

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

PETITIONER:

Employer Account No. - 2616321
BLUE WAVES OF NORTH MIAMI BEACH INC
ATTN: MARIA E MENDEZ
1108 KANE CONCOURSE STE 302
BAY HARBOR ISLANDS FL 33154-2068

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-60773L**

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 April 20, 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 October, 2012.



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 October, 2012.

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:

BLUE WAVES OF NORTH MIAMI BEACH
INC
ATTN: MARIA E MENDEZ
1108 KANE CONCOURSE STE 302
BAY HARBOR ISLANDS FL 33154-2068

NAYSSA A KALLINTERIS
3270 NW 102ND STREET
MIAMI FL 33147

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

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
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2616321
BLUE WAVES OF NORTH MIAMI BEACH INC
ATTEN: MARIA E MENDEZ
1108 KANE CONCOURSE STE 302
BAY HARBOR ISLANDS FL 33154-2068

**PROTEST OF LIABILITY
DOCKET NO. 2012-60773L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim 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 April 20, 2012.

After due notice to the parties, a telephone hearing was held on September 19, 2012. The Petitioner, represented by the Property Manager, 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 not received.

Issue:

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

Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 73B-10.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner, Blue Waves of North Miami Beach Inc., is a corporation which was formed in June 2004 to convert a rental apartment building into condominiums. The Petitioner's owners appointed their daughter-in-law to be the property manager. The Petitioner registered for payment of unemployment taxes but subsequently inactivated the account.
2. The Petitioner's owners formed other corporations, including China Well, Inc. and Sun Investments of Miami Beach, Inc., to operate businesses similar to that of the Petitioner. All of the corporations operated their businesses from the same business office. The Property Manager's duties included, among other things, answering the telephone for each of the businesses, opening the mail for each of the businesses, and sorting the mail. The Property Manager's duties became too much for her to perform and in approximately May 2010 the Petitioner hired an individual, Enrique, to answer the telephone and open the mail. The Petitioner did not pay unemployment tax on Enrique's earnings.
3. Enrique performed services for only a few months. In approximately June 2010 the Property Manager hired her sister, the Joined Party, to replace Enrique and to perform additional duties. There was no written contract or agreement between the Petitioner and the Joined Party.
4. The Property Manager told the Joined Party that the duties would consist of answering the telephone, opening the mail, sorting the mail, collecting the rent, data entry, and other clerical duties. The Property Manager told the Joined Party that the Joined Party should work between 9 AM and 5 PM each day, that she would be paid a salary of \$500.00 per week, and that no payroll taxes would be withheld from the pay.
5. The Petitioner provided the Joined Party with a key to the Petitioner's office. The Petitioner provided the work space, a desk, computer, printer, telephone and all supplies that were needed to perform the work. The Joined Party did not have any expenses in connection with the work.
6. The Property Manager provided some training to the Joined Party at the time of hire. The training included how to answer the telephone, how to use the QuickBooks system, how to sort mail, and how to keep the rental logs.
7. The Joined Party did not have an occupational license, did not have investment in a business, and did not offer services to the general public. The Property Manager was aware that the Joined Party did not have her own business.
8. The Joined Party generally worked about 35 hours per week and all of the work was performed from the Petitioner's office during the Petitioner's regular business hours. The Joined Party was not required to complete a time sheet because the Property Manager was in and out of the office each day and was aware when the Joined Party worked. As a salaried worker the Joined Party was paid for holidays, sick time, and vacation time.
9. The Property Manager was the Joined Party's immediate supervisor. The Joined Party was required to report the progress of the work to the Property Manager.
10. The Joined Party was required to personally perform the work. She was not allowed to hire others to perform the work for her.
11. The Joined Party received her salary of \$500.00 per week, however, the salary was not always paid by the Petitioner, Blue Waves of North Miami Beach Inc. Most of the paychecks were issued from the account of China Well, Inc. and some of the paychecks were issued from the account of Sun Investments of Miami Beach, Inc. No taxes were withheld from the pay. At the end of the year the Petitioner's accountant prepared a Form 1099-MISC showing the total payments made to

the Joined Party by Blue Waves of North Miami Beach, Inc.. For 2010 the Petitioner reported total payments of \$6,000.00 to the Joined Party and for 2011 the Petitioner reported total payments of \$3,000.00.

12. Either party could terminate the relationship at any time without incurring liability for breach of contract. The Petitioner terminated the relationship in October 2001 due to lack of work.
13. The Joined Party filed an initial claim for unemployment compensation benefits effective October 9, 2011. When the Joined Party did not receive any credit for wages during the base period of the claim a *Request for Reconsideration of Monetary Determination* was filed and investigations were issued to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.
14. On January 5, 2012, the Department of Revenue issued a determination holding that the Joined Party was an employee of China Well, Inc. China Well, Inc. appealed that determination. Following a hearing a recommended order and a final order were issued affirming that the Joined Party performed services for China Well, Inc. as an employee.
15. By determination dated April 20, 2012, the Department of Revenue notified Blue Waves of North Miami Beach, Inc. that the Joined Party and other individuals performing services for the Petitioner as office managers were the Petitioner's employees. The determination also held that corporate officers are employees by statute and, as such, their wages are reportable for unemployment tax. The Petitioner filed a timely protest on April 27, 2012.

Conclusions of Law:

16. The issue in this case, whether services performed for Blue Waves of North Miami Beach Inc. by the Joined Party and other individuals working as office managers 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. The only agreement between the parties was verbal and provided that payroll taxes would not be withheld from the pay. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented “while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other.”
24. The Petitioner owns rental property which is being converted to condominiums. The Joined Party was engaged to work in the Petitioner's business office to perform office clerical duties such as answering the telephone, opening the mail, collecting rents, and data entry. The Petitioner provided everything that was needed to perform the work. The Joined Party did not have an investment in a business and did not have any expenses in connection with the work. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the Petitioner's business.
25. The Petitioner controlled what work was to be performed and how it was performed. Training is a method of control because it specifies how the work must be performed. The Joined Party was required to personally perform the work and was required to inform the Petitioner of the progress of the work.

26. The Joined Party performed office clerical work. It was not shown that any skill or special knowledge was needed to perform the work. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)
27. The Petitioner and the related entities paid the Joined Party a weekly salary. The Joined Party was paid by time worked rather than based on production or by the job. The fact that the Petitioner chose not to withhold payroll taxes from the pay, standing alone, does not create an independent contractor relationship. 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.
28. The Joined Party worked for the Petitioner from June 2010 until October 2011, a period of approximately one and one-half years. Either party could terminate the relationship at any time without incurring liability for breach of contract. The relationship was terminated by the Petitioner. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 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."
29. The Petitioner controlled what work was performed, where it was performed, when it was performed, by whom it was performed, and how it was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.
30. The evidence presented in this case reveals that the Joined Party performed services for the Petitioner as an employee, not as an independent contractor. The Department of Revenue extended the determination to include other similarly situated workers, such as Enrique, retroactive to January 1, 2008.
31. Section 443.1216(1)(a)1., Florida Statutes, provides in pertinent part that the employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by an officer of a corporation.
32. Section 443.036(20)(c), Florida Statutes provides that 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.
33. The Petitioner's witness, the property Manager, testified that she did not know who the Petitioner's officers are. She testified that she did not know if the officers were active in the operation of the business or if the officers derived income from the business.

34. The determination issued by the Department of Revenue holds that the Petitioner's corporate officers are the Petitioner's employees and that the wages received by the corporate officers are reportable for payment of unemployment compensation taxes.
35. 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.
36. The Petitioner has not presented any evidence to show that the determination of the Department of Revenue was in error.

Recommendation: It is recommended that the determination dated April 20, 2012, be AFFIRMED.

Respectfully submitted on September 24, 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:
September 24, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

NAYSSA A KALLINTERIS
3270 NW 102ND STREET
MIAMI FL 33147

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

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