AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2944594
APEX MERCHANT GROUP LLC
5220 TENNYSON PKWY STE 400
PLANO TX 75024-4266

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

PROTEST OF LIABILITY
DOCKET NO. 2010-51460L

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 Petitioner's protest is accepted as timely filed. It is also ORDERED that the determination dated February 15, 2010, is MODIFIED to reflect a retroactive date of September 15, 2008. It is further ORDERED that the determination is AFFIRMED as modified.

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. - 2944594
APEX MERCHANT GROUP LLC
ANDY FRANKEL
5220 TENNYSON PKWY
PLANO TX 75024-4266

PROTEST OF LIABILITY
DOCKET NO. 2010-51460L

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 15, 2010.

After due notice to the parties, a telephone hearing was held on August 18, 2010. The Petitioner, represented by the Petitioner's president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified.

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 working as a sales agent constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a Delaware LLC which operates a business from an office located in Texas. The Petitioner's business is to provide electronic transaction processing for small businesses so that the businesses can accept electronic forms of payment such as credit cards, debit cards, and gift cards. The Petitioner sells its services through sales agents. The sales agents who work in the Petitioner's Texas office are employees of the Petitioner. The sales agents who work outside the Petitioner's

office, also known as District Sales Advisors, are classified by the Petitioner as independent contractors.

2. The Joined Party worked for the Petitioner in Florida as a District Sales Advisor from September 15, 2008, until February 12, 2009.

3. When an individual such as the Joined Party applies for work with the Petitioner, the Petitioner provides the applicant with a training CD and also directs the applicant to complete a web based training program. Upon completion of the training the Petitioner asks the applicant what hours the applicant is available to work so that the Petitioner can schedule appointments with potential customers during the hours of availability.

4. The District Sales Advisors are required to sign an *Agreement.* The Joined Party entered into the *Agreement* with the Petitioner on October 9, 2008.

5. The *Agreement* provides that the sales associate is an independent contractor and not an employee of the Petitioner and that the sales associate is bound by the terms of the *Agreement.*

6. The *Agreement* provides that the sales associate will be paid on a commission basis and that the sales associate must submit all new account information to the Petitioner in writing. The new account information must be received by the Petitioner by the second business day following the day the account is written. If the new account information is not received by the Petitioner by the end of the second business day the Petitioner will reduce the amount of the commission by $100 and reduce the commission by $50 for each day thereafter. If the account information is not received by the Petitioner by the end of the second day the Petitioner will not schedule anymore appointments for the sales associate until the information is received by the Petitioner.

7. The *Agreement* requires the sales associate to use his or her best efforts to market the Petitioner's services and requires the sales associate to market the Petitioner's services in a professional manner. The Agreement requires the sales associate to comply with all of the rules and regulations, guidelines, and price lists established by the Petitioner as amended from time to time at the Petitioner's discretion. The sales associates are only allowed to utilize marketing material approved by the Petitioner and are only allowed to make representations approved by the Petitioner. All applications must be approved by the Petitioner. Any equipment leased to a customer by the sales associate must be leased from the Petitioner or from a vendor approved in writing by the Petitioner.

8. The *Agreement* provides that the sales associate may not, in writing or orally, criticize or disparage the Petitioner or any of its affiliates, or any of their respective current or former affiliates, directors, officers, members, partners, employees, agents, or representatives.

9. The *Agreement* provides that the sales associate may not assign the agreement or delegate any of the sales associates duties. The *Agreement* provides that the Petitioner may assign the Agreement to a person or entity that is an affiliate or successor in interest.

10. The term of the *Agreement* is for a period of one year and it automatically renews on each anniversary date. Either party has the right to terminate the Agreement prior to the completion of the term with or without cause.

11. The Joined Party was required to work the appointments set for her by the Petitioner. The Joined Party was assigned to work under a Team Coordinator. The Joined Party was required to report the results of her appointment contacts to the Team Coordinator. If the Joined Party had any questions which she was not able to answer during a customer contact, the Joined Party was required to contact the Team Coordinator for assistance. If the Joined Party had difficulty closing a sale, the Joined Party was required to contact the Team Coordinator to assist with closing the sale. The Team Coordinator held sales meetings with the Joined Party and other sales associates.

12. The Petitioner provided the Joined Party with a price list containing a range of prices for each service or item. The Joined Party was not allowed to go below the minimum price range.

13. The Petitioner paid the Joined Party a commission based on the Joined Party's sales. The Joined Party could earn a bonus based on the amount of the total sales. No taxes were withheld from the pay by the Petitioner. The Petitioner did not provide any fringe benefits such as health insurance, retirement benefits, vacation pay, sick pay, or paid holidays. At the end of 2008 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

14. On or about February 12, 2009, the Joined Party discontinued performing services for the Petitioner without notice.

15. The Joined Party filed an initial claim for unemployment compensation benefits effective November 8, 2009. Her filing on that date established a base period from July 1, 2008, through June 30, 2009. The Joined Party listed the Petitioner as a base period employer. When the Joined Party did not receive credit for her earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

16. On February 15, 2010, a Tax Auditor issued a determination holding that the Joined Party was the Petitioner's employee retroactive to October 1, 2008. The determination was mailed to the Petitioner's correct street address in Texas; however, the determination did not include the suite number of the Petitioner's office.

17. Among other things the determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file a written application to protest this determination, giving your reasons in detail, within twenty days from the date of this letter."

18. The Petitioner filed an appeal on March 11, 2010.

Conclusions of Law:

19. Section 443.141(2)(c), Florida Statutes, provides:
    (c) *Appeals.*--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.

20. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides: Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.

21. Rule 60BB-2.022(1), Florida Administrative Code, defines “Address of Record” for the purpose of administering Chapter 443, Florida Statutes, as the mailing address of a claimant, employing unit, or authorized representative, provided in writing to the Agency, and to which the Agency shall mail correspondence.

22. The determination of August 24, 2009, was not mailed to the Petitioner's correct and complete mailing address. Therefore, the Petitioner's protest is accepted as timely filed.

23. 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.

24. 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).

25. 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).

26. 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.

27. 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.

28. 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.

29. 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.

30. 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).

31. The Petitioner and the Joined Party entered into the *Agreement* on October 9, 2008. The *Agreement* requires the Joined Party to comply with all of the Petitioner's rules, regulations, guidelines, and price lists and to use only the marketing materials approved by the Petitioner. Although the Petitioner's rules, regulations, and guidelines were not submitted as evidence, the *Agreement* establishes that the Petitioner had the right to exercise control over the details of the work. The *Agreement* requires the Joined Party to personally perform the work and prohibits the Joined Party from hiring others to perform any of the duties of the job. The *Agreement* prohibits the Joined Party from criticizing the Petitioner or any of its affiliates, officers, directors, members, partners, employees, agents, or representatives.

32. The Petitioner's business is to provide electronic transaction processing for small businesses. The Joined Party's job was to sell the services and products offered by the Petitioner. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the business.

33. The Petitioner paid the Joined Party by commission. Section 443.1217(1), Florida Statutes, provides that wages includes all remuneration for employment including commissions and bonuses. The Joined Party was paid by production rather than by time worked. The fact that the Petitioner chose not to withhold payroll taxes from the earnings does not, standing alone, establish an independent contractor relationship.

34. The *Agreement* states that the Joined Party is an independent contractor and not an employee of the Petitioner. 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). The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "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."

35. 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.

36. The Petitioner's testimony and evidence does not show that the determination holding that the Joined Party was an employee of the Petitioner is in error. However, the testimony of the Petitioner's president erstablishes that the Joined Party began work for the Petitioner on September 15, 2008. The determination is only retroactive to October 1, 2008. Based on the Petitoner's evidence the correct retroactive date should be September 15, 2008.

Recommendation: It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated February 15, 2010, be MODIFIED to reflect a retroactive date of September 15, 2008. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on August 19, 2010.

R. O. SMITH, Special Deputy
Office of Appeals