AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2985189
RAFAEL LOPEZ PA
8461 SW 179TH ST
MIAMI FL 33157

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

PROTEST OF LIABILITY
DOCKET NO. 2011-57434L

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 April 11, 2011, is MODIFIED to reflect a retroactive date of October 1, 2007. It is further ORDERED that the determination is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 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

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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 April 11, 2011.

After due notice to the parties, a telephone hearing was held on June 22, 2011. The Petitioner, represented by the Petitioner's president, appeared and testified. The Petitioner's Certified Public Accountant testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified. Two witnesses testified for the Joined Party.

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 working as real estate assistants 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 Florida profit corporation which was formed in 1994 to operate a real estate sales business. The Petitioner's president is a licensed real estate sales agent who rents an office from a real estate broker. The president is the only individual who sells real estate for the Petitioner. The Petitioner has had a number of individuals who performed other services for the business, including the Joined Party.
2. In 2007 the Joined Party was employed by another real estate sales agent, who worked for the same real estate broker as the president, as a real estate assistant. The Joined Party lost her

employment and the Petitioner's president contacted the Joined Party and told her that the Petitioner needed a real estate assistant to help with office duties. The president told the Joined Party that the hours of work were from 9:30 AM until 5:30 PM, Monday through Friday and that the rate of pay was $10 per hour. The Joined Party replied that the other real estate sales agent had paid her $11 per hour and that she was not willing to accept $10 per hour. The Petitioner agreed to pay the Joined Party $11 per hour and informed her that she could receive a pay increase after three months if her work was satisfactory. The Joined Party accepted the Petitioner's offer of work. There was no other written or verbal agreement.

3. The Petitioner provided the Joined Party with work space in the Petitioner's office, a desk, computer, printer, telephone, fax machine, copy machine, and all other equipment and supplies that were needed to perform the work. The Joined Party was not required to provide anything to perform the work and did not have significant expenses in connection with the work. Occasionally, the Petitioner would instruct the Joined Party to take photographs of property. The Joined Party used her own car to drive to those properties. Sometimes the Joined Party requested to be reimbursed for the gas and the Petitioner reimbursed her for the gas expense.

4. Although the Joined Party had previously been employed as a real estate assistant, the Petitioner felt that she did not know anything about how to perform the work. The Petitioner provided initial training concerning how to perform the work. As time went by the Petitioner added additional duties and provided on-going training concerning how to perform the work.

5. The Joined Party was required to complete a timesheet for each bi-weekly pay period. The Joined Party was required to list the time she started work each day and the time that she left work each day. The Joined Party was required to deduct any time that she took for a lunch break. The Joined Party usually ate lunch at her desk. On some days the Petitioner allowed the Joined Party to eat lunch in the conference room. The Joined Party had to obtain permission to leave the office for her lunch break. If the Joined Party was absent from work she was required to notify the Petitioner of her absence. The Petitioner informed the Joined Party that the Joined Party was in charge of the Petitioner's office during the president's absences from the office.

6. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. Although the Joined Party objected the Petitioner refused to withhold payroll taxes. Over the years the Petitioner increased the Joined Party's pay to $15 per hour. The Petitioner paid the Joined Party for one week vacation each year and paid her for three holidays each year. The Petitioner paid bonuses to the Joined Party based on the number of properties sold by the Petitioner. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

7. The Petitioner became dissatisfied with the Joined Party's performance and in 2010 began removing some of the Joined Party's assigned duties. The Petitioner reduced the Joined Party's work schedule. During the time that the Joined Party was working reduced hours another real estate sales agent asked the Joined Party if she would do some accounting work for the sales agent. The Joined Party asked the Petitioner for permission to do the accounting work; however, the Petitioner's president told the Joined Party that he had a problem with the Joined Party performing services for anyone else.

8. The Joined Party was required to personally perform the work. She was not allowed to hire others to perform the work for her.

9. The Joined Party did not have any business license or occupational license and did not have business liability insurance. She did not perform services for others and did not offer to perform services to the general public. The Joined Party performed services only for the Petitioner.

10. In 2010 the Department of Revenue conducted an investigation concerning another individual who performed services for the Petitioner as an assistant. The Department of Revenue concluded that the services performed by that individual constituted insured employment. Based on that determination, which the Petitioner did not protest, the Petitioner reclassified all of its workers from independent contractor to employee, including the Joined Party in October 2010. The Petitioner did not discuss the reclassification with the Joined Party. The Petitioner just started withholding payroll taxes from the pay.

11. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. On January 24, 2011, the Petitioner terminated the Joined Party.

12. The Joined Party filed a claim for unemployment compensation benefits effective January 23, 2011. Her filing on that date established a base period from October 1, 2009, through September 30, 2010. When the Joined Party did not receive credit for her earnings during the base period of the claim a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services as an independent contractor or as an employee.

13. On April 11, 2011, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as real estate assistants are the Petitioner's employees retroactive to January 1, 2009. The Petitioner filed a protest by mail postmarked April 20, 2011.

Conclusions of Law:

14. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as real estate assistants 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.

15. 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).

16. 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).

17. 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.

18. 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.

19. 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.

20. 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.

21. The only initial agreement between the parties was a verbal agreement that the Joined Party would perform assigned duties as an assistant to the Petitioner's president at the Petitioner's office from 9:30 AM until 5:30 PM Monday through Friday, and that the Petitioner would pay the Joined Party $11 per hour. There was no agreement concerning whether the Joined Party would perform services as an employee or as an independent contractor. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

22. The Petitioner is a real estate sales business. The Joined Party performed services as an assistant to the Petitioner's president. The Joined Party's services were not separate and distinct from the Petitioner's business but were an integral and necessary part of the business. The Petitioner provided the place of work and everything that was needed to complete the work. The Joined Party did not have any investment in a business and did not have significant expenses in connection with the work. The Petitioner did not allow the Joined Party to perform services for others and did not allow the Joined Party to hire others to perform the work for her.

23. Although some skill and special knowledge may be necessary to perform work as a real estate assistant it was not shown that significant skill or knowledge was required. The Petitioner testified that the Petitioner had to train the Joined Party how to do everything because the Joined Party did not know how to perform the work. The Joined Party's skill and knowledge was obtained from the training provided by the Petitioner. Training is a method of control since it specifies how the work must be performed. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

24. The Petitioner determined both the method and the rate of pay. The Joined Party was paid by time worked rather than based on production or by the Job. Generally, payment by time worked indicates employment. The Petitioner also provided certain fringe benefits normally associated with employment including paid vacation, paid holidays, and bonuses. In addition to the factors

enumerated in the Restatement of Law, *the* provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

25. The Joined Party performed services for the Petitioner from November 2007 until January 2011, a period in excess of three years. Either party could terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

26. The evidence adduced in this case reveals that the Petitioner controlled what work was performed, when it was performed, where it was performed, and how it was performed. The Petitioner controlled the financial aspects of the relationship because the Petitioner controlled the rate of pay and the hours of work. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

27. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as real estate assistants constitute insured employment. The determination issued by the Department of Revenue is retroactive to January 1, 2009; however, the evidence reveals that the Joined Party performed services for the Petitioner as a real estate assistant as early as November 2007.

28. Section 443.1215, Florida States, provides:
    (1) Each of the following employing units is an employer subject to this chapter:
        (a) An employing unit that:
            1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
            2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

29. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.

30. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

31. The Petitioner's president has been active in the operation of the Petitioner's business since 1994. The evidence reveals that the Petitioner's president performed services for the Petitioner during at least twenty different weeks of the year. Thus, based on the services performed by the corporate officer the Petitioner has established liability for payment of unemployment compensation tax. The Joined Party began performing services for the Petitioner during the fourth calendar quarter 2007. Thus, the retroactive date of the determination should be the beginning of the fourth calendar quarter 2007, October 1, 2007.

Recommendation: It is recommended that the determination dated April 11, 2011, be MODIFIED to reflect a retroactive date of October 1, 2007. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on June 30, 2011.

R. O. SMITH, Special Deputy
Office of Appeals