AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2678263
SPECIALTY SHIPPING INC
19119 ROGERS ROAD
ODESSA FL 33556

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

PROTEST OF LIABILITY
DOCKET NO. 2011-6499L

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 November 8, 2010, is MODIFIED to reflect a retroactive date of January 1, 2006. It is further ORDERED that the determination dated November 8, 2010, is AFFIRMED as modified.

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. - 2678263
SPECIALITY SHIPPING INC
ATT: GREG HUTCHENS
19119 ROGERS ROAD
ODESSA FL 33556

PROTEST OF LIABILITY
DOCKET NO. 2011-6499L

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 November 8, 2010.

After due notice to the parties, a telephone hearing was held on April 14, 2011. The Petitioner, represented by its accountant, appeared and testified. The Petitioner's president and the Petitioner's 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 constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner's 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 operates a business as an agent to transport boats for the Petitioner's customers. The Petitioner's president has been active in the operation of

the business since 2000. The Petitioner has realized a profit from operations and the president has derived income from the business.

2. The Joined Party is an individual with over thirty years experience as a mortgage banker. In 2007 the Joined Party was seeking employment and responded to a newspaper help wanted advertisement placed by the Petitioner. The Petitioner's president interviewed the Joined Party for the position of agent. The president explained that the Petitioner would train the Joined Party and that the Joined Party would be responsible for contacting prospective customers through sales leads provided by the Petitioner to arrange for the transportation of boats. The Joined Party would be paid a straight commission beginning at 30% and increasing to 40% after one year.

3. The Joined Party accepted the Petitioner's offer of work and signed an *Agent Agreement* and a *Non-Competition Agreement* on December 4, 2007. The *Agent Agreement* provides that the Joined Party is responsible for marketing the Petitioner's services and will undertake all duties, acts, and obligations necessary for the complete performance of such responsibilities in accordance with the specifications set forth in the Agreement. The Agreement provides that the Joined Party will be paid in accordance with the Petitioner's commission schedule and that the Petitioner will give the Joined Party thirty days notice of any change in the commission rate. No other benefits or remuneration of any kind will be paid by the Petitioner and the Joined Party will be responsible for payment of social security and income taxes.

4. The *Agent Agreement* provides that the Joined Party is an independent contractor and not an employee of the Petitioner. The Agreement states that the Joined Party shall not bind, or attempt to bind, the Petitioner in any manner and that the Joined Party has no authority to enter into any contract or agreement on behalf of the Petitioner. The Petitioner is solely responsible for the collection of all revenues due from customers,

5. The *Agent Agreement* provides that either party may terminate the Agreement at any time, with or without cause, by giving thirty day's written notification of intent to terminate. The Agreement states that it shall terminate at 12:01 AM on January 10, 2008, unless terminated sooner.

6. The *Non-Competition Agreement* provides that the Petitioner will train the Joined Party concerning the methods, content, and operation of certain duties consisting of work assignments that may change from time to time as directed by the Petitioner. In consideration for the training provided by the Petitioner the Joined Party is prohibited from releasing the information provided in the training and prohibited from competing directly or indirectly with the Petitioner either as an employee, employer consultant, contractor, principal, partner, stockholder, or in any other individual or representative capacity, engage or participate in any business that is in competition in any manner whatever with the Petitioner while employed with the Petitioner. The *Non-Competition Agreement* also prohibits the Joined Party from engaging or participating, directly or indirectly, in any business located in the continental United States, "that is in competition with the business of the Employer for a period of one (2) (sic) years." In the event of a breach of the *Non-Competition Agreement* by the Joined Party the Agreement provides that the Joined Party shall pay the Petitioner $100,000 or at the option of the Petitioner a sum of $10,000 per month for the period of time that the Joined Party is in violation of the Agreement.

7. During the Joined Party's first two weeks of work he was required to report to the Petitioner's office for training which was provided by the Petitioner's Vice President of Sales. The Petitioner provided the Joined Party with training manuals and instructed him how to do the work, how to work the leads provided by the Petitioner, how to quote the Petitioner's services, and how to process the contracts. After the Joined Party satisfactorily completed the training he was allowed to work from home doing telephone sales. The Joined Party was required to have a computer and

a telephone when working from home. The Petitioner provided the Joined Party with computer software and a database.

8. The Joined Party was required to come in to the Petitioner's office every Tuesday for a mandatory sales meeting. He was also required to perform some work in the office which he usually performed in conjunction with the days he attended the sales meetings.

9. The Joined Party's immediate supervisor was the Petitioner's president. The Joined Party was required to keep the Petitioner informed on the progress of his work and had to give periodic updates on the leads that were provided by the Petitioner. The Joined Party was not required to meet a sales quota, however, the president warned the Joined Party about the Joined Party's lack of production. The Petitioner provided guidance to the Joined Party concerning sales techniques and work habits.

10. Generally, the Petitioner has three agents performing services for the Petitioner. All of the agents perform services under the same terms and conditions with the exception of the commission percentage. The commission structure generally starts at 30% of the Petitioner's profit but the Petitioner may choose to pay a higher rate based on experience. Although the commission rate generally starts at 30% the Petitioner generally increases the commission rate to 40% and then 50% based on the length of time employed. The agents are paid on the fifteenth of the month following the month in which the work is completed. The Petitioner does not reimburse the agents for any expenses in connection with the work. The agents are not paid to attend the mandatory sales meetings, however, the Petitioner usually treats the agents to lunch on the days that the meetings are held. No taxes are withheld from the pay and no fringe benefits such as health insurance are provided. At the end of each year the Petitioner reports the earnings of each agent on Form 1099-MISC as nonemployee compensation.

11. The Joined Party was aware that he was not allowed to perform services for a competitor of the Petitioner and was aware that he was not allowed to perform boat transportation as a self employed individual. The Joined Party has a boat captain's license and on two occasions he had an opportunity to transport a boat to another location by sailing the boat to that location. He approached the Petitioner and requested permission to be allowed to transport the boats. His requests were granted by the Petitioner's president. He did not perform any other services for a competitor or for himself during the time that he worked for the Petitioner.

12. The Joined Party was required to personally perform the work and the Joined Party never hired anyone to perform the work for him.

13. Although the *Agent Agreement* states that the Agreement will terminate on January 10, 2008, the Agreement remained in force. It was the Petitioner's unwritten and unstated intent to have the Agreement automatically renew unless it was terminated by either party.

14. The last commission check which the Petitioner issued to the Joined Party was on February 19, 2010. During the following six months the Joined Party attempted to make sales but was not successful. As a result the Petitioner terminated the Joined Party.

15. The Joined Party filed an initial claim for unemployment compensation benefits effective September 5, 2010. His filing on that date established a base period from April 1, 2009, through March 31, 2010. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and 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.

16. The Department of Revenue discovered that a previous determination had been made addressing the status of a secretary. The determination held that the Petitioner was liable for payment of

unemployment compensation tax effective January 1, 2005. The Petitioner reported the wages paid to the secretary in 2005 and inactivated the account in September 2005. The secretary, as well as one other salaried employee, still work for the Petitioner. The Petitioner has not reported the earnings of the employees, the earnings of the corporate officers, or the earnings of the agents.

17. On November 8, 2010, the Department of Revenue issued a determination which holds that the Joined Party, performing services as an agent, is the Petitioner's employee. The determination also holds that corporate officers are employees by statute and, as such, the wages of corporate officers are reportable. The determination is retroactive to April 1, 2008. The Petitioner filed a timely protest.

Conclusions of Law:

18. The issue in this case, whether services performed for the Petitioner by the Joined Party as an agent 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.

19. 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).

20. 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).

21. 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.

22. 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.

23. 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.

24. 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.

25. The Petitioner's business is to act as an agent for the Petitioner's customers to procure transportation for the customers' boats. The Joined Party's assigned responsibilities included contacting the prospective customers from leads provided by the Petitioner to market the Petitioner's services. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was in integral and necessary part of the Petitioner's business.

26. The parties entered into an *Agent Agreement* which states that the Joined Party is an independent contractor and not an employee of the Petitioner. A statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). The Florida Supreme Court commented in Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other." In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) 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.

27. It was not shown that any special knowledge or skill was necessary for the Joined Party to perform work for the Petitioner as an agent. 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)

28. The Petitioner paid the Joined Party a commission based on the Petitioner's profit from the Joined Party's sales. The Petitioner controlled the commission rate. 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. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

29. The Petitioner provided both initial and on-going training concerning how to perform the work. Training is a method of control because it specifies how a task is to be performed. The Joined Party was supervised by the Petitioner's president who warned the Joined Party concerning work performance and provided guidance concerning the Joined Party's sales techniques and work habits.

30. The Joined Party performed services for the Petitioner for a period in excess of two and one-half years. Ether party could terminate the relationship at any time without incurring liability for breach of contract. The commission structure established by the Petitioner was based on length of service and it appears to be an inducement designed to create longevity. These facts reveal 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."

31. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

32. The Petitioner exercised control over the Joined Party by providing training concerning how the work was to be performed. The Petitioner provided sales leads and required the Joined Party to report on the progress of each lead. Although no sales quota was established the Petitioner warned the Joined Party concerning the lack of production, the sales techniques, and the Joined Party's work habits. These facts reveal that the Petitioner had the right to exercise significant control over the means and manner in which the Joined Party performed the work.

33. It is concluded that the services performed for the Petitioner by the Joined Party as an agent constitute insured employment. The determination of the Department of Revenue holds that the Petitioner's liability is retroactive to April 1, 2008. However, the Joined Party began performing services for the Petitioner on December 4, 2007. In addition, the Petitioner's corporate president has been performing services for the Petitioner since 2000 but has never reported any wages for the president.

34. 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.

35. 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.

36. In Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9th Cir. 1990), the court determined that dividends paid by an S corporation to an officer of the corporation who performed services for the business, were wages subject to federal employment taxes, including federal unemployment compensation taxes. The court relied upon federal regulations which provide that the "form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment."

37. Section 443.036(21), Florida Statutes, defines employment as a service subject to the Florida Unemployment Compensation Law under s. 442.1216 which is performed by an employee for the person employing him or her.

38. The remuneration received by the Petitioner's active corporate officers, whether based on a salary or based on the profit of the corporation, constitutes wages and is subject taxation.

39. The Petitioner was previously determined to be liable for payment of unemployment compensation tax effective January 1, 2005. During the same year the Petitioner inactivated the account. The account was reactivated by the Department of Revenue effective April 1, 2008. However, the evidence reveals that the Petitioner had unreported wages prior to April 1, 2008.

40. Rule 60BB-2.032(1), Florida Administrative Code, provides that each employing unit must maintain records pertaining to remuneration for services performed for a period of five years following the calendar year in which the services were rendered. Based on that limitation imposed by statute, the Petitioner is liable for payment of unemployment compensation taxes retroactive to January 1, 2006.

Recommendation: It is recommended that the determination dated November 8, 2010, be MODIFIED to reflect a retroactive date of January 1, 2006. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on May 6, 2011.

R. O. SMITH, Special Deputy
Office of Appeals