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

PETITIONER:
Employer Account No. - 2910428
PRIVACY CREW LTD
JAMES R POKORNY
8401 CHAGRIN ROAD STE 16
CHAGRIN FALLS OH 44023-4701

PROTEST OF LIABILITY
DOCKET NO. 2010-66225L

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 July 22, 2009.

After due notice to the parties, a telephone hearing was held on September 16, 2010. An accountant appeared and testified on behalf of the Petitioner. The Joined Party did not appear at the hearing. 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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a Cayman Islands registered corporation incorporated for the purpose of running a yacht.
2. The Petitioner's yacht is registered as a Cayman Islands vessel.

3. The Joined Party performed services for the Petitioner as a ship stewardess until February 28, 2009.

4. The Joined Party was paid $45,250 in 2008 by the Petitioner. The Petitioner reported the wages to the United States Internal Revenue Service with a W-2 form. The Petitioner does not contest that the Joined Party was an employee of the Petitioner.

5. The Petitioner's yacht is primarily docked in Florida.

6. The yacht's captain would send information to the Petitioner's accountant for purposes of payroll and taxes.

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. In this case, it is not contested by the Petitioner that the Joined Party performed services as an employee. It is the Petitioner's contention that the Petitioner does not meet the liability requirement for Florida Unemployment Compensation benefit tax.
14. Florida Statute 443.1216(13)(b) states that; Service performed on or in connection with a vessel or aircraft that is not an American vessel or American aircraft, if the employee is employed on and in connection with the vessel or aircraft while the vessel or aircraft is outside the United States, is exempt from coverage.
15. The Petitioner presented evidence that the vessel is a foreign vessel. The Petitioner presented only hearsay evidence that the Joined Party performed services on and in connection with the vessel while it was outside the United States. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. See Section 120.57, Florida Statutes; Rule 60BB-5.024(3)(d), Florida Administrative Code.
16. The burden of proof is on the protesting party to establish by a preponderance of the evidence that the determination was in error. In this case, the Petitioner provided hearsay evidence for an essential element of their appeal. Therefore, the determination of the Florida Department of Revenue will remain undisturbed.

Recommendation: It is recommended that the determination dated July 22, 2009, be AFFIRMED.

Respectfully submitted on October 25, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2910428

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

O R D E R

This matter comes before me for final Agency Order.

The issues before me are whether services performed for the Petitioner by the Joined Party constitute insured employment, whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed an unemployment compensation claim in May 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that she worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, she would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, she would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to the Joined Party. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because she had a

direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on September 16, 2010. The Petitioner's accountant appeared and testified on behalf of the Petitioner. A Tax Auditor II appeared and testified on behalf of the Respondent. The Joined Party did not appear at the hearing. The Special Deputy issued a Recommended Order on October 25, 2010.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a Cayman Islands registered corporation incorporated for the purpose of running a yacht.

2. The Petitioner's yacht is registered as a Cayman Islands vessel.

3. The Joined Party performed services for the Petitioner as a ship stewardess until February 28, 2009.

4. The Joined Party was paid $45,250 in 2008 by the Petitioner. The Petitioner reported the wages to the United States Internal Revenue Service with a W-2 form. The Petitioner does not contest that the Joined Party was an employee of the Petitioner.

5. The Petitioner's yacht is primarily docked in Florida.

6. The yacht's captain would send information to the Petitioner's accountant for purposes of payroll and taxes.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated July 22, 2009, be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail on November 5, 2010. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not

comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

In Exception #4 and portions of Exceptions #1-2, the Petitioner proposes findings of fact in accord with the Special Deputy's Findings of Fact, proposes alternative findings of fact and conclusions of law, or attempts to enter additional evidence not presented at the hearing. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. Further review of the record also reveals that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Agency may not modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Rule 60BB-2.035(19)(a), Florida Administrative Code, prohibits the acceptance of additional evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. Exception #4 and the portions of Exceptions #1-2 that propose findings of fact in accord with the Special Deputy's Findings of Fact, propose alternative findings of fact and conclusions of law, and attempt to enter additional evidence are respectfully rejected.

Also in Exception #1, the Petitioner cites section 443.101(1)(a) of the Florida Statutes in support of its argument that the Joined Party should be disqualified from the receipt of unemployment compensation

benefits. Section 443.101(1)(a), Florida Statutes, provides for the disqualification of a claimant from the receipt of unemployment compensation benefits if the claimant voluntarily quit his or her job without good cause attributable to the employer or was discharged for misconduct connected with the work. Section 443.101(1)(a), Florida Statutes, does not apply to the case at hand as the nature of the Joined Party's job separation and the claimant's qualification for the receipt of unemployment compensation benefits were not at issue in this case. Accordingly, the remaining portion of Exception #1 is respectfully rejected.

In Exceptions #2-3, the Petitioner relies on a written decision for Docket Number 2010-109166U in support of its arguments. In the decision, the Appeals Referee dismissed the claimant Justin Brinker's appeal without prejudice because Mr. Brinker indicated a desire to pursue his appeal and also indicated an inability to attend a hearing to prosecute the appeal. Since the decision did not address the Petitioner's liability for the services performed by the Joined Party or whether the Joined Party performed services for the Petitioner in insured employment, the decision is not binding upon the Agency in this matter. Exceptions #2-3 are respectfully rejected.

A review of the record reveals that the Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated July 22, 2009, is AFFIRMED.

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

GREAT SEAL OF THE STATE OF FLORIDA
IN GOD WE TRUST

_____
TOM CLENDENNING,
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION