DEPARTMENT OF ECONOMIC OPPORTUNITY
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2482329

LITTLE BLESSING CHILD CARE CENTER
ATTN: TONIETTA G SCOTT
138 GIBSON ROAD
FORT WALTON BEACH FL 32547

PROTEST OF LIABILITY
DOCKET NO. 2010-162693L

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.

The issue before me is whether services performed for the Petitioner constitute insured employment, and if so, the effective date of liability pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

The Department of Revenue, hereinafter referred to as the Respondent, conducted an audit of the Petitioner's records for the 2009 tax year. After completing the audit, the Respondent issued a determination holding that the Petitioner was required to pay additional taxes and interest. The Respondent based its determination on the Petitioner's failure to properly report wages paid to its teacher/instructors. The Respondent concluded that the Petitioner was required to report the wages of these workers because the workers performed services as employees of the Petitioner and were not excluded from unemployment compensation tax coverage under a religious exemption. The Petitioner filed a timely protest of the determination.

A telephone hearing was held on June 27, 2011. The case was held as a consolidated hearing for docket numbers 2010-162693L and 2011-12721L. The Petitioner, represented by its authorized agent, appeared and testified. The Petitioner, a sole proprietor, testified as a witness. The Respondent appeared and testified in both cases, represented by a Revenue Administrator II in regard to 2010-162693L and a Tax Specialist II in regard to 2011-12721L. The Joined Party appeared and testified on her own behalf.

The Joined Party's former fiancé testified as a witness on behalf of the Joined Party. The Special Deputy issued both recommended orders on August 29, 2011.

The Special Deputy's Findings of Fact recite as follows:

1. The Petitioner, Tonietta Scott, is an individual who owned and operated a childcare center as a sole proprietor under the unregistered fictitious name of Little Blessing Christian Academy beginning during the latter part of 2008. The Petitioner closed the business in November 2010. Prior to operating Little Blessing Christian Academy the Petitioner operated a childcare center as a sole proprietor under the registered fictitious name of Little Blessing Child Care Center beginning in 2002.
2. Tonietta Scott is not a church or nonprofit organization and has never applied for nor obtained any tax exemption as a nonprofit organization from any government agency. The businesses owned and operated by the Petitioner are not owned, operated, supported, or controlled by a church or a religious organization.
3. The Joined Party, Tanesia Mitchell, is an individual who applied for work with the Petitioner while she was employed elsewhere as a certified preschool teacher. The Petitioner informed the Joined Party that the hours of work were from 6 AM until 6 PM, Monday through Friday and that the rate of pay was $1,440 per month. The Joined Party accepted the offer of work and began work on or about March 1, 2009 as a preschool teacher. The Petitioner gave the Joined Party a key to the daycare center and informed the Joined Party that the Joined Party was responsible for opening and closing the daycare center each day. The Petitioner also told the Joined Party that the Joined Party would be the Petitioner's assistant and that she would be in charge of the daycare center during the Petitioner's absence. The Petitioner had two other preschool teachers in addition to the Joined Party.
4. On or about March 10, 2009, the Petitioner and the Joined Party entered into a written *Independent Contractor Agreement* which specifies that the Joined Party is responsible for payment of all income tax and social security tax payments. The Joined Party had never worked as an independent contractor and did not know what an independent contractor was. The Agreement was for the term of one year. The Joined Party signed the Agreement because she needed the job.
5. The *Independent Contractor Agreement* provides that the Petitioner will pay the Joined Party the gross sum of $1,440.00 per month and that the Petitioner will not withhold taxes from the pay. The Agreement provides that the Petitioner will reimburse the Joined Party for all reasonable and approved out-of-pocket expenses with the exception of the expenses of commuting to and from the Petitioner's daycare center. The Agreement requires the Joined Party to perform any and all services required or requested by the Petitioner. The Agreement provides that the Petitioner may immediately terminate the Joined Party without prior written notice if the Joined Party fails to comply with the Petitioner's written policies or the Petitioner's directives. The Agreement requires the Joined Party to conduct herself in a Christian manner at all times and to perform all duties requested by the Petitioner.
6. The Joined Party did not have an occupational license, did not have liability insurance, did not advertise her services as a daycare worker to the general public, and did not perform services for others. While engaged by the Petitioner the Joined Party performed services only for the Petitioner at the Petitioner's daycare center. Although the Joined Party signed the *Independent Contractor Agreement* the Joined Party always believed that she was the Petitioner's employee.
7. The Joined Party performed her assigned duties at the location of the Petitioner's business. The Petitioner provided all furnishings and equipment that were needed to perform the work. The Petitioner provided materials and supplies, such as toys and books, however, the Joined

Party also chose to provide books and supplies for the children at her own expense. The Joined Party's expenses were approximately $20 to $30 per month, however, the Joined Party never requested reimbursement.

8. The Petitioner provided the Joined Party with a smock bearing the name of the Petitioner's daycare, Little Blessing Christian Academy. The Joined Party was required to wear the smock while working.
9. The Petitioner determined the days and hours of work. The Petitioner's daycare center was open from 6 AM until 6 PM and the Joined Party was required to work from open to close on most days. The Joined Party was required to request permission to take time off from work. If she was unable to work as scheduled she was required to notify the Petitioner. She was not allowed to come and go as she pleased. On some days the Petitioner told the Joined Party that the Joined Party could leave early because the parents had picked up most of the children and the Petitioner was able to take care of the remaining children by herself.
10. The Petitioner did not provide any training to the Joined Party, however, the Petitioner told the Joined Party different things to do with the children and told the Joined Party how to do those things. All of the Joined Party's activities were supervised by the Petitioner. The Joined Party was required to report to the Petitioner and to report any accidents or other incidents involving the children. The Joined Party was allowed to take the children outside on the grounds of the daycare center but she could not take them off the Petitioner's grounds without the Petitioner's permission. The Joined Party could not take the children on field trips or excursions without the Petitioner's permission.
11. The Joined Party was required to complete a timesheet showing the beginning and ending times each day. The Joined Party and the other daycare workers were required to sign in each morning and sign out at the end of each day.
12. The Petitioner paid the Joined Party $1,440 per month as per the Agreement until August 2009. No taxes were withheld from the pay and the Joined Party did not receive any fringe benefits. In August 2009 the Joined Party was absent from work for one day with the Petitioner's permission. Upon the Joined Party's return to work the Petitioner informed the Joined Party that the Petitioner could not afford to continue paying the Joined Party $1,440 per month and, as a result, the Petitioner reduced the Joined Party's pay by $200 per month. The Petitioner also reduced the Joined Party's pay by $84 for August because the Joined Party was absent for one day. The Joined Party continued working under the reduced pay plan because the Joined Party needed the job. At the end of 2009 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
13. On March 10, 2010, the Petitioner extended the one year term of the *Independent Contractor Agreement.* On May 10, 2010, the Petitioner terminated the Joined Party.
14. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for 2009 to ensure compliance with the Florida Unemployment Compensation Law. The tax auditor concluded that the individuals performing services for the Petitioner as childcare workers, including preschool teachers, were the Petitioner's employees rather than independent contractors. The tax auditor also concluded that the Petitioner was not exempt from the Unemployment Compensation Law as a religious organization. As a result of the preliminary findings of the tax auditor the Petitioner reported the wages of the daycare workers, including the Joined Party, and paid tax on those wages for 2009.
15. The Joined Party filed a claim for unemployment compensation benefits effective September 5, 2010. On September 10, 2010, a *Wage Transcript and Determination* was issued to the Joined Party, however, the Determination only included wages for the second, third, and fourth quarters 2009. It did not include wages for the first quarter 2010. A *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the

Department of Revenue to determine why the Joined Party had not received credit for the 2010 wages.

16. On October 11, 2010, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services as preschool teachers are the Petitioner's employees. The determination reinstated the Petitioner's account effective January 1, 2010. The Petitioner filed a protest by letter dated October 29, 2010.
17. On October 25, 2010, the Department of Revenue issued a *Notice of Proposed Assessment* based on the audit conducted for the 2009 tax year. The Petitioner filed a protest by letter dated November 3, 2010.

Based on these Findings of Fact, the Special Deputy recommended that the determination dated October 25, 2010, be affirmed. On September 14, 2011, the Special Deputy issued an order extending the time for filing exceptions until September 30, 2011. The Petitioner's exceptions to the Recommended Order were received by fax dated September 30, 2011. No other submissions were received from any party.

With respect to the recommended order, Section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

With respect to exceptions, Section 120.57(1)(k), Florida Statutes, provides, in pertinent part:

> The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

The Petitioner's exceptions are addressed below. Additionally, the record of the case was carefully reviewed to determine whether the Special Deputy's Findings of Fact and Conclusions of Law

were supported by the record, whether the proceedings complied with the substantial requirements of the law, and whether the Conclusions of Law reflect a reasonable application of the law to the facts.

In its *History* and *Exemptions Arguments*, the Petitioner proposes findings of fact in accord with the Special Deputy's Findings of Fact, proposes alternative findings of fact and conclusions of law, and attempts to enter additional evidence. The Petitioner also argues that the Special Deputy's Findings of Fact and Conclusions of Law are not supported by competent substantial evidence in the record and takes exception to the Special Deputy's credibility determination in favor of the Joined Party. The Petitioner specifically takes exception to Findings of Fact #1-14 and 16 and Conclusions of Law #24-35. Pursuant to section 120.57(1)(l), Florida Statutes, the Special Deputy is the finder of fact in an administrative hearing, and the Department may not reject or modify the Special Deputy's Findings of Fact unless the Department first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence. Also pursuant to section 120.57(1)(l), Florida Statutes, the Department may not reject or modify the Special Deputy's Conclusions of Law unless the Department first determines that the conclusions of law do not reflect a reasonable application of the law to the facts. A review of the record reveals that all of the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record, that all of the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts, and that the Special Deputy resolved conflicts in evidence in favor of the Joined Party. As a result, the Department may not modify the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l), Florida Statutes, and accepts the findings of fact and conclusions of law as written by the Special Deputy. Rule 60BB-2.035(19)(a), Florida Administrative Code, provides that additional evidence will not be accepted after the close of the hearing. The Petitioner's request for the consideration of additional evidence is respectfully denied. The Petitioner's exceptions are respectfully rejected.

In its exceptions, the Petitioner also contends that the Department has no jurisdiction to rule on this case and has violated the Petitioner's constitutional due process rights. The Petitioner contends that it was not given proper notice and that the Department mistakenly provided notice to the wrong business entity. A review of the record shows that the Petitioner's contentions are unsupported.

Evidence in the record supports the conclusion that the Petitioner received notice of the hearing. During the hearing, the Petitioner did not argue that the Petitioner failed to receive any notice of the hearing or that the Petitioner failed to receive notice of any of the relevant issues. The Petitioner now claims that a lack of notice occurred because the Department incorrectly entered, "INC," on the line

beneath the Petitioner's fictitious name, Little Blessing Child Care Center, on the notices of hearing and other documents. The Petitioner's claim is particularly unpersuasive because the legal name of the sole proprietor, Tonietta Scott, was listed on the line immediately following the listing of the Petitioner's fictitious name on both notices of hearing and the other documents. There has been no showing that the sole proprietor was not provided notice of all issues; in fact, the documents in evidence support the opposite conclusion. While it is true that the Petitioner operated under more than one fictitious name, the Petitioner's legal name and unemployment compensation tax account number were listed on both Respondent exhibits, notices of hearing, and determinations. The Petitioner's arguments are also unconvincing because the Petitioner previously reported the Joined Party's wages to the Respondent under the name and account number of Little Blessing Child Care Center. The Petitioner's current confusion about what entity is involved does not seem warranted in light of these considerations.

Instead, the record clearly demonstrates that both cases deal with the same sole proprietorship and that the Petitioner's choice of fictitious name does not change the fact that the Petitioner was provided adequate notice through the Petitioner's legal name. Thus, the Petitioner has not demonstrated that the Department lacks jurisdiction to rule on this case or that the Petitioner's due process rights were violated by the Department. As previously stated, the Special Deputy's Findings of Fact are supported by competent substantial evidence in the record and the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. The Department accepts the Special Deputy's Findings of Fact and Conclusions of Law without modification in accord with section 120.57(1)(l), Florida Statutes. The Petitioner's exceptions are respectfully rejected.

The Petitioner cites *La Grande v. B&L Services, Inc.*, 432 So.2d 1364, 1366-67 (Fla. 1st DCA 1983), in support of the conclusions that independent contractor cases should be decided on a case-by-case basis, control over the worker should determine employment status, and that governmental regulations should not be considered control when determining employment status. Although the conclusions cited by the Petitioner may be correct, *La Grande* is distinguishable from the current case. *La Grande* involved a taxicab driver who was subjected to a limited dress code by local ordinance, determined the days and hours he worked, and exercised 'complete discretion' in performing his job duties. *Id*. at 1366-67. The deputy and trier of fact in *La Grande* resolved conflicts in favor of the taxi company that engaged the taxicab driver. *Id*. at 1368. A review of the record reveals that the Special Deputy held that the Petitioner required the Joined Party to wear a smock bearing the Petitioner's name and determined the days and hours when the Joined Party would work in Findings of Fact #3, 8, and 9. In Conclusion of Law # 30, the Special Deputy further concluded that "the Petitioner controlled what work

was performed, where it was performed, when it was performed, and how it was performed." The record also reveals that the Special Deputy, unlike the trier of fact in *La Grande*, resolved conflicts in evidence in favor of the worker, the Joined Party. Competent substantial evidence in the record continues to support all of the Special Deputy's Findings of Fact. The Special Deputy's ultimate conclusion that the Petitioner exerted control over the Joined Party consistent with an employment relationship reflects a reasonable application of the law. Thus, the Department does not reject the Special Deputy's Findings of Fact or Conclusions of Law pursuant to section 120.57(1)(l) of the Florida Statutes. The Petitioner's exceptions are respectfully rejected.

The Petitioner also requests in its exceptions that the Department consider that the Respondent and the Joined Party did not file any proposed findings of fact or conclusions of law. Rule 60BB-2.035(19), Florida Administrative Code, allows parties 15 days after the close of testimony to submit written proposed findings of fact and conclusions of law. The rule does not require each party to submit proposed findings of fact or conclusions of law. Also, there is no requirement that a party submit counter proposed findings of fact or conclusions of law in response to another party's proposed findings of fact or conclusions of law. Accordingly, the Petitioner's exceptions are respectfully rejected.

The Petitioner further alleges that the Special Deputy failed to control the hearing. Section 120.57(1)(l), Florida Statutes, does not permit modification or rejection of the Special Deputy's Findings of Fact or Conclusions of Law unless the findings of fact are not supported by competent substantial evidence in the record, the proceedings on which the findings were based did not comply with the essential requirements of law, or the conclusions of law do not represent a reasonable application of the law to the facts. Rule 60BB-2.035(15)(b), Florida Administrative Code, requires that the special deputy prescribe the order of testimony and restrict the inquiry of each witness to the scope of the proceedings. Rule 60BB-2.035(15)(b), Florida Administrative Code, also requires that the special deputy preserve the right of each party to present relevant evidence, cross-examine opposing witnesses, impeach any witness, and rebut the evidence presented. A review of the record reflects that the Special Deputy complied with the requirements of rule 60BB-2.035(15)(b), Florida Administrative Code. A review of the record also reflects that the Special Deputy intervened on several occasions to control interruptions, address objections, and exclude irrelevant, repetitive or non-responsive testimony from both the Petitioner and the Joined Party. While the Special Deputy's efforts to control the hearing may not have satisfied the Petitioner's expectations, it is clear that the Special Deputy attempted to accommodate both the level of sophistication of the parties and the informal nature of the administrative hearing. A review of the record further reflects that the Special Deputy's Findings of Fact are supported by competent substantial

evidence in the record and the Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts. Since there has been no showing that the proceedings on which the findings were based did not comply with the essential requirements of law, the Department accepts both the Special Deputy's Findings of Fact and Conclusions of Law without modification in accord with section 120.57(1)(l), Florida Statutes. The Petitioner's exceptions that allege that the Special Deputy did not control the hearing are respectfully rejected.

Additionally, the Petitioner maintains that the Joined Party should not receive unemployment benefits due to misconduct. The Joined Party's job separation and the Joined Party's receipt of unemployment benefits are not at issue in this case; therefore, the Petitioner's exceptions are respectfully rejected.

