AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2945226
ANTARES GROUP INC
4195 TAMIAMI TRAIL S STE 175
VENICE FL 34293-5112

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

PROTEST OF LIABILITY
DOCKET NO. 2010-45741L

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 18, 2010, is AFFIRMED.

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. - 2945226
ANTARES GROUP INC
CYNTHIA C KRUMENAKER
4195 TAMIAMI TRAIL S STE 175
VENICE FL 34293-5112

PROTEST OF LIABILITY
DOCKET NO. 2010-45741L

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 18, 2010.

After due notice to the parties, a telephone hearing was held on July 2, 2010. The Petitioner's owner appeared and provided testimony at the hearing. The Joined Party appeared and testified 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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a sub-chapter S corporation incorporated in 1997 for the purpose of running a property management service for a condominium and homeowner's association. The Petitioner had one corporate officer.

2. The Joined Party provided services as a bookkeeper for the Petitioner from March 9, 2009, through December 11, 2009. The Joined Party believed that she was an independent contractor.

3. The Joined Party was expected to report to the Petitioner's place of business from 9am to 4pm. The Petitioner provided an office space, computer, printer, and copier, for the Joined Party to use. The Joined Party produced financial statements for accounts assigned to the Joined Party by the Petitioner.

4. The Joined Party would arrive at work at approximately 8am each morning. The Joined Party would receive files from property managers. The property managers would instruct the Joined Party as to what jobs needed to be done that day. The Joined Party fill out checks to make certain that the bills in the files were paid. The Joined Party would also check to see what members were behind on their membership dues. The Joined Party would reconcile bank statements and generate financial statements for each of the properties in question.

5. The Joined Party would give financial statements to the property managers for review.

6. The Joined Party had her own corporation. The Joined Party's corporation was not active.

7. The Joined Party was paid $600 per week at the time of hire. The Petitioner gave the Joined Party a performance based raise to $650 per week during the period of service. The Petitioner paid the Joined Party $24,450 in 2009.

8. The Joined Party had no expenses or investment in the business.

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. The evidence presented in this case reveals that the Petitioner controlled where, when, and what work the Joined Party was to perform. The Joined Party was expected to report to the Petitioner's place of business and remain during the Petitioner's business hours. The Joined Party was given daily instructions on the work to be performed by the Petitioner.

16. The Petitioner provided all of the necessary tools and equipment for performing the work. The Joined Party did not provide equipment or have any expenses in conjunction with the work.

17. The Joined Party was paid a salary by the Petitioner. Salary and hourly pay are not indicative if an independent contractor relationship. The Petitioner had unilateral control over the financial aspects of the relationship and could change the rate of pay.

18. The work performed by the Joined Party as a bookkeeper, monitoring accounts, was a normal part of the day to day business of the Petitioner's property management company.

19. A preponderance of the evidence presented in the hearing reveals that the Petitioner established sufficient control as to create an employer-employee relationship between the Petitioner and the Joined Party.

20. Section 443.036(21), Florida Statutes, provides:
"Employment" means a service subject to this chapter under s. 443.1216, which is performed by an employee for the person employing him or her.

21. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:
The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
(1) An officer of a corporation.
(2) An individual who, under the usual common law rules applicable in determining the employer- employee relationship is an employee.

22. Section 443.036(20)(c), Florida Statutes, provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.
23. Section 443.1215, Florida States, provides:

    Each of the following employing units is an employer subject to this chapter:

    i. An employing unit that:

    a) In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or

    b) 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.

24. The Petitioner paid the Joined Party $24,450 in 2009 which exceeds $1,500 for service in a calendar quarter.
25. The Petitioner had one corporate officer. The corporate officer received payment for services since 1997.
26. The Petitioner is liable for Florida unemployment compensation tax.

Recommendation: It is recommended that the determination dated February 18, 2010, be AFFIRMED.

Respectfully submitted on August 11, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals