DEPAR MENT OF ECONOMIC OPPO. UNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:
Employer Account No. - 3171469
DAWNA BONE PSYD
1555 NW SAINT LUCIE WEST BLVD STE 201
PORT ST LUCIE FL 34986-1758

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

PROTEST OF LIABILITY
DOCKET NO. 0019 3444 40-01

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 August 6, 2013, is MODIFIED to reflect a retroactive date of liability of May 1, 2010. It is further ORDERED that the determination is AFFIRMED as modified.

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 12 day of **May, 2014**.

Magnus Hines,
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

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

Shanedra Y. Barnes
DEPUTY CLERK

5/16/14
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 16th day of May, 2014.

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

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

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PROTEST OF LIABILITY
DOCKET NO. 0019 3444 40-01
(2013-90955L)

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated August 6, 2013.

After due notice to the parties, a telephone hearing was held on November 14, 2013.
The Petitioner appeared; the Joined Party and another witness appeared; a Senior Tax Specialist appeared for the Respondent. No proposed findings of fact or conclusions of law were received. The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

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.

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

Findings of Fact:

1. The Petitioner is a sole proprietor, in practice as a psychologist since 2001. The Joined Party performed clerical services for the Petitioner starting in May 2010, and continuing to June 2, 2013. The Petitioner counsels clients in the Petitioner's office. Services to clients are generally paid through insurance. During the first several years of her practice, the Petitioner herself handled the clerical aspects of the practice, with occasional help from friends or family. The Petitioner did not have strict office hours. In May 2010 the Petitioner learned through a mutual friend that the Joined Party would be willing to help in the office.

2. The Petitioner met with the Joined Party and they agreed that the Joined Party would work in the Petitioner's office at $10 per hour to start. The work schedule would be flexible. The Joined Party would typically appear at the office location around 8:30 a.m., Monday through Friday; and she would typically work until about 2 p.m., at which time the Joined Party would leave the office and pick up her daughter from school. The Joined Party would rarely, if ever, return to the office after she had left.

3. The Joined Party was placed at a vacant desk in the reception area outside of the office that the Petitioner was renting. The desk and telephone that the Joined Party used belonged to the landlord. The computer that the Joined Party used belonged to the Petitioner. In November 2011, the Petitioner moved to an office suite. There was a reception area with a long desk or counter with individual offices adjoining that area. The door to the reception area was generally kept locked. When a client of the Petitioner would appear the Joined Party or the Petitioner would unlock the door. The Joined Party had a key to the office, so she could have worked there outside of ordinary business hours, if she had wanted to, but she did not work in the office after ordinary work hours.

4. The Petitioner was the only psychologist in the office suite, although a social worker/therapist had an office there briefly. The other offices were occupied by other professionals, including an insurance agent and attorneys. In the new office, the Joined Party would sit at the reception desk. The Petitioner paid an additional rent to allow the Joined Party to use the reception desk. The Joined Party used the computer and the telephone supplied by the Petitioner. There was no other receptionist. The Joined Party was not prohibited from providing services to the other professionals in the office suite or elsewhere, but she did not do so.

5. When the Joined Party would arrive at work she would check messages on the telephone, check the schedule for the day, and then work on submitting billing to the appropriate insurance companies. For billing to be done, the Petitioner would make notes in the client file or chart about when the client had been seen, and a designation of the condition for which the client had been seen. The designation of the condition followed the standard clinical psychological diagnoses set out in the DSM (Diagnostic and Statistical Manual of Mental Disorders). The Petitioner would give client charts to the Joined Party so that she could compile the billing. The Joined Party would fill out insurance forms with information identifying the client, the diagnosis/condition information, and the date and time of the visit. The Petitioner would sign the form and the Joined Party would submit it to the insurance company either electronically or by mail, as directed by the insurance company. Occasionally the Joined Party would have to call an insurance company if there was a problem with a claim.

6. Appointments of the Petitioner were controlled through the Petitioner's appointment book. Both the Petitioner and the Joined Party would make entries to schedule appointments. The Petitioner would note days or times when she was not available for appointments. The Joined Party would call clients to remind them of upcoming appointments. Generally the work of billing and contacting clients was done using the Petitioner's computer and telephone, but the Petitioner did not require the Joined Party to work exclusively with the Petitioner's equipment. The Joined Party could use her own cell phone if there was an interruption in the access to the communication service at the office.

7. The Joined Party would get her pay by advising the Petitioner of the number of work hours for the week. She would write the number of hours of work for the week on a sticky note, give it to the Petitioner, and the Petitioner would write a check and give it to the Joined Party a little later that day. The Joined Party would normally provide this information on a Thursday, but sometimes the Joined Party would ask early, on Wednesday, and sometimes the Joined Party would be willing to

wait until Friday. The check issued by the Petitioner was an ordinary personal check. The Petitioner would write "office manager" on the memo line, along with the time period for which the Joined Party was being paid. The Petitioner thought of the "office manager" designation as a courtesy title; a sign of respect. There was no other worker in the office that the Joined Party supervised.

8. At first the Joined Party was paid $10 per hour. This was increased to about $12 per hour in May 2011, and raised to $13.25 per hour in May 2012. The Petitioner did not deduct any amount for income tax or for Social Security or Medicare. The Petitioner supplied the Joined Party with a 1099 form showing the amount of payment for each year. The Petitioner paid the Joined Party $5,706 in 2010; $14,557 in 2011; and $9860 in 2012. The Joined Party was aware from the beginning that the Petitioner would not be deducting any amount for taxes.

9. In December 2010 the Joined Party spoke to the Petitioner about whether she would be treated as an employee or an independent contractor for tax purposes. The Joined Party said that she believed she was an employee. The Petitioner declined to change the way that she was paying the Joined Party. The Joined Party did not object further. When the Joined Party filed her income tax returns she made provisions to have the pay treated as wages.

10. The Joined Party filed a claim for benefits effective June 2, 2013. After an investigation, the Respondent issued a determination on August 6, 2013 finding, "*...the person(s) performing services as Office Manager are employees. This determination is retroactive to 01/01/2012....Your account is effective beginning 01/01/2012.*"

Conclusions of Law:

11. 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.

12. In Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 provides:
    a. 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.
    b. The following matters of fact, among others, are to be considered:
        i. the extent of control which, by the agreement, the business may exercise over the details of the work;
        ii. whether the one employed is in a distinct occupation or business;
        iii. 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;
        iv. the skill required in the particular occupation;
        v. whether the employer or worker supplies the instrumentalities, tools, and a place of work, for the person doing the work;
        vi. the length of time for which the person is employed;
        vii. the method of payment, whether by time or job;
        viii. whether or not the work is part of the regular business of the employer;
        ix. whether or not the parties believe they are creating the relation of master and servant;
            1. (j) whether the principal is or is not in business.

13. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

14. 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. The factors listed in Cantor v. Cochran are the common law factors that determine if a worker is an employee or an independent contractor. See, for example, Brayshaw v. Agency for Workforce Innovation, 58 So. 3d 301 (Fla. 1st DCA 2011).

15. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B. & L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983).

16. Section 443.1215(1), Florida Statutes, provides in pertinent part:
    a. Each of the following employing units is an employer subject to this chapter:
        i. An employing unit that:
        ii. 1.In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
        iii. 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 preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

17. Section 73B-10.035, Florida Administrative Code, provides:
    a. (7) Burden of Proof. The burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.

18. The Petitioner was in business, and the Joined Party's services were rendered as part of the operation of that business. The Joined Party's clerical activities allowed the Petitioner to devote more time to the aspects of the business that involved professional skill and judgment.

19. The Joined Party was not in a business of her own. Especially in the second office, the Joined Party could have established herself as an independent clerical service, but she did not. The Petitioner, rather than the Joined Party, paid for the space in the office that the Joined Party used. In addition to supplying the space in which the Joined Party worked, the Petitioner also provided the tools and equipment—telephone and computer—with which the Joined Party worked.

20. The association between Petitioner and the Joined Party was created without any definite duration, and it lasted for just over three years, a substantial length of time.

21. The Joined Party was paid by time, rather than, for example, being paid for each client insurance claim submitted.

22. The time that was paid for was for activity that required relatively little independent professional skill and judgment. The greater the degree of professional skill and judgment required to do a job the more likely it is that the activity will be classified as that of an independent contractor. See, Florida Gulf Coast Symphony, Inc. v. Dept. of Labor and Employment Security, 386 So.2d 259 (Fla. 2d DCA 1980).

23. There was no agreement between the parties as to the employment status of the Joined Party. To the extent that "office manager" might be considered a designation, it implies employment rather than independent status, since generally a manager is hired to make sure that the policies and procedures of a firm are properly implemented. On the other hand, the Petitioner never withheld taxes, and always provided a 1099 form setting out compensation for the year, rather than issuing a W-2. The documentation relating to the status of the Joined Party does not show an unambiguous pattern establishing the status of independent contractor.

24. The Petitioner believed that the Joined Party was an independent contractor, but the Joined Party believed otherwise. The Joined Party continued to provide services to the Petitioner in the same way, and under the same payment system, when it became clear that they did not agree about the Joined Party's status. That was not later than December 2010, according to the Joined Party's testimony—2 ½ years before the association ended. But simply continuing a mutually advantageous relationship doesn't imply agreement about all aspects of that relationship. In other words, the lack of continuing objection by the Joined Party doesn't imply agreement as to her status.

25. Because the Joined Party provided services to the Petitioner at the Petitioner's location, using the Petitioner's tools and equipment in the Petitioner's business; and because the services were performed over a long period of time, payment was by time rather than by the job, did not require a high degree of independent professional skill and judgment, and the Joined Party did not work for anybody else, the evidence implies that the Joined Party was an employee. The Petitioner may not have closely followed the interactions between the Joined Party and clients, but as noted in Farmer's and Merchant's Bank v. Vocelle, 106 So.2d 92,95(Fla.1st DCA 1958): "It is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and a servant," citing National Surety Corp. v. Windham, 74 So.2d 549 (Fla. 1954); See also, Harper ex rel. Daley v. Toler, 884 So.2d 1124,1131 (Fla. 2nd DCA 2004). By having control over all of the factors necessary to be used in the doing the job, the Petitioner also therefore had the right to control how the job was to be performed. The Petitioner has not carried the burden of proof on it of establishing that the Joined Party was an independent contractor.

26. The Joined Party began her work in May 2010, and she worked continuously, though part-time, until the association ended. The period from May 2010 to the end of the year encompasses more than 20 weeks, so the Joined Party worked in more than 20 weeks in 2010. Moreover, the parties agreed that the Petitioner paid the Joined Party $5,706 in 2010. Since the Joined Party started in the 2nd quarter of 2010, it necessarily follows that she was paid more than $1500 in at least one of the quarters of 2010. Since employment of the Joined Party began in May 2010, and the work was of such an extent that the Petitioner meets the requirements to be considered an employer for 2010, therefore the Petitioner's liability as an employer began when the Joined Party began work.

Recommendation: It is recommended that the determination dated August 6, 2013, finding that the person performing services as Office Manager was an employee, be AFFIRMED as to the status of the worker, but MODIFIED, to establish liability from the beginning of the Joined Party's employment, that is, as of May 1, 2010.

Respectfully submitted on January 2, 2014.

J. Jackson Houser, 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, Special Deputy Clerk

Date Mailed:
January 2, 2014

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