AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2921147
CUVEE WINE & BISTRO LLC
2237 SW 19TH AVE STE 101
OCALA FL 34471-7751

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

PROTEST OF LIABILITY
DOCKET NO. 2010-62441L

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 March 22, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **April, 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. - 2921147
CUVEE WINE & BISTRO LLC
LANCE KIM
2237 SW 19TH AVE STE 101
OCALA FL 34471-7751

PROTEST OF LIABILITY
DOCKET NO. 2010-62441L

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 March 22, 2010.

After due notice to the parties, a telephone hearing was held on December 15, 2010. An attorney appeared on behalf of the Petitioner. The Joined Party and the Petitioner's general manager appeared and testified on behalf of the Joined Party. A tax auditor II and a tax auditor 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 limited liability corporation, formed on January 11, 2008, for the purpose of running a restaurant.

2. The Joined Party began work for the Petitioner in May 2009 as a consultant assisting in setting up the Petitioner's restaurant. The Joined Party was made executive chef for the Petitioner in August 2009. The Joined Party ceased providing services for the Petitioner in February 2010.

3. The Petitioner visited the Joined Party and asked for help starting the restaurant. The Joined Party agreed to provide assistance to the Petitioner. The Joined Party signed a written agreement with the Petitioner. The Joined Party was hired as an employee. The Joined Party assisted with ordering stemware and silverware, write menus, decorating, find foods, hire and interview employees.

4. The Petitioner required the Joined Party to work a 40 hour week as a consultant. The Petitioner supervised the Joined Party during the work week. The Petitioner would instruct the Joined Party in how the cooking should be performed and what ingredients should be used. The Petitioner required the Joined Party to make breakfast twice per week. The Petitioner required the Joined Party to attend mandatory staff meetings each Friday.

5. Once the Petitioner's restaurant was opened, the Joined Party became an executive chef for the Petitioner. The Petitioner provided a new written agreement to the Joined Party. The Petitioner changed the written agreement multiple times. The Petitioner required the Joined Party to sign a non-compete agreement. The non-compete agreement was in effect for one year after separation and covered a county wide area.

6. The Petitioner required the Joined Party, as executive chef, to come in early in the morning. The Joined Party was required to stay until the meal time rush had ended.

7. The Joined Party received health insurance and paid vacation time from the Petitioner.

8. The Joined Party was paid $1500 per month by the Petitioner while working as a consultant. The pay was determined by the Petitioner. The Joined Party received a monthly salary as an executive chef.

9. The Joined Party is a certified culinary professional and has run restaurants in the past. The Joined Party has an organic cattle farm which sells cattle and other organic products.

10. The Joined Party was not allowed to sub-contract the work.

11. The Joined Party was allowed to quit with proper notice to the Petitioner. The Petitioner could discharge the Joined Party at anytime, without liability.

12. The Petitioner provided all of the materials and equipment needed for the work. The Joined Party used his own personal knives.

Conclusions of Law:

13. 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.

14. 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).

15. 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).

16. 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.

17. 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.

18. 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.

19. The evidence presented in this hearing reveals that the Petitioner exercised control over where, when, and how the Joined Party performed the work both as consultant and as executive chef. The Joined Party was expected to be at the Petitioner's place of business each work day and to work until the final meal time rush had ended. The Petitioner exercised control over what food could be prepared, what recipe would be used, and how that recipe would be modified.

20. The Petitioner exercised unilateral control over the financial aspects of the relationship. The Joined Party was paid a monthly salary set by the Petitioner.

21. The Petitioner provided all of the tools, equipment, and materials necessary to perform the work. The Joined Party did use his own knives; however, it is not uncommon for employees in a trade to use their own hand tools.
22. The Petitioner provided paid vacation time and health insurance to the Joined Party. Benefits such as paid vacation time and health insurance are strong indicators of an employer-employee relationship.
23. 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 between the parties.

Recommendation: It is recommended that the determination dated March 22, 2010, be AFFIRMED.

Respectfully submitted on February 22, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals