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

PETITIONER:
Employer Account No. - 2949521
CRISTOBAL GRIJALBA
2057 FAIR OAK DR
CLEARWATER FL 33763-1303

PROTEST OF LIABILITY
DOCKET NO. 2010-63349L

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 17, 2010.

After due notice to the parties, a telephone hearing was held on November 1, 2010. The Petitioner, represented by a public accountant, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified. The Joined Party 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 cleaners 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 an individual who contracted with a janitorial company to clean office buildings. The Petitioner did not actually do the cleaning but engaged other individuals to perform the work.
2. In 2007 the Petitioner contacted the Joined Party on occasion to assist with the cleaning. The Joined Party first performed services on or about January 15, 2007, and he worked for the Petitioner on a part time as-needed basis. During 2008 and 2009 the Joined Party worked for the Petitioner on a regular basis cleaning the seventh and ninth floors of a bank building.

3. The Joined Party believed that the Petitioner was employed as a supervisor for Master Maintenance, the company which the Petitioner had contracted with to clean the bank building. The Joined Party was required to wear a uniform bearing the name of Master Maintenance. The Joined Party always believed that he was an employee and never believed that he was self employed.

4. The Petitioner instructed the Joined Party to report for work after the bank closed at 5 PM each day. The Joined Party was required to sign in and sign out each day. The Petitioner paid the Joined Party by the hour worked at a pay rate determined by the Petitioner that was almost $10 per hour. The Petitioner paid the Joined Party on a bi-weekly basis and no taxes were withheld from the pay. The Joined Party was not required to work on holidays, however, the Petitioner paid for the Joined Party for the holidays. No other fringe benefits were provided.

5. A vacuum cleaner, a cart, a trash can, and all cleaning materials and supplies were provided for the Joined Party. The Joined Party did not provide anything to perform the work. The Joined Party did not have any expenses in connection with the work with the exception of transportation to and from work. The Joined Party also purchased safety shoes which he wore when he performed the work.

6. The work performed by the Joined Party did not require any special knowledge or skill. The Petitioner told the Joined Party what to do and how to do it but the work did not require any training.

7. On December 1, 2008, the Petitioner provided the Joined Party with a *Sub Contractor Agreement* for the Joined Party's signature. The Agreement states that the subcontractor will provide at his expense all labor, materials, tools, equipment, and transportation necessary to perform the janitorial services and that the subcontractor agrees to work without delay on each contract that is sublet. The Agreement states that the subcontractor cannot assign or sublet his/her duties under the contract to any other party without the Petitioner's permission.

8. The Joined Party performed services for the Petitioner until the end of 2009. During the time that the Joined Party performed services for the Petitioner the Joined Party did not have an occupational license and did not provide janitorial services for any other company or individual.

9. The Petitioner reported the Joined Party's earnings for 2009 on Form 1099-MISC as nonemployee compensation.

10. The Joined Party filed an initial claim for unemployment compensation benefits effective January 31, 2010. 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 assigned to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor. On March 17, 2010, the Department of Revenue issued a determination holding that the persons performing services for the Petitioner as cleaners are the Petitioner's employees retroactive to January 15, 2007. The Petitioner filed a timely protest.

Conclusions of Law:

11. 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.

12. 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).

13. 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).

14. 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.

15. 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.

16. 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.

17. 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.

18. The initial agreement under which the Joined Party performed services was verbal. Although the Joined Party began performing janitorial services for the Petitioner in January 2007, the parties did not enter into a written Agreement until December 2008. Although the Agreement specifies that the Joined Party is a subcontractor, 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."

19. The Petitioner is an individual who has contracted with a janitorial company to clean office buildings. The Petitioner does not do the actual cleaning work but contracts with other individuals, such as the Joined Party, to do the cleaning. These facts reveal that 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 business. Contrary to the wording of the Agreement the Joined Party did not provide any tools, equipment, supplies, or materials which were needed to perform the work. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services. It was the Joined Party's belief that he was an employee and that the Petitioner was his supervisor.

20. The work performed by the Joined Party did not require any training, skill, or special knowledge. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

21. The Joined Party was paid by time worked rather than by production or by the job. The Petitioner assigned the work to be performed and the hourly rate of pay. Thus, the Petitioner controlled the financial aspects of the relationship. The fact that the Petitioner chose not to withhold payroll taxes from the pay, standing alone, does not create an independent contractor relationship.

22. The Joined Party worked exclusively for the Petitioner for a period of approximately three years, a fact that reveals a relationship of relative permanence.

23. 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.

24. 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.

25. The Petitioner's only witness was a public accountant who was engaged by the Petitioner to represent the Petitioner in the hearing. The testimony of the accountant consisted of statements made to him by the Petitioner rather than the accountant's personal knowledge. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a

finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.

26. The testimony of the public accountant is hearsay and, as such, is not sufficient to show that the determination of the Department of Revenue is in error. Thus, it is determined that the services performed for the Petitioner by the Joined Party and other individuals as cleaners constitute insured employment retroactive to January 15, 2007.

Recommendation: It is recommended that the determination dated March 17, 2010, be AFFIRMED.

Respectfully submitted on November 2, 2010.

R. O. SMITH, Special Deputy
Office of Appeals

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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 17, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **February, 2011**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION