THE DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 3005566
FUSION RE 1 LLC
2136 NE 123RD STREET
MIAMI FL 33181-2902

RESPONDENT:
State of Florida
THE DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2011-52131L

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 February 7, 2011, is AFFIRMED.

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

TOM CLENDENNING
Director of Workforce Services
THE DEPARTMENT OF ECONOMIC OPPORTUNITY

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

PETITIONER:
Employer Account No. - 3005566
FUSION RE I LLC
ATTN: KIM MARKS
2136 NE 123RD STREET
MIAMI FL 33181-2902

PROTEST OF LIABILITY
DOCKET NO. 2011-52131L

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 February 7, 2011.

After due notice to the parties, a telephone hearing was held on August 16, 2011. The Petitioner, represented by the Petitioner's Certified Public Accountant, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, 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 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 Florida limited liability company which was formed in December 2009. The Petitioner owns a portfolio of rental property.

2. In February 2010, the Petitioner engaged the Joined Party to manage the Petitioner's rental property. The Petitioner informed the Joined Party that he was engaged to be a salaried employee of the Petitioner. The parties did not enter into any written agreement or contract.

3. In early 2010 the Petitioner engaged a Certified Public Accountant to prepare the Petitioner's tax returns and to serve as the custodian of the Petitioner's mail, checkbook, and bank accounts.

4. The Petitioner's Certified Public Accountant was not authorized to sign checks for the Petitioner. Periodically, the Petitioner's principals would visit the office of the Certified Public Accountant and sign blank checks.

5. Periodically, the Joined Party would visit the office of the Certified Public Accountant to pick up the mail and to make out pre-signed checks to pay the Petitioner's expenses including to pay the salary and commissions earned by the Joined Party.

6. Following termination of the relationship between the Petitioner and the Joined Party, the Joined Party filed a claim for unemployment compensation benefits effective December 12, 2010. When the Joined Party did not receive credit for his earnings from the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

7. On February 7, 2011, the Department of Revenue issued a determination to the Petitioner holding that the Joined Party was determined to be an employee of the Petitioner from February 10, 2010, to December 1, 2010. The Petitioner's Certified Public Accountant filed a timely protest.

Conclusions of Law:

8. The issue in this case, whether services performed for the Petitioner by the Joined Party as a property manager 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). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Agency is limited to applying only Florida common law in determining the nature of an employment relationship.

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.

14. 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 Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

16. The only competent evidence in this case concerning the agreement between the parties is the testimony of the Joined Party that the verbal agreement was that the Joined Party was hired to be a salaried employee. Although the Certified Public Accountant testified that it was the understanding of the Certified Public Accountant that the Joined Party was engaged as an independent Contractor, the Certified Public Accountant was not present at the time the Petitioner and the Joined Party entered into the agreement.

17. Section 90.801(1)(c), Florida Statutes, defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.

18. The testimony of the Certified Public Accountant is hearsay and, as such, legally insufficient to rebut the competent testimony of the Joined Party.

19. Rule 60BB-2.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error.

20. It was not shown by a preponderence of competent evidence that the determination of the Department of Revenue was in error. Thus, it is concluded that the services performed for the Petitioner by the Joined Party as a property manager constitute insured employment.

Recommendation: It is recommended that the determination dated February 7, 2011, be AFFIRMED.

Respectfully submitted on August 19, 2011.

R. O. SMITH, Special Deputy
Office of Appeals