AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2913457
A & J AIR AND REFRIGERATION LLC
21592 BELVEDERE LANE
ESTERO FL 33928-7329

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

PROTEST OF LIABILITY
DOCKET NO. 2010-66228L

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 10, 2010, is AFFIRMED.

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

PETITIONER:
Employer Account No. - 2913457
A & J AIR AND REFRIGERATION LLC
CONNIE L KEENEY
21592 BELVEDERE LANE
ESTERO FL 33928-7329

PROTEST OF LIABILITY
DOCKET NO. 2010-66228L

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 10, 2010.

After due notice to the parties, a telephone hearing was held on August 31, 2010. The Petitioner, represented by its owner, appeared and testified. The respondent, represented by a Department of Revenue Tax Specialist II, 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 air conditioning and refrigeration repair technicians 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.

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 single member LLC which was formed October 20, 2008, to purchase and operate an existing business involving the installation and repair of commercial and residential air conditioning equipment. The Petitioner retained the former business owner as the manager of the

Petitioner's business. Several workers of the prior business, including the Joined Party, were transferred with the sale of the business.

2. The Joined Party worked for the Petitioner as an air conditioning and refrigeration technician. There was no written agreement between the Petitioner and the Joined Party.
3. The Petitioner classified the Joined Party, the manager, and other technicians as independent contractors. It is the Petitioner's belief that if the Petitioner does not withhold payroll taxes from the workers' pay, the workers are independent contractors.
4. The Petitioner assigned the Joined Party to drive a service truck owned by the Petitioner. The Petitioner was responsible for the repair, maintenance, fuel, vehicle license, insurance, and other costs of operation of the truck. The Joined Party was allowed to drive the Petitioner's vehicle home at the end of each day.
5. The Joined Party provided his own hand tools. The Petitioner provided all supplies and parts which were used to install and repair the air conditioning equipment.
6. The Petitioner was responsible for scheduling the services and installations for the Petitioner's customers. The Petitioner gave instructions to the Joined Party concerning when to perform the work and how to perform the work. The Petitioner determined the sequence that the jobs were to be performed. The Joined Party was required to report the progress of the work to the Petitioner.
7. The Joined Party worked under the supervision of the manager. On some jobs the manager directly supervised the Joined Party and on other jobs the manager just inspected the completed work.
8. The Petitioner paid the Joined Party an hourly wage. No taxes were withheld from the pay and the only fringe benefit provided by the Petitioner was holiday pay based on an eight hour workday. At the end of 2009 the Petitioner reported the Joined Party's earnings to the Internal Revenue service on Form 1099-MISC.
9. Either party had the right to terminate the relationship at any time without incurring liability.
10. Effective January 1, 2010, the Petitioner began withholding payroll taxes from the pay. No other changes occurred in the terms or conditions of the working relationship.
11. In February 2010, the Petitioner discharged the Joined Party because the Joined Party was in jail and was not able to report for work.
12. On March 10, 2010, the Department of Revenue issued a determination holding that the Joined Party and other individuals working as air conditioning and refrigeration technicians were the Petitioner's employees retroactive to January 1, 2009. The Petitioner filed a timely protest.

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.

19. 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.

20. No evidence was presented in this case concerning any agreement of hire. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

21. The Petitioner’s business is the installation and repair of commercial and residential air conditioning. The work performed by the Joined Party was to install and repair the air conditioning equipment. The work performed by the Joined Party was not separate and distinct from the Petitioner’s business but was a necessary and integral part of the business.

22. It was not shown that the Joined Party had a significant investment in a business. The Joined Party only provided his hand tools. The Petitioner provided the truck and was responsible for all expenses in connection with the truck. The Petitioner provided the supplies and parts.

23. The Petitioner paid the Joined Party an hourly wage. The Joined Party was paid by time worked rather than by the job or by production. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

24. The Petitioner provided holiday pay to the Joined Party. Holiday pay is a benefit that is generally reserved for employees. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

25. The Joined Party worked for the Petitioner from the inception of the LLC until February 2010. However, on January 1, 2010, the Petitioner began withholding payroll taxes from the pay of the Joined Party and the other workers. At that time the Joined Party became an acknowledged employee of the Petitioner even though there was no change in the terms and conditions of the work. These facts reveal that the relationship was one of relative permanence.

26. The Petitioner controlled what work was performed, when it was performed, and how it 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.

27. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as air conditioning and refrigeration repair technicians constitute insured employment.

Recommendation: It is recommended that the determination dated March 10, 2010, be AFFIRMED.

Respectfully submitted on September 2, 2010.

R. O. SMITH, Special Deputy
Office of Appeals