

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

**PETITIONER:**

Employer Account No. – 9976017  
NORTH BROWARD HOSPITAL DISTRICT  
ATTN: PAYROLL OFFICE, 1608 SE 3RD AVE  
FORT LAUDERDALE FL 33316-2564

**PROTEST OF LIABILITY**  
**DOCKET NO. 0023 4523 50-02**

**RESPONDENT:**

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

**ORDER**

This matter comes before me for final Department Order.

The issue before me is whether services performed for the Petitioner by the Joined Party constitute insured employment pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Joined Party filed a reemployment assistance claim in August 2013. An initial determination held that the Joined Party earned insufficient wages in insured employment to qualify for benefits. The Joined Party advised the Department of Economic Opportunity (the Department) that she worked for the Petitioner during the qualifying period and requested consideration of those earnings in the benefit calculation. As a result of the Joined Party's request, the Department of Revenue, hereinafter referred to as the Respondent, conducted an investigation to determine whether the Joined Party worked for the Petitioner as an employee or independent contractor. If the Joined Party worked for the Petitioner as an employee, the Petitioner would owe reemployment assistance taxes on the remuneration it paid to the Joined Party. On the other hand, if the Joined Party worked for the Petitioner as an independent contractor, the Petitioner would not owe reemployment assistance taxes on the wages it paid to the Joined Party. Upon completing the investigation, the Respondent's auditor determined that the services performed by the Joined Party were in insured employment. The Petitioner was required to pay reemployment assistance taxes on wages it paid to the Joined Party. The Petitioner filed a timely protest of the determination. The claimant who requested the investigation was joined as a party because she had an interest in the outcome of the case.

A telephone hearing was held on October 13, 2014. The Petitioner was represented by its attorney. The Regional Human Resource Director, the Director of the Comprehensive Family AIDS Program, and the Administrator of the Children's Diagnostic and Treatment Center, appeared as witnesses. The Respondent, represented by a Department of Revenue Senior Tax Specialist, appeared and testified. The Joined Party did not appear. The Special Deputy issued a recommended order on November 21, 2014.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner, North Broward Hospital District, is a non-profit organization which operates a healthcare system encompassing more than thirty healthcare facilities. Included within the healthcare system is the Children's Diagnostic and Treatment Center which oversees the Comprehensive Family AIDS Program, a program which provides a variety of social services to improve families' acceptance and understanding of HIV/AIDS.
2. As a non-profit organization the Petitioner has elected to reimburse the Florida Unemployment Compensation Trust Fund for benefits paid in lieu of paying a tax on the wages of its employees.
3. The Petitioner has engaged individuals to provide non-medical social services to clients of the Comprehensive Family AIDS Program. The Petitioner refers to those individuals by various interchangeable job class titles including, among other things, Client Advocate, Consumer Consultant, Consumer Advocate, Client Care Consultant, Family Resource Advocate and Family Advocate. The Petitioner has approximately six workers in the job class, all of which are classified by the Petitioner as independent contractors.
4. Individuals who are engaged to provide services as Client Advocates are not required to meet any minimum educational standards and are not required to have any special skill or knowledge. Some of the individuals have been selected by the Petitioner because of personal experience with individuals with HIV/AIDS. The job qualifications state that Client Advocates should have direct knowledge or experience working with individuals with HIV/AIDS and understand the diagnosis.
5. The Joined Party was engaged to perform non-medical support services for the Petitioner as a Client Advocate on or about October 24, 2002. At that time the Joined Party was required to sign a *Client Advocate/Vendor Agreement*. The *Client Advocate/Vendor Agreement* is a generic agreement which was prepared by the Program Director and which all Client Advocates are required to sign. The Agreement provides that Client Advocates are vendors of the Petitioner and if a Client Advocate is not able to comply with the Agreement, the Petitioner will terminate the relationship with that Client Advocate.
6. Among other things the Agreement provides that the Client Advocate must represent the Children's Diagnostic and Treatment Center to all other persons in a positive manner with courtesy, kindness, and respect. Clients should never be argued with or treated inappropriately. Rudeness or hostility in front of clients, or staff is not acceptable. Client Advocates are required to act in a professional manner at internal and external meetings and with individuals at all times. Client Advocates are prohibited from criticizing policies, procedures, activities, staff, or clients while working as a Client Advocate. Client Advocates are required to follow all relevant policies and procedures of the Children's Diagnostic and Treatment Center and of North Broward Hospital District, particularly those policies and

procedures related to chain of command. All issues are required to be addressed with the Children's Diagnostic and Treatment Center Coordinator or Manager or through the Children's Diagnostic and Treatment Center grievance procedure.

7. Among other things the *Client Advocate/Vendor Agreement* provides that the Client Advocate must work the number of hours agreed upon at the time of "employment" and must participate in staff meetings, seminars, conferences, and recreational activities as time and work permits. The Client Advocate is required to maintain time sheets, accurate to the minute, including time of arrival and departure, departure for lunch, and return from lunch. The timesheets must be submitted on Monday of each week by 9AM in order to assure receipt of the paycheck on Friday. Client Advocates are required to submit reports and fulfill specific duties as assigned by the supervisor.
8. At the time of hire the Petitioner verbally informed the Joined Party of the policies and procedures, including a dress code which prohibits, among other things, the wearing of open-toed shoes. The Petitioner provided the Joined Party with a written position description. Basically, the Joined Party was engaged to provide companionship to the Petitioner's clients. The Joined Party's duties included; providing emotional support in HIV education to women with newly diagnosed HIV infection, through telephone calls, office support, and home visits; providing direct consumer support and advocacy; visiting clients in the hospital at the request of the family or social service worker; assisting in coordinating, facilitating, and participating in the Children's Diagnostic and Treatment Center Community and Client Advisory Board as an active and voting member; assisting in assuring that all client areas maintain literature, supplies, and nutritious food as needed; assisting support group facilitators with preparation/reminder calls, refreshments, and other necessary tasks; assisting clients with identification and reduction of barriers in accessing community services and accompanying them to the services if necessary; assisting the front desk with on-site child care if needed; and assisting the Comprehensive Family AIDS Program with special activities which are client centered or in direct support of special projects.
9. The Comprehensive Family AIDS Program is a grant funded program. At the time of hire the Client Advocates are asked how many hours they want to work per week. The Client Advocates are not allowed to work more than the agreed upon hours, however, they may work less than the agreed upon amount of hours.
10. The Petitioner provided initial and on-going training concerning HIPPA laws and concerning HIV/AIDS. The Joined Party participated in a Comprehensive Family AIDS Program Training Retreat and other training programs. The Petitioner paid for the training expenses and paid the Joined Party for the time while attending training. The Joined Party attended staff meetings. The Petitioner paid the Joined Party for attending staff meetings and other functions.
11. The Petitioner provided the Joined Party with an identification badge, business cards, a key card which allowed the Joined Party to enter restricted areas, and a company email address.
12. The Petitioner maintains a food pantry and a clothing closet from which the Joined Party could obtain food and clothing for the Petitioner's clients.
13. The Joined Party performed her assigned duties from the Children's Diagnostic and Treatment Center as well as from outside the Petitioner's offices. When the Joined Party performed the services from the Petitioner's office, the Petitioner provided all of the office equipment and supplies that were needed to perform the work. Prior to June 15, 2011, the Petitioner reimbursed the Client Advocates for mileage if they used their own vehicles. The Petitioner did not provide a vehicle for the Joined Party to drive even though the Joined Party did not have a vehicle for a period of time. When the Joined Party did not have a vehicle she worked

exclusively from the Petitioner's office. The Petitioner made a unilateral decision to stop reimbursing the Client Advocates for mileage on June 15, 2011, because someone informed the Petitioner that it was not appropriate to reimburse independent contractors for their expenses. The Petitioner did not provide any additional compensation to offset the loss of expense reimbursement. The Client Advocates were required to sign a written agreement stating that effective June 15, 2011, they do not qualify for travel reimbursement but that work related travel may remain part of the contracted work. The Joined Party signed the agreement on June 16, 2011. If the Joined Party had not signed the agreement she would have been terminated by the Petitioner.

14. The Joined Party was required to submit a work schedule before the start of each week. If the Joined Party was not able to work the weekly schedule as submitted, she was required to notify the Petitioner. The Joined Party was not allowed to work from the Petitioner's office outside of the Petitioner's regular office hours, however, she could see clients in their homes outside of regular business hours. If the Joined Party wanted to take time off from work for an extended period of time she was required to submit a *Client Care Consultant Request for Time Off*. That form required the Joined Party to include the date the request was submitted, the beginning day and date of the leave, and the return to work day and date. The Joined Party was required to sign the request. The form also contains a signature line for the staff signature. The Petitioner's staff usually did not sign the form because it was treated more as a notification of absence rather than a request which required approval.
15. The Joined Party was required to complete a *Client Care Consultant Sign-in Sheet* for each week. The Joined Party was required to sign in and out listing the starting and ending times for each day and was required to sign out and in listing the starting and ending times of the lunch break for each day. The Joined Party was required mark the *Client Care Consultant Sign-in Sheet* to indicate time spent in training, time off, time off for holidays, and time off for personal leave.
16. When the Petitioner engaged the Joined Party to perform services for the Petitioner as a Client Advocate in 2002 the Petitioner determined that the Joined Party would be paid \$7.00 per hour. Over the years the Petitioner increased the hourly pay rate for the Client Advocates, including the Joined Party. The pay rates were increased due to increases in the budget and based on seniority. The Joined Party's rate of pay in 2013 was \$10.50 per hour.
17. In addition to the *Client Care Consultant Sign-in Sheet* the Joined Party was required to complete a *Consumer/Vendor Time Record* on which she was required to list the time in and out for each day including the time out and in for the lunch break. She was required to list the hours worked for each day, the total hours worked during the week, and the amount of pay due based on the hourly rate of pay. The *Consumer/Vendor Time Record* states "This document certifies that the above schedule is a true representation of the hours I worked during the pay period shown. I understand I must take a mandatory lunch break. Time sheets must be submitted by 9:00 a.m. Monday, immediately following the week worked."
18. The Joined Party was required to personally perform the work. She could not hire others to perform the work for her. She was required to submit written reports to the Petitioner concerning her work activities.
19. The Joined Party was paid based on the *Consumer/Vendor Time Record* which she submitted. No taxes were withheld from the pay and she did not receive any fringe benefits such as paid time off, health insurance, or retirement benefits. At the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on *Form 1099-MISC* as nonemployee compensation.

20. Either party had the right to terminate the relationship at any time without incurring any penalties for breach of contract.
21. The Petitioner received notification that the Joined Party had deposited her paycheck by taking a picture of the paycheck with her cell phone and that she then attempted to cash the paper check at a check cashing store. As a result of that notification the Petitioner decided to terminate the Joined Party immediately. The Petitioner did not confront the Joined Party concerning the allegation nor notify the Joined Party of the reason for termination. On April 26, 2013, the Petitioner notified the Joined Party in writing that her services were no longer needed.
22. The Joined Party filed a claim for reemployment assistance benefits effective August 25, 2013. When the Joined Party did not receive credit for her earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.
23. Initially, the Department of Revenue received information only from the Joined Party. On January 22, 2014, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee. The determination held that the Petitioner was only required to report the wages paid to the Joined Party retroactive to January 1, 2012. On February 10, 2014, the Petitioner requested reconsideration and provided the information previously requested by the Department of Revenue. After considering the information provided by the Petitioner the Department of Revenue issued a determination on February 17, 2014, affirming the January 22, 2014, determination. The Petitioner filed a timely protest by letter dated March 7, 2014.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated February 17, 2014, be affirmed. The Petitioner submitted exceptions on December 5, 2014. No other submissions were received from any party.

With respect to the recommended order, section 120.57(1)(l), Florida Statutes, provides:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Also, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

In the exceptions, the Petitioner contends that the Special Deputy's Findings of Fact and Conclusions of Law are not supported by competent substantial evidence and reflect a misapplication of the law to the facts. The Petitioner specifically takes exception to Findings of Fact 5-11, 13-15, 17-18, 21, and 23, and Conclusions of Law 31-38. The Petitioner also proposes alternative findings of fact and conclusions of law. Pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines from a review of the entire record that the findings of fact were not based upon competent substantial evidence. Also pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Conclusions of Law unless the Department first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that the Special Deputy's Findings of Fact, including Findings of Fact 5-11, 13-15, 17-18, 21, and 23, are supported by competent substantial evidence in the record and that the Special Deputy's Conclusions of Law, including Conclusions of Law 31-38, reflect a reasonable application of the law to the facts. As a result, the Department may not modify or reject the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Accordingly, the Petitioner's exceptions, including Exceptions 1-14, are respectfully rejected.

A review of the record reveals that the Findings of Fact contained in the Recommended Order are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having considered the Petitioner's exceptions, the record of this case, and the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order. A copy of the Recommended Order is attached and incorporated in this order.

Therefore, it is ORDERED that the determination dated February 17, 2014, is AFFIRMED.

**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 responsabiltè 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 28th day of **January, 2015**.



*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

*1-29-15*

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 29th day of January, 2015.

*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:

CARAN ROTHCHILD ESQ  
KRISTINA L CLAFFI ESQ  
GREENBERG TAURIG PA  
401 E LAS OLAS BLVD  
FORT LAUDERDALE FL 33301-4223

ANGELENA DELVALLE,  
4463 NW 112TH AVE  
CORAL SPRINGS FL 33065

DENISE MORRIS  
BROWARD HEALTH  
HUMAN RESOURCE DIRECTOR  
303 SE 17TH STREET  
FORT LAUDERDALE FL 33316-2523

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

NORTH BROWARD HOSPITAL  
DISTRICT  
ATTN: PAYROLL OFFICE,  
1608 SE 3RD AVE  
FORT LAUDERDALE FL 33316-2564

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

MYRA TAYLOR  
TALLAHASSEE CENTRAL SERVICE  
CENTER  
FLORIDA DEPARTMENT OF  
REVENUE  
COMPLIANCE CAMPAIGNS  
PO BOX 6417  
TALLAHASSEE FL 32314-6417

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

**PETITIONER:**

Employer Account No. - 9976017  
NORTH BROWARD HOSPITAL DISTRICT  
ATTN: ANA CALDERON RANDAZZO  
EXECUTIVE DIRECTOR  
303 SE 17<sup>TH</sup> STREET  
ROOM 200  
FT LAUDERDALE FL 33319-2523

**PROTEST OF LIABILITY  
DOCKET NO. 0023 4523 50-02**

**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Magnus Hines  
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 February 17, 2014.

After due notice to the parties, a telephone hearing was held on October 13, 2014. The Petitioner was represented by its attorney. The Regional Human Resource Director, the Director of the Comprehensive Family AIDS Program, and the Administrator of the Children's Diagnostic and Treatment Center, appeared as witnesses. The Respondent, represented by a Department of Revenue Senior Tax Specialist, appeared and testified. The Joined Party did not appear.

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 constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

**Findings of Fact:**

1. The Petitioner, North Broward Hospital District, is a non-profit organization which operates a healthcare system encompassing more than thirty healthcare facilities. Included within the healthcare system is the Children's Diagnostic and Treatment Center which oversees the Comprehensive Family AIDS Program, a program which provides a variety of social services to improve families' acceptance and understanding of HIV/AIDS.

2. As a non-profit organization the Petitioner has elected to reimburse the Florida Unemployment Compensation Trust Fund for benefits paid in lieu of paying a tax on the wages of its employees.
3. The Petitioner has engaged individuals to provide non-medical social services to clients of the Comprehensive Family AIDS Program. The Petitioner refers to those individuals by various interchangeable job class titles including, among other things, Client Advocate, Consumer Consultant, Consumer Advocate, Client Care Consultant, Family Resource Advocate and Family Advocate. The Petitioner has approximately six workers in the job class, all of which are classified by the Petitioner as independent contractors.
4. Individuals who are engaged to provide services as Client Advocates are not required to meet any minimum educational standards and are not required to have any special skill or knowledge. Some of the individuals have been selected by the Petitioner because of personal experience with individuals with HIV/AIDS. The job qualifications state that Client Advocates should have direct knowledge or experience working with individuals with HIV/AIDS and understand the diagnosis.
5. The Joined Party was engaged to perform non-medical support services for the Petitioner as a Client Advocate on or about October 24, 2002. At that time the Joined Party was required to sign a *Client Advocate/Vendor Agreement*. The *Client Advocate/Vendor Agreement* is a generic agreement which was prepared by the Program Director and which all Client Advocates are required to sign. The Agreement provides that Client Advocates are vendors of the Petitioner and if a Client Advocate is not able to comply with the Agreement, the Petitioner will terminate the relationship with that Client Advocate.
6. Among other things the Agreement provides that the Client Advocate must represent the Children's Diagnostic and Treatment Center to all other persons in a positive manner with courtesy, kindness, and respect. Clients should never be argued with or treated inappropriately. Rudeness or hostility in front of clients, or staff is not acceptable. Client Advocates are required to act in a professional manner at internal and external meetings and with individuals at all times. Client Advocates are prohibited from criticizing policies, procedures, activities, staff, or clients while working as a Client Advocate. Client Advocates are required to follow all relevant policies and procedures of the Children's Diagnostic and Treatment Center and of North Broward Hospital District, particularly those policies and procedures related to chain of command. All issues are required to be addressed with the Children's Diagnostic and Treatment Center Coordinator or Manager or through the Children's Diagnostic and Treatment Center grievance procedure.
7. Among other things the *Client Advocate/Vendor Agreement* provides that the Client Advocate must work the number of hours agreed upon at the time of "employment" and must participate in staff meetings, seminars, conferences, and recreational activities as time and work permits. The Client Advocate is required to maintain time sheets, accurate to the minute, including time of arrival and departure, departure for lunch, and return from lunch. The timesheets must be submitted on Monday of each week by 9AM in order to assure receipt of the paycheck on Friday. Client Advocates are required to submit reports and fulfill specific duties as assigned by the supervisor.
8. At the time of hire the Petitioner verbally informed the Joined Party of the policies and procedures, including a dress code which prohibits, among other things, the wearing of open-toed shoes. The Petitioner provided the Joined Party with a written position description. Basically, the Joined Party was engaged to provide companionship to the Petitioner's clients. The Joined Party's duties included; providing emotional support in HIV education to women with newly diagnosed HIV infection, through telephone calls, office support, and home visits; providing direct consumer support and advocacy; visiting clients in the hospital at the request of the family or social service worker; assisting in coordinating, facilitating, and participating in the Children's Diagnostic and Treatment Center Community and Client Advisory Board as an active and voting member; assisting in assuring that all client areas maintain literature, supplies, and nutritious food as needed; assisting support group facilitators with preparation/reminder calls, refreshments, and other necessary tasks; assisting clients with identification and reduction of barriers in accessing community services and

accompanying them to the services if necessary; assisting the front desk with on-site child care if needed; and assisting the Comprehensive Family AIDS Program with special activities which are client centered or in direct support of special projects.

9. The Comprehensive Family AIDS Program is a grant funded program. At the time of hire the Client Advocates are asked how many hours they want to work per week. The Client Advocates are not allowed to work more than the agreed upon hours, however, they may work less than the agreed upon amount of hours.
10. The Petitioner provided initial and on-going training concerning HIPPA laws and concerning HIV/AIDS. The Joined Party participated in a Comprehensive Family AIDS Program Training Retreat and other training programs. The Petitioner paid for the training expenses and paid the Joined Party for the time while attending training. The Joined Party attended staff meetings. The Petitioner paid the Joined Party for attending staff meetings and other functions.
11. The Petitioner provided the Joined Party with an identification badge, business cards, a key card which allowed the Joined Party to enter restricted areas, and a company email address.
12. The Petitioner maintains a food pantry and a clothing closet from which the Joined Party could obtain food and clothing for the Petitioner's clients.
13. The Joined Party performed her assigned duties from the Children's Diagnostic and Treatment Center as well as from outside the Petitioner's offices. When the Joined Party performed the services from the Petitioner's office, the Petitioner provided all of the office equipment and supplies that were needed to perform the work. Prior to June 15, 2011, the Petitioner reimbursed the Client Advocates for mileage if they used their own vehicles. The Petitioner did not provide a vehicle for the Joined Party to drive even though the Joined Party did not have a vehicle for a period of time. When the Joined Party did not have a vehicle she worked exclusively from the Petitioner's office. The Petitioner made a unilateral decision to stop reimbursing the Client Advocates for mileage on June 15, 2011, because someone informed the Petitioner that it was not appropriate to reimburse independent contractors for their expenses. The Petitioner did not provide any additional compensation to offset the loss of expense reimbursement. The Client Advocates were required to sign a written agreement stating that effective June 15, 2011, they do not qualify for travel reimbursement but that work related travel may remain part of the contracted work. The Joined Party signed the agreement on June 16, 2011. If the Joined Party had not signed the agreement she would have been terminated by the Petitioner.
14. The Joined Party was required to submit a work schedule before the start of each week. If the Joined Party was not able to work the weekly schedule as submitted, she was required to notify the Petitioner. The Joined Party was not allowed to work from the Petitioner's office outside of the Petitioner's regular office hours, however, she could see clients in their homes outside of regular business hours. If the Joined Party wanted to take time off from work for an extended period of time she was required to submit a *Client Care Consultant Request for Time Off*. That form required the Joined Party to include the date the request was submitted, the beginning day and date of the leave, and the return to work day and date. The Joined Party was required to sign the request. The form also contains a signature line for the staff signature. The Petitioner's staff usually did not sign the form because it was treated more as a notification of absence rather than a request which required approval.
15. The Joined Party was required to complete a *Client Care Consultant Sign-in Sheet* for each week. The Joined Party was required to sign in and out listing the starting and ending times for each day and was required to sign out and in listing the starting and ending times of the lunch break for each day. The Joined Party was required mark the *Client Care Consultant Sign-in Sheet* to indicate time spent in training, time off, time off for holidays, and time off for personal leave.
16. When the Petitioner engaged the Joined Party to perform services for the Petitioner as a Client Advocate in 2002 the Petitioner determined that the Joined Party would be paid \$7.00 per hour.

Over the years the Petitioner increased the hourly pay rate for the Client Advocates, including the Joined Party. The pay rates were increased due to increases in the budget and based on seniority. The Joined Party's rate of pay in 2013 was \$10.50 per hour.

17. In addition to the *Client Care Consultant Sign-in Sheet* the Joined Party was required to complete a *Consumer/Vendor Time Record* on which she was required to list the time in and out for each day including the time out and in for the lunch break. She was required to list the hours worked for each day, the total hours worked during the week, and the amount of pay due based on the hourly rate of pay. The *Consumer/Vendor Time Record* states "This document certifies that the above schedule is a true representation of the hours I worked during the pay period shown. I understand I must take a mandatory lunch break. Time sheets must be submitted by 9:00 a.m. Monday, immediately following the week worked."
18. The Joined Party was required to personally perform the work. She could not hire others to perform the work for her. She was required to submit written reports to the Petitioner concerning her work activities.
19. The Joined Party was paid based on the *Consumer/Vendor Time Record* which she submitted. No taxes were withheld from the pay and she did not receive any fringe benefits such as paid time off, health insurance, or retirement benefits. At the end of each year the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on *Form 1099-MISC* as nonemployee compensation.
20. Either party had the right to terminate the relationship at any time without incurring any penalties for breach of contract.
21. The Petitioner received notification that the Joined Party had deposited her paycheck by taking a picture of the paycheck with her cell phone and that she then attempted to cash the paper check at a check cashing store. As a result of that notification the Petitioner decided to terminate the Joined Party immediately. The Petitioner did not confront the Joined Party concerning the allegation nor notify the Joined Party of the reason for termination. On April 26, 2013, the Petitioner notified the Joined Party in writing that her services were no longer needed.
22. The Joined Party filed a claim for reemployment assistance benefits effective August 25, 2013. When the Joined Party did not receive credit for her earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.
23. Initially, the Department of Revenue received information only from the Joined Party. On January 22, 2014, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee. The determination held that the Petitioner was only required to report the wages paid to the Joined Party retroactive to January 1, 2012. On February 10, 2014, the Petitioner requested reconsideration and provided the information previously requested by the Department of Revenue. After considering the information provided by the Petitioner the Department of Revenue issued a determination on February 17, 2014, affirming the January 22, 2014, determination. The Petitioner filed a timely protest by letter dated March 7, 2014.

#### **Conclusions of Law:**

24. The issue in this case, whether services performed for the Petitioner by the Joined Party 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.

25. 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).
26. 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.
27. 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.
28. 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.
29. 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.
30. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> 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. 1<sup>st</sup> 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.
31. The agreement in this case, the *Client Advocate/Vendor Agreement* establishes that the Petitioner had the right to exercise substantial and significant control over the Joined Party and the manner in which the Joined Party performed the work. The Agreement requires the Joined Party to maintain strict confidentiality; to act in a professional manner; to represent the Petitioner in a positive manner with courtesy, kindness, and respect; to follow all of the Petitioner's relevant policies and procedures; to participate in staff meetings, seminars, conferences, and recreational events as time and work schedule permit; to submit reports and fulfill specific duties as assigned by the supervisor;

prohibits arguing with clients; prohibits rudeness or hostility of any kind in front of clients or staff members; and prohibits criticizing policies and procedures, activities, staff members, and clients. In VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5<sup>th</sup> DCA 1984) the court stated that it is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the agreement provides the employer with the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the work is the principal consideration.

32. The business activity of the Comprehensive Family AIDS Program is to provide social services for families and other individuals affected by HIV/AIDS. The Petitioner engaged the Joined Party to provide those services. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of a unit of the Petitioner's business. It was not shown that the Joined Party had any investment in a business, had business expenses, or advertised her services to the general public. It was not shown that the Joined Party was in business for herself.
33. The Petitioner provided the place of work and all equipment and supplies needed to perform the work, including food and clothing for the clients. Initially, the Petitioner reimbursed the Client Advocates for use of personal vehicles. The fact that the Petitioner unilaterally chose to stop reimbursing the Client Advocates for mileage is further evidence of the control exercised by the Petitioner over the Client Advocates.
34. The *Client Advocate/Vendor Agreement*, which was written by the Petitioner, refers to the Joined Party as a "vendor" and ambiguously refers to the relationship with the Petitioner as "employment." Neither the term "vendor" nor the term "employment" are defined by the Agreement. It is well established in principles of law regarding construction of contracts that any ambiguity of language within the contract will be strictly construed against the party who chose the language and drafted the contract. See, Bouden v. Walker, 266 So. 2d 353 (Fla App. 1972); Tannen v. Equitable Life Ins. Co. of Washington, D.C., 303 So. 2d 352 (Fla. 3rd DCA). In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
35. The position of Client Advocate does not require any skill or special knowledge. The evidence reveals that the Client Advocate was to basically be a companion and to provide support. The Joined Party's formal training was provided by the Petitioner at the Petitioner's expense. In Farmers and Merchants Bank v. Vocelle, 106 So.2d 92 (Fla. 1<sup>st</sup> DCA 1958) the court stated that the humblest labor can be independently contracted and the most highly trained artisan can be an employee. However, in Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980) the court held that 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.
36. The Joined Party was paid by time work rather than by the job or based on production. The Petitioner determined the method of pay as well as the hourly rate of pay. The fact that the Petitioner chose not to withhold payroll taxes from the pay or provide fringe benefits does not, standing alone, establish an independent contractor relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash.
37. The Joined Party provided services for the Petitioner from approximately October 24, 2002, until approximately April 26, 2013, a period in excess of ten years. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the




existence of an at-will relationship of relative permanence. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), 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."

38. The Petitioner controlled what work was performed, where it was performed, when it was performed, who it was performed by, and to a significant degree how it was performed. The Petitioner controlled the financial aspects of the relationship. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla, 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.
39. It is determined that the services performed by the Joined Party for the Petitioner as a Client Advocate constitute insured employment.

**Recommendation:** It is recommended that the determination dated February 17, 2014, be AFFIRMED.

Respectfully submitted on November 21, 2014.



  
 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 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.

*Shanetra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk

*Date Mailed:*

*November 21, 2014*

Copies mailed to:

Petitioner

Respondent

Joined Party

ANGELA DELVALLE  
4463 NW 112<sup>TH</sup> AVENUE  
CORAL SPRINGS FL 33065-7224

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

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

DENISE MORRIS  
BROWARD HEALTH  
HUMAN RESOURCE DIRECTOR  
303 SE 17<sup>TH</sup> STREET  
FORT LAUDERDALE FL 33316-2523

CARAN ROTHCHILD ESQ  
KRISTINA L CIAFFI ESQ  
GREENBERG TAURIG PA  
401 E LAS OLAS BLVD  
FORT LAUDERDALE FL 33301-4223