

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

PETITIONER:

Employer Account No. – 2583538
SUNSHINE PROPERTY MANAGEMENT AND
IMPROVEMENT INC
125 FLAMINGO RD
EDGEWATER FL 32141-7206

**PROTEST OF LIABILITY
DOCKET NO. 0021 1406 99-02**

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 1, 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 11th day of **April, 2014**.



[Handwritten signature]

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

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.

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:

NEREIDA CAMPILLO
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125 FLAMINGO RD
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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

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PROTEST OF LIABILITY
DOCKET NO. 0021 1406 99-02

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 1, 2013.

After due notice to the parties, a telephone hearing was held on January 30, 2014. Counsel appeared for the Petitioner, and two witnesses testified, the office manager and the vice-president owner; the Joined Party appeared, but did not testify; 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 and other individuals constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner supplies site maintenance services to AT&T, among others. Among the services provided to the customer are Damage Prevention Inspectors. The Joined Party was a Damage Prevention Inspector for the Petitioner from early April 2012 to August 2013. The Petitioner was associated with approximately 10 such workers in 2012.

2. On April 6, 2012 the Joined Party signed a contract with the Petitioner. Among other things, the contract provided that the Joined Party was an independent contractor and not an employee. The agreement provided that the Joined Party was not subject to follow any particular work schedule, and that advice from the Petitioner to the Joined Party about doing the work was a suggestion, not an instruction. The agreement provided for the indemnification of the Petitioner for any damage caused by the Joined Party. No taxes were to be taken from pay due to the Joined Party. There was a waiver of any right to receive benefits such as medical insurance or vacation pay from the Petitioner. The Joined Party was to be paid by the hour, biweekly. The claimant was sent a 1099-MISC showing the amount paid in box labeled "Nonemployee Compensation". The Petitioner maintained the same arrangements with other Damage Prevention Inspectors that it maintained with the Joined Party.
3. The Petitioner employs workers that are recognized as employees. Those workers, including clerks and the office manager, primarily work the Petitioner's office. Other workers, who work primarily in the field, such as Damage Prevention Inspectors and site maintenance workers, are considered independent contractors.
4. The Joined Party would be advised of scheduled work by "work tickets" issued to her by the Petitioner for activities to be done the following day. The Joined Party would go to an excavation site that contained AT&T cables. The underground location of the cables would have been marked on the ground surface, and the Joined Party would monitor and report any damage that might occur to the cables from the digging. The Joined Party might be sent work tickets for up to 20 sites in a single day. The Petitioner did not instruct the Joined Party as to the order or time she was to appear at the sites. The Joined Party would submit to the Petitioner a weekly timesheet setting out the assignments on which she had worked, and the time spent on each assignment. This information was used by the Petitioner to pay the Joined Party and to bill AT&T.
5. The Petitioner supplied the Joined Party an identification badge showing her to be associated with AT&T. The Joined Party could display the badge on a lanyard or pinned to her clothing. The Petitioner also supplied a specialized laptop computer from AT&T, which provided information about the various work ticket job sites. If a problem arose on a jobsite, the Joined Party could call a clerk on the Petitioner's staff, or the Joined Party could call AT&T directly for further information. The clerk on the Petitioner's staff was not authorized to supervise the Joined Party's work. The Petitioner occasionally had one of its staff people inspect the Joined Party's work.
6. The Joined Party was not required to refrain from doing similar work for someone other than the Petitioner.
7. The Joined Party maintained liability insurance covering her activities.
8. The Joined Party filed a claim for reemployment assistance benefits effective August 18, 2013. After an investigation the Department of Revenue issued the determination of November 1, 2013, finding the Joined Party and other Damage Prevention Inspectors to be employees. The determination was retroactive to April 2, 2012.

Conclusions of Law:

9. 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.

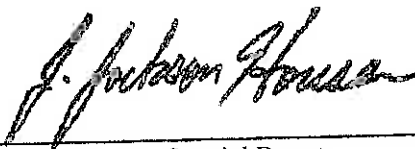
10. In Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 provides:
- (1) A servant is a person employed to perform services 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.
11. 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.
12. 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).
13. 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).
14. 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.

15. 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.
16. The contract between the Petitioner and the Joined Party expressly designates the Joined Party as an independent contractor and not an employee. Other provisions in the contract are consistent with, and reinforce that status.
17. The evidence shows that the Joined Party was not closely supervised in her work activities, and the Petitioner was primarily interested in the results of the work rather than in the manner that the results were obtained. The actions of the parties were consistent with the terms of their agreement. The Petitioner did not exercise control over the manner in which the Joined Party did her work.
18. The Joined Party did not work on the Petitioner's premises and the Joined Party did not use the Petitioner's tools to do the job. The Joined Party did use a laptop computer the Petitioner gave her to help with the work, but the evidence shows that the computer was simply passed through to the Joined Party from the client, AT&T. The provision of the computer did not establish control by the Petitioner over the manner of performing the work.
19. Although the Joined Party was paid by the hour, worked with the Petitioner for well over a year, and performed services as part of the Petitioner's regular business, factors that can be considered indicia of employee status, these factors are outweighed by the other aspects of the relationship. They do not directly show what control could be exercised over the manner of performing the work. See, Farmers & Merchants Bank v. Vocelle, 106 So.2d 92, 94-95(Fla. 1st DCA 1958).
20. The Petitioner did inspect the Joined Party's work, but that sort of quality assurance activity is consistent with the status of independent contractor. See, 4139 Management Inc. v. Dept. of Labor and Employment Security, 763 So.2d 514 (Fla. 5th DCA 2000). It is a method to make sure that the contract terms are being complied with.
21. The evidence shows that the Joined Party provided services to the Petitioner as an independent contractor, and since the other workers in the same Damage Prevention Inspector position had the same kind of relationship, the evidence shows that all of the workers of that type were independent contractors.

Recommendation: It is recommended that the determination dated November 1, 2013, finding the Joined Party and other Damage Prevention Inspectors to be employees, be REVERSED.

Respectfully submitted on March 5, 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 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:

March 5, 2014

Copies mailed to:

Petitioner
Respondent
Joined Party

Joined party:

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