AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2950677
FOX VIEW FARM INC
4615 NW 110TH AVENUE
OCALA FL 34482-1833

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

PROTEST OF LIABILITY
DOCKET NO. 2010-82779L

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 28, 2010, is ORDERED that the determination dated April 28, 2010, is MODIFIED to reflect a retroactive date of liability of January 1, 2008. It is further ORDERED that the determination is AFFIRMED as modified.

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

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. - 2950677
FOX VIEW FARM INC
ALEX LINGARES
4615 NW 110TH AVENUE
OCALA FL 34482-1833

PROTEST OF LIABILITY
DOCKET NO. 2010-82779L

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 28, 2010.

After due notice to the parties, a telephone hearing was held on February 2, 2011. The Petitioner was represented by its attorney. The Petitioner's president and vice president testified as witnesses. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

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 working as stall cleaners 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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Whether the Petitioners 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 is a subchapter S corporation which was formed in 1993 to operate a horse boarding and horse training business in Miami. In 2005 the Petitioner moved its business to Ocala.
2. Both the Petitioner's president and the Petitioner's vice president are active in the operation of the business. The president trains horses and provides care for the horses. The vice president does the office work including the bookkeeping. The Petitioner's accountant advised the president and vice president that they should each draw a salary from the business so that they could contribute to an IRA. They each drew a gross salary of $200 per week. The net salary which they each received was $169 per week.
3. The Joined Party's brother worked for the Petitioner as a stall cleaner and left that position in approximately March 2008. Prior to March 2008 the Joined Party was employed by a Realtor who was one of the Petitioner's clients. The Joined Party took care of the Realtor's horse and did odd jobs for the Realtor. The Joined Party's brother referred the Joined Party to the Petitioner as the brother's replacement.
4. The Joined Party was interviewed by the Petitioner's president. The president asked the Joined Party if the Joined Party had any construction experience. The Joined Party had previously worked in construction but did not have a contractor's license or an occupational license. The president advised the Joined Party that the job was for a "jack of all trades" but that the primary duties would be to feed the horses, clean the stalls, and mow the grass. The president informed the Joined Party that the hours of work were from Monday through Saturday, 7 AM until 5 PM and that the rate of pay was $500 per week. The Joined Party accepted the Petitioner's offer of work and began work on April 16, 2008. The parties did not enter into any written agreement or contract.
5. In addition to the Joined Party the Petitioner had four workers who lived on the farm, including the Joined Party's nephew. The regular payday for all of the workers was on Friday of each week. The Petitioner paid the Joined Party by check; however, no taxes were withheld from the pay. The Joined Party requested that the Petitioner withhold taxes from the Joined Party's pay. The president told the Joined Party that the Petitioner would withhold payroll taxes after the Joined Party had worked at the farm for one year. The Joined Party observed that some of the other workers were paid in cash.
6. In addition to the work performed by the Joined Party and the workers who lived on the farm, each day individuals would contact the Petitioner seeking work and if the Petitioner needed to have work performed the Petitioner would hire those individuals to perform the work. The Petitioner paid those workers and classified the workers as "casual labor." Also several of the Petitioner's clients performed services for the Petitioner in exchange for the boarding and training of their horses.
7. The Petitioner provided all of the facilities, equipment, tools, and supplies that the Joined Party needed to perform the work, including the tractor that was used to mow the grass. The Joined Party did not have any expenses in connection with the work.
8. The Joined Party was not required to complete a timesheet or to report his hours of work because the Petitioner was aware of when the Joined Party reported for work each day and when the Joined Party left work each day. Each morning the Petitioner's president told the Joined Party what to do during the day.
9. The Petitioner did not provide any training for the Joined Party. The Joined Party knew how to perform the work.

10. If the Joined Party was not able to work on a scheduled workday, he was required to notify the Petitioner. The Joined Party never hired anyone to perform the work for him and did not believe that he had the right to hire someone else to perform the work. Although the Petitioner had never discussed the Joined Party's right to hire others to perform the assigned work, the Petitioner would have allowed the Joined Party to hire someone else to perform the work, but only with the Petitioner's prior approval.

11. The Joined Party's supervisor was the Petitioner's president. The Joined Party was required to keep the president informed of the progress of the work and to report any problems to the president. The president warned the Joined Party several times because the president did not believe that the Joined Party completed assigned tasks while the president was out of town.

12. Although the agreement of hire was that the Petitioner would pay the Joined Party $500 per week, shortly after the Joined Party began work the Petitioner unilaterally reduced the rate of pay to $400 per week. After several weeks the Joined Party complained because he was not able to support his family on $400 per week. As a result, the Petitioner increased the rate of pay to $425 per week. At the end of 2008 the Petitioner reported the Joined Party's earnings for 2008 in the amount of $17,000 on Form 1099-MISC as nonemployee compensation. At the end of 2009 the Petitioner reported the Joined Party's earnings for 2009 in the amount of $19,616.09 on Form 1099-MISC as nonemployee compensation. In spite of the Petitioner's promise that the Petitioner would withhold payroll taxes after the Joined Party worked for a period of one year, the Petitioner never withheld any payroll taxes.

13. Either party had the right to terminate the relationship at any time without incurring liability. The Petitioner terminated the Joined Party on January 16, 2010.

14. The Joined Party filed an initial claim for unemployment compensation benefits effective February 14, 2010. His filing on that date established a base period from October 1, 2008, through September 30, 2009. When the Joined Party did not receive credit for his earnings with the Petitioner an investigation was issued to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor and to determine if the Petitioner had established liability for payment of unemployment compensation taxes.

15. On April 28, 2010, the Department of Revenue issued a determination holding that the Joined Party performing services for the Petitioner as a stall cleaner, horse feeder, and related duties was the Petitioner's employee. The Determination states that services performed for the corporation by corporate officers constitute employment and that the Petitioner established liability for payment of unemployment compensation tax effective January 1, 2007. The Petitioner filed a timely protest.

Conclusions of Law:

16. 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.

17. 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).

18. 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).

19. 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.

20. 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.

21. 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.

22. 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.

23. There was no written contract or agreement between the parties. No evidence was presented to show that there was any verbal agreement concerning whether the Joined Party would perform services as an employee or as an independent contractor. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

24. The Petitioner's business is a horse farm engaged in the boarding and training of horses for the Petitioner's clients. The Joined Party was engaged by the Petitioner to feed the horses, to clean the stalls, to mow the grass, and to perform any other tasks as directed by the Petitioner. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.

25. The Petitioner provided all of the facilities, equipment, tools, and supplies. The Joined Party did not have any expenses in connection with the work and was not at risk of suffering a financial loss from performing services.

26. Although the Joined Party knew how to clean stalls, how to feed horses, how to operate a tractor to mow grass, and how to perform handyman duties, it was not shown that any skill or special knowledge was needed to perform the work. 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)

27. The Petitioner testified that the Joined Party was paid by the hour at a pay rate determined by the Petitioner. The Petitioner controlled the rate of pay as well as the hours of work. The Joined Party testified that he was paid the same amount each week at a pay rate determined and controlled by the Petitioner. The Joined Party was paid by time worked rather than by the job or based on production. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

28. The Joined Party performed services exclusively for the Petitioner for a period of twenty-one months. Either party had the right to terminate the relationship at any time without incurring liability. These facts reveal the existence of an at-will relationship of relative permanence. 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."

29. The Petitioner controlled what work was performed, where it was performed, when it was performed, and how it was performed. Of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984) In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

30. The Joined Party's testimony reveals that there were numerous other workers performing similar services for the Petitioner, including individuals who lived on the Petitioner's premises. According to the Petitioner some of the workers were not paid in money but instead were paid through the exchange of boarding and training services provided by the Petitioner. Both the living quarters which may have been provided by the Petitioner and the services provided to clients in return for services performed by the clients may constitute wages. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. (emphasis supplied)

31. Section 443.1216(5), Florida Statutes, provides:
    (5) The employment subject to this chapter includes service performed by an individual in agricultural labor if:
        (a) The service is performed for a person who:

1. Paid remuneration in cash of at least $10,000 to individuals employed in agricultural labor in a calendar quarter during the current or preceding calendar year.
2. Employed in agricultural labor at least five individuals for some portion of a day in each of 20 different calendar weeks during the current or preceding calendar year, regardless of whether the weeks were consecutive or whether the individuals were employed at the same time.

32. The Petitioner's vice president initially testified that the vice president and the president were each paid $169 per week. The vice president subsequently clarified that testimony to disclose that $169 was the net pay and that the gross weekly pay was at least $200 per week.

33. 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.

34. 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.

35. There are thirteen weeks in each calendar quarter. Thus, wages in the total amount of $5,200 were paid to the vice president and the president during each calendar quarter. The Joined Party's earnings for the last three quarters of 2008, as reported by the Petitioner, are $17,000. Thus, the Joined Party earned wages of $5,666 per quarter. These facts reveal that the Petitioner paid wages in 2008 in excess of $10,000 during a calendar quarter. Thus, the Petitioner has established liability for payment of unemployment tax as an agricultural entity.

36. The determination of the Department of Revenue holds the Petitioner liable for payment of unemployment tax effective January 1, 2007. Although the Petitioner may have had individuals performing similarly situated services in 2007 there is insufficient evidence to establish that the Petitioner established liability prior to 2008.

Recommendation: It is recommended that the determination dated April 28, 2010, be MODIFIED to reflect a retroactive date of liability of January 1, 2008. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on March 1, 2011.

R. O. SMITH, Special Deputy
Office of Appeals