AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2992352
VERTEX MARKETING LLC
701 SE 6TH AVE STE 102
DELRAY BEACH FL 33483-5186

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

PROTEST OF LIABILITY
DOCKET NO. 2011-20996L

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 1, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 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. - 2992352
VERTEX MARKETING LLC
ATTN: CRYSTIAN BARRERA
701 SE 6TH AVE STE 102
DELRAY BEACH FL 33483-5186

PROTEST OF LIABILITY
DOCKET NO. 2011-20996L

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 December 1, 2010.

After due notice to the parties, a telephone hearing was held on April 28, 2011. The Petitioner's manager appeared and testified at the hearing. A tax specialist II appeared and testified on behalf of the Respondent. The Joined Party did not appear at the hearing.

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 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 Florida Department of Revenue issued a notice of determination dated December 1, 2010, holding that the Joined Party, while performing services as a telemarketer for the Petitioner, was an employee. The Petitioner received the notice of determination on December 3, 2010. The Petitioner was aware of the 20 day deadline to protest the determination. The Petitioner was visited on December 14, 2010 by an agent of the Department of Revenue. The agent referred the Petitioner to a Florida Department of Revenue collector. The Petitioner was told by the collector that the Petitioner would be required to pay

all of the money due to the Department of Revenue in order to file a protest of the notice of determination. The Petitioner was unable to pay the money due at that time. The Petitioner composed a letter of protest on December 27, 2010. The Petitioner hand delivered the letter of protest to the Florida Department of Revenue on January 3, 2011. The Petitioner's protest was delayed as a result of erroneous information received from a state agency involved in the matter. The Petitioner took steps to protest the determination as soon as they had the money to pay the fine they were told was a prerequisite to appeal. The delay was due not to the Petitioner but rather because of the erroneous information upon which the Petitioner reasonably relied. The Protest is timely.

Findings of Fact:

1. The Petitioner is a limited liability company formed in 2009 for the purpose of running an internet marketing company.

2. The Joined Party provided services as a telemarketer from June 19, 2009, through October 2, 2009.

3. The Joined Party was responsible for advertising, promotions, and sales of product for the Petitioner.

4. The Joined Party was allowed to work for a competitor.

5. The Joined Party was allowed to subcontract the work.

6. The Joined Party set his own work schedule. The Joined Party was allowed to use a common work space at the Petitioner's place of business.

7. The Petitioner did not supervise or direct the Joined Party.

8. The Joined Party was paid a commission based upon a percentage of sales made by the Joined Party. The Joined Party received a bonus based upon the number of sales made each week. The commission percentage and bonus were set by the Petitioner.

Conclusions of Law:

9. 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.

10. 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).

11. 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).

12. 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.

13. 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.

14. 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.

15. The evidence presented in this hearing reveals that the Petitioner did not exercise control over where, when or how the work was performed by the Joined Party. The Joined Party was free to set his own hours and work from the location of his choosing.

16. The Joined Party was allowed to subcontract the work.

17. The Petitioner did not supervise or direct the Joined Party in the performance of the work.

18. The Joined Party was allowed to work for a competitor of the Petitioner.

19. A preponderance of the evidence presented in this case reveals that the Petitioner did not exercise sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated December 1, 2010, be REVERSED.

Respectfully submitted on June 17, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals