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

PETITIONER:
Employer Account No. – 3240098
THE HOUSE OF ISRAEL INC
ATTN: MAURICE NELSON
PO BOX 881
FORT MEADE FL 33841-0881

PROTEST OF LIABILITY
DOCKET NO. 0024 0340 73-02

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

ORDER

This matter comes before me for final Department Order.

The issues before me are whether services performed for the Petitioner by the Joined Party constitute insured employment pursuant to sections 443.036(19); 443.036(21); 443.1216, Florida Statutes, and whether the Petitioner meets liability requirements for Florida reemployment assistance contributions pursuant to sections 443.036(19); 443.036(21); 443.1215, 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.

No exceptions were received from any party.

Upon review of the record it was determined that a portion of Finding of Fact 17 must be modified because it does not reflect the correct date. The record reflects that the letter mailed to the Petitioner was dated August 4, 2014, and not August 14, 2014, as held by the Special Deputy. As a result, Finding of Fact 17 is modified as follows:

> Because the Petitioner is a non-profit organization the Department of Revenue Tax Auditor mailed a letter to the Petitioner on August 4, 2014, requesting information concerning the number of full-time employees and part-time employees employed by the Petitioner for twenty weeks during 2010, 2011, 2012, 2013, and 2014. The Petitioner returned the letter providing information that the Petitioner employed two full-time employees and three part time employees during 2012; two full-time employees and two part time employees during 2013; and two full-time employees and one part-time employee during 2014.

It was also determined that Conclusions of Law 35 and 36 must be modified to only address the status of the Joined Party. In *Florida Gulf Coast Symphony, Inc. v. Dep't of Labor & Employment Sec.*, 386 So. 2d 259, 262 (Fla. 2d DCA 1980), the court held that it was improper to consider an issue when the notice of hearing was insufficient to allow the petitioner to properly prepare its argument. A review of the record reveals that both the Respondent's determination and the notice of hearing stated that only the Joined Party's employment status as a security guard was at issue and did not mention any other security guards. Since the Petitioner was not provided sufficient notice that other security guards would be addressed by the Department, Conclusion of Law 35 is modified as follows:

> In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant.

Conclusion of Law 36 is also modified as follows:

> It is determined that the Joined Party was the Petitioner's employee. Although it has been shown that the Joined Party was an employee of the Petitioner, the Petitioner is not liable for payment of reemployment assistance contributions unless it is shown that the Petitioner has had sufficient employment activity to establish liability for payment of reemployment assistance contributions.

A review of the record reveals that the amended Findings of Fact are based on competent, substantial evidence. The Findings of Fact are thus adopted as modified in this order. The amended Conclusions of Law reflect a reasonable application of the law to the facts and are also adopted as modified herein.

Having considered the record of this case, the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact and Conclusions of Law as modified above. I also adopt the Special Deputy's Recommendation that the Respondent's determination be affirmed. I respectfully reject the Special Deputy's Recommendation that the determination be modified to include the similarly situated security guard.

In consideration thereof, it is ORDERED that the determination dated August 21, 2014, is 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 15th day of **May, 2015**.

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

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

Shanedra Y. Barnes
DEPUTY CLERK

5.15.15
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 15th day of May, 2015.

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:

VERNETTE BROWN
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THE HOUSE OF ISRAEL INC
ATTN: MAURICE NELSON
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FLORIDA DEPARTMENT OF REVENUE
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

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

PETITIONER:
Employer Account No. - 3240098
HOUSE OF ISRAEL INC
ATTN: MAURICE NELSON
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FORT MEADE FL 33841-0729

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

PROTEST OF LIABILITY
DOCKET NO. 0024 0340 73-02

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 August 21, 2014.

After due notice to the parties, a telephone hearing was held on January 7, 2015. The Petitioner, represented by its Executive Director, appeared and testified. The Respondent, represented by a Department of Revenue Senior Tax Specialist, appeared and testified. The Joined Party appeared and testified.

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 by the Joined Party constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

ISSUE: Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages pursuant to §443.036(21); 443.036(40); 443.1216, Florida Statutes; Rule 73B-10.025(2), Florida Administrative Code.

ISSUE: Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions pursuant to §443.036(19); 443.036(21); 443.1215, Florida Statutes.

Findings of Fact:

1. The Petitioner, The House of Israel, Inc., is a Florida non-profit corporation which operates a residential shelter for women with substance, alcohol, and mental disorders.

2. The Joined Party, Vernette Brown, is a neighbor of the Petitioner's Executive Director, Maurice Nelson, and has known her since they attended high school together. In 2013 the Petitioner obtained grant funds which the Petitioner chose to use to provide security services to ensure the safety of the Petitioner's residents during the night. The Executive Director approached the Joined Party and asked if he wanted a part-time job. Although the Joined Party had never previously provided security services the Petitioner's Executive Director felt that he was capable of doing the work because she was aware that he had safely raised his own family.

3. The Executive Director wrote an *Agreement for Independent Contracting Services* which both the Executive Director and the Joined Party signed on September 9, 2013. The Agreement states that the Petitioner desires to hire the Joined Party as an independent contractor, that the Joined Party is qualified to perform the services, that the Joined Party shall provide security services at the Petitioner's property, that the Joined Party shall adhere to all of the Petitioner's policies and procedures while performing services, that the Petitioner shall provide a parking space for the Joined Party to perform his duties, that the Agreement is non-assignable, and that the term of the Agreement is from September 9, 2013, until September 9, 2014, unless terminated by either party at any time. The Agreement does not contain any clause stating that the Joined Party will be compensated for the services or how the Joined Party will be compensated.

4. It was the Petitioner's intent to establish a relationship with the Joined Party of indefinite duration even though the funding was based on a grant.

5. The Executive Director verbally advised the Joined Party that the Agreement was for six hours per night, 9 PM until 3 AM, seven nights each week, and that another security guard had been hired to perform the same job. The Executive Director informed the Joined Party that he should meet with the other security guard to decide which nights each would work. The Joined Party was told that the duties consisted solely of sitting in his car to make sure that no intruders entered the building. The Executive Director informed the Joined Party that the rate of pay was $12 per hour.

6. The other security guard was hired under the same terms and conditions as the Joined Party.

7. The Joined Party met with the other security guard and they reached an agreement that they would work alternating weeks. The Joined Party would work seven nights and would then be off from work for seven nights while the other security guard worked.

8. The work performed by the Joined Party was simple and did not require any training, instruction, or supervision. It was the Joined Party's understanding that if he observed an intruder he was to contact the Executive Director and the Executive Director would then notify the police.

9. The work performed by the Joined Party did not require any tools, supplies, or equipment other than the Joined Party's personal vehicle. The Joined Party did not have any expenses in connection with the work. The Joined Party did not have any investment in a business, did not offer services to the general public, did not advertise, did not have business liability insurance, and did not have a security license authorizing him to provide security services. The Joined Party believed that he was hired to be an employee of the Petitioner.

10. The Joined Party was required to personally perform the work. He was not allowed to assign his duties to others. He was not allowed to subcontract the work or to hire and pay others to perform the work for him.

11. Although the Joined Party was not supervised while he performed the work the Petitioner maintained the right to discipline the Joined Party if the Petitioner learned that the Joined Party had acted inappropriately while performing the work. The Petitioner never had cause to discipline the Joined Party.

12. At some point in time the Executive Director decided that it was not necessary to have security until 3 AM. As a result the Petitioner reduced the Joined Party's hours of work.

13. The Joined Party reported the number of hours that he worked each week to the Executive Director. The Petitioner paid the Joined Party on a bi-weekly basis based on the number of hours worked. No payroll taxes were withheld from the pay. The Petitioner did not provide the Joined Party with any fringe benefits such as health insurance, paid holidays, paid sick days, or paid vacations.

14. The Petitioner exhausted the grant funds that were used to compensate the Joined Party and the other security guard. As a result, the Petitioner notified the Joined Party that he was terminated as of December 31, 2013.

15. Following the end of 2013 the Petitioner reported the Joined Party's earnings for 2013 on Form 1099-MISC as nonemployee compensation in the amount of $3,748.00.

16. The Joined Party filed a claim for reemployment assistance benefits. When the Joined Party did not receive credit for his earnings with the Petitioner an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor and whether the Petitioner was liable for payment of reemployment assistance tax.

17. Because the Petitioner is a non-profit organization the Department of Revenue Tax Auditor mailed a letter to the Petitioner on August 14, 2014, requesting information concerning the number of full-time employees and part-time employees employed by the Petitioner for twenty weeks during 2010, 2011, 2012, 2013, and 2014. The Petitioner returned the letter providing information that the Petitioner employed two full-time employees and three part time employees during 2012; two full-time employees and two part time employees during 2013; and two full-time employees and one part-time employee during 2014.

18. Based on the information provided by the Petitioner and by the Joined Party the Department of Revenue made a determination, which was mailed to the Petitioner on August 21, 2014, holding that the Joined Party, performing services as a security guard, was the Petitioner's employee retroactive to September 13, 2013. The determination also held that based on the information provided by the Petitioner concerning the number of full-time and part-time employees employed by the Petitioner, the Petitioner was liable for payment of reemployment assistance tax effective January 1, 2012. The Petitioner filed a timely protest by fax on August 22, 2014.

Conclusions of Law:

19. 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.

20. 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).

21. 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.

22. 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.

23. 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.

24. 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.

25. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st 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. 1st 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.

26. The Petitioner and the Joined Party entered into a written *Agreement for Independent Contracting Services.* The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

27. The Agreement states that the Joined Party shall adhere to all of the Petitioner's policies and procedures. That clause establishes that the Petitioner maintained the right to control the Joined Party concerning the performance of the work. The Executive Director also testified that, although the Petitioner did not directly oversee the performance of the work, the Petitioner maintained the right to control the means and manner in which the work was performed.

28. The Petitioner's business is the operation of a residential center for women. Part of the operation is to ensure the safety and well-being of the residents by providing nighttime security. The Petitioner engaged the Joined Party and the other security guard to provide the nighttime security. The work performed by the Joined Party and the other security guard was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business. The Petitioner provided the place of work, including a designated parking spot for the security guard to park. The Joined Party did not provide anything other than his time and he did not have any expenses in connection with the work.

29. Although it was shown that the Petitioner is in business, it was not shown that the Joined Party performed services for a business separate from the Petitioner's business. The Joined Party did not have any investment in a business, did not advertise or provide services to others, did not have business liability insurance, did not have a business license, and did not have a state security license. Section 493.6301, Florida Statutes, provides that any person, firm, company, partnership, or corporation which engages in business as a security agency shall have a security license.

30. The work performed by the Joined Party and the other security guard did not require any special skill or knowledge. The work was so simple that it did not require any training or instruction. The Joined Party merely sat in his car and watched the building. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

31. Although the Joined Party and the other security guard were allowed to determine which nights they would individually work, they were not free to determine the hours they would work. Initially, they were required to work six hours a night from 9 PM until 3 AM. At some point in time the Petitioner unilaterally reduced the number of nightly hours. The Petitioner also determined the method and rate of pay. The Joined Party was paid by time worked rather than by the job or based on production.

32. The Petitioner controlled the financial aspects of the relationship because the Petitioner controlled both the number of hours worked and the rate of pay. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash.

33. It was the intent of the Petitioner to create a relationship of indefinite duration. The Agreement provides that the duration of the relationship was one year but that either party could terminate the relationship at any time. In reality the relationship lasted less than four months when it was terminated by the Petitioner. These facts reveal the existence of a relationship of indefinite duration with either party having the right to terminate the relationship at any time without incurring liability for breach of contract. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

34. The evidence reveals that the Petitioner exercised significant control over the manner in which the services were performed. The Petitioner controlled what work was performed, where it was performed, when it was performed, by whom it was performed, and to a significant degree how it was performed. It is not necessary for the employer to actually direct or control the manner in which the services are performed; it is sufficient if the agreement provides the employer with the right to direct and control the worker. Of all the factors, the right of control as to the mode of doing the

work is the principal consideration. VIP Tours v. State, Department of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)

35. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

36. It is determined that the Joined Party and the other similarly situated security guard were the Petitioner's employees. Although it has been shown that the Joined Party and the other security guard were employees of the Petitioner, the Petitioner is not liable for payment of reemployment assistance contributions unless it is shown that the Petitioner has had sufficient employment activity to establish liability for payment of reemployment assistance contributions.

37. Section 443.1216, Florida Statutes, provides that Employment, as defined in s.443.036, is subject to this chapter under the following conditions:
    (3) The employment subject to this chapter includes service performed by an individual in the employ of a religious, charitable, educational, or other organization, if:
        (a) The service is excluded from the definition of "employment" in the Federal Unemployment Tax Act solely by reason of s. 3306(c)(8) of that act; and
        (b) The organization had at least four individuals in employment for some portion of a day in each of 20 different weeks during the current or preceding calendar year, regardless of whether the weeks were consecutive and whether the individuals were employed at the same time.

38. Section 443.036(19), Florida Statutes, defines "employer" as an employing unit subject to the Florida Unemployment Compensation Law.

39. Section 443.036(21), Florida Statutes, defines "employment" as a service subject to this chapter under s. 443.1216 which is performed by an employee for the person employing him or her.

40. Section 443.1216, Florida Statutes, provides that Employment, as defined in s.443.036, is subject to this chapter under the following conditions:
    (3) The employment subject to this chapter includes service performed by an individual in the employ of a religious, charitable, educational, or other organization, if:
        (a) The service is excluded from the definition of "employment" in the Federal Unemployment Tax Act solely by reason of s. 3306(c)(8) of that act; and
        (b) The organization had at least four individuals in employment for some portion of a day in each of 20 different weeks during the current or preceding calendar year, regardless of whether the weeks were consecutive and whether the individuals were employed at the same time.

41. Based on the information provided by the Petitioner's Executive Director to the Department of Revenue Tax Auditor it was determined that the Petitioner met the liability provisions of the Florida Reemployment Assistance Program Law effective January 1, 2012, because the Petitioner had at least four individuals in employment for some portion of a day in each of twenty different weeks during 2012. At the hearing the Executive Director testified concerning the Petitioner's employees but could not recall the employees' dates of employment. The testimony of the Executive Director is not sufficient to show that the determination of the Department of Revenue is in error. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderence of the evidence that the determination was in error.

42. It is concluded that the Petitioner has established liability for payment of reemployment assistance contributions on the wages paid to its employees, including the Joined Party and the other security guard, effective January 1, 2012.

43. It is noted that the testimony of the Executive Director is internally inconsistent and in conflict with the Executive Director's prehearing statements. The special deputy is charged with resolving the evidentiary conflicts in a logical manner. In cases involving internally inconsistent testimony the special deputy may choose to believe some of the testimony or may choose to disregard all of the testimony.

Recommendation: It is recommended that the determination dated August 21, 2014, be MODIFIED to include the similarly situated security guard. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on March 5, 2015.

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 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:
March 5, 2015

Copies mailed to:
Petitioner
Respondent
Joined Party

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