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

PETITIONER:
Employer Account No. - 3145322
AMERICAN CARE HEALTH PLAN
ATTN: JENNIFER ESPINET ESQ
11255 SW 211TH STREET
MIAMI FL 33189-2240

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

PROTEST OF LIABILITY
DOCKET NO. 0019 3454 14-01

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 Petitioner's protest of the determination dated March 25, 2013, is accepted as timely filed. It is further ORDERED that the determination dated March 25, 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 13th day of **January, 2014**.

Altemese Smith,
Bureau Chief,
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 D. Barnes
DEPUTY CLERK

1-14-14
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 14th day of January, 2014.

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

By U.S. Mail:

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AMERICAN CARE HEALTH PLAN
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPAR MENT OF ECONOMIC OPPO UNITY
Reemployment Assistance Appeals
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TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 3145322
AMERICAN CARE HEALTH PLAN
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PROTEST OF LIABILITY
DOCKET NO. 2013-42815L

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

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 March 25, 2013.

After due notice to the parties, a telephone hearing was held on August 29, 2013. The Petitioner was represented by its attorney. The Petitioner's president, a clerk employed by American Care Inc, the Director of Benefit Outreach employed by American Care Inc, and a Benefit Outreach Consultant, testified as witnesses. The Respondent, represented by a Department of Revenue Senior Tax Specialist, 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 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 meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner, American Care Health Plans, Inc., is a Florida profit corporation formed effective July 29, 2011. The Petitioner's president, Jose Garcia, has been active in the operation of the business as the Chief Executive Officer since inception of the business. The Petitioner is an authorized Florida Health Flex Plan, a Florida Discount Medical Plan Organization, a Field Marketing Organization, and a Benefits and Outreach Services Organization.
2. Jose Garcia is also involved in the businesses of sister corporations to the Petitioner which operate medical centers in Florida, including medical centers located in Lakeland and Winter Haven.
3. The Petitioner uses the services of individuals, which the Petitioner has classified as Independent Benefits Outreach Consultants, to sell the health plans to eligible patients and other eligible individuals.
4. The Joined Party is an individual who has been a licensed insurance agent for over forty years. The Joined Party applied for work with the Petitioner as an Independent Benefits Outreach Consultant and was interviewed by the Petitioner's president at the medical center located in Lakeland. Independent Benefits Outreach Consultants are not required to have an insurance license to sell the health plans; however, the Petitioner prefers to hire licensed insurance agents such as the Joined Party. During the interview the Petitioner described the duties performed by the Independent Benefits Outreach Consultants and explained that the Petitioner would pay the Joined Party $2,000 per month to sell the health plans in the Lakeland and Winter Haven areas of Polk County. It was explained to the Joined Party that he would have the use of office space at the medical centers since those were the locations where he would enroll the patients. In addition the Joined Party would sell the health plans at other locations of the Joined Party's choice.
5. The Petitioner uses an *Independent Benefits Outreach Consultant Agreement* to enter into contracts with the Independent Benefits Outreach Consultants. The Agreement provides, among other things, that the Independent Benefits Outreach Consultants are engaged as independent contractors and not employees of the Petitioner to enroll persons in medical or health plans offered by or through the Petitioner, to assist members who are already enrolled in medical or health plans offered by the Petitioner, and to assist with education and outreach to existing members.
6. The Joined Party printed out a copy of the Agreement and signed it. There were several pages missing from the printed Agreement. The Petitioner refused to accept the incomplete copy and destroyed it. The Petitioner advised the Joined Party that a copy of the entire Agreement would be provided to him at a later date for his signature. The Petitioner never provided a copy to the Joined Party and the Joined Party never signed the *Independent Benefits Outreach Consultant Agreement* or any other agreement. The Joined Party understood that he was hired by the Petitioner as an independent contractor.
7. The Petitioner never provided any training to the Joined Party. Although the Joined Party was advised that he could use the office at the medical center he was not told that he had to perform the services from that location. The Petitioner did not advise the Joined Party of any required work schedule. The Joined Party assumed that he should work the same days and hours as the operating days and hours of the medical center. The Joined Party did not always work at the medical centers during the regular operating hours. Sometimes the Joined Party met with prospective customers in their homes. The Joined Party was not reimbursed for car expenses, or any other expenses, by the Petitioner.
8. Insurance agents are required to maintain their licenses by satisfying continuing education requirements mandated by law. The Joined Party was responsible for the expense of maintaining his license and completing the continuing education required by law or regulation.

9. The Joined Party was required to comply with all federal, state, and local laws and regulations regarding the sale of health plans and insurance products.

10. The Joined Party was not required to complete a timesheet or otherwise account for his time. On one occasion the Joined Party chose to take a one week vacation. Although he was not required to request permission or notify the Petitioner, the Joined Party notified the Benefit Outreach Director and requested permission.

11. The Joined Party was not restricted to selling just the health plans offered by the Petitioner. The Joined Party sold other insurance policies and health plans and received sales commissions from the insurance companies.

12. The Joined Party did not have a sales quota and was not required to sell a minimum number of the Petitioner's health plans. The Joined Party was not required to personally perform the work. He was free to hire others to perform the work for him.

13. The Petitioner paid the Joined Party $1,000 on the first and the fifteenth day of each month. No taxes were withheld from the pay. The Petitioner did not provide any fringe benefits, such as health insurance or retirement benefits. At the end of 2012 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

14. Either party had the right to terminate the relationship at any time, with or without cause. By letter dated January 25, 2013, the Petitioner notified the Joined Party that that the Petitioner had terminated the relationship with the Joined Party but would pay the Joined Party through the end of the month.

