DEPAR. .IENT OF ECONOMIC OPPOI UNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:
Employer Account No. - 2406128
NATIONAL TRAINING SYSTEMS INC
13907 N DALE MABRY HWY STE 203
TAMPA FL 33618-2411

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

PROTEST OF LIABILITY
DOCKET NO. 0019 3454 32-01

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 March 29, 2013, is REVERSED.

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 19th day of **February, 2014**.

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.

Shanedra Y. Barnes
DEPUTY CLERK

2.19.14
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 19th day of February, 2014.

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

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PROTEST OF LIABILITY
DOCKET NO. 0019 3454 32-01
(2013-42817L)

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 March 29, 2013.

After due notice to the parties, a telephone hearing was held on October 30, 2013. The Petitioner appeared, represented by the company president, who testified, along with the director of customer relations; the Joined Party, Neil Gerard, did not appear; A Senior Tax Specialist appeared and testified 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 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.

Findings of Fact:

1. The Petitioner incorporated in its present form as of January 14, 2008; the business began initially in 1998. The Petitioner sells software and related services which customers can use to conduct their own online training. The selling is performed by salespersons that the Petitioner considers to be independent contractors.

2. The Joined Party was associated with the Petitioner as a salesperson from June 1, 2011 to October 31, 2011. The Petitioner presented the Joined Party with a "Contractor Agreement" under which the Joined Party was designated a "contractor". The agreement provided for the possibility of converting the Joined Party's status to "W-2 employee" if goals stated in the agreement were met.

3. The agreement referred to the Petitioner as "NTS" and included among its provisions:

> NTS will provide identity and marketing materials for Contractor's use, including web sites, Business Cards and Sales collateral materials. All services covered in this agreement will be performed by Neil Gerard. Contractor will be supervised by the NTS Director of Sales.
>
> ....
>
> Contractor will follow normal business hours and work primarily from our Carrollwood office.
>
> ....
>
> Contractor will initially be assigned to a "base" of current customers who will be expected to renew their Support/Upgrades (for license customers) or their Login & Go subscription annually or at some other frequency. These renewal transactions, along with renewals from customers sold by Contractor, will generate commission for Contractor.
>
> ....
>
> In addition, NTS will pay contractor a special monthly "ramp-up fee" of $2000 per month for the first 5 months of this agreement, for a total of $10,000. This payment will be paid near the end of each month of service. This payment will be made for all 5 months even if the transition to Reseller Manager has started, as described below.
>
> ....
>
> If total compensation is less than $80,000 in year one, Contractor will meet with the Director of Sales to examine performance and identify ways to generate higher revenue amounts.
>
> ....

4. The "Reseller Manager" position mentioned as a possibility was a sales position with a different focus than directly selling the training software. The Director of Sales was an employee who was supposed to be the person that salespersons could contact without having to bother the company president. The Petitioner had a Director of Sales for just a short time, but that included time in 2011. The "ramp-up fee" was not a draw against commission. Part of the "Contractor Agreement" consisted of a special section titled, "Non-Compete Non-Solicitation Agreement". The provisions in that section prohibited the contractor from contacting any customer of the Petitioner for one year from the termination of the agreement, and prohibited the contractor from revealing proprietary information of the Petitioner to others.

5. The agreement presented by the Petitioner was not signed by the Joined Party. The Petitioner has presented a similar agreement to all of its salespeople. There were at least two other salespeople working with the Petitioner in 2011, and there have been a similar number of salespeople at any point in time since then. Some of the salespeople who have worked with the Petitioner have also worked with the Petitioner's competitors, occasionally doing so simultaneously. The Petitioner has not terminated its relationship with any of those salespeople. Salespeople who do not make substantial sales generally quit, or just stop contacting the Petitioner.

6. The Joined Party was provided with business cards, some stationery with the Petitioner's letterhead, and with sales brochures that could be sent to potential customers. The Petitioner's office was open in the morning and the afternoon. The Petitioner does not maintain strict hours of opening and closing. The Joined Party was not given a key to the office. The Petitioner reserves space in its office for use by salespeople, along with a telephone and a computer. Salespeople are not required to use this equipment. The Joined Party rarely appeared in the Petitioner's facility.

7. When an initial sale or a renewal was made, the customer would send payment directly to the Petitioner by check or by wire transfer. The Joined Party made few, if any, original sales. The Petitioner paid the Joined Party $29,941.00 in 2011, which would have come from the ramp-up fee and from renewal commissions. The amount was set out in the "Nonemployee compensation" box on a 1099-MISC form sent to the Joined Party. No taxes were withheld or deducted from payments to the Joined Party. Some salespeople operate under a business name, and the Petitioner pays the business in those cases rather than the salesperson personally. The Joined Party operated under his own name.

8. In the summer of 2011 the Joined Party demonstrated a sales call to the president of the Petitioner. The president thought that the presentation was weak. The president did not suggest any change in the presentation. The company president did not review any actual sales call that the Joined Party might have made.

9. The Joined Party filed a claim for reemployment assistance benefits effective December 2, 2012. After an investigation, the Florida Department of Revenue issued a determination on March 29, 2013 finding, "*...the person(s) performing services as a Salesman, was an employee. This determination is retroactive to 06/01/2011.*"

Conclusions of Law:

10. 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.

11. 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:
    (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 the one employed is 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 worker supplies the instrumentalities, tools, and a 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 time or job;
        (h) whether or not the work is 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.

12. 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.

13. 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).

14. 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).

15. In Keith v. News and Sun-Sentinel Co., 667 So.2d 167, 171 (Fla. 1995) the Florida Supreme Court stated:

> Hence, courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status. In the event that there is no express agreement and the intent of the parties cannot otherwise be determined, courts must resort to a fact-specific analysis under the Restatement based on the actual practice of the parties. Further, where other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control.

16. Section 73B-10.035, Florida Administrative Code, provides:

> (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.

17. Case law establishes that the Joined Party in this case was an independent contractor, as were other similarly situated salespeople. Some of the relevant factors tend to point toward a finding of employment: the Petitioner was in business, and the Joined Party's sales efforts, whatever they may have been, were part of the ordinary work of the Petitioner; the Petitioner allowed the use of some of its space and communication equipment in connection with making sales, and the Petitioner provided the Joined Party with some identifying materials; but more important than those factors was that the Petitioner did not direct or control the specific selling methods that the Joined Party could use.

18. The evidence shows that the Petitioner has consistently stated that the Joined Party was an independent contractor, and it has not been shown that the Joined Party believed otherwise, since there was no evidence from the Joined Party. Salespeople could perform their services for the Petitioner as self-employed workers, though the Joined Party did not set up his own business. The testimony in the hearing establishes that the Joined Party could have, but mostly did not, perform services at the Petitioner's premises during the period of time the Joined Party was associated with the Petitioner.

19. The Petitioner supplied certain materials to the Joined Party, including business cards; but such materials do not show that the Petitioner thereby controlled any sales presentation. The materials had an identification function, establishing the Joined Party's association with the Petitioner, but not establishing that the Petitioner controlled any activity of the Joined Party. See, e.g., VIP Tours of Orlando, Inc. v. Florida Dept. of Labor and Employment Security, 449 So.2d 1307, 1310 (Fla. 5th DCA 1984) (tour guides held to be independent contractors in spite of wearing company

uniform and working on company bus: the content of the tour guides' presentation was not controlled by the company.)

20. In the 1980's several cases ruled on the status of workers in situations similar to the situation in the current case. Among these decisions are Cosmo Personnel Agency of Fort Lauderdale, Inc. v. Florida Dept. of Labor and Employment Security, 407 So.2d 240 (Fla. 4th DCA 1981); United States Telephone Co. v. Fla. Dept. of Labor and Employment Security, 410 So.2d 1002 (Fla. 3rd DCA 1982); Sarasota County Chamber of Commerce v. Fla. Dept. of Labor and Employment Security, 463 So.2d 461 (Fla. 2nd DCA 1985); and Delco Industries, Inc. v. Fla. Dept. of Labor and Employment Security, 519 So. 2d 1109 (Fla. 4th DCA 1988). In each of the cases, the worker was found to be an independent contractor. In each of those cases, the company made available office space and office equipment so workers could engage in sales activity over the telephone. Some of the companies provided extensive training, others did not. In some of the cases there was a written contract, in others there was not. In some of the cases some monitoring of the sales activity was performed by the company, in others there was not. In Cosmo Personnel Agency the employment counselors paid for the office services, in the other cases the sales people did not. An employment counselor is not exactly a sales position, but insofar as the activity involves recruiting potential workers for referral to clients and in convincing clients that the referred worker is acceptable, the position involves sales activity or something very much like it, so it is relevant for the current case. The key in all of the cases, however, is that the company did not direct and control the workers as to how they interacted with potential customers, and the company was simply interested in the profits generated by the activity of the workers.

21. In the current case, it has not been established that there was a written contract. There was opportunity for the Petitioner to have submitted a signed copy of the "Contractor Agreement," if there was one; the Respondent requested a signed copy as part of its investigation; and the lack of a signed copy was mentioned in one of the documents of the Respondent that were sent to the Petitioner before the hearing; but the only actual document submitted was a copy prepared for the Joined Party but lacking any signatures. The president of the Petitioner believed that the Petitioner had a copy of the signed agreement, but was not sure. Consequently, it has not been proven that the Joined Party did actually sign and thereby demonstrate his consent to the agreement. But as the cases mentioned above demonstrate, the lack of a written contract does not necessarily mean that the worker was an employee.

22. However, information from the agreement is not irrelevant: it can function as an admission by the Petitioner as to certain facts, as can the answers of the president on the Independent Contractor Analysis questionnaire submitted by the Petitioner as part of the investigation leading to the determination. In those documents are some indications of control: a supervisor is designated, and on the Independent Contractor Analysis questionnaire the president marked "Yes" to questions about whether the employing unit gave the worker instructions about when to do the work, how to do the work, and the sequence in which the work was done. Yet even these admissions do not establish that the Petitioner had the right to direct and control the Joined Party in the details of his presentation. The content of the instructions has not been established. None of the witnesses who testified in the hearing gave instructions to the Joined Party, or heard any being given. Indeed, telling a sales person that he could engage in sales activity any time, any way he desired, so long as the customer sent in a check to the company for the price of the software afterward, would, in some sense, be a set of instructions about when, how, and in what order the work was to be done. But there is another person who could have given instructions: the Director of Sales, who was designated a supervisor. Supervision of a worker implies control; mere monitoring of a worker does not. See, Delco Industries, at 1111. Still, any testimony about what, if anything, the Sales Manager did with or said to the Joined Party is speculative. Consequently, the admissions of the Petitioner in the documents are suggestive, but not determinative. A speculative admission is more

useful than a speculative denial, but not much. The admissions do not outweigh the testimony of the Petitioner's witnesses at the hearing, which was subject to cross-examination by the Respondent.

23. The Joined Party was paid the ramp-up fee, which could be considered a payment for time; but the Joined Party was not paid only by time. Some of the Joined Party's compensation would have been commission, and even the ramp up fee was supposed to be a temporary approximate replacement for the amount of foregone commission. But the ramp up fee need not be considered to be just a time payment. It can be viewed as a sort of retainer or signing bonus, a payment made to induce a person to associate himself with an organization, in hopes that such association will be mutually productive. The payment of a ramp-up fee does not establish such control over the Joined Party's methods of work as to show that he was an employee.

24. In summary, so far as the evidence goes, the parties believed that the Joined Party was an independent contractor, and the Joined Party was not subject to control about the details of how he attempted to sell the Petitioner's products. The relevant case law and the most important of the factors noted above in Cantor v. Cochran show that in this case the Joined Party was an independent contractor.

Recommendation: It is recommended that the determination dated March 29, 2013, finding the Joined Party to be an employee when providing services to the Petitioner as a salesperson, be REVERSED.
Respectfully submitted on December 31, 2013.

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

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
January 2, 2014

Copies mailed to:
Petitioner
Respondent
Joined Party

Joined Party:
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