AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 3007120
BAYSHORE LANDING LLC
2550 S BAYSHORE DRIVE
MIAMI FL 33133-4743

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

PROTEST OF LIABILITY
DOCKET NO. 2011-52136L

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 11, 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. - 3007120
BAYSHORE LANDING LLC
ATTN: JOE TRIMBLE
2550 S BAYSHORE DRIVE
MIAMI FL 33133-4743

PROTEST OF LIABILITY
DOCKET NO. 2011-52136L

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 11, 2011.

After due notice to the parties, a telephone hearing was held on June 14, 2011. The Petitioner's controller and the Petitioner's general manager appeared and testified at the hearing. The Joined Party appeared and testified on his own behalf. A tax specialist 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.

Findings of Fact:

1. The Petitioner is a limited liability company, established for the purpose of running a marina property. The marina property includes docks, restaurants, and offices.

2. The Joined Party performed services for the Petitioner as an assistant property manager from October 4, 2008, through December 3, 2010.

3. The Joined Party was expected to maintain the docks and structures of the property. The Joined Party's work included repairs and maintenance of the structures and facilities.

4. The Joined Party was offered the position by the Petitioner's property manager. The Joined Party was not informed that he would be working as an independent contractor at the time of hire. The Petitioner required the Joined Party to sign a Waiver Agreement which indicated that the Joined Party was an independent contractor approximately one year after the date of hire.

5. The Joined Party was expected to report to work from 7am until 4pm from Monday through Friday. The Petitioner would require work on Saturdays as needed. The Joined Party was required to be on call if needed outside of normal work hours.

6. The Joined Party was expected to clean ponds and check docks upon reporting to work. The Joined Party would then report to the supervisor to find out what needed to be done.

7. The Joined Party was paid $15 per hour. The Joined Party was paid every 2 weeks. The Petitioner determined the rate of pay. The Joined Party was required to clock in and out each work day using a time card.

8. The Petitioner warned the Joined Party about drinking during the work day.

9. The Petitioner provided all tools, equipment and materials needed to perform the work.

Conclusions of Law:

10. 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.

11. 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).

12. 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).

13. 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.

14. 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.

15. 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.

16. The evidence presented in this case reveals that the Petitioner exercised control over where, when, and what services would be provided. The Petitioner established the work schedule as well as requiring that the Joined Party be on call to take care of any situation that arose outside of the normal work hours at the Petitioner's discretion. The work was all performed at the Petitioner's place of business although the nature of the work tended to dictate this particular condition. The Petitioner determined what specific tasks the Joined Party would perform each day at work.

17. The Joined Party performed services for the Petitioner for a period of over two years. Such a length of service tends to demonstrate a more permanent relationship than the temporary relationship implicit in an independent contractor relationship.

18. The Joined Party was paid by the hour and required to use a time card. Pay by time tends to be indicative of an employment relationship as opposed to pay by the job which is more common in an independent contractor relationship.

19. The Petitioner provided all of the tools, equipment, and materials needed to perform the work.

20. The Petitioner warned the Joined Party about drinking, tardiness, and leaving work early. While rules and standards can certainly be set within an independent contractor relationship, rules regarding when the work is to be performed or when the worker must report are more indicative of an employer-employee relationship between the parties.

21. 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 February 11, 2011, be AFFIRMED.

Respectfully submitted on August 2, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals