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

PETITIONER:
Employer Account No. - 1118441
FIRST FLORIDA FUNDING CORP
JOSEPH ANDRULONIS
15141 GARVOCK PLACE
MIAMI LAKES FL 33016

PROTEST OF LIABILITY
DOCKET NO. 2010-80842L

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 May 3, 2010.

After due notice to the parties, a telephone hearing was held on November 4, 2010. The Petitioner's former president appeared and testified at the hearing. The Joined Party appeared and testified on his own behalf. A tax specialist 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 and other individuals 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 was a subchapter S corporation, incorporated in or about 1980, for the purpose of running a mortgage brokerage. The Petitioner retained 14 mortgage brokers that were considered independent contractors.

2. The Joined Party provided services for the Petitioner as a mortgage broker from June 25, 2008, through January 25, 2010.

3. The Joined Party approached the Petitioner to determine if the Petitioner had work available after a friend's recommendation. The Joined Party filled out an application with the heading "For Employment" and an *Associates Code of Ethics* with the Petitioner.

4. The Joined Party was responsible for soliciting customers interested in purchasing a home. The Joined Party would have the customer fill out an application. The application would be taken to the Petitioner. The Petitioner's in-house underwriters would determine whether the loan should be approved.

5. The Petitioner provided a workspace for the Joined Party to use. The workspace included a computer and telephone. The Petitioner provided the Joined Party with a company email address.

6. The Joined Party was required to provide his own transportation for work done away from the Petitioner's place of business. The Petitioner provided business cards to the Joined Party although the Joined Party paid for the business cards.

7. The Joined Party did not have any set hours. The Joined Party could work outside of the Petitioner's normal business hours and was provided a key for access.

8. The Joined Party was allowed to hire an assistant at his own expense.

9. The Joined Party had a Mortgage Broker's License issued by the State of Florida.

10. The Petitioner did not provide training for the Joined Party. The Petitioner would have meetings in the event of a change in the law to inform the associates.

11. The Petitioner withheld for Federal Income Tax for the Joined Party.

Conclusions of Law:

12. 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.

13. 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).

14. 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).

15. 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.

16. 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.

17. 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.

18. A preponderance of the evidence presented in this case reveal that the Petitioner did not control, nor attempt to control, the means and manner of performing the work. Any control exercised over the mortgage brokers by the Petitioner was the result of governmental regulation. Regulation imposed by governmental authorities does not evidence control by the employer for the purpose of determining whether a worker is an employee or an independent contractor. See Global Home Care, Inc. v. Dept. of Labor and Emp. Sec., 521 So. 2d 568 (Fla. 2d DCA 1988). Therefore, the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated May 3, 2010, be REVERSED.

Respectfully submitted on January 4, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA

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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 May 3, 2010, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION