AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2305091
TEC MARC INC
7857 W SAMPLE ROAD STE 156
CORAL SPRINGS FL 33065-4748

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

PROTEST OF LIABILITY
DOCKET NO. 2010-26412L

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 December 17, 2009, is REVERSED.

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

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. - 2305091
TEC MARC INC
TOM GIBBONS
7857 W SAMPLE ROAD STE 156
CORAL SPRINGS FL 33065-4748

PROTEST OF LIABILITY
DOCKET NO. 2010-26412L

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 December 17, 2009.

After due notice to the parties, a telephone hearing was held on August 9, 2010. The Petitioner's owner appeared and provided testimony at the hearing. A tax specialist II appeared and testified on behalf of the Respondent. The Joined Party did not appear at the hearing.

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 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 October 2000, for the purpose of running a burglar alarm and surveillance camera sales and installation business.

2. The Joined Party provided services for the Petitioner as an alarm technician from 2006, through 2008.

3. The Joined Party contacted the Petitioner while searching for work. The Joined Party completed an application, provided references, and had an interview with the Petitioner. The Petitioner provided a package of paperwork including a standard contract to the Joined Party. The Joined Party did not return the contract to the Petitioner.

4. The Joined Party performed alarm service calls for the Petitioner.

5. The Joined Party was allowed to work for a competitor.

6. The Joined Party was not licensed to do alarm installation and repair. The Joined Party worked under the Petitioner's license.

7. The Joined Party would call in to the Petitioner each morning and would be given a list of jobs to be performed. The Joined Party was generally expected to finish jobs on the same day as they were begun. The Joined Party was expected to call in at the end of the day to let the Petitioner know that the Joined Party was done for the day. The Joined Party was expected to call in if there were any problems.
8. The Joined Party was paid based upon the work performed. The Joined Party would submit his work schedule for the week to the Petitioner. The Petitioner would confirm that the work had been done and then pay the Joined Party a set fee for each task performed. The Joined Party was issued a weekly pay check. The work schedule was created by the Petitioner. The fee for service calls was created by the Petitioner.

9. The Joined Party provided his own tools and vehicle for performing the work. The Petitioner provided magnetic signs with the Petitioner's name for the Joined Party's vehicle. The Joined Party was required to wear a shirt with the company name. The Joined Party was required to purchase the shirts.

10. The Petitioner followed up on a percentage of the work to make certain that it had been done completely and correctly. The Joined Party would be required to fix mistakes on his own time and without additional compensation.

11. The Petitioner required that work be performed in a professional manner. A customer complaint would result in a warning. A second customer complaint would result in the discharge of the Joined Party.

12. The Joined Party's work was a part of the normal course of business for the Petitioner.

13. Either party could end the relationship at anytime without liability.

Conclusions of Law:

14. 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.

15. 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).

16. 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).

17. 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.

18. 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.

19. 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.

20. The evidence presented in this case reveals that the Petitioner did not exercise direct control over the manner in which the Joined Party performed services. The Petitioner performed a number of inspections of the final product of the Joined Party’s work but these were aimed at making certain that the final product met the standards of the Petitioner.

21. The Joined Party was free to work or not work on any given day. The Petitioner would provide a list of jobs in the event that the Joined Party called in for work. The Petitioner did not exercise control over when the Joined Party performed the work.

22. The Joined Party provided his own hand tools and vehicle for performance of the work. The Petitioner did require the use of magnetic vehicle signs and a company shirt; however the nature of the alarm installation and repair business makes identification of workers of great importance.
23. The evidence presented in this case reveals that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated December 17, 2009, be REVERSED.

Respectfully submitted on September 2, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals