AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 0561615
ROYAL BEACH CLUB CONDOMINIUM ASSOCIATION INC
LINDA BARNES
800 ESTERO BLVD
FT MYERS BEACH FL 33931-2110

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

PROTEST OF LIABILITY
DOCKET NO. 2009-166884L

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 September 10, 2009, is REVERSED.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
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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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 September 10, 2009.

After due notice to the parties, a telephone hearing was held on April 13, 2010. The Petitioner, represented by the property manager, 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 working as a housekeeper/cleaner constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is an owners association for a 27 unit timeshare and condominium which was formed in approximately 1983. The Petitioner has two acknowledged employees, the property manager and the assistant manager.
2. The Petitioner cleans the units on a weekly basis if the units are occupied and also cleans each unit when it is vacated. The Petitioner uses individuals which the Petitioner considers to be independent contractors to clean the units. The cleaners are paid by the unit cleaned. The Petitioner has a rate schedule listing the amounts to be paid for each individual unit. The rates vary based on the size of the unit, the number of bathrooms, and whether the unit is carpeted.

3. The Joined Party is an individual with a history of employment in dental laboratories. In addition, the Joined Party has worked for approximately 27 years doing cleaning on a self employed basis. The Joined Party began performing services for the Petitioner as a cleaner in 1999. At that time the Joined Party signed an independent contractor agreement.

4. The work performed by the Joined Party did not require any special skill or knowledge. The Petitioner did not provide any training. The Petitioner provided the Joined Party with a list of what needed to done when cleaning each room.

5. The Petitioner notified the Joined Party and the other cleaners to call in on Thursdays to determine if work was available. The Joined Party had the right to decline any work without penalty. If the Joined Party declined to work or to clean a room, the Petitioner would then offer the work to another cleaner.

6. The Joined Party was free to do cleaning for others while working for the Petitioner and the Joined Party did so by cleaning private residences. The Joined Party was not required to personally perform the work. The Joined Party was free to hire others to perform the work for her. Occasionally, the Joined Party brought her father with her to assist with the cleaning.

7. The Petitioner provided all of the cleaning supplies that were needed to perform the work. Each room contained a vacuum cleaner and any other tools or equipment that was needed to perform the work. The Joined Party was not required to provide any supplies or tools to perform the work. The Joined Party did not have any expenses in connection with the work other than the expense of commuting to and from the Petitioner's property.

8. The Petitioner notified the Joined Party of when each unit needed to be completed based on the date and time the guests would be leaving or arriving. Check-out time was at 10 AM. The Joined Party determined what time to report for work based on the check-out times and the arrival times of the guests.

9. The Joined Party was not directly supervised. When the Joined Party completed each room she would give the Petitioner a sheet of paper showing that the room was completed. The Petitioner would spot check the rooms to ensure that they were cleaned properly. Occasionally, the Petitioner found minor things that were not cleaned to the Petitioner's satisfaction. On those occasions the Joined Party was required to return to the room to correct the problem.

10. The Petitioner generally paid the Joined Party on a weekly basis based on the units cleaned by the Joined Party during the week. The pay was based on the cleaning rate list established by the Petitioner, however, since the Joined Party did not have her own workers' compensation insurance coverage, the Petitioner deducted two or three dollars per unit as the cost of providing workers' compensation coverage for the Joined Party. No taxes were withheld from the pay. The Petitioner did not provide any fringe benefits such as health insurance, paid vacation, paid holidays, or bonuses.

11. 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. The Joined Party reported the income and paid tax as a self employed individual.

12. The Joined Party was separated from her full time employment in the dental laboratory and filed a claim for unemployment compensation benefits effective August 2, 2009. At that time she notified the unemployment compensation agency that she was continuing to work part time for the Petitioner as a self employed independent contractor.

Conclusions of Law:

13. 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.

14. 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).

15. 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).

16. 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.

17. 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.

19. 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.

20. In 4139 Management, Inc. v. Dept. of Labor, 763 So.2d 514 (Fla.5th DCA 2000), the District Court addressed a factually analogous case involving a condominium association and a housekeeper/cleaner who worked for the association on an as-needed basis. The housekeeper had the right to decline work assignments. On the first day of work the housekeeper was shown what was expected as to cleaning and was provided with a list of what was to be done. The property manager for the condominium association made occasional inspections of the housekeeper's work and required the housekeeper to redo the work if it was not performed satisfactorily. The association provided the equipment and tools and the housekeeper provided the cleaning supplies. The District Court held that the association did not exercise sufficient control over the housekeeper to establish an employer/employee relationship.

21. In Kearns v. Dept. of Labor and Employment Security, 680 So. 2d 619 (Fla. 3rd DCA 1996) the District Court held that a secretary who worked in the office of an attorney was an independent contractor. The court placed emphasis on the fact that there was an express understanding between the parties that the secretary was an independent contractor. The court further noted that the secretary had the right to determine when or if she worked and was free to perform work for others.

22. The Joined Party in this case works for the Petitioner under the express understanding that the Joined Party is a self employed independent contractor. The Joined Party does not always perform the work personally and she performs similar work for others as a self employed individual. The Joined Party determines when or if she performs work for the Petitioner. The Petitioner did not provide training concerning how to perform the work and the Joined Party uses her own methods to perform the work.

23. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

24. It is concluded that the services performed for the Petitioner by the Joined Party do not constitute insured employment.

Recommendation: It is recommended that the determination dated September 10, 2009, be REVERSED.

Respectfully submitted on April 19, 2010.

R. O. SMITH, Special Deputy
Office of Appeals