AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2682622
DONE RIGHT FIRE GEAR REPAIR INC
6203 MASSACHUSETTS AVE
NEW PORT RICHEY FL 34653-2527

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

PROTEST OF LIABILITY
DOCKET NO. 2010-83592L

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 May 17, 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

PETITIONER:
Employer Account No. - 2682622
DONE RIGHT FIRE GEAR REPAIR INC
PAT GANSERT
6203 MASSACHUSETTS AVE
NEW PORT RICHEY FL 34653-2527

PROTEST OF LIABILITY
DOCKET NO. 2010-83592L

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 May 17, 2010.

After due notice to the parties, a telephone hearing was held on August 5, 2010. The Petitioner's owner and an office manager appeared and provided testimony at the hearing. The Joined Party and two former co-workers appeared and provided testimony at the hearing. 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 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 2005 for the purpose of running a business dedicated to the cleaning and repair of fire fighter gear.

2. The Joined Party provided services as a seamstress for the Petitioner from September 8, 2009, through March 15, 2010. The Joined Party's primary work was repairing firefighting equipment.

3. The Joined Party contacted the Petitioner in response to an advertisement on Craig's list. The Joined Party was interviewed and tested by the Petitioner before being given a start date to begin services. The Joined Party was required to sign a ten year non-compete agreement and a non-disclosure agreement at the time of hire.

4. The Petitioner provided certification training at Petitioner's expense to the Joined Party.

5. The Joined Party was not allowed to work for a competitor.

6. The Joined Party was paid an hourly rate based upon seniority and experience. The Petitioner retained the right to give raises to the Joined Party. The Joined Party's time was kept track of by way of handwritten timecards. The Joined Party would be paid for the day even if no work was available.

7. The Joined Party would report to work from 8 to 5 each day at the Petitioner's place of business. The Petitioner's office manager would then instruct the Joined Party in what needed to be done. The manager would also instruct the Joined Party in how the items should be inspected and perform checks on the work. The Petitioner would at times instruct the Joined Party to participate in fire truck runs to fire departments. The Joined Party would be required to wear a uniform tee shirt. The Petitioner supplied the uniform shirts.

8. The Petitioner provided industrial sewing machines for the Joined Party to use. The sewing machines are specialized items that must be certified under Federal guidelines. Federal regulation required that the firefighting equipment had to have a chain of custody maintained and that all garments be inspected four times.

9. Both parties had the right to terminate the relationship at anytime without liability.

Conclusions of Law:

10. 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.

11. 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).

12. 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).

13. 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.

14. 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.

15. 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.

16. The evidence presented in this case reveals that the Petitioner controlled how, when, and where the Joined Party performed services. The Joined Party was given training and daily instructions from the Petitioner in how to perform the work and what work should be done. The Petitioner required that the work be performed at the Petitioner's place of business or on occasional fire truck runs. The Petitioner required that the Joined Party work during the Petitioner's normal hours of operation.

17. The Joined Party was paid at an hourly rate. Such a method of pay is more indicative of an employee relationship than of an independent contractor relationship. The Petitioner had control over the financial aspects of the relationship insofar as the Petitioner controlled the rate of pay.

18. The Joined Party was not allowed to work for a competitor. The Joined Party was required to sign a non-compete agreement with a duration of ten years. These factors demonstrate a great deal of Petitioner control over the Joined Party's ability to perform services within this field.

19. The relationship was terminable at will. Either party could end the relationship without liability at any time. 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."

20. 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 May 17, 2010, be AFFIRMED.

Respectfully submitted on September 1, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals

TALLAHASSEE FL 32399-4143