

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250**

PETITIONER:

Employer Account No. – 3169177
L&SF ENGINEERING CONSULTANTS CORP
ATTN: LUIS SEPULVEDA
PO BOX 208
PALM HARBOR FL 34685

**PROTEST OF LIABILITY
DOCKET NO. 0025 0203 28-02**

RESPONDENT:

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

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 December 4, 2014, 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 4th day of **June, 2015**.



Magnus Hines

Magnus Hines,
RA Appeals Manager,
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.

Shanendra Y. Barnes

DEPUTY CLERK

6.9.15

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 9th day of June, 2015.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

By U.S. Mail:

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250**

PETITIONER:

Employer Account No. - 3169177
L&SF ENGINEERING CONSULTANTS CORP
ATTN: LUIS SEPULVEDA
PO BOX 308
PALM HARBOR FL 34682-2083

**PROTEST OF LIABILITY
DOCKET NO. 0025 0203 28-02**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager,
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 December 4, 2014.

After due notice to the parties, a telephone hearing was held on April 1, 2015. The Petitioner, represented by its controller, appeared and testified. The Petitioner's president testified as a witness. The Respondent, represented by a Department of Revenue Tax Auditor III, 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 Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner by the Joined Party constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages pursuant to §443.036(21); 443.036(40); 443.1216, Florida Statutes; Rule 73B-10.025(2), Florida Administrative Code.

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions pursuant to §443.036(19); 443.036(21); 443.1215, Florida Statutes.

Findings of Fact:

1. The Petitioner, L&SF Engineering Consultants Corp., is a Florida profit corporation which was formed on March 12, 2008, to operate a general contracting business. The Petitioner's president is Luis A Sepulveda who has been active in the operation of the business since inception.

2. The Joined Party, a close friend of the Petitioner's president, is a citizen of the Dominican Republic. The Joined Party contacted the Petitioner's president seeking work and seeking a place to live. Although the Joined Party did not have any construction skills the president allowed the Joined Party to move in with him and engaged the Joined Party to perform unskilled labor for the Petitioner.
3. Whenever the Petitioner had work available for the Joined Party the Joined Party would ride to the job site with the Petitioner's president. The Petitioner's president would tell the Joined Party what to do and would provide whatever equipment or tools, such as brooms, that were needed to do the work. The Petitioner provided the Joined Party with a cell phone.
4. One of the Petitioner's job sites was a school located in Pinellas County. The School District of Pinellas County requires workers to wear an identification badge. The identification badge was provided to the Joined Party so that he could perform services for the Petitioner while on school property.
5. Although the Petitioner has a checking account with sequentially numbered checks the Petitioner's president does not always use the company checks in sequential order. For instance check 1358 was written to the Joined Party for "professional services" on December 14, 2013, in the amount of \$728.00, check 1509 was written to the Joined Party on January 25, 2014, in the amount of \$624.00 and check 1461 was written to the Joined Party on June 8, 2014, in the amount of \$364.00, for three and one-half day's pay. Check 1629 was written to the Joined Party on March 29, 2014, in the amount of \$624.29 with a notation that the check was for "payroll" and that FICA in the amount of \$51.71 had been withheld. Check 1678 was written to the Joined Party on April 28, 2014, for \$275.11 with a notation that the gross pay was \$260.00 and that FICA in the amount of \$19.89 was withheld for a net pay of \$240.11, with an unidentified additional payment of \$35.00.
6. Either party could terminate the relationship at any time without incurring liability for breach of contract.
7. The Joined Party filed a claim for reemployment assistance benefits. When the Joined Party did not receive credit for his earnings with the Petitioner an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.
8. On December 4, 2014, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to January 1, 2013, that corporate officers are statutory employees and their wages are reportable, and that the Petitioner established liability for payment of reemployment assistance contributions effective January 1, 2013. The Petitioner filed a timely protest by letter postmarked December 17, 2014.
9. As a result of the Petitioner's error in reporting its Federal Employer Identification Number the Department of Revenue assigned two different employer account numbers, 3257796 and 3169177. Upon discovery of the error the Department of Revenue canceled account number 3257796.

Conclusions of Law:

10. The issue in this case, whether services performed for the Petitioner 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.
11. 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).

12. 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.
13. 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.
14. 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.
15. 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.
16. 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.
17. No evidence was presented concerning any written or verbal agreement between the Petitioner and the Joined Party. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

18. The Petitioner operates a business as a general construction contractor. The Joined Party performed unskilled labor such as sweeping and other menial tasks. The work did not require any training, special knowledge or skill. 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)
19. The Petitioner determined what work the Joined Party would perform, where he would perform the work, and when he would perform the work. The Petitioner took the Joined Party to work each day. The Petitioner provided everything that was needed to perform the work and the Joined Party did not have any expenses in connection with the work.
20. Either party could terminate the relationship at any time without incurring liability for breach of contract. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in 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."
21. No explanation was provided by the Petitioner concerning how the Joined Party's pay was computed. One of the checks is noted to be for three and one-half days of work. That note indicates that the Joined Party was paid by time worked rather than based on production or by the job. Two paychecks indicate that payroll taxes were withheld. The withholding of FICA taxes is an occurrence that militates a conclusion that there was an employer/employee relationship between the Petitioner and the Joined Party.
22. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
23. The evidence presented in this case reveals that the Joined Party performed services for the Petitioner as an employee. Although the evidence is limited concerning the dates of employment, the copies of checks submitted in evidence show a payment to the Joined Party as early as December 14, 2013, and as recently as June 8, 2014.
24. Section 443.1215, Florida Statutes, provides:
 - (1) Each of the following employing units is an employer subject to this chapter:
 - (a) An employing unit that:
 1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or
 2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
25. Section 443.1216(1)(a)1. Florida Statutes, provides that the employment subject to the Florida Reemployment Assistance Law includes a service performed by an officer of a corporation.
26. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

27. The Petitioner's president, Luis Sepulveda, has been active in the business since the Petitioner's inception. Thus, he is a statutory employee of the Petitioner during all of each week. The Petitioner has had at least one employee performing services in employment during twenty different weeks of each year and has established liability for payment of reemployment assistance contributions.

Recommendation: It is recommended that the determination dated December 4, 2014, be AFFIRMED.
Respectfully submitted on April 29, 2015.



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:
April 29, 2015

Copies mailed to:

Petitioner

Respondent

Joined Party

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