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

PETITIONER:
Employer Account No. – 2525921
SEMIPACK SERVICES INC
345 EAST DR
MELBOURNE FL 32904-1030

PROTEST OF LIABILITY
DOCKET NO. 0024 0341 60-02

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

ORDER

This matter comes before me for final Department Order.

The issue before me is 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.

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 Conclusions of Law 25 and 26 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 was at issue and did not mention any other similarly situated workers. Since the Petitioner was not provided sufficient notice that other workers would be addressed by the Department, Conclusion of Law 25 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 26 is also modified as follows:

> The evidence reveals that the Petitioner controlled what work was performed, when it was performed, where it was performed, and to a significant degree how it was performed. It is concluded that the Joined Party performed services for the Petitioner as an employee.

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

Having considered the record of this case, the Recommended Order of the Special Deputy, I hereby adopt the Findings of Fact as set forth in the Recommended Order. I adopt the 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 similarly situated workers.

In consideration thereof, it is ORDERED that the determination dated August 13, 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
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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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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 August 13, 2014.

After due notice to the parties, a telephone hearing was held on January 12, 2015. The Petitioner, represented by the Chief Executive Officer, appeared and testified. The Petitioner's President testified as a witness. The Respondent, represented by a Department of Revenue Senior Tax Specialist, appeared and testified. The Joined Party did not appear.

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.

Findings of Fact:

1. The Petitioner, Semipack Services, Inc., is a corporation which provides electronic manufacturing support services for the Petitioner's clients.
2. On or about July 17, 2012, the Petitioner engaged the Joined Party to do assembly and packaging. The Petitioner interviewed the Joined Party to determine if the Joined Party was capable of performing the work. The only requirements for the job were that the Joined Party had to be a United States citizen and that he had to be able to read and write.

3. The Petitioner presented the Joined Party with a *Subcontractor Agreement*, which he was required to sign, and copies of the Petitioner's policies which he was also required to sign. The *Subcontractor Agreement* states "The subcontractor will be responsible for ALL taxes due on monies earned from Semipack Services, Inc. The subcontractor will be responsible for any and all insurance coverage needed while are (sic) Semipack Services, Inc. i.e. Wrist Strap & Heel Guard Policy, Lab Coat Policy, Time Card Policy, Attendance & Time Policy, etc. The subcontractor's payment will be made on the same schedule as all regular employees of Semipack Services, Inc." In addition to the policy documents mentioned in the Agreement, the Joined Party was required to sign a door policy since the Petitioner's doors have magnetic locks.
4. The work performed by the Joined Party was as simple as "stuffing an envelope" and did not require any license or certification. The Petitioner gave the Joined Party an instruction sheet which explained how to perform the work. The training consisted of ensuring that the Joined Party performed the work correctly.
5. The Petitioner's regular business hours are from 8 AM until 6 PM. The Joined Party performed the work at the Petitioner's location. The Joined Party's workstation included a table and all supplies that were needed to perform the work. No equipment or tools were needed to perform the work. The Joined Party did not have any expenses in connection with the work.
6. The Petitioner provided the Joined Party with an identification badge which was necessary to gain access to the Petitioner's facility. The Joined Party was required to punch a time clock.
7. The Petitioner had approximately twenty-seven employees and approximately three workers who performed the same work as the Joined Party and were classified by the Petitioner as independent contractors. All of the individuals classified by the Petitioner as independent contractors performed services under the same terms and conditions as the Joined Party. The difference between the employees and the individuals classified as independent contractors was that the employees were cross trained to perform multiple tasks, including the task performed by the Joined Party, while the independent contractors were trained to perform only one task. On several occasions the Petitioner offered additional training to the Joined Party so that the Joined Party could be considered to be an employee. The Joined Party chose not to learn the additional tasks.
8. The Petitioner paid the Joined Party by the hour and his rate of pay was approximately $8.00 per hour. The Joined Party was paid on a regularly occurring payday, the first and the fifteenth of each month. No taxes were withheld from the pay. At the end of 2013 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC in the amount of $13,456.08 as nonemployee compensation.
9. Either party had the right to terminate the Agreement at any time without incurring liability for breach of contract. The Petitioner terminated the Joined Party on or about April 4, 2014, when the Petitioner determined that the Joined Party had entered the Petitioner's premises at 6:30 AM.
10. 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 as an employee or as an independent contractor. On August 13, 2014, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to July 17, 2012. The Petitioner filed a timely protest by email on August 19, 2014.

Conclusions of Law:

11. 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.

12. 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).

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. In this case the *Subcontractor Agreement* does not set forth, among other relevant factors, the duties to be performed, the compensation for services performed, or the term of the Agreement. Although the Agreement refers to the Joined Party as a "subcontractor" the Agreement establishes the Petitioner's right of control over the Joined Party by requiring the Joined Party to follow the Petitioner's polices.

19. 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."

20. The Petitioner's business is providing electronic manufacturing support services for the Petitioner's clients. The Joined Party was assigned the task of performing assembly and packaging of the products. The work performed by the Joined Party 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 and everything that was needed to complete the work. The Joined Party did not have any expenses in connection with the work. It was not shown that the Joined Party was at risk of financial loss by performing services.

21. It was not shown that the Joined Party had any investment in a business, advertised his services to the general public, or performed services for other companies.

22. The services that the Petitioner engaged the Joined Party to perform were as simple as "stuffing an envelope" and did not require any skill or special knowledge. 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)

23. The Joined Party was paid by the hour, was required to punch a time clock and was paid on a regularly established payday. The Petitioner was not able to recall the Joined Party's hourly rate of pay and testified that the pay rate was either $8.00 or $8.50 per hour. For 2013 the Petitioner reported the Joined Party's earnings as $13,456.08. Assuming that the Joined Party was paid at the higher hourly amount, $8.50, the Joined Party was compensated for 1,583 hours which is an average of thirty hours per week during 2013. The Florida Reemployment Assistance Program Law does not discriminate between part time or full time employment and does not discriminate between temporary or permanent employment. 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. The fact that the Petitioner chose not to withhold payroll taxes from the Joined Party's earnings does not, standing alone establish an independent contractor relationship.

24. The Joined Party performed services for the Petitioner from July 17, 2012, until April 4, 2014, a period of approximately one year and nine months. The Petitioner terminated the Joined Party because the Joined Party entered the Petitioner's facility at an unauthorized time. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. 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."

25. 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.

26. The evidence reveals that the Petitioner controlled what work was performed, when it was performed, where it was performed, and to a significant degree how it was performed. It is concluded that the Joined Party performed services for the Petitioner as an employee. The other individuals classified by the Petitioner as independent contractors performed services under the same terms and conditions as the Joined Party. Thus, it is concluded that the similarly situated workers also performed services as employees rather than as independent contractors.

Recommendation: It is recommended that the determination dated August 13, 2014, be MODIFIED to include similarly situated workers. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on February 17, 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 peryèd 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:
February 17, 2015

Copies mailed to:
Petitioner
Respondent
Joined Party

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