

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

PETITIONER:

Employer Account No. - 2246879
SUMMIT BROKERAGE SERVICES INC
595 S FEDERAL HWY STE 500
BOCA RATON FL 33432-5542

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-32909L**

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 March 7, 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 _____ day of **August, 2013**.



Altemese Smith,
Bureau Chief,
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

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 August, 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:

SUMMIT BROKERAGE SERVICES INC
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BOCA RATON FL 33432-5542

MICHAEL THORNE
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DEPARTMENT OF REVENUE
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4230-D LAFAYETTE ST.
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DEPARTMENT OF REVENUE
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

107 EAST MADISON STREET

TALLAHASSEE FL 32399-4143

PETITIONER:

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SUMMIT BROKERAGE SERVICES INC
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**PROTEST OF LIABILITY
DOCKET NO. 2013-32909L**

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 March 7, 2013.

After due notice to the parties, a telephone hearing was held on June 3, 2013.

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.

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated March 7, 2013

After due notice to the parties, a telephone hearing was held on June 3, 2013.

The record of the case, including the cassette tape recordings 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 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 financial services firm. The Joined Party began his association with the Petitioner after he was contacted by a recruiter. The Joined Party is a CPA with work experience in financial services. The Petitioner was seeking to replace its Chief Financial Officer (CFO).

2. The Petitioner submitted a proposed agreement, called an Employment Term Sheet, to the Joined Party, under which the Joined Party would work with the Petitioner as an independent contractor for three months, at \$3750 per semi-monthly pay period, and then the Petitioner might offer the Joined Party the position of CFO, at a higher rate of pay, \$115,000 per year, paid out at \$4791.66 per semi-monthly pay period. The Joined Party did not accept that agreement.
3. Instead, the Joined Party and the Petitioner's executive vice president agreed that the Joined Party would start work for the company at the lower pay rate noted in the proposed agreement, and the Joined Party would review the financial practices of the Petitioner while the Petitioner determined whether the Joined Party would be offered the position of CFO. No written memorandum was made of that agreement.
4. The Joined Party began working with the Petitioner on May 14, 2012. The Joined Party was living on the west coast of Florida. He would drive across the state on Monday, stay with in-laws in the local area, and then drive back across the state to his residence on Friday. The Petitioner did not reimburse the Joined Party's travel expenses.
5. The Joined Party worked during the standard business hours of the Petitioner, and in addition worked at least two hours beyond that. Most workers left work around 5 p.m. Not long after the Joined Party started work with the Petitioner the executive vice president reprimanded the Joined Party for attempting to leave work at 6 p.m., and advised that the Joined Party was expected to work until 7 p.m. at least. The Joined Party worked until that time or beyond after that.
6. The Joined Party worked at the Petitioner's offices. The Petitioner supplied the Joined Party with the computer and other supplies necessary to do his job. The Joined Party reviewed financial practices of the Petitioner. He reported to the executive vice president. The executive vice president would sometimes tell the Joined Party who should be met with next. The Joined Party's salary increased to the higher pay rate in July 2012.
7. On August 6, 2012, an announcement was made to employees of the firm that the Joined Party had accepted the position of CFO, replacing the person who had previously filled that position. The Petitioner began to treat the Joined Party as an ordinary executive employee as of August 6, 2012. The Joined Party signed an acknowledgement of the employee manual on that date, and also signed a notice of probationary period. The claimant signed the Employment Term Sheet at that time, in order to accept the medical insurance benefits set out in that document. The Joined Party assumed responsibility for the employees who worked in the CFO's department, including the power to hire and fire subordinates.

Conclusions of Law:

8. 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).

9. 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.

10. 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.

11. The Petitioner and the Joined Party began their association with the intent and mutual knowledge that the Joined Party was being considered to replace the existing CFO. Training to be an employee of a specific employer implies an existing employment relationship more than it implies a status of independent contractor.
12. The evidence shows that even during the training period the Joined Party was subject to the control of the Petitioner: the executive vice president reprimanded the Joined Party for leaving early, and the executive vice president told the Joined Party who he should meet with.
13. The other listed factors tend to show control by the Petitioner: The Joined Party was supervised by the executive vice president. The Joined Party worked on the Petitioner's premises, on days that the Petitioner was open for business, using the Petitioner's equipment and supplies. The Joined Party was paid by time, with an annual salary, portions of which were paid at regular intervals. The work of CFO was part of the internal administration of the Petitioner's business, so the work of learning to be CFO would be part of that same business.
14. The evidence shows that the Petitioner attempted to expressly classify the Joined Party as an independent contractor at the beginning of the association, but the Joined Party resisted that classification. The written agreement offered to the Joined Party was not signed until after the

Joined Party was officially recognized as an employee. An agreement that is as appropriate for an employee as it is for an independent contractor provides no evidence of status that points more strongly one way or the other. The factor noted above relating to whether the parties believe they are creating an employer/employee relationship is equally weighted as between the two kinds of status.

15. Similarly, differences between the tasks carried out by the Joined Party before August 6, 2012 and after; and differences in the authority of the Joined Party within the Petitioner before and after that date, are at least as consistent with a status of employee-trainee, or conditional employee, as with a status of independent contractor.
16. Because the various factors point toward employment status throughout the relationship, where they point more strongly one way or the other; and because none of the relevant factors point unambiguously toward a finding of independence, the evidence shows that the Joined Party was an employee throughout his association with the Petitioner, and not just from the time that he was acknowledged as an employee.
17. 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.
18. The evidence presented in this case does not establish that the determination of the Department of Revenue was in error. The Petitioner has not met the necessary burden of proof.

Recommendation: It is recommended that the determination dated March 7, 2013, be AFFIRMED.

Respectfully submitted on June 25, 2013.

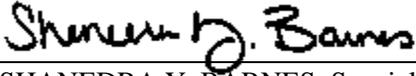


J JACKSON HOUSER, Special Deputy
Office of Appeals

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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
June 25, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

MICHAEL THORNE
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