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

PETITIONER:
Employer Account No. - 1496635
GHYABI LASSITER & ASSOCIATES INC
MELONIE DONNALLY
1459 N US HIGHWAY 1
ORMOND BEACH FL 32174-0706

PROTEST OF LIABILITY
DOCKET NO. 2010-80836L

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 April 16, 2010.

After due notice to the parties, a telephone hearing was held on September 30, 2010. An attorney appeared on behalf of the Petitioner. The Petitioner's vice president was called as a witness. The Joined Party appeared and testified on his own behalf. A tax specialist 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 corporation incorporated for the purpose of running an engineering and planning business. The Petitioner primarily contracts with government to provide civil engineering and traffic planning services.

2. The Joined Party was referred to the Petitioner by an acquaintance. The Joined Party applied for work with the Petitioner. The Petitioner informed the Joined Party that he would be working under a 90 day probationary period after which the Joined Party would receive full benefits. There was no written agreement. The Joined Party did not ever receive benefits from the Petitioner.

3. The Joined Party performed services for the Petitioner as a graphic information systems technician from August 12, 2008, through February 28, 2010.

4. The Joined Party provided data for traffic reports and obtained information on traffic systems for analysis.

5. The Joined Party would report to work each morning at 8am and sign in to the log book. The Joined Party was informed by the Petitioner that he was required to sign in each day. The Joined Party would be told what work needed to be done for the day. The Joined Party was directed as to what work needed to be done, how the work needed to be done, and how any particulars or details should be handled. The Joined Party was expected to perform the work at the Petitioner's place of business.

6. The Petitioner required the Joined Party to attend employee meetings related to the Joined Party's work.

7. The Joined Party was paid for time spent correcting any errors the Joined Party had made.

8. The Petitioner provided a cubicle work space at the Petitioner's place of business. The Petitioner supplied a computer and software to the Joined Party for the work. The Petitioner provided a company email address for identification purposes for information requests from clients. The Petitioner compensated the Joined Party for mileage when the Joined Party was required to drive.

9. The Joined Party initially kept track of hours using the Petitioner's computer time sheet system. After approximately one year, the Joined Party was informed by the Petitioner that he should submit an invoice sheet. The Joined Party continued using the computer time sheet system as well as signing an invoice.

10. The Joined Party was paid $19 per hour. The Joined Party was paid bi-weekly.

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

Conclusions of Law:

12. 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.

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. 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.

16. 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.

17. 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.

18. The evidence presented in this case reveals that the Petitioner controlled where, when, and how the Joined Party would perform the work. The Joined Party was expected to perform the work at the place of business, during hours specified by the Petitioner, and at the direction of the Petitioner.

19. The Petitioner placed the Joined Party under a 90 day probationary period. Such a probationary period is indicative of an employer-employee relationship rather than the arms-length conditions of an independent contractor relationship.

20. The Joined Party performed services for the Petitioner for approximately one and a half years. Such a length of service implies a more permanent relationship than that normally found in a temporary independent contractor relationship.

21. The Joined Party was paid by the hour. Such a means of payment tends to be indicative of an employer-employee relationship. Independent contractors are generally paid by the job, rather than by the hour.

22. The relationship was terminable at will. Either party could end the relationship at anytime and without liability. Normally in an independent contractor relationship the contractor has contracted to perform a task and the relationship may not be ended by either party, without liability, until the contract is fulfilled. In the instant case, the Petitioner could, and did, terminate the relationship without liability.

23. A preponderance of the evidence presented in this case reveals that the Petitioner established 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 April 16, 2010, be AFFIRMED.

Respectfully submitted on November 18, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals

AGENCY FOR WORKFORCE INNOVATION
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 April 16, 2010, is AFFIRMED.

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

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION