AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2964868
THE BAR CODE MAGAZINE LLC
1108 NE 2ND STREET
FT LAUDERDALE FL 33301-1667

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

PROTEST OF LIABILITY
DOCKET NO. 2010-98456L

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 8, 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

PETITIONER:
Employer Account No. - 2964868
THE BAR CODE MAGAZINE LLC
SAM HOSKING
1108 NE 2ND STREET
FT LAUDERDALE FL 33301-1667

PROTEST OF LIABILITY
DOCKET NO. 2010-98456L

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 8, 2010.

After due notice to the parties, a telephone hearing was held on August 18, 2010. The Petitioner's sole proprietor/general manager and the Petitioner's art director both appeared and provided testimony at the hearing. The Joined Party appeared and testified on his own behalf. A tax specialist II appeared 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 corporation formed in November 2008, for the purpose of publishing a magazine.

2. The Joined Party provided services for the Petitioner as a graphic designer from September 27, 2009, through March 18, 2010.

3. The Joined Party applied for work with the Petitioner after seeing a job posting.

4. The Joined Party was given the title of Art Director for the Petitioner's magazine. The Petitioner provided a computer to the Joined Party. The Petitioner provided company business cards and a company email address to the Joined Party. There was no written agreement between the parties.

5. The Petitioner informed the Joined Party at the time of hire that he would receive a six month review.

6. The Joined Party was required to report to work from 9-5, Monday through Friday. The Joined Party was expected to work any necessary overtime. The Joined Party was informed by the Petitioner's creative director that the Joined Party was required to attend mandatory meetings.

7. The Petitioner instructed the Joined Party in what was to be done each day. The Petitioner would provide photographs and articles to the Joined Party with instructions on what was to be done with them.

8. The Petitioner paid the Joined Party $2,500 per month. The salary was determined by the Petitioner. The Petitioner paid the Joined Party $8,175 in 2009.

9. Either party had the right to end the relationship at anytime, without liability.

10. The Petitioner laid off the Joined Party on or about March 18, 2010.

Conclusions of Law:

11. 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.

12. 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).

13. 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).

14. 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.

15. 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.

16. 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.

17. The evidence presented in this case reveals that the Petitioner maintained control over the Joined Party's work in the form of instructions and mandatory meetings. The Petitioner set the Joined Party's schedule and determined where he should perform the work.

18. The Joined Party was paid a monthly salary. The Petitioner controlled the financial aspects of the relationship in that the salary was determined by the Petitioner.

19. The Petitioner supplied the computer needed for the work as well as the materials to be worked with. The Joined Party was also provided with company business cards and a company email address.

20. The Petitioner's magazine listed the Joined Party as the Art Director. The clear impression gained from the magazine credits, business cards, and email address was that the Joined Party was an employee of the Petitioner and not a separate entity.

21. The relationship was terminable at will. Both parties could end the relationship at anytime and without liability. The Petitioner laid off the Joined Party at the conclusion of the relationship. 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."

22. 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 Petitioner and the Joined Party.

23. Section 443.036(21), Florida Statutes, provides:
"Employment" means a service subject to this chapter under s. 443.1216, which is performed by an employee for the person employing him or her.

24. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:
The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
(1) An officer of a corporation.
(2) An individual who, under the usual common law rules applicable in determining the employer- employee relationship is an employee.

25. Section 443.036(20)(c), Florida Statutes, provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

26. Section 443.1215, Florida States, provides:

Each of the following employing units is an employer subject to this chapter:

An employing unit that:

a) In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or

b) For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

27. The Petitioner paid the Joined Party $2,500 per month during the period of service. The Joined Party worked five days per week during the period of service. The Petitioner meets the liability requirements for Florida unemployment compensation contributions effective September 27, 2009.

Recommendation: It is recommended that the determination dated June 8, 2010, be AFFIRMED.

Respectfully submitted on September 14, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals