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

PETITIONER:
Employer Account No. - 1297470
NATIONAL MARINE SUPPLIERS
2800 SW 2ND AVE
FORT LAUDERDALE FL 33315-3120

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

PROTEST OF LIABILITY
DOCKET NO. 2012-96338L

O R D E R

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated August 16, 2012, 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 _____ day of April, 2013.

Altemese Smith,
Bureau Chief,
Reemployment Assistance 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.

Shanedra Y. Barnes
DEPUTY CLERK

_____
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of April, 2013.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

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

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
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PROTEST OF LIABILITY
DOCKET NO. 2012-96338L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: SECRETARY,
Bureau Chief,
Reemployment Assistance 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 August 16, 2012.

After due notice to the parties, a telephone hearing was held on February 13, 2013. The Petitioner, represented by the Human Resource Manager, appeared and testified. The Petitioner's vice president testified as a witness. The Petitioner's Accounts Payable Supervisor testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation which provides supplies for yachts that are in excess of 100 feet in length.
2. In 2007 the Joined Party was a student with very limited employment experience. She applied for work with the Petitioner and was hired by the Petitioner on March 1, 2007. The Petitioner did not interview the Joined Party and did not tell her anything about what work she was hired to perform, her hours of work, or her rate of pay. She was merely told to go sit at a computer and start work. The Petitioner then taught the Joined Party how to operate the computer, told the Joined Party

what tasks to perform, and taught the Joined Party how to perform the tasks. The Joined Party's position was assistant accounts payable clerk and her duties included filing, matching invoices and sales orders, and entering data in the accounting database. All of the duties were clerical in nature and did not require any special knowledge or skill.

3. There was no written agreement or contract between the Petitioner and the Joined Party.

4. Initially, the Joined Party was scheduled to work approximately twenty hours per week. The Joined Party was required to provide the Petitioner with a copy of her school schedule so that the Petitioner would know what hours she was free to work for the Petitioner. The Petitioner determined that the Joined Party would be paid by the hour and determined the hourly rate of pay. The Joined Party was required to punch a time card and she was paid based on the time that she was at the Petitioner's office. Although the Joined Party was allowed to take a thirty minute lunch break she chose to eat at her desk. If the Joined Party had left her desk for lunch she would have been required to clock out and would not have been paid for the time that she was off the clock.

5. The Petitioner provided a desk, a computer, and all other office equipment and supplies that were needed to perform the work. The Joined Party did not provide any equipment or tools and did not have any expenses in connection with the work. The Petitioner provided the Joined Party with a company email address. The Joined Party did not have a key to the Petitioner's office and she was restricted to working only during the Petitioner's regular business hours. The Joined Party was not allowed to work unless there was a supervisor, or other person of authority, present.

6. The Joined Party was required to personally perform the work. She was not allowed to hire others to perform the work for her. The Joined Party was not allowed to work for a competitor and was not allowed to perform services for any other business.

7. If the Joined Party was unable to work on a scheduled work day she was required to notify the Petitioner that she was not able to work.

8. The Joined Party was required to attend mandatory staff meetings. The Joined Party also attended company Christmas parties, birthday parties, company barbeques, and other company functions.

9. The Petitioner paid the Joined Party on a bi-weekly basis. When the Joined Party received her paycheck she noticed that the Petitioner had not withheld payroll taxes. When the Joined Party asked why taxes were not withheld she was told that it was because that was the way that the owner wanted it.

10. If the Joined Party made an error that needed to be corrected the Petitioner either paid the Joined Party for the additional time to correct the error or paid another employee to correct the error.

11. The Joined Party was considered to be a satisfactory worker and no warnings or reprimands were issued to her. The Joined Party never requested a pay increase; however, the Petitioner increased the pay on several occasions because of the Joined Party's satisfactory performance.

12. After working for the Petitioner for two or three years the Joined Party began attending school on-line. Since she was not attending classes in person her work schedule was no longer restricted by her school schedule. At that point the Joined Party's work schedule became full time, forty or more hours per week. During the Joined Party's last three years of work when she worked full time the Petitioner paid her for holidays and for a one week vacation each year. The Joined Party did not receive fringe benefits that were provided to other employees such as health insurance or retirement benefits.

13. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

14. During the time that the Joined Party performed services for the Petitioner the Joined Party did not have any investment in a business, did not have a business or occupational license, did not have business liability insurance, did not advertise her services to the general public, and performed services only for the Petitioner. During all times the Joined Party believed that she was an employee of the Petitioner.

15. Either party could terminate the relationship at any time without incurring liability for breach of contract. On June 25, 2012, the Petitioner informed the Joined Party that she was terminated because she had forwarded an email on the company email system.

16. The Joined Party filed an initial claim for unemployment compensation benefits (now known as reemployment assistance benefits) effective June 24, 2012. Her filing on that date established a base period consisting of the 2011 calendar year. When the Joined Party did not receive credit for her earnings with the Petitioner for the base period a *Request for Reconsideration of Monetary Determination* was filed 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.

17. On August 16, 2012, the Department of Revenue issued a determination holding that the Joined Party was an employee of the Petitioner. Although the Joined Party began performing services for the Petitioner on March 1, 2007, the determination only addresses the period beginning July 1, 2007, due to the statute of limitations. The Petitioner filed a timely protest by letter dated August 24, 2012.

Conclusions of Law:

18. 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.

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 Department 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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

25. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

26. The Petitioner's business is to provide supplies for yachts. The Joined Party performed clerical services solely for the Petitioner at the Petitioner's place of business. The Petitioner provided everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work and was not at risk of suffering a financial loss from performing services. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.

27. The work performed by the Joined Party was simple office clerical work that did not require any special knowledge or skill. The Petitioner provided training. The Joined Party was supervised by the Petitioner. The Petitioner told the Joined Party what to do and how to do it. 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)

28. The Joined Party was paid by time worked rather than by the job or based on production. The Petitioner determined the method of pay and the rate of pay. The Petitioner controlled the hours of work because the Joined Party was restricted to working during the Petitioner's regular business hours when a supervisor or other person of authority was present. The Petitioner provided some fringe benefits, paid holidays and paid vacations. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

29. The Joined Party performed services exclusively for the Petitioner for a period in excess of five years. Either party could terminate the relationship at any time without incurring liability for breach of contract. The Joined Party was terminated by the Petitioner. These facts reveal the existence of an at-will relationship of relative permanence. 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."
30. 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.
31. The evidence presented in this case reveals that the Petitioner controlled what work was performed, where it was performed, when it was performed, by whom it was performed, and how it was performed. The Petitioner controlled the financial aspects of the relationship. Thus, 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 August 16, 2012, be AFFIRMED.

Respectfully submitted on March 11, 2013.

R. O. SMITH, Special Deputy
Office of Appeals

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

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de 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:
March 11, 2013

Copies mailed to:
Petitioner
Respondent
Joined Party

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MARGATE FL 33068

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