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

PETITIONER:
Employer Account No. – 3183735
A PLUS PRINTING & GRAPHICS CENTER INC
6561 NW 18TH CT
PLANTATION FL 33313-4520

PROTEST OF LIABILITY
DOCKET NO. 0020 9505 94-02

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 November 6, 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 i 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 11th day of **April, 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.

DEPUTY CLERK 4.11.14
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 11th day of April, 2014.

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

By U.S. Mail:

A PLUS PRINTING & GRAPHICS CENTER
INC
6561 NW 18TH CT
PLANTATION FL 33313-4520

CHARLES DELL AIRA
5429 NW 106TH DR
CORAL SPRINGS FL 33076-2794

DEPARTMENT OF REVENUE
WILLA DENNARD
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DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
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TALLAHASSEE FL 32314-6417

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

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
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PETITIONER: Employer Account No. - 3183735 A PLUS PRINTING & GRAPHICS CENTER INC 6561 NW 18TH CT PLANTATION, FL 33313-4520	
	PROTEST OF LIABILITY **DOCKET NO. 0020 9505 94-02**
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 November 6, 2013.

After due notice to the parties, a telephone hearing was held on January 23, 2014. The Accounting/HR manager appeared and testified for the Petitioner, and an accountant from a separate firm testified as a witness; the Joined Party appeared; and a Senior Tax Specialist 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 services performed for the Petitioner by the Joined Party constitute employment pursuant to §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 is a commercial printer. The Joined Party worked in association with the Petitioner from April 4, 2011 to March 15, 2013. The Petitioner uses a number of employees in its operation, which are on the payroll of an employee leasing company known as Engage PEO. All of the workers that the Petitioner considers employees are on the Engage PEO payroll. The Joined Party was not placed on the Engage PEO payroll.

2. The Joined Party has approximately three decades of experience in the field of commercial printing. He worked as the manufacturing manager of a printing company for many years until it shut down. While at that job the Joined Party came to know the president of the Petitioner. The Joined Party had a business relationship with entities that needed printing services from time to time. The Joined Party agreed with the president of the Petitioner that the Joined Party would direct customers with printing needs to the Petitioner. The Joined Party would also act as a consultant about commercial printing matters, including dealing with problems that occurred in the course of printing operations. The Joined Party and president of the Petitioner agreed that the services would be worth on average about $1400 per week, so that is the amount that the Joined Party would be paid. This would be in lieu of commission on sales and in lieu of any fee for other services that the Joined Party might perform. The Joined Party agreed to bill the Petitioner for services weekly.

3. The Joined Party signed a document on April 4, 2011 identifying him as a subcontractor of the Petitioner. In the document the Joined Party acknowledged that he was solely responsible for paying "*all Federal and Social Security taxes and withholdings as well as any liabilities due the Internal Revenue Services.*" The Joined Party agreed to carry liability insurance for himself, his vehicle, and any employed agents of his working on the Petitioner's premises. The document agreed not to hold the Petitioner liable for damage or injury that might occur to the Joined Party or employees while working.

4. The Joined Party submitted brief invoices to the Petitioner for each week in which he performed services. Some weeks the Joined Party decided not to work, so he did not bill the Petitioner for services for those weeks. In other weeks the Joined Party billed less than the agreed upon amount because his services had been minimal. In some cases the Joined Party billed more than $1400 for the week. The Joined Party would include in his bill any supplies that he had purchased in connection with printing services. The Petitioner would reimburse the Joined Party for those expenses in addition to paying the weekly fee for services.

5. The services provided by the Joined Party to the Petitioner included answering and returning telephone calls, taking customer orders, reviewing and correcting print jobs, and soliciting new business. The Joined Party had a cubicle set aside for him on the Petitioner's premises. The Joined Party used the Petitioner's telephone when he was on the Petitioner's premises.

6. The Joined Party did not have a mandatory work schedule. He could work when he chose. The Joined Party would deal with customers using his own cell phone when he was not on the Petitioner's premises. The Joined Party used his own computer equipment when providing services to the Petitioner.

7. Those customers who were introduced to the Petitioner by the Joined Party were referred to as the Joined Party's customers. When the Petitioner performed printing services for one of the Joined Party's customers, the customer would pay the Petitioner, not the Joined Party. The Joined Party felt an obligation to refer his customers to the Petitioner. The Joined Party was not required to work only for the Petitioner.

8. The Petitioner issued a 1099-MISC to the Joined Party summarizing payments to the Joined Party for 2012. The payment amount noted on the form included reimbursement payments as well as the payments purely for services.

9. The association between the Joined Party and the Petitioner came to an end when the Joined Party decided that he wanted to operate a commercial printing firm of his own. Many of the customers that the Joined Party introduced to the Petitioner continued to have printing done by the Petitioner.

Some of the Joined Party's customers decided to have their printing done by the Joined Party's new firm.

10. The Joined Party filed a claim for reemployment assistance benefits effective September 8, 2013. As a result of that claim the issue of wage credits was referred to the Florida Department of Revenue which ultimately issued its determination of November 6, 2013 that the Joined Party was an employee of the Petitioner.

Conclusions of Law:

11. 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.

12. 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.

13. 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.

14. 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).

15. 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).

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.

16. 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.

17. The express agreement between the parties contained provisions that are indicative of the status of independent contractor. The term "subcontractor," used in the agreement, is often a synonym for "independent contractor." The Petitioner was not obligated to deduct taxes from payments to the Joined Party, as would have been the case if the Joined Party was an employee. The Joined Party also agreed to protect the Petitioner from responsibility for damages caused by the Joined Party or his associates, including injury to the Joined Party himself. The agreement therefore was attempting to relieve the Petitioner of the necessity of providing workers' compensation coverage, which would have been required for an employee. Moreover, since employees are subject to the direction and control of employers, damage caused by employees within the scope of the employment is the responsibility of the employer. The agreement was attempting to negate that. Even if those provisions were not effective against parties who were not privy to the agreement, the provisions show that the parties did not believe that they were creating a typical relation of employer and employee.

18. The Joined Party had a high degree of skill in the work that he was doing for the Petitioner. Workers who must use a high degree of specialized skill are more likely to be considered independent contractors. See, e.g., Florida Gulf Coast Symphony, Inc. v Dept. of Labor and Employment Security, 386 So.2d 259 (Fla. 2d DCA 1980). That is because the worker uses independent skill and judgment to control the method of doing the work rather than being controlled by a supervisor.

19. Further, the Joined Party controlled when and where he was working. The Petitioner made accommodations on its own premises for the Joined Party to work, but the Joined Party was not required to use them.

20. Similarly, the Petitioner provided some tools and equipment for doing the work on its own premises, but the Joined Party also supplied tools and equipment for the work.

21. The Joined Party was paid what amounted to a weekly salary, and he was reimbursed for purchases he made for the Petitioner in connection with the work, which was part of the regular business of the Petitioner. These things tend to indicate employment, but they are not absolutely inconsistent with the status of independent contractor.

22. The Joined Party was not required to work exclusively for the Petitioner. While that is not a factor listed among those cited by Cantor v. Cochran, above, it is an important indicator of control. A worker, even a skilled professional, who must perform duties for the principal is likely to be considered an employee, subject to the control of the principal, while one who can choose when to work is more likely to be considered an independent contractor. *Compare*, University Dental

Health Center v. Agency for Workforce Innovation, 89 So.3d 1139 (Fla. 4th DCA 2012) (dentist found to be employee in spite of exercising professional judgment in treating patients, because he worked on employer's premises, using employer's tools, and could not pick and choose which patients to see) *with* VIP Tours of Orlando, Inc. v. Dept. of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984) (tour guides found to be independent contractors though they wore company uniforms and worked on company vehicles, but they could pick and choose which tours they guided, using their own presentation, and often worked for more than one company).

23. The greater weight of the factors in this case shows that when the Joined Party was providing services to the Petitioner it was as an independent contractor and not as an employee.

Recommendation: It is recommended that the determination dated November 6, 2013, finding the Joined Party to be an employee, be REVERSED.

Respectfully submitted on February 13, 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:
February 13, 2014

Copies mailed to:
Petitioner
Respondent
Joined Party

Joined party:

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