the janitorial workers were misclassified by the Petitioner as independent contractors. The Tax Auditor concluded that the services performed by the janitorial workers constituted insured employment during the 2008 tax year.
4. The Petitioner contracts with the Petitioner's customers to provide general cleaning of offices and/or floor and carpet cleaning. During 2008 the Petitioner engaged individuals to perform those

services. Those individuals did not have occupational licenses, did not have business liability insurance, and did not advertise their services to the general public. With only a few exceptions the Petitioner provided all of the equipment and supplies that were needed to perform the work. Some of the workers were paid by the job and some of the workers were paid by time worked. None of the workers submitted invoices to the Petitioner for the work performed. The workers were free to perform work for others either as employees or as independent contractors. Some of the workers performed full time services for the Petitioner and some worked on a part time basis. The Petitioner was liable for any damage caused by the workers. Either the Petitioner or the workers could terminate the relationship at any time without incurring a penalty for breach of contract.

5. On February 2, 2010, the Department of Revenue issued a *Notice of Proposed Assessment* listing the additional tax that was due as a result of the Tax Auditor's reclassification of the workers. The Notice advised that Petitioner that the Petitioner could file a protest within twenty days of February 2, 2010.

6. The Petitioner filed a timely protest by mail postmarked February 16, 2010. The Petitioner filed the protest because, although the Petitioner agreed that some of the full time workers were the Petitioner's employees, the Petitioner did not agree that all of the workers should have been classified as employees.

Conclusions of Law:

7. 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.

8. 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).

9. 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).

10. 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.

11. 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.

12. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

13. The Petitioner's business is to provide janitorial and cleaning services to the Petitioner's customers. The workers in this case were engaged by the Petitioner to perform those janitorial and cleaning services for the Petitioner's customers. The work performed by the Petitioner's workers was not separate and distinct from the Petitioner's business but was a necessary and integral part of the Petitioner's business. The workers did not have occupational licenses, did not have liability insurance, and did not advertise their services to the general public. With very few exceptions the Petitioner provided all of the equipment and supplies that were needed to perform the work. It was not shown that the workers performed services through a separate business and it was not shown that the workers were at risk of suffering a financial loss from services performed.

14. The work performed for the Petitioner did not require any skill or special knowledge. 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)

15. Either party could terminate the relationship at any time without incurring a penalty for breach of contract. 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."

16. Some of the workers were paid by the job and some were paid by time worked. The Florida Unemployment Compensation Law does not discriminate between full time and part time or between permanent and temporary workers. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The fact that the Petitioner may not have withheld payroll taxes does not, standing alone, establish an independent contractor relationship.

17. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error.

18. The evidence presented by the Petitioner is not sufficient to establish by a preponderance of the evidence that the determination of the Department of Revenue is in error.

Recommendation: It is recommended that the determination dated February 2, 2010, be AFFIRMED.

Respectfully submitted on October 4, 2010.

R. O. SMITH, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2517259
ALL BUILDING CLEANING CORP
8567 CORAL WAY #271
MIAMI FL 33155-2335

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

PROTEST OF LIABILITY
DOCKET NO. 2010-45739L

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 February 2, 2010, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION