AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2462948
UNITED REAL ESTATE VENTURES INC
240 CRANDON BLVD STE 167
KEY BISCAYNE FL 33149-1543

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

PROTEST OF LIABILITY
DOCKET NO. 2011-8514L

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 December 7, 2010, is AFFIRMED.

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

PETITIONER:
Employer Account No. - 2462948
UNITED REAL ESTATE VENTURES, INC.
ATTN: CATHERINE BEZZINA
240 CRANDON BLVD STE 167
KEY BISCAYNE FL 33149-1543

PROTEST OF LIABILITY
DOCKET NO. 2011-8514L

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 December 7, 2010.

After due notice to the parties, a telephone hearing was held on April 27, 2011. An attorney for the Petitioner appeared and called the Petitioner's general contractor, a worker, a plumber, and a carpenter as witnesses. The Joined Party appeared and testified on his own behalf. A tax specialist II appeared and testified for 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 on May 10, 2011.

Issue:

Whether services performed for the Petitioner by the Joined Party 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 Florida corporation, incorporated for the purpose of running a real estate development business. The Petitioner's developments are primarily located on a private island in the Bahamas. The island has a club with dining facilities and a commissary.

2. The Joined Party provided services for the Petitioner as a carpenter from June 2009 through October 2010.

3. The Petitioner paid to have the Joined Party transported from Florida to the Bahamas when work was to be performed. The Petitioner provided food and living accommodations for the Joined Party while in the Joined Party was providing services in the Bahamas. The Petitioner would pay to transport the Joined Party back and forth, between Florida and the Bahamas, for holidays and family events.

4. The Joined Party was expected to report to work at the work site each day at 7 am. The Joined Party was given a break at 10 am. The Joined Party was given a lunch break at noon. The Joined Party finished work for the day at 6pm. The hours of work were based upon the requirements of the club with regards to not disturbing guests and when food was served in the club.

5. The Joined Party would be instructed by the Petitioner in what needed to be done each day at the beginning of the day. The Joined Party was normally allowed to work unsupervised in the performance of the work as a skilled carpenter. The Petitioner would inspect the work at key phases and reserved the right to order the work torn down if not satisfied. The Joined Party was paid to fix mistakes.

6. The Joined Party provided those hand tools which could be carried on an aircraft. The Petitioner provided all large equipment, power tools, and materials needed to perform the work. The Joined Party had no expenses in conjunction with the work save the maintenance of hand tools.

7. The Joined Party was paid $25 per hour at the start of the term of service. The Joined Party's pay was subsequently increased to $30 per hour. The Joined Party was paid every two weeks.

8. The Joined Party was allowed to work for a competitor.

9. The Joined Party did not have his own business.

10. The Joined Party considered himself to be an employee.

Conclusions of Law:

11. 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.

12. 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).

13. 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).

14. 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.

15. 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.

16. 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.

17. The evidence presented in this case reveals that the Joined Party performed services for the Petitioner as a skilled carpenter. The court in Florida Gulf Coast Symphony, Inc., v. Department of Labor and Employment Security, Etc.,386 So.2d 259(Fla. 2nd DCA 1980) placed a diminished value upon direct control over the work in the case of work performed by skilled individuals. The court quoted Carnes v. Industrial Commission, 73 Ariz. 264, 240 P.2d 536(1952) stating that, "The controlling factor is: For whom is the work being performed, and who had the power to control the work and the employee?" In this case the Joined Party was directed as to what work needed to be done as well as what hours the work should be performed. The Joined Party was limited as to when breaks could be taken. The Petitioner inspected the work at times during the course of the work. The Petitioner could have the work torn down and re-done if it did not meet the Petitioner's requirements.

18. The Joined Party provided his own hand tools. The Petitioner provided all other tools, equipment, and materials needed to perform the work. The Petitioner paid for the Joined Party's travel, lodging, and meals while the Joined Party was at the work site. The Joined Party had no expenses in conjunction with the work.

19. The Joined Party provided services for the Petitioner for a period in excess of one year. Such a length of service tends to suggest a more permanent relationship than the temporary relationship implicit in an independent contractor agreement.

20. The Joined Party was paid an hourly rate. Pay by time tends to indicate an employer-employee relationship as opposed to payment by the job which is typical in an independent contractor situation.
21. The Joined Party was not in business for himself. The Joined Party did not have his own business and considered himself to be an employee of the Petitioner.
22. 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.
23. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law on May 10, 2011. Where the proposed findings are reflected by the record, they are incorporated in this recommended order. Where the findings do not comport with the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated December 7, 2010, be AFFIRMED.

Respectfully submitted on June 29, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals