

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

PETITIONER:

Employer Account No. - 9975199
HERNANDO COUNTY SHERIFFS OFFICE
ATTN AMY TODD HR DIR
PO BOX 10070
BROOKSVILLE FL 34603-0070

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-41688L**

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 March 13, 2012, 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 February, 2013.



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 February, 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:

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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

107 EAST MADISON STREET

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**PROTEST OF LIABILITY
DOCKET NO. 2012-41688L**

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 March 13, 2012.

After due notice to the parties, a telephone hearing was held on November 27, 2012. The Petitioner was represented by its attorney. An individual employed by the Petitioner as a colonel testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist, 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 received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as breath test operators 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 Joined Party, Frances Greifenberger, attended Santa Fe Community College and obtained certification to work as a breath test machine operator in November 2004. Shortly thereafter the Joined Party entered into a contract with the operator of the Hernando County Jail, CCA of Tennessee LLC., to perform the breath tests at the jail as an independent contractor.

2. The Joined Party performed services for CCA of Tennessee LLC as a breath test machine operator through August 26, 2010. On August 27, 2010, the Petitioner, Hernando County Sheriffs Office, took over the operation of the Hernando County Jail. The Joined Party entered into an Agreement with the Petitioner effective August 27, 2010, to administer the collection of breath samplings and to perform monthly agency inspections of the breath sampling instruments as an independent contractor.
3. The Agreement provides that the Joined Party will be responsible to respond, per a schedule posted at the Hernando County Jail, to perform breath samplings at the jail, to video tape the breath tests, to assist the State Attorney's Office in response to a subpoena in preparation of cases including testifying in hearings involving breath tests, to transport the video tapes of the breath tests to the State Attorney's Office, to perform monthly inspections of the breath test instrument, and to perform administrative duties associated with evidence collection, chain of custody, and disposal of physical evidence associated with the taking of breath tests.
4. The Agreement provides that the Petitioner will pay the Joined Party \$50 per test performed; \$10 per hour for time spent in case preparation, transporting the video tapes and other tasks; \$13 per hour, with a minimum of two hours, for testifying in legal proceedings when issued a subpoena; \$15 per hour for inspection of the instruments as required by the Florida Department of Law Enforcement; and \$1.00 per hour on call fee when no test is performed in a given 24 hour period. In addition, the Agreement provides that the Petitioner will pay the Joined Party mileage reimbursement at the rate published by the Internal Revenue Service for trips to the Hernando County Courthouse or the Department of Motor Vehicles originating from the Hernando County Jail. The Agreement provides that the Joined Party will submit a monthly invoice to the Petitioner for payment of the services performed.
5. The Agreement between the Joined Party and the Petitioner was substantially the same as the agreement between the Joined Party and CCA of Tennessee LLC.
6. In addition to the Joined Party the Petitioner engaged another breath test operator effective August 27, 2010, John Douglass Lowrey, under the identical terms and conditions as the Joined Party.
7. The Hernando County Jail is operated twenty-four hours a day, seven days a week. It was the responsibility of the Joined Party and Mr. Lowrey to make sure that that at least one of them was available to perform breath tests when required. The Joined Party was considered to be in charge of the breath test unit and was responsible for posting the work schedule. The Joined Party and Mr. Lowrey worked out the schedule between themselves and the Joined Party posted the schedule.
8. The Joined Party was provided with a room at the Hernando County Jail where the tests were performed. The breath test machine and the video equipment were provided by Hernando County. Any supplies that were needed to perform the work were provided by the Petitioner. The Joined Party did not have any expenses in connection with the work.
9. The Joined Party was not supervised by any employee of the Hernando County Sheriffs Office and she was not subject to performance evaluations. She was not required to wear a uniform or any identification badge. She was provided with a key to the breath testing room which was to be locked at all times.
10. The Joined Party was required to maintain her state certification. The Petitioner did not provide any training for the Joined Party.
11. The Joined Party was prohibited from hiring others to perform the work for her without the Petitioner's prior written approval. The Joined Party was not prohibited from performing breath test services for others, including other governmental agencies.

12. The Petitioner paid the Joined Party monthly. The majority of the Joined Party's earnings were from the payments for breath tests performed rather than from hourly pay for administrative functions, for assisting the State Attorney, or for testifying in court. No payroll taxes were deducted from the Joined Party's pay.
13. The Petitioner's acknowledged employees receive fringe benefits including paid time off, insurance benefits, and retirement benefits. The Joined Party did not receive paid time off, insurance benefits, retirement benefits, or any other fringe benefits. At the end of 2010 and 2011 the Petitioner reported the Joined Party's earnings, including the amount of the mileage reimbursement, on Form 1099-MISC as nonemployee compensation.
14. During the years that the Joined Party performed services for CCA of Tennessee LLC. the Joined Party was paid bi-weekly, did not receive any fringe benefits, and received a Form 1099-MISC each year reporting her earnings as nonemployee compensation. At the end of each year she performed services for CCA of Tennessee LLC. or the Petitioner the Joined Party prepared her own income tax return and reported her earnings on Schedule C *Profit or Loss from Business*. The Joined Party deducted her automobile expenses, automobile depreciation, and the expense of her cell phone service from her gross earnings.
15. Either party could terminate the relationship at any time without incurring liability for breach of contract. By letter dated May 19, 2011, the Joined Party resigned her position as breath test operator for the Petitioner.
16. The Joined Party filed a claim for unemployment compensation benefits, now known as reemployment assistance benefits, effective January 29, 2012, and established a base period from October 1, 2010, through September 30, 2011. When the Joined Party did not receive credit for any earnings within the base period a *Request for Reconsideration of Monetary Determination* was filed and 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.
17. By determination dated March 13, 2012, the Department of Revenue held that the Joined Party and other individuals performing services for the Petitioner as breath test operators are the Petitioner's employees retroactive to August 27, 2010. The Petitioner filed a timely protest on March 30, 2012.

Conclusions of Law:

18. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals working as breath test operators 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.
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). 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.
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.

24. 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.

25. The Joined Party entered into an Agreement with the Petitioner effective August 27, 2010. The Agreement provides that the Joined Party will perform services as a breath test operator for the Petitioner and that the Joined Party will perform the services as an independent contractor. Although the Agreement specifies the duties that are to be performed there is nothing in the Agreement that specifies how the duties are to be performed. The Agreement does not establish that the Petitioner had the right to control the Joined Party in the details of the performance of the duties. 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).

26. The Joined Party attended Santa Fe Community College in 2004 to become certified to operate a breath test machine. The Petitioner relied upon the Joined Party's expertise as a certified operator. The Petitioner did not provide any training to the Joined Party. These facts reveal that the Joined Party possessed special knowledge and skills which were required to perform the work. 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)

27. The majority of the Joined Party's earnings were earned by the job rather than by time worked. 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.

- 28. The Joined Party performed the breath machine tests at the Hernando County Jail for CCA of Tennessee LLC. and for the Hernando County Sheriffs Office for a total of approximately seven years. During those years the Joined Party filed income tax returns as a self employed worker and never challenged CCA of Tennessee LLC. or the Petitioner concerning the designation of independent contractor. These facts reveal that the parties believed that the relationship was independent rather than an employer-employee relationship
- 29. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).
- 30. The nature of the work performed by the Joined Party and Mr. Lowrey requires that the work must be performed at the jail and that they must be available to perform the work around the clock. The Joined Party's testimony reveals that she and Mr. Lowrey worked out the schedule between themselves and that the Joined Party posted the schedule since the Joined Party was in charge. Thus, the Joined Party, not the Petitioner, controlled when the work was performed. The Petitioner never trained the Joined Party, never supervised the Joined Party, and never told the Joined Party how to perform the work. The Agreement does not establish that the Petitioner had the right to control the Joined Party concerning how the work was to be performed. The evidence reveals that the Petitioner did not exercise control over the performance of the work. Thus, it is concluded that the services performed for the Petitioner by the Joined Party do not constitute insured employment.

Recommendation: It is recommended that the determination dated March 13, 2012, be REVERSED.

Respectfully submitted on January 2, 2013.

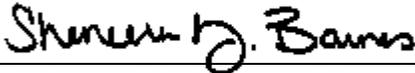


R. O. SMITH, Special Deputy
Office of Appeals

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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
January 2, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

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