AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2811380
REALTY TRADE
14 E WASHINGTON ST STE 300B
ORLANDO FL 32801-2328

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

PROTEST OF LIABILITY
DOCKET NO. 2011-31764L

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 27, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 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. - 2811380
REALTY TRADE
VIRTUAL GROUP INC
14 E WASHINGTON ST STE 300B
ORLANDO FL 32801-2328

PROTEST OF LIABILITY
DOCKET NO. 2011-31764L

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 27, 2010.

After due notice to the parties, a telephone hearing was held on May 19, 2011. An attorney appeared on behalf of the Petitioner and called a shareholder of the Petitioner, a sales consultant of the Petitioner, and a sales contractor of the Petitioner as witnesses. A tax specialist represented the Respondent and called a tax auditor III 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 from the Petitioner on May 23, 2011.

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.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated in September 2006, for the purpose of running a marketing and advertising firm.

2. An audit was performed by a tax auditor III at the office of the Petitioner's accountant on October 6, 2010. The Petitioner's accountant was present for the audit.

3. The tax auditor III found a large number of workers performing services as sales representatives for the Petitioner. The Petitioner listed the sales representatives as independent contractors.

4. The tax auditor III determined that those workers performing services as sales representatives were employees of the Petitioner. The determination excluded those workers with their own corporations or businesses.

5. The Petitioner sought workers through referrals and advertisements.

6. The sales representatives were expected to prospect for new clients, to look for individuals renting or selling vacation properties. The sales representative was expected to contact prospective clients, offer the Petitioner's services, and sign up the client for services.

7. Sales representatives were required to sign a written agreement at the time of hire. The agreement specifies that the relationship between the parties is an independent contractor relationship.

8. Sales representatives were allowed choose to work from the Petitioner's place of business or from the worker's home. Sales representatives electing to work from the Petitioner's office were limited to the Petitioner's hours of operation. The workers were allowed to determine their own hours and to come and go at will.

9. The Petitioner did not provide training to the workers. The Petitioner made scripts available. The workers were not required to follow the scripts.

10. The Petitioner did not supervise or direct the sales representatives.

11. The sales representatives could purchase leads from the Petitioner or from an approved vendor. The Petitioner would withhold $150 from each commission resulting from a sale based upon a lead provided by the Petitioner.

12. The sales representatives were paid a commission based upon sales. The percentage is established by the Petitioner based upon the worker's length of service and performance. The Petitioner held the sales representative's pay until payment was received from the client.

13. The Petitioner made computers and phones available for those representatives that chose to work in the Petitioner's office.

Conclusions of Law:

14. 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.

15. 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).

16. 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).

17. 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.

18. 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.

19. 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.

20. The evidence presented at this hearing reveals that the Petitioner did not exercise control over where, when, or how the work was performed. The workers were allowed to determine the location of the work, set their own schedules, and work without any direct supervision or instruction from the Petitioner.

21. The Petitioner provides a place in which the worker can elect to work. The workplace provided by the Petitioner includes the telephone and computer needed to perform the work. The workers are responsible for any equipment used outside of the workplace. The workers were required to purchase their leads, either from the Petitioner or from an approved vendor.

22. The Petitioner paid the workers by commission. Commission is payment by the job and not by time. Payment by the job is indicative of an independent contractor relationship.

23. The parties signed a written agreement that indicated that the relationship was an independent contractor relationship. While not dispositive in and of itself, this certainly indicates that the parties considered that an independent contractor relationship was being created.

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

25. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law on May 23, 2011. The special deputy considered the proposals. Where the proposals are reflected in the record, they are incorporated in this recommended order. Where the proposals do not comport with the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated December 27, 2010, be REVERSED.

Respectfully submitted on July 26, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals