

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 1574337

TIDY CO OF MIAMI INC
DALLAS D BROWN
334 NE 101ST ST
MIAMI SHORES FL 33138-2425

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-82783L**

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 constitute insured employment pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of liability. An issue also before me is whether the Petitioner's corporate officers received remuneration for employment which constitutes wages pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

The Department of Revenue conducted a random audit of the Petitioner for the 2008 tax year. The auditor determined that earnings reported by the Petitioner were taxable wages for unemployment compensation purposes and increased the amount of taxable wages for the Petitioner's corporate officer. As a result, the Petitioner was required to pay additional unemployment compensation taxes. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on September 8, 2010. The Petitioner, represented by its Certified Public Accountant, appeared and testified. Another Certified Public Accountant from the same firm testified as a witness. The Respondent was represented by a Department of Revenue Tax Audit Supervisor. A Tax Auditor testified as a witness. The Special Deputy issued a Recommended Order on September 15, 2010.

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

1. The Petitioner is a subchapter S corporation which operates a commercial cleaning business.
2. The Department of Revenue randomly selected the Petitioner for an audit of the Petitioner's books and records for the 2008 tax year to ensure compliance with the Unemployment Compensation Law. The Tax Auditor contacted the Petitioner's Certified Public Accountant to obtain the books and records.
3. The Tax Auditor examined the Forms 1099-MISC filed by the Petitioner with the Internal Revenue Service. The Tax Auditor requested documentary proof from the Petitioner that the individuals to whom the forms were issued were bona fide independent contractors. The proof was provided and the Tax Auditor concluded that the workers who received the Forms 1099-MISC were independent contractors.
4. The Tax Auditor examined the Petitioner's corporate income tax return and discovered a deduction for casual labor. That item included the payments made to the independent contractors, however, the deduction on the tax return was \$181,727.51 greater than the total payments made to the independent contractors. The Tax Auditor requested W-9 forms or social security numbers for those additional workers who were paid for casual labor but the Petitioner advised that the information was not available. The Tax Auditor reclassified \$181,727.51 of the casual labor as taxable wages.
5. The Tax Auditor examined the amount of wages reported for the Petitioner's corporate officer who was active in the operation of the business. The Petitioner had reported and paid unemployment tax on wages of \$2,400 for the 2008 tax year. Based on the earnings of the corporation the Tax Auditor increased the amount of the corporate officer's wages to reflect wages of \$7,000 for the year, an increase of \$4,600.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated May 4, 2010, be affirmed. The Petitioner's exceptions to the Recommended Order were received by mail on September 28, 2010. 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 Petitioner'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.

The exceptions propose alternative findings of fact and conclusions of law and attempt to enter evidence that was not provided 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 that the findings of fact were not based upon competent substantial evidence. 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. Further 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 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. Rule 60BB-2.035(19)(a), Florida Administrative Code, prohibits the acceptance of additional evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. The exceptions are respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order 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 Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated May 4, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **October, 2010.**



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:

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RESPONDENT:

State of Florida
Agency for Workforce Innovation
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**PROTEST OF LIABILITY
DOCKET NO. 2010-82783L**

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 May 4, 2010.

After due notice to the parties, a telephone hearing was held on September 8, 2010. The Petitioner, represented by its Certified Public Accountant, appeared and testified. Another Certified Public Accountant from the same firm testified as a witness. The Respondent was represented by a Department of Revenue Tax Audit Supervisor. A Tax Auditor testified as a witness.

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 constitute insured employment, and if so, the effective date of the Petitioner’s liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Whether the Petitioner’s corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which operates a commercial cleaning business.
2. The Department of Revenue randomly selected the Petitioner for an audit of the Petitioner’s books and records for the 2008 tax year to ensure compliance with the Unemployment Compensation Law. The Tax Auditor contacted the Petitioner’s Certified Public Accountant to obtain the books and records.

3. The Tax Auditor examined the Forms 1099-MISC filed by the Petitioner with the Internal Revenue Service. The Tax Auditor requested documentary proof from the Petitioner that the individuals to whom the forms were issued were bona fide independent contractors. The proof was provided and the Tax Auditor concluded that the workers who received the Forms 1099-MISC were independent contractors.
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5. The Tax Auditor examined the amount of wages reported for the Petitioner's corporate officer who was active in the operation of the business. The Petitioner had reported and paid unemployment tax on wages of \$2,400 for the 2008 tax year. Based on the earnings of the corporation the Tax Auditor increased the amount of the corporate officer's wages to reflect wages of \$7,000 for the year, an increase of \$4,600.

Conclusions of Law:

6. 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.
7. 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).
8. 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).
9. 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.
10. 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.
11. The Petitioner was represented in the hearing by the Petitioner’s Certified Public Accountant who also testified as a witness. The Petitioner’s accountant testified that he did not have personal knowledge of the Petitioner’s day-to-day operations and that his testimony was based on what he had been told by the Petitioner.
 12. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.
 13. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
 14. The Petitioner’s testimony and evidence is not sufficient to show that the determination issued by the Department of Revenue is in error.

Recommendation: It is recommended that the determination dated May 4, 2010, be AFFIRMED.

Respectfully submitted on September 15, 2010.



R. O. SMITH, Special Deputy
Office of Appeals