

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

PETITIONER:

Employer Account No. - 2473112
GEMSTARR MORTGAGE SERVICES INC
ATTEN URLINE MCLAUGHLIN
2331 NORTH STATE ROAD 7 STE 119
SUNRISE FL 33313-3748

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-135364L**

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 October 13, 2011, is MODIFIED. It is ORDERED that the portion of the determination holding that the services performed by the Petitioner by the Joined Party constitute insured employment is REVERSED. It is further ORDERED that the Petitioner's president is found to be the Petitioner's employee and that the Petitioner is liable for payment of unemployment compensation taxes retroactive to January 1, 2010.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

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



Altemese Smith,
Assistant Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Barnes

DEPUTY CLERK

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of April, 2012.

Shanendra Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

GEMSTARR MORTGAGE SERVICES INC
ATTEN URLINE MCLAUGHLIN
2331 NORTH STATE ROAD 7 STE 119
SUNRISE FL 33313-3748

ANN ROSS
17702 SOUTHWEST 35TH COURT
MIRAMAR FL 33029

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

GEMSTARR MORTGAGE SERVICES INC
1843 SW 132ND WAY
DAVIE FL 33325-5743

MAITLAND TAX
ATTN GORDON HERGET SUITE 160
2301 MAITLAND CENTER PARKWAY
MAITLAND FL 32751-4192

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2473112
GEMSTARR MORTGAGE SERVICES INC
ATTEN URLINE MCLAUGHLIN
2331 NORTH STATE ROAD 7 STE 119
SUNRISE FL 33313-3748

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-135364L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Interim Executive Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated October 13, 2011.

After due notice to the parties, a telephone hearing was held on February 7, 2012. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist, appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were received from the Petitioner.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which was formed in March 2002 to operate a mortgage company. The Petitioner's president has been active in the operation of the business since inception. The president is the administrator of the business and originates loans and supervises the workers. The president does not receive a regular salary. Instead, the president takes money out of the business at irregular intervals when the Petitioner receives payments for loans that have been closed.
2. The Petitioner has classified all of the workers who perform services for the Petitioner, including the Joined Party, as independent contractors.
3. The Joined Party, Ann Ross, began performing services for the Petitioner as a loan processor on or about August 2, 2010. At that time the Joined Party told the Petitioner that she had her own business, Ashtec Financial Services, through which she performed loan processing services. There was no written agreement or contract between the Petitioner and the Joined Party.
4. The Petitioner provided the Joined Party with office space and a computer so that the Joined Party could process loans from the Petitioner's location. The Petitioner's regular business hours are from 10 AM until 5:30 PM. The Joined Party was free to come and go as she pleased. The Petitioner downloaded software to the Joined Party's personal laptop computer so that the Joined Party could perform loan processing services from locations other than the Petitioner's office.
5. The Petitioner did not provide any training to the Joined Party and did not supervise the Joined Party. The Petitioner did not reimburse the Joined Party for any expenses which the Joined Party may have had.
6. The Joined Party was not restricted from providing loan processing services to other mortgage companies.
7. The Joined Party was not required to personally perform the work. The Joined Party could hire others to perform the work for her.
8. The verbal agreement between the Petitioner and the Joined Party was that the Petitioner would pay the Joined Party \$750 for each file that the Joined Party processed.
9. The Joined Party did not bill the Petitioner for the services which she performed. The Petitioner paid the processing fee to the Joined Party as soon as each loan closed. The Petitioner made the checks payable to Ashtec Financial Services. No taxes were withheld from the pay and the Petitioner did not provide any fringe benefits such as health insurance, paid vacations or paid holidays.
10. Either party could terminate the relationship at any time without incurring liability for breach of contract. The Joined Party last performed services for the Petitioner in December 2010.
11. Normally, the Petitioner's accountant prepares the 1099 forms which are provided to the contract workers. The Joined Party did not want to wait for the accountant to prepare her 1099 form and Petitioner's president agreed to prepare a 1099 form for the Joined Party. The Joined Party requested the president to show the recipient's name as Ann Ross rather than Ashtec Financial Services and the president complied with the Joined Party's request.
12. The Joined Party filed an initial claim for unemployment compensation benefits effective August 21, 2011. When the Joined Party did not receive credit for her earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.

13. During the course of the investigation the Department of Revenue provided a Form UCS-6061, *Independent Contractor Analysis*, to both the Joined Party and to the Petitioner. The Department of Revenue received the completed form from the Joined Party but did not receive any completed forms or information from the Petitioner.
14. On October 13, 2011, based solely on information received, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee rather than as an independent contractor. The determination also held that the Petitioner was liable for payment of unemployment compensation tax retroactive to August 6, 2010, based on active corporate officer activity. The Petitioner filed a timely protest.

Conclusions of Law:

15. The issue of 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.
16. 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).
17. 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.
18. 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.
19. 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.
20. 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.
 21. 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.
 22. The evidence presented in this case reveals that the Joined Party determined when the work was performed, where it was performed, and how it was performed. The Joined Party was paid by the job rather than by time worked and was responsible for her own expenses. No taxes were withheld from the pay and the Petitioner did not provide any fringe benefits that are normally associated with employment relationships. These facts point to an independent contractor relationship.
 23. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.
 24. The Joined Party did not participate in the hearing. The Form UCS-6061, *Independent Contractor Analysis* submitted to the Department of Revenue by the Joined Party was entered into evidence by the Department of Revenue. On that form the Joined Party wrote that she was in business for herself under the name of Ashtec Financial Services and that she performed services for the Petitioner as an independent contractor rather than an employee.
 25. Section 90.801(1)(c), Florida Statutes, defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Since the Joined Party did not testify or participate in the hearing the information contained in the *Independent Contractor Analysis* is hearsay.
 26. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes. The information contained in the *Independent Contractor Analysis* supplements and supports the competent evidence pointing to a conclusion that the Joined Party performed services for the Petitioner as an independent contractor.
 27. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.
 28. 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.

29. The Petitioner is a corporation. Thus, the Petitioner's president is a statutory employee of the Petitioner. The Petitioner's president has been active in the operation of the business since inception.
30. 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.
31. The evidence reveals that the Petitioner had at least one employee, the Petitioner's president, during twenty different calendar weeks during 2010. Thus, the Petitioner has established liability for payment of unemployment compensation taxes.
32. 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.
33. In Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9th Cir. 1990), the court determined that dividends paid by an S corporation to an officer of the corporation who performed services for the business, were wages subject to federal employment taxes, including federal unemployment compensation taxes. The court relied upon federal regulations which provide that the "form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment."
34. The Petitioner is a subchapter S corporation and the Petitioner's profits pass through the corporation to the Petitioner's president at the end of each tax year. The Petitioner's president testified that, although she did not receive a salary paid at regular intervals, she did receive income from the corporation which was paid from the Petitioner's profits following the loan closings. Those payments constitute wages subject to the Unemployment Compensation Law, as well as the profits of the corporation as reported on the Petitioner's Form 1120S, *U.S. Income Tax Return for an S Corporation*.

Recommendation: It is recommended that the determination dated October 13, 2011, be MODIFIED. It is recommended that the portion of the determination holding that the services performed for the Petitioner by the Joined Party constitute insured employment be REVERSED. It is recommended that the Petitioner's president be found to be the Petitioner's employee and that the Petitioner is liable for payment of unemployment compensation taxes retroactive to January 1, 2010.

Respectfully submitted on February 29, 2012.



R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

February 29, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party:

ANN ROSS
17702 SOUTHWEST 35TH COURT
MIRAMAR FL 33029

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

GEMSTARR MORTGAGE SERVICES INC
1843 SW 132ND WAY
DAVIE FL 33325-5743

MAITLAND TAX
ATTN GORDON HERGET SUITE 160
2301 MAITLAND CENTER PARKWAY
MAITLAND FL 32751-4192