



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: JANUARY 07, 2021

IN THE MATTER OF:

Appeal Board No. 611222

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board Nos. 611221 and 611222, the Commissioner of Labor appeals from the decisions of the Administrative Law Judge filed May 27, 2019 (sic), which sustained the employer's objection that the claimant and all other persons similarly situated were independent contractors, and overruled the determination holding iTutor.com Inc. liable for additional contributions, effective the first quarter of 2016, based on remuneration paid to the claimant and to all other tutors similarly situated as employees.

At the combined hearings before the Administrative Law Judge all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the employer and the Commissioner of Labor.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted on behalf of the employer and the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The company provides certified teachers/tutors to school districts (the clients). The company retains the services of tutors who mainly teach online classes to homebound students, K through 12, who need additional help outside of the regular classroom setting. The classes may be taught during or after regular school hours. The company signed contracts with its clients regarding the terms and conditions of their relationships. The company compiled a list of certified tutors whose services were offered to the clients

when necessary. To compile the list, the company solicited tutors by way of online advertisement or word of mouth referral. An interested tutor would submit a resume; might complete an application; and would submit a recorded demo, reviewed by the company to evaluate the tutor's suitability for work. The company would conduct a background check on the tutor, if requested by the client. Once approved, the tutor signed an "Independent Contractor Agreement" (the agreement) and the company's policies and procedures (the policy), containing the terms and conditions of service. Once a tutor name was on the company's list, the tutor was eligible to apply for any available teaching position offered by the client. The client dictated the fee to be paid to the company while the company negotiated the rate it paid each tutor.

When the client notified the company of an open tutor position, the company sent an email notification to tutors on its list informing them of that available position. The email generally contained the student's requirements, including subject; instructional hours; and number of sessions, which were set by the client. A tutor might choose to ignore the email. The assignments were given on a first-come first-serve basis. To pair a student with a tutor, the tutor's hours must conform to the student's available hours. The company reserved the right to withhold an assignment from a tutor and only the company reassigned a class. Since the classes were generally online, the tutor was required to have the following equipment: a computer, webcam, headset, and internet connection. Generally, the company did not provide any equipment to its tutors and did not reimburse tutors for out of pocket expenses. For a tutor to teach a class, the tutor must logon to the company's website or portal. All online tutoring sessions were recorded without pause. Even when a student did not attend a class, a mini recording was required. The recording allowed the company to assess any complaint that might be leveled against the tutor. All sessions were subject to observation by the company, with or without the tutor's knowledge.

The claimant worked as a part-time science tutor for the company beginning in 2016, after responding to the company's online advertisement for work. She submitted a resume, completed an application, and provided an online demo lesson which was evaluated by the company to ascertain her ability to provide the services required. She submitted to a background check and she signed an agreement which was renewed in 2017. She worked from December 2016 until July 2018.

Before the beginning of her first assignment and thereafter, she watched

"webinars" provided by the company, for instructions on how to use the company's online system, present lesson plans, and communicate with students. The claimant was required to use the model provided by the company. She was told to follow the protocol, lesson outline, or plan provided by the client. She could not use outside materials for teaching without company's permission. She used her personal equipment for tutoring, except on one occasion when she was provided a headset by the company. She was subject to observation when performing each assignment. She recorded all her assignments and provided mini recordings when a student was absent from class. She was required to communicate with the students using the company's message board system only. She could not provide her personal information to the students and she was to ensure that she did not have a distracting background while teaching. The company provided feedback and coaching, especially in her second year when HSB became her go-to or point person for the company. The unpaid coaching sessions were required for claimant to maintain an active status with the company. She was subject to reviews and evaluations by the company.

The claimant was notified by the company if, and when, a class was cancelled. She was required to give a mandatory 24-hour cancellation notice to the company if she became unavailable for a session already chosen by her. To streamline the notice process, the company later provided a form which claimant was required to complete for her absences. The claimant could not reassign a class without the company's permission. The company found the claimant's replacement. At the end of tutoring session, the claimant submitted a report to the client and the company. She provided feedback on the students and submitted quarterly report cards. The company billed and collected payment from the clients and paid the claimant, after verifying the classes she taught. She was paid bi-weekly, in her name, for each assignment even if the company was not paid by the client and even when a student did not attend class so long as the claimant was present. At the end of the year, the claimant was issued a Form 1099.

OPINION: The credible evidence establishes that the company exercised, or reserved the right to exercise, sufficient direction, supervision and control over the claimant to render her an employee. Significantly, the company advertised for tutors and screened or evaluated those tutors, including the claimant, to ensure suitability. The company required the claimant to give it 24-hour notice in the event that she became unavailable for an assignment she chose. The company, and not the claimant, provided the claimant's replacement. The claimant was evaluated and coached; she watched "webinars" provided by the

company, for instructions on how to use the employer's online system, present lesson plans and communicate with the students; she was subject to observation by the company when performing each assignment; she could not use outside materials for teaching without the employer's permission; and she was compensated for every session she attended, even when the employer was not paid by the client or when the student did not attend class. Also, she was required to communicate with the students using the employer's message board system only; and she could not provide her personal information to the students. We credit the claimant's firsthand testimony regarding her encounter with the coach over the employer's hearsay evidence to the contrary. We note that CF, the director of human resources, testified that unpaid coaching sessions were required.

The cases relied on by the company are distinguishable. For example, in *Matter of Wright (Mid Is. Therapy Assoc. LLC)*, 134 AD3d 1216 (2015), the employer did not perform any type of evaluation of claimant, and there were additional factors of control present in the case at hand. Appeal Board No. 547071 is also distinguishable because in that case, the employer did not train or direct or provide guidance to the tutors, and the tutors were not paid if the clients did not pay the employer. Accordingly, we conclude that an employer/employee relationship existed and that the claimant and other similarly situated tutors were employees.

DECISION: The decisions of the Administrative Law Judge are reversed.

The employer's objection, that the claimant and all other persons similarly situated were independent contractors, is overruled.

The determination, holding iTutor.com Inc. liable for additional contributions, effective the first quarter of 2016, based on remuneration paid to the claimant and to all other tutors similarly situated as employees, is sustained.

MICHAEL T. GREASON, MEMBER