AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2966283
SPA AT MADEIRA BAY LLC
1114 17TH AVE SOUTH SUITE 205
NASHVILLE TN 37212

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

PROTEST OF LIABILITY
DOCKET NO. 2010-89605L

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 June 18, 2010, is AFFIRMED.

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

PETITIONER:
Employer Account No. - 2966283
SPA AT MADEIRA BAY LLC
KATHY GRISHAM
1114 17TH AVE SOUTH SUITE 205
NASHVILLE TN 37212

PROTEST OF LIABILITY
DOCKET NO. 2010-89605L

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 June 18, 2010.

After due notice to the parties, a telephone hearing was held on January 25, 2011. The Petitioner's controller 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 organized as a partnership in 2008. The Petitioner's controller worked from Tennessee and visited the Florida location on two occasions. The Petitioner was created for the purpose of running a spa.

2. The Joined Party provided services for the Petitioner as a spa manager/massage therapist from July 29, 2009, through January 28, 2010. The Joined Party was hired by the Petitioner after presenting a resume to the Petitioner.

3. The Petitioner agreed to pay the Joined Party a salary for services as a manager. The Petitioner agreed to pay the Joined Party a commission for massage therapy services.

4. The Joined Party was expected to keep the spa open from 10 a.m. through 5 p.m. except for Tuesdays and Thursdays. The hours of operation on Tuesday and Thursday were from 10 a.m. through 7 p.m. The Joined Party was responsible for making certain that the spa was staffed during the hours of operation. The Petitioner gave the Joined Party instructions as to what steps should be taken and in what direction the spa should be taken.

5. The Petitioner had an account with a beauty supply store. The Joined Party was allowed to use the account to purchase supplies for the spa.

6. The Joined Party was expected to place advertisements for the spa. The Joined Party was expected to conduct interviews with potential workers. The Joined Party did not have the authority to hire or contract new workers.

7. The Petitioner provided all of the materials and equipment needed to perform the work. The Petitioner provided the Joined Party with business cards.

8. The Petitioner provided training to the Joined Party in managerial duties. The training included how to payroll and make deposits.

9. The Joined Party made daily calls to keep the Petitioner informed. The Petitioner regularly contacted the Joined Party for progress reports.

10. The Joined Party was a licensed massage therapist.

11. Either party could terminate the relationship at anytime without liability.

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. The evidence presented in this hearing reveals that the Joined Party was hired by the Petitioner to run the Petitioner's business in Florida. The work performed by the Joined Party as a spa manager was not separate or distinct from the Petitioner's spa business but is rather an integral part of the Petitioner's business.

19. The Joined Party was responsible for managing workers paid by the Petitioner. While the Joined Party may not have supervised the work of the workers, the Joined Party was responsible for making certain that workers were present during the hours of operation.

20. The Joined Party received a weekly salary rather than being paid by the job.

21. The Petitioner had the right to discharge the Joined Party at anytime and without liability.

22. The Petitioner's witness was not involved in the day to day operations of the spa but rather provided assistance from out of state. The Petitioner's witness did visit the spa on two occasions and did have communications with the Joined Party. The Petitioner provided primarily hearsay testimony. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. See Section 120.57, Florida Statutes; Rule 60BB-5.024(3)(d), Florida Administrative Code.

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

24. The Petitioner submitted Proposed Findings of Fact and/or Conclusions of Law on February 4, 2011. Where the proposed findings are supported by the record, they are incorporated into this recommended order. Where the proposed findings do not comport with the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated June 18, 2010, be AFFIRMED.

Respectfully submitted on March 18, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals