AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1262363

GENE DUNN CONTINUOUS GUTTERING INC
GENE DUNN
352 SHORE DRIVE EAST
OLDSMAR FL 34677-3916

PROTEST OF LIABILITY
DOCKET NO. 2010-66227L

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 issue before me is whether services performed for the Petitioner by the Joined Party as a sales supervisor constitute insured employment pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of liability.

The Joined Party filed an unemployment compensation claim in February 2010. 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 he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether the Joined Party worked for the Petitioner as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he 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 with 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 it 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 he 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 January 13, 2011. The Petitioner was represented by its attorney. The Petitioner's secretary and treasurer testified as a witness on behalf of the Petitioner. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified on his own behalf. The Special Deputy issued a recommended order on March 14, 2011.

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

1. The Petitioner is a subchapter S corporation incorporated in 1986 for the purpose of running a guttering and sheet metal business.

2. The Joined Party began providing services for the Petitioner as an installer in 1996. The Joined Party was involved in an accident in 2006. The Joined Party began work in a sales supervisor position with the Petitioner in 2007. The Petitioner and the Joined Party were separated when the Petitioner discharged the Joined Party on January 21, 2010.

3. The Joined Party was required to report to the Petitioner's place of business from 7 a.m. through 3:30 p.m. The Joined Party worked from Monday through Friday. The Joined Party would report to the office/warehouse to meet with the installers. The Joined Party was responsible for handing out assignments to the installers. The Joined Party would then generally travel to customer locations to perform estimates requested by the customer or follow up leads for potential new customers. The Joined Party would perform whatever work or tasks the Petitioner directed him to.

4. The Joined Party's work was overseen by the Petitioner. The Petitioner would set up mandatory meetings at times which the Joined Party would be required to attend.

5. The Joined Party was paid $500 per week.

6. The Joined Party purchased business cards. The Petitioner reimbursed the Joined Party for the business cards. The Petitioner provided a company vehicle for the Joined Party's use. The Joined Party was allowed to bring the vehicle home. The Petitioner insured and maintained the vehicle.

Based on these Findings of Fact, the Special Deputy recommended that the determination be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail on March 28, 2011. 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.

Upon review of the record, it was determined that a portion of Finding of Fact #6 must be modified because it does not accurately reflect the evidence provided at the hearing. The record reflects that no party testified that the Petitioner insured the company vehicle. Finding of Fact #6 is amended to say:

> The Joined Party purchased business cards. The Petitioner reimbursed the Joined Party for the business cards. The Petitioner provided a company vehicle for the Joined Party's use. The Joined Party was allowed to bring the vehicle home. The Petitioner maintained the vehicle.

In Exceptions #1 and #4, the Petitioner contends that the Special Deputy abused his discretion by ignoring the testimony of the Petitioner's witness, Ms. Dunn. The Petitioner also takes exception to the fact that the Special Deputy did not make an outright credibility determination. Pursuant to Section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and 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 the essential requirements of law. A review of the record reveals that the Petitioner and the Joined Party presented conflicting testimony. The record also reflects that the Special Deputy resolved conflicts

in evidence in favor of the Joined Party based on the record of the hearing. Competent substantial evidence in the record supports the Special Deputy's Findings of Fact as amended herein; therefore, the Special Deputy's Findings of Fact may not be further modified or rejected by the Agency. The portions of Exceptions #1 and #4 that argue that the Special Deputy ignored the Petitioner's testimony and failed to make an outright credibility determination are respectfully rejected.

In Exceptions #1-4 and #6, the Petitioner proposes alternative findings of fact and conclusions of law. Also in Exception #1, the Petitioner specifically takes exception to Conclusion of Law #15. 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. A 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 further 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 amended herein. The exceptions that propose alternative findings of fact or conclusions of law or take exception to Conclusion of Law #15 are respectfully rejected.

The amended Findings of Fact and Conclusions of Law support the Special Deputy's ultimate conclusion that an employer/employee relationship existed between the Petitioner and the Joined Party. The Special Deputy's conclusion that the Petitioner exerted control over the Joined Party consistent with an employment relationship is supported by competent substantial evidence in the record. The Special Deputy's Conclusions of Law represent a reasonable application of law to the facts and are not rejected by the Agency.

A review of the record reveals that the Findings of Fact as amended herein 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 amended 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 amended in this order.

In consideration thereof, it is ORDERED that the determination dated April 14, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 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

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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 14, 2010.

After due notice to the parties, a telephone hearing was held on January 13, 2011. An attorney appeared on behalf of the Petitioner and called the Petitioner's secretary/treasurer as a witness. The Joined Party appeared and testified on his own behalf. A tax specialist 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 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 subchapter S corporation incorporated in 1986 for the purpose of running a guttering and sheet metal business.

2. The Joined Party began providing services for the Petitioner as an installer in 1996. The Joined Party was involved in an accident in 2006. The Joined Party began work in a sales supervisor position with the Petitioner in 2007. The Petitioner and the Joined Party were separated when the Petitioner discharged the Joined Party on January 21, 2010.
3. The Joined Party was required to report to the Petitioner's place of business from 7 a.m. through 3:30 p.m. The Joined Party worked from Monday through Friday. The Joined Party would report to the office/warehouse to meet with the installers. The Joined Party was responsible for handing out assignments to the installers. The Joined Party would then generally travel to customer locations to perform estimates requested by the customer or follow up leads for potential new customers. The Joined Party would perform whatever work or tasks the Petitioner directed him to.

4. The Joined Party's work was overseen by the Petitioner. The Petitioner would set up mandatory meetings at times which the Joined Party would be required to attend.

5. The Joined Party was paid $500 per week.

6. The Joined Party purchased business cards. The Petitioner reimbursed the Joined Party for the business cards. The Petitioner provided a company vehicle for the Joined Party's use. The Joined Party was allowed to bring the vehicle home. The Petitioner insured and maintained the vehicle.

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. The evidence presented in this hearing reflects that the Petitioner controlled where, when, and how the Joined Party would perform services. The Petitioner provided oversight and direction of the Joined Party's work. The Joined Party was expected to follow a set schedule and report to work at the Petitioner's place of business each day.

14. The Joined Party was expected to attend mandatory meetings at the Petitioner's discretion. Such control is more typical of an employer-employee relationship that on that of an independent contractor.

15. The Joined Party was paid a salary of $500 per week. While the Petitioner indicated that this money was a draw against commission, no effort was ever made to recover the draw.

16. The Petitioner reimbursed the Joined Party for the purchase of business cards. The Petitioner provided a vehicle to the Joined Party. The Joined Party was allowed to take the vehicle home.

17. The work performed by the Joined Party as a sales supervisor was not separate and distinct from the Petitioner's guttering and sheet metal business; rather, it is an integral part of the day to day operation of the business.

18. A preponderance of the evidence presented in this hearing reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

19. The Petitioner submitted proposed findings of fact and conclusions of law on January 21, 2011. The Joined Party submitted a letter with two attached exhibits on January 21, 2011. The Petitioner submitted a Motion to Strike the Joined Party's submission on January 27, 2011. Florida law does not allow for submissions to be stricken from the record. Florida law does not dictate what form proposed findings of fact and/or conclusions of law should take. Florida law prohibits the introduction of additional evidence after the hearing has been concluded. The two attached exhibits submitted by the Joined Party are therefore, respectfully rejected. With regards to both parties proposed findings of fact and/or conclusions of law, where they comport with the record they are incorporated into the recommended order. Where the proposed findings of fact and/or conclusions of law do not comport with the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated April 14, 2010, be AFFIRMED.

Respectfully submitted on March 14, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals