

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

PETITIONER:

Employer Account No. - 1524840
REGAL TRACE LTD (MILTON JONES
ATTN: DAPHNE JONES, PROPERTY MGR
PO BOX 357
DANIA FL 33004-0357

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-16724L**

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 October 11, 2011, 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 _____ day of **June, 2012**.



Altemese Smith,
Assistant Director,
Unemployment Compensation 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 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 June, 2012.

Shanendra Barnes

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

By U.S. Mail:

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DOR BLOCKED CLAIMS UNIT
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
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**PROTEST OF LIABILITY
DOCKET NO. 2012-16724L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation 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 October 11, 2011.

After due notice to the parties, a telephone hearing was held on March 15, 2012. The Petitioner, represented by the Petitioner’s property manager, appeared and testified. The Respondent, represented by a Tax Specialist II, 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/or Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals as courtesy guard/rover 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 partnership that owns a 408-unit rental apartment complex located on 27 acres. The complex, which opened in 1995, is gated, and the Petitioner provides security for the premises. The entrance has a guardhouse that is staffed by courtesy guards 24 hours per day. Additionally, rovers patrol the property from 4:00 p.m. until 2:00 a.m. or 3:00 a.m. Initially, the Petitioner utilized a private security

company to provide security services. For the past three years, the Petitioner has engaged individual courtesy guards and rovers directly.

2. The Petitioner considers the courtesy guards and rovers to be independent contractors. The Petitioner requires the courtesy guards and rovers to have a security license. The Petitioner's practice is to have each courtesy guard or rover sign an *Independent Consultant Agreement*.
3. The *Independent Consultant Agreement* refers to the worker as "Consultant." The agreement provides that the parties to the agreement are independent contractors, and not partners, principal and agent, employer and employee, or joint venturers. The agreement provides that the Consultant will be compensated based upon the submission of time cards on a bi-weekly basis. The rate of compensation is not stated. The agreement states that the Petitioner will not provide any benefits to the Consultant and that the Petitioner will not be responsible for the payment of taxes, overtime wages, or insurance. The agreement states that the Petitioner will provide a form 1099 for tax purposes.
4. The agreement provides that the Consultant has been trained and has received a copy of the Regal Trace procedures. The agreement requires the Consultant to perform his/her services in accordance with the Regal Trace procedures. The agreement prohibits the Consultant from acting in a manner that will detrimentally affect the operations, prospects, or reputation of Regal Trace.
5. The term of the agreement is indefinite, and the agreement provides for termination with or without cause. The agreement prohibits the Consultant from assigning or subcontracting the agreement. The agreement allows the Consultant to perform similar services for others.
6. The duties of the courtesy guards include greeting visitors, obtaining identification from visitors, distributing guest passes, announcing visitors to residents, receiving and reporting emergency maintenance calls, and recording activities in a daily log. The courtesy guards are provided with a *How to Greet Visitors* form that instructs them on how to perform their duties.
7. The rovers are expected to continuously patrol the premises. The rovers are provided with a copy of a brochure, *Guides for Better Living*, which contains rules and regulations for tenants. During the patrol, the rovers are to identify items in need of maintenance or repair, ensure that areas are properly locked, write-up and record tenant violations, and look for indications of crime and vandalism. The rovers are required to complete a report that is to be left in a drop box upon completion of their shift.
8. The Petitioner provides the courtesy guards and rovers with tee shirts bearing the Petitioner's name and a golf cart for use in patrolling the property. The Petitioner requires the courtesy guards and rovers to wear the tee shirt and closed-toe shoes. The courtesy guards and rovers are otherwise allowed to wear dark pants, khakis, jeans or long shorts.
9. The availability of the courtesy guards and rovers is ascertained by the Petitioner at the time of hire. The Petitioner consults with the courtesy guards and rovers to develop a monthly schedule. If a courtesy guard or rover can not work a particular shift, he/she can advise the Petitioner of his/her unavailability. Once the schedule is completed, the courtesy guards and rovers were expected to work their scheduled shifts.
10. The Petitioner maintains a time clock in the guardhouse for the courtesy guards and rovers to use to clock in and out. If a courtesy guard or rover forgets to clock in or out, the individual can write in the time on the time card. Time cards are submitted by the courtesy guards and rovers every two weeks for payment.
11. The Petitioner requires the courtesy guards and rovers to personally perform the work. If a courtesy guard or rover is unable to work a scheduled shift, the courtesy guard or rover is responsible for obtaining coverage from another of Petitioner's courtesy guards or rovers. The courtesy guards and rovers are required to let the Petitioner know if they are unable to report for a scheduled shift.

12. The Joined Party performed services for the Petitioner as a courtesy guard and rover from September 16, 2009, until August 6, 2011. The Joined Party completed an employment application and was interviewed by the Petitioner's property manager. The Joined Party was told that he would be hired as an independent contractor, paid \$8.00 per hour, allowed to select his shifts each month, and required to arrange with another security guard to cover his shift if he was unable to work.
13. The Petitioner and the Joined Party entered into an *Independent Consultant Agreement*. Neither party dated the agreement on the signature page. On the first page of the agreement, someone inserted the year 2010 in the blank space provided for the effective date.
14. The Petitioner paid the Joined Party at a rate of \$8.00 per hour. The Petitioner did not withhold payroll taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits, such as vacation pay, holiday pay, or sick pay. The Petitioner reported the Joined Party's earnings on a form 1099-MISC.
15. The Petitioner received a number of complaints about the Joined Party's behavior from tenants and other workers. The Petitioner met with the Joined Party and provided several write-ups to the Joined Party. The Petitioner told the Joined Party that he could be temporarily removed from the schedule for behaving in a manner detrimental to the Petitioner. The Joined Party was warned on June 25, 2011, that his abusive behavior would not be tolerated and that further incidents would lead to termination.
16. Either party could terminate the relationship at any time without incurring liability. After a number of warnings, the Petitioner ended the relationship by removing the Joined Party from the schedule.
17. The Joined Party last worked for the Petitioner on August 6, 2011. The Joined Party filed a claim for unemployment compensation benefits effective August 7, 2011. When the Joined Party did not receive credit for his 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.
18. On October 11, 2011, the Department of Revenue issued a determination holding that the services performed by the Joined Party and other individuals as Security Guards/Rovers/Courtesy Patrol constitute insured employment retroactive to September 16, 2009. The Petitioner filed a timely protest.

Conclusions of Law:

19. The issue in this case, whether services performed for the Petitioner 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.
20. 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).
21. 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).
22. 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.

23. 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.
24. 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.
25. 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.
26. The written agreement between the parties states that the Joined Party is considered to be an independent contractor. A statement in an agreement that the existing relationship is that of an independent contractor is not dispositive of the issue. Lee v. American Family Assurance Company, 431 So.2d 249 (Fla. 1st DCA 1983). In Justice v. Belford Trucking Company, Inc., 272 So. 2d 131 (Fla. 1972), a case involving an independent contractor agreement that specified the worker was not to be considered an employee, 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.”
27. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B. & L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983). In this case, the Petitioner exercised a significant degree of control over the performance of the work. The Petitioner determined what work was performed and where the work was performed. Although the Joined Party could advise the Petitioner of times he was unavailable, the Petitioner determined the hours for each shift. The Petitioner controlled how the work was performed through its training, policies, procedures, and reporting requirements. The Joined Party was required to personally perform the work.
28. The Petitioner provided tee shirts, a golf cart, time clock, logs, forms, and all other instrumentalities needed to perform the work.
29. The Petitioner controlled the financial aspects of the relationship. The Petitioner determined the rate and method of payment. The Joined Party was paid by the hour, rather than by production or by the job. The

Joined Party was required to submit time cards for payment. The fact that the Petitioner did not withhold payroll taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.

30. The Petitioner owns an apartment complex. Among other services and amenities, the Petitioner provides security for the premises. The Joined Party performed services for the Petitioner as a courtesy guard and rover. The work performed by the Joined Party was an integral and necessary part of the Petitioner's business.
31. The *Independent Consultant Agreement* is for an indefinite term. The Joined Party worked for the Petitioner for approximately two years. Either party had the right to terminate the agreement at any time for any reason without notice. 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 is 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. In Adams v. Department of Labor and Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the court determined the Department had the authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers. It is concluded that the services performed for the Petitioner by the Joined Party and others as courtesy guards/rovers constitute insured work.

Recommendation: It is recommended that the determination dated October 11, 2011, be AFFIRMED.

Respectfully submitted on May 1, 2012.



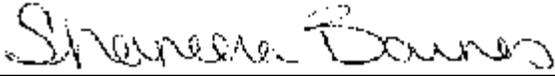
SUSAN WILLIAMS, Special Deputy
Office of Appeals

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 dozye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke

objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
May 1, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

MICHAEL DENSON
540 NW 4TH AVENUE APT #809
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DEPARTMENT OF REVENUE
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