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

**PETITIONER:**
Employer Account No. - 1085418
SARVINAS INC
CAROL SARVINAS
905 PINE WAY
SANFORD FL 32703

**PROTEST OF LIABILITY**
**DOCKET NO. 2010-63346L**

**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 16, 2010.

After due notice to the parties, a telephone hearing was held on November 9, 2010. The Petitioner, represented by a consultant to the Petitioner's Certified Public Accountant, appeared and testified. A bookkeeper in the office of the Certified Public Accountant and the Certified Public Accountant testified as witnesses. The Respondent was represented by a Department of Revenue Tax Specialist. A Tax Auditor testified as a witness.

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 from the Petitioner.

**Issue:**

Whether services performed for the Petitioner constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

**Findings of Fact:**

1. The Petitioner, a subchapter S corporation, is engaged in the business of installing and removing Realtors' yard signs. The Petitioner's vice president is active in the operation of the business.
2. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2008 tax year to ensure compliance with the Florida Unemployment Compensation Law.
3. The Tax Auditor conducted the audit at the office of the Petitioner's Certified Public Accountant.
4. One of the documents examined by the Tax Auditor was the Petitioner's *Form 1120S U. S. Income Tax Return for an S Corporation.* The Income Tax Return revealed that the Petitioner realized a profit of $10,848 during 2008. The Petitioner did not report any of the earnings as wages for either the president or the vice president. Initially, the Tax Auditor proposed to split the earnings between the two officers, however, the Petitioner's accountant provided documentation that the president was not active in the business due to medical reasons. Therefore, the Tax Auditor determined that the vice president received wages of $10,848.
5. The Tax Auditor examined eight *Form 1099-MISC*. Those forms were issued to individuals who installed and removed the Realtors' signs. One of the individuals who received a *Form 1099-MISC* was also issued a *Form W-2* by the Petitioner. The Tax Auditor concluded that all of the sign installers were misclassified by the Petitioner as independent contractors. After the Tax Auditor concluded that the workers were the Petitioner's employees the accountant provided the Tax Auditor with independent contractor agreements for some of the workers. None of the agreements indicated that they were in effect during 2008. The accountant provided other documentation for years other than 2008.
6. The Department of Revenue notified the Petitioner of the audit results by *Notice of Proposed Assessment* mailed on or before March 16, 2010. The Petitioner's Certified Public Accountant filed a timely protest by letter dated March 29, 2010.

**Conclusions of Law:**

7. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.
8. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.
9. Rule 60BB-2.023, Florida Administrative Code, provides:
   (3) Reporting Wages Paid. Wages are considered paid when:
   (a) Actually received by the worker; or;
   (b) Made available to be drawn upon by the worker; or
   (c) Brought within the worker's control and disposition, even if not possessed by the worker.
10. In Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9th Cir. 1990), the court determined that dividends paid by an S corporation to an officer of the corporation who performed services for the business, were wages subject to federal employment taxes, including federal unemployment compensation taxes. The court relied upon federal regulations which provide that the "form of

payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment."

11. It is concluded that the Tax Auditor properly concluded that the earnings of the Petitioner were wages earned by the active corporate officer.

12. The issue of whether the services performed for the Petitioner by individuals working as sign installers 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. 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.

17. 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. Three witnesses testified on behalf of the Petitioner. The consultant was engaged by the Certified Public Accountant in 2010 specifically in regard to the protest filed by the Petitioner. The consultant testified that he had no personal knowledge of the terms and conditions under which the installers performed services. The bookkeeper testified that the installers were classified as independent contractors by the Petitioner and that the bookkeeper's knowledge was limited to what

she was told by the Petitioner. The Certified Public Accountant testified that he had never visited the business location and that he had never met or spoken to any of the sign installers.

19. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.

20. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error.

21. It has not been established by a preponderance of competent evidence that the determination of the Department of Revenue is in error.

**Recommendation:** It is recommended that the determination dated March 16, 2010, be AFFIRMED.

Respectfully submitted on November 29, 2010.

R. O. SMITH, Special Deputy
Office of Appeals

**AGENCY FOR WORKFORCE INNOVATION**
**TALLAHASSEE, FLORIDA**

**PETITIONER:**
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**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 constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes. An issue also before me is whether the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

The Department of Revenue conducted an audit of the Petitioner for the 2008 tax year. The auditor determined that the earnings reported by the Petitioner were taxable wages under the Florida unemployment compensation law. As a result, the Petitioner was required to pay additional taxes. The Petitioner filed a timely protest of the determination. A telephone hearing was held on November 9, 2010. The Petitioner, represented by a consultant to the Petitioner's Certified Public Accountant, appeared and testified. A bookkeeper in the office of the Certified Public Accountant and the Certified Public Accountant also testified as witnesses on behalf of the Petitioner. The Respondent was represented by a Department of Revenue Tax Specialist. A Tax Auditor testified as a witness on behalf of the Respondent.

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

1. The Petitioner, a subchapter S corporation, is engaged in the business of installing and removing Realtors' yard signs. The Petitioner's vice president is active in the operation of the business.

2. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2008 tax year to ensure compliance with the Florida Unemployment Compensation Law.

