

**DEPARTMENT OF ECONOMIC OPPORTUNITY**  
**Reemployment Assistance Appeals**  
**PO BOX 5250**  
**TALLAHASSEE FL 32399-5250**

**PETITIONER:**

Employer Account No. – 3014027  
JACAR CLEANING CARE INC  
ATTN: CARLOS RODRIGUEZ  
13030 WATERBOURNE DR  
GIBSONTON FL 33534-3908

**PROTEST OF LIABILITY**  
**DOCKET NO. 0019 3444 51-01**

**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 July 17, 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 16th day of **June, 2014**.



*Magnus Hines*

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.

*Shanendra Y. Barnes*

DEPUTY CLERK

6/16/14

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 June, 2014.

*Shanendra 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:

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State of Florida  
DEPARTMENT OF ECONOMIC OPPORTUNITY  
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**DOCKET NO. 0019 3444 51-01**

**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Magnus Hines  
RA Appeals Manager,  
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 July 17, 2013.

After due notice to the parties, a telephone hearing was held on March 6, 2014. The Petitioner appeared, represented by its accountant, who gave testimony, and the company president also testified; the Joined Party appeared; a Tax Auditor II appeared for the Respondent. No proposed findings of fact or conclusions of law were received. The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

**Issue:**

Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 73B-10.035(18).

Whether services performed for the Petitioner by the Joined Party and other individuals constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

**Good Cause for Additional Hearing:**

1. A hearing was scheduled for November 4, 2013. The Petitioner did not receive the notice of hearing and so it did not appear for the hearing. It is recommended that good cause be found for holding an additional hearing.

**Findings of Fact:**

2. The Petitioner provides cleaning services to clients. It has been in operation since approximately 2007. Most of the cleaners that the Petitioner assigns to client companies are employees. The Petitioner began its association with the Joined Party on September 11, 2011. The Petitioner considered the Joined Party to be an independent contractor, not an employee.
3. The Petitioner's employees get their paychecks biweekly through a third party payroll administration firm. They are scheduled to work 8 a.m. to 4:30 p.m., Monday through Friday. They are paid by the hour.
4. The Joined Party was hired to provide services to one particular client, a daycare facility. The company president told the Joined Party that she would start work each weekday at approximately 6 p.m. This would be just after most of the children at the facility would have left. The Joined Party would be paid \$600 per week.
5. Before starting work at the facility, the president of the Petitioner presented the Joined Party with some t-shirts printed with the Petitioner's name. The Joined Party had planned to be assisted in the work by her boyfriend. The company president gave the claimant t-shirts for her boyfriend. The t-shirts were provided to give assurance to anyone still on the premises that the Joined Party was authorized to be there to clean. Occasionally a few parents and children would still be at the center when the Joined Party appeared.
6. For the first three days that the Joined Party cleaned at the day care center, the president of the Petitioner was also there. He told the Joined Party that the restrooms should be cleaned first. The Joined Party concentrated on cleaning the restrooms while her boyfriend cleaned the floors in the classrooms. The Joined Party followed that sequence and division of the work throughout the time that she was associated with the Petitioner.
7. The work would take three to four hours to perform, depending on the condition of the facility. After the first three days the president of the Petitioner was at the premises perhaps once a month. He would observe the Joined Party and her helper at work for a few minutes.
8. The owner of the day care center was sometimes on the premises when the Joined Party was doing her work. Occasionally the owner of the day care center would tell the Joined Party that sufficient cleaning had been done and she could go home. The Joined Party would leave at that point.
9. The day care center supplied the cleaning tools and supplies. The cleaning equipment was stored on a cleaning cart kept at the day care center. The Joined Party traveled to and from work in her own vehicle.
10. The Petitioner issued business checks to the Joined Party paying \$600 semi-monthly. No taxes were withheld or deducted from the payments. The Petitioner issued a 1099-MISC to the Joined Party for 2011 and 2012, summarizing the payments for the year under "nonemployee compensation". The Joined Party would pay her boyfriend for his work out of that payment. When the Joined Party's boyfriend was unable to work, the Joined Party substituted her daughter. She advised the Petitioner that she was doing so. The Petitioner voiced no objection.
11. On two or three occasions, the wife of the president asked the Joined Party to work with the wife cleaning other premises. On those occasions the Petitioner paid the Joined Party \$60 for the day. This was paid separately from the regular semi-monthly check.

12. The daycare center was closed on certain holidays, such as Memorial Day, Independence Day, Thanksgiving Day and the day after, Christmas day and New Year's Day. The Joined Party did not have to clean at the daycare center on those days. The semimonthly payment was not reduced for periods that included such holidays.
13. The Joined Party had a key to the facility and an alarm code so that she could set the alarm when she finished work. If the Joined Party had wanted to clean in the facility on holidays or on a Saturday instead of a Friday evening she had the means to do so, but she saw little reason to do so.
14. The daycare center owner told the president of the Petitioner that the Joined Party had been observed in surveillance video to have had a minor child on the premises while she was cleaning. The daycare center owner objected to that. The president of the Petitioner spoke to the Joined Party about the complaint. The Joined Party said that there was no one available to take care of the child. The president told the Joined Party she should not have a minor child on the premises. Later, the daycare center owner complained to the president that the Joined Party had once again brought a minor child to premises. The daycare center ended its contract with the Petitioner. The president of the Petitioner advised the Joined Party to turn in the facility key to the Petitioner, which the Joined Party did. The Petitioner did not assign the Joined Party to any other work. The Joined Party last worked for the Petitioner on or about June 14, 2013.

**Conclusions of Law:**

15. Section 443.036 (28), Florida Statutes, provides:
  - (28) "Insured work" means employment for employers.
16. 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.
17. 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.
18. 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.
19. 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. 1<sup>st</sup> DCA 2011).
  20. 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. 4<sup>th</sup> DCA 1971); La Grande v. B. & L. Services, Inc., 432 So. 2d 1364 (Fla. 1<sup>st</sup> DCA 1983).
  21. Section 73B-10.035, Florida Administrative Code, provides:
    - (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.
  22. Cleaners are sometimes employees, and sometimes independent contractors. See, for example, Farmers and Merchants Bank v. Vocelle, 106 So.2d 92 (Fla. 1<sup>st</sup> DCA 1958); 4139 Management Inc. v. Dept. of Labor and Employment Security, 763 So.2d 514 (Fla. 5<sup>th</sup> DCA 2000).
  23. The Petitioner has cleaners who are employees, but treated the Joined Party differently from the way it treated those it considered to be employees: the Joined Party was not paid through the payroll firm, she did not work during the daytime, she was assigned to one client only, and the Petitioner issued a 1099 form rather than a W-2. After an initial orientation period, the Petitioner engaged in little if any supervision over how the Joined Party got the work done. The evidence shows that the Joined Party’s work for the Petitioner was as an independent contractor rather than as an employee.
  24. The Joined Party used tools and supplies from the client for whom the cleaning was done; the Petitioner did not supply the tools and other instrumentalities of the work. The work was on the premises of the client.
  25. Although the Joined Party cleaned according to the sequence that the president of the Petitioner had suggested in the beginning, the Joined Party was not required to do so. The Joined Party had the ability and opportunity to clean in a different manner, but she did not choose to do so.
  26. The Joined Party was assisted by other workers, and she paid the other workers, rather than the Petitioner doing so. The Joined Party decided on the assistant, rather than the Petitioner doing so. Although the Joined Party notified the Petitioner of who she was working with, the Petitioner did not exercise any control over the Joined Party’s choice.
  27. The Joined Party was paid for cleaning services over a period of time, rather than being paid by the hour. She received the same pay even for periods where less cleaning was done because the client was closed for holidays. There was no separate payment that was called “holiday pay,” which might suggest a fringe benefit that implies employment, see Harper ex rel. Daley v. Toler, 884 So.2d 1124, 1131 (Fla. 2<sup>nd</sup> DCA 2004), but instead there was simply the same undifferentiated periodic payment.



28. The Joined Party wore a shirt supplied by the Petitioner, but this was a security and reassurance measure, rather than an exercise of control over how the work was done. See, for example, VIP Tours of Orlando, Inc. v. Dept. Labor and Employment Security, 449 So.2d 1307, 1310 (Fla. 5<sup>th</sup> DCA 1984). Similarly, the president of the Petitioner visited the premises occasionally, but review of the quality of work does not establish control over how the work is done. See, e.g., 4139 Management Inc. at 517.
29. The relationship between the Petitioner and the Joined Party came to an end because of a conflict over the Joined Party having a minor child on the premises while she cleaned, over the objection of the client. Again, this was a dispute over security and potential liability on the client's premises, rather than an exercise by the Petitioner over how the Joined Party conducted the cleaning.
30. In summary, the Petitioner subcontracted the work of cleaning the client's premises to the Joined Party, but the Petitioner did not control how the Joined Party performed her cleaning in the facility, so the work of the Joined Party for the Petitioner was as an independent contractor, not an employee. It is noted that the Joined Party provided occasional services to the Petitioner elsewhere than the premises of the client. But even then, the Joined Party was paid for a block of cleaning services—\$60 per day—rather than being paid in detail by the hour. The primary relationship between the Petitioner and the Joined Party was that of independent contractor; the occasional extra instances of service were merely incidental. Moreover, the extra services were not mandatory; the relation of independence was retained because the Joined Party controlled the extra work, not the Petitioner.

**Recommendation:** It is recommended that the determination dated July 17, 2013, finding that the Joined Party was an employee, be REVERSED.

Respectfully submitted on May 5, 2014.




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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 envío 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 ken z 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.

*Shanendra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:**

**May 5, 2014**

**Copies mailed to:**

Petitioner

Respondent

Joined Party

**Joined party:**

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GIBSONTON FL 33534-5217

**Other Addresses:**

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