DEPA .TMENT OF ECONOMIC OPF .RTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:
Employer Account No. -3105858
ATLANTIS GROUP AGENCY INC
8131 VINELAND AVE STE 325
ORLANDO FL 32821-6847

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

PROTEST OF LIABILITY
DOCKET NO. 0019 3463 19-01

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 June 10, 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 25th day of **March, 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

3-26-14
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 26th day of March, 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 3463 19-01
(2013-68114I)

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 June 10, 2013, which found that the person or persons performing services as housekeeping were employees, retroactive to January 9, 2012, and reinstating the Reemployment Assistance Tax account effective January 1, 2012. The determination also noted that corporate officers' wages are also reportable.

After due notice to the parties, a telephone hearing was held on December 5, 2013. The company president appeared for the Petitioner; the Joined Party appeared; and 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 and other individuals constitute employment pursuant to §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 incorporated in July 2011. Since its beginning and through the hearing date it has had a single officer, the company president. The company president manages the corporation. The Petitioner supplies cleaners to hotels in the Orlando area to supplement the cleaning staff employed by the hotel. Some assignments are for just a day, and some assignments may last years. The Petitioner regards all of the cleaners as independent contractors.

2. The Joined Party began providing services to the Petitioner on January 10, 2012. The Joined Party had previously worked in the engineering department of a hotel in the Orlando area. When he lost that position, he applied for work with another hotel at the suggestion of a friend who worked there. The hotel referred the Joined Party to the Petitioner. The Petitioner supplies a number of workers to the hotel, the Hilton Grand Vacation Club.

3. The company president presented the Joined Party with a W-9 form, *Request for Taxpayer Identification Number and Certification*, which the Joined Party completed with his Social Security number. The company president told the Joined Party that he would be working as an independent contractor and not as an employee. No taxes would be withheld from the Joined Party's pay. The pay would be $8 per hour. The Joined Party advised that he knew what an independent contractor was and he would pay his own taxes.

4. The Joined Party worked as a building houseman at the hotel starting on or about January 10, 2012. The Joined Party provided janitorial services inside the hotel building. The hotel supplied the gloves, broom, dustpan, cleaning chemicals, and whatever other tools and supplies were needed for the Joined Party to be able to perform his work. The hotel required the Joined Party to wear a white shirt, khaki pants, and special shoes, all of which the Joined Party supplied on his own. Duties were assigned on a duty sheet each day issued by the hotel. The work of the Joined Party was inspected by other employees of the hotel. Sometimes the inspection work was performed by a worker who was associated with the Petitioner. The Joined Party was not given extra pay for work that had to be redone.

5. The Joined Party was injured on the job in early 2012, when his finger was cut while working with a trash compactor. The Joined Party reported the injury to the hotel, which referred the Joined Party to the Petitioner. The Petitioner's president took the Joined Party to a clinic where the cut was treated. The president paid for the treatment. The Joined Party did not reimburse the Petitioner or the president for the medical treatment. The president declined to seek reimbursement. In the course of some research online the president read that a contractor is liable for the medical bills of a subcontractor whose medical insurance has lapsed.

6. The Joined Party would record his arrival and departure from the hotel by means of an identification card containing a bar code laminated in clear plastic. The Joined Party would run the card through a special card reader when he arrived in the morning, and he would do the same as he was leaving in the evening. The bar code reader was used by workers at the hotel who were not employees of the hotel. Employees of the hotel clocked in and out with a different device, one that relied on a fingerprint scan. The bar code reader did not belong to the Petitioner. The company president was informed that the bar code reader was placed by a third party under a contract with the hotel. The hours between swipes of the identification card were tabulated by the hotel and sent to the Petitioner. The Petitioner paid the Joined Party according to the hours stated by the hotel, multiplied by the $8 per hour rate. The Petitioner did not independently verify whether the Joined Party had actually worked the stated hours. When the Joined Party exceeded 40 hours of work in a week, the additional hours were paid as "bonus hours"—$12 per hour.

7. The Joined Party typically, but not always, worked about 40 hours per week, from about 8 a.m. to about 4:30 p.m., five days per week. The hotel would post a work schedule that would show which days the Joined Party should work. The five days of work and two days off varied from week to week. If the Joined Party needed some time off, he would request the director of housekeeping, a hotel employee, not to schedule him for that period of time.

8. On May 2, 2012, a referee's decision was issued in Docket Number 2012-16648U Medina. The referee ruled that the claimant in that case, Wendy Medina, had worked as an employee of the Petitioner and of a related company, Atlantis Group Enterprises, Inc. The company president of the Petitioner is also president of Atlantis Group Enterprises, Inc. The claimant Medina provided cleaning services to hotels. The money paid by the Petitioner and the related company to Medina was ruled to be wages and wage credits were awarded to her.

9. The president of the Petitioner contacted the Florida Department of Revenue after the referee's decision and paid the amount that a Department of Revenue representative said was due at that time for reemployment assistance taxes.

10. On May 16, 2012, the president of the Petitioner presented all of the workers associated with the Petitioner a nine page *Independent Contractor Agreement*. Other workers at the hotel requested the Joined Party to translate the agreement, since he could speak and read both English and Spanish, but the Joined Party declined to do so. A person associated with the Petitioner, a woman who would often deliver the weekly pay, suggested that it was unnecessary to read the agreement. The Joined Party did not read the agreement. The Joined Party signed. Other workers did not sign.

11. The Independent Contractor Agreement stated expressly that the Joined Party (designated "the Contractor") was an independent contractor and not an employee. The agreement contained provisions, among others, stating that the Petitioner (designated "AGA") could specify only the results to be obtained, and not the methods of obtaining those results; that the Petitioner would not withhold taxes; that the Petitioner would not provide any fringe benefits; that the Petitioner would not be responsible for the expenses of the Joined Party; that the Joined Party would be solely liable for any damages caused by the Joined Party; and that the Joined Party would be responsible for any "vehicles, equipment, tools and supplies" needed to do the job. The agreement provided for a required notice of termination—24 hours by the Petitioner and 30 days by the Joined Party, with the Joined Party remaining liable for the performance of services during the notice period. The agreement included provisions prohibiting the Joined Party from working for a competitor without the Petitioner's permission, and extending that prohibition for 36 months after termination of the relationship, within 100 miles of the Petitioner's location. The agreement prohibited the Joined Party from assigning the agreement without consent of the Petitioner, but allowed the Petitioner to assign the agreement.

12. After the agreement was signed the Joined Party continued to perform his work as he had before. There was no change in any of the practices on the job or in the dealings of the Petitioner with the Joined Party.

13. In late October 2012 the hotel complained to the Petitioner about an argument between the Joined Party and another worker at the hotel. The hotel declined to schedule the Joined Party for any more work on its premises.

14. In late December 2012 the Joined Party agreed to work at another hotel, the Hilton Tuscany, which is associated with the Hilton Grand Vacation Club. The Joined Party worked for approximately four hours, until the Petitioner advised the Joined Party that the Hilton Tuscany did not wish to have the Joined Party on its premises, given the circumstances under which the Joined Party's services had ended with the Hilton Grand Vacation Club.

15. The Petitioner suggested other work to the Joined Party, but the Joined Party did not accept. The Joined Party filed a claim for benefits effective April 7, 2013, which led to the investigation by the Florida Department of Revenue that resulted in the determination of June 10, 2013, mentioned above.

16. Conclusions of Law:

17. 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.

18. 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.

19. 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.

20. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties. 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).

21. 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).

22. 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.

23. 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.

24. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:

(1)(a) The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:

1. An officer of a corporation.
2. An individual who, under the usual common-law rules applicable in determining the employer-employee relationship, is an employee.

25. Section 443.1215(1), Florida Statutes, provides in pertinent part:

(1) Each of the following employing units is an employer subject to this chapter:

(a) An employing unit that:

1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

26. The Joined Party provided cleaning services to the Petitioner's clients, but the Petitioner did not exercise control over the methods that the Joined Party was to use to perform those services. The Petitioner did not set the schedule for the Joined Party, and did not supply tools or supplies to the Joined Party.

27. Persons associated with the Petitioner did occasionally review the work of the Joined Party, but even if this is considered an instance of the Petitioner reviewing the Joined Party's work, that sort of quality control check is not inconsistent with the status of independent contractor. In 4139 Management Inc. v. Dept. of Labor and Employment Security, 763 So.2d 514 (Fla. 5th DCA 2000) it was found that condominium cleaners were independent contractors, notwithstanding that the employing unit conducted regular quality control inspections. The inspections in that case were more systematic than any inspections by the Petitioner in the current case. The cleaners in 4139 Management had more flexibility in choosing particular cleaning assignments than the Joined Party in the current case, but the greater demand on the Joined Party in the current case came from the hotel, not the Petitioner.

28. Moreover, there was a written agreement that designated the Joined Party as an independent contractor. The agreement was not in place at the beginning of the time that the Joined Party was providing services, but it is undisputed that the working arrangement was the same after the written agreement as it was before. This implies that the written agreement was simply a formal confirmation of the Joined Party's status, rather than something that imposed a change.

29. The company president paid for medical treatment of an injury that the Joined Party received on the job, but this does not establish that either the Petitioner, or the company president personally, was legally required to provide such treatment. When the Joined Party was injured, he requested assistance from the client, the hotel, rather than the Petitioner. The Joined Party was not acting as if he believed that the Petitioner was obligated to provide workers' compensation benefits, as most employers are required to do. The testimony of the company president shows that he intended to get reimbursement from the Joined Party for the medical bill, until he read something that raised doubts. It is not clear, however, whether what the company president read actually applies to the situation in the current case.

30. The Joined Party, and other similarly situated housekeepers, were not employees but instead were independent contractors, so the Petitioner should not be liable for paying reemployment assistance taxes on money paid to them. The case noted above, 2012-16648U Medina, has become final, so the current case would not change that.

Recommendation: It is recommended that the determination dated June 10, 2013, finding that persons performing services as housekeeping were employees, should be REVERSED.
Respectfully submitted on January 7, 2014.

J. Jackson Houser

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 7, 2014

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