AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2989407
BIRDS EYE GLOBAL TRACKING LLC
1423 PINE GLEN LN APT 82
TARPON SPRINGS FL 34688-6548

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

PROTEST OF LIABILITY
DOCKET NO. 2011-22314L

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 January 11, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 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:
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1423 PINE GLEN LN APT 82
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PROTEST OF LIABILITY
DOCKET NO. 2011-22314L

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 January 11, 2011.

After due notice to the parties, a telephone hearing was held on June 1, 2011. The Petitioner, represented by the Petitioner's president, appeared and testified. The Petitioner's CEO and the Petitioner's Office Manager also testified as witnesses. The Respondent, represented by a Department of Revenue Tax Auditor II, appeared and testified. The Joined Party 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 working as a sales representative 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 which sells GPS tracking devices to businesses and other organizations.
2. The Joined Party, who has a background in sales, responded to a help wanted advertisement placed by the Petitioner. The Petitioner interviewed the Joined Party and offered a sales position to the Joined Party. The Petitioner informed the Joined Party that the job consisted of cold calling sales prospects by telephone and that the Joined Party would be paid a commission on his sales. The Petitioner informed the Joined Party that he would be classified as an independent contractor,

that the Petitioner would hire other independent contractors to work under the Joined Party, and that if it worked out the Petitioner would employ the Joined Party as Sales Manager.

3. On June 1, 2010, the Petitioner presented the Joined Party with an *Independent Contractor Agreement* for the Joined Party's signature. The Joined Party accepted the offer of work and signed the Agreement without fully reading the Agreement.

4. The *Independent Contractor Agreement* states that the Joined Party is an independent contractor and not an employee, agent, partner, or joint venturer of the Petitioner. The Agreement requires the Joined Party to adhere to all applicable laws, rules, and regulations promulgated by any governmental agency or regulatory body, to adhere to all ethical standards applicable to sales agents, and to perform in a manner consistent with generally accepted procedures for sales agents. The Agreement states that the Joined Party is solely responsible for withholding income taxes or other taxes from the Joined Party's pay and that the Petitioner is not responsible for providing any fringe benefits such as health insurance, retirement benefits or paid vacations.

5. The *Independent Contractor Agreement* states that the Joined Party will perform services primarily at the Joined Party's office but will, upon request of the Petitioner, provide the services from the Petitioner's office or from such other place as designated by the Petitioner. The Agreement provides that the Joined Party's daily schedule and hours, on a given day, shall generally be subject to the Joined Party's discretion. Unless otherwise agreed to by the Petitioner the Joined Party shall be responsible for procuring, paying for, and maintaining any outside computer equipment, software, paper, tools, or supplies necessary to perform the work.

6. The *Independent Contractor Agreement* prohibits the Joined Party from conducting any type of advertising without the Petitioner's prior approval. The Agreement prohibits the Joined Party from doing any "cold calling" of any form without the prior written approval of the Petitioner. All call lists must have the Petitioner's written approval.

7. The *Independent Contractor Agreement* provides that the Joined Party may not make any assignment of the Agreement or any interest in the Agreement without the prior consent of the Petitioner. The Petitioner, however, may assign its rights and obligations under the Agreement without the consent of the Joined Party. The Agreement provides that either party may terminate the Agreement at any time, with or without cause, without prior notice. During the term of the Agreement and for a period of twelve months following termination the Agreement prohibits the Joined Party from working or providing services, whether as an employee or independent contractor, whether with or without compensation, to any person engaged in any business that is competitive with the Petitioner's business or the business of any of the Petitioner's affiliates. The Agreement prohibits the Joined Party from being engaged, either directly or indirectly, in any manner, including without limitation, as a principal, partner, sole practitioner, consultant, joint venturer, member, agent, or employee of any business, entity or other activity which provides, renders or performs any services competitive with any business conducted by the Petitioner at any time during the term of the Agreement.

8. The *Independent Contractor Agreement* provides that the Petitioner has the sole and exclusive right to make use of, and to permit others to make use of, the Joined Party's name, pictures, photographs, and other likeness and voice in connection with the advertising, publicity, and exploitation of any products and services, or in connection to the implementation of any of the Petitioner's services. The Agreement provides that the Petitioner's right continues in perpetuity as a non-exclusive and non-compensable right after termination, for any reason whatsoever. The Agreement states that at no event, however, shall the Joined Party, directly or indirectly, be represented as endorsing any product or commodity without the Petitioner's written and expressed consent.

9. The *Independent Contractor Agreement* sets forth the commission structure based on the sales of the Joined Party and the sales of the total sales team. The commission schedule provides for a commission on each sale and residual income if four or more units are sold in a month, The commission rate for sales of one to ten units is 30%, eleven to twenty units is 40%, and twenty-one and up is 50%. Based on the sales of the total sales team the Joined Party could earn a bonus. The Agreement provides that the Petitioner will pay the Joined Party on the fifteenth and the thirtieth of each month for any commissions earned.

10. During the first four or five weeks of the relationship the Joined Party worked exclusively from the Petitioner's office. The Petitioner provided the workspace, a desk, computer, telephone, and any supplies. The Petitioner provided the Joined Party with business cards. The Joined Party did not have any expenses in connection with the work other than the expense of commuting to and from the Petitioner's office.

11. The first four or five weeks were considered by the Petitioner to be a training period. The Petitioner trained the Joined Party concerning the Petitioner's products, how to use the Petitioner's software, what to say to sales prospects, and how to sell the Petitioner's products. The Petitioner told the Joined Party what he could and what he could not do. The Petitioner provided the Joined Party with a database containing the sales leads for the Joined Party to contact.

12. The Joined Party's residence was located a considerable distance from the Petitioner's office. The Joined Party did not receive any commissions from the Petitioner during June. After working for the Petitioner for four or five weeks the Joined Party requested permission to work from his home because of the cost of commuting. The request was granted by the Petitioner. When the Joined Party worked from home he used his own telephone and computer. The Petitioner provided the Joined Party with the computer software and the sales lead database. The Joined Party did not have any work expenses when he worked from home.

13. As specified by the Petitioner at the time of hire the Joined Party hired and supervised other individuals to be part of the sales team. Those individuals were classified by the Petitioner as independent contractors. Those individuals were not paid by the Joined Party for the work which they performed. If members of the sales team made sales the Petitioner paid the commissions to those members of the team.

14. The Petitioner did not withhold any payroll taxes from the Joined Party's earnings. The Petitioner did not provide any fringe benefits to the Joined Party such as health insurance or paid time off from work. Following the end of 2010 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

15. The Joined Party and the sales team did not work out as well as anticipated by the Petitioner and the Joined Party was not offered employment as sales manager. The commissions earned by the Joined Party were not sufficient to meet the Joined Party's needs. On or about September 20, 2010, the Joined Party discontinued the relationship, without notice, to seek other employment.

Conclusions of Law:

16. The issue in this case, whether services performed for the Petitioner by the Joined Party as a sales representative 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.

17. 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).

18. 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).

19. 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.

20. 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.

21. 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.

22. 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.

23. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent

contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

24. In the instant case the Agreement provides that the Joined Party is an independent contractor and not an employee of the Petitioner. However, the Agreement provides the Petitioner with the right to control how the work must be performed. The Agreement provides that the Joined Party must obtain prior written consent from the Petitioner to contact any sales prospect lead that was not provided to the Joined Party by the Petitioner. The Joined Party was prohibited from doing any advertising without the Petitioner's prior approval. Although the Agreement anticipates that the Joined Party will perform services from locations other than the Petitioner's office, the Agreement gives the Petitioner the right to require the Joined Party to perform the services from the Petitioner's location.

25. The Petitioner's business is the sale of GPS units. The Petitioner engaged the Joined Party to sell GPS units exclusively for the Petitioner. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business. During the initial four or five weeks the Petitioner provided everything that was needed for the Joined Party to perform the work. The Joined Party did not have a financial investment in a business and did not have significant business expenses. The Joined Party did not advertise his services to the general public and was prohibited from performing similar work for others.

26. The Petitioner trained the Joined Party how to sell the Petitioner's products. The Petitioner told the Joined Party what to say when talking to sales prospects. Training is a method of control because it specifies how the work must be performed. Although sales work requires some degree of skill it was not shown that any significant skill or special knowledge was required to perform the work. 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)

27. The Joined Party was not paid by time worked but was paid a commission based on production. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, (emphasis supplied) bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

28. Although the Joined Party only performed services for the Petitioner for a period of four months or less the evidence reveals that the intent of the parties was to develop a relationship of relative permanence and a relationship that would transition into an employment relationship. Either party had the right, without liability for breach of contract, to terminate the relationship at any time, with or without cause and with or without prior notice. 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."

29. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person

or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

30. The *Independent Contractor Agreement* provided the Petitioner with the right to control the means which were to be used to perform the work to a significant degree. Other Restatement factors also point to an employer-employee relationship. By considering the totality of the evidence it is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the determination dated January 11, 2011, be AFFIRMED.

Respectfully submitted on June 2, 2011.

R. O. SMITH, Special Deputy
Office of Appeals