The Petitioner cites again to *La Grande v. B&L Services, Inc.*, 432 So.2d 1364, 1366-67 (Fla. 1st DCA 1983), in support of its contention that the right to terminate is not conclusive of the issue of employment status. The Petitioner also refers to the cases cited in *La Grande* to support the same contention: *Cantor v. Cochran*, 184 So.2d 173 (Fla. 1966), *Jenkins v. Peddie*, 145 So.2d 729 (Fla. 1962), and *Lee v. Am. Family Life Assur. Co. of Columbus*, 431 So.2d 249 (Fla. 1st DCA 1983). In *La Grande*, *Cantor*, *Jenkins*, and *Lee*, the courts held that the right to terminate alone does not determine whether a worker is an employee and that other factors of the parties' relationship must also be considered. 432 So.2d at 1367; 184 So.2d at 174-75; 145 So.2d at 730; 431 So.2d at 251. In the absence of other compelling factors of control, the courts in *La Grande*, *Jenkins*, and *Lee* held that employment relationships did not exist between parties even when the businesses had the right to discharge the workers. 432 So.2d at 1368; 145 So.2d at 730; 431 So.2d at 251. In contrast, the court in *Cantor* held that the ability to terminate a worker without liability was a telling indicator of employment when significant factors of control were otherwise present in a working relationship. 184 So.2d at 174. A review of the record reveals that the Special Deputy found that the Petitioner had the right to terminate the Joined Party and that such a right was consistent with an employer/employee relationship in Findings of Fact #5 and 13 and Conclusion of Law #27. In the Recommended Order, the Special Deputy considered several factors of control and ultimately determined that these factors were not characteristic of an independent contractor relationship. Section 120.57(1)(l), Florida Statutes, requires that the Department accept all of the Findings of Fact and Conclusions of Law in this case because the findings of fact are supported by competent substantial evidence in the record and the conclusions of law reflect a reasonable application of the law to the facts. The Petitioner's remaining exceptions are rejected.

A review of the record reveals that the Findings of Fact are based on competent, substantial evidence and that the proceedings on which the findings were based complied with the essential requirements of the law. The Special Deputy's Findings of Fact are thus adopted in this order. The Special Deputy's Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted.

Having fully considered the record of this case, the Recommended Order of the Special Deputy, and the exceptions filed by the Petitioner, I hereby adopt the Findings of Fact and Conclusions of Law of the Special Deputy as set forth in the Recommended Order.

In consideration thereof, it is ORDERED that the determination dated October 25, 2010, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **January, 2012.**

_____
TOM CLENDENNING,
Director of Workforce Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2482329
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ATTN: TONIETTA G SCOTT
138 GIBSON ROAD
FORT WALTON BEACH FL 32547

PROTEST OF LIABILITY
DOCKET NO. 2010-162693L

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated October 25, 2010.

After due notice to the parties a consolidated hearing involving 2010-162693L and 2011-12721L was held on June 27, 2011. The Petitioner, represented by an authorized agent, appeared and testified. The Petitioner, a sole proprietor, testified as a witness. In regard to 2010-162693L the Respondent, represented by a Revenue Administrator II from the Department of Revenue, appeared and testified. In regard to 2011-12721L the Respondent, represented by a Tax Specialist II, appeared and testified. The Joined Party appeared and testified. The Joined Party's fiancé testified as a witness.

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

Findings of Fact:

1. The Petitioner, Tonietta Scott, is an individual who owned and operated a childcare center as a sole proprietor under the unregistered fictitious name of Little Blessing Christian Academy beginning during the latter part of 2008. The Petitioner closed the business in November 2010. Prior to operating Little Blessing Christian Academy the Petitioner operated a childcare center as a

sole proprietor under the registered fictitious name of Little Blessing Child Care Center beginning in 2002.

2. Tonietta Scott is not a church or nonprofit organization and has never applied for nor obtained any tax exemption as a nonprofit organization from any government agency. The businesses owned and operated by the Petitioner are not owned, operated, supported, or controlled by a church or a religious organization.

3. The Joined Party, Tanesia Mitchell, is an individual who applied for work with the Petitioner while she was employed elsewhere as a certified preschool teacher. The Petitioner informed the Joined Party that the hours of work were from 6 AM until 6 PM, Monday through Friday and that the rate of pay was $1,440 per month. The Joined Party accepted the offer of work and began work on or about March 1, 2009 as a preschool teacher. The Petitioner gave the Joined Party a key to the daycare center and informed the Joined Party that the Joined Party was responsible for opening and closing the daycare center each day. The Petitioner also told the Joined Party that the Joined Party would be the Petitioner's assistant and that she would be in charge of the daycare center during the Petitioner's absence. The Petitioner had two other preschool teachers in addition to the Joined Party.

