AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2903092
ERIC'S PLUMBING INC
502 MANDY STREET
AUBURNDALE FL 33823-2218

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

PROTEST OF LIABILITY
DOCKET NO. 2009-91158L

O R D E R

This matter comes before me for final Agency Order.

The issues before me are whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18), and whether services performed for the Petitioner by the Joined Party and other individuals as office 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.

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.

Exceptions to the Recommended Order were not received from any party.

Upon review of the entire record, it was determined that portions of the last paragraph on the first page of the Recommended Order must be modified to reflect the correct dates. The record reflects that the hearing was originally scheduled for August 19, 2009, and that the Petitioner's appeal was

subsequently dismissed on August 19, 2009. The last paragraph on the first page of the Recommended Order is amended to say:

> The hearing was originally scheduled for August 19, 2009, and the Petitioner did not appear. The Petitioner's appeal was subsequently dismissed August 19, 2009. The Petitioner requested that the hearing be reopened on August 26, 2009. The Petitioner was mistaken as to the scheduled time and date of the originally scheduled hearing. The Petitioner's representative was in a training class at the time of the original hearing and was unable to answer his telephone. The Petitioner's representative contacted the Agency by telephone upon leaving class and learning that he had missed the hearing. The Petitioner's representative's failure to appear at the hearing was the result of human error, and the Petitioner exercised due diligence in attempting to rectify the situation. There is good cause to proceed with the hearing.

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 amended herein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated May 26, 2009, is AFFIRMED.

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

TOM CLENDENNING
Director, Unemployment Compensation Services
AGENCY FOR WORKFORCE INNOVATION

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

PETITIONER:
Employer Account No. - 2903092
ERIC'S PLUMBING INC
ERIC LONSKI
502 MANDY STREET
AUBURNDALE FL 33823-2218

PROTEST OF LIABILITY
DOCKET NO. 2009-91158L

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 May 26, 2009.

After due notice to the parties, a telephone hearing was held on October 1, 2009. The Petitioner's president, the Joined Party, and a tax specialist for the Respondent appeared at the hearing. All parties 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 as office 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.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

Jurisdictional Issue: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 60BB-2.035(18).

The hearing was originally scheduled for August 18, 2009, and the Petitioner did not appear. The Petitioner's appeal was subsequently dismissed August 18, 2009. The Petitioner requested that the hearing be reopened on August 26, 2009. The Petitioner was mistaken as to the scheduled time and date

of the originally scheduled hearing. The Petitioner's representative was in a training class at the time of the original hearing and was unable to answer his telephone. The Petitioner's representative contacted the Agency by telephone upon leaving class and learning that he had missed the hearing. The Petitioner's representative's failure to appear at the hearing was the result of human error, and the Petitioner exercised due diligence in attempting to rectify the situation. There is good cause to proceed with the hearing.

Findings of Fact:

1. The Petitioner is a subchapter S corporation founded in 2004 as a plumbing company.

2. The Joined Party performed services as an office worker for the Petitioner from May 2008, through July 2009. The Joined Party was paid $14,832.90 in 2008 by the Petitioner. The Petitioner and the Joined Party are siblings. The Petitioner, aware that the Joined Party needed work, contacted the Joined Party to offer work. The Joined Party's services included clerical work, typing up bids, balancing the checkbooks, and paying bills. The Petitioner informed the Joined Party of her duties and hours of work at the time of hire.

3. The Joined Party was paid $13 per hour and was paid weekly. The Joined Party received pay for half of a day for Christmas and Thanksgiving.

4. The Joined Party began working Monday through Friday. The Joined Party's schedule was reduced by the Petitioner due to a lack of business. The Joined Party normally worked from the Petitioner's place of business. The Joined Party could perform some tasks from the Joined Party's home. The Joined Party was expected to perform the work within the normal business hours of the Petitioner. When work was available, the Joined Party was expected to report to work at 8 A.M. The Joined Party initially worked until 5 P.M. each day. The Petitioner began to send the Joined Party home early due to lack of business. The Petitioner provided a computer, fax machine, and calculator for the Joined Party to use at work.

5. The Joined Party was required to notify the Petitioner of any absence.

6. The Petitioner instructed the Joined Party as to what work was needed. The Petitioner reviewed the Joined Party's work. The Joined Party was responsible for making corrections and was paid for the additional work.

7. The Petitioner provided a $100 gift card as a Christmas bonus to the Joined Party.

8. The Joined Party considered herself an employee of the Petitioner. Both parties had the right to end the relationship at any time without liability.

9. The Joined Party had access to the Petitioner's company credit card. The Joined Party was responsible for dispersing petty cash to other workers for expenses.

Conclusions of Law:

10. 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.

11. 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).

12. 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).

13. 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.

14. 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.

15. The evidence in this case reveals that the Petitioner informed the Joined Party at the time of hire of the duties of the job and the hours of work. The Joined Party's work was directed by the Petitioner. The Joined Party was instructed in what tasks needed to be performed and had her work reviewed by the Petitioner. The Petitioner changed the hours of work unilaterally during the time the Joined Party provided services. The evidence reveals that the Petitioner had control over where, when, and how the work was to be done. The relationship of employer and employee requires control and direction by the employer over the actual conduct of the employee. This

exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and to the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Company, 247 So.2d 461, 463 (Fla. 4th DCA 1971); See also La Grande v. B. & L. Services, Inc., 432 So.2d 1364 (Fla. 1st DCA 1983).

16. The work performed by the Joined Party as an office manager is not an occupation or business that is separate and distinct from the Petitioner's plumbing business. The Joined Party took care of the paperwork and billing that allowed the Petitioner's company to operate and as such the Joined Party's duties were an integral part of the business. No particular skill or knowledge was required to perform the Joined Party's duties. The Joined Party was provided guidance and correction in the performance of the work. The Petitioner provided the equipment and location needed to perform the work.

17. 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."

18. A preponderance of the evidence presented in this case reveals that the Petitioner established sufficient control over the means and manner of performing the work as to create an employer-employee relationship between the Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated May 26, 2009, be AFFIRMED.

Respectfully submitted on March 8, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals