DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 3028095
7 REACH MEDIA LLC
10211 PINES BLVD STE 215
PEMBROKE PINES FL 33026-6003

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

PROTEST OF LIABILITY
DOCKET NO. 2011-92496L

O R D E R

This matter comes before me for final Department 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 good cause is found to rescind the Recommended Order of Dismissal dated October 13, 2011, and the Petitioner's protest is accepted as timely filed. It is further ORDERED that the determination dated May 24, 2011, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **January, 2012**.

TOM CLENDENNING
Director of Workforce Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 3028095
7 REACH MEDIA LLC
ATTN PHILLIP VALDES
10211 PINES BLVD STE 215
PEMBROKE PINES FL 33026-6003

PROTEST OF LIABILITY
DOCKET NO. 2011-92496L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Director, Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated May 24, 2011.

After due notice to the parties, a telephone hearing was held on November 30, 2011. The Petitioner, represented by the Petitioner's owner, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

Findings of Fact:

1. The Petitioner is a Delaware limited liability company which has operated an internet advertising business from Florida since 2008. The Petitioner's owner is active in the operation of the business. Initially, the business was operated from the residence of the owner. In approximately May 2009 the owner moved the business to a business office. In approximately February 2011 the owner closed the business office and resumed operating the business from his residence.

2. The Petitioner has used, and is currently using, a mailing address which is a mail drop box at a packing and shipping store. The Petitioner has incorrectly used a zip code of 33026 rather than the correct zip code of 33025 for the mailing address. Generally, the Petitioner's owner or his wife pick up the mail from the drop box about once every week or two.

3. The Joined Party began performing services for the Petitioner, without pay, prior to March 2009. The Joined Party was a friend of the owner and his family. Beginning March 1, 2009, the owner told the Joined Party that he would pay her whatever he could afford to pay her for the work which she was performing. The Joined Party was working part time and the Petitioner paid her $1,000 per month. Generally, the rate of pay was based on time worked. When the Petitioner increased the amount of work provided to the Joined Party the Petitioner increased the pay to $2,000 per month.

4. Initially, the Joined Party performed the work from the owner's residence. When the Petitioner moved the business to the business office in May 2009 the Petitioner provided the Joined Party with workspace, including a desk, in the new office. The Joined Party used her own computer, however, the Petitioner provided everything else that was needed to perform the work. In February 2011 when the Petitioner closed the business office the Joined Party resumed working from the residence of the owner.

5. At the time of hire the Petitioner provided training to the Joined Party concerning what to do and how to do it. Generally, the Joined Party's duties consisted of clerical work including answering the telephone. The Joined Party was responsible for helping the owner with anything that the owner needed to be done.

6. The Petitioner provided the Joined Party with business cards listing the Petitioner's name and telephone number, and the Joined Party's name.

7. The Petitioner did not provide the Joined Party with a key to the office, however, the Joined Party may have been provided with a key on occasions when the Joined Party had to open the office because another worker was going to be late for work or absent from work.

8. The Petitioner did not maintain regular business office hours. The owner would determine what days to open the office and sometimes the owner would not open the office for several days at a time. The owner told the Joined Party when to work.

9. The Joined Party was not allowed to work for a competitor. The Joined Party was required to personally perform the work.

10. The Petitioner's president determined the amount of the Joined Party's pay each month. The Joined Party did not submit a bill or invoice to the Petitioner for the services which she performed. The Petitioner did not provide fringe benefits such as health insurance but did provide an end-of-year bonus to the Joined Party. The Petitioner did not reduce the Joined Party's pay during months that the Joined Party was absent or on vacation. The Petitioner did not reduce the Joined Party's pay for time the Joined Party spent redoing defective work.

11. The Petitioner did not withhold any payroll taxes from the pay. At the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

12. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The relationship was terminated in February 2011, a few weeks after the Petitioner closed the business office and resumed operating the business from the residence of the owner.

13. The Joined Party filed an initial claim for unemployment compensation benefits effective March 13, 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 with the Petitioner an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.

14. The Department of Revenue issued a determination on May 24, 2011, holding that the Joined Party was the Petitioner's employee and that the Petitioner was responsible for filing Employer's Quarterly Reports retroactive to March 1, 2009. The determination was mailed to the Petitioner's address of record using the incorrect zip code of 33026. Among other things the determination advises "This letter is an official notice of the above determination and will become conclusive and binding unless you file written application to protest this determination within twenty (20) days from the date of this letter."

15. The determination was received by the Petitioner on an unknown date. The Petitioner filed a written protest on July 1, 2011.

16. On August 5, 2011, the Agency for Workforce Innovation mailed an *Order to Show Cause* to the Petitioner directing the Petitioner to show cause why the Director should not dismiss the Petitioner's protest due to lack of jurisdiction. The *Order to Show Cause* was mailed to the Petitioner using the incorrect zip code of 33026. The Petitioner did not respond to the *Order to Show Cause*.

17. On or before September 26, 2011, a *Notice of Telephone Hearing Before Special Deputy* was mailed to the Petitioner using zip code 33026. At the same time a duplicate Notice was mailed to the Petitioner using the correct zip code 33025. The Notice directed the Petitioner to provide the name and telephone number of the person to be contacted for the hearing which was scheduled to be held on October 13, 2011.

18. The Petitioner received the *Notice of Telephone Hearing Before Special Deputy*, however, due to a misunderstanding or miscommunication between the Petitioner's owner and his wife, contact information was not provided. The special deputy attempted to contact the Petitioner, however, the only telephone number available to the special deputy was no longer in service.

19. A *Recommended Order of Dismissal* was mailed to the Petitioner on October 13, 2011, which was received by the Petitioner. The Petitioner made a written request for reopening of the protest on October 19, 2011.

Conclusions of Law:

20. Rule 60BB-2.035, Florida Administrative Code, provides:

(18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause

exists for a party's failure to attend the previous hearing.

If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.

21. Rule 60BB-2.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.

22. The Petitioner did not participate in the October 13, 2011, hearing due to human error. The Petitioner exercised due diligence in promptly requesting that the protest be reopened. Thus, good cause has been established.

23. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides:

    Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.

24. The Petitioner uses a third party address for mail purposes. The determination was not correctly mailed to the third party address because the determination bears an incorrect zip code. Since no evidence is availble concerning the date that the determination was received at the third party mail address, the protest is accepted as timely filed.

25. 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.

26. 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).

27. 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). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Agency is limited to applying only Florida common law in determining the nature of an employment relationship.

28. 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.

29. 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.

30. 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.

31. 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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

32. No evidence was presented to show the existence of any written or verbal agreement or contract between the Petitioner and the Joined Party. 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 can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

33. The Petitioner operates an on-line advertising business. The Joined Party was engaged by the Petitioner to perform clerical work and to assist the Petitioner's owner with anything that the Petitioner needed to be done. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business. The Joined Party was required to personally perform the work and she was not permitted to perform similar services for a competitor. No evidence was presented to show that the Joined Party had an investment in a business or offered services to the general public.

34. The Petitioner trained the Joined Party. The Petitioner told the Joined Party what to do and how to do it. The Petitioner controlled the work schedule and where the work was performed. The Petitioner determined both the method of compensation and the rate of compensation. Generally, the Petitioner paid the Joined Party by time worked rather than by 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.

35. The Joined Party performed services for the Petitioner for a period of approximately two 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."

36. The Petitioner controlled what work was performed, where it was performed, when it was performed, and how it was performed. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.
37. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that it be found that there is good cause to rescind the *Notice of Recommended Order of the Special Deputy* dated October 13, 2011. It is recommended that the Petitioner's protest be accepted as timely filed. It is recommended that the determination dated May 24, 2011, be AFFIRMED.

Respectfully submitted on December 2, 2011.

R. O. SMITH, Special Deputy
Office of Appeals