THE DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 3010713
VEHLTOR INC
303 SE 17TH STREET STE 309
OCALA FL 34471-4423

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

PROTEST OF LIABILITY
DOCKET NO. 2011-52138L

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 25, 2011, is AFFIRMED.

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

TOM CLENDENNING
Director of Workforce Services
THE DEPARTMENT OF ECONOMIC OPPORTUNITY

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 3010713
VEHLTOR INC
ATTN: TOM BURKE
303 SE 17TH STREET STE 309
OCALA FL 34471-4423

PROTEST OF LIABILITY
DOCKET NO. 2011-52138L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
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 25, 2011.

After due notice to the parties, a telephone hearing was held on July 7, 2011. An attorney appeared for the Petitioner and called the Petitioner's president, a franchisee, an investor, and an accountant as witnesses. The Joined Party appeared and testified on her 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 as office worker/assistant/consultants 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 subchapter C corporation, incorporated in 2009 for the purpose of running a vehicle consignment company.

2. The Joined Party provided services as an administrative assistant for the Petitioner from June 15, 2009, through November 30, 2010. The Joined Party was listed as a corporate officer of the Petitioner.

3. The Joined Party was placed on the payroll of an employee leasing company retained by the Petitioner on May 31, 2010. The work performed by the Joined Party did not change subsequent to May 31, 2010.

4. The Joined Party was required to answer telephones, enter data into the computers, and issue checks on behalf of the Petitioner.

5. The Joined Party was required to work at the Petitioner's place of business from 8am-5pm, Monday through Friday. The Joined Party was at times asked to work on Saturdays. The Joined Party was required to call if she were going to be late to work.

6. The Joined Party was informed of what needed to be done by the Petitioner. The Petitioner monitored the Joined Party's work and made changes as necessary.

7. The Petitioner provided a workspace, office supplies, a desk top computer, and a lap top computer for the Joined Party.

8. The Joined Party performed services for another company when instructed to do so by the Petitioner.

9. The Joined Party began work making $750 per week. The Joined Party was paid every two weeks.

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 controlled where, when, and how the work was performed. The work was performed at the Petitioner's place of business and within the Petitioner's hours of operation. The work was monitored by the Petitioner and changed at the Petitioner's discretion.

17. The Petitioner provided all of the equipment and materials needed to perform the work. The Petitioner provided a workspace, telephone, and computers to the Joined Party.

18. The Joined Party provided services for the Petitioner for over two years. Such a length of service is indicative of a more permanent relationship than is consistent with an independent contractor relationship.

19. The Joined Party was paid a salary by the Petitioner. Pay by time is consistent with an employer-employee relationship. An independent contractor relationship would generally be paid by the job.

20. The Petitioner made the Joined Party into an employee in May of 2010. There were no changes in the work conditions or in the relationship between the parties as a result of this change.

21. Florida Statutes Section 443.1216(1)(a) states that, "The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:

    1. An officer of a corporation."

22. The Joined Party was an officer of the Petitioner's corporation. While the Petitioner contended that the services performed by the Joined Party as a corporate officer were unpaid services, the issuance of checks was a part of the job description of the Joined Party. As such the services cannot be separated from one another. Even were the services severable, the issue would still be determined by a common law analysis.

23. A preponderance of the evidence presented in this case reveals that the Petitioner exercised 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 25, 2011, be AFFIRMED.

Respectfully submitted on September 13, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals