

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

**PETITIONER:**

Employer Account No. -1454419  
SOUTHERN PAINTING INC  
ATTN MIRIAM BOVES  
4440 NW105TH TERRACE  
CORAL SPRINGS FL 33065-2380

**PROTEST OF LIABILITY**  
**DOCKET NO. 0019 3454 13-01**

**RESPONDENT:**

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

**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 May 14, 2013, is MODIFIED. The portion of the determination holding Victor Perez to be an employee of the Petitioner during 2010 and 2011 is REVERSED. All other portions of the determination holding painters, painter helpers, salesmen, the bookkeeper, and corporate officers to be the Petitioner's employees are 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 13<sup>th</sup> day of **January, 2014**.



Altemese Smith  
Altemese Smith,  
Bureau Chief,  
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.

Shanendra Y. Barnes  
DEPUTY CLERK

1.14.14  
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 14<sup>th</sup> day of January, 2014.

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

By U.S. Mail:

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CORAL SPRINGS FL 33065-5096

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  
TALLAHASSEE FL 32399-4143

**PETITIONER:**

Employer Account No. - 1454419  
SOUTHERN PAINTING INC  
ATTN MIRIAM BOVES  
10172 NW 47TH ST  
SUNRISE FL 33351

**PROTEST OF LIABILITY  
DOCKET NO. 2013-57954L**

**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 May 14, 2013.

After due notice to the parties, a telephone hearing was held on September 5, 2013. The Petitioner was represented by its Certified Public Accountant. The Petitioner's bookkeeper, the Petitioner's president, and an estimator testified as witnesses. The Respondent was represented by a Department of Revenue Tax Specialist II. A Tax Auditor III 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 not received.

**Issue:**

Whether services performed for the Petitioner constitute insured employment, and if so, the effective date of the Petitioner's liability, pursuant to Sections 443.036(19), (21); 443.1216, 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 73B-10.025, Florida Administrative Code.

**Findings of Fact:**

1. The Petitioner, Southern Painting Inc., is a subchapter S corporation which operates a business as a painting contractor. The Petitioner's president is Gabriel Orden. Gabriel Orden is active in the operation of the business by, among other things, performing sales, managing the business, managing the business office, and supervising the painter supervisors. Charmaine Orden is also a corporate officer. Charmaine Orden was not active in the business during 2011.
2. The Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2011 tax year to ensure compliance with the Florida Unemployment Compensation Law, now known as the Florida Reemployment Assistance Program Law. The audit was performed by a Department of Revenue Tax Auditor at the Petitioner's place of business with both the Petitioner's president and the Petitioner's bookkeeper present. After completing the 2011 year audit, the audit was extended to the 2009 and 2010 tax years.
3. During previous years the Petitioner classified the unincorporated painters, painter helpers, salesmen, the bookkeeper, and the corporate officers who were active in the operation of the business, as employees. Due to a downturn in the economy the Petitioner attempted to reduce business expenses by reclassifying employees as independent contractors
4. The Tax Auditor discovered that some painters during 2009 were classified by the Petitioner as independent contractors and were issued 1099 forms by the Petitioner. If the 1099 form was issued to a corporation the Tax Auditor accepted that the corporation was an independent contractor. The Tax Auditor questioned the Petitioner's president concerning the terms and conditions under which the other painters and painter helpers performed services. There were no written contracts or agreements. The president stated that the Petitioner provided the paint, provided some of the tools and equipment, provided liability insurance, and exercised total control over the painters and painter helpers. The Tax Auditor reclassified the individual painters and painter helpers from independent contractors to employees.
5. For 2009 the Petitioner classified the bookkeeper and the salesmen as employees. The Petitioner reported the wages paid to the corporate officers who were both active in the business. For 2009 the Tax Auditor discovered payments made to URUSA, Inc., a corporation through which the president of URUSA, Inc., Victor Perez, provided estimating services. Victor Perez determined his own hours of work, determined the method and rate of pay, provided his own computer and software, and submitted an invoice to the Petitioner for his services performed through URUSA, Inc. The Tax Auditor classified URUSA, Inc. as an independent contractor.
6. The Tax Auditor discovered that the Petitioner had classified the salesman as an independent contractor for 2010 even though the salesman was classified as an employee during prior years. The salesman performed services at the Petitioner's office and used the Petitioner's equipment to perform the work. There was no written agreement or contract. The Tax Auditor reclassified the salesman from independent contractor to employee for 2010.
7. For 2010 the Petitioner classified painters and painter helpers as independent contractors even though some of the painters and painter helpers had been classified as employees during prior years. The Petitioner paid some of the painters and painter helpers as employees during the first part of 2010 and then reclassified those workers as independent contractors for the remainder of the year. The painters and painter helpers classified as independent contractors worked under the same terms and conditions as when the Petitioner classified them as employees. The Tax Auditor classified the painters and painter helpers as employees for the entire year.
8. The bookkeeper, who was classified as an employee prior to 2010, worked in the Petitioner's office full time and used the Petitioner's equipment, including the Petitioner's computer and accounting program software, was reclassified by the Petitioner as an independent contractor in the middle of 2010. During the first part of 2010 and during prior years the Petitioner paid the bookkeeper a salary. Midway during 2010 the Petitioner's president informed the bookkeeper that due to a change in company policy the bookkeeper's services were no longer needed as an

employee. The president took over some of the duties performed by the bookkeeper, such as management of the office, and notified the bookkeeper when to come into the office to perform the bookkeeping duties. The Petitioner paid the bookkeeper at a pay rate which was calculated by the president, \$23.10 per hour, based on the hourly equivalent of the former salary. The bookkeeper continued to perform the duties at the Petitioner's office using the Petitioner's equipment. The bookkeeper performed bookkeeping duties exclusively for the Petitioner. The Tax Auditor reclassified the bookkeeper as the Petitioner's employee for the entire year.

9. Victor Perez, who previously performed services as an estimator through his corporation, URUSA, Inc., dissolved the corporation during 2010. During 2010 Victor Perez performed services exclusively for the Petitioner as an estimator and was paid by the Petitioner as an individual. Victor Perez performed almost all of his services from the Petitioner's office using blue prints and drawings provided by the Petitioner. On a few occasions Victor Perez performed the estimates by visiting the job sites. Victor Perez used his personal laptop computer and software to prepare the estimates. After Victor Perez completed an estimate he would present the estimate to the Petitioner. The Petitioner would then decide whether to present the job estimate to the potential customer. Victor Perez determined the amount to charge the Petitioner for preparing the estimates. Victor Perez based his fees on an hourly amount, which varied from estimate to estimate based on the amount of money Victor Perez wanted to earn. Victor Perez notified the Petitioner of the amount that was due through invoices submitted by Victor Perez to the Petitioner. During 2010, the Petitioner paid Victor Perez \$25,800. The Tax Auditor reclassified Victor Perez as an employee for 2010.
10. For 2011 the Petitioner classified all individuals performing services for the Petitioner, including painters, painter helpers, the estimator, salesmen, the bookkeeper, and the Petitioner's president as independent contractors. The Tax Auditor reclassified the estimator, Victor Perez, as an employee. The Petitioner issued a 1099 form to Victor Perez in the amount of \$21,785 for 2011.
11. The Petitioner issued a 1099 form to the Petitioner's president showing payments made to Gabriel Orden in the amount of \$42,800. The Tax Auditor reclassified the Petitioner's president as an employee and determined the amount of wages paid to the Petitioner's president to be the amount shown on the 1099 form, \$42,800. The Tax Auditor also reclassified the painters, painter helpers, salesmen, and the bookkeeper as employees.
12. On May 14, 2013, the Department of Revenue mailed a *Notice of Proposed Assessment* to the Petitioner notifying the Petitioner of the results of the audit for 2009, 2010, and 2011. The Petitioner's Certified Public Accountant filed a timely written protest on May 31, 2013.

### Conclusions of Law:

13. The issue in this case, whether services performed for the Petitioner 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.
14. 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).
15. 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.

16. 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.
17. 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.
18. 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.
19. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> 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. 1<sup>st</sup> 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.
20. The Petitioner does not contest the portion of the determination holding that the painters and painter helpers are the Petitioner's employees during 2009, 2010, and 2011. The Petitioner acknowledges that the Petitioner incorrectly reclassified the painters and helpers as independent contractors, with one exception. The exception is a painter named Mario Cots. No competent evidence was presented to show that Mario Cots performed services under terms and conditions that differed from the terms and conditions under which all of the Petitioner's painters performed services. The evidence presented at the hearing establishes that the painters, including Mario Cots, and the painter helpers were the Petitioner's employees.
21. 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.

22. The Petitioner does not contest the portion of the determination holding that the Petitioner's president was the Petitioner's employee rather than an independent contractor. However, the Petitioner contends that the amount of compensation determined to be wages by the Tax Auditor is excessive. The Petitioner's president testified that he performs many duties for the corporation including managing the business, sales, and overseeing the work performed by the painter supervisors. \$42,800 per year for performing the president's duties, as described by the president, is a reasonable wage. Thus, it has not been shown that the amount determined to be the president's wage for 2011 was in error.
23. The Petitioner contends that the bookkeeper was correctly classified by the Petitioner as an independent contractor because the bookkeeper worked full time when she was classified as an employee and only part time when she was classified as an independent contractor. Whether a worker performs services full time or part time is not a factor that determines employment status. It is common knowledge that many employees work part time hours. The Petitioner's president testified that he terminated the bookkeeper's employment to reduce operating expenses. The Petitioner determined the bookkeeper's hourly rate of pay and notified the bookkeeper when to report for work. The bookkeeper testified that she was required to perform the work at the Petitioner's location, although she later testified in response to leading questions that she performed the work at the Petitioner's location for the convenience of the Petitioner. The bookkeeper also testified that she formed a limited liability company on an undetermined date. Although the bookkeeper may have formed a limited liability company it was not shown that she performed her services through the limited liability company during 2010 or 2011. The bookkeeper's earnings were paid by the Petitioner in the bookkeeper's name rather than paid to the limited liability company.
24. The evidence reveals that the salesmen performed their services at the Petitioner's place of business and used the Petitioner's equipment. The salesmen were reclassified by the Petitioner as independent contractors in order to reduce business expenses, such as payroll taxes. No competent evidence was presented to show that the salesmen were bona fide independent contractors.
25. The estimator, Victor Perez, performed services for the Petitioner during 2010 and prior years through a corporation, URUSA, Inc. During that time Victor Perez was an employee of URUSA, Inc. rather than an employee of the Petitioner. When URUSA, Inc. was dissolved Victor Perez continued to perform services for the Petitioner in the same manner that he performed services through the corporation. Victor Perez determined his own hours of work, determined the method and rate of pay, provided his own computer and software, and submitted an invoice to the Petitioner for his services. These facts reveal that Victor Perez performed estimating services for the Petitioner as a self employed sole proprietor rather than as an employee.
26. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error. It has been shown that the determination is in error in regard to the reclassification of \$25,800 for 2010 and of \$21,785 for 2011 as wages paid to Victor Perez. It has not been shown by a preponderance of the evidence that the reclassification of the other workers as employees was in error.

**Recommendation:** It is recommended that the determination dated May 14, 2013, be MODIFIED. It is recommended that the portion of the determination holding Victor Perez to be an employee of the Petitioner during 2010 and 2011 be REVERSED. It is recommended that all other portions of the determination holding painters, painter helpers, salesmen, the bookkeeper, and corporate officers to be the Petitioner's employees be AFFIRMED.

Respectfully submitted on October 1, 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 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:  
 October 1, 2013

Copies mailed to:  
Petitioner  
Respondent  
Joined Party

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