AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2675509
VISION SATELLITE INC
D/B/A DIRECT MARKETING
9318 E COLONIAL DR STE A14
ORLANDO FL 32817-4175

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

PROTEST OF LIABILITY
DOCKET NO. 2009-114565L

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 June 16, 2009, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 346 Caldwell Building
107 East Madison Street
Tallahassee FL 32399-4143

PETITIONER:
Employer Account No. - 2675509
VISION SATELITTE INC
MARK EBHOHIMEN
D/B/A DIRECT MARKETING
9318 E COLONIAL DR STE A14
ORLANDO FL 32817-4175

PROTEST OF LIABILITY
DOCKET NO. 2009-114565L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated June 16, 2009.

After due notice to the parties, a telephone hearing was held on February 9, 2010. A Representative appeared for the Petitioner. The Petitioner's Owner appeared and provided testimony. The Joined Party appeared and provided testimony on her own behalf. A Tax Specialist appeared 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. The Joined Party provided additional documents February 12, 2010.
Additional 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 as long distance specialists 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 subchapter S corporation incorporated in 2004 for the purpose of running a telemarketing business. The Petitioner contacts customers of a client telecommunication company for the purpose of offering additional services to the client's customers.

2. The Joined Party provided services for the Petitioner from January 14, 2008, through May 6, 2009 as a member of the long distance service promotional team. The Petitioner had 8-10 other workers performing the same sort of duties as the Joined Party. All of the individuals performing the same sort of work as the Joined Party were considered independent contractors.

3. The Joined Party signed a contract with the Petitioner at the time of hire. The contract was titled *Contract With Independent Contractor*. The contract stipulated that the Joined Party was required to provide services between Monday and Friday during business hours. The contract further provided that an independent contractor relationship existed between the Joined Party and the Petitioner. The contract went on to indicate that no taxes were with-held from the Joined Party's pay and the Joined Party would not receive any fringe benefits. The contract held the Joined Party responsible for all equipment and expenses needed to perform the work. The Joined Party signed a second contract with the Petitioner April 4, 2008. The April contract changed the pay structure for the Joined Party.

4. The Joined Party was supervised by a manager. The manager would randomly listen to telephone calls, provide advice to the workers, and handle any problems with the workers.

5. The Joined Party was required to work from the Petitioner's worksite. The Joined Party was expected to provide advance notice to the Petitioner if she was not going to report to the Petitioner's place of business on a given work day.

6. The Petitioner provided telephones, headsets, a computer, scripts, calling lists, office cubicles, office chairs, pens, pads, and product training to the Joined Party. The Joined Party was responsible for any other expenses or equipment. There were no other expenses or equipment at the Joined Party's worksite. The Joined Party could be reimbursed for the use of her personal cellular telephone by the Petitioner. The Joined Party could be reimbursed for part of her internet bill for time spent working from home by the Petitioner.

7. The Joined Party was allowed to hire an assistant at her own expense. The Joined Party was allowed to hire someone to close deals if they had completed the training required by the client.

8. The Joined Party contacted the Petitioner for work. The Joined Party filled out an application and took a training course provided by the Petitioner. The training course was primarily informational, providing an overview of the various services available.

9. The Joined Party would contact customers of the client company by telephone to attempt to convince the customer to accept additional services. The Joined Party worked with a list of customers provided by the client company.

10. The Joined Party was required to follow a code of conduct in dealing with customers. The code of conduct was provided by the client company. The Joined Party's telephone calls were monitored and recorded by the Petitioner to make certain that the Joined Party covered all of the points of discussion required by the Petitioner. If the Joined Party failed to properly handle a call, the Petitioner would provide a written checklist to show what the problem area was. A serious violation could result in the discharge of the Joined Party.

11. The Joined Party was not covered by the Petitioner's workers' compensation policy.

12. The Petitioner required all workers to sign a confidentiality agreement. The Joined Party was not allowed to work for a competitor.

13. The Joined Party was paid a salary based upon the weekly performance of the Joined Party. The rate of pay was modified on two occasions by the Petitioner due to changes in the client company's policy. The Joined Party was paid bi-weekly.

14. The Joined Party was paid $40,148.25 by the Petitioner in 2008. The Joined Party was paid $10,733.75 by the Petitioner in 2009.

15. The Petitioner discharged the Joined Party for alleged fraud on May 1, 2009. The Joined Party could quit at any time without liability.

16. The Joined Party ran an internet based travel business during her free time.

Conclusions of Law:

17. 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.

18. 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).

19. 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).

20. 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.

21. 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.

22. 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.

23. The evidence presented in this case reveals that the Petitioner provided instruction and supervision in how to properly perform the work to the Joined Party. The evidence reflects that the Petitioner maintained control over how the work was performed through monitoring live telephone calls and providing feedback to the workers.

24. The Petitioner controlled the time and location at which the work was to be performed.

25. The Petitioner supplied the tools and equipment necessary to perform the duties required by the job and covered any expenses incurred for the use of a personal cellular telephone. The Joined Party had no investment in the work and could not take a loss from the work.

26. There was a written agreement between the parties which indicated that the work was performed as an independent contractor. The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

27. The relationship was an at-will relationship. Either party had the right to end the relationship at anytime without liability. The relationship was terminated when the Petitioner discharged the Joined Party. 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."

28. A preponderance of the evidence 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.

29. The Joined Party provided additional post-hearing documents on February 12, 2010. The documents were examined by the Special Deputy and cannot be considered proposed findings of fact or conclusion of law; rather, the documents constitute new evidence not presented at the hearing. Rule 60BB-2.035(19)(a) of the Florida Administrative Code prohibits the introduction of additional evidence after the hearing has concluded. Therefore, the documents submitted by the Joined Party on February 12, 2010, are not admitted into the record or considered as proposed findings of fact or conclusions of law.

Recommendation: It is recommended that the determination dated June 16, 2009, be AFFIRMED.

Respectfully submitted on June 1, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals