AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2897979

MELBA RUBERA
2693 LA ALAMEDA AVE
KISSIMMEE FL 34746-3201

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

PROTEST OF LIABILITY
DOCKET NO. 2009-164783L

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 by the Joined Party and other individuals working as loan processors constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

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 Special Deputy issued the Recommended Order on August 11, 2010. The Petitioner's exceptions to the Recommended Order were received by mail postmarked September 17, 2010. The Petitioner submitted additional exceptions by mail postmarked September 20, 2010. Rule 60BB-2.035(19)(c)**,** Florida Administrative Code, requires that written exceptions be filed within 15 days of the mailing date of the Recommended Order. As a result, the Agency may not consider the Petitioner's exceptions in this order because the exceptions were filed more than 15 days after the mailing date of the Recommended Order. No other submissions were received from any party.

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 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 and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that the determination dated October 13, 2009, is MODIFIED to reflect a retroactive date of April 1, 2006. It is also ORDERED that the determination is AFFIRMED as modified.

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

____
TOM CLENDENNING,
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

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Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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

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 October 13, 2009.

After due notice to the parties, a telephone hearing was held on July 15, 2010. The Petitioner appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

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 working as loan processors 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. In approximately April 2005 the Joined Party began employment with Apex Lending Inc. as a loan processor. The Joined Party worked at a branch office and the branch manager was the Petitioner, Melba Rubera. The borrowers were charged a fee for processing the files. Apex Lending Inc. paid the Joined Party for processing files. Payroll taxes were withheld from the Joined Party's pay and at the end of 2005. Apex Lending Inc. reported the Joined Party's earnings on Form W-2. Apex Lending Inc. reported the Joined Party's wages to the Florida Department of Revenue and paid unemployment compensation tax on the wages.

2. Melba Rubera was the license holder for the franchised branch of Apex Lending where the Joined Party processed the files. The Petitioner operated the branch as a sole proprietorship. The Petitioner charged the borrowers $395 for each file that the Joined Party processed. On or about April 1, 2006, Apex Lending discontinued paying the Joined Party but instead began paying the processing fee to the Petitioner. The Petitioner then paid the Joined Party $395 for each file that the Joined Party processed.
3. There was no written agreement or contract between the Petitioner and the Joined Party.
4. No changes in working conditions occurred on or about April 1, 2006, when the Petitioner began paying the Joined Party. The only change that occurred was that the Petitioner did not withhold payroll taxes from the Joined Party's pay.
5. The Joined Party worked at the Petitioner's branch office. The Petitioner provided a desk, computer, telephone, copy machine, fax machine, and any other equipment or supplies that were needed. The Joined Party was not required to provide anything to perform the work and did not have any expenses in connection with the work.
6. The Petitioner gave the Joined Party instructions about when to do the work. The Joined Party was required to work Monday through Friday from 9 AM until 5 PM. The Joined Party was not allowed to take more than thirty minutes for a lunch break. The Joined Party was required to ask for permission to leave the office during working hours or to take time off from work.
7. The Petitioner taught the Joined Party everything that the Petitioner knew about processing the files. The Petitioner gave the Joined Party instructions about how to do the work. The Petitioner supervised the Joined Party. The Petitioner directed the sequence in which the files were processed.
8. The Petitioner had the ability to earn a bonus if the branch office closed a specified number of loans within a month. If the Petitioner received a bonus the Petitioner sometimes paid a portion of the bonus to the Joined Party. The amount of the Joined Party's bonus was unilaterally determined by the Petitioner. The Petitioner did not withhold any payroll taxes from the Joined Party's pay and at the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
9. The Joined Party was not required to have any type of license or certification to process the files. The Joined Party did not have any investment in a business, did not perform services for anyone other than the Petitioner and did not advertise or offer her services to the general public. The Joined Party did not have business liability insurance. The Petitioner did not allow the Joined Party to process files for other mortgage companies.
10. Due to the poor economy there was very little work for the Joined Party to perform during 2008. The Joined Party had to pick up her daughter from school and asked permission to leave work early. The request was granted and the Joined Party was allowed to leave work at 4 PM each day.
11. From the outset the Petitioner paid the Joined Party $395 for each file processed, the same amount that was charged to the borrower for file processing. In 2008 the Petitioner increased the processing fee charged to the borrower to $450 due to the poor economy. At that time the Petitioner increased the amount paid to the Joined Party to $400 per file.
12. In 2008, even though there was very little work for the Joined Party to perform, the Petitioner still required the Joined Party to report to the office each day and to remain in the office all day. It was costing the Joined Party more to drive to and from work than what she was earning. The Joined Party requested permission to work a four day work schedule. The Petitioner denied the Joined Party's request.

13. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. Since the Joined Party was not earning enough money to cover the cost of commuting to and from work and because the Petitioner would not allow the Joined Party to alter the work schedule, the Joined Party resigned to seek other employment in April 2008.

14. The Joined Party filed a claim for unemployment compensation benefits effective February 1, 2009. When the Joined Party did not receive credit for her earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

15. On May 6, 2009, the Department of Revenue issued a determination to the Petitioner holding that the persons performing services for the Petitioner as loan processors are the Petitioner's employees retroactive to January 1, 2006. However, the determination was not mailed to the Petitioner's correct address.

16. On October 13, 2009, the Department of Revenue reissued the determination to the Petitioner's correct mailing address. The Petitioner filed a written protest by mail postmarked October 26, 2009.

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.

23. 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.

24. There was no written agreement or contract between the Petitioner, Melba Rubera, and the Joined Party. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

25. The Petitioner is the license holder for a franchised branch of a mortgage company. The Joined Party processed the loans for the Petitioner. The work performed for the Petitioner by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.

26. The Petitioner provided the work location and all equipment and supplies which were needed to perform the work. The Joined Party did not have an investment in a business and did not have any expenses in connection with the work. The Joined Party performed services exclusively for the Petitioner for a period of approximately two years and was prohibited by the Petitioner from performing services for others.

27. The Petitioner controlled the hours and days of work. The Joined Party was prohibited from leaving the Petitioner's office during working hours without permission. The Petitioner even controlled the amount of time which the Joined Party could take for a lunch break. The Petitioner trained the Joined Party concerning how to process the files, gave instructions to the Joined Party concerning how to perform the work, and directly supervised the Joined Party.

28. The Petitioner paid the Joined Party based on work production rather than by time worked, even though the Petitioner required the Joined Party to be in the office when there was no work to be performed. The fact that the Petitioner did not withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

29. The evidence adduced in this case reveals that the Petitioner exercised significant control over the Joined Party and the working relationship. The Petitioner determined what work was performed, when it was performed, where it was performed and how it was performed. In Adams v.

Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

30. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals working as loan processors constitute insured employment. The determination, however, is retroactive to January 1, 2006. During the first quarter 2006 the Joined Party was an employee of Apex Lending Inc. and that employer properly reported the Joined Party's earnings and paid unemployment compensation tax on the earnings. It was not until April 2006 when the Petitioner began paying the Joined Party directly. Therefore, the correct retroactive date should be April 1, 2006.

Recommendation: It is recommended that the determination dated October 13, 2009, be MODIFIED to reflect a retroactive date of April 1, 2006. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on August 11, 2010.

R. O. SMITH, Special Deputy
Office of Appeals