AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2159731
T & T COMPUTERS INC
HIEP TANG
11254 W HILLSBOROUGH AVE
TAMPA FL 33635-9762

PROTEST OF LIABILITY
DOCKET NO. 2010-18531L

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 November 24, 2009.

After due notice to the parties, a telephone hearing was held on September 15, 2010. An attorney appeared on behalf of the Petitioner; the Petitioner's owner was called 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 not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals 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 is a subchapter S corporation, incorporated on or about 1996, for the purpose of running a computer repair business.

2. The Joined Party contacted the Petitioner in an attempt to find work. The Joined Party signed an Independent Contractor agreement at the time of hire. The Joined Party provided services to the Petitioner as a computer repair person from on or about January 5, 2009, through on or about May 14, 2009.

3. The Joined Party was informed at the time of hire that the Joined Party was on a probationary period with the possibility of going to full time work at the conclusion of the evaluation period.

4. The Joined Party was initially required to report to work at 9am Monday through Friday and work 5 hours per day. The Joined Party's schedule was later changed by the Petitioner to Monday through Thursday, from 9am to 6pm.

5. The Joined Party would run virus scans on computers and perform repairs as directed by the Petitioner. The Petitioner monitored, instructed, and directed the Joined Party in the performance of the work. The Petitioner considered the Joined Party and the Petitioner to be in a mentor-protégé relationship.

6. The Joined Party performed work primarily at the Petitioner's place of business. The Joined Party performed work occasionally at the place of business of clients of the Petitioner. The Joined Party was accompanied by the Petitioner on outside work.

7. The Petitioner provided a workspace and all necessary tools and materials for the Joined Party.

8. The Petitioner paid the Joined Party $9 per hour. The Joined Party was required to sign in a time sheet to keep track of hours worked. The Joined Party was paid weekly.

9. Both parties had the right to end the relationship at anytime without liability.

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.

14. 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.

15. 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.

16. The evidence presented in this hearing reveals that the Petitioner controlled where, when, and how the Joined Party performed the work. The Petitioner established a schedule for the Joined Party. The Joined Party was required to report to the Petitioner's place of business. The Petitioner directed and monitored the Joined Party's work.

17. The Petitioner provided the workspace, tools, and materials required for the work. The Joined Party had no financial investment in the business.

18. The Joined Party was paid an hourly rate. Such a method of pay tends to be indicative of an employer-employee relationship as opposed to the by the job method usually found in independent contractor relationships.

19. There was a written independent contractor agreement signed by both parties at the time of hire. 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."

20. The relationship was terminable at will. Either party had the right to end the relationship at anytime and without 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."

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

22. A preponderance of the evidence presented in this case indicates that the conditions of employment for the Joined Party are sufficiently unique as to not apply to the remainder of the class of worker.

Recommendation: It is recommended that the determination dated November 24, 2009, be MODIFIED to apply only to the Joined Party, and as modified, it is recommended that the determination dated November 24, 2009, be AFFIRMED.

Respectfully submitted on October 25, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals

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TALLAHASSEE, FLORIDA

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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 November 24, 2009, is MODIFIED to apply only to the Joined Party. It is further ORDERED that the determination is AFFIRMED as modified.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION