AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 0436809
ATLANTIC GOOD SERVICES INC
3005 NW 24TH ST # 3037
MIAMI FL 33142-7009

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

PROTEST OF LIABILITY
DOCKET NO. 2011-20997L

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 December 6, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 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. - 0436809
ATLANTIC GOOD SERVICES INC
ATTN: CARY SANCHEZ
3005 NW 24TH ST # 3037
MIAMI FL 33142-7009

PROTEST OF LIABILITY
DOCKET NO. 2011-20997L

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 December 6, 2010.

After due notice to the parties, a telephone hearing was held on March 23, 2011. The Petitioner's vice president appeared and testified at the hearing. The Joined Party did not appear 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 corporation, incorporated in 1976 for the purpose of running a trucking company.

2. The Joined Party performed services for the Petitioner as a driver from approximately 2004 through 2009. The Joined Party applied for work with the Petitioner. The Joined Party was required to have his driver's license approved by the Petitioner's insurance company.

3. The Joined Party was required to report to work each morning at 7 am. The Petitioner would dispatch drivers to specific jobs as work became available. The Joined Party would be instructed where and what containers were to be picked up for the work.

4. The Petitioner issued warnings to the Joined Party at times due to the Joined Party's failure to report to work.

5. The Joined Party was paid by the trip. The amount paid depended upon the distance involved. The rates were established by the Petitioner. The Joined Party was paid weekly. The Petitioner did not hold the Joined Party's checks.

6. The Joined Party used a vehicle provided by the Petitioner. The vehicle had the Petitioner's logo and address on the side. The Joined Party was not responsible for paying insurance or fuel costs for the vehicle. The Petitioner provided money to the Joined Party for the paying of tolls.

7. The Joined Party was required to report in when picking up the load, when dropping off the load, and at the conclusion of the work day.

8. The Joined Party was not allowed to use the vehicle for personal business.

Conclusions of Law:

9. 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.

10. 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).

11. 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).

12. 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.

13. 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.

14. 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.

15. The evidence presented in this case reveals that the Petitioner exercised control over the timing, the locations, and the means of performing the work. The Joined Party was required to report to work each morning at 7 am. The Petitioner assigned specific jobs to the Joined Party. The Petitioner owned the vehicles used to perform the work.

16. The Joined Party was required to keep the Petitioner appraised of the work by calling in. The Joined Party was required to call in when picking up, dropping off, and concluding the day.

17. The Petitioner provided the vehicle used by the Joined Party. The vehicle was marked with the Petitioner's company logo and information. The Joined Party was not required to pay fuel, insurance, or tolls.

18. The Petitioner had unilateral control over the financial aspects of the relationship. The Petitioner set the rates for jobs. The Petitioner determined what jobs were available to the Joined Party.

19. The work performed by the Joined Party as a driver was an integral part of the daily course of business for the Petitioner's trucking company.

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 parties.

Recommendation: It is recommended that the determination dated December 6, 2010, be AFFIRMED.

Respectfully submitted on May 23, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals