AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2989612

BRAINCHILD BRANDING LLC
ATTN: CHRIS MYERS
4726 W WALLACE AVE
TAMPA FL 33611-5647

PROTEST OF LIABILITY
DOCKET NO. 2011-8515L

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

O R D E R

This matter comes before me for final Agency Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other account sales executives constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes. Another issue before me is whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Special Deputy issued the Recommended Order on June 13, 2011. The Petitioner's exceptions to the Recommended Order were submitted by fax on June 30, 2011. Rule 60BB-2.035(19)(c), Florida Administrative Code, requires that written exceptions be filed within 15 days of the mailing date of the Recommended Order. As a result, the Agency may not consider the Petitioner's exceptions in this order because the exceptions were filed more than 15 days after the mailing date of the Recommended Order. No other submissions were received from any party.

Having considered the Special Deputy's Recommended Order and the record of the case and in the absence of any timely 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.

Therefore, it is ORDERED that the determination dated November 9, 2010, is MODIFIED to pertain only to the Joined Party and not to the entire account sales executive class of workers. It is further ORDERED that the determination is MODIFIED to reflect a retroactive date of October 27, 2008. It is further ORDERED that the determination is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 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

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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 9, 2010.

After due notice to the parties, a telephone hearing was held on May 24, 2011. The Petitioner was represented by its attorney. The Petitioner's co-owner and two other individuals testified as witnesses for the Petitioner. 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. Submissions identified as Proposed Findings of Fact and Conclusions of Law were not received from any party. A post-hearing submission was received from the Petitioner which included documentary evidence not previously submitted. The Petitioner's post-hearing submission is discussed in the Conclusions of Law portion of the recommended order.

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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a limited liability company which was formed in August 2003 to operate a business to design and development websites. The business is operated by the Petitioner's co-owner who designs and develops the websites from an office in her residence. The Petitioner does not have a commercial business location. As early as 2003 the Petitioner engaged an individual to sell the Petitioner's services and classified that individual as an independent contractor.

2. The Joined Party is an individual with over twenty years of employment in sales. In approximately early 2008 the Petitioner's co-owner and the Joined Party met and became friends. The Joined Party lost her most recent employment and was seeking full time employment. The Petitioner's co-owner wanted to help the Joined Party by providing income to the Joined Party and offered a sales position to the Joined Party. The Petitioner gave the position the title of Account Executive.

3. The Petitioner created a written agreement titled *Independent Contractor Agreement for Direct Seller* for the Joined Party's signature. The Agreement provides that the Joined Party is an independent contractor and not the Petitioner's employee. The Agreement states that the Petitioner will pay the Joined Party a fee of $500 per week plus a commission of 15% of the Joined Party's completed net sales. The Agreement provides that the Petitioner will reimburse the Joined Party for networking dues and fees that are directly attributable to work performed by the Joined Party, with a monthly budget of $200, and that the Petitioner will provide a cell phone and laptop computer to the Joined Party for use with business related activities. The Agreement states that the Agreement will become effective on October 27, 2008, will terminate on January 31, 2009, and that either party may terminate the Agreement at any time by giving thirty days written notice of termination.

4. The Joined Party had never worked as an independent contractor and did not understand the meaning of that term. The Joined Party was happy to find work and signed the *Independent Contractor Agreement for Direct Seller* without reading or understanding the Agreement.

5. The Joined Party did not have any prior experience providing sales for website design and development. As a result the Petitioner had to provide training to the Joined Party so that the Joined Party would be fluent in the terminology used in the industry. The training took place at the Petitioner's home office. It was not necessary for the Petitioner to train the Joined Party how to make sales because the Joined Party was an experienced sales person. The Joined Party was able to make sales contacts from the first day of work.

6. The Petitioner provided the Joined Party with a laptop computer and a cell phone. The Petitioner provided the Joined Party with business cards bearing the Petitioner's name and logo, the Joined Party's name, and the title of Account Executive. The Petitioner paid the all of the networking dues and fees so that it was not necessary for the Petitioner to reimburse the Joined Party for those expenses as stated in the *Independent Contractor Agreement for Direct Seller*. The Petitioner paid for the Joined Party's telephone service.

7. The Petitioner informed the Joined Party that the Joined Party's work schedule was Monday through Friday from 8 AM until 5 PM. As set forth in the *Independent Contractor Agreement for Direct Seller* the Petitioner paid the Joined Party on a weekly basis at the rate of $500 each week.

8. The Petitioner did not withhold any payroll taxes from the pay. The Petitioner paid a Christmas bonus to the Joined Party. The Petitioner did not provide fringe benefits such as health insurance. The Joined Party's pay was not reduced during holiday weeks or weeks that the Joined Party was not able to work due to illness or other reason. If the Joined Party was not able to work on a regular workday she was required to notify the Petitioner of the absence.

9. The Joined Party would develop the sales leads. The Joined Party would notify the Petitioner when a lead appeared to be promising and the Petitioner would then accompany the Joined Party

to meet with the sales prospect. The Petitioner was responsible for preparing the sales proposals. The Petitioner's co-owner accompanied the Joined Party on every sales contact and after each meeting the Petitioner would offer pointers about how the Joined Party could improve her performance in the future.

10. In January 2009 the Petitioner's co-owner decided that she wanted to continue providing income to the Joined Party. Although the parties did not enter into a new Agreement, the relationship did not terminate on January 31, 2009.

11. Following the end of 2008 the Petitioner did not report the Joined Party's earnings to the Internal Revenue Service and did not provide any accounting of the earnings to the Joined Party. When the Joined Party asked the Petitioner about the income taxes the Petitioner's co-owner told the Joined Party that the Joined Party was responsible for paying her own taxes. Prior to that time the Joined Party did not understand that being an independent contractor meant that she was responsible for paying her own income taxes.

12. During the initial period of work the Joined Party was required to attend weekly sales meetings, usually held at the Petitioner's home office at 6 PM on Friday evenings. Sometimes the meetings were held in a bar. The Petitioner and the Joined Party discussed the status of sales contacts at the meetings.

13. After the Joined Party had worked for the Petitioner for approximately six months the Petitioner informed the Joined Party that the Petitioner could not afford to continue paying the Joined Party $500 per week. The Joined Party was informed that the Joined Party could continue working on straight commission but that the Joined Party should seek full time employment elsewhere. The Joined Party began seeking other full time employment. In an attempt to assist the Joined Party in finding employment the Petitioner even contacted a company that was seeking a part time employee. However, the Joined Party was not interested in part time employment in a candy store.

14. After the Petitioner discontinued paying the Joined Party $500 each week the Petitioner gave the Joined Party cash and a credit card so that the Joined Party could purchase gas for her car. When the Joined Party's mother became ill the Petitioner purchased an airline ticket for the Joined Party. The Joined Party later reimbursed the Petitioner for the cost of the airline ticket.

15. During the time that the Joined Party worked on straight commission the Petitioner paid the Joined Party only when the Joined Party made a sale. The Petitioner computed the amount of the commissions and no accounting was provided to the Joined Party concerning how the commission amount was derived. Since the Petitioner was responsible for creating the sales proposals the Joined Party did not know the amounts that were charged to the clients by the Petitioner.

16. During the time that the Joined Party performed services for the Petitioner the Joined Party was not allowed to perform services for a competitor and she was not allowed to hire others to perform the work for her. The Joined Party did not have a business or occupational license, did not have business liability insurance, did not have a listing in the business telephone directory, and did not offer services to the general public.

17. In approximately the middle of December 2009 the Petitioner informed the Joined Party that the Joined Party's services were no longer needed. The Joined Party had not yet found other employment and the Petitioner agreed to allow the Joined Party to continue using the Petitioner's computer and cell phone so that the Joined Party could continue to seek employment. The Petitioner continued to pay for the cell phone service.

18. Following the end of 2009 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

19. After the Joined Party's termination the Petitioner hired another individual to perform services as an account sales executive. The Petitioner has never provided a weekly payment to any other sales person other than the Joined Party and has never provided a computer and telephone for other sales representatives. The Agreement with the Joined Party was specific to the Joined Party and was the result of the friendship between the Petitioner's co-owner and the Joined Party.

20. The Joined Party filed an initial claim for unemployment compensation benefits effective August 29, 2010. Her 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 her base period earnings with 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 independent contractor or as an employee.

21. On November 9, 2010, the Department of Revenue determined that the persons performing services for the Petitioner as account sales executives are the Petitioner's employees retroactive to January 1, 2009, and that the Petitioner is liable for paying unemployment compensation taxes effective January 1, 2009. The Petitioner filed a protest by letter dated November 23, 2010.

Conclusions of Law:

22. 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.

23. 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).

24. 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).

25. 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.

26. 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.

27. 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.

28. 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.

29. 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). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "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."

30. The *Independent Contractor Agreement for Direct Seller* was in effect from October 27, 2008, until January 31, 2009. From February 1, 2009, until the relationship ended in December 2009 the Joined Party worked under a verbal agreement.

31. The Petitioner's business is website design and development. The Petitioner engaged the Joined Party to sell the Petitioner's website design and development services to prospective clients. Although the Joined Party was not engaged to design or develop websites, her work was a necessary part of the Petitioner's business. The Petitioner could not exist without clients for whom website design and development services are performed. The Joined Party performed services exclusively for the Petitioner on a full time basis. Although the Joined Party was not required to account for her time the Petitioner determined the work schedule. The Petitioner provided a computer, a cell phone, paid for the cell phone service, paid for networking dues and fees, and paid for some of the Joined Party's automobile expenses. The Joined Party did not have an investment in a business and did not offer services to the general public.

32. At the time of hire the Joined Party was an experienced sales person, however, the Joined Party did not have any prior experience selling website design and development services. Although it was not necessary for the Petitioner to provide training on how to make sales it was necessary for the Petitioner to train the Joined Party concerning terminology used in website design and development. The training was provided not only at the beginning of the relationship but was on-going throughout the relationship. It was not shown that significant skill is required to perform services as a sales person. Any special knowledge that the Joined Party had concerning website

design and development terminology was provided by the Petitioner through training. 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)

33. For approximately the first six months of the relationship the Petitioner paid a fee to the Joined Party in the amount of $500 each week, the amount of which was determined by the Petitioner. The Petitioner testified that the fee was a draw against commissions; however, that testimony is in conflict with the written Agreement produced by the Petitioner. Nothing in the Agreement even suggests that the fee was based on sales or that the fee was recoverable if the Joined Party's commissions did not equal or exceed the weekly fee. The Joined Party testified that nothing was ever said to her that the fee was a draw against commissions and testified that no record was ever provided to show an accounting of the commissions earned. The fee most closely resembles a weekly salary which is typical in employment situations. The Petitioner unilaterally extended and then unilaterally terminated the payment of the fee. These facts show that the Petitioner controlled the financial aspects of the relationship. After the Petitioner terminated payment of the fee the Joined Party worked on straight commission. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions (emphasis supplied), 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.

34. During the investigation conducted by the Department of Revenue the Petitioner's co-owner completed a questionnaire on which she stated that the Joined Party could not work for a competitor and that the Joined Party could not hire others to perform the work for her. The Joined Party completed a similar questionnaire on which the Joined Party recorded the identical information that she could not perform services for a competitor and that she could not hire others to perform the work. After the Department of Revenue made the determination that the Joined Party was an employee of the Petitioner, based in part on the information provided by both the Petitioner and the Joined Party that the Joined Party could not perform services for a competitor or hire others to perform the work, the Petitioner "amended" the questionnaire to show that the Joined Party could perform services for a competitor and could hire others to perform the work. At the hearing the Joined Party testified that she was not allowed to perform services for a competitor and that she could not hire others to perform the work. The Petitioner's evidence is internally inconsistent and in conflict with the Joined Party's testimony. The questions on the questionnaire are not vague or confusing. The co-owner is in a position of knowledge and the Petitioner's initial answers to those questions are more credible than the subsequent self serving amendments to the questionnaire. These facts reveal that the Petitioner exercised control over how the work was performed.

35. The Joined Party performed services for the Petitioner for a period of approximately one year. Either party could terminate the relationship at any time without incurring liability for breach of contract. The Petitioner terminated the relationship without advance notice. 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."

36. The Petitioner determined what work was performed, how the work was performed, and to a significant degree when the work was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

37. The evidence reveals that the Petitioner exercised sufficient control over the Joined Party in the performance of the Joined Party's duties to create an employer-employee relationship. The Department of Revenue extended its determination to include other individuals performing services for the Petitioner as account sales executives. However, the evidence reveals that the other account sales executives did not perform services under the same terms and conditions as the Joined Party. Thus, the other account sales executives are not similarly situated workers.

38. The determination holds that the Joined Party was the Petitioner's employee retroactive to January 1, 2009, and that the Petitioner was liable for payment of unemployment compensation taxes effective January 1, 2009. It is undisputed that the Joined Party began performing services for the Petitioner on October 27, 2008, and that the Petitioner paid the Joined Party at least $500 for each week during the remainder of 2008. The Petitioner has not provided any accounting of the total earnings paid to the Joined Party during 2008 but agrees that the amount would have been approximately $4,000 or more.

39. Section 443.1215, Florida States, provides:
    (1) Each of the following employing units is an employer subject to this chapter:
        (a) An employing unit that:
            1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
            2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

40. The Petitioner paid wages to the Joined Party during the fourth calendar quarter 2008 in excess of $1,500. Thus the Petitioner has established liability for payment of unemployment compensation tax effective October 27, 2008.

41. On June 6, 2011, 13 days after the hearing was closed, the Petitioner submitted additional documents to be considered as evidence. The documents were not previously submitted and are not part of the record. Rule 60BB-2.035(19)(a), Florida Administrative Code, provides that the parties will have 15 days from the date of the hearing to submit written proposed findings of fact and conclusions of law with supporting reasons. However, no additional evidence will be accepted after the hearing has been closed.

42. The Petitioner's June 6, 2011, post-hearing submission does not contain any proposed findings of fact but does contain a proposed conclusion and supporting case law. The Petitioner's proposed conclusion has been considered. The proposed conclusion is rejected because it is not supported by a preponderance of the credible competent evidence.

Recommendation: It is recommended that the determination dated November 9, 2010, be MODIFIED to pertain only to the Joined Party and not to the entire account sales executive class of workers. It is recommended that the determination be MODIFIED to reflect a retroactive date of October 27, 2008. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on June 13, 2011.

R. O. SMITH, Special Deputy
Office of Appeals