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

PETITIONER:
Employer Account No. - 1575298
TAMPA OPTIONS FOR PSYCHIATRIC SERVICES INC
ATTN: DR KRISHAN BATRA
16725 RACE TRACK RD
ODESSA FL 33556-3024

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

PROTEST OF LIABILITY
DOCKET NO. 0024 2679 72-02

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 September 15, 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 4th day of **June, 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

6-9-15
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 9th day of June, 2015.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
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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
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PROTEST OF LIABILITY
DOCKET NO. 0024 2679 72-02

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 September 15, 2014.

After due notice to the parties, a telephone hearing was held on March 2, 2015. The Petitioner, represented by the Petitioner's president, appeared and testified. The Petitioner's Certified Public Accountant testified as a witness. The Respondent, represented by a Department of Revenue Tax Auditor III, 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.

Findings of Fact:

1. The Petitioner, Tampa Options for Psychiatric Services, Inc., is a corporation which has operated the medical practice of its president, Dr. Krishan Batra, since approximately 1993. The Petitioner operates under the trade name of Sanskar Clinic.
2. In 2013 the Petitioner placed a help wanted advertisement in the local newspaper, or on the Internet, for a receptionist/secretary. The Joined Party was seeking employment at the time and replied to the advertisement.

3. The Joined Party is an individual who had been employed for thirty years as a secretary at an elementary school. She also had experience as an employee at a medical office as a receptionist. The Joined Party did not have her own business and had never been self-employed.

4. The Petitioner's president interviewed the Joined Party and informed her concerning the duties, the hours of work, the rate of pay, and that the Joined Party would be classified as an independent contractor. The Joined Party had never worked as an independent contractor and did not know what an independent contractor was. The Joined Party accepted the offer of work and began work on August 19, 2013. The Joined Party believed that she was hired to be an employee of the Petitioner.

5. The Petitioner provided the Joined Party with workspace in the Petitioner's medical office which included a desk and chair. The Petitioner provided a computer, typewriter, fax machine, copy machine, telephone, stapler, and all other equipment and supplies that were needed to perform the work. The Joined Party did not have any expenses in connection with the work.

6. On August 28, 2013, the Petitioner presented the Joined Party with an *Independent Contract Agreement* dated July 1, 2010, which was written by the Petitioner's president. The *Independent Contract Agreement* specifies that the Joined Party's duties include "secretarial/receptionist which include telephone calls and messages, filing work, setting appointments, and communicating with patients/families, typewriting duties, any sundry functions related to office up keep." An attachment to the Agreement set forth the rules of the Petitioner's office including instructions concerning how the work was to be performed, that termination would occur if absent from work for three consecutive days, and the Petitioner's "3 warning rule" providing for the progressive discipline system used by the Petitioner.

7. The Agreement provides that the Joined Party is an "independent contractor" and not an employee of the Petitioner, that no fringe benefits are provided by the Petitioner, that the Petitioner will not withhold any payroll taxes from the pay, and that the Joined Party is responsible for payment of her own taxes.

8. The *Independent Contract Agreement* requires the Joined Party to complete a timesheet, to submit the timesheet bi-weekly following Monday, that the Joined Party would be paid the following Thursday after, that the rate of pay is $12.00 per hour, that the Joined Party is not allowed to work more than 40 hours per week, and if the Joined Party is occasionally requested to work more than 40 hours per week the rate of pay for the extra hours is $12.00 per hour.

9. The *Independent Contract Agreement* states that "contractor has shall not exercise the right to perform services at other places during the term of this agreement unless specifically agreed upon due to unique circumstances of the contractor" and that "contractor agrees not to hire another person to do jobs which are required on duty in this office practice whereas training skills and supervision will be regularly provided by Sanskar. Contractor agrees that there will be 'performance reviews' as well as '3 warnings rules applied."

10. The *Independent Contract Agreement* requires the Joined Party to obtain and maintain commercial general liability insurance providing for coverage of at least $250,000 for each occurrence, naming the Petitioner as an additionally insured under the policy, before beginning work, and requires the Joined Party to provide proof of insurance. The Agreement also requires the Joined Party to obtain professional liability insurance for malpractice and requires the Joined Party to inform the insurance company of the type of work performed by the Joined Party. Although the requirements regarding the provision of liability and malpractice insurance remained in the written Agreement, the Petitioner's president verbally informed the Joined Party that she did not need to provide the liability and malpractice insurance. In spite of the fact that the Petitioner verbally altered the Agreement the Agreement states "this agreement may be modified only by written and signed by both parties."

11. The Agreement states that the Joined Party may terminate the relationship with two weeks' notice and that either party may terminate the relationship with reasonable cause effective immediately upon written notice.

12. The wife of the Petitioner's president also worked in the Petitioner's office and was considered to be the Joined Party's immediate supervisor. The Joined Party was supervised by both the president and his wife. The Joined Party was required to notify her supervisors of any problems that she encountered.

13. The Petitioner posted a list of the office work rules on the wall. The list included the rule that the Joined Party was required to answer the telephone within three rings.

14. The work performed by the Joined Party was not skilled labor and did not require any formal education or certification. The Petitioner provided initial training which lasted only a few hours. The Joined Party was trained concerning what to say when answering the telephone, and trained concerning other office procedures.

15. Generally, the Petitioner's office hours are from 9 AM until 6 PM. The Petitioner determined the Joined Party's hours of work to be from 9 AM until 5 or 6 PM on Mondays, and to be from 10 AM until 5 or 6 Tuesdays through Fridays. The Joined Party was occasionally required to work on Saturdays but was required to adjust her work time on other days so that the hours did not exceed 40 hours per week. The Joined Party was allowed to take thirty minutes for a lunch break. Usually the immediate supervisor told the Joined Party when she could take the lunch break.

16. The Petitioner provided blank timesheets for the Joined Party to complete. The Joined Party was required to list the time she reported for work each day and the time that she left work each day. She was not required to list the time she left for lunch and returned from lunch. She was merely required to list whether or not she took a lunch break for each day.

17. The Joined Party was paid on a regularly scheduled bi-weekly payday. No payroll taxes were withheld from the pay and the Joined Party did not receive any fringe benefits such as health insurance, life insurance, paid holidays, paid sick days, paid vacations, or retirement benefits. At the end of 2013 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation in the amount of $8,043.00.

18. The Petitioner's president periodically reviewed the Joined Party's work performance with the Joined Party. Although there were no problems with the Joined Party's attendance, if the Joined Party had been excessively absent or late reporting for work the Petitioner would have issued a warning under the 3 warnings progressive discipline policy. The Petitioner only issued one warning to the Joined Party which was for being forgetful.

19. The Joined Party submitted a resignation with two weeks' notice effective May 21, 2014. On the last day of work the Petitioner held a luncheon for the Joined Party and gave her a bonus.

20. The Joined Party filed a claim for reemployment assistance benefits. When the Joined Party did not receive credit for her 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.

21. On August 26, 2014, the Department of Revenue issued a determination holding that the Joined Party was an employee of the Petitioner retroactive to August 19, 2013. On September 8, 2014, the Petitioner protested the determination and provided documentation including a copy of the *Independent Contract Agreement.* The Department of Revenue reviewed the additional information submitted by the Petitioner. On September 15, 2014, the Department of Revenue issued a determination which states that the determination is an affirmation of the August 26, 2014, determination. The Petitioner filed a timely protest by mail postmarked October 4, 2014.

Conclusions of Law:

22. The issue in this case, whether services performed for the Petitioner by the Joined Party 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.

23. 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).

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. The parties entered into an Agreement written by the Petitioner's president which specifies that the Joined Party was engaged to be an independent contractor. At the time the Joined Party signed the Agreement the Joined Party did not know what an independent contractor was and believed, in spite of the Agreement, that she was hired to be the Petitioner's employee. Although it is well established that an individual is bound by a document he or she signs even if he or she does not read or understand the document, see Rivero v. Rivero, 963 So. 2d 934 (Fla. 3d DCA 2007); Peralta v. Peralta Food Corp., 506 F. Supp. 1274 (S.D.Fla. 2007) and Merrill Lynch v. Benton, 467 So. 2d 311, 313 (Fla. 5th DCA 1985), it is equally well established that a statement in an agreement that the existing relationship is that of independent contractor is not dispositive of the issue. Lee v. American Family Assurance Co. 431 So.2d 249, 250 (Fla. 1st DCA 1983). 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."

30. The Petitioner's business is a medical practice. The Petitioner engaged the Joined Party to perform the duties of receptionist/secretary in the Petitioner's medical office. The Petitioner provided the workspace and all equipment, tools, and supplies that were needed to perform the work. The Joined Party did not have any investment in a business, did not have any expenses connected with the work, and was not at risk of suffering a financial loss from performing services for the Petitioner. The Petitioner prohibited the Joined Party from performing any work for others and prohibited the Joined Party from hiring others to perform the work for her. The work performed by the Joined Party was not separate and distinct from the Petitioner's medical practice but was an integral and necessary part of the Petitioner's practice.

31. The work performed by the Joined Party did not require any license or certification. The Petitioner was able to train the Joined Party how to perform the work in just a few hours. The Petitioner provided the Joined Party with an attachment to the Agreement which specified the work rules, including how the work was to be performed. The Petitioner also posted the work rules on the wall. It was not shown that any skill or special knowledge was needed to perform the work. 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)

32. The Petitioner determined both the method of pay and the rate of pay. The Petitioner paid the Joined Party by time worked rather than by the job or based on production. 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. The Agreement does not state a specific term for the Agreement. The Agreement basically provides that either party may terminate the Agreement at any time without incurring liability for breach of contract. The president's testimony confirms that either party was free to terminate the relationship at any time without incurring a penalty for breach of contract. The Joined Party performed services from August 19, 2013, until May 21, 2014, a period of approximately nine months. 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."

34. The Petitioner controlled what work was performed, where it was performed, by whom it was performed, when it was performed, and how it was performed. The Petitioner controlled the financial aspects of the relationship. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

35. It is affirmatively determined from the facts of this case that the Joined Party was an employee of the Petitioner retroactive to August 19, 2013, her first day of employment with the Petitioner.

Recommendation: It is recommended that the determination dated September 15, 2014, be AFFIRMED.

Respectfully submitted on April 15, 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:
April 15, 2015

Copies mailed to:
Petitioner
Respondent
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