AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2796632
BILL MCCARTY'S PAINTING SERVICE INC
4713 W ANITA BLVD
TAMPA FL 33611-1117

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

PROTEST OF LIABILITY
DOCKET NO. 2010-49437L

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 16, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **May, 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. - 2796632
BILL MCCARTY'S PAINTING SERVICE INC
WILLIAM MCCARTY
4713 W ANITA BLVD
TAMPA FL 33611-1117

PROTEST OF LIABILITY
DOCKET NO. 2010-49437L

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 16, 2010.

After due notice to the parties, a telephone hearing was held on January 20, 2011. An attorney appeared on behalf of the Petitioner and called the Petitioner's president and a painter were called as witnesses. The Joined Party appeared and testified on his own behalf. A tax auditor 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 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 subchapter S corporation, incorporated in 2007 for the purpose of running a painting business.

2. The Joined Party provided services as a painter from May 2008, through September 2009. The Petitioner knew of the Joined Party as a painter.

3. The Joined Party was paid $10 per hour while in an initial evaluation period. The Joined Party's pay was later increased to $12.50 per hour and subsequently to $15.00 per hour. The Petitioner reduced the Joined Party's pay to $12.50 per hour for economic reasons.

4. The Joined Party was expected to contact the Petitioner to find out about jobs. The Petitioner would give the Joined Party instructions as to where to report for work. The Joined Party worked from 8:30 a.m. to 4:30 p.m. each day.

5. The Petitioner exercised control over the manner in which the work was performed through the use of comprehensive instructions and on site supervision.

6. The Petitioner provided all tools, materials, and equipment needed for the work.

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. 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.

11. 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.

12. 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.
13. The evidence presented in this hearing reflects that the Petitioner exercised control over where, when, and how the work was performed by the Joined Party. The Petitioner controlled what jobs the Joined Party would work on, what the scheduling was, and exactly how those jobs would be performed.
14. The Petitioner had unilateral control over the financial aspects of the relationship. The rate of pay and availability of work were determined by the Petitioner.
15. The Petitioner provided all materials, equipment, and tools needed for the work.
16. The Petitioner supervised the Joined Party's work, both directly and through written instructions.
17. A preponderance of the evidence presented in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship.

Recommendation: It is recommended that the determination dated February 16, 2010, be AFFIRMED.

Respectfully submitted on March 17, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals