

**AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA**

PETITIONER:

Employer Account No. - 2311184
WHITE WING CLEANING
P O BOX 2223
NEW SMYRNA BEACH FL 32170

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-83587L**

ORDER

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 May 10, 2010, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **December, 2010**.



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. - 2311184
WHITE WING CLEANING
DIANNA D BECKLER
P O BOX 2223
NEW SMYRNA BEACH FL 32170

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2010-83587L**

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 10, 2010.

After due notice to the parties, a telephone hearing was held on September 9, 2010. A tax auditor appeared and provided testimony on behalf of the Respondent. A manager appeared and testified on behalf of the Petitioner. There was no Joined Party for this hearing.

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 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 single member limited liability corporation incorporated in 2001 for the purpose of running a residential cleaning company.
2. The Petitioner was randomly selected for an audit.
3. The audit was conducted on April 26, 2010 at the Petitioner’s place of business.

4. The Respondent reviewed records provided by the Petitioner during the Audit.
5. The Respondent found that sixteen workers within the class of maid service workers did not have proper documentation to show their independent contractor status. The Respondent found that those workers without licenses or insurance on file were employees. The Respondent found that the other members of the class were independent contractors.
6. The workers without proper documents were operating within an initial hire period during which the Petitioner did not require the documents. The Petitioner required that the documents be provided at the conclusion of the initial period in order for the worker to continue providing services.
7. The only difference between those workers found to be independent contractors and those workers found to be employees was the absence of license or insurance documents on file at the time of the audit.
8. The Petitioner contacts workers for individual jobs. The workers can accept or turn down work at their discretion.
9. The Petitioner pays the workers a percentage of the cleaning fee charged to the customer. The commission varies based upon bidding by the workers for the job.
10. The workers sign an independent contractor agreement. The agreement is a standard form provided by the Petitioner.
11. The workers were required to fix defective work without additional compensation.
12. The workers were allowed to work for a competitor.
13. The workers were not allowed to subcontract the work.
14. The Petitioner requires that maid service workers have their own occupational licenses.
15. The maid service workers provide their own supplies.

Conclusions of Law:

16. 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.
17. 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).
18. 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).

19. 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.
20. 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.
21. 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.
22. The evidence presented in this case reveals that the Petitioner did not exercise over the maid service workers in the performance of their duties. The workers bid upon particular jobs and were free to reject or not bid upon any job that did not meet the worker’s scheduling or financial needs at the time. The Petitioner did not exercise control over the performance of the work.
23. The workers were required to fix defective work on their own time and without additional compensation.
24. The workers were required to maintain their own occupational licenses.
25. The workers signed independent contractor agreements with the Petitioner. While not dispositive of the matter, such an agreement does help to establish the intent of the parties.
26. The Respondent’s findings were that the bulk of the class of maid service workers were independent contractors. Those individuals found by the Respondent to be employees were determined to be such due to occupational licenses missing from their files. While an occupational license is certainly a factor in making the determination of the status of a worker, it is not, by itself, a dispositive factor. In the instant case, the occupational licenses had not yet been

provided by new workers. This situation had been rectified by the Petitioner by the time of the hearing. Regardless of the presence of the occupational licenses, the weight of the other factors to be considered in an independent contractor analysis demonstrate that the workers were not employees.

27. A preponderance of the evidence in this case reveals that the Petitioner did not exercise sufficient control over the maid service workers to establish an employer-employee relationship between the parties.

Recommendation: It is recommended that the determination dated May 10, 2010, be REVERSED.

Respectfully submitted on September 28, 2010.



KRIS LONKANI, Special Deputy
Office of Appeals