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

PETITIONER:
Employer Account No. - 2990429
COMMITTEE ON ARRANGEMENTS OF 2012 RNC
310 1ST ST SE
WASHINGTON DC 20003-1885

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

PROTEST OF LIABILITY
DOCKET NO. 0021 4121 51-02

ORDER

This matter comes before me for final Department Order.

The issue before me is whether services performed for the Petitioner by the Joined Party constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

With respect to the recommended order, section 120.57(1)(l), Florida Statutes, provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Exceptions to the Recommended Order were not received from any party.

Upon review of the entire record, it was determined that the Special Deputy's *Recommendation* on the fifth page of the Recommended Order must be modified because it lists an incorrect determination date. The record reflects that the determination at issue has a mailing date of October 14, 2013. Accordingly, the paragraph is amended as follows:

> **Recommendation:** It is recommended that the determination dated October 14, 2013, finding that the Joined Party to be an employee, be REVERSED.

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 modified herein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated October 14, 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 22nd day of **August, 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**

8.26.14
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 August, 2014.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
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By U.S. Mail:

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

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PETITIONER:
Employer Account No. - 2990429
COMMITTEE ON ARRANGEMENTS OF 2012 RNC
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WASHINGTON DC 20001-4611

PROTEST OF LIABILITY
DOCKET NO. 0021 4121 51-02

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager,
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 October 14, 2013.

After due notice to the parties, a telephone hearing was held on June 9, 2014. Three witnesses appeared for the Petitioner, which was represented in the hearing by counsel. The Joined Party appeared. A Senior Tax Specialist appeared for the Respondent. The Petitioner submitted proposed findings of fact and conclusions of law. 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 employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner was formed (as its name implies) to make arrangements for the 2012 Republican Party National Convention, held in Tampa, Florida, which was to nominate the party's candidate for President of the United States. The Petitioner registered as an employer with the Florida Department of Revenue in 2010.

2. The Petitioner has workers that it considers employees, and it has some workers that it considers independent contractors. The employees are eligible to receive medical benefits. The Petitioner withholds taxes from the semi-monthly wages of those workers. The Petitioner issues a W-2 form to those workers.

3. The Petitioner does not provide medical insurance to those workers it considers independent contractors. The Petitioner does not deduct anything for taxes from the pay issued to those it considers independent contractors. The Petitioner has a standard agreement that it uses when it associates with workers that it considers independent contractors.

4. The Joined Party signed a standard agreement with the Petitioner on May 7, 2012. She began work on May 14, 2012. The agreement designated the Joined Party as an independent contractor. The term was used many times throughout the agreement, printed in all capital letters each time it was used to refer to the Joined Party. The agreement provided, among other things, that the Joined Party would provide "online community management services;" that she would be paid $4000 per month, or a pro-rated portion of that amount if she worked less than a full month; that the Joined Party would present an invoice for payment; that the Joined Party was responsible for any taxes; and that the Petitioner's insurance did not cover the Joined Party. The agreement was extended by an addendum dated August 16, 2012.

5. The Joined Party submitted invoices to the Petitioner on a monthly basis. The Joined Party had some trouble with this requirement at first. She had never worked as an independent contractor. She received an initial payment of $2322, and then four payments of $4000 pursuant to invoices, paid on June 29, 2012, July 31, 2012, August 31, 2012, and September 4, 2012. No taxes were withheld or deducted. The Petitioner issued a 1099-MISC for 2012 to the Joined Party showing payment of $18,322.72, which was entered in the "Nonemployee Compensation" box on the form.

6. The Petitioner had taken over an entire floor of an office building in downtown Tampa, Florida near the convention center where the 2012 Republican Convention was being held. The claimant worked in an office there. The claimant would typically work in the office from 8:30 a.m. or 9 a.m. until about 5 p.m., at which time she would leave to pick up her son from school. The claimant was issued an ID pass or badge that was necessary to open doors to enter the building. A laptop computer was issued to the claimant. She was advised to use that device in her work and no other, to avoid security problems that might arise from using unauthorized devices. The claimant was one of four similar workers.

7. The Petitioner hired a digital marketing firm to set up a "Convention Without Walls" to promote the convention with online content. The Joined Party was hired to be part of that activity. The Joined Party posted content on Facebook and Twitter accounts that were set up as part of the "Convention Without Walls." A representative of the digital marketing firm and another worker associated with the Petitioner would suggest content for the claimant to post. The Joined Party regarded those other workers as supervisors. They were independent contractors. The content suggestions included subjects about which the Joined Party could publish, and sometimes there were suggestions about what wording could be used. Sometimes a sample post was presented to the Joined Party.