15. During the time that the Joined Party performed services for the Petitioner the Joined Party believed that he performed services as an independent contractor and not as an employee of the Petitioner.

16. The Joined Party filed a claim for reemployment assistance benefits effective January 20, 2013. 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 employee or as an independent contractor. The investigation was issued using an incorrect address for the Petitioner.

17. The Department of Revenue was not able to make contact with the Petitioner during the investigation due to the incorrect address. Based on information provided by the Joined Party the Department of Revenue determined on March 25, 2013, that the Joined Party performed services for the Petitioner as an employee. The determination was mailed to the Petitioner at the incorrect address provided on the investigation. As a result of the incorrect address the Petitioner did not receive the determination until April 12, 2013. The Petitioner filed a protest on April 17, 2013. In its written protest the Petitioner advised the Department or Revenue of its correct mailing address.

18. On or before May 17, 2013, an *Order to Show Cause* was mailed to the Petitioner's correct mailing address directing the Petitioner to file a written statement within fifteen calendar days explaining why the protest should not be dismissed due to lack of jurisdiction. The Petitioner filed a timely response to the *Order to Show Cause* advising that the protest was received late due to an incorrect address.

Conclusions of Law:

19. Section 443.141(2), Florida Statutes, provides:
    (c) *Appeals.* The department and the state agency providing reemployment assistance tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on

the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.

Rule 73B-10.035, Florida Administrative Code provides;

(1) Filing a Protest. Protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to the Department of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, DOR will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in DEO for resolution.

20. Rule 73B-10.035, Florida Administrative Code, provides:

(5) Timely Protest.

(a)1. Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.

2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.

(b) If a protest appears to have been filed untimely, DEO may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.

21. The Petitioner's protest was not filed within twenty days of the date that the determination was mailed because the determination was mailed to an incorrect address and was not received by the Petitioner until April 12, 2013. The Petitioner's protest was mailed within twenty days of receipt of the determination. Thus, the Petitioner's protest is accepted as timely filed.

22. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as benefit consultants constitute employment subject to the Florida Reemployment Assistance Program 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.

23. 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).

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. Although the individuals who perform services for the Petitioner as benefit consultants normally enter into the *Independent Benefits Outreach Consultant Agreement* there is no signed *Independent Benefits Outreach Consultant Agreement* between the Petitioner and the Joined Party. The Joined Party printed a partial copy of the Agreement and signed it, however, the partial copy of the Agreement was rejected by the Petitioner and the partial Agreement was destroyed. It was, however the clear understanding of both parties that the Joined Party was engaged to perform services as an independent contractor and not as an employee of the Petitioner. The Florida Supreme Court has held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995).

30. Although the Petitioner allowed the Joined Party to use office space located at the medical center operated by a sister corporation, the Joined Party was not required to work from that location and had the freedom to determine where to perform the duties. The Petitioner did not reimburse the Joined Party for any expenses incurred while performing the duties.

31. The Joined Party is a licensed insurance agent and, in addition to the health plans that were offered by the Petitioner, the Joined Party sold plans offered by other insurance companies and competitors of the Petitioner. The Joined Party sold the plans for other companies during what the Joined Party assumed were his regular working hours with the Petitioner. The Joined Party was not required to work specific days or hours for the Petitioner and he was not required to account for his time.

32. As a licensed insurance sales agent for over forty years the Joined Party has knowledge of insurance and health plan products and has the skills necessary to sell the products. 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)

33. The Petitioner paid the Joined Party $2,000 per month for enrolling new members and assisting existing members. The Petitioner did not pay any commissions to the Joined Party and did not require the Joined Party to work a specified number of hours in return for the pay. Thus, the Joined Party was paid by the job rather than based on time worked. No payroll taxes were withheld from the pay and the Petitioner did not provide any fringe benefits that are normally associated with employment relationships. The Joined Party's earnings were reported to the Internal Revenue Service as nonemployee compensation.

34. The Joined Party performed services for the Petitioner for a period of approximately one year. Either party could terminate the relationship at any time, for any reason. These facts reveal the existence of an at-will relationship of relative permanence.

35. The Joined Party was required to comply with all federal, state, and local laws and regulations regarding the sale of health plans and insurance products. Regulation imposed by governmental authorities does not evidence control by the employer for the purpose of determining if the worker is an employee or an independent contractor. NLRB v. Associated Diamond Cabs, Inc., 702 F.2d 912, 922 (11th Cir. 1983); Global Home Care, Inc. v. D.O.L. & E.S., 521 So. 2d 220 (Fla. 2d DCA 1988).

36. The Petitioner did not control where the work was performed, when the work was performed, or by whom the work was performed. 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).

37. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as benefit consultants do not constitute insured employment.

Recommendation: It is recommended that the Petitioner's protest of the determination dated March 25, 2013, be accepted as timely filed. It is recommended that the determination dated March 25, 2013, be REVERSED.

Respectfully submitted on September 27, 2013.

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:
September 27, 2013

Copies mailed to:
Petitioner
Respondent
Joined Party

RUGBY BALDERAMOS
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AMERICAN CARE HEALTH PLAN
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DEPARTMENT OF REVENUE
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DEPARTMENT OF REVENUE
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