AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2778845
DELTA BUILDING MAINTENANCE &
MANAGEMENT CORP
CO PACHEX INC
PO BOX 2000
HENRIETTA NY 14467-2000

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

PROTEST OF LIABILITY
DOCKET NO. 2009-118908L

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 July 27, 2009, is AFFIRMED.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

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

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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 July 27, 2009.

After due notice to the parties, a telephone hearing was held on October 7, 2009. The Petitioner's Owner, the Joined Party, and a Tax Specialist for the Respondent appeared and testified at the hearing.

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 as property managers 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 corporation founded in 2000 for the purpose of property management. The Petitioner had three licensed property managers. Some of the Petitioner's property managers were considered employees while others were considered independent contractors by the Petitioner.

2. The Joined Party provided services as a property manager for the Petitioner from January 2007 through February 2009. The Joined Party provided basic property management services. These services included all of the administrative duties for condominium associations. This included

rules enforcement, ensuring compliance with statutes, regulations, and association governing documents.

3. The Joined Party is required to have a Community Association Managers license.

4. The Joined Party contacted the Petitioner for work by submitting an application and resume. The Petitioner gave the Joined Party the option of choosing to be on payroll or being a 1099 worker at the time of hire. The Petitioner explained that as a 1099 worker, the Joined Party would have to pay her own taxes while the Petitioner would withhold those taxes for a payroll worker. No other differences between the employee and independent contractor options were discussed by the Petitioner with the Joined Party. The Petitioner informed the Joined Party of the responsibilities, hours of work, and rate of pay at the time of hire. The Petitioner provided limited training in the Petitioner's systems and expected the Joined Party to learn the job on her own.

5. The Joined Party was originally hired as an on-site manager for one association. The Joined Party was later given additional associations to manage by the Petitioner. The Joined Party was expected to work 8 hours per day and 40 hours per week. The Petitioner later reduced the Joined Party to working 4 days per week due to economic conditions and problems with clients. The Joined Party was initially required to use a handwritten time sheet. The Joined Party was later required to use a timecard

6. The Joined Party was paid $15 per hour and paid twice per month. The rate of pay was set by the Petitioner based upon the Petitioner's business requirements. The Joined Party received $22,322.44 from the Petitioner in 2008.

7. The Joined Party was not allowed to perform services for a competitor. The Petitioner required the Joined Party to sign a non-compete agreement. The Joined Party was not allowed to solicit clients after her separation with the Petitioner. The non-compete agreement prohibited the Joined Party from working for a competitor or substantially similar business. While the Petitioner did not enforce this provision, the Petitioner had the power to enforce it.

8. The Joined Party's time was split between time at the client establishments and the Petitioner's office as directed by the Petitioner. The Joined Party was required to report to work at 9 a.m. to open the office at the client's property, meet with vendors, and manage the property. Normally, the Joined Party would return to the Petitioner's office after her lunch break and remain there for the rest of the day. The Petitioner determined the Joined Party's daily schedule.

9. The Joined Party was not covered under the Petitioner's workers' compensation policy. The Joined Party was covered under the Petitioner's professional liability insurance as an additional insured. The Joined Party did not receive medical insurance. The Joined Party received paid time off for holidays. The Petitioner paid a bonus to the Joined Party for bringing in new clients.

10. The Petitioner provided the Joined Party with telephones, a computer, office equipment and all other supplies necessary to perform the work. The Petitioner provided the Joined Party with a business card with the Petitioner's logo that also listed an email address with the Petitioner's company for the Joined Party. The Joined Party provided her own cellular telephone. Any purchases made by the Joined Party were reimbursed by the Petitioner. The Petitioner reimbursed the Joined Party for mileage travelled. The Petitioner allowed the Joined Party to use a company vehicle insured by the Petitioner.

11. The Petitioner would receive feedback from clients and then discuss the feedback with the Joined Party in meetings. Disciplinary issues were handled verbally and through email by the Petitioner. The Petitioner would remove the Joined Party from working with a particular client if the problems could not be solved. The Petitioner would then send the Joined Party to a new client or clients.

12. Either party could terminate the relationship at anytime without liability.

13. The Joined Party owns her own company which provides computer technical services. The company has not provided any property management services.

Conclusions of Law:

14. 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.

15. 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).

16. 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).

17. 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.

    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.

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

19. The evidence presented in this case reveals that the Petitioner had three property managers, some of which were considered employees and some of which were considered independent contractors. The record does not demonstrate any difference between employees and independent contractors beyond a choice in how they should be paid made at the time of hire. The Joined Party verbally agreed at the time of hire to pay her own taxes and receive a 1099 form. The Joined Party initially considered herself to be an independent contractor but later considered herself to be an employee due to the actual work relationship between the Joined Party and the Petitioner. While there was a verbal independent contractor agreement between the parties, independent contractor status depends not on the statements of the parties but upon all the circumstances of their dealings with each other. Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972)

20. The evidence presented demonstrates that the Petitioner had unilateral control over the time and place of the work. The Petitioner set the Joined Party's expected hours worked per week and determined how many days each week the Joined Party would work. The Petitioner reduced the Joined Party's hours due to the Petitioner's economic concerns.

21. The evidence reflects that the Petitioner controlled the financial aspects of the relationship. The Petitioner determined the method and rate of pay, and the Joined Party was paid by time worked rather than by the job. The Joined Party was covered under the Petitioner's Professional Liability Insurance. The Petitioner provided the equipment and locations necessary for the Joined Party to perform the work. The Petitioner compensated the Joined Party for mileage.

22. The Joined Party worked for the Petitioner for just over 2 years. The length of time worked demonstrates a permanent relationship rather than an occasional relationship and as such is indicative of an employer-employee relationship.

23. While the Joined Party did have her own company, there is no evidence that the Petitioner intended to hire the Joined Party's company rather than the Joined Party as an individual. Furthermore, the Joined Party's company has not provided any services in property management. The Joined Party was issued a 1099 form by the Petitioner in her name rather than that of a company.

24. The relationship was an at-will relationship. Either party could terminate the relationship at any time without incurring liability. 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."

25. 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.

Recommendation: It is recommended that the determination dated July 27, 2009, be AFFIRMED.

Respectfully submitted on March 8, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals