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

PETITIONER:
Employer Account No. – 3005962
JUPITER LANES LIMITED
1210 NE 8TH AVE
FORT LAUDERDALE FL 33304-2002

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

PROTEST OF LIABILITY
DOCKET NO. 0025 3064 94-02

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 31, 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 16th day of **June, 2015**.

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.

Shanedra Y. Barnes
DEPUTY CLERK

6.18.15
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 18th day of June, 2015.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
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Reemployment Assistance Appeals
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
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PETITIONER:
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RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 0025 3064 94-02

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 31, 2014.

After due notice to the parties, a telephone hearing was held on May 4, 2015. The Petitioner, represented by its managing member, appeared and testified. The Respondent, represented by a Department of Revenue Tax Auditor III, 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 constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner, Jupiter Lanes Limited, is a limited partnership which operates a bowling center.
2. The Joined Party is an individual who was employed at the bowling center from 1991 until 2001. The Joined Party's final position was floor manager and league coordinator. Following that period of employment the Joined Party was employed as a telephone solicitor for nine and one-half years for a tax consulting company. Following termination from the tax consulting company the Joined Party contacted the Petitioner in an attempt to obtain employment.

3. The Joined Party was interviewed by the Petitioner's general manager. The general manager informed the Joined Party that the Petitioner needed the Joined Party to come aboard to get the Petitioner's bowling leagues back in order. During the interview process the general manager told the Joined Party that the duties would include soliciting bowlers to join leagues and contacting schools to schedule events for students. The Joined Party was told that the Petitioner would pay her $10 per hour. At that point the Petitioner's managing member entered the conversation and suggested that the Joined Party perform services as a "1099." The Joined Party understood what "1099" meant, that she would be responsible for paying her own taxes, but she did not know what an independent contractor was. The Joined Party needed a job and accepted the Petitioner's offer of work and began work on May 15, 2012.
4. There was no written contract or agreement between the parties.
5. The Petitioner told the Joined Party that the Joined Party was required to perform the work efficiently and that the Joined Party was required to complete an event sheet for each event that was booked so that the Petitioner's employees would know what they needed to do for the event. The Petitioner told the Joined Party what organizations or companies to contact. The Joined Party was required to meet with the managing member or the general manager each morning at which time the Joined Party was required to explain what her plans were for the day. The Joined Party was required to attend a staff meeting each Monday morning at which time the Joined Party was required to disclose the contacts that she had made during the prior week. During the meeting the Petitioner would go over the work performed by the Joined Party during the prior week. The Joined Party was required to produce a sufficient amount of new business to be a success, however, the Petitioner never discussed with the Joined Party the amount of new business which she needed to produce to be considered a success by the Petitioner. The Petitioner did not set a quota for the Joined Party. The Petitioner's managing member reviewed the Joined Party's weekly production and determined if the Joined Party met the undisclosed goals for the week.
6. The Petitioner provided the Joined Party with an office at the bowling center containing a desk and telephone. The Joined Party was free to use any of the Petitioner's equipment. The Joined Party was not required to pay the Petitioner for use of the office or equipment. The Petitioner provided the Joined Party with a name tag bearing the name of the bowling center and the Joined Party's first name. The Petitioner provided the Joined Party with business cards bearing the Petitioner's name, the Joined Party's name, and the title of Community Coordinator. The job title of Community Coordinator was selected by the managing member.
7. The regular business hours of the bowling center are from 9 AM until midnight. The Joined Party was not provided with a key to the bowling center but she was provided with a key to her office. On occasion the Joined Party was required to be at the bowling center before 9 AM and on those occasions a manager would be present at the center to let the Joined Party in before 9 AM.
8. The Joined Party was required to clock in and out each day on a time clock. The Joined Party spent approximately 80% of her working time at the bowling center and the remainder of her work time was spent personally contacting organizations or companies outside of the bowling center. Sometimes the Joined Party would make those contacts on the way to the bowling center. Sometimes the Joined Party would ask a manager to adjust her time on the time card to include the outside contacts and sometimes the Joined Party would not include those contacts on her weekly hours.
9. The Joined Party's hours of work depended on the scheduled events, such as birthday parties. The Joined Party would talk to individuals who came in the bowling center attempting to persuade them to sign up for leagues, would telephone league bowlers to sign them up for another league, and would contact bowlers by mail to remind them of upcoming events or leagues.

10. The Petitioner asked the Joined Party to not work more than 25 hours per week. However, depending on the time of the year the Joined Party found that it was necessary to work as many as thirty hours in a week. The Petitioner told the Joined Party to use some of the Petitioner's employees to assist the Joined Party with her duties so that she could reduce her hours of work. The Joined Party did use the Petitioner's employees to assist her and the Petitioner paid those employees. The Petitioner warned the Joined Party once or twice about working more than 25 hours a week. At some point in time the Petitioner hired another individual to make the outside marketing contacts.

11. The Joined Party did not submit a bill or invoice to the Petitioner for her services. The Petitioner paid the Joined Party on a weekly basis from the hours that were recorded on the Joined Party's time card. The Petitioner did not withhold any payroll taxes from the pay and did not provide any fringe benefits such as paid vacations, paid sick days, paid holidays, or health insurance. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

12. The Joined Party did not have any expenses in connection with the work other than the occasional use of her car to make outside contacts. The Joined Party did not request reimbursement for the expense of using her personal car. While performing services for the Petitioner the Joined Party did not have an investment in a business, did not offer services to the general public, did not perform any services for any other company other than the Petitioner, did not have business liability insurance, and did not have an occupational license of business license.

13. Either party was free to terminate the relationship at any time without incurring liability for breach of contract.

14. On November 14, 2014, the Petitioner informed the Joined Party that the Joined Party's services were no longer needed. Since November 14, 2014, the duties which were previously performed by the Joined Party are performed by the Petitioner's employees.

15. Following termination the Joined Party spoke to her accountant. The accountant advised the Joined Party that he did not believe that she was correctly classified as an independent contractor and that she should file a claim for reemployment assistance benefits. When the Joined Party filed a claim for reemployment assistance benefits the Joined Party did not receive credit for her earnings with the Petitioner and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

16. On December 31, 2014, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee and not as an independent contractor. The Petitioner filed a timely protest by mail postmarked January 13, 2015.

Conclusions of Law:

17. The issue in this case, whether services performed for the Petitioner by the Joined Party 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.

18. 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).

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. The evidence reveals that the parties did not enter into any written agreement or contract. The testimony concerning the verbal agreement does not reveal the existence of a definitive agreement, although the Petitioner suggested that the Joined Party perform services as a "1099" and the Joined Party accepted because she needed the job. 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). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, 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."

25. The Petitioner operates a bowling center. The Joined Party was engaged by the Petitioner to get the Petitioner's bowling leagues back in order and to develop new business by soliciting individuals, including existing league bowlers, and soliciting schools and other organizations for special events. The work performed by the Joined Party was an integral part of the Petitioner's regular business activity as shown by the fact that the Joined Party's former duties are currently being performed by the Petitioner's employees. The Joined Party did not have any investment in a business, did not perform services for others, did not have business liability insurance, and did not have any business or occupational license. The Petitioner provided the place of work and everything that was needed to perform the work. The Joined Party provided a laptop computer and her own personal transportation. The Joined Party did not have significant expenses in connection with the work and it was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

26. It was not shown that any skill or special knowledge was needed 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 Petitioner paid the Joined Party by time worked, $10 per hour, rather than by production or by the job. The Petitioner limited the number of hours that the Joined Party was allowed to work thereby controlling the financial aspects of the relationship. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship. 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 services for the Petitioner from May 15, 2012, until November 14, 2014, a period of approximately two and one-half years. Either party could terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. The Petitioner terminated the relationship. 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."

29. The facts of this case reveal that the Joined Party worked under the close control of the Petitioner. The Joined Party was required to report to the general manager or managing member each morning and to explain what her work plans were for the day. Each Monday morning she was required to report what she had done during the previous week and to explain who she had contacted. The Joined Party was required to work efficiently and was required to produce an undisclosed amount of new business.

30. 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).

31. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the determination dated December 31, 2014, be AFFIRMED.

Respectfully submitted on May 14, 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 envió 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

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
May 14, 2015

Copies mailed to:
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