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

PETITIONER:
Employer Account No. - 2895803
SECURITY GUARDIANS OF AMERICA INC
HILDELISA M GARCIA
825 TANGIER STREET
CORAL GABLES FL 33134-2431

PROTEST OF LIABILITY
DOCKET NO. 2010-98458L

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 11, 2010.

After due notice to the parties, a telephone hearing was held on October 12, 2010. The Petitioner, represented by the Assistant Manager, appeared and testified. The Petitioner's Road Supervisor testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified.

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 working as security guards 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 is a corporation which was formed on September 20, 2007, to provide security services to the Petitioner's clients. The Petitioner's president is active in the business as the Manager. On March 14, 2008, the Petitioner hired an Assistant Manager.
2. The Petitioner hired the Joined Party as a security guard on or about May 9, 2009. The Petitioner classified the Joined Party as an independent contractor because the Petitioner did not believe that the business had enough income to afford to have employees. Other security guards were also classified as independent contractors for the same reason. There were no written agreements or contracts between the Petitioner and the security guards.

3. The Petitioner provided the Joined Party with a uniform bearing the Petitioner's name and a two-way radio so that the Joined Party could remain in contact with the Petitioner while the Joined Party was on duty.
4. In addition to the Manager and the Assistant Manager the security guards worked under the direction of a supervisor. The supervisor trained the Joined Party. The Petitioner has many rules and policies that the security guards are required to follow.
5. The Petitioner determined at which location the Joined Party was required to work. The Petitioner's Manager determined the Joined Party's work schedule.
6. The Joined Party was required to personally perform the work. He could not hire others to perform the work for him.
7. The Petitioner paid the Joined Party $7.25 per hour. The rate of pay was determined by the Petitioner. The Petitioner pays all of the security guards in the same manner and at the same hourly rate.
8. The Joined Party was required to complete a company provided timesheet and he was paid by the Petitioner on a bi-weekly basis. No taxes were withheld from the pay and no fringe benefits were provided by the Petitioner. At the end of 2009 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
9. Either party could terminate the relationship at any time without incurring liability.
10. The Petitioner registered with the Department of Revenue for payment of unemployment compensation taxes effective May 1, 2009. However, the Petitioner did not report the earnings of the Joined Party or the other security guards.
11. The Joined Party last worked for the Petitioner on or about April 4, 2010. The Joined Party filed an initial claim for unemployment compensation benefits effective April 4, 2010. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
12. On May 11, 2010, the Department of Revenue issued a determination holding that the services performed by the Joined Party and other individuals as security guards constitute insured employment retroactive to July 1, 2008. The Petitioner filed a timely protest.

Conclusions of Law:

13. 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.
14. 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).
15. 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).
16. 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.

17. 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.

18. 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.

19. 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.

20. The evidence reveals that there was no written contract or agreement between the Petitioner and the security guards. No competent evidence was presented to show the existence of any verbal agreement. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

21. The Petitioner's business is to provide security services to the Petitioner's customers. The Joined Party and the other security guards engaged by the Petitioner provided those security services. The services provided by the security guards are not separate and distinct from the Petitioner's business but the services are an integral and necessary part of the Petitioner's business. The Petitioner provides uniforms identifying the guards as part of the Petitioner's business to the security guards. The Petitioner provides everything that is needed to perform the work. It was not shown that the security guards are at risk of suffering a financial loss from services performed.

22. It was not shown that any special skill or knowledge is required to perform services as a security guard. The greater the skill or special knowledge required to perform the work, the more likely

the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

23. The Petitioner pays all of the security guards by time worked rather than by production or by the job. The Petitioner determines the hours of work and the rate of pay. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

24. Either party has the right to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party worked for a period of approximately one year. These facts reveal the existence of an at-will relationship of relative permanence. 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."

25. The Petitioner controls what work is performed, where it is performed, when it is performed, and how it is performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

26. The evidence presented in this case reveals that the Petitioner exercised significant and extensive control over the Joined Party and the other security guards. Thus, it is concluded that the services performed for the Petitioner by the Joined Party and other individuals as security guards constitute insured employment.

27. The Petitioner registered for payment of unemployment tax effective May 1, 2009, however, it is apparent that the Petitioner actually established liability prior to that date. The Petitioner was incorporated effective September 20, 2007. The corporate officer is the manager of the business and on March 4, 2008, the Petitioner hired an assistant manager.

28. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.

29. 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.

30. The Petitioner is a corporation and the Petitioner's president is a statutory employee of the Petitioner. The Petitoner's president has been active in the operation of the business since inception. However, there is insufficient evidence to show that the Petitioner established liability during 2007.

31. Section 443.1215, Florida States, provides:
    (1) Each of the following employing units is an employer subject to this chapter:

(a) An employing unit that:
1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
2. 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.

32. The Petitioner had at least one employee during twenty different weeks during 2008. Therefore, the Petitioner's effective date of liability is January 1, 2008.

Recommendation: It is recommended that the determination dated May 11, 2010, be MODIFIED to reflect a retroactive date of January 1, 2008. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on October 14, 2010.

R. O. SMITH, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA

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ORDER

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 11, 2010, is MODIFIED to reflect a retroactive date of January 1, 2008. It is also ORDERED that the determination is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _______ day of **January, 2011**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION