AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2360404
THE ACTION GROUP INC
11943 NW 37TH STREET
CORAL SPRINGS FL 33065-2500

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

PROTEST OF LIABILITY
DOCKET NO. 2009-134863L

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 August 27, 2009, is REVERSED.

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 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2360404
THE ACTION GROUP INC
MICHAEL ROBERTS
11943 NW 37TH STREET
CORAL SPRINGS FL 33065-2500

PROTEST OF LIABILITY
DOCKET NO. 2009-134863L

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 August 27, 2009.

After due notice to the parties, a telephone hearing was held on November 17, 2009. The Petitioner's Owner and Accountant appeared and provided testimony. The Joined Party appeared and provided testimony on 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 in data entry/accounting 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 founded in 2001 for the purpose of running a sales and marketing business.

2. The Joined Party was told by the Petitioner that the Petitioner had work she could do while she was unemployed. Neither party considered the Joined Party to be an employee. The Petitioner explained what was required of the Joined Party on the first day she performed services for the Petitioner.

3. The Joined Party performed services for the Petitioner from August, 2008 through October 2009. The Joined Party worked with spread sheets and compiled sales data for the Petitioner. The Joined Party worked on an as-needed basis with the Petitioner.

4. The Joined Party was allowed to perform services for a competitor.

5. The Joined Party was paid $20 per hour. The Joined Party wrote down her hours worked and turned them in to the Petitioner. The Joined Party was paid $2,860 in 2008. The Petitioner issued a 1099 form for the Joined Party's 2008 income.

6. The Petitioner would contact the Joined Party when work was available. The Joined Party would go to the Petitioner's worksite and get the data she needed for her work. The Petitioner supplied a computer for the Joined Party's use at the Petitioner's worksite. The Joined Party provided the majority of her services from her home. The Joined Party was handed data and told to put it into the appropriate format as designated by the Petitioner. The Petitioner required the Joined Party to complete the work within the month. The Joined Party continued to receive pay while correcting errors that needed to be fixed. The Petitioner checked the final work product but otherwise allowed the Joined Party to work without interference.

7. The Joined Party provided her own computer and software for the work. The Petitioner made a computer available to the Joined Party for any work she chose to perform at the Petitioner's work site.

8. The Joined Party did not have her own business.

Conclusions of Law:

9. 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.

10. 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).

11. 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).

12. 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.

13. 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.

14. The evidence presented in this case reveals that the Petitioner did not control the time, place, or means of the work. The Petitioner informed the Joined Party when work was available and expected the work to be completed within the month it was assigned. The Petitioner did not exercise supervision over the Joined Party except to go over the final results to make certain they were correct. The Joined Party did the majority of her work from her own home.

15. The record reflects that the Joined Party supplied her own computer and software for the work. The Petitioner did make a computer available for the Joined Party at the Petitioner's worksite; however, the bulk of the work was performed from the Joined Party's home.

16. The record reflects that neither party considered the Joined Party to be an employee. This is indicative of the intention of the parties to create an independent contractor relationship.

17. A preponderance of the evidence in this case reveals that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the Joined Party and the Petitioner.

Recommendation: It is recommended that the determination dated August 27, 2009, be REVERSED.

Respectfully submitted on June 4, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals