- *DECISION* -

EMPLOYER:

GREAT SOUTHERN PRINTING

DATE: March 27, 1997

DECISION #00899-BH-97

DETERMINATION #

EMPLOYER ACCT

Issue: The issue in this case is whether payments to certain individuals constitute covered employment or represent payments to independent contractors and are thereby excluded from unemployment insurance covered wages.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200.*

The period for filing an appeal expires: April 26, 1997

- APPEARANCES -

FOR THE APPELLANT:
Sharon Snyder, Atty.
Philip Hammond
Erwin H. Hagy
George Randall

FOR THE SECRETARY:
John T. McGucken

STATEMENT OF THE CASE

Maryland Labor and Employment Article Section 8-205 sets forth a three prong test for determining whether an individual is an independent contractor or employee. In order for an individual to be considered an independent contractor for unemployment insurance purposes, it is the

burden of the employer to show it meets all three tests required by this section of the law. The employer must show (1) that the individual is free from control over the performance and direction of his/her work, (2) that the individual is customarily engaged in an independent business or occupation, and (3) that the work is either (a) outside the usual course of business of the employer or (b) the work is performed outside any place of business of the employer.

At issue in this case was whether persons who are contracted by Great Southern Printing for the personal service of delivering newspapers (the "carriers"), freelance writers (the "writers"), and outside salespersons (the "salespersons") were independent contractors within the meaning of Section 8-205. In this case, Great Southern Printing (the "employer" for convenience) had the burden of showing that it met all three prongs of this test in order to establish that these individuals are independent contractors and not its employees.

As the result of a routine audit, a field auditor for the Agency, Harold Sisler, determined, inter alia, that payments made to these individuals constituted covered wages to employees of the employer under the Maryland Labor and Employment Article. The Agency determined that the employer did not meet their burden under Section 8-205(1) and 8-205(2); that the carriers were not free from control, and they were not engaged in an independent business or occupation. The Agency determined that the writers and salespersons were not engaged in independent businesses within the meaning of Section 8-205(2).

It is not in dispute that these individuals worked outside any place of business of the employer; therefore, the employer has satisfied the requirements of the third prong of the test within the meaning of 8-205(3)(ii). In addition, it is not materially in dispute that the writers and salespersons were free from control and direction over the performance of their work within the meaning of Section 8-205(1).

The Agency determined that the independent contractors agreement which governed and defined the relationship between the employer and the carriers, exercised more than minimal control over the carriers. It based its determination upon the following: 1) the carriers could not alter or amend the employers products; 2) the required standards of performance were the employer's standards; 3) the carriers could not assign their contract to another contractor; 4) the carriers could not set their own retail prices; 5) the employer controlled the accounting and collections of the carriers; and 6) the carriers were required to carry liability insurance.

The Agency also determined that individuals contracted as "writers" and "sales personnel" did not meet the statutory requirements of Section 8-205 of being engaged in an independently established business because they did not perform services for more than one employer.

The employer appealed the Agency's determination to the Appeals Division. The hearing examiner affirmed the decision of the Agency. Based upon the hearing examiner's decision, the employer timely appealed this case to the Board of Appeals.

The Board of Appeals held a hearing for legal argument only based on the evidence in the record.

FINDINGS OF FACT

Based upon a review of the record and upon reviewing the legal arguments set forth by the parties, the Board makes the following findings of fact as it relates to the issues in dispute:

1. The employer is in the business of printing newspapers. The newspapers are the employer's proprietary product. The employer publishes in excess of 46,000 newspapers per day.

2. The employer established a wholesale price for its newspapers. Because the employer's product is proprietary, it would not allow a retailer (the carrier) to modify, alter, or change its products in any manner.

3. The employer entered into a contractual arrangement with the newspaper carriers in a document entitled "Agreement of Independent Contractor to Deliver Newspapers" (the "Contract") which defined the terms and conditions of the relationship of the employer and the carriers. See Agency Exhibit 2. The essence of the contract established the carriers as the exclusive, sub-contracted retailer of a particular route within a geographic area. This contract could not be assigned to another contractor.

4. The retail customers reasonably expected that their newspapers would be promptly delivered at a reasonable time (i.e. the morning paper shall be delivered in the early morning). The practice of the newspaper industry is to deliver a dry newspaper at a reasonable time as expected by their customers. Absent the demands of their retail customers, the carriers were free to deliver their services and sell the employer's product in any reasonable manner.

5. The carriers were engaged in independently established businesses.

6. The carriers had a substantial financial interest in their business operations.

7. The carriers could have incurred a loss as the result of their businesses and in fact may have received no wages from their businesses as a result.

8. The carriers were free to hire their own employees.

9. The newspaper carriers must have carried their own liability and workers compensation insurance.

10. Although the newspapers had a printed suggested retail price, the carriers were free to establish their own retail price, above or below the suggested price.

11. The carriers procured, serviced and maintained their own retail customers. The carriers supplied their own plant and equipment and paid for all related costs.

12. The carriers were free to perform services and sell the products of other wholesale vendors, including the employer's competition, simultaneous with or in addition to the services and products it sold for the employer.

13. The carriers were free to set their own reasonable hours of operation.

14. The employer and the carriers negotiated and mutually agreed to acknowledge the reasonable standard of performance demanded by the retail customers of the carriers' delivery area. The employer monitored the carriers to insure that the carrier met the demands of the retail customers and (like any general contractor) may take actions necessary to protect the integrity of its proprietary product in relation to the demands and complaints of the customer. See Agency Exhibit 2, the Contract at paragraph 9.

15. For convenience and efficiency, both for the employer and the carrier, the employer provided an accounting service to the carriers. This service aids in facilitating the collection of fees. The carrier is free, however, to collect his own fees, although most carriers found it more efficient to utilize the employer's service.

16. The Board adopts the findings of fact of the hearing examiner regarding the writers and salespersons. The Board also finds that the writers and salespersons submitted their own invoices for the services they performed for the employer. In addition, the Board finds that the writers and salespersons were not paid a salary or by the hour, but by sub-contracted work by which they were paid a fee for their independent work product.

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

The Board notes that the Agency's field auditor, who was the fact finder of the Agency's initial determination in this case, was not present at the hearing before the hearing examiner. The Agency's case was based on the testimony of Jerry Placek, a representative for the agency. Mr. Placek presented Agency documents kept in the normal course of business. Mr. Placek did not participate in the audit of the employer, nor did he have first hand knowledge as to the facts in this case. His testimony was based on his understanding of the field auditor's report/determination and is thus hearsay. Although hearsay

evidence is allowed in hearings before the Board and its hearing examiners, the Board gives much more weight to first hand, live testimony.

The Board recognizes that it is the employer's burden to show that it meets the three prong test set forward in Section 8-205; but it is also the Agency's responsibility to put on a case before the Appeals Division which clearly establishes the reasons for its findings based on a logical foundation of facts and law. The Board addressed the issues presented in Sections 8-205(1) as to the carriers only (as this issue was not in dispute as to the writers and salespersons) and 8-205(2) as to all individuals in the audit. Since the issue of whether the carriers, writers, and salespersons performed services outside any place of business of the employer pursuant to Section 8-205(3) was not in dispute the Board did not address this issue.

The Board is persuaded that the employer carried its burden of proof in regard to Section 8-205(1); the newspaper carriers are free from control and direction over the performance of their work, both in fact and under contract.

In this case the customers ordered the employer's product through its retail agent, the carriers. When the customer ordered a newspaper, he requires it to be delivered within a reasonable period; the fact that a morning paper must be delivered in the early morning is not a control of the employer - it is a requirement of the customer that he gets his paper delivered in the early morning at a reasonable time. If the customers' demands were not satisfied, they usually complained to the employer. The employer monitored the carriers' performance by the number of complaints made by customers. The threshold of tolerable complaints was negotiated and mutually agreed to in contract between the carrier (the retailer/subcontractor) and the employer (the wholesaler/contractor). The Board is persuaded that the performance and direction of the work is not controlled by the employer in this regard; the employer merely monitored the performance of the carriers to insure that they were satisfying the minimum standards for delivery required by the customers and as mutually agreed to by the carriers and the employer.

The Board is not persuaded that because the carriers could not assign their contract to another contractor that this constitutes an element of control, in fact or under contract. The employer contracted for the personal services of particular carriers; not the services of other contractors. The Board is not persuaded that this is control over the performance and direction of the work. The Board notes that the carriers were free to hire their own employees, however.

The Board rejects the Agency's argument that because the carriers may not alter the employer's product it constitutes an element of control over the performance and direction of the work. When the retail customers ordered a newspaper, the integrity of the employer's proprietary product was expected to be protected. While the carrier was free to deliver another vendor's product <u>with</u> the employer's product, it could not be inserted into or be connected with the employer's product under the contract. The Board is not persuaded that

this constitutes control and direction over the performance of the work.

The fact that the carriers must have supplied their own liability insurance is collateral to the work, and goes more to the carriers' qualifications than control over the performance and direction of the work. Indeed, it may suggest the independence of the carriers as businesspersons. In fact, the Board finds persuasive the argument that it supports a finding that the carriers are independent contractors because they do carry their own insurance. See COMAR 09.02.01.18(c)(vii).

The Board rejects the Agency's argument that the retail price is fixed by the employer, and that this is another indicia of control over their work. Like on many products, the price on the front of the newspapers was a "suggested retail price"; the carriers were free, both in fact and under contract to establish their own retail price - above or below the printed suggested retail price. There is insufficient evidence in the record to show that the printed price of the papers was required by the employer to be charged by the carriers in fact or under contract.

The Board is persuaded that the employer has carried its burden of proof in regard to Section 8-205(2); the carriers were engaged in independent businesses. COMAR 09.02.01.18b(3)(c) sets forth ten criteria which may be used as indicia of whether a person is engaged in an independent business. The Board finds that the employer carried its burden regarding these guidelines. The Board makes no finding that all ten must be met to satisfy the requirements of Section 8-205(2). The Board does find, however, based upon a preponderance of the evidence using these guidelines, a finding that the carriers are engaged in independent businesses is supported.

The carriers were engaged in a business with a limited pool of potential wholesale vendors. The mere fact that many of the carriers may not have had business cards, business telephone listings, or formal offices (other than their vehicles) is not dispositive on the question of whether the carriers are employees or independent contractors, nor does the Board give these factors much weight. The carriers did, however, actively solicit retail customers using other promotional means, which is evidence of their pursuing business for themselves.

Some of the carriers performed services for other companies/ wholesalers, but others elected not to do so. The mere fact that most carriers did not choose to perform services for other contractors/wholesalers does not seem dispositive of whether they are employees. The Board finds the fact that the carriers were free to perform services for other contractors/wholesalers, including the employer's competitors, while simultaneously or in addition to performing services for this employer, persuasive in establishing a finding that the carriers operated independent businesses.

The evidence that weighed heavily in favor of a finding that the carriers were independent contractors was the fact that the carriers had a financial investment in their businesses and could have incurred losses in the performance of their services (and may, in fact, receive

no "wages" as a result). In fact, when establishing the "wages" to be taxed, the Board is not persuaded that the "wages" as reported by the Agency are "wages" at all within the meaning of Maryland Labor and Employment Article Section 8-101(v). In any enterprise, business related expenses must be deducted from the gross income to determine the net income; "wages", another business expense, can only be taken from the residual net income, if any, from the business. The Maryland Labor and Employment Article Section 8-101(v) defines what wages are; it also defines what wages are not. Section 8-101(v)(3)(xi) states that "wages" does not include "any payment to an individual as allowance or reimbursement for travel or other expenses incurred on the business of the employer up to the amount of expenses actually incurred and accounted for by the individual to the employer". The record supports that the carriers incurred such expenses. Arguendo, if the Board was to find that the carriers were employees, it would still not find as a fact that the "wages" set forth by the Agency are "wages" within the meaning of Section 8-101(v). See Agency Exhibit 1 (5 pages).

The Board is persuaded that the employer carried its burden in regard to Section 8-205(2) regarding the writers and salespersons; these individuals were engaged in independent businesses. The employer averred sufficient evidence that these individuals were engaged in independent businesses. Contra Nancy S. Fox t/a Dental Placements, 740-EA-95, (where the Board found that, upon providing no evidence to support a finding that individuals were engaged in independent businesses, the employer did not meet its burden under Section 8-205(2)). The Board rejects the agency's argument that because these individuals did not perform services for another client, they could not establish that they were customarily engaged in independent businesses. The Board finds persuasive the fact that these individuals were free to perform services for other clients, simultaneous with or in addition to the services it provided for the employer as sufficient evidence of independent businesses. The mere fact that these individuals chose to work for only one client is not dispositive on a finding that they were employees.

CONCLUSIONS OF LAW

Under Section 8-201, except as otherwise provided in this subtitle, employment is covered employment if:

(1) regardless of whether the employment is based on the common law relation of master and servant, employment is performed:

  (i) for wages; or
  (ii) under a contract of hire that is written or oral or express or implied; and

(2) the employment is performed in accordance with Section 8-202 of this subtitle.

Section 8-205 states work that an individual performs under any contract of hire is not covered employment if the Secretary is satisfied that:

(1) the individual who performs the work is free from control and direction over its performance both in fact and under the contract;

(2) the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and

(3) the work is:

(i) outside of the usual course of business of the person for whom the work is performed; or
(ii) performed outside of any place of business of the person for whom the work is performed.

Services performed are presumed to be employment under Section 8-201 regardless of whether or not there is a common law relationship of master and servant between the employer and employee unless it is shown by the employer that a person rendering services comes within all three of the enumerated exceptions in Section 8-205. The employer has the burden of proof. Warren v. Board of Appeals, 226 Md. 1, 172 A.2d 124 (1964).

The statute does not limit the right of an employer to contract with an employee. However, the statute does authorize those who are charged with its enforcement to look through the "tag" placed on the employment relationship and determine, as a matter of fact, whether the relationship, regardless of what it may be called, comes within the purview of the statute. See Warren, supra.

The Board finds that the employer has satisfied the requirements of Section 8-205(1) as to the carriers. The carriers were free from control, both in fact and under contract.

In traditional general contractor-subcontractor arrangements, there is a standard of performance which is established by the end-user, customer, or client, to outline and define the responsibilities and scope of the work to be performed. These are not controls of the employer. For example, when a general contractor (in the construction trade) retains the services of an independent, sub-contracted, licensed plumber to place plumbing into a house which the contractor is building for a customer, the plumber cannot simply place the pipes anywhere he wishes not can he use any materials that he wishes. The contractor has a set of plans (established and approved independently by the customer or his agent which must be followed). The restrictions placed upon the plumber are not by the general contractor, but by the customer. These restrictions and standards do not constitute control by the general contractor. Although a plumber is free to "perform" his/her work as s/he deems proper, s/he must adhere to the standard set forth in the customer's plans. The sole fact that the plumber must follow the plans set forth by the customer/client does not create an employee-employer relationship. The function of the general contractor is merely to monitor the integrity of the plumber's work to insure conformity with the instructions and requirements set forth by the customer/client, but not to control the "performance" of the work of the plumber.

Pharmakinetics 156-EA-94. Also see Susan Gage Caterers, Inc., 740-BR-97.

In the case at bar, the carriers and the employer contractually acknowledged the standard of performance reasonably required by the local retail customers under the Contract. The employer and the carriers mutually agreed to measure, by a negotiated level of customer complaints, the meaning of compliance to the overall, aggregate customers' requirements and demands. The complaints of the customers could have been for "missed, wet, or damaged paper(s)". See Agency Exhibit 2, "Agreement of Independent Contractor to Deliver Newspapers", Terms and Conditions - paragraph 9. The Board finds that these complaints were not the requirements of the employer, but a contractual acknowledgement of the reasonable requirements of the local retail customers.

The Board finds that although the employer monitors the performance of the carriers based on these customer complaints, it does not, in fact or under contract, control the performance and direction of the work in this regard; the employer monitors to insure that the customers' requirements of the reasonable, timely delivery of its product is received in a manner which is reasonable to the retail customer much the same way a general contractor monitors the performance of a sub-contracted plumber in regard to its customer's demands. To assert that a morning newspaper might have been delivered in the afternoon and could have been a reasonable expectation of the customer is absurd. The Board finds that the delivery of the employer's proprietary product at a reasonable time a control of the customer and not the employer.

In addition, the Board finds that the employer satisfied the requirements of 8-205(1) as to the writers and salespersons.

The Board finds that the employer has satisfied the requirements of Section 8-205(2) as to the carriers, writers, and salespersons; these individuals were engaged in independent businesses.

The carriers were free to perform services for other companies and wholesale vendors, including the employer's competition. The carriers had established, independent businesses which operated independently of the employer. The carriers had a financial investment in their businesses and could have incurred losses in their business operations. The carriers were free to set their own retail prices and reasonable hours of operation. The carriers supplied their own plant and equipment, and delivered the newspapers in any manner they deemed proper.

The writers and salespersons were free to perform services for other contractors simultaneous with or in addition to performing services for the employer. The Board finds that the employer has shown sufficient additional evidence that the writers and salespersons were engaged in independent businesses. Nancy S. Fox, supra.

The Board makes no findings as to the extent or length of time which any individual was engaged in their own business. There is no requirement set forth in the law to require any length of time to meet

this prong of the test. See Susan Gage Caterers, Inc., 740-BR-97. "They may be involved with the business for two hours or ten years, but they are engaged in the business" of professional newspaper carriers, writers, and salespersons. Pharmakinetics, 156-EA-94.

The requirements of Section 8-205(3) were not in dispute. The Board finds that the carriers', writers', and salespersons' work was performed outside any place of business for the employer; therefore, the Board finds that the employer has satisfied the requirements of this section of the law as to all individuals in the agencys audit.

The Board finds that the employer met its burden of proof, establishing that it meets the requirements of the three tests set forth in Section 8-205 of the law; the newspaper carriers, writers, and salespersons were independent contractors within the meaning of Maryland Labor and Employment Article Section 8-205.

DECISION

The Board finds that Great Southern Printing has satisfied all statutory requirements of the Maryland Labor and Employment Article Section 8-205 regarding services performed by the individuals in the Agency's audit.

The decision of the hearing examiner is reversed.

Clayton A. Mitchell, Sr.,
Associate Member

Hazel A. Warnick, Chairperson

KJK
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