AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 0593769

UNIVERSITY DENTAL HEALTH CENTER INC
LINDA COMMONS
5629 GLEN CREST BLVD
TAMPA FL 33625-1008

PROTEST OF LIABILITY
DOCKET NO. 2010-59947L

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 as a dentist constitute insured employment pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of liability.

The Joined Party filed an unemployment compensation claim in December 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. 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. 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 August 4, 2010. The Petitioner was represented by its owner. A dental assistant appeared and testified 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 Special Deputy issued a Recommended Order on September 1, 2010.

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

1. The Petitioner is a subchapter S corporation, incorporated in 1982 for the purpose of running a dental facility.

2. The Joined Party responded to an advertisement placed on Craig's list by the Petitioner. The Joined Party had a telephone interview with the Petitioner and was subsequently hired by the Petitioner. The Joined Party provided services for the Petitioner, as a dentist, from June 8, 2009, through November 30, 2009.

3. The Petitioner consulted the Joined Party about the work schedule. The Petitioner scheduled the Joined Party to work on Mondays and Fridays due to the Joined Party's schedule. The Petitioner required all work to be performed at the Petitioner's place of business.

4. The Petitioner's office manager handled the scheduling of patients. The Joined Party was expected to be at work by 9 o'clock on days when patients were scheduled. The Joined Party was allowed to leave early if there were no patients scheduled. All work was done during the Petitioner's business hours. The Petitioner informed the Joined Party if she would be required to work on any given scheduled day. The Joined Party was not free to refuse to see patients.

5. The Joined Party exercised her professional medical judgment in the work. The Joined Party was responsible for determining what treatments were necessary for patients and carrying out those treatments.

6. The Petitioner determined what fees the patients were charged.

7. The Joined Party was paid either $450 per day or a 33% commission, whichever was higher. The Joined Party was expected to pay a percentage of lab fees.

8. The Petitioner provided the tools, equipment, and space required for the work.

9. The Joined Party was covered under the Petitioner's workmen's compensation insurance.

10. Either party could end the relationship at anytime, without liability.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated March 25, 2010, be affirmed. The Petitioner's exceptions to the Recommended Order were received by fax dated September 14, 2010. 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 Petitioner'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 exceptions, including portions of sections (a) – (j), propose findings of fact in accord with the Special Deputy's Findings of Fact, propose alternative findings of fact or conclusions of law, and attempt to enter additional evidence. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and the Agency may not reject or modify the Special Deputy's 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 the essential requirements of

law. Also pursuant to section 120.57(1)(l), Florida Statutes, the Agency may not reject or modify the Special Deputy's 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 are supported by competent substantial evidence in the record. Further review of the record also reveals that the Special Deputy's Conclusions of Law 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 or 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 Petitioner's request for the consideration of additional evidence is respectfully denied. The exceptions that propose findings of fact in accord with the Special Deputy's Findings of Fact, propose alternative findings of fact or conclusions of law, or attempt to enter additional evidence are respectfully rejected.

In its exceptions, the Petitioner alleges that the Special Deputy ignored key factors demonstrating independent contractor status. The Petitioner also offers an alternative analysis of the case under the Restatement factors in sections (a)-(j) of its exceptions. In support of its arguments, the Petitioner quotes large portions of the court's analysis from *Kane Furniture Corp. v. Miranda*, 506 So.2d 1061 (Fla. 2d DCA 1987). In *Kane*, the court ruled that carpet installers worked as independent contractors for a furniture store. *Id*. at 1066. The court considered many factors in its analysis, including that the installers supplied their own equipment and vehicles, that a small space and a telephone was provided to them by the furniture store, that they only worked when needed by the store, that each job varied in length, and that the installers were paid by yard of carpet installed instead of by the time they actually worked. *Id*. at 1065. The current case is distinguishable in that the Special Deputy found that the Petitioner provided all tools, equipment, and space and paid the Joined Party by a flat fee or commissions for each day of work in Findings of Fact #7-8. The current case is also distinguishable in the Special Deputy found that the Petitioner scheduled the Joined Party to work on Mondays and Fridays, expected the Joined Party to be at work at 9 o'clock, and required that the work be completed within the Petitioner's business hours in Findings of Fact #3-4. Competent substantial evidence in the record supports the Special Deputy's Findings of Fact. The Special Deputy's Findings of Fact support the Special Deputy's ultimate conclusion that the Petitioner exerted control over the Joined Party's work as is characteristic of an employment relationship. Thus, the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are not rejected by the Agency in accordance with section 120.57(1)(l), Florida Statutes. The Petitioner's request for an alternative analysis of the case is respectfully denied. The portions of the exceptions that allege that the

Special Deputy ignored key factors demonstrating independent contractor status, offer an alternative analysis of the case under the Restatement factors, and quote the *Kane* case are respectfully rejected.

The portions of the *Kane* case quoted by the Petitioner in its exceptions also refer to the following cases: *T & T Communications v. State, Dep't. of Labor and Employment Secur.*, 460 So.2d 996 (Fla. DCA 1984); *VIP Tours of Orlando, Inc. v. State, Dep't of Labor and Employment Secur.*, 499 So.2d 1307 (Fla. 5th DCA 1984); *D. O. Creasman Electronics, Inc, v. State, Dep't of Labor and Employment Secur.*, 458 So.2d 894 (Fla. 2d DCA 1984); *Miami Herald Publishing Co. v. Kendall*, 88 So.2d 276 (Fla. 1956); *Ware v. Money-Plan International, Inc.*, 467 So.2d 1072 (Fla. 2d DCA 1985); and *Burnup & Sims Com Tec, Inc. v. State, Dep't of Labor and Employment Secur.*, 459 So.2d 447 (Fla. 2d DCA 1984). These cases are also distinguishable from the case at hand. While the courts in all of these cases found an independent contractor status when a worker was subject to control only as to the results of the work and was not subject to control in regards to the manner in which the work was performed, the Special Deputy did not conclude in this case that the Petitioner exerted control over merely the results of the Joined Party's work; instead, the Special Deputy concluded in Conclusions of Law #19 and 21 that the Petitioner controlled "the surrounding circumstances" of the Joined Party's work and that the control exercised by the Petitioner over those circumstances was consistent with an employment relationship. Competent substantial evidence in the record supports the Special Deputy's conclusion that an employment relationship existed between the parties. Since the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record and the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts, the Petitioner has not provided a basis for the modification or rejection of the Findings of Fact or Conclusions of Law permitted under section 120.57(1)(l), Florida Statutes. The portions of the exceptions that cite distinguishable cases are 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 Petitioner, 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 March 25, 2010, is AFFIRMED.

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

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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 March 25, 2010.

After due notice to the parties, a telephone hearing was held on August 4, 2010. The Petitioner's owner and a dental assistant employed by the Petitioner appeared and provided testimony at the hearing. The Joined Party appeared and testified on her own behalf. A tax specialist II appeared 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 1982 for the purpose of running a dental facility.

2. The Joined Party responded to an advertisement placed on Craig's list by the Petitioner. The Joined Party had a telephone interview with the Petitioner and was subsequently hired by the

Petitioner. The Joined Party provided services for the Petitioner, as a dentist, from June 8, 2009, through November 30, 2009.

3. The Petitioner consulted the Joined Party about the work schedule. The Petitioner scheduled the Joined Party to work on Mondays and Fridays due to the Joined Party's schedule. The Petitioner required all work to be performed at the Petitioner's place of business.

4. The Petitioner's office manager handled the scheduling of patients. The Joined Party was expected to be at work by 9 o'clock on days when patients were scheduled. The Joined Party was allowed to leave early if there were no patients scheduled. All work was done during the Petitioner's business hours. The Petitioner informed the Joined Party if she would be required to work on any given scheduled day. The Joined Party was not free to refuse to see patients.

5. The Joined Party exercised her professional medical judgment in the work. The Joined Party was responsible for determining what treatments were necessary for patients and carrying out those treatments.

6. The Petitioner determined what fees the patients were charged.

7. The Joined Party was paid either $450 per day or a 33% commission, whichever was higher. The Joined Party was expected to pay a percentage of lab fees.

8. The Petitioner provided the tools, equipment, and space required for the work.

9. The Joined Party was covered under the Petitioner's workmen's compensation insurance.

10. Either party could end the relationship at anytime, without liability.

Conclusions of Law:

11. 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.

12. 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).

13. 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).

14. 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.

15. 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.

16. 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.

17. The evidence presented in this case reveals that the Petitioner controlled where and when the Joined Party performed services. The Petitioner controlled the scheduling of patients and while the Joined Party had flexibility in determining what days of the week she was available, the Petitioner controlled if and how much work the Joined Party would receive on each of those days. The services were all performed at the Petitioner's place of business and during the Petitioner's hours of operation.

18. The relationship was terminable at will. Either party had the right to terminate the relationship at anytime 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."

19. The Petitioner did not directly supervise the work of the Joined Party. The Joined Party is a skilled worker with many years of schooling in her field. In analyzing the work of a highly trained professional it can be difficult to show control over the work. In Kay v. General Cable Corp., 144 F.2d 635, the court examined the surrounding circumstances. The physician's discretion over what patients were treated, the use of the employer's facilities and equipment, the right of the employer to discharge, and the fact that the doctor was considered an ordinary employee, were considered. In this case, the Joined Party had no discretion over what patients would be seen. The

Joined Party used the Petitioner's equipment and facilities. The Petitioner had the right to terminate the agreement at anytime without liability. The Petitioner considered the Joined Party to be an independent contractor in the instant case; however, the Joined Party was covered under the Petitioner's workmen's compensation coverage.

20. The services performed by the Joined Party as a dentist were a part of the normal course of business of the Petitioner's dental facility.

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 Petitioner and the Joined Party.

22. The Petitioner submitted proposed findings of fact and conclusions of law on August 18, 2010. The proposed findings of fact and conclusions of law were considered by the Special Deputy. Where those proposals comport with the record, they are incorporated into this recommended order. Where those proposals do not comport with the record, they are respectfully rejected.

Recommendation: It is recommended that the determination dated March 25, 2010, be AFFIRMED.

Respectfully submitted on September 1, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals