

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 2843816
THE ROELKER GROUP INC
2253 POCOSIN CT
JACKSONVILLE FL 32246-4193

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-91355L**

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 July 18, 2012, 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 _____ day of January, 2013.



Altemese Smith,
Assistant Director,
Reemployment Assistance Services
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.

Shanendra Y. Barnes

DEPUTY CLERK

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 _____ day of January, 2013.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

THE ROELKER GROUP INC
2253 POCOSIN CT
JACKSONVILLE FL 32246-4193

DAEL E B YISRAEL
609 VILLAGE CIR UNIT C
DUBLIN GA 31021

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

FLORIDA DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
P O 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

MSC 347 CALDWELL BUILDING

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PROTEST OF LIABILITY

DOCKET NO. 2012-91355L

RESPONDENT:

State of Florida

DEPARTMENT OF ECONOMIC

OPPORTUNITY

c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Executive Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated July 18, 2012.

After due notice to the parties, a telephone hearing was held on November 15, 2012. The Petitioner, represented by the Petitioner's former president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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 received from the Petitioner. .

Issue:

Whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation which was formed in September 2002 to provide services for another corporation as a subcontractor. The subcontracted duties consisted of removing computers from various businesses and replacing them with new computers. The Petitioner was voluntarily dissolved on June 29, 2012.
2. The Petitioner had three acknowledged employees, a supervisor, an assistant to the supervisor, and a clerical employee. The Petitioner registered for payment of unemployment tax to Florida effective the third quarter 2008.

3. The Joined Party responded to a help wanted advertisement placed on the Internet by the Petitioner and was interviewed by the supervisor who was employed by the Petitioner. The supervisor explained the terms and conditions of the job including that the Petitioner would pay the Joined Party an hourly wage. The Petitioner conducted a background check and required the Joined Party to satisfactorily complete a drug test at the Petitioner's expense.
4. The supervisor advised the Joined Party that the Joined Party was hired as a lead technician and provided the Joined Party with a written contract. The Petitioner instructed the Joined Party to report to Ocala, Florida for two weeks of training beginning in early June 2011. During the training the supervisor advised the Joined Party, among other things, that the Joined Party was not allowed to perform services for a competitor while under contract with the Petitioner and that the Joined Party was not allowed to wear sneakers, T-shirts, or shorts while working.
5. The Joined Party completed the two weeks of training in Ocala. The Petitioner paid for the hotel room and reimbursed the Joined Party for his automobile mileage. The Petitioner paid the hourly wage to the Joined Party for attending the training. The Petitioner did not withhold any taxes from the pay. Although the Joined Party was paid for his time and his expenses the Petitioner did not make payment until over a month after the Joined Party began performing services.
6. The supervisor provided the Joined Party with a weekly work schedule on Sunday of each week. The work schedule stated where the Joined Party was to work and the day and times that he was required to work. If the Joined Party was not able to work each day as scheduled he was required to notify the supervisor.
7. As lead technician the Joined Party was required to oversee the work performed by the other technicians hired by the Petitioner. The Joined Party was not allowed to hire and pay others to perform the work for him. However, the supervisor informed the Joined Party that if the Joined Party recommended another worker for the job and that worker was hired by the Petitioner and remained on the job for a specified amount of time, the Petitioner would pay a bonus to the Joined Party. The supervisor also informed the Joined Party that if the Joined Party and the technicians on the team completed the work in fewer hours than scheduled, the Petitioner would pay a bonus to the Joined Party.
8. 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 in August 2011 before the job was completed.
9. While performing services for the Petitioner the Joined Party did not have an occupational license or business license, did not have business liability insurance, did not have an investment in a business, and did not advertise or offer services to the general public.
10. Following the end of 2011 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
11. The Joined Party filed a claim for reemployment assistance effective March 25, 2012. When the Joined party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.
12. On July 18, 2012, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to July 1, 2011. The reason the Department of Revenue determined the retroactive date to be July 1, 2011, rather than the date when the Joined Party first performed services, was because no compensation was paid to the Joined Party prior to July 1, 2011. The Petitioner filed a timely protest by mail postmarked August 1, 2012.

Conclusions of Law:

13. The issue in this case, whether services performed for the Petitioner by the Joined Party working as a lead technician 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.
14. 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).
15. 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.
16. 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.
17. 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.
18. 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.

19. 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.
20. The testimony reveals that there was a written contract between the parties, however, neither the Petitioner nor the Joined Party provided a copy of the contract as evidence prior to the hearing or at the hearing and neither could recall the terms and conditions set forth in the contract. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
21. The Petitioner was a subcontractor which had contracted to remove old computers and to install new computers. The Petitioner hired the Joined Party to be a lead technician responsible for performing the work which the Petitioner had contracted to perform. 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 Petitioner's business. The Petitioner reimbursed the Joined Party for travel expenses and it was not shown that the Joined Party had any significant expenses in connection with the work which were not reimbursed by the Petitioner.
22. The Joined Party worked under the direction of a supervisor who told the Joined Party what to do, where to do it, and when to do it. The supervisor trained the Joined Party for a period of two weeks before the Joined Party performed services for the Petitioner. Training is a method of control because it specifies how the work must be performed. In the training the Joined Party was told that he could not work for a competitor, that he was required to personally perform the work, and that he was required to adhere to a dress code.
23. The Joined Party was paid by time worked rather than by production or by the job. In addition, the Joined Party had the ability to earn a bonus by completing the work in less time than scheduled or by recommending the hiring of other technicians who remained on the job for specified periods of time. 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.
24. Either party had the right to terminate the agreement at any time without incurring a penalty for breach of contract. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 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. The Petitioner's only witness, the former president of the Petitioner, testified that she was not directly involved in the Petitioner's business and that she had never met or spoken to the Joined Party or any of the other technicians. She testified that all of the Petitioner's files and records have been either lost or destroyed.

26. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
27. The Petitioner's evidence is not sufficient to establish that the determination of the Department of Revenue is in error.
28. On November 29, 2012, the Petitioner submitted proposed findings of fact and conclusions of law containing what appears to be an agreement of hire between the parties. Rule 73B-10.035(10)(a), Florida Administrative Code, provides that the parties will have 15 days from the date of the hearing to submit written proposed findings of fact and conclusions of law with supporting reasons. However, no additional evidence will be accepted after the hearing has been closed. Thus, the additional evidence presented by the Petitioner is rejected and has not been considered in this recommended order.

Recommendation: It is recommended that the determination dated July 18, 2012, be AFFIRMED.

Respectfully submitted on December 3, 2012.



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 envío 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
December 3, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

DAEL B'YISRAEL
609 VILLAGE CIRCLE
DUBLIN GA 31021

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

FLORIDA DEPARTMENT OF REVENUE
ATTN: MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417