DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2798935
LAKELAND CLEANING CORP
3839 COUNTRY BND E
LAKELAND FL 33811-1303

RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2011-42311L

O R D E R

This matter comes before me for final Department 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 25, 2011, is MODIFIED to find that the portion of the determination from February 17, 2010, through September 30, 2010, is REVERSED, that the portion of the determination from October 1, 2007, through December 31, 2007, is AFFIRMED, and that the Petitioner's appeal of the portion from January 1, 2008, through February 16, 2010, is DISMISSED due to lack of jurisdiction.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **December, 2011**.

TOM CLENDENNING
Director of Workforce Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

THE DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2798935
LAKELAND CLEANING CORP
ATTN: ISMAEL MENDOZA
3839 COUNTRY BND E
LAKELAND FL 33811-1303

PROTEST OF LIABILITY
DOCKET NO. 2011-42311L

RESPONDENT:
State of Florida
THE DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
THE DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated February 25, 2011.

After due notice to the parties, a telephone hearing was held on September 12, 2011. The Petitioner was represented by its attorney. The Petitioner's president and a janitorial worker testified as witnesses for the Petitioner. The Respondent was represented by a Department of Revenue Tax Specialist. A Tax Auditor testified 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.

Issue:

Whether services performed for the Petitioner constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a corporation which has operated a janitorial business since October 1, 2007. The business is operated by the Petitioner's president who is also a pastor of a church.

2. Another company, referred to as ENA, obtains contracts to perform commercial cleaning. ENA then assigns the work to the Petitioner to perform the janitorial services. ENA provides some of the equipment such as floor stripping and polishing machines which are needed to complete the work. ENA also requires the Petitioner to purchase the cleaning chemicals and supplies from ENA.

3. The Petitioner does not perform the actual janitorial services. The Petitioner's president engages individuals to perform those services, many of whom are members of the president's congregation. On or about January 1, 2008, the president engaged his sister-in-law, Febe Sobalvarro, to perform janitorial services. The Petitioner and Febe Sobalvarro did not enter into any written agreement.

4. In March 2008 the Petitioner required the janitorial workers to sign an *Independent Contractor Agreement and Acknowledgment* which provides that the worker is not an employee of the Petitioner and is not entitled to receive any fringe benefits. The Agreement provides that the Petitioner will not withhold taxes from the earnings. The Agreement provides that the worker is solely responsible for the provision of and maintenance of equipment and supplies, solely responsible for any insurance required, and solely responsible for the payment and actions of any of the worker's employees. The Agreement provides the Petitioner with the right to terminate the Agreement if the work is not performed satisfactorily. The Agreement states that the worker agrees not to compete or solicit or acquire the accounts from the Petitioner.

5. The Petitioner's witness, Manga Mejia, began performing services for the Petitioner as a janitorial worker in January 2009 and signed the *Independent Contractor Agreement and Acknowledgement* on January 4, 2009. Manga Mejia was a member of the congregation and was aware that the Petitioner's president operated a janitorial service. Manga Mejia did not have an investment in a business, did not have an occupational or business license, did not have liability insurance, and did not advertise cleaning services to the general public. Manga Mejia had previous cleaning experience from cleaning residences and from cleaning a restaurant.

6. The Petitioner offered the work assignment, a school, to Magna Mejia and negotiated the amount that the Petitioner would pay her to perform the work. The negotiated amount of pay was $1,300 every two weeks. The work did not require any special skill or knowledge and the Petitioner did not provide any training to Manga Mejia and did not tell her how to perform the work. The Petitioner provided everything that was needed to perform the work including brooms, mops, vacuums, and cleaning supplies. The Petitioner provided Magna Mejia with a key to the school and the code to the school's security system. Manga Mejia determined when to perform the work as long as the work was performed at night after school hours.

7. Manga Mejia was not required to personally perform the work. She hired two other workers and paid each of them $400 every two weeks. In addition to helping her clean the school, the two helpers helped her clean the restaurant. She did not request or obtain permission from the Petitioner to hire the two helpers.

8. Despite the wording of the *Independent Contractor Agreement and Acknowledgement* the workers are not prohibited from working for a competitor or prohibited from performing janitorial services for others.

9. The Petitioner's contract with ENA required the workers to wear a uniform shirt with "cleaning team" printed on the shirt. The workers were required to purchase the shirt from ENA or from the Petitioner.

