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

PETITIONER:
Employer Account No. - 2585135
BCRE BRICKELL LLC
EDITA ADAMAVICIENE
885 3RD AVE FL 27 STE 2401
NEW YORK NY 10022-4834

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

PROTEST OF LIABILITY
DOCKET NO. 2012-41686L

O R D E R

This matter comes before me for final Department 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 March 9, 2012, is MODIFIED to reflect a retroactive date of July 25, 2009. It is further ORDERED that the determination is AFFIRMED as modified.

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:

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DEPARTMENT OF REVENUE
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DOR BLOCKED CLAIMS UNIT
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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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PROTEST OF LIABILITY
DOCKET NO. 2012-41686L

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 March 9, 2012.

After due notice to the parties, a telephone hearing was held on July 30, 2012. The Petitioner, represented by the Property Manager, appeared and testified. Two of the Petitioner's accountants testified as witnesses. 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 and other individuals working as maintenance technicians 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.

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 limited liability company which is classified as a partnership for federal tax purposes. The Petitioner is a real estate development company which constructed a residential and commercial building in Miami and rented the units until such time as they could be sold. The Petitioner established liability for payment of unemployment compensation taxes in 2004.
2. The Joined Party is an individual who was employed as an electrician for approximately 28 years. The Joined Party was seeking employment and was interviewed by the supervisor of the Petitioner's maintenance team. The supervisor told the Joined Party that the Petitioner had limited work available for an electrician and asked the Joined Party if he was able to perform other work such as painting. The Joined Party replied that he was capable of performing other work. The maintenance supervisor informed the Joined Party that the job was forty hours per week, eight hours per day, that the rate of pay was $23 per hour, and that the Petitioner did not withhold taxes from the pay. The Joined Party asked why taxes would not be withheld and did not receive an answer. The Joined Party accepted the offer of work and began work on September 25, 2009.
3. There was no written agreement between the parties.
4. The Joined Party did not have any investment in a business, did not have an occupational or business license, did not have business liability insurance, and did not offer services to the general public. The Joined Party was required to personally perform the work. He could not hire others to perform the work for him.
5. All of the Joined Party's work was performed on the Petitioner's premises. The supervisor determined the Joined Party's days and hours of work. The Joined Party was not allowed to come and go as he pleased and was limited to a one hour lunch break from 12 PM until 1 PM each day. The Joined Party was required to be on call for after hours emergencies.
6. The Petitioner provided all materials, supplies, and tools that were needed to complete the work. The Joined Party did not have any expenses in connection with the work.
7. The supervisor held a maintenance team meeting during regular working hours each week. Attendance at the meeting was mandatory. At the meetings the supervisor told the Joined Party and other members of the team what to do and how to do it. At some of the meetings the supervisor criticized the workers when the work was not performed to the supervisor's satisfaction.
8. The supervisor kept track of the hours worked by the Joined Party. Although the Petitioner considered the Joined Party to be an "employee" of the Petitioner, the Petitioner did not withhold payroll taxes from the pay and did not provide any fringe benefits such as paid holidays and paid vacations. Some members of the maintenance team were paid a weekly salary. The salaried maintenance team employees worked under the same terms and conditions except the salaried employees received fringe benefits such as paid holidays and paid vacations. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
9. Either party could terminate the relationship at any time without incurring liability for breach of contract. On January 31, 2011, the Petitioner terminated the entire maintenance team due to lack of work and due to dissatisfaction with the work performed by the maintenance team.
10. The Joined Party filed a claim for unemployment compensation benefits effective January 1, 2012. When the Joined Party did not receive credit for his 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 independent contractor or as an employee.

11. On March 9, 2012, the Department of Revenue determined that the persons performing services for the Petitioner as maintenance technicians are the Petitioner's employees retroactive to January 1, 2010. The Petitioner filed a timely protest by letter dated March 26, 2012.

Conclusions of Law:

12. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as maintenance workers 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. The only competent evidence of the verbal agreement is the testimony of the Joined Party concerning the initial interview conducted by the maintenance supervisor. The evidence does not reveal that the Joined Party agreed to perform services as an independent contractor, only that he accepted the fact that the Petitioner would not withhold payroll taxes from the pay. 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 is a real estate development company which rented its units until such time as the Petitioner could sell the units. The Petitioner was responsible for maintaining the rental property. The Joined Party was engaged by the Petitioner to provide the maintenance services as directed by the Petitioner. The Petitioner provided all materials, supplies, and tools that were needed to perform the work. The Joined Party did not have any expenses in connection with the work. 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 Petitioner determined both the method of pay and the rate of pay. The Petitioner paid the Joined Party by time worked, rather than by production or by the job, which is indicative of an employment relationship. The fact that the Petitioner chose not to withhold taxes from the pay or to provide fringe benefits does not, standing alone, establish an independent contractor relationship.

22. The Joined Party performed services exclusively for the Petitioner for a period of approximately one 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. 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."

23. The evidence reveals that the Petitioner determined what work was performed, where it was performed, when it was performed, and how it was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

24. It is determined that the services performed for the Petitioner by the Joined Party and other individuals as maintenance technicians constitute insured employment. The determination of the Department of Revenue is only retroactive to January 1, 2010; however, the Joined Party performed services for the Petitioner as early as July 25, 2009. Thus, based on the evidence, the correct retroactive date is July 25, 2009.

25. The Petitioner submitted proposed findings of fact and conclusions of law which includes documentary evidence that was not presented at the hearing. 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. The additional evidence presented by the Petitioner is rejected and has not been considered in this recommended order.

Recommendation: It is recommended that the determination dated March 9, 2012, be MODIFIED to reflect a retroactive date of July 25, 2009. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on August 17, 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:
August 17, 2012

Copies mailed to:
Petitioner
Respondent
Joined Party

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