4. On or about March 10, 2009, the Petitioner and the Joined Party entered into a written *Independent Contractor Agreement* which specifies that the Joined Party is responsible for payment of all income tax and social security tax payments. The Joined Party had never worked as an independent contractor and did not know what an independent contractor was. The Agreement was for the term of one year. The Joined Party signed the Agreement because she needed the job.

5. The *Independent Contractor Agreement* provides that the Petitioner will pay the Joined Party the gross sum of $1,440.00 per month and that the Petitioner will not withhold taxes from the pay. The Agreement provides that the Petitioner will reimburse the Joined Party for all reasonable and approved out-of-pocket expenses with the exception of the expenses of commuting to and from the Petitioner's daycare center. The Agreement requires the Joined Party to perform any and all services required or requested by the Petitioner. The Agreement provides that the Petitioner may immediately terminate the Joined Party without prior written notice if the Joined Party fails to comply with the Petitioner's written policies or the Petitioner's directives. The Agreement requires the Joined Party to conduct herself in a Christian manner at all times and to perform all duties requested by the Petitioner.

6. The Joined Party did not have an occupational license, did not have liability insurance, did not advertise her services as a daycare worker to the general public, and did not perform services for others. While engaged by the Petitioner the Joined Party performed services only for the Petitioner at the Petitioner's daycare center. Although the Joined Party signed the *Independent Contractor Agreement* the Joined Party always believed that she was the Petitioner's employee.

7. The Joined Party performed her assigned duties at the location of the Petitioner's business. The Petitioner provided all furnishings and equipment that were needed to perform the work. The Petitioner provided materials and supplies, such as toys and books, however, the Joined Party also chose to provide books and supplies for the children at her own expense. The Joined Party's expenses were approximately $20 to $30 per month, however, the Joined Party never requested reimbursement.

8. The Petitioner provided the Joined Party with a smock bearing the name of the Petitioner's daycare, Little Blessing Christian Academy. The Joined Party was required to wear the smock while working.

9. The Petitioner determined the days and hours of work. The Petitioner's daycare center was open from 6 AM until 6 PM and the Joined Party was required to work from open to close on most days. The Joined Party was required to request permission to take time off from work. If she was unable to work as scheduled she was required to notify the Petitioner. She was not allowed to come and go as she pleased. On some days the Petitioner told the Joined Party that the Joined Party could leave early because the parents had picked up most of the children and the Petitioner was able to take care of the remaining children by herself.

10. The Petitioner did not provide any training to the Joined Party, however, the Petitioner told the Joined Party different things to do with the children and told the Joined Party how to do those things. All of the Joined Party's activities were supervised by the Petitioner. The Joined Party was required to report to the Petitioner and to report any accidents or other incidents involving the children. The Joined Party was allowed to take the children outside on the grounds of the daycare center but she could not take them off the Petitioner's grounds without the Petitioner's permission. The Joined Party could not take the children on field trips or excursions without the Petitioner's permission.

11. The Joined Party was required to complete a timesheet showing the beginning and ending times each day. The Joined Party and the other daycare workers were required to sign in each morning and sign out at the end of each day.

12. The Petitioner paid the Joined Party $1,440 per month as per the Agreement until August 2009. No taxes were withheld from the pay and the Joined Party did not receive any fringe benefits. In August 2009 the Joined Party was absent from work for one day with the Petitioner's permission. Upon the Joined Party's return to work the Petitioner informed the Joined Party that the Petitioner could not afford to continue paying the Joined Party $1,440 per month and, as a result, the Petitioner reduced the Joined Party's pay by $200 per month. The Petitioner also reduced the Joined Party's pay by $84 for August because the Joined Party was absent for one day. The Joined Party continued working under the reduced pay plan because the Joined Party needed the job. At the end of 2009 the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

13. On March 10, 2010, the Petitioner extended the one year term of the *Independent Contractor Agreement.* On May 10, 2010, the Petitioner terminated the Joined Party.

14. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for 2009 to ensure compliance with the Florida Unemployment Compensation Law. The tax auditor concluded that the individuals performing services for the Petitioner as childcare workers, including preschool teachers, were the Petitioner's employees rather than independent contractors. The tax auditor also concluded that the Petitioner was not exempt from the Unemployment Compensation Law as a religious organization. As a result of the preliminary findings of the tax auditor the Petitioner reported the wages of the daycare workers, including the Joined Party, and paid tax on those wages for 2009.

15. The Joined Party filed a claim for unemployment compensation benefits effective September 5, 2010. On September 10, 2010, a *Wage Transcript and Determination* was issued to the Joined Party, however, the Determination only included wages for the second, third, and fourth quarters 2009. It did not include wages for the first quarter 2010. A *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine why the Joined Party had not received credit for the 2010 wages.

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employees. The determination reinstated the Petitioner's account effective January 1, 2010. The Petitioner filed a protest by letter dated October 29, 2010.

17. On October 25, 2010, the Department of Revenue issued a *Notice of Proposed Assessment* based on the audit conducted for the 2009 tax year. The Petitioner filed a protest by letter dated November 3, 2010.

Conclusions of Law:

18. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

19. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).

20. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987). 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 Agency 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 cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

25. The Petitioner's business was the operation of a daycare center. The work performed by the Joined Party and other individuals as daycare workers, including preschool teachers, was an integral and necessary part of the Petitioner's business. The Petitioner provided the place of work and all equipment, furnishings, materials, and supplies that were needed to perform the work. Although the Joined Party chose to purchase books and supplies for the benefit of the children, the Joined Party's purchases did not represent a significant investment in a business. The parents of the children at the daycare center paid the Petitioner for the daycare services rather than paying the Joined Party and the other teachers. The work performed by the preschool teachers and daycare workers was not separate and distinct from the Petitioner's business.

26. The Petitioner and the Joined Party entered into an *Independent Contractor Agreement* shortly after the Joined Party was hired. The Agreement states that the Joined Party is an independent contractor. The Agreement also requires the Joined Party to perform any and all services required by the Petitioner and requires the Joined Party to comply with all of the Petitioner's policies and directives. The Agreement establishes that the Petitioner had the right to control the manner in which the work was performed. It is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the agreement provides the employer with the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)

27. The Agreement provides that the Petitioner has the right to terminate the relationship immediately, without prior written notice. 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."

28. 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."

29. The Petitioner initially determined the rate of pay, $1,440 per month. The Joined Party was required to complete a timesheet showing the time that the Joined Party worked. In August 2009 the Petitioner deducted $84, the pay for one day, because the Joined Party was absent from work. The fact that a deduction was made for an absence reveals that the Petitioner paid the Joined Party by time worked rather than by production or by the job. Also, in August 2009 the Petitioner unilaterally reduced the Joined Party's pay by $200 per month. That fact reveals that the Petitioner was in control of the financial aspects of the relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation 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. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

30. The Petitioner controlled what work was performed, where it was performed, when it was performed, and how it was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

31. It is concluded that the Joined Party and other individuals performing services for the Petitioner are the Petitioner's employees.

32. The Petitioner argues that the Petitioner is exempt from the Unemployment Compensation Law because Little Blessing Christian Academy is a religious organization.

33. Section 443.1216(4)(a), Florida Statutes, provides that the employment subject to the Unemployment Compensation Law does not apply to service performed for a church or a convention or association of churches, and does not apply to services performed for an organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or a convention or association of churches.

34. The Petitioner is Tonietta Scott. Tonietta Scott is not a church. Little Blessing Christian Academy is a for-profit daycare center which was owned, operated, supervised, supported and controlled by Tonietta Scott. The primary purpose of Little Blessing Christian Academy was to provide daycare services for children. Thus, Tonietta Scott is not exempt from the Unemployment Compensation Law.

35. Section 443.1215, Florida States, 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.

36. The evidence reveals that the Petitioner has established liability for payment of unemployment compensation tax. Thus, the services performed by the Petitioner's common law employees, including the Joined Party, constitute insured employment.

Recommendation: It is recommended that the determination dated October 25, 2010, be AFFIRMED.

Respectfully submitted on August 29, 2011.

R. O. SMITH, Special Deputy
Office of Appeals