AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2962405
WOMEN CERTIFIED, INC.
2029 TAFT STREET
HOLLYWOOD FL 33020-2724

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

PROTEST OF LIABILITY
DOCKET NO. 2010-94325L

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 portion of the determination dated May 26, 2010, holding that the Joined Party performed services as the Petitioner's employee is AFFIRMED. It is further ORDERED that the determination dated May 26, 2010, is MODIFIED to reflect that the Joined Party did not perform services as a corporate officer.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **June, 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. - 2962405
WOMEN CERTIFIED INC
GREG SMALTER
2029 TAFT STREET
HOLLYWOOD FL 33020-2724

PROTEST OF LIABILITY
DOCKET NO. 2010-94325L

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 26, 2010.

After due notice to the parties, a telephone hearing was held on March 8, 2011. The Petitioner's chief financial officer appeared and testified at the hearing. The Joined Party appeared and testified on his own behalf. 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 constitute insured employment, and if so, the effective date of the petitioners liability, pursuant to Sections 443.036(19), (21); 443.1216, Florida Statutes.

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 C corporation, incorporated in August 2009 for the purpose of running a marketing services and training business.

2. The Joined Party performed services for the Petitioner as a vice president of sales and sales consultant from August 6, 2009, through March 15, 2010. The Joined Party was hired by the Petitioner after the Joined Party, while working for another employer, contacted the Petitioner as part of the work. The Joined Party was hired by the Petitioner as an independent contractor.

3. The Joined Party initially had a flexible part time schedule. The Joined Party was instructed by the Petitioner to begin reporting to work at the Petitioner's place of business full time on or about September 9, 2009. The Joined Party was expected to report to work from 8 am until 6 pm as a full time worker.

4. The Joined Party was involved in the launch of a new product line. The Joined Party was responsible for supervising employees of the Petitioner. The Petitioner supervised the work of the Joined Party. The Joined Party was expected to be present for frequent review meetings. The Joined Party was kept informed of the Petitioner's expectations.

5. The Petitioner provided a workspace for the Joined Party. The Petitioner provided the Joined Party with business cards and a company email address. The Joined Party was required to use the Petitioner's computer. The Joined Party was reimbursed for expenses including out of pocket expenses, airline tickets, and company lunches.

6. The Joined Party began with pay of $1500 per month. The Joined Party was paid $8200 per month when he began working full time.

7. The Joined Party was not listed as a corporate officer by the Petitioner.

Conclusions of Law:

8. 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.

9. 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).

10. 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).

11. 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.

12. 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.

13. 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.
14. The evidence presented in this hearing reveals that the Petitioner exercised control over where, when, and how the Joined Party performed the work. The Joined Party was required by the Petitioner to report to the Petitioner's place of business. The Joined Party had a set schedule. The Joined Party was directed by the Petitioner through status meetings and supervision.
15. The Joined Party was paid a monthly salary by the Petitioner.
16. The Petitioner provided a workspace and computer for the Joined Party. The Petitioner reimbursed the Joined Party for out of pocket expenses. The Joined Party had no expenses in connection with the work.
17. The Petitioner provided the Joined Party with business cards and a company email address. This is reflective of the Petitioner holding out the Joined Party as a representative of the Petitioner.
18. The Petitioner supervised and was responsible for employees of the Petitioner. This level of involvement is not typical of an independent contractor relationship.
19. A preponderance of the evidence reveals that the Petitioner established sufficient control over the Joined Party as to create an employer-employee relationship between the parties.
20. The Joined Party was not listed as a corporate officer by the Petitioner.

Recommendation: It is recommended that the determination dated May 26, 2010, be AFFIRMED to show that the Joined Party was the Petitioner's employee. It is recommended that the determination dated May 26, 2010, be REVERSED to show that the Joined Party was not a corporate officer of the Petitioner.

Respectfully submitted on May 9, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals