

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 2920879
COMMUNITY RESOURCE NETWORK OF
FLORIDA INC
PO BOX 949
ESTERO FL 33929-0949

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-104028L**

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 and other individuals as home support/personal care assistants constitute insured employment pursuant to sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

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.

Exceptions to the Recommended Order were not received from any party.

Upon review of the record, it was determined that the Special Deputy's Recommendation, the third full paragraph on the fifth page of the Recommended Order, requires clarification. The record reflects that the Special Deputy concluded that the Petitioner voluntarily elected to report and pay reemployment assistance tax on the wages of personal care assistants prior to April 15, 2011, and that the Joined Party and other personal care assistants did not perform services in insured work after April 15, 2011. Accordingly, the Special Deputy's Recommendation is amended as follows:

Recommendation: It is recommended that the determination dated August 16, 2012, be MODIFIED to reflect that the Petitioner voluntarily elected to report and pay reemployment assistance tax on the wages of personal care assistants prior to April 15, 2011. It is also recommended that the determination be MODIFIED to reflect that the services performed for the Petitioner by the Joined Party and other individuals as personal care assistants do not constitute insured work effective April 15, 2011. Accordingly, it is recommended that the portion of the determination holding the Petitioner liable for reemployment assistance tax on the wages of personal care assistants prior to April 15, 2011, is AFFIRMED. It is further recommended that the portion of the determination holding that the Joined Party and other personal care assistants performed services as employees effective April 15, 2011, be REVERSED.

Having 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 amended herein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated August 16, 2012, is MODIFIED to reflect that the Petitioner voluntarily elected to report and pay reemployment assistance tax on the wages of personal care assistants prior to April 15, 2011. It is also ORDERED that the determination is MODIFIED to reflect that the services performed for the Petitioner by the Joined Party and other individuals as personal care assistants do not constitute insured work effective April 15, 2011. Accordingly, it is ORDERED that the portion of the determination holding the Petitioner liable for reemployment assistance tax on the wages of personal care assistants prior to April 15, 2011, is AFFIRMED. It is further ORDERED that the portion of the determination holding that the Joined Party and other personal care assistants performed services as employees effective April 15, 2011, 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 _____ day of **April, 2013**.



Altemese Smith,
Bureau Chief,
Reemployment Assistance Services
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

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 _____ day of April, 2013.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

COMMUNITY RESOURCE NETWORK OF
FLORIDA INC
PO BOX 949
ESTERO FL 33929-0949

ROSEMARY JACKSON
2929 MARKET STREET
FT MYERS FL 33916

COMMUNITY RESOURCE NETWORK OF
FLA
ATTN: COLE CARUSOEXEC DIRECTOR
P O BOX 368
ESTERO FL 33929-0949

DEPARTMENT OF REVENUE
ATTN: PATRICIA ELKINS - CCOC #1-4866
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

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

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

107 EAST MADISON STREET

TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2920879
COMMUNITY RESOURCE NETWORK OF
FLORIDA INC
PO BOX 949
ESTERO FL 33929-0949

**PROTEST OF LIABILITY
DOCKET NO. 2012-104028L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Bureau Chief,
Executive Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated August 16, 2012

After due notice to the parties, a telephone hearing was held on December 6, 2012. The Petitioner, represented by the Petitioner's President/Executive Director, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not submitted.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals as home support/personal care assistants constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is a for-profit corporation that provides in-home care and community based services, adult life skills training, and transportation services for people with developmental disabilities. The Petitioner is licensed by the Agency for Health Care Administration ("AHCA"). The Petitioner provides its services under contracts with AHCA and the Agency for Persons with Disabilities ("APD"). APD regulates the funding the Petitioner receives from Medicaid and establishes rules and guidelines that the Petitioner is required to follow. The Petitioner receives client referrals from waiver support coordinators. After an interview with a client, if the client

chooses the Petitioner to provide services, the Petitioner enters into a contract with APD for a period of one year. The client's waiver support coordinator and APD determine what services are to be provided for the client and the maximum number of hours allowed for each type of service provided.

2. The Joined Party performed respite and personal care services for the Petitioner from March 6, 2011, until May 3, 2012. The Joined Party performed services under the same terms and conditions as other personal care assistants perform services for the Petitioner. The Joined Party provided the services for her brother-in-law, who was the Petitioner's client. The parties did not enter into a written agreement.
3. Individuals who register or sign-up with the Petitioner to perform in-home services as personal care assistants, or caregivers, are not required to be available at any particular time or to accept a particular client. The Petitioner advertises to its network of individuals when a client is in need of services. Based upon responses from caregivers, the Petitioner attempts to match the needs of the client with the skills or preferences of a caregiver. The Petitioner may schedule interviews for the client with several caregivers.
4. APD requires individuals providing caregiving services to have two years of experience and to complete various courses conducted by APD. The Petitioner only utilizes individuals who have the experience required by APD and who have or can obtain within ninety (90) days the required certifications. The Petitioner reimburses caregivers for any costs incurred in obtaining or maintaining the required certifications. The Joined Party had prior experience as a personal care assistant. The Joined Party obtained the necessary certifications in 2009.
5. The Petitioner does not provide training to caregivers. The Petitioner provides the caregivers with documentation describing the general requirements for the particular services to be provided. The Petitioner does not provide any instructions about how the services are to be performed. The needs of the client for whom the Joined Party provided services included bathing, grooming, preparing meals, cleaning, doing laundry, and administering medications. The client's mother reviewed with the Joined Party the services that were needed and how they were to be performed.
6. The Joined Party's services were performed in the client's home. The family of the client furnished the equipment, tools, and supplies needed for the work. The Joined Party used her personal vehicle to transport the client to the adult day training facility on one or two occasions. The Petitioner does not reimburse the caregiver for expenses related to the use of the caregiver's personal vehicle.
7. The Joined Party performed her services from 6:00 a.m. to 9:00 a.m. and from 3:00 p.m. to 6:00 p.m., five or six days per week. The Joined Party's schedule was determined by the needs of the client and the availability of the other caregiver providing services for the client. The other caregiver worked a full-time job and provided in-home support services for the Petitioner's client on his days off from the other job.
8. The Joined Party's work was not supervised by the Petitioner. The Petitioner did not visit the client's home or contact the Joined Party while the Joined Party was performing her services. The Petitioner contacted the client's mother periodically to determine whether the needs of the client were being met.
9. The Joined Party could not subcontract the work or hire others to perform all or part of her services. ADP requires that client services be provided under a licensed provider.

10. The Joined Party was free to provide similar services for a competitor of the Petitioner. Some individuals who provide services as caregivers for the Petitioner provide the same services for other providers or agencies or are themselves licensed providers. The Joined Party did not perform personal care services for any other provider or agency.
11. The Joined Party was paid bi-monthly at a rate of \$10.50 per hour. Caregivers are required to provide documentation at least four days prior to the end of a pay period listing dates and times worked, activities completed with the client, and a short description of tasks performed. The documentation is required by APD. Until April 15, 2012, taxes were withheld from the Joined Party's pay. All individuals working for the Petitioner, whether considered employees or independent contractors, are covered under the Petitioner's worker's compensation and professional liability insurance policies, as required by APD. The Petitioner pays one and one-half times the hourly rate for services performed on Thanksgiving, Christmas, and New Year's Day. The Petitioner does provide sick pay or vacation pay to individuals performing caregiving services.
12. At the time the Joined Party was hired to perform services as a personal care assistant, the Petitioner classified its personal care assistants as employees. The Petitioner listed those individuals on its quarterly tax reports and paid reemployment assistance tax on their wages. As of April 15, 2011, the Petitioner determined that its personal care assistants were, in fact, independent contractors. At that time personal care assistants, including the Joined Party, were asked to complete a form W-9. Thereafter, the Petitioner did not withhold taxes from their pay and reported their earnings to the Internal Revenue Service on a form 1099-MISC.
13. The Joined Party filed a claim for unemployment compensation benefits effective June 17, 2012. When the Joined Party did not receive credit for all of her earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
14. On August 16, 2012, the Department of Revenue issued a determination holding that the services performed for the Petitioner by the Joined Party and other individuals as home support/personal care assistants were the Petitioner's employees retroactive to September 1, 2009. The Petitioner filed a timely protest.
15. The Joined Party performed services as a temporary driver for the Petitioner from May 29, 2012, through June 19, 2012. The Joined Party's duties and the terms and conditions under which the Joined Party worked as a driver were different from her duties and the terms and conditions under which she worked as a personal care assistant.

Conclusions of Law:

16. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as personal care assistants constitute employment subject to the Florida Unemployment Compensation 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.
17. 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).

18. 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).
19. 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.
20. 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.
21. 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.
22. 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 cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.
23. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that the basic test for determining a worker's status is the employing unit's right of control over the manner in which the work is performed. The Court, quoting Farmer's and Merchant's Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), stated: "[I]f the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor; if he is subject to the control of the person being served as to the means to be used, he is not an independent contractor." In this case, the Petitioner did not exercise control over the performance of the work. The Petitioner did not determine what work was performed, when the work was performed, where the work was performed, or how the work was performed. Personal care assistants are free to accept or decline offers of work. The hours worked are determined by the client's needs and the needs of the client's family. The work is performed in the client's home, using the equipment, tools, and supplies furnished by the client or the client's

family. The Petitioner does not tell personal care assistants how to perform the work, nor does the Petitioner supervise the work of the personal care assistants.

24. It is concluded that the services performed for the Petitioner by the Joined Party and others as personal care assistants do not constitute insured employment. The Petitioner's voluntary election to report and pay reemployment assistance tax on the wages of individuals performing services for the Petitioner as personal care assistants prior to April 15, 2011, will not be disturbed.
25. The scope of the determination of the Department of Revenue was limited to services performed by individuals as home support/personal care assistants. At the hearing, the testimony of the parties revealed that the Joined Party performed services during a separate time period as a driver. The recommended order does not address the services performed by the Joined Party as a driver.

Recommendation: It is recommended that the determination dated August 16, 2012 be MODIFIED to reflect that the services performed by the Joined Party and other individuals as personal care assistants do not constitute insured work effective April 15, 2011. As MODIFIED, it is recommended that the determination be REVERSED.

Respectfully submitted on February 15, 2013.



SUSAN WILLIAMS, 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 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:
February 15, 2013**

Copies mailed to:

Petitioner
Respondent
Joined Party

ROSEMARY JACKSON
2929 MARKET STREET
FT MYERS FL 33916

COMMUNITY RESOURCE NETWORK OF FLA
ATTN: COLE CARUSO EXEC DIRECTOR
P O BOX 368
ESTERO FL 33929-0949

DEPARTMENT OF REVENUE
ATTN: PATRICIA ELKINS - CCOC #1-4866
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417