

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

**PETITIONER:**

Employer Account No. - 2849027  
CREEDO CONSULTING ENGINEERS LLC  
ATTN: IRENA GOLDENBERG, PRESIDENT  
13375 NW 11TH PL  
SUNRISE FL 33323-2932

**RESPONDENT:**

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

**PROTEST OF LIABILITY**  
**DOCKET NO. 0019 3454 25-01**

**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 16, 2013, 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 11<sup>th</sup> day of April, 2014.



Magnus Hines  
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.

Shanendra Y. Barnes  
DEPUTY CLERK

4.11.14  
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 11<sup>th</sup> day of April, 2014.

Shanendra 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:

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DEPARTMENT OF REVENUE  
WILLA DENNARD  
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DEPARTMENT OF REVENUE  
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CORAL SPRINGS FL 33065-4149

State of Florida  
DEPARTMENT OF ECONOMIC OPPORTUNITY  
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**DOCKET NO. 0019 3454 25-01**

**RESPONDENT:**

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

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Altemese Smith  
Bureau Chief,  
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 July 16, 2013.

After due notice to the parties, a telephone hearing was held on January 15, 2014. The Petitioner, represented by its president, appeared and testified. The Petitioner's Certified Public Accountant testified as a witness. The Respondent was represented by a Department of Revenue Tax Specialist II. A Tax Auditor III testified as a witness.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. At the hearing the parties were notified that they had fifteen days to submit Proposed Findings of Fact and Conclusions of Law. By letter dated January 20, 2014, and submitted on January 30, 2014, the Petitioner provided comments concerning an analysis of the evidence. At the same time the Petitioner submitted a request for an extension of time to "gather additional and pertinent/material, documentation." The time for submitting Proposed Findings of Fact and Conclusions of Law was extended until February 11, 2014, for all parties while cautioning the parties that as set forth in Rule 73B-10.035(10), Florida Administrative Code no additional evidence will be accepted. The Petitioner submitted additional documentation by certified mail postmarked February 13, 2014. Although the Petitioner's submission was not timely submitted it is addressed in the conclusions of law section of the recommended order.

**ISSUE:** Whether services performed for the Petitioner constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

**Findings of Fact:**

1. The Petitioner, Credo Consulting Engineers, LLC is a Florida Limited Liability Company which performs engineering for construction projects. The Petitioner has elected to be taxed as a partnership for federal income tax purposes. The Petitioner's president, Irina Goldenberg, is active in the operation of the business.
2. In 2011 a former worker, Francisco Gonzalez, who performed services for the Petitioner as a mechanical engineer and who was classified by the Petitioner as an independent contractor, filed a claim for unemployment compensation. Following an investigation a determination was issued by the Department of Revenue holding that Francisco Gonzalez performed services as an employee. The Petitioner appealed that determination and a hearing was held. On November 1, 2011, a final order was issued holding that Francisco Gonzalez was the Petitioner's employee.
3. During 2012 the Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2011 tax year to ensure compliance with the Florida Unemployment Compensation Law, currently known as the Florida Reemployment Assistance Program Law. The Petitioner notified the Department of Revenue that the contact person for the audit was the Petitioner's Certified Public Accountant located in North Carolina.
4. The Tax Auditor examined the individual earnings records, the check register, cash disbursements journal, payroll ledger, payroll summaries, general ledger, income statement, balance sheet, Form 1065 *U.S. Return of Partnership Income*, Form UCT-6 *Employers Quarterly Report*, Form 940 *Employer's Annual Federal Unemployment Tax Report*, Form 941 *Employer's Quarterly Federal Tax Report*, W-2 forms, Form W-3, and 1099 forms. The Petitioner's books and records examined by the Tax Auditor were provided by the Certified Public Accountant via the Internet.
5. During 2011 the Petitioner reported wages paid to the Petitioner's president, Irina Goldenberg, and paid unemployment taxes to Florida on the wages. The Tax Auditor removed the wages reported for the Petitioner's president holding that wages paid to a member of a limited liability company are exempt from payment of unemployment tax unless the limited liability company is classified as a corporation for federal income tax purposes.
6. The Tax Auditor examined the W-2 forms and the 1099 forms and discovered that several workers received a 1099 form as well as a W-2 form. The Tax Auditor provided the Petitioner with a Form 6061 *Independent Contractor Analysis* to be completed for each worker or each job class. The Petitioner's president completed the forms and returned them to the Tax Auditor through the Certified Public Accountant. On each completed Form 6061 the Petitioner's president wrote, among other things, "The company cannot afford to hire full time workers and keep them idle in between assignments." as an explanation of the difference between workers who were classified by the Petitioner as independent contractors and those that were classified as employees. It is the Petitioner's practice to hire workers to work part time or on an as needed basis and to classify the part time workers as independent contractors. When steady full time work becomes available the Petitioner offers full time employment to the workers. Workers who were reclassified by the Petitioner from independent contractor to employee within the same year received both a Form 1099 and a Form W-2 for the year.
7. Some of the workers classified by the Petitioner as independent contractors performed engineering work or engineering design work but did not have any type of degree or certification to perform that type of work. Those individuals were required to perform work under the supervision of a Professional Engineer. The Professional Engineer was required to review the work performed and to direct the workers to make changes in the work if necessary.
8. Some of the workers classified by the Petitioner as independent contractors performed information technology work including repairing the Petitioner's computers and printers. Those workers also performed delivery or courier services for the Petitioner.
9. The Petitioner classified clerical workers as independent contractors. At least one of the clerical workers also cleaned the Petitioner's office.

