AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2997258
MYRTLE BEACH HOLDINGS LLC
2852 20TH AVE N
ST PETERSBURG FL 33713-4238

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

PROTEST OF LIABILITY
DOCKET NO. 2011-22312L

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 29, 2010, is AFFIRMED.

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

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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 29, 2010.

After due notice to the parties, a telephone hearing was held on May 10, 2011. An office manager and two owners appeared and testified for the Petitioner. The Joined Party appeared and testified on his 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.

Findings of Fact:

1. The Petitioner is a limited liability company, formed in August 2004 for the purpose of running a night club.

2. The Joined Party began performing services for the Petitioner after the termination of a separate business venture. The Joined Party performed services as a web developer for the Petitioner from 2005 through June 2010.

3. The Joined Party was responsible for the creation of web sites, the maintenance of the office data center, and attending certain trade shows.

4. The Joined Party initially performed services at an office space of the Petitioner. The Joined Party was expected to report to work from 10am to 6 pm. The Joined Party was required to attend impromptu meetings set up by the Petitioner. The Joined Party was expected to be on-call when not at the workplace in the event of an after-hours problem.

5. The Joined Party had a supervisor. The Joined Party took orders from the supervisor but was generally allowed to perform the work unsupervised.

6. The Joined Party relocated out of state in January 2010. The Joined Party was expected to perform the work remotely. The Joined Party was required to be working during the same hours.

7. The Joined Party used a computer purchased for him by the Petitioner. The Joined Party used the Petitioner's office equipment while performing services at the Petitioner's place of business. The Petitioner repaid any expenses incurred by the Joined Party in connection with trade shows. The Petitioner booked and paid for the Joined Party's flight expenses when the Joined Party was required to report back to the Petitioner's place of business. The Petitioner provided the Joined Party with a magnetic key. The Petitioner provided the Joined Party with a company email address. The Petitioner provided business cards for the Joined Party.

8. The Joined Party was paid a salary. The salary was reduced by the Petitioner in 2010.

9. The Joined Party performed services for other companies owned by the Petitioner at the Petitioner's direction. The Joined Party did not have his own business during the term of service.

Conclusions of Law:

10. 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.

11. 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).

12. 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).

13. 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.

14. 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.

15. 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.

16. The evidence presented in this case reveals that the Petitioner exercised control over where and when the work was performed. The Joined Party was expected to report to work at the office provided by the Petitioner during the hours dictated by the Petitioner. The Joined Party was required to be available and on-call to meet any contingencies or emergencies that arose outside of normal business hours.

17. The Joined Party had a supervisor and a set work schedule. The Joined Party was required to attend mandatory meetings at the Petitioner's discretion. The Joined Party was treated as an employee by the Petitioner.

18. While the Joined Party used his own computer, the computer was purchased for the Joined Party by the Petitioner. The Petitioner provided reimbursement for expenses to the Joined Party. The Petitioner provided a magnetic key, business cards, and a company email address for the Joined Party.

19. The Joined Party performed services for the Petitioner for a period of nearly 5 years. Such a period is indicative of a permanent, continuing relationship, rather than the temporary nature indicative of an independent contractor relationship.

20. The Petitioner had unilateral control over the financial aspects of the relationship. The Joined Party's pay was set by the Petitioner and was lowered at the Petitioner's discretion.

21. A preponderance of the evidence presented in this case reveals that the Petitioner exercised 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 29, 2010, be AFFIRMED.

Respectfully submitted on July 5, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals