AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2904396

AMERICAN PRIVATE LABEL LLC
FELIPE BARRIOS
1700 NW 65TH AVENUE STE 13
PLANTATION FL 34433

PROTEST OF LIABILITY
DOCKET NO. 2010-83586L

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 lab assistant 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 March 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 she 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, she would qualify for unemployment benefits. 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 February 14, 2011. The Petitioner, represented by its Partner, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified on her own behalf. The Special Deputy issued a recommended order on April 7, 2011.

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

1. The Petitioner is a limited liability company, formed in May 2009, for the purpose of running a cosmetic formulation laboratory and manufacturing facility.

2. The Joined Party provided services for the Petitioner as a lab assistant from May 2009 through September 30, 2009.

3. The Joined Party worked as a lab assistant for a partner of the Joined Party as an employee of a different company. The Petitioner's partner formed the Petitioner's company in May 2009 and gave the Joined Party the opportunity to work for the Petitioner in the same capacity. The Joined Party considered herself to be an employee of the Petitioner.

4. The Joined Party acted as an assistant for the Petitioner. The Joined Party performed whatever tasks were dictated by the Petitioner. The Joined Party's work included making coffee, cleaning bathrooms, and batching formulas provided by the Petitioner.

5. The Petitioner paid the Joined Party $625 per week.

6. The Petitioner's hours of operation were Monday through Friday from 8 a.m. to 5 p.m. The Joined Party was allowed to work weekends. The Joined Party was expected to report to work each day during the work week. At times the Petitioner would expect the Joined Party to work on weekends.

7. The Joined Party's work required the use of an assortment of lab equipment. The equipment was provided by the Petitioner. The Petitioner provided a desk and workspace for the Joined Party. The Petitioner reimbursed the Joined Party for any purchases made by the Joined Party for the Petitioner.

8. The Petitioner provided business cards and a company email address for the Joined Party.

9. The Petitioner provided guidance to the Joined Party in the performance of the work. The Petitioner reviewed the results of the Joined Party's work.

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 postmarked April 20, 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 #3 must be modified because it does not accurately reflect the evidence provided at the hearing. The record reflects that no party testified that the partner was the Joined Party's partner. Finding of Fact #3 is amended to say:

> The Joined Party worked as a lab assistant for a partner as an employee of a different company. The Petitioner's partner formed the Petitioner's company in May 2009 and gave the Joined Party the opportunity to work for the Petitioner in the same capacity. The Joined Party considered herself to be an employee of the Petitioner.

In the exceptions, the Petitioner proposes alternative findings of fact and conclusions of law. The Petitioner also requests consideration of additional evidence not provided at the hearing or evidence previously considered by the Special Deputy. While the Petitioner refers to several attachments in its

exceptions, the Petitioner did not provide any attachments with its exceptions and appears to be referring to documents previously submitted by the parties for the case. 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. Rule 60BB-2.035(19)(a) of the Florida Administrative Code prohibits the acceptance of evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. The exceptions are respectfully rejected.

The Petitioner also contends in its exceptions that the Joined Party confirmed her independent contractor status on several occasions. In *Keith v. News & Sun Sentinel Co.*, 667 So.2d 167 (Fla. 1995), the Florida Supreme Court provided guidance on how to approach an analysis of employment status. The court held that the lack of an express agreement or clear evidence of the intent of the parties requires "a fact-specific analysis under the Restatement based on the actual practice of the parties." *Id*. at 71. However, when an agreement does exist between the parties, the court held that the courts should first look to the agreement and honor it "unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status." *Id*. As a result, the analysis in this case would not stop at an examination of the agreement between the parties and statements made by the parties regarding the Joined Party's status.

A complete analysis would examine whether the agreement, the other provisions of the agreement, and the parties' statements were consistent with the actual practice of the parties. If a conflict is present, *Keith* provides further guidance. In *Keith*, the court concluded that the actual practice and relationship of the parties should control when the "other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties." *Id*. For example, in *Justice v. Belford Trucking Co*., 272 So.2d 131, 136 (Fla. 1972), the Florida Supreme Court held that the Judge of Industrial Claims

erred when relying solely on the language of a contract instead of considering all aspects of the parties' working relationship. In doing so, the court found that the judge "did not recognize the employment relationship that actually existed." *Id.* Therefore, the mere existence of an independent contractor agreement and the specific terms of such an agreement would not be conclusive regarding the issue of the Joined Party's status. Additionally, the claimant's admission that she worked as an independent contractor would not be conclusive of the issue. Even if the Special Deputy had concluded that the Joined Party admitted that she worked as an independent contractor, the working relationship as described by the Special Deputy in the Findings of Fact would still merit the conclusion that an employer/employee relationship existed. Contrary to the result in *Keith,* the Special Deputy did not find that the behavior of the parties was consistent with an independent contractor status and did not find the Petitioner's right to control the Joined Party was limited to merely a right to control the results of the Joined Party's work. Instead, the Special Deputy concluded in Conclusion of Law #16 that the Petitioner controlled where and how the Joined Party performed the work. Competent substantial evidence in the record supports the Special Deputy's ultimate conclusion that the Petitioner controlled the way the Joined Party performed her services in a manner characteristic of an employment relationship. Thus, the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are not rejected by the Agency. The Petitioner's exceptions 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 May 7, 2010, is AFFIRMED.

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

_____
TOM CLENDENNING,
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
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107 EAST MADISON STREET
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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 May 7, 2010.

After due notice to the parties, a telephone hearing was held on February 14, 2011. The Petitioner's partner appeared and testified at the hearing. The Joined Party appeared and testified on her 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 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 limited liability company, formed in May 2009, for the purpose of running a cosmetic formulation laboratory and manufacturing facility.

2. The Joined Party provided services for the Petitioner as a lab assistant from May 2009 through September 30, 2009.

3. The Joined Party worked as a lab assistant for a partner of the Joined Party as an employee of a different company. The Petitioner's partner formed the Petitioner's company in May 2009 and gave the Joined Party the opportunity to work for the Petitioner in the same capacity. The Joined Party considered herself to be an employee of the Petitioner.

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7. The Joined Party's work required the use of an assortment of lab equipment. The equipment was provided by the Petitioner. The Petitioner provided a desk and workspace for the Joined Party. The Petitioner reimbursed the Joined Party for any purchases made by the Joined Party for the Petitioner.

8. The Petitioner provided business cards and a company email address for the Joined Party.

9. The Petitioner provided guidance to the Joined Party in the performance of the work. The Petitioner reviewed the results of the Joined Party's work.

Conclusions of Law:

10. 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.

11. 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).

12. 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).

13. 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.

14. 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.

15. 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.

16. The evidence presented in this hearing revealed that the Petitioner exercised control over where, what, and how the Joined Party performed the work. The Joined Party was expected to report to the place of business for work each day. The Joined Party was directed in what tasks needed to be performed and given direction in how the work should be performed.

17. The Joined Party was paid a weekly salary. This form of remuneration is indicative of an employer-employee relationship rather than the 'by the job' basis more typical of an independent contractor relationship.

18. The Petitioner supplied all of the tools and equipment necessary to perform the work. The Joined Party had no investment in the business and could not suffer a loss.

19. The Petitioner provided the Joined Party with business cards and a company email address. These factors tend to create an association with the Petitioner rather than the arms length relationship typical in an independent contractor situation.

20. 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.

Recommendation: It is recommended that the determination dated May 7, 2010, be AFFIRMED.

Respectfully submitted on April 7, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals