

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

**PETITIONER:**

Employer Account No. - 2903258  
HEALTH CARE AT HOME INC  
910 NE 8TH AVE  
OCALA FL 34470-5337

**RESPONDENT:**

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

**PROTEST OF LIABILITY**  
**DOCKET NO. 0019 3454 31-01**

**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 protest of the determination dated May 15, 2013, is accepted as timely filed. It is further ORDERED that the determination dated May 15, 2013, 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 4<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

4-7-14  
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 7<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:

BONNIE KERESTESY  
13936 E HIGHWAY 316  
FORT MCCOY FL 32134

HEALTH CARE AT HOME INC  
910 NE 8TH AVE  
OCALA FL 34470-5337

HOLMES & YOUNG PA  
ATTN: GEORGE A YOUNG ESQ  
222 NORTH 3RD STREET  
PALATKA FL 32177

DEPARTMENT OF REVENUE  
WILLA DENNARD  
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TALLAHASSEE FL 32399

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

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



REEMPLOYMENT ASSISTANCE PROGRAM  
PO BOX 5250  
TALLAHASSEE, FL 32314-5250

**Rick Scott**  
Governor

**Jesse Panuccio**  
Executive Director



\*22675188 \*

HEALTH CARE AT HOME INC  
910 NE 8TH AVE  
OCALA, FL 34470

**PETITIONER:**

Employer Account No. - 2903258  
HEALTH CARE AT HOME INC  
910 NE 8TH AVE  
OCALA, FL 34470-5337

Protest Of Liability  
DOCKET NO.: 0019 3454 31-01

**RESPONDENT:**

STATE OF FLORIDA  
Department of Economic Opportunity  
C/O DEPARTMENT OF REVENUE - TAX WORLD

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Altemese Smith  
Bureau Chief,  
Executive Director,  
Reemployment Assistance Program  
Department of Economic Opportunity

Issue:

ISSUE: Whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Whether services performed for the Petitioner by the Joined Party and other individuals constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated May 15, 2013.

After due notice to the parties, a telephone hearing was held on January 7, 2014. Counsel appeared for the Petitioner; and

the president of the Petitioner gave testimony the Joined Party did not appear; a Senior Tax Specialist appeared for the Respondent. No proposed findings of fact or conclusions of law were received. The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

**Issues:** Whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Whether services performed for the Petitioner by the Joined Party and other individuals as caregiver constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

**Findings of Fact, timeliness:**

1. A determination bearing the date of May 15, 2013 was mailed to the Petitioner at its last-known address of record. Among other things, the determination advised:  
This letter is an official notice of the above determination and will become conclusive and binding unless you file a written application to protest this determination, within twenty (20) days from the date of this letter. If your protest is filed by mail, the postmark date will be considered the filing date of your protest.
2. The Petitioner follows a standard mail handling procedure: the office manager receives mail when it is delivered, and mail that needs a response is given that same day to the company president.
3. The determination was received in the mail at the

Petitioner's address on or about June 5, 2013.

4. The Petitioner, through its attorney, protested this determination on June 6, 2013. On August 29, 2013, an *Order to Show Cause* was mailed to the Petitioner, instructing the Petitioner to set forth in writing the reasons why its protest should not be dismissed for lack of jurisdiction. A hearing was scheduled because the Petitioner's response to the *Order to Show Cause* indicated the appeal may have been filed timely.

**Conclusions of Law, timeliness:**

5. Section 443.141(2)(c), Florida Statutes, provides:

*Appeals.*--The department and the state agency providing reemployment assistance tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.

6. Rule 73B-10.035, Florida Administrative Code, provides, in relevant part:

(1) Filing a Protest. Protests of determinations of liability, assessments, reimbursement requirements, and tax rates are filed by writing to DOR of Revenue in the time and manner prescribed on the determination document. Upon receipt of a written protest, DOR will issue a redetermination if appropriate. If a redetermination is not issued, the letter of protest, determination, and all relevant documentation will be forwarded to the Office of Appeals, Special Deputy Section, in DEO for resolution.

(5) Timely Protest.

(a) 1. Determinations issued pursuant to Sections 443.1216, 443.131 and 443.1312, F.S., will become final and binding unless application for review and protest is filed with DOR within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.

2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.

(b) If a protest appears to have been filed untimely, DEO may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.

7. Section 443.171 (10) Florida Statutes (2012) provides:  
EVIDENCE OF MAILING.--A mailing date on any notice, determination, decision, order, or other document mailed by the department or its tax collection service provider pursuant to this chapter creates a rebuttable presumption that such notice, determination, order, or other document was mailed on the date indicated.



8. The Petitioner's witness gave un rebutted testimony that ordinary office procedures were followed with respect to the handling of the determination. Those procedures include the prompt delivery of the day's mail from the office manager to the company president. As a result, the evidence shows that the determination was received in the mail by the Petitioner on June 5, 2013. The appeal was filed one day later.

9. The evidence shows that the determination was mailed, since it was received in the mail by the Petitioner, and the address on the determination was admitted to be a correct address. But the 15 day difference between the mailing date and the receipt date rebuts any presumption of proper or routine mailing that arises from the mailing date noted on the determination. The evidence of mailing of the determination consists of the determination itself, including the mailing date and address; and the testimony of the Petitioner's president relating to his receipt of the determination. There is no other independent evidence establishing that the determination was mailed on the day noted in the document itself. It is recommended that the Petitioner's appeal be accepted as an appeal within the time limits allowed by law.

**Findings of Fact, liability:**

10. The Petitioner provides caregivers in the home for clients, especially to individuals who are suffering from memory loss.

11. The Joined Party worked as a caregiver in association with the Petitioner from September 6, 2011 to a last day of work on or about February 14, 2013. The Joined Party is one of several caregivers associated with the Petitioner.

12. Clients contact the Petitioner to obtain the services of a caregiver. A plan of care is created by the Petitioner's director

of nursing in consultation with the client. The plan of care sets out what services a caregiver will provide, and a schedule under which the services will be provided.

13. Once a plan of care is created, the Petitioner contacts a caregiver and offers the opportunity to provide the services. The Petitioner is not obligated to offer any particular client opportunity to caregivers, nor is the Petitioner obligated to offer any particular number of opportunities to any caregiver.

14. The caregiver can accept or reject any offered client care opportunity. The caregiver is not required to accept any particular kind of offer, nor is the caregiver required to accept any particular number of offered opportunity.

15. Caregivers are typically paid by the hour if the plan of care provides for a limited amount of time per day or week with the client. If the plan of care calls for a live-in caregiver, the caregiver is paid a set amount per day. The rate per hour or per day varies depending on the amount of care called for in the plan of care. A rate of \$10 per hour is common.

16. Caregivers sign a written agreement with the Petitioner covering the terms of their association. Among the terms of the agreement is a provision that prohibits conflicts of interest of a caregiver with respect to the client. This includes a prohibition on the caregiver coercing the client and a prohibition on the caregiver accepting gifts from the client. The agreement provides for termination of the contract if the caregiver violates any of the terms of the agreement. The agreement can also be terminated upon 10 days' notice and if the caregiver has been convicted of a crime. The Petitioner designates caregivers as independent contractors. The Joined Party signed a standard agreement with the Petitioner before beginning to provide services to clients.

17. Caregivers associated with the Petitioner can and do

accept assignments from firms in competition with the Petitioner, so a caregiver might provide care to clients of several different companies over the course of a week.

18. When caregivers go to a client they are supposed to wear an identification badge showing their affiliation with the Petitioner. The Petitioner does not otherwise specify any particular clothing to be worn by the caregiver when with a client.

19. The Petitioner does not provide training to caregivers. Caregivers are required to maintain appropriate state-required licenses and certification for giving care to others. The required certification includes state mandated training in CPR and other continuing education.

