

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2869565

TRINDLE ENTERPRISES LLC
JEFFREY TRINDLE
828 PLEASANT HILL RD NW STE 20
LILBURN GA 30047-2757

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-49432L**

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals as managers constitute insured employment pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of liability.

The Joined Party filed an unemployment compensation claim in December 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that he worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether the Joined Party worked for the Petitioner as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, he would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any others who worked under the same terms and conditions. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, he would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party and the other workers. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party and the other managers were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to the Joined Party and any other workers who performed services under the same terms and conditions. The Petitioner filed a

timely protest of the determination. The claimant who requested the investigation was joined as a party because he had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on January 5, 2011. The Petitioner was represented by its president, and several witnesses testified on its behalf. The Joined Party appeared and testified on his own behalf. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a limited liability corporation, incorporated on or about March 4, 2008, for the purpose of running cellular telephone stores.
2. The Petitioner and the Joined Party were acquaintances of one another. The Petitioner, Joined Party, and a third party contemplated forming cellular telephone sales business as a three way partnership.
3. The Joined Party was experienced in the business and had two cellular telephone stores in operation.
4. The Petitioner and the third party discussed payment to the Joined Party in exchanged for part ownership in the Joined Party's cellular telephone business.
5. The third party subsequently abandoned the arrangement. The Petitioner and the Joined Party continued with the agreement. The Petitioner was to pay the Joined Party in exchange for a share of the Joined Party's business. The Petitioner was to open stores of his own as well as part of the business agreement.
6. The Joined Party continued to operate his businesses until the arrangement collapsed. The Joined Party maintained the property leases, hired workers, and generally ran the business. The Joined Party determined what hours he would work and what work those hours would be spent on.

Based on these Findings of Fact, the Special Deputy recommended that the determination be reversed. The Joined Party's exceptions to the Recommended Order were received by fax dated March 17, 2011. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule

and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Joined Party's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

In the exceptions, the Joined Party proposes alternative findings of fact and conclusions of law. The Joined Party also relies on additional evidence not presented at the hearing. Pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Findings of Fact unless the Agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record. A review of the record also reveals that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Agency may not modify or reject the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy in the Recommended Order. Additionally, rule 60BB-2.035(19)(a) of the Florida Administrative Code prohibits the acceptance of evidence after the

hearing is closed. The Joined Party's request for the consideration of additional evidence is respectfully denied. The Joined Party's exceptions are respectfully rejected.

A review of the record reveals that the Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Joined Party, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as contained in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated February 22, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 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. - 2869565
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RESPONDENT:

State of Florida
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**PROTEST OF LIABILITY
DOCKET NO. 2010-49432L**

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 February 22, 2010.

After due notice to the parties, a telephone hearing was held on January 5, 2011. The Petitioner’s president appeared and testified at the hearing. The Petitioner called the landlord for the business, and a representative of a client company as witnesses. 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 not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals 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 corporation, incorporated on or about March 4, 2008, for the purpose of running cellular telephone stores.
2. The Petitioner and the Joined Party were acquaintances of one another. The Petitioner, Joined Party, and a third party contemplated forming cellular telephone sales business as a three way partnership.

3. The Joined Party was experienced in the business and had two cellular telephone stores in operation.
4. The Petitioner and the third party discussed payment to the Joined Party in exchanged for part ownership in the Joined Party's cellular telephone business.
5. The third party subsequently abandoned the arrangement. The Petitioner and the Joined Party continued with the agreement. The Petitioner was to pay the Joined Party in exchange for a share of the Joined Party's business. The Petitioner was to open stores of his own as well as part of the business agreement.
6. The Joined Party continued to operate his businesses until the arrangement collapsed. The Joined Party maintained the property leases, hired workers, and generally ran the business. The Joined Party determined what hours he would work and what work those hours would be spent on.

Conclusions of Law:

7. 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.
8. 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).
9. 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).
10. 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.
11. 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.
12. 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.
 13. The evidence presented in this hearing reflects that the Petitioner and the Joined Party entered into a joint venture with one another. The arrangement was to be a partnership between the parties for the purpose of running a cellular telephone sales business.
 14. The Joined Party had prior experience in the cellular telephone business and had two operating stores at the time of the agreement. The Joined Party continued to operate the stores as he had in the past. The Joined Party hired personnel and set his own hours and tasks.
 15. The arrangement between the parties was intended to be a partnership and was not intended to create a master servant relationship between the parties. While the arrangement may have broken down or failed to operate as intended by the parties, a preponderance of the evidence presented in this hearing reflects that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated February 22, 2010, be REVERSED.

Respectfully submitted on March 10, 2011.



KRIS LONKANI, Special Deputy
Office of Appeals