AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2587906
BLAND & ASSOCIATES INC
1525 FAIRWAY DRIVE
CHARLESTON SC 29412-2635

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

PROTEST OF LIABILITY
DOCKET NO. 2010-162054L

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 28, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **April, 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. - 2587906
BLAND & ASSOCIATES INC
ATT: MYLES BLAND
1525 FAIRWAY DRIVE
CHARLESTON SC 29412-2635

PROTEST OF LIABILITY
DOCKET NO. 2010-162054L

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 28, 2010.

After due notice to the parties, a telephone hearing was held on January 26, 2011. An attorney appeared on behalf of the Petitioner and called the Petitioner's owner as a witness. The Joined Party appeared and testified on his own behalf. A tax specialist II appeared and testified on behalf of the Respondent.

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 received.

Issue:

Whether services performed for the Petitioner by the Joined Party 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 a subchapter S corporation, incorporated in 2003 for the purpose of running an archaeology and historic preservation business.

2. The Joined Party provided services for the Petitioner as an archaeologist from May 2004 through April 2009. The Joined Party contacted the Petitioner while looking for work. There was no written agreement. The Petitioner had the Joined Party sign a W-9 form.

3. The Petitioner would provide the Joined Party with a map of the survey site. The Joined Party would be expected to locate the survey site and conduct the appropriate survey at the site.

4. The Joined Party was expected to make decisions based upon the local conditions at the survey site. The Joined Party was expected to supervise the workers at the job site.

5. The Joined Party's schedule at the work site was dependent upon local conditions. The work had to be conducted during daylight hours. The work could not be conducted in rain or adverse weather conditions.

6. The Joined Party was allowed to hire a support staff for the work. The support staff was paid by the Petitioner.

7. The Joined Party provided his own personal hand tools, including a compass and a machete. The Petitioner provided all other tools, materials, and equipment needed for the work. The Petitioner provided a vehicle for approximately one year of the Joined Party's term of service. The Petitioner provided the Joined Party with an American Express card to use in purchasing fuel for the company vehicle. The Petitioner compensated the Joined Party for mileage when the Joined Party used his own vehicle. The Petitioner paid for the Joined Party's lodging when necessary. The Petitioner provided a per diem to the Joined Party.

8. The Joined Party was paid an hourly rate by the Petitioner. The Joined Party used a time sheet created by the Petitioner to track hours. The Joined Party began at $11 per hour. The pay was eventually increased to $13 per hour. The rate of pay was set by the Petitioner. The pay increases were to compensate for economic conditions and to encourage the Joined Party to continue to work for the Petitioner.

9. The Joined Party was not allowed to do work for a competitor while actively working for the Petitioner on a job site.

10. Either party could end the relationship at any time and without liability.

11. The Joined Party created his own company in 2007 for the purpose of creating and selling archaeological equipment.

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. 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.

18. The evidence presented in this hearing reveals that the Petitioner exercised control over what work would be performed by the Joined Party. The Petitioner provided the client's instructions to the Joined Party as to where the survey should be conducted. The Petitioner entrusted the Joined Party with making the business decisions of how the survey should actually be conducted on behalf of the Petitioner.

19. The work performed by the Joined Party as an archaeologist was not distinct or separate from the Petitioner's archaeology and historical preservation business.

20. The Joined Party had a great deal of experience performing surveys, and the work required specialized skills and knowledge. The Petitioner retained the services of the Joined Party because of the specialized skill possessed by the Joined Party. In instances of highly skilled workers, the exercise of direct control over the work is not as great a factor. In such instances, "The controlling factor is: For whom is the work being performed, and who had the power to control the work and the employee?" *Carnes v. Industrial Commission*, 73 Ariz. 264, 240 P.2d 536(1952). In the instant case, the Joined Party was unquestionably performing the work for the Petitioner. The Petitioner provided the clients, the work site, the bulk of the equipment, and the staff.

21. The Joined Party provided his own hand tools and personal gear. The Petitioner provided all other tools, equipment, and materials needed to perform the work. The Petitioner provided a company

vehicle at times for the Joined Party's use. The Petitioner compensated the Joined Party for mileage in instances when a company vehicle was not provided. The Petitioner compensated the Joined Party for lodging and allowed a per diem. The Petitioner provided an American Express card for the Joined Party to use for purchasing fuel.

22. The Joined Party provided services for the Petitioner for nearly five years. Such a length of time is indicative of a permanent relationship as opposed to the temporary nature of an independent contractor relationship.

23. The Joined Party was paid an hourly rate. The Joined Party was required to keep track of hours using a time sheet provided by the Petitioner. The Petitioner controlled the rate of pay and provided raises when the Petitioner believed it appropriate. The Petitioner indicated that one purpose of the raises was to prevent the Joined Party from going to work for a competitor which is indicative of a long term relationship.

24. The relationship was terminable at will. Either party could end the relationship at anytime and without liability.

25. The work performed by the Joined Party as an archaeologist was a part of the regular course of business for the Petitioner. The Joined Party was responsible for making decisions as to how the Petitioner's business should be conducted. The Joined Party was responsible for hiring and supervising workers paid by the Petitioner.

26. The Joined Party did have his own company. The Joined Party's company was formed in 2007 and handled the manufacturing of certain archaeological equipment. The Petitioner did not issue either paychecks or 1099 forms to the Joined Party's company. The services performed by the Joined Party's company were separate and distinct from those services performed for the Petitioner by the Joined Party. Mere ownership of a business or work at a second job does not preclude an employer-employee relationship.

27. A preponderance of the evidence presented in this case reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated September 28, 2010, be AFFIRMED.

Respectfully submitted on March 16, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals