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

PETITIONER:
Employer Account No. – 2698539
AAA CRIMINAL DEFENSE.COM PA
ATTN: GREY TESH
1610 SOUTHERN BLVD
WEST PALM BEACH FL 33406-3242

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

PROTEST OF LIABILITY
DOCKET NO. 0023 5750 18-02

ORDER

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated July 22, 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 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 17th day of **March, 2015**.

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.

Shanedra Y. Barnes
DEPUTY CLERK

3-18-15
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 18th day of March, 2015.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
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Reemployment Assistance Appeals
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated July 22, 2014.

After due notice to the parties, a telephone hearing was held on December 9, 2014. The Petitioner was represented by its president. The Joined Party appeared and testified. The Respondent, represented by a Department of Revenue Senior Tax Specialist, 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 not received.

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 is a corporation which established liability for payment of unemployment compensation tax, now known as reemployment assistance tax, in 2010. The Petitioner's business is the operation of the law practice of the Petitioner's president, Grey Tesh.

2. The Joined Party is an individual who testified as a witness against one of the Petitioner's clients approximately seven years ago. Over the years the Joined Party developed a friendship with the Petitioner's president. In 2013 the Joined Party was attending school and was considering furthering his education. In approximately August 2013 the Joined Party contacted the Petitioner's president for advice. During the conversation the Petitioner's president offered the Joined Party a job in the Petitioner's office as an assistant to the president. The Petitioner offered to pay the Joined Party $15 per hour with the understanding that the Joined Party would be responsible for paying his own taxes. The Joined Party accepted the Petitioner's offer.

3. The Petitioner's regular office hours are 9 AM until 5 PM. The Joined Party worked in the Petitioner's office and used the Petitioner's office equipment and supplies, including a computer, fax machine, copy machine, and telephone. The Joined Party's assigned duties consisted of clerical and administrative work. The Petitioner provided business cards to the Joined Party bearing the title of Case Manager.

4. The Joined Party had never worked in a legal office and did not have any prior experience. The Petitioner's president told the Joined Party what to do and gave him instructions about how to perform the work. The Petitioner taught the Joined Party how to create certain legal documents and write letters. When the Joined Party completed the assigned tasks he would present the completed work to the Petitioner. The Petitioner's president would review the completed work and, if necessary, return the completed work to the Joined Party for correction. The Joined Party was paid for the time required to redo the work.

5. Approximately four weeks after the Joined Party began work for the Petitioner the Petitioner's president informed the Joined Party that the Petitioner had to end the relationship for financial reasons. During the conversation the Joined Party agreed to accept a reduction in pay to $10 per hour with the understanding that the Joined Party would not work more than twenty hours per week. The Joined Party agreed to continue working for the Petitioner under the new terms.

6. The Petitioner provided the Joined Party with a key to the Petitioner's office. Most of the Joined Party's work was performed from the Petitioner's office. On one occasion the Joined Party was ill and unable to report to the Petitioner's office. The Joined Party did some work from his home while he was ill using the Joined Party's personal computer. As a result of that incident the Petitioner told the Joined Party that the Joined Party had to work from the Petitioner's office.

7. On one or more occasions the Petitioner's president had a conversation with the Joined Party about the Joined Party being late to work.

8. Initially, the Joined Party completed a weekly timesheet from which he was paid by the Petitioner on a weekly basis. No taxes were withheld from the pay. Some of the paychecks bore a note that the payments were for "independent contractor."

9. The Petitioner did not provide any fringe benefits such as life insurance, health insurance, vacation pay, holiday pay, sick pay, or retirement benefits.

10. Occasionally, the Joined Party was required to use his personal car to perform duties for the Petitioner. From time to time the president would give the Joined Party cash to cover the cost of fuel. The Joined Party had an accident and did not have any transportation for a period of time. The Petitioner loaned a vehicle to the Joined Party to use, not only for business purposes but also for personal use. The Joined Party did not have any unreimbursed expenses in connection with the work which he performed for the Petitioner.

11. In approximately November or December 2013 the Joined Party became concerned because he believed that the Petitioner had misclassified him as an independent contractor. The Joined Party approached the president and expressed his concern about the liability that the Petitioner might face concerning the misclassification of employment. The president assured the Joined Party that the Petitioner's accountant approved of the independent contractor classification.

12. In December 2013 the Joined Party received a paycheck that was greater than his hourly earnings. When the Joined Party brought the apparent overpayment to the president's attention the president advised the Joined Party that a Christmas bonus was included in the payment.

13. Following the end of 2013 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation in the amount of $7,979.00

14. On or about February 19, 2014, the Petitioner presented the Joined Party with a document titled *Independent Contractor Agreement* for the Joined Party's signature. Among other things the Agreement states that the parties desire to enter into a contract whereby the contractor will perform certain administrative and marketing services and that the parties agree that the Agreement is not to be construed as an employer-employee agreement under any circumstances. The Agreement provides that the Petitioner agrees to pay the Joined Party $10 per hour and that the Joined Party is responsible for all social security taxes and income taxes. The Agreement requires the Joined Party to, no later than noon Friday the week before, let the Petitioner know what hours the Joined Party intends to work during the following week.

15. The Agreement provides that the Joined Party is free to engage in any other work at any time and that either party may terminate the Agreement at any time without notice.

16. The Agreement states "Contractor will always be on time. Contractor will never work more than 40 hours in one week. Contractor will keep a detailed log of time spent and what work was done and provide to company before any payment will be made. Contractor will only be paid for work done inside the office-at the office-unless prior written approval is given by Company for work outside the office. While at the office, Contractor will at all times work diligently."

17. In approximately June 2014 the Petitioner notified the Joined Party that the Joined Party was terminated for financial reasons.

18. During the time that the Joined Party performed services for the Petitioner he did not have any financial investment in a business, did not offer services to the general public, did not have business liability insurance, and did not have an occupational or business license.

19. The Joined Party filed a claim for reemployment assistance benefits. When the Joined Party did not receive credit for his earnings with the Petitioner an investigation was issued to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. On July 22, 2014, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee and that the Joined Party's wages had been added to the Petitioner's previously filed quarterly tax reports for the third and fourth quarters 2013. The Petitioner filed a timely protest by letter dated July 28, 2014.

Conclusions of Law:

20. 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.

21. 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).

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. The Florida Supreme Court 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). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

28. The Petitioner is a corporation which operates the law practice of the Petitioner's president. The Petitioner engaged the Joined Party to be an assistant to the Petitioner's president. The president directed the Joined Party concerning what to do and how to do it. The work performed by the Joined Party was not separate and distinct from the Petitioner's law practice but was an integral and necessary part of the law practice. The Petitioner provided the place of work and everything that was needed to perform the work. The Joined Party did not have any financial investment and did not have unreimbursed expenses in connection with the work. The Joined Party was not at risk of suffering a financial loss from performing services for the Petitioner.

29. The Joined Party had never worked in a legal office before performing services for the Petitioner. It was not shown that the work required any special knowledge or skill. 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)

30. The Petitioner paid the Joined Party by time worked rather than by production or by the job. The Petitioner determined and controlled the method of pay, the rate of pay, and the number of hours worked. The Petitioner controlled the financial aspects of the 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. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

31. The Joined Party performed services for the Petitioner from August 2013 until June 2014, a period of approximately ten months. The Joined Party was not engaged to perform work for a specific term or job. The engagement was for an indefinite period of time. Either party could 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."

32. The Petitioner controlled what work was performed, where it was performed, when it was performed, and how it was performed. 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.

33. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error. The Petitioner chose not to testify at the hearing. The documentary evidence submitted by the Petitioner and the testimony of the Joined Party establish that, as found by the determination, the Joined Party was an employee of the Petitioner. The Petitioner has not submitted evidence showing that the determination is in error.

Recommendation: It is recommended that the determination dated July 22, 2014, be AFFIRMED.

Respectfully submitted on January 14, 2015.

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:
January 14, 2015

Copies mailed to:
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