

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

PETITIONER:

Employer Account No. - 2676346
RAZZLE DAZZLE PAWS INC
ATTN:JERI WAGNER
6126 SE FEDERAL HWY
STUART FL 34997-8105

**PROTEST OF LIABILITY
DOCKET NO. 2012-86270L**

RESPONDENT:

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

O R D E R

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 30, 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 1 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 Tribunal la pou 1 prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou 1 prepare apati de kopi anrejistremant 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 **October, 2013.**



Altemese Smith,
Bureau Chief,
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

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 October, 2013.

Shanedra 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:

RAZZLE DAZZLE PAWS INC
ATTN:JERI WAGNER
6126 SE FEDERAL HWY
STUART FL 34997-8105

LOURDES BERGMANN
7111 SW 129TH AVE APT #5
MIAMI FL 33183

DEPARTMENT OF REVENUE
ATTN: JODY BURKE
4230-D LAFAYETTE ST.
MARIANNA, FL 32446

ED WALKER ESQ
500 SOUTH AUSTRALIAN AVE STE 600
WEST PALM BEACH FL 33401

DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
PO 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

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**PROTEST OF LIABILITY
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RESPONDENT:

State of Florida

DEPARTMENT OF ECONOMIC

OPPORTUNITY

c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
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 30, 2012.

After due notice to the parties, a telephone hearing was held on August 6, 2013. The Petitioner was represented by its attorney. The Petitioner's president and a dog groomer testified as witnesses. 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 received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as dog groomers 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 corporation which operates a business involving pet grooming, pet sitting, and retail sale of pet supplies. The Petitioner's president is active in the operation of the business one day a week and is an acknowledged employee. Another employee does pet grooming, opens and closes the business each day, handles the cash receipts, and performs other administrative duties. Individuals engaged to perform bathing of pets are also acknowledged to be the Petitioner's employees. Individuals engaged by the Petitioner to perform pet grooming, including the Joined Party, are classified as independent contractors.

2. The Joined Party approached the Petitioner in December 2010 seeking work as a pet groomer. At the time the Joined Party was employed as a pet groomer at a retail pet supply store. The Petitioner's president asked the Joined Party what days she was available to work. The Joined Party replied that she was requesting to work Wednesday through Saturday and that she was willing to groom between four and six dogs per day. The Petitioner agreed to pay the Joined Party 50% of the fees collected from the customers for whom the Joined Party performed the pet grooming. The Petitioner informed the Joined Party that the Joined Party was engaged as an independent contractor. The parties did not enter into any written contract or agreement. The Joined Party began performing services for the Petitioner as a dog groomer on December 8, 2010.
3. Dog grooming is an unregulated industry. Dog groomers are not required to attend school to learn how to groom and may learn how to perform the work through on-the-job training. Dog groomers are not required to be registered, certified, or licensed. The Petitioner's president attended school to learn how to groom dogs, however, she has less experience than other groomers who work in her shop.
4. The Joined Party performed the dog grooming at the Petitioner's shop during the Petitioner's regular business hours. The Joined Party was not provided with a key to the shop.
5. The Joined Party was not required to comply with a dress code and was not required to wear a uniform or identification badge.
6. The Petitioner's shop has an open area where the dogs are groomed. There are grooming tables that are attached to the walls and which are used by the dog groomers for grooming the dogs. The Petitioner also provides tubs for bathing the dogs, a washer and dryer for washing and drying towels, large hair dryers for drying the dogs, and dog cages. The Joined Party provided scissors, hair clippers, nail clippers, and other hand tools. The Petitioner buys dog shampoo in bulk which the groomers use. When the Petitioner purchases additional bulk shampoo the Petitioner divides the cost of the shampoo among the groomers and charges each groomer for a portion of the cost. The groomers usually provide their own ribbons and bows, however, the groomers may purchase ribbons, bows, and other items from the Petitioner. The Petitioner did not reimburse the Joined Party for any expenses in connection with the work.
7. The Petitioner performed a study to determine the prices that are charged for the various breeds of dogs by other dog grooming services in the local area. Based on that study the Petitioner created a price list. The groomers are required to adhere to the Petitioner's price list for a dog's first grooming. However, if the groomer discovers that it was either easier or more difficult to groom the dog, the groomer may adjust the price of grooming by charging more or less during subsequent groomings with the same dog.
8. The groomers collect the fees from the customers and then turn the money over to either the Petitioner's president or the employee who is responsible for handling the cash.
9. The Joined Party set her own appointments with the customers. The Joined Party was required to speak with the customers to determine what services were to be performed and how those services were to be performed. The Joined Party determined the sequence in which the dogs were groomed. The Petitioner did not provide any training and did not supervise the Joined Party or tell the Joined Party how to perform the work. If a customer complained to the Petitioner the Joined Party was required to redo the work without additional compensation. If the Joined Party injured a dog while grooming the Joined Party was responsible for paying the veterinarian fees.
10. The Petitioner did not employ bathers at the time that the Joined Party performed services for the Petitioner. The Joined Party bathed the dogs that she groomed. The Joined Party was free to hire bathers at her own expense and was free to hire other dog groomers to perform the grooming at the Joined Party's expense.

11. The Joined Party was free to perform dog grooming services for the Petitioner's competitors. Based on comments which the Joined Party made to the Petitioner the Petitioner determined that the Joined Party continued her employment grooming dogs at the retail store and also groomed dogs from her home.
12. The Joined Party did not bill the Petitioner for services performed. The appointments and the amount of the collected fees were recorded in a logbook. At the end of the pay period the Petitioner totaled the Joined Party's share of the earnings and paid the Joined Party. No taxes were withheld from the pay.
13. The Petitioner did not provide any fringe benefits such as health insurance, life insurance, paid vacations or paid holidays. At the end of 2010 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
14. The Joined Party was almost always late for her first appointment, many times by two hours or more. As a result the Joined Party was not available to speak to the customers. Other groomers had to talk to the Joined Party's customers and take notes so that the Joined Party would know how the customers wanted the services performed. The Petitioner warned the Joined Party but the tardiness continued. In May 2011 the Petitioner attempted to terminate the Joined Party but allowed the Joined Party to continue working when the Joined Party promised not to be late again. The Joined Party continued to be late for scheduled grooming appointments and the Petitioner terminated the Joined Party on June 8, 2011.
15. The Joined Party filed a claim for unemployment compensation benefits, now known as reemployment assistance benefits, effective June 12, 2011. Although the Joined Party established a valid claim for benefits based on her employment with the retail store she did not receive credit for her earnings with the Petitioner and filed a *Request for Reconsideration of Monetary Determination*. As a result an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. The Department of Revenue completed the investigation in August 2011 but did not issue a determination until July 30, 2012. The Petitioner filed a timely protest by mail postmarked July 30, 2012.

Conclusions of Law:

16. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as dog groomers 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.
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). 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.

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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.
23. The only evidence concerning an agreement between the parties is the Petitioner's testimony that the Petitioner told the Joined Party at the time of hire that the Joined Party was hired to be an independent contractor rather than an employee. 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).
24. The Petitioner's primary business is dog grooming. The dog grooming services which were performed by the Joined Party were not separate and distinct from the Petitioner's business but were an integral part of the business. The Petitioner provided the place of work and the major tools and equipment which were used to perform the work. The Joined Party provided the hand tools and supplies. The Petitioner did not reimburse the Joined Party for any expenses.
25. Although some skill may be required to groom dogs it was not shown that dog grooming is a highly skilled occupation. Although the humblest labor can be independently contracted and the most highly trained artisan can be an employee, see Farmers and Merchants Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), 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)

26. Although the Joined Party was restricted to working during the Petitioner's regular business hours, the Joined Party chose which days she worked and how many dogs she would groom during those days. The Joined Party set the appointments with the customers. These facts reveal that the Joined Party exercised control over when the work was performed.
27. The Joined Party was not paid based on time worked but rather based on production. The Joined Party controlled how many dogs she groomed and had the freedom to exercise some control over the fees charged to the customers. The Joined Party was in control of the amount of time it took to groom each dog and was responsible for redoing defective work without additional compensation. Payroll taxes were not withheld from the pay by the Petitioner and the Petitioner did not provide fringe benefits which are customarily associated with employment relationships. The Petitioner reported the Joined Party's earnings to the Internal Revenue Service as nonemployee compensation.
28. The Joined Party determined how to perform the work. The Petitioner did not provide any training, supervision, or direction concerning how to perform the work. The Petitioner's only concern was customer satisfaction, not how the work was performed. 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. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004). 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.
29. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as dog groomers do not constitute insured employment.

Recommendation: It is recommended that the determination dated July 30, 2012, be REVERSED.

Respectfully submitted on September 6, 2013.

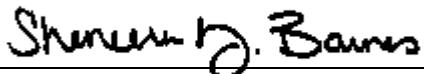


R. O. SMITH, Special Deputy
Office of Appeals

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 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, Special Deputy Clerk

Date Mailed:
September 6, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

LOURDES BERGMANN
7111 SW 129TH AVE APT #5
MIAMI FL 33183

DEPARTMENT OF REVENUE
ATTN: JODY BURKE
4230-D LAFAYETTE ST.
MARIANNA, FL 32446

ED WALKER ESQ
500 SOUTH AUSTRALIAN AVE STE 600
WEST PALM BEACH FL 33401

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