AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2791254
CENTRAL FLORIDA FINANCIAL AND ASSOCIATES
MELISSA MCAFFEE
12360 66TH ST N STE M
LARGO FL 33773-3434

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

PROTEST OF LIABILITY
DOCKET NO. 2010-63347L

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 April 1, 2010, is MODIFIED to reflect a retroactive date of May 1, 2006. It is also 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

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

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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 April 1, 2010.

After due notice to the parties, a telephone hearing was held on August 25, 2010. The Petitioner, represented by the General Manager, appeared and testified. The former Sales Manager testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist, 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 and other individuals working as sales closers 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.

Findings of Fact:

1. The Petitioner is a corporation which was formed in May 2006 to operate a business which provides a private credit card to customers with bad credit so that the customers may purchase general merchandise items from the Petitioner's catalog. The Petitioner began business operations in May 2006.
2. The Joined Party initially began performing services as a fronter. The fronter is an individual who has the initial contact with the prospective customer and is responsible for verifying that the prospective customer is employed and has a checking account. The prospective customer is then transferred to a closer to make the sale. After working as a fronter for a period of time the Joined Party was transferred to the position of closer.

3. The Joined Party was required to sign an *Independent Contractor Agreement*; however, the Agreement was not signed by a representative of the Petitioner. The Agreement provides that the Joined Party understands that his status is that of independent contractor, that he will be paid by commission, that he must sign in and out when entering or leaving the Petitioner's premises, that he must maintain a professional appearance and professional conduct at all times, that he must abide by all of the Petitioner's rules and regulations, that the Petitioner may provide work schedule preference to high sales producers, and that the work may be terminated by either party at any time.
4. The Joined Party worked at the location of the Petitioner. The Petitioner provided the Joined Party with a work cubicle containing a desk, chair, computer and telephone. The Joined Party was not required to provide anything in order to perform the work.
5. The Joined Party was required to personally perform the work. He was not permitted to hire others to perform the work for him.
6. The Petitioner's sales office is open Monday through Friday from 9 AM until 10 PM. Each workday is divided into two work shifts, from 9 AM until 3:30 PM and from 3:30 PM until 10 PM. The Joined Party could work during either shift. The Petitioner had between fifteen and twenty fronters and closers. If all of the cubicles were occupied during a work shift and a high volume producer wanted to work, the Sales Manager would require a lower volume producer to leave so that the higher producer could work.
7. The Joined Party was required to clock in when he arrived at work and clock out at the end of the work shift. During the work day the Joined Party was required to clock out whenever he left the sales floor, such as to take a meal break.
8. The Joined Party's immediate supervisor was the Sales Manager. The Sales Manager was initially hired in May 2006 as a fronter and was classified as an independent contractor. She was subsequently promoted to the position of Sales Manager. As Sales Manager she was classified by the Petitioner as an independent contractor.
9. The Sales Manager provided training for the fronters and closers and monitored their telephone calls to ensure that they did not make inappropriate statements and to ensure that they were trying to make sales and not just putting in time. The Sales Manager provided instructions concerning how to perform the work. The Petitioner directed the sequence in which the work was required to be done.
10. The Petitioner paid the Joined Party a commission on his sales. If the sales reached a certain level the Petitioner paid a bonus. The Petitioner paid the Joined Party weekly on an established payday which was Friday of the following week. If the Joined Party's commissions did not equal minimum wage the Petitioner adjusted the pay to equal minimum wage.
11. The Petitioner did not provide any fringe benefits such as health insurance, paid vacations, or paid holidays.
12. The Sales Manager determined that the volume of the Joined Party's sales was not satisfactory. As a result the Petitioner discharged the Joined Party on December 23, 2008.
13. The Joined Party filed a claim for unemployment compensation benefits effective March 7, 2010. His filing on that date established a base period from October 1, 2008, through September 30, 2009. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.

14. On April 1, 2010, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services as sales closers are the Petitioner's employees retroactive to November 5, 2007. The Petitioner filed a timely protest by letter dated April 2, 2010.

Conclusions of Law:

15. 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.

16. 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).

17. 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).

18. 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.

19. 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.

20. 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.

21. 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.

22. 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).

23. The *Independent Contractor Agreement* provides the Petitioner with the significant right to exercise control over the workers. The workers are required to abide by all of the Petitioner's rules and regulations, the workers are required to dress in a manner specified by the Petitioner, the workers are required to act in a manner specified by the Petitioner, and the workers are required to sign in and out. The Agreement provides the Petitioner with the right to determine which workers may or may not work.

24. The *Independent Contractor Agreement* states that the Joined Party understands that he is an independent contractor. 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). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "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."

25. The Petitioner's business is to sell private credit cards to customers so that the customers may purchase merchandise from the Petitioner's catalog. When the Joined Party worked as a fronter and when he worked as a closer his assigned duty was to offer the Petitioner's services and ensure that the potential customer met the Petitioner's guidelines for obtaining credit. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.

26. The Petitioner provided the place of work and everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work. It was not shown that the Joined Party had any investment in a business or that the Joined Party was at risk of suffering a financial loss from performing services.

27. The Petitioner provided training for the Joined Party and provided instructions concerning how the work was to be performed. The Joined Party was closely supervised by a sales manager who monitored the calls of the workers to determine if the workers were abiding by the rules and

regulations and to determine if the workers were genuinely attempting to make sales or just putting in time.

28. The Joined Party was paid by commission but was guaranteed minimum wage if the Joined Party's commissions did not equal minimum wage. Section 443.1217(1), Florida Statutes, provides that the wages subject to the unemployment compensation Law include commissions and bonuses. The Joined Party was paid on a regularly scheduled payday and the commission rate was established by the Petitioner. The fact that the Petitioner chose not to withhold payroll taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.

29. The *Independent Contractor Agreement* was not for a specified period of time. The relationship between the Petitioner and the Joined Party was a continuing relationship and either party could terminate the relationship at any time without incurring liability. The Petitioner chose to terminate the relationship due to dissatisfaction with the volume of the Joined Party's sales. These facts reveal the existence of an at-will relationship of relative permanence. 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."

30. The facts of this case reveal that the Petitioner controlled what work was performed, when the work was performed, where the work was performed, and how the work was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

31. The Petitioner exercised significant control over the Joined Party and the other workers. Thus, it is concluded that the services performed by the Joined Party and other individuals constitute insured employment. The determination of the Department of Revenue is retroactive to November 5, 2007. However, the testimony of the sales manager reveals that the sales manager began work as a fronter in May 2006 and that there were four other individuals performing services at that time. Therefore the correct retroactive date of liability is May 1, 2006.

Recommendation: It is recommended that the determination dated April 1, 2010, be MODIFIED to reflect a retroactive date of May 1, 2006. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on August 27, 2010.

R. O. SMITH, Special Deputy
Office of Appeals