AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2688971
JOE MERTZ PRODUCTION CONSULTING LLC
13538 VILLAGE PARK DR STE 235
ORLANDO FL 32837-3604

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

PROTEST OF LIABILITY
DOCKET NO. 2011-14983L

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 December 2, 2010, is REVERSED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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

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RESPONDENT:
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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 December 2, 2010.

After due notice to the parties, a telephone hearing was held on June 15, 2011. An attorney appeared for the Petitioner and called the Petitioner's owner and one of the Petitioner's contractors as witnesses. A tax specialist represented the Respondent and called a tax auditor as a witness.

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 received.

Issue:

Whether services performed for the petitioner constitute insured employment, and if so, the effective date of the petitioners liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Jurisdictional Issue: Whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 60BB-2.035, Florida Administrative Code. The Notice of Proposed Assessment had a mail date of December 2, 2010. The envelope the Notice was mailed in was postmarked December 14, 2010. The address on the envelope was for an old address for the Petitioner. The Petitioner received the Notice on December 22, 2010. The Petitioner mailed a letter of protest on December 22, 2010. The Petitioner mailed the protest letter within 20 days of receipt of the Notice. The Petitioner's appeal is timely.

Findings of Fact:

1. The Petitioner is a limited liability company created in July 2001 for the purpose of running a business referring specialized workers to clients in need of workers for special events.

2. The Petitioner was selected by the Respondent for a random audit covering the period from January 1, 2008, through December 31, 2008.

3. The audit was conducted at the Petitioner's place of business. The Petitioner's owner/president and an assistant were present at the audit, along with the tax auditor.

4. The tax auditor examined the Petitioner's books and records as part of the audit.

5. The audit found that those workers considered to be contractors by the Petitioner working as lighting designers, video engineers, production managers, productions coordinators, and audio engineers, were employees of the Petitioner.

6. The Petitioner maintains a database of specialists including the classes of workers listed in the audit. The database includes approximately 300 workers.

7. The membership of the database is composed of those known by the Petitioner as well as those referred to the Petitioner.

8. The Petitioner is contacted by a client seeking to hold an event or theatre performance. The client informs the Petitioner of what workers are needed. The Petitioner provides the client with a list of workers with the appropriate skills.

9. The client contacts the workers on the list and negotiates the rate of pay, schedule, duties, and duration of the work with the worker. The worker is not required to accept the work. The client pays the Petitioner the fees negotiated for the worker along with an administrative fee.

10. The Petitioner pays the workers the fee agreed upon by the worker and client. The workers are normally paid a day rate. The workers are either paid upon completion or in installments based upon the agreement between the workers and the client.

11. The Petitioner is not involved in the performance of the work.

12. The Petitioner does not mediate disputes between the worker and the client or handle client complaints about the workers.

13. The workers are free to work for competitors.

14. The worker's expenses may be paid by the client if so agreed upon during the initial client/worker negotiation for service.

Conclusions of Law:

15. 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.

16. 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).

17. 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).

18. 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.

19. 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.

20. 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.

21. The evidence presented in this hearing reveals that the Petitioner did not exercise control over where, when or how the work was to be performed. The Petitioner was not involved in the work but rather served to connect clients with needed temporary workers for special events.

22. The workers provide specialized services and are skilled workers.

23. The Petitioner does not supply any materials, tools, or place of work.

24. The workers are paid in the manner agreed upon with each client and for each job. The normal method of pay is a day rate.
25. The work performed by the workers as skilled specialists in various event production areas is not a normal part of the normal business activities of the Petitioner's referral business.
26. A preponderance of the evidence presented in this case reveals that the Petitioner did not establish sufficient control over the workers listed in the Notice of Proposed Assessment as to create an employer-employee relationship.
27. The Petitioner requested an extension of time to submit Proposed Findings. The Petitioner's request was granted and the time limit was extended to July 15, 2011. The Petitioner provided Proposed Findings of Fact and Conclusions of Law on July 15, 2011. The Special Deputy considered the Proposals. Those Proposals supported by the record are incorporated into the decision. Those Proposals which do not comport with the record are respectfully rejected.

Recommendation: It is recommended that the determination dated December 2, 2010, be REVERSED.

Respectfully submitted on August 10, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals