AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2785842
GOURMET FOR LIFE LLC
1197 W NEWPORT CENTER DR
DEERFIELD BEACH FL 33442-7732

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

PROTEST OF LIABILITY
DOCKET NO. 2011-6497L

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 November 5, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **June, 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. - 2785842
GOURMET FOR LIFE LLC
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DEERFIELD BEACH FL 33442-7732

PROTEST OF LIABILITY
DOCKET NO. 2011-6497L

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 November 5, 2010.

After due notice to the parties, a telephone hearing was held on April 18, 2011. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

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 salespeople 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 which was formed in August 2007 to prepare and deliver gourmet meals.
2. In 2009 the Petitioner decided to sell its meals at a kiosk located at a shopping mall on a trial basis. The Petitioner leased the kiosk for a three month period.

3. The Joined Party was employed at another kiosk at the same shopping mall; however, he had been notified by his employer that the kiosk was closing. The Petitioner's president approached the Joined Party and offered the Joined Party a job selling the gourmet meals at the kiosk which the Petitioner had leased. The president informed the Joined Party that the rate of pay was $8.00 per hour plus a commission on sales and that the job was for forty hours per week. The Joined Party needed a job and accepted the offer.

4. On May 5, 2009, the Petitioner and the Joined Party entered into a written *Agreement.* The *Agreement* specifies that the Joined Party is an independent contractor and that the Joined Party is personally responsible for his federal and state taxes and workers compensation. Although the Joined Party had never worked as an independent contractor and believed that he was hired to be an employee of the Petitioner, he signed the *Agreement* because he needed a job. The *Agreement* was not for a specified period of time.

5. The *Agreement* prohibits the Joined Party from owning, managing, operating, providing consultation to or working as an independent contractor for any other business substantially similar to or competitive with the Petitioner while performing services for the Petitioner or during a period of three years after termination of the *Agreement* within a radius of 100 miles of the Petitioner's business location.

6. The Joined Party began work for the Petitioner on May 8, 2009, and was the first salesperson hired by the Petitioner.

7. The Petitioner provided limited training concerning the Petitioner's product. The training was limited because selling the Petitioner's product was not "rocket science" but was a simple task that did not require major instructions. The Petitioner provided the place of work and a computer. Nothing else was required to perform the work and the Joined Party did not have any expenses in connection with the work.

8. The Petitioner determined the sales prices of the Petitioner's meals and the Joined Party was not allowed to deviate from the Petitioner's price schedule without permission.

9. The Petitioner determined the Joined Party's work schedule. Generally, the Joined Party worked from 10 AM until 5 PM. The Joined Party was required to complete a *Weekly Time Sheet* listing both the starting and ending times of work for each day. During most weeks the Joined Party worked 52.5 hours.

10. Although the Joined Party's starting rate of pay was $8.00 per hour, after approximately two or three weeks the Petitioner promoted the Joined Party to manager and increased the pay rate to $10 per hour. As manager the Joined Party interviewed and hired other sales persons. Those individuals hired by the Joined Party were paid by the Petitioner for the work which they performed.

11. The Joined Party was paid by the Petitioner on a weekly basis. No taxes were withheld from the pay and the Petitioner did not provide any fringe benefits such as health insurance, or paid time off. Although the Petitioner paid the Joined Party a bonus or commission for each sale, the vast majority of the Joined Party's earnings were the result of the hourly pay. At the end of 2009 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

12. From time to time the Petitioner's president would go to the kiosk to check on the Joined Party and the other salespeople. The purpose of the visits was to make sure that the salespeople were actively working and not goofing off. The president observed the Joined Party's sales techniques and told the Joined Party that he should be more aggressive and forceful and that he should go outside the kiosk and stop people who were walking by the kiosk.

13. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The president gave the Joined Party notice that the kiosk was closing due to lack of sales on July 31, 2009.

Conclusions of Law:

14. 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.

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 Petitioner's business is the preparation, sale, and delivery of meals to the Petitioner's customers. The work performed by the Joined Party was the sale of the Petitioner's meals. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the Petitioner's business. The Petitioner provided everything that was needed to perform the work and determined the prices that were to be charged to the Petitioner's customers. The Joined Party did not have any investment in a business and did not have any expenses in connection with the work.

22. The *Agreement* states that the Joined Party is an independent contractor. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "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."

23. The work performed for the Petitioner by the Joined Party was simple and did not require any major instruction or training. 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 significant portion of the Joined Party's remuneration was based on time worked rather than on production or by the job. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash.

25. The Petitioner hired the Joined Party to work at the kiosk leased by the Petitioner for an unspecified period of time. Unfortunately, the kiosk sales did not prove to be profitable for the Petitioner after three months and the Petitioner closed the kiosk. Either party had the right to terminate the relationship at any time without incurring a penalty for breach of contract. 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. Although the work performed by the Joined Party did not require direct supervision, the Petitioner checked on the Joined Party while the Joined Party was working to make sure that the Joined Party was actively working and not goofing off. The Petitioner provided instructions to the Joined Party concerning how he was to approach shoppers in the vicinity of the kiosk. The Petitioner determined what work was to be performed, when it was to be performed, and how it was to be performed. The Petitioner determined the rate of pay and controlled the product sales prices. The Petitioner controlled the financial aspects of the relationship.

27. 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.

28. It is concluded that the services performed for the Petitioner by the Joined Party and other similarly situated persons as salespeople constitute insured employment.

Recommendation: It is recommended that the determination dated November 5, 2010, be AFFIRMED.

Respectfully submitted on April 20, 2011.

R. O. SMITH, Special Deputy
Office of Appeals