AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 3004283

CLIP N SAVE HAIR SALON
ATTN: ELLA MONIZ
6500 N ATLANTIC AVE SUITE A
CAPE CANAVERAL FL 32920-3881

PROTEST OF LIABILITY
DOCKET NO. 2011-36994L

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

O R D E R

This matter comes before me for final Agency Order.

The issues before me are whether services performed for the Petitioner by the Joined Party and other individuals as hairstylists constitute insured employment, whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed an unemployment compensation claim in December 2010. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that she worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether the Joined Party worked for the Petitioner as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, she would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any others who worked under the same terms and conditions. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, she would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party and the other workers. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party and the other hairstylists were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to the Joined Party and

any other workers who performed services under the same terms and conditions. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because she had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on April 19, 2011. The Petitioner appeared and was represented by its attorney. The Petitioner's owner and partner testified as witnesses on behalf of the Petitioner. The Joined Party represented herself and called her boyfriend as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Special Deputy issued a recommended order on June 13, 2011.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a sole proprietorship, established May 27, 2008, for the purpose of running a hair salon. The Petitioner retains three hair stylists, all of which are considered independent contractors by the Petitioner.

2. The Joined Party performed services for the Petitioner as a hair stylist from October 9, 2009, through November 20, 2010.

3. The Joined Party contacted the Petitioner while searching for work. The Joined Party signed a contract with the Petitioner at the time of hire. The Joined Party signed a subsequent Independent Contractor Agreement on or about January 11, 2010.

4. The January 11, 2010, *Independent Employment Agreement* is a standard document; created and provided by the Petitioner. The Agreement indicates that the relationship between the parties is an independent contractor relationship. The agreement includes a non-compete clause that restricts the Joined Party from owning a business, participating in management, or performing services that compete with the Petitioner within a three mile radius for the period of one year. The Petitioner did not elect to enforce the non-compete clause.

5. The Petitioner was open for business Monday through Friday, from 9am to 6pm. The Petitioner's Saturday hours were from 9am to 5pm. The Petitioner was closed on Sundays. The Petitioner maintained this schedule, providing services during the hours of operation.

6. The Joined Party was required to report to the Petitioner's place of business at 8:45 each morning. The Petitioner would either verbally warn or send the Joined Party home for the day if the Joined Party arrived after 9am. The Joined Party performed services as a hairstylist, primarily dealing with walk in clients. The Joined Party was expected to perform closing duties at the conclusion of the work day. The Petitioner posted a list of closing duties which included various cleaning tasks including, cleaning towels, taking out garbage, and cleaning and dusting the salon.

7. The Joined Party provided her own hand tools including clippers, trimmers, and shears. The Petitioner provided towels, color, shampoos, and neck strips. The Petitioner provided a work space for the Joined Party to work from and store her tools.

8. The Joined Party was paid a sliding scale commission. The commission increased dependent upon the production of the Joined Party. The commission rate was established by the Petitioner. The Joined Party was paid once per week. The Petitioner kept track of pay through the use of a ticket book supplied to the Joined Party.

9. The work required the Joined Party to possess a cosmetology license.

10. The Petitioner could discharge the Joined Party at will and without liability.

Based on these Findings of Fact, the Special Deputy recommended that the determination be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail postmarked June 27, 2011. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were

supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

The Petitioner takes exception to Finding of Fact #6. A review of the record reveals that a portion of Finding of Fact #6 must be modified because it does not accurately reflect the evidence provided at the hearing. The record reflects that the Joined Party testified that she folded towels and did not mention cleaning towels. Finding of Fact #6 is amended to say:

> The Joined Party was required to report to the Petitioner's place of business at 8:45 each morning. The Petitioner would either verbally warn or send the Joined Party home for the day if the Joined Party arrived after 9am. The Joined Party performed services as a hairstylist, primarily dealing with walk in clients. The Joined Party was expected to perform closing duties at the conclusion of the work day. The Petitioner posted a list of closing duties which included various cleaning tasks including taking out garbage, cleaning and dusting the salon.

Additionally, the Petitioner proposes alternative findings of fact and conclusions of law. The Petitioner also requests consideration of additional evidence not provided at the hearing. Along with its exception to Finding of Fact #6, the Petitioner also specifically takes exception to Finding of Fact #9 and Conclusions of Law #17 and 19-21. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact, including the amended Finding of Fact #6 and Finding of Fact #9, are supported by competent substantial evidence in the record. A review of the record also reveals that the Special Deputy's Conclusions of Law, including Conclusions of Law #17 and 19-21, reflect a reasonable application of the law to the facts. As a result, the Agency may not further modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as amended herein. Rule 60BB-2.035(19)(a) of the Florida Administrative Code prohibits the acceptance of evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. The exceptions are respectfully rejected.

The amended Findings of Fact and Conclusions of Law support the Special Deputy's ultimate conclusion that an employer/employee relationship existed between the Petitioner and the Joined Party. The Special Deputy's conclusion that the Petitioner exerted control over the Joined Party consistent with an employment relationship is supported by competent substantial evidence in the record. The Special Deputy's Conclusions of Law represent a reasonable application of law to the facts and are not rejected by the Agency.

A review of the record reveals that the Findings of Fact as amended herein are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The amended Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as amended in this order.

In consideration thereof, it is ORDERED that the determination dated February 7, 2011, 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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PROTEST OF LIABILITY
DOCKET NO. 2011-36994L

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 February 7, 2011.

After due notice to the parties, a telephone hearing was held on April 19, 2011. An attorney appeared for the Petitioner and called the Petitioner's owner and a partner as witnesses. The Joined Party appeared and testified and called a friend as a witness. 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 and other individuals constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

11. The Petitioner is a sole proprietorship, established May 27, 2008, for the purpose of running a hair salon. The Petitioner retains three hair stylists, all of which are considered independent contractors by the Petitioner.

12. The Joined Party performed services for the Petitioner as a hair stylist from October 9, 2009, through November 20, 2010.

13. The Joined Party contacted the Petitioner while searching for work. The Joined Party signed a contract with the Petitioner at the time of hire. The Joined Party signed a subsequent Independent Contractor Agreement on or about January 11, 2010.

14. The January 11, 2010, *Independent Employment Agreement* is a standard document; created and provided by the Petitioner. The Agreement indicates that the relationship between the parties is an independent contractor relationship. The agreement includes a non-compete clause that restricts the Joined Party from owning a business, participating in management, or performing services that compete with the Petitioner within a three mile radius for the period of one year. The Petitioner did not elect to enforce the non-compete clause.

15. The Petitioner was open for business Monday through Friday, from 9am to 6pm. The Petitioner's Saturday hours were from 9am to 5pm. The Petitioner was closed on Sundays. The Petitioner maintained this schedule, providing services during the hours of operation.

16. The Joined Party was required to report to the Petitioner's place of business at 8:45 each morning. The Petitioner would either verbally warn or send the Joined Party home for the day if the Joined Party arrived after 9am. The Joined Party performed services as a hairstylist, primarily dealing with walk in clients. The Joined Party was expected to perform closing duties at the conclusion of the work day. The Petitioner posted a list of closing duties which included various cleaning tasks including, cleaning towels, taking out garbage, and cleaning and dusting the salon.

17. The Joined Party provided her own hand tools including clippers, trimmers, and shears. The Petitioner provided towels, color, shampoos, and neck strips. The Petitioner provided a work space for the Joined Party to work from and store her tools.

18. The Joined Party was paid a sliding scale commission. The commission increased dependent upon the production of the Joined Party. The commission rate was established by the Petitioner. The Joined Party was paid once per week. The Petitioner kept track of pay through the use of a ticket book supplied to the Joined Party.

19. The work required the Joined Party to possess a cosmetology license.

20. The Petitioner could discharge the Joined Party at will and without liability.

Conclusions of Law:

21. 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.

22. 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).

23. 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).

24. 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.

25. 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.

26. 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.

27. The evidence presented in this hearing shows that the Petitioner exercised control over where and when the work was performed. The Joined Party had a set schedule enforced by the Petitioner. The Joined Party was either warned or sent home if late for work. The Petitioner expected the Joined Party to perform services at the Petitioner's place of business and during the Petitioner's hours of operation. An independent contractor can generally choose when the work is to be performed and where possible where it is to be performed.

28. The parties signed an independent contractor agreement. The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "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."

29. The independent contractor agreement included a covenant not to compete. The non-compete restricted the Joined Party from engaging in her chosen profession in any meaningful way within a three mile radius and for a one year period. While the geographic and temporal scope may have been reasonable, it demonstrates control during and after the conclusion of the relationship. While the Petitioner may have elected to not enforce the clause, the Petitioner had the power to enforce it at anytime.

30. The Joined Party was paid a commission. The percentage was based upon a sliding scale based upon production and set by the Petitioner. Such a method of payment is more indicative of an employer-employee relationship.

31. The Petitioner could discharge the Joined Party at anytime and without liability. 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."

32. A preponderance of the evidence presented in this hearing demonstrates that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

33. Section 443.036(21), Florida Statutes, provides:
"Employment" means a service subject to this chapter under s. 443.1216, which is performed by an employee for the person employing him or her.

34. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:
The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
(1) An officer of a corporation
(2) An individual who, under the usual common law rules applicable in determining the employer-employee relationship is an employee.

35. Section 443.1215, Florida Statutes, provides:
Each of the following employing units is an employer subject to this chapter:
i) An employing unit that:
a) In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
b) For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

36. The Petitioner maintained consistent hours of operation. The Petitioner was open Monday through Saturday each week during the year. Therefore the Petitioner meets the liability requirements for Florida unemployment compensation contributions effective, January 1, 2010.

Recommendation: It is recommended that the determination dated February 7, 2011, be AFFIRMED.

Respectfully submitted on June 13, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals