AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2570502
CHRISTIAN DEBT CONSOLIDATION
2201 NW CORPORATE BLVD STE 202
BOCA RATON FL 33431-7337

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

PROTEST OF LIABILITY
DOCKET NO. 2010-82775L

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 19, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **November, 2010**.

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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PROTEST OF LIABILITY
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RESPONDENT:
State of Florida
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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 19, 2010.

After due notice to the parties, a telephone hearing was held on August 19, 2010. A contractor responsible for the Petitioner's payroll, human resources, and accounting, appeared and testified for the Petitioner. The Joined Party appeared and testified on his own behalf. 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.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated September 1, 2003, for the purpose of running a debt consolidation business.

2. The Joined Party provided services for the Petitioner as a sales counselor from January 2006, through April 5, 2010. The Joined Party was tasked with selling debt settlements and consolidations.

3. The Joined Party would be given leads by the Petitioner. The Petitioner would forward telephone calls to the Joined Party. The Joined Party would make the telephone calls and give information to the prospective clients. The Joined Party would take down any necessary information. The Joined Party would then present the information to a manager. The manager would check the Joined Party's work and then initiate the procedures to close the sale.

4. The Joined Party contacted the Petitioner while seeking work. The Joined Party was interviewed by the Petitioner. The Joined Party was provided an Independent Contractor Agreement by the Petitioner. The agreement required that the Joined Party work full time. The agreement indicates that the Petitioner will compensate the Joined Party for all preauthorized and reasonable expenses. The agreement prohibited the Joined Party from working for a competitor without permission from the Petitioner. The agreement went on to bind the Joined Party to a one year non-compete agreement effective within the United States. The agreement prohibits the Joined Party from working with Petitioner's employees or customers for a one year period after separation. The agreement allows the Petitioner to discharge the Joined Party at anytime, without liability. The agreement was a standard contract created and provided by the Petitioner.

5. The Petitioner's place of business was open from 9am to 6pm. The telephones were only manned during the Petitioner's hours of operation. The Joined Party was expected to work Monday through Thursday from 9am to 5pm and on Fridays from 9am to 4pm. The Joined Party was allowed to work late. The Petitioner provided a work space for the Joined Party at the Petitioner's place of business.

6. The Joined Party was initially paid a salary by the Petitioner. The Petitioner changed the payment arrangement to commission in 2008. The Joined Party was paid a 25% commission on sales. The commission rate was set by the Petitioner.

7. The Petitioner provided a computer and telephone for the Joined Party to use. The Petitioner paid the internet and telephone bills. The Petitioner provided a company email address to the Joined Party.

Conclusions of Law:

8. 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.

9. 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).

10. 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).

11. 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.

12. 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.

13. 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.

14. The evidence presented in this case reveals that the Petitioner exercised control over several aspects of the Joined Party's work relationship with the Petitioner. The Joined Party was required to receive leads and telephone calls by the Petitioner. This required the Joined Party to be present at his work place at the Petitioner's place of business and during the Petitioner's hours of operation.

15. The Joined Party was not allowed to work for a competitor without permission from the Petitioner. Normally an independent contractor is free to work for whomever he chooses and is not subject to the limitations of the hiring party.

16. The Petitioner bound the Joined Party in a covenant not to compete as well as a one year prohibition on doing business with or employing any customers or staff of the Petitioner. Normally, an independent contractor is a separate entity from the hiring unit. An independent contractor is generally free to work with or employ at their own discretion.

17. The Petitioner had unilateral control over the financial aspects of the relationship. The Petitioner determined the pay and modified the pay arrangements during the Joined Party's time of service with the Petitioner.

18. The relationship was terminable at will. Either party could end the relationship at anytime, without liability. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept

of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

19. There was a written contract between the parties that stipulated that the Joined Party was an independent contractor. 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."

20. A preponderance of the evidence presented in this case demonstrates that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the Petitioner and the Joined Party.

21. The Petitioner submitted 14 pages of additional evidence and documents on September 7, 2010. Florida Administrative Code section 60BB-2.035(10)(a) prohibits the acceptance of any additional evidence after the hearing has closed. Therefore, the submissions are respectfully rejected.

Recommendation: It is recommended that the determination dated May 19, 2010, be AFFIRMED.

Respectfully submitted on September 14, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals