AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2610351

JACKSONVILLE CONSERVATORY
OF MUSIC INC
JOYCE CALLANDER
12502 RUNNING RIVER RD SOUTH
JACKSONVILLE FL 32246-3222

PROTEST OF LIABILITY
DOCKET NO. 2010-38015L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals working as music teachers constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed an unemployment compensation claim in November 2009. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Agency that she worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As the result of the Joined Party's request, the Department of Revenue conducted an investigation to determine whether work for the Petitioner was done as an employee or an independent contractor. If the Joined Party worked for the Petitioner as an employee, she would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, she would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any others who worked under the same terms and conditions. Upon completing the investigation, an auditor at the Department of Revenue determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages paid to the Joined Party and any other workers who performed services under the same terms and conditions. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was

joined as a party because she had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on July 8, 2010. The Petitioner's Owner represented the Petitioner and provided testimony on its behalf. The owner of the corporation CNM, Inc., the Petitioner's accountant, a customer of the Petitioner's, the Petitioner's Owner's husband, and one of the Petitioner's workers appeared and testified on behalf of the Petitioner. A Department of Revenue Tax Specialist II appeared and testified on behalf of the Respondent. The Joined Party appeared and testified on her own behalf. The Special Deputy issued a Recommended Order on August 26, 2010.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner was a subchapter S corporation purchased December 1, 2006, for the purpose of running a music school. The Petitioner's business was sold October 12, 2009. The Petitioner's corporation was dissolved January 25, 2010.

2. The Joined Party provided services for the Petitioner as a one on one music teacher. The Joined Party taught piano, voice, flute, and saxophone. The Joined Party began providing services in August 2006, prior to the Petitioner's purchase of the music school. The Joined Party continued providing services after the Petitioner sold the business and dissolved the corporation.

3. The Joined Party previously worked for other music schools and privately as an independent contractor.

4. The Petitioner considered the Joined Party to be an independent contractor. The local practice in the industry was for music teachers to operate as unsupervised independent contractors.

5. The Joined Party informed the Petitioner of what days and times the Joined Party was available to provide services. The Petitioner would set up a schedule based upon the requests of the customers and the availability of the teachers. If the Joined Party were unable to make a scheduled lesson, the Joined Party could either reschedule a make-up session or arrange to have a substitute instructor teach the lesson. The Joined Party could refuse additional work.

6. The Petitioner leased a building with classrooms. The Joined Party was allowed to use the classrooms and equipment provided by the Petitioner. The Petitioner provided a drum set and piano because of the size of the instruments. With the exception of the drum set and piano, the students were expected to supply their own instruments.

7. The Petitioner expected services to be performed at the Petitioner's place of business. The Joined Party could work from another location with the permission of the student. The Joined Party and other teachers had building keys so that they could provide services at times when the Petitioner was closed.

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

9. The Joined Party was paid every two weeks. The rate of pay was based upon the number of students taught lessons during the pay period. The pay was $8.50 per half hour lesson. The rate of pay was determined by the Petitioner. The Joined Party's pay was not held by the Petitioner pending client payment for services.

10. The Petitioner gave the Joined Party $100 Christmas bonuses.

11. The Petitioner determined the amount to be charged to customers for music lessons.

12. The Joined Party was allowed to subcontract the work.

13. The Joined Party was not allowed to solicit students under contract from the Petitioner.

14. The Petitioner could discharge the Joined Party at any time without liability. The Joined Party could quit at anytime without liability.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated January 14, 2010, be reversed. The Joined Party's exceptions to the Recommended Order were received by mail postmarked September 7, 2010. The Petitioner's counter exceptions were received by mail postmarked September 18, 2010. Since the Petitioner's counter exceptions were not submitted within 10 days of the mailing of the Joined Party's exceptions, the Agency will not consider them in this order pursuant to rule 60BB-2.035(19)(d), Florida Administrative Code. No other submissions were received from any party.

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.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion

> of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Joined Party's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

The Joined Party's exceptions propose findings of fact in accord with the Special Deputy's Findings of Fact, propose alternative findings of fact and conclusions of law, or attempt to enter evidence that was not presented during the hearing. The Joined Party also takes exception to Findings of Fact #2 and 6 and Conclusion of Law #19. Section 120.57(1)(l), Florida Statutes, provides that the Agency may not reject or modify the Findings of Fact unless the Agency first determines that the findings of fact were not based upon competent substantial evidence in the record. Section 120.57(1)(l), Florida Statutes, also provides that the Agency may not reject or modify the Conclusions of Law unless the Agency first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact, including Findings of Fact #2 and 6, are supported by competent substantial evidence in the record. A review of the record also reveals that the Special Deputy's Conclusions of Law, including Conclusion of Law #19, reflect a reasonable application of the law to the facts. As a result, the Agency may not modify the Special Deputy's Findings of Fact and Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Rule 60BB-2.035(19)(a), Florida Administrative Code, prohibits the acceptance of additional evidence after the hearing is closed. The Joined Party's request for the consideration of additional evidence is respectfully denied. The Joined Party's exceptions are respectfully rejected.

In the exceptions, the Joined Party argues the absence of a signed independent contractor agreement requires the conclusion that an employer/employee relationship existed between the Joined Party and the Petitioner. The law does not require that conclusion in this case. In *Cantor v. Cochran*, 184 So.2d 173, 174 (Fla. 1966), the Florida Supreme Court commented that employment status "depends not on the statements of the parties but upon all the circumstances of their dealings with each other." Thus, employment status is a matter of law to be decided based on the entire working relationship between the parties, and it need not be determined solely by an agreement between the parties regarding such status. In *Cantor*, the court found the existence of an employment relationship even when presented with a signed

written statement from the worker indicating an independent status. *Id*. at 174. The court's conclusion was based on the other aspects of the working relationship that demonstrated factors of control uncharacteristic of an independent contractor status. *Id*. at 174-75. Therefore, the law does not support the Joined Party's contention that the absence of a written independent contractor agreement between the parties should solely determine the Joined Party's employment status.

Also in *Magarian v. Southern Fruit Distributors*, 1 So.2d 858, 861 (Fla. 1941), the Florida Supreme Court held that the parties' beliefs were not determinative of independent contractor status in light of the other factors of control present in the working relationship. The court commented, "The parties evidently thought they did not stand in the relation of master and servant but if, as a matter of law, they did so stand, their mistake in this regard would not change the status." *Id*. Thus, the appropriate analysis of a worker's employment status would require an examination of all relevant aspects of the working relationship. In *Keith v. News Sentinel Co*. case. 667 So.2d 167 (Fla. 1995), the Florida Supreme Court provided guidance on how to approach such an analysis. *Id*. at 171. The court held that the lack of an express agreement or clear evidence of the intent of the parties requires "a fact-specific analysis under the Restatement based on the actual practice of the parties." *Id*. However, when an agreement does exist between the parties, the court held that the courts should first look to the agreement and honor it "unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status." *Id*. As a result, the analysis in this case would not stop at an examination of the agreement between the parties.

A complete analysis would examine whether the agreement and the other provisions of the agreement were consistent with the actual practice of the parties. If a conflict is present, *Keith* provides further guidance. *Id*. In *Keith*, the court concluded that the actual practice and relationship of the parties should control when the "other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties." *Id*. For example, in *Justice v. Belford Trucking Co*., 272 So.2d 131, 136 (Fla. 1972), the Florida Supreme Court held that the Judge of Industrial Claims erred when relying solely on the language of a contract instead of considering all aspects of the parties' working relationship. In doing so, the court found that the judge "did not recognize the employment relationship that actually existed." *Id*. at 136. Therefore, the mere existence of an independent contractor agreement and the specific terms of such an agreement would not be conclusive regarding the issue of the Joined Party's status. A review of the record reveals that the Special Deputy found that the Petitioner considered the Joined Party to be an independent contractor in Finding of Fact #4. A review of the record also reveals that the Special Deputy concluded that the working relationship between the parties was consistent

with that status. Competent substantial evidence in the record supports the conclusion that the Petitioner did not control the manner in which the Joined Party performed her services and controlled only the results of her work as is characteristic of an independent contractor relationship. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. The Joined Party's exception is respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Joined Party, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated January 14, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **October, 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. - 2610351
JACKSONVILLE CONSERVATORY
OF MUSIC INC
JOYCE CALLANDER
12192 BEACH BLVD SUITE 5
JACKSONVILLE FL 32246-1177

PROTEST OF LIABILITY
DOCKET NO. 2010-38015L

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 January 14, 2010.

After due notice to the parties, a telephone hearing was held on July 8, 2010. The Petitioner's owner appeared and provided testimony at the hearing. The new company owner appeared and provided testimony on behalf of the Petitioner. The Petitioner's accountant appeared and provided testimony for the Petitioner. A customer of the Petitioner and one of the Petitioner's workers appeared and provided testimony. The Petitioner's owner's husband appeared and provided testimony on behalf of the Petitioner. The Joined Party appeared and testified on her 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 was a subchapter S corporation purchased December 1, 2006, for the purpose of running a music school. The Petitioner's business was sold October 12, 2009. The Petitioner's corporation was dissolved January 25, 2010.

2. The Joined Party provided services for the Petitioner as a one on one music teacher. The Joined Party taught piano, voice, flute, and saxophone. The Joined Party began providing services in August 2006, prior to the Petitioner's purchase of the music school. The Joined Party continued providing services after the Petitioner sold the business and dissolved the corporation.

3. The Joined Party previously worked for other music schools and privately as an independent contractor.

4. The Petitioner considered the Joined Party to be an independent contractor. The local practice in the industry was for music teachers to operate as unsupervised independent contractors.

5. The Joined Party informed the Petitioner of what days and times the Joined Party was available to provide services. The Petitioner would set up a schedule based upon the requests of the customers and the availability of the teachers. If the Joined Party were unable to make a scheduled lesson, the Joined Party could either reschedule a make-up session or arrange to have a substitute instructor teach the lesson. The Joined Party could refuse additional work.

6. The Petitioner leased a building with classrooms. The Joined Party was allowed to use the classrooms and equipment provided by the Petitioner. The Petitioner provided a drum set and piano because of the size of the instruments. With the exception of the drum set and piano, the students were expected to supply their own instruments.

7. The Petitioner expected services to be performed at the Petitioner's place of business. The Joined Party could work from another location with the permission of the student. The Joined Party and other teachers had building keys so that they could provide services at times when the Petitioner was closed.

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

9. The Joined Party was paid every two weeks. The rate of pay was based upon the number of students taught lessons during the pay period. The pay was $8.50 per half hour lesson. The rate of pay was determined by the Petitioner. The Joined Party's pay was not held by the Petitioner pending client payment for services.

10. The Petitioner gave the Joined Party $100 Christmas bonuses.

11. The Petitioner determined the amount to be charged to customers for music lessons.

12. The Joined Party was allowed to subcontract the work.

13. The Joined Party was not allowed to solicit students under contract from the Petitioner.

14. The Petitioner could discharge the Joined Party at any time without liability. The Joined Party could quit at anytime without liability.

Conclusions of Law:

15. 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.

16. 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).

17. 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).

18. 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.

19. 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.

20. 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.

21. The evidence presented at the hearing revealed that the Joined Party previously worked for other schools as an independent contractor. The Joined Party at times had her own private students. The local industry standards were for music schools to be staffed by independent contractor music teachers that operate without supervision.

22. The Joined Party is a musician and music teacher. The Petitioner did not provide training to the Joined Party in music or concerning how the students should be taught. The greater the skill or

special knowledge required to perform the work; the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec.. 386 So.2d 259 (Fla. 2d DCA 1980)

23. The "extent of control" referred to in Restatement section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

24. The Petitioner did not exert any control over how the Joined Party taught the students. The Joined Party determined, without interference from the Petitioner, how to teach the students and what music to teach to the students. The Joined Party used her own methods to teach the students rather than methods dictated by the Petitioner. The Petitioner merely required the Joined Party to provide the lessons at the scheduled times so that the students received the lessons for which the students paid. The control exercised by the Petitioner was focused on results rather than means.

25. The preponderance of the evidence presented at the hearing shows that the Petitioner did not exercise sufficient control over the Joined Party as to create an employer-employee relationship between the Petitioner and the Joined Party.

Recommendation: It is recommended that the determination dated January 14, 2010, be REVERSED.

Respectfully submitted on August 26, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals