

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

PETITIONER:

Employer Account No. - 2722976
SCOTTYCO INC
ATTN JOHN PIMENTA
2153 WILTON DR
WILTON MANORS FL 33305-2123

RESPONDENT:

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

PROTEST OF LIABILITY
DOCKET NO. 0019 3463 23-01

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 18, 2013, is MODIFIED to exclude independent massage therapists Donald Green and Paul Manuel. It is further ORDERED that the determination is AFFIRMED as modified.

JUDICIAL REVIEW

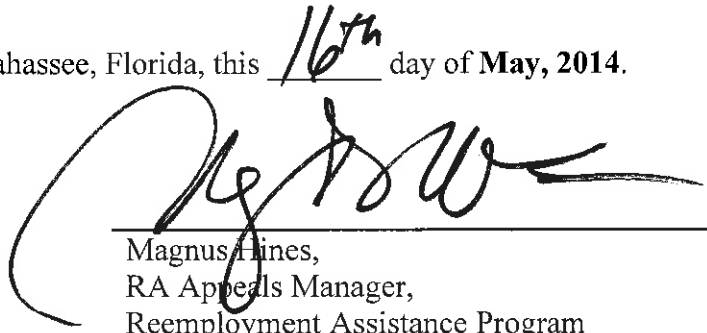
Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed 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 16th day of **May, 2014**.




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

5.16.14
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 16th day of May, 2014.

Shanendra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
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Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

By U.S. Mail:

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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
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RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
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RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager,
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 18, 2013.

After due notice to the parties, a telephone hearing was held on February 4, 2014. The accountant for the Petitioner appeared as representative and as a witness. Three other witnesses testified for the Petitioner: the company president and two independent massage therapists. The Joined Party appeared, with a representative. 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 services performed for the Petitioner constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

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

Findings of Fact:

1. The Petitioner has been in business since April 2007, following a predecessor that started in 2006 under a different name. The Petitioner operates 78 Degrees Spa. Massages are provided by licensed massage therapists, and other services are provided by estheticians. The president of the Petitioner has been the primary administrative worker since the inception of the business. The president does not take any regular salary for his services.

2. The Petitioner is one of many providers of massage therapy services in its local area. Massage therapists in the area sometimes work as employees and sometimes they are self-employed.
3. The Petitioner rents a massage therapy room to two independent massage therapists, Donald Green and Paul Manuel. They perform services for their own clients in that rented space; providing their own furniture and supplies. They have separate trade names. Their clients pay them for massage services; the clients do not pay the Petitioner. Those massage therapists also perform services for the Petitioner, for which the Petitioner splits the fee from the Petitioner's client 50/50. When the independent massage therapists work on the Petitioner's clients they work in the massage rooms maintained by the Petitioner, using the Petitioner's furniture, and sometimes the Petitioner's supplies. One of the independent massage therapists prefers to use his own supplies. The association between the independent massage therapists and the Petitioner began in August 2007.
4. The Joined Party provided massage therapy services to the Petitioner's clients from April 10, 2012 to June 6, 2013. The Joined Party did not rent space from the Petitioner. The agreement between the president of the Petitioner and the Joined Party was that the Petitioner would pay the Joined Party a 50/50 split on fees from its own clients referred for massage therapy, and a 60/40 split on fees for clients that the Joined Party brought in. Clients paid the Petitioner for services on the Petitioner's premises. The Joined Party was working part-time as a personal trainer at a gym in Miami, Florida. It was believed that the work there might prove to be a good source of massage clients.
5. The Joined Party was designated as an independent contractor. Clients were not specifically advised that the massage therapists were independent contractors. Some of the massage therapists associated with the Petitioner had an arrangement similar to that of the Joined Party.
6. There were five work rooms on the premises. One was the room rented to the independent massage therapists and used only by them. One room was used primarily by the esthetician. The remaining rooms were primarily massage therapy rooms. The Petitioner outfitted its massage therapy rooms with suitable furniture, such as a massage table, and a place for supplies such as lotions and essential oils. Equipment for aromatherapy was provided, as was a player for recorded music. The Petitioner used a professional linen service to provide necessary sheets and towels. The Joined Party could supply his own lotions or essential oils if he wished; but he generally did not do so. The Joined Party requested certain items for aromatherapy, which the Petitioner supplied. The Joined Party would usually choose the background music for a massage therapy session, usually from the music on hand at the location, but he could supply some of his own if he wanted.
7. The independent massage therapists would mark out times in the Petitioner's appointment book when they would be available to take clients from the Petitioner. The Joined Party was expected to be at the spa, or close by, from 11 a.m. to 5 p.m., Tuesday through Saturday. Later, the president of the Petitioner advised the Joined Party that he would need to be on the premises from 1 p.m. to 8 or 9 p.m. on Thursdays, because there was no other massage therapist available to cover the hours on that day. The Joined Party's other job ran from 7 p.m. to 10 p.m., Monday through Wednesday, so there was generally no conflict.
8. In between appointments the Joined Party was expected to perform services in the spa such as answering the telephone, taking out trash, and making sure that the restroom was clean. The Joined Party did not receive any pay specifically for those services. When the Joined Party objected, the president of the Petitioner noted that the Joined Party did not pay rent as the independent massage therapists did.

9. When there was no client appointment, and no other work to do in the spa, the Joined Party would leave the spa premises and walk around the area. The Joined Party would tell the president before he did this. The president told the Joined Party that he should remain close enough to be able to get back to the spa in half an hour. The Joined Party would visit nearby businesses. He would wear a polo shirt with the Petitioner's logo when he was on the Petitioner's premises or when he was walking around outside. The shirt was a special athletic-cut polo shirt. The Petitioner supplied several such shirts to the Joined Party, in various colors. The Joined Party would pass out business cards or palm cards. The palm cards showed his picture and displayed information about the spa. The Petitioner supplied the cards to the Joined Party.
10. Massage sessions would usually be scheduled for an hour. Appointments would be set for the Joined Party and for the other massage therapists based on when the massage therapist was available, as noted in the appointment book, and based on which services that the client desired.
11. There are a number of different massage services. The Joined Party was skilled in certain services, such as Swedish massage, deep tissue massage, and Reiki. The Petitioner did not observe or control the actual massage session.
12. The Petitioner set the prices charged for services to clients. A Swedish massage session, for example, had a lower price than a deep tissue massage. Sometimes the Petitioner would advertise reduced prices for services to encourage business. In those cases the Joined Party would receive his percentage share of the lower price. The Petitioner issued gift certificates. When a client paid for services with a gift certificate, the Joined Party would receive a fee from the Petitioner equivalent to his share of the regular price of that service.
13. The Petitioner paid the Joined Party biweekly. No taxes were to be taken from the payments by the Petitioner to the Joined Party. The Petitioner issued a 1099-MISC to the Joined Party for 2012 and for 2013.
14. The Joined Party maintained a license from the state to provide massage therapy services, as required for all massage therapists. The Joined Party did not always maintain liability insurance. The independent massage therapists who rented a space maintained liability insurance; the Petitioner was named as an additional insured on the policy.
15. The Joined Party provided massage services at locations other than the Petitioner's premises. The Joined Party did not pay the Petitioner any part of any fee derived from those services.
16. The president of the Petitioner ended the association between the Petitioner and the Joined Party. The president had become dissatisfied with the Joined Party not being on the premises when he was supposed to be, and because the Joined Party did not maintain liability insurance that would protect the Petitioner.
17. The Joined Party filed a claim for reemployment assistance benefits. After an investigation the Florida Department of Revenue issued a determination on July 18, 2013 finding that the Joined Party and other massage therapists were employees.

Conclusions of Law:

18. 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.

19. 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.
20. 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.
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. 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).
22. 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).
23. 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.

24. 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.

25. The evidence shows that there were two classes of massage therapist associated with the Petitioner. The massage therapists who rented space had separate businesses, and determined what hours they would be available to provide services to the Petitioner's clients. They maintained separate tools and supplies from those used for the Petitioner's clients. In University Dental Health Center v. Agency for Workforce Innovation, 89 So.3d 1139 (Fla. 4th DCA 2012), a dentist was found to be an employee because even though he used independent professional judgment and skill in treating patients, he used the employing unit's tools and equipment and had no right to refuse to treat the patients scheduled for him. The evidence shows that massage therapists exercise independent special skills in providing massage to clients, and the application of those skills is not controlled by the Petitioner. The massage therapists who rent space, referred to as the independent massage therapists, also maintained separate businesses, and by controlling when they were available for the Petitioner's clients they exercised control over who they provided services to. This is the opposite of the dentist in University Dental Health Center, and so by implication the opposite result should obtain. This is the case even for those instances when the independent massage therapists are performing services in the other massage rooms: the independent massage therapists could simply decline to block out any time at all in the Petitioner's appointment book to take any of the Petitioner's clients. The independent massage therapists are independent contractors.

26. The Joined Party did not rent space from the Petitioner, and he did not have a formal separate business; he did not maintain the same degree of independence as the independent massage therapists. The Joined Party did display some independence: he did provide massage services to clients other than those of the Petitioner, but that was not on the Petitioner's premises or within the hours scheduled for the Petitioner. The issue to be decided is whether the Petitioner exercised sufficient control over the services provided by the Joined Party on its premises as to make those services employment. As noted above, the Joined Party was not subject to control of the Petitioner in the application of massage techniques to the client; but neither was the employee dentist in University Dental Health Center.

27. The evidence shows that the Petitioner controlled when the Joined Party was supposed to be available to provide services to its clients. There were conflicts in the testimony on this and on other points. It is noted that there were inconsistencies between the testimony given by the Petitioner's president in the hearing and the information he provided to the Florida Department of Revenue prior to the determination being issued. Based on this, and based on the candor and demeanor of the witnesses, where there are conflicts in the testimony between the president and the Joined Party, those conflicts have been resolved in favor of the Joined Party. Consequently, the evidence shows that the president of the Petitioner required the Joined Party to be on premises, or close by, for a substantial portion of five days each week; and the president of the Petitioner exercised control over which hours the Joined Party needed to be available. The Petitioner exercised control over what the Joined Party did during those hours when he was not actively providing services to a client. This implies an employment relationship rather than that of independent contractor.

28. Two other factors noted in Cantor v. Cochran, above, point in the same direction. The Petitioner supplied the location, furniture, and supplies used in the services. The services were part of the Petitioner's business, rather than part of a business of the Joined Party.

Recommendation: It is recommended that the determination dated July 18, 2013, finding that the Joined Party and other similarly situated massage therapists are employees, be AFFIRMED, but MODIFIED to exclude the independent massage therapists, Donald Green and Paul Manuel.

Respectfully submitted on March 20, 2014.



J. Jackson Houser
 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

March 20, 2014

Copies mailed to:

Petitioner

Respondent

Joined Party

JOINED PARTY:

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