AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2288391
RC ACOUSTIC CORP
6157 NW 167TH ST STE F9
HIALEAH FL 33015-4318

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

PROTEST OF LIABILITY
DOCKET NO. 2011-36995L

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 31, 2011, is AFFIRMED.

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. - 2288391
RC ACOUSTIC CORP
ATTN: SARAH CARRASQUIILLO
6157 NW 167TH ST STE F9
HIALEAH FL 33015-4318

PROTEST OF LIABILITY
DOCKET NO. 2011-36995L

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 31, 2011.

After due notice to the parties, a telephone hearing was held on May 18, 2011. The Petitioner's vice president appeared and testified at the hearing. 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 subchapter S corporation, incorporated in October 1999 for the purpose of running an acoustical ceiling business.

2. The Joined Party provided services for the Petitioner as an acoustical ceiling installer. The Joined Party worked as an employee of the Petitioner from August 2007 through October 2007. The

Joined Party and the Petitioner separated in October 2007. The Joined Party performed services for the Petitioner on an 'as-needed' basis from April 2010 through December 2010.

3. The Joined Party performed the same type of work during both periods of service with the Petitioner. The difference between the two periods of service was that in the April 2010 through December 2010 period, the Joined Party was used on an as needed basis as opposed to a full time basis.

4. The Petitioner would contact the Joined Party to see if he were available for work. The Joined Party could refuse work.

5. The Joined Party was covered by the Petitioner's workmen's compensation insurance while on the job.

6. The Joined Party was paid $16 per hour by the Petitioner. The Joined Party's pay was not held.

7. The Joined Party was generally required to work from 7am through 3:30 pm while on the job. Work times varied due to the needs of the particular client.

8. The Petitioner would inform the Joined Party of what work needed to be done prior to the work beginning. The Petitioner did not directly supervise or oversee the Joined Party's work.

9. The Joined Party would inform the Petitioner upon completion of the work and schedule for another job based upon the availability of work and the Joined Party.

10. The Petitioner provided scaffolding, viper guns, and all materials needed to perform the work. The Joined Party provided his own hand tools.

11. The Joined Party was not allowed to subcontract the work.

12. Either party could end the relationship at any time without penalty.

Conclusions of Law:

13. 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.

14. 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).

15. 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).

16. 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.

17. 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.

18. 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.

19. The evidence presented in this hearing reveals that the Joined Party performed services for the Petitioner as a full time employee from August 2007 through October 2007. The Joined Party worked for the Petitioner a second time from April 2010 through December 2010 doing the same work in an as needed capacity.

20. The Joined Party had no control over the hours work was to be performed. The Joined Party was required to work from 7am through 3:30 pm unless the particular client had other needs.

21. The Joined Party was covered by the Petitioner's workmen's compensation insurance while on the job. Such coverage is a strong indicator of employment.

22. The Joined Party was paid by the hour as opposed to by the job. Pay by time tends to be indicative of an employer-employee relationship between the parties.

23. The Petitioner provided the most tools, equipment, and materials needed to perform the work. The Joined Party was only required to provide his own hand tools.

24. The relationship was terminable at will. Either party could end the relationship at anytime without penalty. Such a relationship suggests employment.

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

Recommendation: It is recommended that the determination dated January 31, 2011, be AFFIRMED.

Respectfully submitted on July 25, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals