DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 3069517

THE CHARTERHOUSE GROUP TRUST INC
2218 US HIGHWAY 19
HOLIDAY FL 34691-4351

PROTEST OF LIABILITY
DOCKET NO. 2012-27941L

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

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 constitute insured employment, and if so, the effective date of liability pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes. An issue also before me is whether the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to sections 443.036(21), (44), Florida Statutes; Rule 73B-10.025, Florida Administrative Code.

The Joined Party filed a reemployment assistance claim in December 2011. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department of Economic Opportunity (the Department) 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, hereinafter referred to as the Respondent, conducted an investigation to determine whether the Joined Party worked for the Petitioner as an employee or independent contractor. If the Joined Party worked for the Petitioner as an employee, she would qualify for reemployment assistance benefits, and the Petitioner would owe reemployment assistance taxes on the remuneration it paid to the Joined Party.

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 reemployment assistance taxes on the wages it paid to the Joined Party. Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay reemployment assistance taxes on wages it paid to 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 June 26, 2012. The Petitioner, represented by its Director, appeared and testified. The Joined Party appeared and testified on her own behalf. The Respondent, represented by a Tax Specialist II, appeared and testified. The Special Deputy issued a recommended order on July 16, 2012.

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

1. The Petitioner is a subchapter S corporation which was formed in 2004 to operate a real estate rental business. The Petitioner owns the properties that it rents.

2. In early 2009 the Joined Party was seeking employment and responded to a help wanted advertisement which had been placed by the Petitioner for the position of office manager for a property management company. The Joined Party had prior employment experience as an office manager. The Joined Party was interviewed by a mortgage broker associated with the Petitioner and was informed that it was a full time position, forty hours per week, and that the rate of pay was $10 per hour. After a second interview the position was offered to the Joined Party and the Joined Party accepted the offer. There was no written agreement or contract between the parties other than a confidentiality agreement.

3. The Joined Party began performing services for the Petitioner on or about April 30, 2009. The Petitioner trained the Joined Party during the first few days. During that time the Joined Party was required to follow the person who had hired her so that the Joined Party could learn what was to be done and how it was to be done. After a few days the Petitioner asked the Joined Party if she was willing to perform work as a property manager for the Petitioner's properties. The Joined Party had never worked in property management. The Joined Party accepted after the Petitioner explained to the Joined Party that the Joined Party was not required to have a real estate license or a property management license to manage the Petitioner's properties because the Petitioner owned the properties. The Petitioner provided additional training for the property management duties.

4. The Joined Party received her first paycheck after her first week of work. The Joined Party noticed that no taxes had been withheld from the pay. The Petitioner had not informed the Joined Party that the Petitioner had classified the Joined Party as an independent contractor. The Joined Party did not understand why payroll taxes were not withheld but she did not question why taxes were not withheld.

5. The Petitioner's office is open from 10 AM until 4 PM. The Petitioner provided the Joined Party with a key to the office. The Petitioner provided a computer and all supplies that were needed to perform the work. The Joined Party was required to be in the office as much as possible during the

office hours, however, since the Joined Party was required to meet with the Petitioner's clients and visit the rental properties during the day, the Petitioner provided the Joined Party with a cell phone.

6. In addition to the Joined Party's hourly wage the Petitioner paid the Joined Party $50 per week as a reimbursement of automobile expenses. The Petitioner reimbursed the Joined Party for all other expenses in connection with the work. The Joined Party did not have any unreimbursed expenses in connection with the work.

7. The Joined Party did not have any investment in a business and did not have any business or occupational license. Although the Joined Party had a secondary job as a waitress on weekends for a period of time, the Joined Party did not perform property management or office management services for anyone other than the Petitioner. The Joined Party did not hire others to perform the work for her. The Joined Party always believed that she was the Petitioner's employee.

8. The Joined Party was required to complete a weekly timecard. The Joined Party did not bill the Petitioner for her services but was paid from the hours recorded on the timecard. After the Joined Party had worked for the Petitioner for approximately one year the Petitioner reduced her hours of work but increased the hourly rate of pay.

9. The Petitioner never withheld taxes from the pay and never provided any fringe benefits such as paid holidays or paid vacations. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

10. The Petitioner's business declined due to the real estate market and the Petitioner changed the Joined Party's pay period from weekly to biweekly. The Petitioner criticized the Joined Party's work performance and in approximately November 2011 the Petitioner gave the Joined Party a list of things that the Joined Party was required to do. The Petitioner changed the method of pay from hourly to commission based on a percentage of the rents collected by the Petitioner. The Petitioner's behavior led the Joined Party to believe that the Petitioner was attempting to force the Joined Party to quit working for the Petitioner. In December 2011, the Petitioner discharged the Joined Party. In approximately January 2012 the Petitioner closed the business.

11. The Joined Party filed a claim for unemployment compensation benefits effective December 18, 2011. When the Joined Party did not receive credit for her 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 employee or as an independent contractor. On February 10, 2012, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee retroactive to May 1, 2009. The Petitioner filed a timely protest by mail postmarked February 24, 2012.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated February 10, 2012, be affirmed. On July 31, 2012, the Petitioner submitted a written request for an extension of time for filing exceptions to the Recommended Order.

On August 1, 2012, the Special Deputy granted an extension for filing exceptions until August 10, 2012. The Petitioner's exceptions were received by the Department on August 10, 2012. No other submissions 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.

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 Petitioner's exceptions are addressed below. Also, 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.

In the Petitioner's *Lack of standing with points of law* and the Petitioner's *Findings of Fact* #1-5, 8, and 10, the Petitioner proposes alternative findings of fact or conclusions of law. Additionally, in the Petitioner's *Findings of Fact* #2, 8, and 10, the Petitioner takes exception to the Special Deputy resolving conflicts in evidence in favor of the Joined Party. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department 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. Also pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Conclusions of Law unless the Department first determines that the conclusions of law do not reflect a reasonable application of the law to the facts.

A review of the record reveals that the Special Deputy resolved conflicts in evidence in favor of the Joined Party. A review of the record also reveals that the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record and that the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. As a result, the Department may not modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. The Petitioner's exceptions regarding the Special Deputy's Findings of Fact and Conclusions of Law are respectfully rejected.

In the Petitioner's *Findings of Fact* #2, 4, and 10, the Petitioner requests the consideration of additional evidence or offers to submit additional evidence not presented during the hearing. In Petitioner's *Finding of Fact* #2, the Petitioner also offers to subpoena an additional witness that did not participate in the hearing. Rule 73B-10.035(19)(a), Florida Administrative Code, provides that additional evidence will not be accepted after the close of the hearing. Rule 73B-10.035(11)(a), Florida Administrative Code, further provides that any application for a subpoena must be delivered to the office of the special deputy prior to the scheduled hearing. Accordingly, the Petitioner's requests for the consideration of additional evidence and the opportunity to submit additional evidence are respectfully denied. The Petitioner's request to subpoena an additional witness is also respectfully denied. Petitioner's *Findings of Fact* #2, 4, and 10, are respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's findings are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the record of this case and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that the determination dated February 10, 2012, is AFFIRMED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this *Order* and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY]* en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt *Lòd* sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

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

Altemese Smith,
Assistant Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Shanedra Y. Barnes
DEPUTY CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of September, 2012.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

THE CHARTERHOUSE GROUP TRUST INC
2218 US HIGHWAY 19
HOLIDAY FL 34691-4351

CARRIE AMUNDSEN
10300 ALBERTA CT
NEW PORT RICHEY FL 34654

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
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PETITIONER:
Employer Account No. - 3069517
THE CHARTERHOUSE GROUP TRUST INC
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HOLIDAY FL 34691-4351

PROTEST OF LIABILITY
DOCKET NO. 2012-27941L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated February 10, 2012.

After due notice to the parties, a telephone hearing was held on June 26, 2012. The Petitioner, represented by its Director, appeared and testified. 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. Proposed Findings of Fact and Conclusions of Law were received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 73B-10.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which was formed in 2004 to operate a real estate rental business. The Petitioner owns the properties that it rents.
2. In early 2009 the Joined Party was seeking employment and responded to a help wanted advertisement which had been placed by the Petitioner for the position of office manager for a property management company. The Joined Party had prior employment experience as an office manager. The Joined Party was interviewed by a mortgage broker associated with the Petitioner and was informed that it was a full time position, forty hours per week, and that the rate of pay was $10 per hour. After a second interview the position was offered to the Joined Party and the Joined Party accepted the offer. There was no written agreement or contract between the parties other than a confidentiality agreement.
3. The Joined Party began performing services for the Petitioner on or about April 30, 2009. The Petitioner trained the Joined Party during the first few days. During that time the Joined Party was required to follow the person who had hired her so that the Joined Party could learn what was to be done and how it was to be done. After a few days the Petitioner asked the Joined Party if she was willing to perform work as a property manager for the Petitioner's properties. The Joined Party had never worked in property management. The Joined Party accepted after the Petitioner explained to the Joined Party that the Joined Party was not required to have a real estate license or a property management license to manage the Petitioner's properties because the Petitioner owned the properties. The Petitioner provided additional training for the property management duties.
4. The Joined Party received her first paycheck after her first week of work. The Joined Party noticed that no taxes had been withheld from the pay. The Petitioner had not informed the Joined Party that the Petitioner had classified the Joined Party as an independent contractor. The Joined Party did not understand why payroll taxes were not withheld but she did not question why taxes were not withheld.
5. The Petitioner's office is open from 10 AM until 4 PM. The Petitioner provided the Joined Party with a key to the office. The Petitioner provided a computer and all supplies that were needed to perform the work. The Joined Party was required to be in the office as much as possible during the office hours, however, since the Joined Party was required to meet with the Petitioner's clients and visit the rental properties during the day, the Petitioner provided the Joined Party with a cell phone.
6. In addition to the Joined Party's hourly wage the Petitioner paid the Joined Party $50 per week as a reimbursement of automobile expenses. The Petitioner reimbursed the Joined Party for all other expenses in connection with the work. The Joined Party did not have any unreimbursed expenses in connection with the work.
7. The Joined Party did not have any investment in a business and did not have any business or occupational license. Although the Joined Party had a secondary job as a waitress on weekends for a period of time, the Joined Party did not perform property management or office management services for anyone other than the Petitioner. The Joined Party did not hire others to perform the work for her. The Joined Party always believed that she was the Petitioner's employee.
8. The Joined Party was required to complete a weekly timecard. The Joined Party did not bill the Petitioner for her services but was paid from the hours recorded on the timecard. After the Joined Party had worked for the Petitioner for approximately one year the Petitioner reduced her hours of work but increased the hourly rate of pay.

9. The Petitioner never withheld taxes from the pay and never provided any fringe benefits such as paid holidays or paid vacations. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

10. The Petitioner's business declined due to the real estate market and the Petitioner changed the Joined Party's pay period from weekly to biweekly. The Petitioner criticized the Joined Party's work performance and in approximately November 2011 the Petitioner gave the Joined Party a list of things that the Joined Party was required to do. The Petitioner changed the method of pay from hourly to commission based on a percentage of the rents collected by the Petitioner. The Petitioner's behavior led the Joined Party to believe that the Petitioner was attempting to force the Joined Party to quit working for the Petitioner. In December 2011, the Petitioner discharged the Joined Party. In approximately January 2012 the Petitioner closed the business.

11. The Joined Party filed a claim for unemployment compensation benefits effective December 18, 2011. When the Joined Party did not receive credit for her 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 employee or as an independent contractor. On February 10, 2012, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee retroactive to May 1, 2009. The Petitioner filed a timely protest by mail postmarked February 24, 2012.

Conclusions of Law:

12. The issue in this case, whether services performed for the Petitioner by the Joined Party as an office manager and a property manager 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.

13. 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).

14. 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). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Department is limited to applying only Florida common law in determining the nature of an employment relationship.

15. 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.

16. 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.

17. 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.

18. 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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

19. There was no written agreement or contract between the parties and the only evidence concerning any verbal agreement is the Joined Party's testimony. The Petitioner's witness was not the individual who interviewed and hired the Joined Party. The Joined Party's testimony reveals that there was no agreement that the Joined Party would provide services to the Petitioner as an independent contractor. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

20. The Petitioner operated a real estate property rental company and provided property management for the rental properties. The Joined Party was engaged by the Petitioner to manage the Petitioner's office and to manage the rental properties. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business.

21. The Joined Party did not have any investment in a business, did not provide services to others, did not have a business license, and did not have any expenses in connection with the work. The Petitioner owned the properties and provided the place of work and everything that was needed to perform the work. The Petitioner reimbursed the Joined Party for any expenses the Joined Party had in connection with the work.

22. At the time of hire the Joined Party had previous experience as an office manager; however, she had no prior experience as a property manager. Although the Petitioner trained the Joined Party it does not appear that any skill or special knowledge was required to perform the work. 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)

23. The Petitioner determined both the method of pay and the rate of pay, which the Petitioner unilaterally changed from time to time. It was also shown that the Petitioner exercised control over the hours of work. The Petitioner established the hours of operation for the Petitioner's office, from 10 AM until 4 PM. The Joined Party was initially engaged to work forty hours per week, a work schedule that that was reduced by the Petitioner approximately one year after the Joined Party began performing services. With the exception of approximately one month the Petitioner paid the Joined Party by time worked, a method of pay which is typical of an employer-employee relationship, rather than by production or by the job. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

24. The Joined Party performed services exclusively for the Petitioner from April 30, 2009, until December 2011, a period in excess of two and one-half years. Either party could terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the Joined Party without prior notice. 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."

25. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

26. The Petitioner determined what work was performed, where it was performed, and when it was performed. The Petitioner provided training which is a method of control because it specifies how the work is to be performed. The Petitioner provided not only the place of work but everything that was needed to perform the work. The Petitioner controlled the means which were used to perform the work.

27. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

28. Rule 73B-10.035(10)(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.

29. In its Proposed Findings of Fact and Conclusions of Law the Petitioner included statements that were not supported by the evidence and submitted additional evidence which was not previously provided. The additional evidence is rejected.

Recommendation: It is recommended that the determination dated February 10, 2012, be AFFIRMED.

Respectfully submitted on July 16, 2012.

R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envió por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

Shanedra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
July 16, 2012

Copies mailed to:
Petitioner
Respondent
Joined Party

CARRIE ADMUNDSEN
10300 ALBERTA CT
NEW PORT RICHEY FL 34654

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417