3. The Tax Auditor conducted the audit at the office of the Petitioner's Certified Public Accountant.

4. One of the documents examined by the Tax Auditor was the Petitioner's *Form 1120S U. S. Income Tax Return for an S Corporation.* The Income Tax Return revealed that the Petitioner realized a profit of $10,848 during 2008. The Petitioner did not report any of the earnings as wages for either the president or the vice president. Initially, the Tax Auditor proposed to split the earnings between the two officers, however, the Petitioner's accountant provided documentation that the president was not active in the business due to medical reasons. Therefore, the Tax Auditor determined that the vice president received wages of $10,848.

5. The Tax Auditor examined eight *Form 1099-MISC*. Those forms were issued to individuals who installed and removed the Realtors' signs. One of the individuals who received a *Form 1099-MISC* was also issued a *Form W-2* by the Petitioner. The Tax Auditor concluded that all of the sign installers were misclassified by the Petitioner as independent contractors. After the Tax Auditor concluded that the workers were the Petitioner's employees the accountant provided the Tax Auditor with independent contractor agreements for some of the workers. None of the agreements indicated that they were in effect during 2008. The accountant provided other documentation for years other than 2008.

6. The Department of Revenue notified the Petitioner of the audit results by *Notice of Proposed Assessment* mailed on or before March 16, 2010. The Petitioner's Certified Public Accountant filed a timely protest by letter dated March 29, 2010.

Based on these Findings of Fact, the Special Deputy recommended that the determination be affirmed. The Petitioner’s exceptions to the Recommended Order were received by fax dated December 13, 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.

In its exceptions, including Exceptions #1a.-d., Exception #1f., and Exception #2, the Petitioner proposes alternative findings of fact and conclusions of law and attempts to enter additional evidence. The Petitioner specifically takes exception to Finding of Fact #5 in Exception #1f. and Conclusion of Law #15 in Exception #2. Pursuant to section 120.57(1)(l), Florida Statutes, 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, including Finding of Fact #5, 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 #15, 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) of the Florida Administrative Code prohibits the acceptance of evidence after the hearing is closed. The Petitioner's request for the consideration of additional evidence is respectfully denied. The exceptions, including Exceptions #1a.-d., Exception #1f. and Exception #2, are respectfully rejected.

Also in its exceptions, including Exceptions #1a. and 1d., the Petitioner cites section 440.02, Florida Statutes, and proposes alternative legal theories for the determination of the case. Section 440.02, Florida Statues, applies to Florida workers' compensation claims and is not relevant to the case at hand. The

Supreme Court of Florida has 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 So2d 1061 (Fla. 2d DCA 1987). *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. *1 Restatement of Law*, Agency 2d Section 220 (1958) provides:

> 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.
>
> The following matters of fact, among others, are to be considered:
>
> the extent of control which, by the agreement, the business may exercise over the details of the work;
> whether or not the one employed is engaged in a distinct occupation or business;
> 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;
> the skill required in the particular occupation;
> whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
> the length of time for which the person is employed;
> the method of payment, whether by the time or by the job;
> whether or not the work is a part of the regular business of the employer;
> whether or not the parties believe they are creating the relation of master and servant;
> whether the principal is or is not in business.

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 in Florida the factors listed in the *Restatement* are the proper factors to be considered in determining whether an employer-employee relationship exists for unemployment compensation tax purposes. 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. Thus, Florida law does not permit the application of the alternative theories of law offered by the Petitioner. The Petitioner's request for the consideration of alternative theories of law is respectfully denied.

In Exception #1e., the Petitioner takes exception to Conclusion of Law #18, relies on alternative findings of fact and conclusions of law, and contends that the Petitioner was never informed that firsthand testimony was needed to prevail in the case. Rule 60BB-2.035(15)(b), Florida Administrative Code, provides:

(b) The special deputy will prescribe the order in which testimony will be taken and preserve the right of each party to present evidence relevant to the issues, cross-examine opposing witnesses, impeach any witness and rebut the evidence presented. The special deputy will restrict the inquiry of each witness to the scope of the proceedings.

Rule 60BB-2.035(15)(c), Florida Administrative Code, also provides:

(c) Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but will not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S.

A review of the record shows that the Petitioner told the Special Deputy that the Petitioner would be represented by the Petitioner's consultant and that the consultant, the Certified Public Accountant, and the bookkeeper would testify on behalf of the Petitioner. A review of the record also shows that the Petitioner did not ask any questions about who should testify on behalf of the Petitioner when provided an opportunity by the Special Deputy, did not request an opportunity to call on any additional witnesses, and did not make any objection regarding the Special Deputy's conduct during the hearing. Pursuant to rule 60BB-2.035(15)(b), Florida Administrative Code, the Special Deputy properly rejected hearsay information provided by the Petitioner's witness that was not established by other competent evidence or presented or substantiated as a hearsay exception. The Special Deputy's Findings of Fact are based on competent substantial evidence in the record. Also, the Special Deputy's Conclusions of Law, including Conclusion of Law #18, reflect a reasonable application of the law to the facts. The Petitioner has not demonstrated that the Special Deputy failed to preserve the Petitioner's right to present evidence relevant to the issues, that the Special Deputy failed to preserve the Petitioner's right to rebut any evidence, or that the proceedings did not comply with essential requirements of law. Therefore, the Agency must accept the Recommended Order without modification in accord with section 120.57(1)(l), Florida Statutes. Exception #1e. is respectfully rejected.

A review of the record reveals that the Findings of Fact 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 contained in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated March 16, 2010, is AFFIRMED.

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


_____
TOM CLENDENNING,
Assistant Director
AGENCY FOR WORKFORCE INNOVATION