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

PETITIONER:
Employer Account No. – 2812542
BESTWAY HOLDINGS INC
1841 12TH ST SE
LARGO FL 33771-3705

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

PROTEST OF LIABILITY
DOCKET NO. 0024 6060 71-02

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 23, 2014, 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 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
TALLAHASSEE FL 32399-5250

By U.S. Mail:

BESTWAY HOLDINGS INC
1841 12TH ST SE
LARGO FL 33771-3705

ERNEST MICCICHE
1000 10TH AVE NW APT 2
LARGO FL 33770

FLORIDA DEPARTMENT OF REVENUE
DRENEA YORK
4230 LAFAYETTE STREET SUITE D
MARIANNA FL 32446

FLORIDA DEPARTMENT OF REVENUE
DIANNE AYERS
PO BOX 6417
TALLAHASSEE FL 32314-6417

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. - 2812542
BESTWAY HOLDINGS, INC.
1841 12TH STREET SE
LARGO FL 33771

PROTEST OF LIABILITY
DOCKET NO. 0024 6060 71-02

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 September 23, 2014.

After due notice to the parties, a telephone hearing was held on April 20, 2015. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Auditor III, 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, Bestway Holdings, Inc., is a Florida profit corporation which was formed in 2006 to operate a landscaping and lawn maintenance company.
2. The Petitioner's president was a longtime friend of the Joined Party. To the president's knowledge the Joined Party worked as an independent contractor providing sales to a pest control company as well as other companies. In 2012 the Joined Party contacted the Petitioner looking for work as an independent contractor.

3. On or about April 1, 2012, the Petitioner engaged the Joined Party to provide sales as an independent contractor. The Joined Party was paid solely by way of commission. The Joined Party was responsible for his own transportation and expenses. The Joined Party determined if or when he would work. The Petitioner did not provide any training and did not provide any instructions concerning how to perform the work or when to perform the work.
4. The relationship ended in June 2012 when the Joined Party informed the Petitioner that he had violated his probation and had to go to jail. In December 2012 the Joined Party contacted the Petitioner seeking work following his release from jail. The Petitioner worked closely with the Joined Party's probation officer to provide work for the Joined Party.
5. The probation officer required the Joined Party to obtain employment in order to prove that he was capable of holding a job rather working as an independent contractor.
6. In December 2012 the Joined Party began working for the Petitioner as an employee, primarily to oversee the work performed by the landscape and lawn maintenance crews, as well as to make sales. The Joined Party was required to work every day, forty hours per week. The Petitioner paid the Joined Party by the hour and withheld payroll taxes from the pay. The Petitioner provided the Joined Party with a company vehicle, a company cellphone, a company credit card, and everything else that was needed to perform the work. The Petitioner required the Joined Party to wear a company uniform. Following the end of 2012 the Petitioner provided the Joined Party with a Form 1099-MISC reporting the Joined Party's earnings from April until June in the amount of $5,610.25 as nonemployee compensation and a Form W-2 reporting the wages paid to the Joined Party in December in the amount of $1,200.00.
7. The Joined Party continued working for the Petitioner as an employee until late April or early May 2013. At that time the Joined Party approached the Petitioner and stated that he wanted to reactivate his old independent contractor sales company selling services for the Petitioner as well as other companies with related lawn care products. He advised the Petitioner that he already had several clients lined up and provided the Petitioner with a letter stating that he had obtained an exemption from workers compensation as an independent sales consultant.
8. Beginning in May 2013 the Joined Party performed sales for the Petitioner but no longer was responsible for overseeing the work performed by the landscaping and lawn maintenance crews. The Petitioner did not give the Joined Party any instructions concerning when to do the work or how to perform the work. The Joined Party was not required to wear a company uniform. The Joined Party was free to come and go as he pleased and was responsible for developing his own sales leads. Although the Petitioner provided the Joined Party with some sales leads the Joined Party was not required to contact the leads and was not required to notify the Petitioner concerning his activities or the progress of the work. The Joined Party was not required to meet any sales goals or quotas.
9. The Joined Party was responsible for providing his own transportation. On some occasions the Joined Party did not have transportation available. The Petitioner's president was the Joined Party's friend and wanted to help the Joined Party. On those occasions the Petitioner allowed the Joined Party to use a company vehicle. The Joined Party was also required to use his own laptop computer. When the Joined Party's laptop broke down the Petitioner's president allowed the Joined Party to use an old laptop that belonged to the president's son.
10. The Joined Party was free to come and go as he pleased. He was not required to personally perform the work but was free to hire others to perform the sales for him. He was free to sell for other companies, including other landscaping and lawn maintenance companies. The Petitioner gave the Joined Party permission to use the Petitioner's name on business cards and door hangers, however, the Joined Party was responsible for the expense of having the business cards and door hangers printed.

