DEPAR MENT OF ECONOMIC OPPO. UNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:
Employer Account No. – 3129582
THE LEADERS INSTITUTE LLC
ATTN: DOUG STANEART
6703 CORONATION CT
ARLINGTON TX 76017-4965

PROTEST OF LIABILITY
DOCKET NO. 0019 3444 41-01

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

ORDER

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 May 15, 2013, is REVERSED.

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 12 day of **May, 2014.**

Magnus Hines,
RA Appeals Manager,
Reemployment Assistance Program
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

5.16.14
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 16th day of May, 2014.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

By U.S. Mail:

THE LEADERS INSTITUTE LLC
ATTN: DOUG STANEART
6703 CORONATION CT
ARLINGTON TX 76017-4965

CONNIE TIMPSON
1481 MANDARIN POINT LN S
JACKSONVILLE FL 32223-1723

DEPARTMENT OF REVENUE
WILLA DENNARD
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
PO BOX 6417
TALLAHASSEE FL 32314-6417

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

DEP. .TMENT OF ECONOMIC OPI RTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:
Employer Account No. - 3129582
THE LEADERS INSTITUTE LLC
ATTN: DOUG STANEART
6703 CORONATION CT
ARLINGTON TX 76017-4965

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

PROTEST OF LIABILITY
DOCKET NO. 0019 3444 41-01

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated May 15, 2013.

After due notice to the parties, a telephone hearing was held on January 6, 2014. The managing member/company president appeared for the Petitioner; the Joined Party appeared; and a Senior Tax Specialist appeared for the Respondent. Proposed findings of fact and conclusions of law were received from the Petitioner and from the Joined Party. The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

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 meets liability requirements for Florida unemployment compensation contributions pursuant to §443.036(19); 443.036(21); 443.1215, Florida Statutes.

Findings of Fact:

1. The Petitioner provides management training for corporate events. Often the training takes the form of team building exercises that benefit a local charity. Employees of the client corporation work together to build bicycles, for example, or to assemble stuffed teddy bears, which are then given to local children, with publicity. During the team building event, an instructor gives general instruction and points out useful principles of behavior drawn from the activities. The Petitioner is one of many firms who provide similar services.

2. The Joined Party worked as an instructor for the Petitioner from June 1, 2008 to January 16, 2013. The Joined Party had many years of experience in management and teamwork consulting both in the US and overseas prior to beginning with the Petitioner. The Joined Party was self-employed prior to beginning her association with the Petitioner.

3. The headquarters of the Petitioner is in Texas, near Dallas. The Joined Party resided in Jacksonville, Florida throughout her association with the Petitioner.

4. When the Joined Party began her association with the Petitioner, she signed an agreement which referred to the Joined Party as an independent contractor. It provided for a 30 day notice period to terminate the agreement. An appendix set out the specific compensation schedule. Instructors were paid a percentage of the Petitioner's revenue on the event, plus a bonus for events with more than a certain number of participants, plus reimbursement for certain travel expenses, up to a specified dollar amount. A fee was paid to the instructor for a blog post published on the Petitioner's website about recently completed events. Instructors sometimes received an additional payment when the instructor assisted the salespeople in generating repeat business from a client. The Petitioner sometimes gives instructors a gift at the end of the year, such as a gift basket of some kind. Once, the Petitioner's gift to instructors was in cash. The Petitioner did not deduct taxes from payments made to the Joined Party. The Petitioner issued a 1099-MISC each year summarizing the amount paid to the Joined Party for the just-completed year.

5. The Joined Party was not prohibited from accepting assignments from other management training companies, but the Petitioner expected the Joined Party not to work for any direct competitor; that is, the Joined Party was not to work for any company that engaged in team building events such as those the Petitioner held. When the Joined Party began accepting assignments from the Petitioner she had a consulting arrangement with a company in Europe. The Joined Party continued to provide services to that client for several months after she began taking assignments from the Petitioner. The Petitioner's president told the Joined Party that if she continued the arrangement with her client in Europe, the Joined Party would miss out on assignments from the Petitioner.

6. The Petitioner would create a schedule each week that contained assignments. The assignments would be discussed in a telephone conference call on most Mondays involving from four up to a dozen instructors. The assignments for the Joined Party were sometimes in Florida, and sometimes were in distant states. The Joined Party could decline an assignment, but she rarely if ever did so, because she believed that refusal of an assignment could result in the Petitioner refusing to schedule her for any further assignments. The president of the Petitioner, who created the schedule, did not say that refusal of an assignment would result in fewer assignments. Assignments were offered based on factors such as proximity of the instructor to the event, whether the client had asked for the particular instructor, and client reviews of the instructor.

7. The typical practice of instructors associated with the Petitioner is that once an instructor accepts an assignment, the instructor contacts the client to obtain details about the particular location of the event and about any particular details the client wishes to have included in the event. The Petitioner supplies the materials for the event. The instructor will typically contact the material supplier to confirm what supplies to send, and then the instructor will submit that information to the Petitioner's logistics manager. The Petitioner has standard outlines for the various kinds of events with a suggested agenda and suggested seating arrangements for the participants. The Petitioner's sales people produce an initial or tentative agenda. After speaking to the client, the instructor establishes a specific final agenda for the event.

8. At the event location the instructor will arrive a day or two in advance to set up the event space, including arranging tables and chairs, with tools and supplies arranged at the various work stations. The instructor will sometimes have to purchase some extra supplies locally if the shipped-in materials prove to be deficient. The Petitioner reimburses the instructor for such purchases. The instructor would speak to a representative of the charity to be benefitted, to confirm details of the presentation at the end of the event. Typically some client employees at an event would be assigned to act as judges. The instructor would meet with those client employees prior to the event, to explain their role in the event.

9. At the time of the event, the instructor would give an introduction, which would vary from instructor to instructor. Often the instructor would include personal anecdotes. The Joined Party would typically arrange for suitable music to accompany the event. Other instructors associated with the Petitioner adopted that idea. The Joined Party chose the music and it was played at the events on the Joined Party's equipment. The participants would be divided into teams using various techniques, some of which were suggested by the Petitioner in its outline materials. The instructor would typically engage in a warm-up exercise for the teams—a memory or trivia contest, for example. The Petitioner's outline material included suggestions for several such warm-up exercises. The instructor would choose an appropriate one for the client. The teams would then begin to assemble the bicycles, teddy bears, or whatever else had been chosen for the teambuilding activity. The instructor would talk to participants during the activity. The Joined Party typically would take pictures of the event in progress. The Joined Party would use her own camera to take the pictures. At the conclusion of the assembly activities, there would be the presentation to the charity.

10. Sometimes instructors would bring assistants to help at the event. Often the assistants were the instructors' spouses. The assistant's expenses were paid by the instructor, not the Petitioner or the client. The Joined Party could have used her spouse as an assistant but she did not ever do so.

11. The Joined Party observed other instructors at events on a couple of occasions before her first assignment. After the Joined Party had done several events, other instructors new to the Petitioner occasionally observed her. The Petitioner's president occasionally attended an event. On one such occasion, in the summer of 2012, when there were unusual problems, the Petitioner's president asked the Joined Party why she had arranged things the way she had. The Joined Party took this to be a reprimand.

12. In the late summer of 2012 the Joined Party had accepted an assignment to an event with a repeat client. The client suggested having a different kind of activity than had been presented in the previous event. The president of the Petitioner spoke to the Joined Party about that, and eventually the president of the Petitioner conducted the event, not the Joined Party. Not long after that, logistical problems occurred at other events to which the Joined Party was assigned. There were not enough parts available for all of the participants. The president of the Petitioner objected to the way that the Joined Party had dealt with the problems—giving out tokens representing bicycle parts instead of giving actual parts. The Petitioner did not offer new assignments to the Joined Party after that, except for one event in January 2013. The Joined Party completed the events she had already accepted for 2012. In late 2012 a repeat client asked for the Joined Party specifically. The event was offered to the Joined Party; she accepted and completed the event.

13. The Joined Party filed a claim for reemployment assistance benefits effective October 21, 2012, after the Joined Party had received no offers of assignments for several weeks. After an investigation, the Florida Department of Revenue issued a determination on May 15, 2013 finding that the Joined Party was an employee, not an independent contractor, retroactive to January 1, 2011.

Conclusions of Law:

14. 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.

15. In Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 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 the one employed is 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 worker supplies the instrumentalities, tools, and a 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 time or job;
        (h) whether or not the work is 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.

16. 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. 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. The factors listed in Cantor v. Cochran are the common law factors that determine if a worker is an employee or an independent contractor. See, for example, Brayshaw v. Agency for Workforce Innovation, 58 So. 3d 301 (Fla. 1st DCA 2011).

17. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B. & L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983).

18. In Keith v. News and Sun-Sentinel Co., 667 So.2d 167, 171 (Fla. 1995) the Florida Supreme Court stated:

> Hence, courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status. In the event that there is no express agreement and the intent of the parties cannot otherwise be determined, courts must resort to a fact-specific analysis under the Restatement based on the actual practice of the parties. Further, where other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control.

19. Section 73B-10.035, Florida Administrative Code, provides:
    (1) (7) Burden of Proof. The burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.

20. The evidence shows that the work of management training instructor is skilled work, which can be engaged in by self-employed individuals. The greater the degree of skill in an occupation, the more likely the practitioner is to be considered an independent contractor; see, Florida Gulf Coast Symphony, Inc. v. Dept. of Labor and Employment Security, 386 So.2d 259 (Fla. 2d DCA 1980).

21. In this case, the parties agreed initially that the Joined Party was an independent contractor, and it has not been shown that there was any express agreement changing that status. Pursuant to Keith, the agreement of the parties should control, unless the actual practice of the parties belies it.

22. As to the actual practice of the parties, there were conflicts in the testimony over whether an instructor could decline assignments; over how closely the Petitioner controlled the details of the work, including conflicts over the arrangements set out in the Petitioner's outline materials; and conflicts over how strenuously the president of the Petitioner objected when the Joined Party exercised independent judgment in executing details of the events. Both parties had opportunities to present documentary evidence corroborating their contentions: the Petitioner with respect to a series of agreements allegedly signed by the Joined Party after the first, and the Joined Party with respect to the allegedly highly detailed procedural manuals. Such additional documentation was not presented. Ultimately, the conflicts in the testimony have been resolved in favor of the Petitioner based on the consistency, candor, and demeanor of the witnesses. Accordingly, it is accepted that the Joined Party could decline assignments, though for prudential reasons she chose not to; and that the president of the Petitioner asked questions about why the Joined Party acted in certain ways, rather than that the president reprimanded the Joined Party for failing to follow procedures. It is accepted that the outline materials gave general suggestions, rather than that the outline materials were a detailed mandatory blueprint.

23. There were elements of exclusivity in the association between the Petitioner and the Joined Party, and exclusivity can imply control, because the worker has to do things in the employing unit's way or not work at all. At the beginning of the relationship the president of the Petitioner told the Joined Party that by continuing to service her existing client in Europe she could be missing out on assignments from the Petitioner. The evidence does not show that this was a command to the Joined Party to stop her other work; but instead was a statement about the potential opportunities available to the Joined Party. The Petitioner expected instructors not to work for other firms that engaged in assembly-type team building activities, but this is only one kind of management consulting and training. The limitation is at least as consistent with the Petitioner trying to maintain a particular image or brand as it is with attempting to control the manner in which the Joined Party provided management training. The elements of exclusivity in this case do not imply control by the Petitioner over the manner in which the Joined Party performed her work.