20. Caregivers who work by the hour are paid weekly based on timesheets submitted by the caregiver to the Petitioner. The timesheets are a standard form that comes from the Petitioner. The caregiver fills out the times that care is provided, and client signs the form to certify that the times are correct.

21. The Petitioner does not withhold or deduct any amount for taxes from amounts paid to caregivers. The Petitioner does not provide any sort of insurance for caregivers. It does not provide any vacation pay. If a caregiver is unable or unwilling to provide service as scheduled, the caregiver contacts the Petitioner, who arranges to send a substitute.

22. The director of nursing visits clients approximately every 60 days to review the plan of care and compliance with it. In addition the Petitioner employs a client liaison who visits clients from time to time, or as called by a client or caregiver, to resolve problems in the provision of care, if there are any.

23. The association between the Joined Party and Petitioner came to an end when the Petitioner learned that the Joined

Party had violated the prohibition against accepting gifts from a client. This matter was ruled upon in a referee's decision, Docket number 2013-52017U, issued August 6, 2013. The Joined Party was the claimant/appellant in that case. The referee ruled that the claimant had violated the Petitioner's rule prohibiting accepting gifts from a client.

**Conclusions of Law:**

24. 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.

25. In *Cantor v. Cochran*, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 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 the one employed is 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 worker supplies the instrumentalities, tools, and a 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 time or job;
- (h) whether or not the work is 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.

26. 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.

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. The factors listed in *Cantor v. Cochran* are the common law factors that determine if a worker is an employee or an independent contractor. See, for example, *Brayshaw v. Agency for Workforce Innovation*, 58 So. 3d 301 (Fla. 1st DCA 2011).

28. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor

from a servant. *Collins v. Federated Mutual Implement and Hardware Insurance Co.*, 247 So. 2d 461 (Fla. 4th DCA 1971); *La Grande v. B. & L. Services, Inc.*, 432 So. 2d 1364 (Fla. 1st DCA 1983).

29. In *Keith v. News and Sun-Sentinel Co.*, 667 So.2d 167, 171 (Fla. 1995) the Florida Supreme Court stated:

Hence, courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status. In the event that there is no express agreement and the intent of the parties cannot otherwise be determined, courts must resort to a fact-specific analysis under the Restatement based on the actual practice of the parties. Further, where other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control.

30. Section 73B-10.035, Florida Administrative Code, provides:

(7) Burden of Proof. The burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.

31. The Joined Party and other similarly situated caregivers were not controlled in the way they provided services to the clients, nor were the caregivers obligated to accept any particular assignment. There was no requirement that the Joined Party or any other caregiver provide services only

through the Petitioner. The caregivers were treated as independent contractors for tax purposes. These factors show that the Joined Party and other caregivers were independent contractors.

32. The Petitioner did provide some identification and did check on the quality of services from time to time, but these things do not necessarily show control over the manner of working. The identification badge assures the clients that they are dealing with a service provider that they have contracted for. The quality check assures that the contract is actually being complied with. See, 4139 Management Inc. v. Dept. of Labor and Employment Security, 763 So.2d 514 (Fla. 5thDCA 2000).

33. The circumstances of the caregivers associated with the Petitioner in this case are similar to the “live-in aides” of Global Home Care, Inc. v. Dept. of Labor and Employment Security, 521 So.2d 220 (Fla. 2ndDCA 1988) and the “housekeepers” of Department of Health and Rehabilitative Services v. Department of Labor and Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985), both of which were found to be independent contractors. As a result, the Joined Party in this case and similarly situated caregivers should be considered to be independent contractors and not employees.

**Recommendation:**It is recommended that the appeal of the determination dated May 15, 2013 be accepted as timely filed; and the finding in the determination of the Joined Party and other caregivers to be employees, be REVERSED.



*J Jackson Houser*

J JACKSON HOUSER, Special Deputy  
Department of Economic Opportunity  
Reemployment Assistance 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 Barnes*

SHANEDRA BARNES, Special Deputy Clerk

Date Mailed: 01/31/2014

Copies mailed to:

Representative

Petitioner

Joined Claimant