**THE DEPARTMENT OF ECONOMIC OPPORTUNITY**
**TALLAHASSEE, FLORIDA**

**PETITIONER:**
Employer Account No. - 2937780
GIVING REWARDING OPPORTUNITIES TO WORK INC
1599 POINTE WEST DR
VERO BEACH FL 32966-2500

**RESPONDENT:**
State of Florida
THE DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

**PROTEST OF LIABILITY**
**DOCKET NO. 2011-33232L**

**O R D E R**

This matter comes before me for final Department Order.

The issue before me is whether services performed for the Petitioner by the Joined Party and other individuals as assistant teacher/students constitute insured employment, and if so, the effective date of liability pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed an unemployment compensation claim in December 2010. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department (the Agency for Workforce Innovation and its successor, the Department of Economic Opportunity) that she worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue (DOR) conducted an investigation to determine whether the Joined Party and other assistant teacher/students worked for the Petitioner as employees or independent contractors. If the Joined Party worked for the Petitioner as an employee, she would qualify for unemployment benefits, and the Petitioner would owe unemployment compensation taxes on the remuneration it paid to the Joined Party and any other workers who performed services under the same terms and conditions. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, she would remain ineligible for benefits, and the Petitioner would not owe unemployment compensation taxes on the wages it paid to the Joined Party and any other assistant teacher/students. Upon completing the investigation, an auditor at DOR determined that the services performed by the Joined Party and other assistant teacher/students were in insured employment. The Petitioner was required to pay unemployment compensation taxes on wages it paid to the Joined Party and any other workers who performed services under the same terms and conditions as the Joined Party. The Petitioner

filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because she had a direct interest in the outcome of the case. That is, if the determination is reversed, the Joined Party will once again be ineligible for benefits and must repay all benefits received.

A telephone hearing was held on May 12, 2011. The Petitioner, represented by its Executive Director, appeared and testified. The Respondent, represented by a DOR Tax Specialist, appeared and testified. The Joined Party did not appear for the hearing. The Special Deputy issued a recommended order on July 19, 2011.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner is a corporation, incorporated on November 20, 2000, for the purpose of running a job training center. The Petitioner is a 501(c)(3) non-profit corporation.

2. The Petitioner provides a combination of class room instruction and lab workshops for students to help prepare them for seeking and retaining work.

3. The Joined Party enrolled as a student with the Petitioner from August 3, 2009 through February 2010.

4. The Joined Party attended classes with the Petitioner. The Joined Party performed daycare work as part of her lab workshop credits.

5. The Joined Party received a living allowance from the Petitioner. The allowance was based upon hours spent in the program. The allowance included both classroom and lab hours.

Based on these Findings of Fact, the Special Deputy recommended that the determination be reversed. No exceptions were received from any party.

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.

The record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

## Findings of Fact

A review of the record reveals that the Special Deputy's Findings of Fact are based on competent substantial evidence in the record. Accordingly, the Department accepts the findings of fact made by the Special Deputy.

## Conclusions of Law

Section 443.1216(13)(i)2., Florida Statutes, provides that service performed in the employ of a school is exempt from coverage if the service is performed by a student who is enrolled and is regularly attending classes at the school. The record reflects that this statutory exemption should be applied in the current case because Special Deputy found that the Joined Party was an enrolled student of the Petitioner and attended classes with the Petitioner. The Special Deputy's Conclusions of Law #7-11 are respectfully rejected by the Department and Conclusions of Law #6 and 14 are modified as follows:

> 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(13)(i)2., Florida Statutes, provides that service performed in the employ of a school, college, or university, if the service is performed by a student who is enrolled and is regularly attending classes at the school, college, or university is exempt from coverage under the Florida Unemployment Compensation Law.

Conclusion of Law #14 is also amended to say:

> A preponderance of the evidence presented in this case reveals that the Petitioner and the Joined Party did not create an employment relationship that would be considered insured work under the law. A preponderance of the evidence indicates that a student-teacher relationship was created by the parties.

The modified Conclusions of Law are a more reasonable application of the law to the facts.

Having considered the record of this case and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact as set forth in the Recommended Order. I adopt the Conclusions of Law as modified above. I also adopt the Special Deputy's Recommendation that the Respondent's determination be reversed.

In consideration thereof, it is ORDERED that the determination dated January 19, 2011, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **January, 2012**.

TOM CLENDENNING
Director of Workforce Services
THE DEPARTMENT OF ECONOMIC OPPORTUNITY

**AGENCY FOR WORKFORCE INNOVATION**
**Unemployment Compensation Appeals**
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

**PETITIONER:**
Employer Account No. - 2937780
GIVING REWARDING OPPORTUNTIES
TO WORK INC
ATTN: JACQUELINE REASON
1599 POINTE WEST DR
VERO BEACH FL 32966-2500

**PROTEST OF LIABILITY**
**DOCKET NO. 2011-33232L**

**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 January 19, 2011.

After due notice to the parties, a telephone hearing was held on May 12, 2011. The Petitioner's executive director appeared and testified at the hearing. The Joined Party did not appear at the hearing. A tax specialist appeared and testified on behalf of the Respondent.

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 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.

**Findings of Fact:**

1. The Petitioner is a corporation, incorporated on November 20, 2000, for the purpose of running a job training center. The Petitioner is a 501(c)(3) non-profit corporation.

2. The Petitioner provides a combination of class room instruction and lab workshops for students to help prepare them for seeking and retaining work.

3. The Joined Party enrolled as a student with the Petitioner from August 3, 2009 through February 2010.

4. The Joined Party attended classes with the Petitioner. The Joined Party performed daycare work as part of her lab workshop credits.

5. The Joined Party received a living allowance from the Petitioner. The allowance was based upon hours spent in the program. The allowance included both classroom and lab hours.

**Conclusions of Law:**

6. 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.

7. 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).

8. 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).

9. 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.

10. 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.

11. 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.

12. The evidence presented in this hearing reveals that the Joined Party enrolled as a student in a work-study program of the Petitioner.
13. The evidence presented reveals that the Petitioner's primary purpose was providing education to facilitate the student finding and retaining work.
14. A preponderance of the evidence presented in this case reveals that the Petitioner and the Joined Party did not create the master servant relationship required to find an employee relationship. A preponderance of the evidence indicates that a student-teacher relationship was created by the parties rather than an employer-employee relationship.

**Recommendation:** It is recommended that the determination dated January 19, 2011, be REVERSED.

Respectfully submitted on July 18, 2011.

KRIS LONKANI, Special Deputy
Office of Appeals