10. Although none of the workers had an assigned workspace in the Petitioner's office, workspace was available for the workers to use in the Petitioner's office. Some of the workers performed the work from other locations. All of the workers were required to report the progress of the work to the Petitioner. The Petitioner reimbursed the workers for travel expenses and out-of-pocket expenses as long as receipts were provided.
11. Some of the workers had written agreements with the Petitioner and some did not have written agreements. Some of the written agreements specify the company office hours, some contain a description of the duties to be performed, some contain the rate of compensation, and some state that the "contract-to-hire agreement will be reviewed periodically, and it will depend upon the company profitability and construction market stability."
12. The Tax Auditor determined that some of the workers who were classified as independent contractors during 2011 should have been classified as employees. The Tax Auditor extended the audit to include 2010 and found similar results, although in 2010 the Petitioner did not report wages paid to the Petitioner's president.
13. On June 4, 2013, the Tax Auditor issued a *Notice of Intent to Make Audit Changes*, notifying the Petitioner of the results of the audit. The *Notice of Intent to Make Audit Changes* informed the Petitioner that if the Petitioner did not agree with the results of the audit the Petitioner could request an audit conference. The Petitioner responded to the *Notice of Intent to Make Audit Changes* by mail postmarked June 28, 2013, however, an audit conference was not granted. On July 16, 2013, the Department of Revenue issued a *Notice of Proposed Assessment* providing the Petitioner with the right to file a protest within twenty days. The Petitioner filed a timely protest on July 21, 2013.

#### Conclusions of Law:

14. 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.
15. 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).
16. 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.
17. 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.
18. 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.
19. 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.
20. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> 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. 1<sup>st</sup> 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.
21. In this case the services performed by the workers were not separate and distinct from the Petitioner's business but were an integral and necessary part of the business. It was not shown that the workers who were reclassified by the Tax Auditor as employees operated their own businesses or that the workers were at risk of suffering a financial loss from performing services.
22. Although the Petitioner was vague about the specific duties performed by the workers it appears that most of the reclassified workers performed some sort engineering work or engineering design work. Since the workers are not Professional Engineers their work had to be performed under the direction of a Professional Engineer. The completed work was reviewed by a Professional Engineer and if the work was not performed appropriately the Petitioner had the right to direct the workers to redo the work or correct the errors. Thus, the workers performed the work under the direction and control of the Petitioner.
23. Section 443.036(20), Florida Statutes provides:
- (c) A person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.
  - (d) A limited liability company shall be treated as having the same status as it is classified for federal income tax purposes. However, a single-member limited liability company shall be treated as the employer.
24. Partners of a partnership are not employees of the partnership. In the same light members of an LLC classified for federal income tax purposes as a partnership are not employees of the LLC and are not reportable for purposes of unemployment compensation taxes. The Petitioner is classified



as a partnership for federal income tax purposes. Thus, the income received by the Petitioner's president is not wages and is not reportable.

25. 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. It has not been shown that, based on the evidence that has been accepted as credible, that the determination of the Department of Revenue is in error.
26. 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.
27. The last date for submitting proposals was January 30, 2014. On January 30, 2014, the Petitioner requested a seven day extension to submit proposals because the Petitioner needed time to "gather additional and pertinent/material documentation." By order dated February 4, 2014, the special deputy extended the time for filing proposals for all parties until February 11, 2014, while cautioning the parties that as set forth in Rule 73B-10.035(10), Florida Administrative Code no additional evidence will be accepted. By certified mail postmarked February 13, 2014, the Petitioner submitted six affidavits which had not been previously submitted as evidence. The additional evidence submitted by the Petitioner is rejected and has not been considered in this recommended order.

**Recommendation:** It is recommended that the determination dated July 16, 2013, be AFFIRMED

Respectfully submitted on February 24, 2014.



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*

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SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:**

**February 24, 2014**

Copies mailed to:

Petitioner

Respondent

WILLA DENARD  
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DEPARTMENT OF REVENUE  
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