

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2952291
THOMAS WOLFE JR DBA
RESOURCE NATIONAL RECOVERY CORP
3945 E EDEN ROC CIRCLE
TAMPA FL 33634-7417

**PROTEST OF LIABILITY
DOCKET NO. 2010-62442L**

RESPONDENT:

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

ORDER

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 2, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **March, 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. - 2952291
THOMAS WOLFE JR DBA
RESOURCE NATIONAL RECOVERY CORP
3945 E EDEN ROC CIRCLE
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RESPONDENT:

State of Florida
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**PROTEST OF LIABILITY
DOCKET NO. 2010-62442L**

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 April 2, 2010.

After due notice to the parties, a telephone hearing was held on November 29, 2010. The Petitioner’s owner appeared and provided testimony at the hearing. The Joined Party appeared and testified in her own behalf. A tax specialist 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 company established to handle the personal affairs of its owner.
2. The Joined Party responded to an advertisement placed at the Petitioner’s behest. The advertisement indicated that the Petitioner needed an accountant. The Joined Party provided a resume to the Petitioner. The Joined Party and the Petitioner corresponded via email with regards to the salary history and pay requirements of the Joined Party. The Joined Party had a two hour interview with the Petitioner before being hired by the Petitioner. The Joined Party performed accounting services for the Petitioner from December 23, 2009, through January 8, 2010.

3. The Joined Party was informed that she would be paid as an independent contractor after the Joined Party had worked for five days.
4. The Petitioner required that the Joined Party report to work at the Petitioner's location from 9am to 4pm, Monday through Friday.
5. The Petitioner gave the Joined Party daily instructions as to tasks to be performed.
6. The Petitioner instructed the Joined Party that she was not to open the door for anyone including the police without a search warrant.
7. The Petitioner provided the Joined Party with a work space. The Petitioner provided file cabinets, a desk, and a computer for the Joined Party's use. The Petitioner provided all necessary documents to the Joined Party.
8. The Petitioner paid the Joined Party \$15 per hour. The Joined Party was paid with the Petitioner's company checks.
9. The Joined Party was a full charge book-keeper. The Joined Party did not have any license or certification.
10. The Petitioner had a prior worker performing the same services as the Joined Party. The Petitioner had a certified public accountant assist with the work after the Joined Party's service.

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 at this hearing reveals that the Petitioner exercised control over where, when, and how the Joined Party performed the work. The Petitioner provided the location at which the work was to be performed. The Petitioner set the hours within which the Joined Party was allowed to work. The Petitioner gave daily instructions to the Joined Party as to what work should be done. The Petitioner exercised control over the behavior of the Joined Party to the extent that the Joined Party was not allowed to allow the police access to the property without a search warrant.
18. The Joined Party was paid by the hour. Such a payment method tends to be indicative of an employer-employee relationship.
19. There was no meeting of the minds between the parties as to the nature of the work relationship. The Joined Party was not informed that she would be working as an independent contractor until after she had worked for the Petitioner for five days.
20. The Petitioner provided the work space and all supplies needed to perform the work. The supplies included file cabinets, a desk, and a computer for the Joined Party’s use.
21. 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 Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated April 2, 2010, be AFFIRMED.

Respectfully submitted on January 27, 2011.



KRIS LONKANI, Special Deputy
Office of Appeals