24. Further, in Cantor v. Cochran, cited above, 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. In this case, the evidence shows that the Petitioner did withdraw one assignment after the Joined Party started working on it; but on the other hand, after the Petitioner stopped giving the Joined

Party new assignments, for the most part, in the fall of 2012, the Joined Party did perform those assignments she was already contracted for; and she was offered a further assignment after that. The Petitioner did not exercise a power to discharge the Joined Party.

26. The evidence shows that the field auditor who issued the determination considered the payment of bonuses as an indicator of employment. Though it is not listed among the factors in Cantor v. Cochran, it is also the case that the list of factors is not stated to be comprehensive or exclusive. A year-end bonus would tend to imply employment if it was a payment for work that was performed in an exemplary manner. For example, a bonus would be of this type if it rewarded work that was performed faster than usual, or that turned out more profitable than anticipated due to lower costs than had been budgeted. The bonus payment would be a reward not just for the product of the work, but for the way in which it was done. It would show control over the details of the work by means of positive reinforcement. But not every payment labeled as a bonus is a payment of that type. Some payments labeled as bonuses are ordinary payments for optional services. Such payments do not imply control over the manner of the work, since they are compatible with the pay being contingent merely upon the attainment of a particular result. Also, some payments labeled as bonuses are instead promotional expenditures, designed to increase business or at least reduce future problems by fostering good will. Such promotional expenditures might include pens or paperweights or other marginally useful office supplies; or they might take the form of consumables such as fruit or candy. Such gifts between business associates do not imply any control over the manner of doing any work. In this case, the payments to the Joined Party from the Petitioner labeled as bonuses were either payment for the performance of some additional service, or they took the form of goodwill promotional items. The president of the Petitioner admitted that there was one year-end bonus paid in cash to instructors, which makes it look more like an exemplary reward than a goodwill gesture, but it only happened once, and the evidence does not show that the cash gift was tied to any particular performance. The payments labeled bonuses do not in this case imply that instructors were employees rather than some other kind of business associate.

27. Because the evidence shows that the Joined Party could work for other firms in the same general field, and because she controlled the details of her presentation, could decline offered assignments, used her own presentation tools and equipment, and could exercise professional judgment in making her decisions about the presentation, the relationship between the Joined Party and Petitioner is more consistent with that of independent contractor than of employment. See, for example, VIP Tours of Orlando, Inc. v. Dept. of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)(tour guides controlled their own presentations, so they were independent even though they were on the vehicles of, and wore uniforms of, the employing unit).

28. The Petitioner and the Joined Party submitted proposed findings of fact or conclusions of law. The Joined Party also submitted documents containing potential additional evidence. It has not been shown that the additional proposed evidence was unobtainable with the exercise of reasonable diligence prior to the final hearing in this matter. Since this information was not presented at the hearing, the additional proposed evidence is not accepted. To the extent that the proposals of the parties were relevant and supported by the evidence they have been incorporated in the findings of fact and conclusions of law, above; and to the extent that the proposals are not supported by the credible evidence they are rejected. The Petitioner and Joined Party submitted proposals relating to whether Florida or Texas should be considered the base of operations of the Joined Party; but in light of the recommendation in this matter, such proposals are moot.

Recommendation: It is recommended that the determination dated May 15, 2013, finding the Joined Party to be an employee not an independent contractor, be REVERSED.
Respectfully submitted on March 20, 2014.

J.Jackson Houser, 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, Special Deputy Clerk

Date Mailed:
March 20, 2014

Copies mailed to:
Petitioner
Respondent
Joined Party

Joined Party:
CONNIE TIMPSON
1481 MANDARIN PT LN SO
JACKSONVILLE FL 32223-1723

Other Addresses:
WILLA DENNARD
DEPARTMENT OF REVENUE
CCOC BLDG#1 SUITE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

FL DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
PO BOX 6417
TALLAHASSEE FL 32314-6417