11. The Joined Party would usually come in to the Petitioner's office on Monday of each week. At that time the Joined Party would usually submit an invoice to the Petitioner for the commissions earned on sales and would collect payment from the Petitioner. No payroll taxes were withheld from the pay. The Petitioner did not provide any fringe benefits such as health insurance or paid holidays.

12. Following the end of 2013 the Petitioner reported the Joined Party's wages which he received prior to May 2013 on Form W-2 in the amount of $7,200.00. The Petitioner reported the commissions received by the Joined Party beginning in May 2013 on Form 1099-MISC as nonemployee compensation in the amount of $22,654.38.

13. The Joined Party continued performing sales for the Petitioner until early August 2014. At that time the Petitioner decided to discontinue using the services provided by the Joined Party and any other individual providing services as an independent contractor. The reason for the Petitioner's decision was because the Petitioner did not have any control over the work performed by the independent contractors. The Petitioner did not give the Joined Party an opportunity to continue performing services for the Petitioner as an employee.

14. The Joined Party filed a claim for reemployment assistance benefits. When the Joined Party did not receive credit for his earnings during the time he was classified as an independent contractor 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.

15. On September 23, 2014, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to July 1, 2013. The Petitioner filed a timely protest by mail postmarked October 9, 2014.

Conclusions of Law:

16. 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.

17. 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).

18. 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.

19. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

20. 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.

21. 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.

22. 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.

23. When the Joined Party performed services as an employee from December 2012 until April 2013 there was a clear understanding between the parties that the Joined Party was engaged to perform services as an employee. The Petitioner controlled when the work was performed and controlled the means and manner in which the work was performed. The Petitioner was responsible for providing a company vehicle and was responsible for the expenses associated with the job. The Joined Party was required to wear a company uniform. The Joined Party was paid by time worked rather than based on production and no payroll taxes were withheld from the pay. The wages were reported on Form W-2 at the end of the year. The Joined Party did not submit a bill or invoice to the Petitioner for his services.

24. When the Joined Party performed services for the Petitioner between April 2012 and June 2012 and between May 2013 and August 2014 the Joined Party worked under significantly different terms and conditions from when he was employed during the December 2012 through April 2013 timeframe. There was a clear understanding between the parties that the Joined Party would perform services as an independent contractor in both April 2012 and May 2013. In both cases the Joined Party was the individual who initiated the offer to perform services independently. The Joined Party was paid by production because the pay was a commission on the Joined Party's sales. No payroll taxes were withheld from the pay and the Joined Party was responsible for the payment of his own taxes. The Joined Party was not required to work a set schedule, was not required to work leads provided by the Petitioner, was not required to personally perform the work, and was free to sell for other companies. The Joined Party was responsible for his own expenses. Although the Petitioner loaned the Joined Party a computer for a period of time and although the Petitioner occasionally allowed the Joined Party to use a company vehicle, the Petitioner did so out of friendship rather than as a condition of the agreement.

25. During the periods of time when the Joined Party was classified as an independent contractor the Joined Party controlled who he contacted to make sales, when or if he contacted individuals to make sales, how he made sales, and where he made sales. Since he was free to hire other to make sales the Joined Party controlled who performed the work. 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.

26. The facts in this case are similar to the working relationship addressed by the court in Kearns v. Dept. of Labor and Employment Security, 680 So. 2d 619 (Fla. 3rd DCA 1996). In that case the court held that a secretary who worked in the office of an attorney was an independent contractor. The court placed emphasis on the fact that there was an express understanding between the parties that the secretary was an independent contractor. The court further noted that the secretary provided her own equipment to perform the work, had the right to determine when or if she worked, and was free to perform work for others. Thus, it is concluded that the Joined Party was an independent contractor while performing services for the Petitioner during all times other than during the period of acknowledged employment from December 2012 through April 2013.

Recommendation: It is recommended that the determination dated September 23, 2014, be REVERSED.

Respectfully submitted on April 24, 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 24, 2015

Copies mailed to:
Petitioner
Respondent
Joined Party

ERNEST MICCICHE
1000 10TH AVE NW APT 2
LARGO FL 33770-4140

MYRA TAYLOR
FLORIDA DEPARTMENT OF REVENUE
PO BOX 6417
TALLAHASSEE FL 32314-6417

FLORIDA DEPARTMENT OF REVENUE
ATTN: DRENEA YORK
4230 LAFAYETTE STREET
MARIANNA FL 32446