AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 1569377
SUNRISE HOME HEALTH CARE INC
2331 SW 82ND PL
MIAMI FL 33155-1252

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

PROTEST OF LIABILITY
DOCKET NO. 2009-166879L

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 that the Petitioner's protest is accepted as timely filed, and the determination dated October 16, 2009, is AFFIRMED.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
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. - 1569377
SUNRISE HOME HEALTH CARE INC
MARIA NIURKA RODANES
2331 SW 82ND PL
MIAMI FL 33155-1252

PROTEST OF LIABILITY
DOCKET NO. 2009-166879L

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 October 16, 2009.

After due notice to the parties, a telephone hearing was held on April 20, 2010. The Petitioner, represented by the Petitioner's Human Resource Director, appeared and testified. The Respondent, represented a Department of Revenue Tax Specialist II, 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 as a home health aide constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 60BB-2.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a corporation that operates a home health care company which provides skilled and non-skilled services to patients in the patient's homes. The Petitioner has approximately eighteen acknowledged employees including clerical employees and Registered Nurses. The Petitioner also has approximately 150 home health care aides who provide the services to the

patients in the patient's homes. The Petitioner has classified the home health care aides as independent contractors.

2. The Joined Party began performing services for the Petitioner as a home health care aide on or about December 15, 2005. The Joined Party last performed services for the Petitioner on or about September 12, 2009.

3. The Joined Party's job consisted of performing supportive, specified, non-clinical duties under the direction and supervision of a Registered Nurse or other health care professional.

4. The Petitioner and the Joined Party entered into a written *Contract*. The *Contract* requires the Joined Party to abide by all of the Petitioner's policies, procedures and practices. It sets forth the rate and method of pay and requires the Joined Party to maintain records showing the computation of the pay. It provides that the Joined Party must complete notes for each patient and must turn the notes in to the Petitioner every seven days. The *Contract* requires the Joined Party to participate with the Petitioner's health personnel in staff meetings and discussions for the purpose of planning and evaluating patient care, to meet all requirements relating to professional qualifications, functions, supervision, and in-service education, and requires the Joined Party to provide the Petitioner with proof of personal automobile liability insurance, personal injury protection automobile insurance, and other certificates or licenses.

5. The *Contract* provides that the Petitioner will maintain full responsibility for control over the services performed by the Joined Party and that the Petitioner is responsible for scheduling the Joined Party for patient visits, responsible for reviewing and revising Patient Care Plans, and responsible for coordinating, supervising, and evaluating the care provided by the Joined Party. The *Contract* provides that the Petitioner will provide direct supervision of the Joined Party in the patient's home every fourteen days, or every sixty days for patients receiving non-skilled care.

6. The *Contract* was specified to be for a period of two years. The *Contract* provides that either party may terminate the agreement with fifteen days written notice.

7. The Joined Party was required to complete forms and paperwork for each patient. The Joined Party was required to report to the Petitioner's office to turn in *Weekly Visit/Sign Sheets* and *Home Health/Home Care Aide Weekly Visit Records.*

8. The Petitioner provided the Joined Party with the required forms and paperwork and with an identification tag listing the Petitioner's name, the Joined Party's name, the Joined Party's title, and the Joined Party's date of hire. No other equipment or supplies were needed to perform the work.

9. The Petitioner trained the Joined Party concerning how to complete the Petitioner's paperwork including the *Weekly Visit/Sign Sheets* and the *Home Health/Home Care Aide Weekly Visit Records.* The Petitioner gave the Joined Party instructions about when to do the work and how to do the work. The Petitioner determined the sequence in which the work was performed.

10. The Petitioner paid the Joined Party by patient visit based on an hourly rate of pay. Based on the *Contract* the rate varied from patient to patient. The Petitioner did not withhold any payroll taxes from the pay. The Petitioner did not provide any fringe benefits such as health insurance, retirement benefits, or paid time off. The Joined Party was covered under the Petitioner's workers' compensation insurance policy. 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.

11. The Joined Party was not allowed to subcontract the work or hire others to perform the work for her. If the Joined Party was not able to work a scheduled visit, she was required to notify the Petitioner so that the Petitioner could schedule a different home health aide to make the visit.

12. The Joined Party was not prohibited from working for competitors of the Petitioner. The Joined Party was not prohibited from working for other businesses, such as restaurants.

13. The Joined Party filed a claim for unemployment compensation benefits effective July 19, 2009. On July 29, 2009, the Agency for Workforce Innovation issued a determination showing that the Joined Party did not have wage credits for earnings received from the Petitioner. The Joined Party filed a Request for Reconsideration of Monetary Determination and an investigation was assigned to the Department of Revenue to determine if the Joined Party was entitled to wage credits.

14. On October 16, 2009, the Department of Revenue mailed a determination to the Petitioner's correct mailing address holding that the Joined Party was the Petitioner's employee retroactive to January 1, 2008. The determination was received by the Petitioner. The Petitioner filed a written protest by fax and by mail on November 3, 2009. The Department of Revenue did not date stamp the fax when it was received. The envelope in which the protest letter was mailed was not postmarked by the Post Office.

Conclusions of Law:

15. Section 443.141(2)(c), Florida Statutes, provides:

    (c) *Appeals.*--The Agency for Workforce Innovation and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.

16. Rule 60BB-2.035(5)(a)1., Florida Administrative Code, provides:

    Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.

17. Rule 60BB-2.023(1), Florida Administrative Code, provides, in pertinent part:

    Filing date. The postmark date will be the filing date of any report, protest, appeal or other document mailed to the Agency or Department. The "postmark date" includes the postmark date affixed by the United States Postal Service or the date on which the document was delivered to an express service or delivery service for delivery to the Department.

18. The evidence reveals that the Petitioner's protest was filed within the twenty day appeal period.

19. 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.

20. 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).

21. 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).

22. 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.

23. 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.

24. 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.

25. 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.

26. The *Contract*, which has been presented as evidence, establishes that the Petitioner had the right to determine how the work was performed and when it was performed. The Petitioner was responsible for scheduling the Joined Party to work and responsible for providing both direct and indirect supervision of the Joined Party and of the work performed by the Joined Party.

27. The *Contract* does not identify the Joined Party as an independent contractor. In addition to the *Contract* the Petitioner submitted a *Tax Exempt Form* as evidence. The *Tax Exempt Form* states that the Joined Party acknowledges that the Joined Party is an independent contractor, that the Joined Party is responsible for social security and taxes, and that the Joined Party is not eligible for any benefits such as vacation, disability, or unemployment and will not be covered by workman's compensation. The *Tax Exempt Form* contains a place for the "Employee's Signature" however, the *Tax Exempt Form* is not signed by the Joined Party or by the Petitioner. The Petitioner's representative has no personal knowledge of any written or verbal agreement between the Petitioner and the Joined Party concerning whether or not the Joined Party was an independent contractor. Even if such agreement exists, a statement in an agreement that the relationship is that

of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). 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."

28. The Petitioner's business is providing skilled and non-skilled care to patients in the patients' homes. The Petitioner scheduled the Joined Party to perform those non-skilled home visits. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business.

29. The Joined Party worked for the Petitioner for approximately four years. Either party could terminate the relationship with fifteen days notice. These facts reveal the existence of an at-will relationship of relative permanence.

30. The Petitioner paid the Joined Party an hourly rate of pay, determined by the Petitioner, which varied from patient to patient. The Petitioner assigned the work to the Joined Party and controlled the financial aspects of the relationship. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

31. It is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the agreement provides the employer with the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)

32. The *Contract* establishes that the Petitioner had the right to determine what work was performed, where it was performed, when it was performed, and how it was performed. The Petitioner's witness, the Human Resource Director, was not the individual who hired the Joined Party and did not directly oversee the Joined Party's daily activities. The testimony of the Human Resource Director is not sufficient to show that the determination of the Department of Revenue was in error.

33. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error.

34. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the Petitioner's appeal be accepted as timely filed. It is recommended that the determination dated October 16, 2009, be AFFIRMED.

Respectfully submitted on April 26, 2010.

R. O. SMITH, Special Deputy
Office of Appeals