8. The Joined Party was required to keep track of the interactions on the social media accounts: postings to Facebook or messages on Twitter, and whether anyone became a Facebook friend or Twitter follower. The Joined Party would engage in this activity when she was in the office, and she would continue the activity outside of the office, working on the laptop computer she had been issued. The workers that the Joined Party regarded as supervisors expressed a desire from time to time that the Joined Party engage in greater activity and attempt to get more people to associate themselves with the social media accounts.

9. The 2012 Republican Party National Convention was officially open from August 27, 2012 to August 30, 2012. The Joined Party's work for the Petitioner ended on August 31, 2012.

10. The Joined Party filed a claim for reemployment assistance benefits effective August 11, 2013. The Florida Department of Revenue issued a determination on October 14, 2013 finding the Joined Party to be an employee. The Petitioner filed an appeal on October 31, 2013.

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:
    (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.

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. 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.

17. 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.

18. The Joined Party and the Petitioner had a written contract which expressly and repeatedly designated the Joined Party as an independent contractor. The Joined Party was treated as an independent contractor for tax purposes. Notwithstanding this, the Joined Party considered herself to be an employee subject to the control of supervisors.

19. The Joined Party's belief was not unreasonable, since she regularly worked on the premises of the Petitioner, using the tools of the Petitioner to promote the Petitioner's objectives, with people she regarded as supervisors.

20. However, even these indicia of employment do not compel an inference that the Joined Party was an employee. Workers who communicate for a living have been found to be independent contractors even though they work on the principal's premises, using the principal's tools to further the principal's business. See, for example, Cosmo Personnel v. Dept. of Labor and Employment Security, 407 So.2d 249 (Fla. 4th DCA 1981) (employment counselors); Sarasota County Chamber of Commerce v. Dept. of Labor and Employment Security, 463 So.2d 461 (Fla. 2nd DCA 1985) (membership salespersons given office space and telephones for prospecting, though sales took place off premises); Delco Industries, Inc. v. Dept. of Labor and Employment Security, 519 So.2d 1109 (Fla. 4th DCA 1988) (telephone solicitors). In the cases cited, the worker controlled the specific sales pitch and was determined to be an independent contractor. The Joined Party in the current case received suggestions about what she should post, but the evidence does not show that she was required to use any suggestion verbatim or that she was required to use only content suggested by those workers she considered supervisors. So the Joined Party was in a similar situation to the sales people in the cases cited above as to the manner of communicating. But the analogy is not exact because the workers in the cases cited were paid by commission: their compensation depended on their persuasive skills. Joined Party's compensation was different.

21. The pay for the Joined Party was calculated on a per month basis. So the claimant was in some sense paid by time. But the significance of pay by the hour or by the day is that the principal can better control the diligence by which the worker works. However, pay by the month gave the Joined Party more control over when (and where) she worked than would have been the case if the pay had been by the hour. The focus could be more on whether the Joined Party delivered satisfactory results over a reasonable evaluation period than over whether the Joined Party displayed suitable diligence during certain designated periods of the day. This aspect of the relationship is as consistent with independence as it is with employment.

22. The persons that the Joined Party regarded as supervisors were independent contractors and not employees of the Petitioner. This diminishes the ability of those workers to control the details and methods by which the Joined Party worked. While having a supervisor may indicate employment, the supervision in this case does not strongly show employment rather than independence.

23. The length of the relationship was inherently limited. This factor tends to weigh more on the side of independence than of employment.

24. At least four of the ten factors specifically cited in Cantor v. Cochran allude to whether one or both of the parties is in business. The significance of this is probably meant to be "business activities" as contrasted to "domestic activities": a plumber is more likely to be considered an independent contractor if she performs work on a homeowner's residence, even if the plumber is called in regularly to repair and renovate an old house, than if the plumber works for a hotel part-time. But for what it is worth, the Petitioner in this case is not in business. It may have engaged in commercial activity—leasing office space, buying office supplies, and hiring people—but the Petitioner was not engaged in selling merchandise or selling a service. The Petitioner was assisting in the promotion of a political candidate. This can be called a social or political activity, but it is not the typical business activity of, say, an advertising agency or a management consultant. This factor weighs more on the side of independence than of employment.

25. The parties expressly agreed that the relationship was that of independent contractor and not employment. The actual conduct of the parties was fully consistent with that status in many ways and even the ambiguous aspects do not necessarily suggest employment; so it is concluded that the Joined Party was, in fact, an independent contractor and not an employee. The Petitioner has carried of the burden on it of establishing that the Joined Party was an independent contractor.

26. Those aspects of the proposed findings of fact and conclusions of law submitted by the Petitioner that were relevant and supported by the evidence have been incorporated in this recommended order. Those aspects of the proposals that were not relevant or not supported by the evidence have been rejected.

Recommendation: It is recommended that the determination dated October 13, 2014, finding the Joined Party to be an employee, be REVERSED.

Respectfully submitted on July 15, 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

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
July 15, 2014

Copies mailed to:
Petitioner
Respondent
Joined Party

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