

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

PETITIONER:

Employer Account No. - 2971970
TROPICAL VACATION RESORTS INC
PO BOX 570774
ORLANDO FL 32857-0774

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-128361L**

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 September 28, 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 December, 2012.



Altemese Smith,
Assistant Director,
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 December, 2012.

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:

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DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
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DOR BLOCKED CLAIMS UNIT
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
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DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

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**PROTEST OF LIABILITY
DOCKET NO. 2011-128361L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
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 September 28, 2011.

After due notice to the parties, a telephone hearing was held on September 26, 2012. The Petitioner's attorney appeared on behalf of the Petitioner and called the Petitioner's president and a former employee of the Petitioner as witnesses. The Joined Party and a former co-worker appeared and testified on behalf of the Joined Party. A tax specialist II appeared and testified on behalf of the Respondent.

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 insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a subchapter S corporation, incorporated in 2008 for the purpose of running an advertising and telemarketing business.
2. The Joined Party began performing services for the Petitioner in March 2010. The Joined Party worked as a telemarketer. The Joined Party was discharged by the Petitioner in September of 2010. The Petitioner offered the Joined Party work as a branch manager in September of 2010. The Joined Party worked as a branch manager from September 2010, through January 2011.

3. There was no written agreement at the time of hire in March 2010. The Petitioner and Joined Party signed a *Branch Office Agreement* in September 2010 when the Joined Party assumed a new position.
4. During the initial period of work from March 2010, through September 2010, the claimant was required to report to work at the Petitioner's place of business. The Petitioner's place of business was open from 10am through 6pm, Monday through Friday. The Joined Party was required to perform any work during these hours.
5. The Joined Party would call customers provided by the Petitioner in order to make sales to the customers.
6. The Joined Party was paid a 40% commission on sales made. The rate of pay was set by the Petitioner.
7. The Petitioner provided a cubicle and telephone for the work. The Joined Party had no expenses in conjunction with the work.
8. The Joined Party worked under a supervisor or manager.
9. The Petitioner discharged the Joined Party in September 2010. The Petitioner subsequently offered the Joined Party the position of branch manager. The second period of work was from September 2010, through January 2011.
10. The Joined Party was responsible for running a branch of the Petitioner's business.
11. The Petitioner and the Joined Party signed a *Branch Office Agreement* at the start of the Joined Party's second period of work.
12. The agreement required that the Joined Party keep records for the Petitioner, and abide by all rules, regulations, guidelines, and directions from the Petitioner. The agreement also indicated that there was a non-compete and non-solicitation agreement between the parties. The Petitioner did not enforce the terms of the contract.
13. The Petitioner required that the Joined Party work 40 hours per week.
14. The Petitioner covered the rent and expenses for the Joined Party's branch. The Joined Party covered some expenses but was subsequently reimbursed by the Petitioner. The Petitioner paid for the workers at the Joined Party's branch.
15. The Petitioner and the Joined Party split the proceeds of the branch run by the Petitioner. The Joined Party was paid a bonus for weeks with good performance.
16. The Joined Party did not hire workers for the branch office.
17. The Joined Party was not in business for himself.

Conclusions of Law:

18. 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.

19. 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).
20. 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).
21. 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.
22. 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.
23. 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. 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.
24. The record reflects that the Petitioner and the Joined Party had two distinct work relationships.
25. During the first period of work, the Petitioner exercised control over where and how the work was performed. The Joined Party was required to report to the Petitioner's place of business during the Petitioner's hours of operation. The Joined Party's work was supervised by a manager.
26. The Petitioner provided the work place, cubicle, and telephone necessary for the work. The Joined Party had no expenses in conjunction with the work.

27. The work performed by the Joined Party as a telemarketer was a normal part of the Petitioner's advertising and telemarketing business.
28. A preponderance of the evidence presented in this case reveals that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship between the parties from March 2010, through September 2010.
29. The second period of work was from September 2010, through January 2011.
30. The *Branch Office Agreement* required that the Joined Party maintain complete records for the Petitioner as well as follow all rules and guidelines of the Petitioner. While the agreement was not enforced, the Petitioner had the right to enforce the agreement at any time.
31. The Petitioner required that the Joined Party work 40 hours per week.
32. The Petitioner covered the rent and expenses of the Joined Party's branch office. The Joined Party had no expenses in conjunction for the work that were not reimbursed by the Petitioner.
33. The Joined Party was not in charge of hiring his own workers.
34. A preponderance of the evidence presented in this case reveals that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship between the parties during the second period of work, from September 2010, through January 2011.

Recommendation: It is recommended that the determination dated September 28, 2011, be AFFIRMED.

Respectfully submitted on October 29, 2012.



KRIS LONKANI, 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:

October 29, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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