THE DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2849027
CREDO CONSULTING ENGINEERS LLC
13375 NW 11TH PLACE
SUNRISE FL 33323-2932

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

PROTEST OF LIABILITY
DOCKET NO. 2011-69492L

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 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

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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 April 25, 2011.

After due notice to the parties, a telephone hearing was held on July 19, 2011. The Petitioner's president appeared and testified at the hearing. The Joined Party appeared and testified on his own behalf. A tax specialist II 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 received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party as a designer/drafter/mechanical engineer constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a limited liability company formed in March 2007, for the purpose of running an engineering business for architecture and construction.

2. The Joined Party provided services for the Petitioner from January 10, 2010, through December 30, 2010. The Joined Party began working on a part time basis during which time the Joined Party had a second job. The Petitioner offered a full time position to the Joined Party on April 22, 2010. The Joined Party accepted the full time position and quit his other job.

3. The Joined Party was responsible for design work, drafting, and mechanical engineering. The Joined Party would meet with clients and perform the necessary work. The Petitioner would check completed plans, returning them for corrections or revisions if needed.

4. The Joined Party was required to report to the Petitioner's place of business from 8am through 6pm, Monday through Friday.

5. The Joined Party was provided a cubicle, computer, and software by the Petitioner. The Petitioner provided a company credit card to the Joined Party to cover expenses. The Petitioner covered the Joined Party's gas expenses and any travel expenses. The Petitioner booked any airline tickets needed by the Joined Party for travel. The Petitioner provided business cards to the Joined Party. The business cards had the company logo, as well as the Joined Party's name. The Petitioner provided a company email address to the Joined Party.

6. The Joined Party was paid $3200 per month through bi-weekly checks. The Joined Party had two paid holidays.

7. The Petitioner provided the Joined Party with a daily to do list with information on what tasks needed to be accomplished that day.

8. The Petitioner warned the Joined Party about speaking without proper respect within the workplace. The Petitioner subsequently discharged the Joined Party for reported disrespectful talk. The Petitioner provided the Joined Party with $500 through a company check subsequent to the Joined Party's discharge.

Conclusions of Law:

9. 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.

10. 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).

11. 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).

12. 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.

13. 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.

14. 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.

15. The evidence presented in this case reveals that the Petitioner exercised control over where and when the work was performed. The Joined Party was expected to report to the Petitioner's place of business from 8am through 6pm each work day.

16. The Petitioner supplied the location, tools, and equipment necessary to perform the work. The Petitioner further provided the Joined Party with a company credit card. The Petitioner covered the Joined Party's travel expenses and booked flights on behalf of the Joined Party. The Joined Party was provided with business cards with the company name and logo as well as a company email address.

17. The Joined Party provided services for the Petitioner for approximately one year. Such a length of service tends to indicate a more permanent arrangement than the temporary nature of an independent contractor relationship.

18. The Joined Party was paid a salary. Payment by time is indicative of an employer-employee relationship.

19. The Petitioner warned and eventually discharged the Joined Party for reported disrespectful behavior. Verbal warnings for conduct not directly related to the work is more typical of an employer-employee relationship.

20. A preponderance of the evidence presented in this case reveals that the Petitioner established sufficient control as to create an employer-employee relationship between the parties.

21. The Petitioner provided Proposed Findings of Fact and Conclusions of Law on July 29, 2011. Included with the proposed findings were a copy of an email and a copy of timesheets. New evidence may not be submitted after the hearing has been closed. Therefore, the additional documents are respectfully rejected. The Proposed Findings were considered and where those findings are reflected in the record, they are incorporated into this recommended order. Where the findings do not comport with the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated April 25, 2011, be AFFIRMED.

Respectfully submitted on September 6, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals