AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2752767
PRMA INC
778 S MILITARY TRL
DEERFIELD BEACH FL 33442-3025

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

PROTEST OF LIABILITY
DOCKET NO. 2011-42309L

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 February 16, 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. - 2752767
PRMA INC
PEER REVIEW MEDIATION & ARBITRATION
ATTN:MARC COMBS
778 S MILITARY TRL
DEERFIELD BEACH FL 33442-3025

PROTEST OF LIABILITY
DOCKET NO. 2011-42309L

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 16, 2011.

After due notice to the parties, a telephone hearing was held on June 24, 2011. The Petitioner's chief financial officer appeared and testified at the hearing. The Joined Party appeared and testified in her 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 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.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

Jurisdictional Issue: NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18). The hearing was originally scheduled for May 11, 2011. After due notice, the Petitioner did not appear at the hearing. The Petitioner had written down the wrong time for the hearing on the schedule. The Petitioner realized the mistake and immediately contacted the agency in order to correct the situation. The Petitioner's failure to

appear was the result of human error and the Petitioner exercised due diligence in rectifying the error once it became known. Therefore, there is good cause to proceed with the hearing.

Findings of Fact:

1. The Petitioner is a subchapter C corporation, incorporated in April 2001, for the purpose of running a business performing medical mediation for the medical and legal community.

2. The Joined Party provided services as a telephone solicitor for the Petitioner from February 5, 2005, through December 16, 2010.

3. The Joined Party was expected to report to work from 8:30 am until 5 pm, Monday through Friday. The Petitioner changed the Joined Party's work hours to 9am through 4pm in 2007. The Petitioner changed the Joined Party's work hours to 8am to 3pm in 2010. The Joined Party was expected to have lunch at her desk during the 2010 work hours.

4. The Joined Party received a W-2 from the Petitioner from 2005 through 2009. In 2009 the Joined Party received both a W-2 and a 1099 form from the Petitioner. After 2009 the Joined Party received 1099 forms. The change from W-2 to 1099 forms was due to the Petitioner changing the relationship from an employer-employee relationship to an independent contractor one. The Joined Party was never told she would be working as an independent contractor. The Joined Party's work conditions did not change during the course of her employment.

5. The Joined Party was given a schedule and protocol to determine what needed to be done each day. The Joined Party would consult a list of names in the Petitioner's database, make telephone calls, and update client information.

6. The Petitioner expected the Joined Party to work out of the place of business and during business hours.

7. The Joined Party was supervised and directed by the Petitioner. The Petitioner conducted a weekly review of the details of the Joined Party's performance. Problems with the Joined Party could result in the Petitioner monitoring the Joined Party's calls. The Petitioner reserved the right to place the Joined Party on probation.

8. The Petitioner required the Joined Party to attend general company meetings.

9. The Petitioner recorded the Joined Party's telephone calls and subsequently audited the calls. The Petitioner provided scripts to the Joined Party for use in making telephone calls.

10. The Joined Party was paid $450 per week at the time of hire. The pay was set by the Petitioner. The Joined Party received raises at the Petitioner's discretion. The Joined Party was paid $750 per week at the time of separation. The Joined Party was required to use a time card to clock in and out each day. The Petitioner reduced the Joined Party's pay in the event that the Joined Party did not work the required number of hours per week. The Petitioner deducted money for the Joined Party's insurance from each paycheck.

11. The Petitioner provided a workspace, computer, and telephone to the Joined Party. The Joined Party was not required to provide any tools, equipment, or materials for the work. The Joined Party was provided with a company email address.

Conclusions of Law:

12. 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.

13. 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).

14. 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).

15. 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.

16. 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.

17. 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.

18. The evidence presented in this case reveals that the Petitioner exercised control over where, when, and how the work was performed by the Joined Party. The Petitioner required that the Joined Party work set hours within the Petitioner's normal business hours. The Joined Party was required

to work from the Petitioner's place of business. The Petitioner required that the Joined Party attend company meetings and submit to discipline at the Petitioner's discretion.

19. The work performed by the Joined Party in telephone solicitation was an integral part of the Petitioner's mediation business.
20. The Petitioner provided all of the tools, equipment, and materials needed to perform the work. The Petitioner provided the workspace and a company email address to the Joined Party. The Joined Party had no expenses in connection with the work.
21. The Joined Party provided services to the Petitioner for a period of over 5 years. Such a length of service is indicative of a permanent relationship between the parties. Such a length of service does not indicate a temporary relationship as would exist in an independent contractor situation.
22. The parties created an employer-employee relationship at the time of hire. The Petitioner unilaterally altered the relationship to an independent contractor relationship in 2009. The work conditions did were not altered contemporaneously or subsequent to the change in relationship.
23. The Joined Party was paid by time. The Joined Party received a weekly amount based upon the expectation of a minimum number of hours worked. The Joined Party's pay was reduced in the event that the Joined Party did not work the required number of hours each week. The amount of the pay was determined by the Petitioner. Pay by time is indicative of an employer-employee relationship while pay by the job tends to show an independent contractor relationship.
24. 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.
25. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law on July 8, 2011. The Special Deputy considered the Proposals. Those Proposals that are reflected in the record are incorporated into the Recommended Order. Those Proposals that do not comport with the record are respectfully rejected.

Recommendation: It is recommended that the determination dated February 16, 2011, be AFFIRMED.

Respectfully submitted on August 15, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals