AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2983767
IC DECLARATION OF TRUST
703 GRANITE ST
BRAINTREE MA 02184-5320

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

PROTEST OF LIABILITY
DOCKET NO. 2010-161265L

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 29, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **March, 2011**.

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. - 2983767
IC DECLARATION OF TRUST
ATTN: KIMBERLY WINSLOW
703 GRANITE ST
BRAINTREE MA 02184-5320

PROTEST OF LIABILITY
DOCKET NO. 2010-161265L

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 September 29, 2010.

After due notice to the parties, a telephone hearing was held on February 9, 2011. The Petitioner, represented by a Trustee, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, 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 bike assemblers 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, IC Declaration of Trust, is a trust which has a bank account for the purpose of issuing payments to individuals who are classified as independent contractors by companies that contract with the Petitioner to issue the payments. Those companies provide the funds for the payments. The Petitioner does not derive any profit from issuing the payments.
2. The Joined Party was hired by one of the companies, Go Configure, that contracted with the Petitioner to issue payments to independent contractors. Go Configure hired the Joined Party to assemble treadmills, bicycles, and other equipment at various Sports Authority locations.

3. There was no written contract or written Agreement between the Joined Party and Sports Authority, Go Configure, or the Petitioner. However, the Joined Party understood and always believed that he was an independent contractor. The Joined Party has never been employed and has always worked as an independent contractor.
4. Initially, Go Configure trained the Joined Party how to assemble the bicycles and other equipment.
5. Go Configure notified the Joined Party of work assignments through email. The emails would merely inform the Joined Party that he was to assemble certain equipment at a specified store on a particular date. The Joined Party would then contact the store manager to schedule the store visit. The Joined Party determined when he would perform the work.
6. The Joined Party used hand tools assemble the equipment. The Joined Party provided all of his own tools. The Joined Party wore uniform shirts bearing the logo of Go Configure. The Joined Party purchased those shirts from Go Configure. The Joined Party was responsible for his own expenses.
7. When the Joined Party completed the work assignment he would prepare a list of the items which he had assembled at the store and would have the store manager sign the list. The Joined Party would submit a bill or invoice to Go Configure listing all of the items assembled at each of the stores. The Joined Party was paid a specified amount for each piece of equipment which the Joined Party had assembled. Upon receipt of the Joined Party's invoice Go Configure would provide the funds to the Petitioner and the Petitioner would authorize payment to the Joined Party's debit card. No taxes were withheld from the pay.
8. The Joined Party was not required to submit a timesheet to Sports Authority, Go Configure, or the Petitioner. The Joined Party was not required to keep any record of the time that he worked.
9. The Joined Party was free to perform work for others. The Joined Party did assemble bicycles for another company as an independent contractor. The Joined Party was free to hire others to assist him or to perform the work for him.
10. At the end of 2009 the Petitioner, IC Declaration of Trust, reported the payments made to the Joined Party on Form 1099-MISC as nonemployee compensation.
11. The Joined Party performed services as a bicycle assembler through Go Configure from approximately September 2007 until approximately June 2010. In June 2010 the Joined Party had an argument with the manager of Go Configure. Go Configure did not provide any further work assignments to the Joined Party after the argument.

Conclusions of Law:

12. 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.
13. 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).
14. 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).

15. 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.

16. 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.

17. 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.

18. 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.

19. The evidence presented in this case reveals that the Joined Party determined when to perform the work and how to perform the work. The Joined Party provided his own tools and was responsible for his own expenses. He was free to perform work for other companies and was free to hire others to perform the work for him. The Joined Party was paid based on the work which he completed rather than on time worked. The Joined Party always believed that he was an independent contractor rather than an employee. 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.

20. The facts in this case are similar to the working relationship addressed by the court in Kearns v. Dept. of Labor and Employment Security, 680 So. 2d 619 (Fla. 3rd DCA 1996). In that case the 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 provided her own equipment to perform the work, had the right to determine when or if she worked, and was free to perform work for others. Thus, as in Kearns, it is concluded that the Joined Party was an independent contractor while performing services for the Petitioner.

Recommendation: It is recommended that the determination dated September 29, 2010, be REVERSED.

Respectfully submitted on February 15, 2011.

R. O. SMITH, Special Deputy
Office of Appeals