10. The Petitioner does not supervise the workers while the work is being performed. However, a supervisor with ENA does periodically inspect the work. If there were any problems or if the client company was not satisfied with the work, ENA would contact the Petitioner. The Petitioner would then inspect the work and was responsible for resolving the complaint. Manga Mejia was paid by the job regardless of the number of hours worked. The Petitioner did not pay her any additional money to redo work that was not performed properly; however, if the client requested additional services be performed, additional money was paid to Manga Mejia.
11. The Petitioner did not withhold payroll taxes from the pay of Manga Mejia and did not provide any fringe benefits. The Petitioner reported the earnings of each worker on Form 1099-MISC as nonemployee compensation.
12. Febe Sobalvarro filed a claim for unemployment compensation benefits. When Febe Sobalvarro did not receive credit for her earnings with the Petitioner an investigation was assigned to the Department of Revenue to determine if Febe Sobalvarro performed services for the Petitioner as an independent contractor or as an employee.
13. By determination dated February 16, 2010, the Department of Revenue issued a determination which states "We have reviewed the information submitted and have determined that the person(s) performing services as JANITORS are employees. This determination is retroactive to 1/1/2008."
14. The determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter." The determination also advises "You are still required to submit quarterly reports to include those workers covered under this determination and you are required to pay tax on those wages. If a protest results in a ruling in your favor, we will refund taxes you paid on the worker(s) at the time of this determination." The Petitioner filed a timely protest on March 5, 2010, and docket number 2010-49434L was assigned.
15. By letter dated August 4, 2010, before the protest was scheduled for a hearing, the Petitioner withdrew its protest of the February 16, 2010, determination. A final Agency Order dismissing the Petitioner's protest was issued on August 24, 2010.
16. Although the Petitioner withdrew its protest the Petitioner did not comply with the February 16, 2010, determination and did not report and pay unemployment tax on the earnings of the janitorial workers.
17. In 2010 the Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2009 tax year to ensure compliance with the Florida Unemployment Compensation Law. During the course of the audit the Tax Auditor concluded that the Petitioner was not in compliance with the Unemployment Compensation Law and extended the audit back to the inception of the business, October 1, 2007, and forward to September 30, 2010.
18. By an undated Notice of Proposed Assessment received by the Petitioner on or about March 7, 2011, the Department of Revenue notified the Petitioner of the additional taxes that were due for the period October 1, 2007, through September 30, 2010, as a result of the audit. The Petitioner filed a protest by letter dated March 14, 2011.

Conclusions of Law:

19. Section 443.141(2)(c), Florida Statutes, provides:
    (c) *Appeals.*--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on

the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131. (emphasis supplied)

20. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides: Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.

21. The Petitioner filed a timely protest of the February 16, 2010, determination requiring the Petitioner to report the wages paid to the janitorial workers and to pay tax on those earnings. However, the Petitioner did not prosecute the appeal and withdrew its protest. As a result of the Petitioner's withdrawal a final Agency Order was issued dismissing the protest. Thus, the determination of February 16, 2010, has become final and binding on both the Petitioner and the Respondent. The determination is retroactive to January 1, 2008, and clearly addresses not just the services performed by Febe Sobalvarro but the services performed by all of the Petitioner's workers classified as janitors. Thus, the determination holding that all of the janitorial workers performing services for the Petitioner from January 1, 2008, through February 16, 2010, are the Petitioner's employees has become final and may not be disturbed.

22. Although the Department of Economic Opportunity lacks jurisdiction on the issue of whether the Petitioner is liable for payment of unemployment tax from January 1, 2008, through February 16, 2010, the audit covered the time period from October 1, 2007, through September 30, 2010. Thus, the Petitioner's liability for the periods of time from October 1, 2007 through December 31, 2007, and from February 17, 2010, through September 30, 2010, must still be addressed. The issue of 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.

23. 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).

24. 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). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Agency is limited to applying only Florida common law in determining the nature of an employment relationship.

25. 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.

26. 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.

27. 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.

28. 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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

29. 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."

30. The Petitioner did not enter into any written agreements with the workers until March 2008. No evidence was presented to show the existence of any written or verbal agreements between the Petitioner and the workers prior to March 2008. The Petitioner's witness, Manga Mejia, did not perform services for the Petitioner prior to 2009. Her testimony is not sufficient to establish the terms and conditions under which other workers performed services prior to 2009.

31. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error.

32. The Petitioner's evidence is not sufficient to show that the audit determination of the Department of Revenue was in error for the period of time from October 1, 2007, through December 31, 2007.

33. Regarding Manga Mejia and the other janitorial workers who performed services for the Petitioner from February 17, 2010, through September 30, 2010, the evidence reveals that they all performed services under the written *Independent Contractor Agreement and Acknowledgment.* Some aspects of the Agreement are inaccurate or misleading. Despite the wording of the Agreement

which states that the workers are responsible for providing and maintaining all equipment and supplies, the Petitioner provided all of the equipment and supplies.

34. 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. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

35. Although the Petitioner did exercise some control over the workers, including the provision of equipment and supplies, the evidence reveals that the Petitioner's primary concern was not when or how the work was performed. The Petitioner's workers are not required to personally perform the work. The Petitioner does not supervise the workers or even inspect the completed work unless the Petitioner receives a complaint from the client. The workers are not paid by time worked but by the job or by production. These facts reveal that the Petitioner has shown that the determination of the Department of Revenue is in error for the period of time from February 17, 2010, through September 30, 2010.

Recommendation: It is recommended that the determination dated February 25, 2011, be MODIFIED to find that the portion of the determination from February 17, 2010, through September 30, 2010, be REVERSED, that the portion of the determination from October 1, 2007, through December 31, 2007, be AFFIRMED, and that the Petitioner's appeal of the portion from January 1, 2008, through February 16, 2010, be DISMISSED due to lack of jurisdiction.

Respectfully submitted on October 26, 2011.

R. O. SMITH, Special Deputy
Office of Appeals