

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

PETITIONER:

Employer Account No. – 3083996
ANGEL HANDS COMPANION SERVICES INC
147 MOCKINGBIRD RD
DAVENPORT FL 33896-4764

**PROTEST OF LIABILITY
DOCKET NO. 0020 9766 48-02**

RESPONDENT:

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

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 December 3, 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 11th 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

21.11.14
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 11th 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:

ASHLEE SMITH
7712 LOOKOUT POINT DR
JACKSONVILLE FL 32210-2581

ANGEL HANDS COMPANION
SERVICES INC
147 MOCKINGBIRD RD
DAVENPORT FL 33896-4764

DEPARTMENT OF REVENUE
WILLA DENNARD
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
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

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

PETITIONER:

Employer Account No. - 3083996
ANGEL HANDS COMPANION SERVICES INC
147 MOCKINGBIRD ROAD
DAVENPORT FL 33896-4764

PROTEST OF LIABILITY
DOCKET NO. 0020 9766 48-02

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 December 3, 2013.

After due notice to the parties, a telephone hearing was held on January 28, 2014. The company president appeared and testified for the Petitioner, as did an accountant; the Joined Party appeared; and 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.

Issue:

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.

Findings of Fact:

1. The Petitioner provides home care services to clients, especially clients covered by Medicaid. The business began in 2009 and it was incorporated in February 2012. The president of the Petitioner at the time of incorporation was still president at the time of the hearing. The Joined Party worked for the Petitioner as a field worker, providing home care to clients from May 8, 2011 to December 2, 2011. Both the Petitioner and the Joined Party considered the home care work to be that of an independent contractor. The Joined Party began a second period of work when she signed an agreement on March 11, 2013 under which she was designated as an executive assistant. That period of work with the Petitioner ended on August 30, 2013. It is that second period of work which is the subject of this recommended order.
2. The Petitioner's president is the only individual that the corporation recognizes as an employee. The Petitioner considers all other workers to be independent contractors.

3. The written agreement between the Petitioner and the Joined Party provided for a payment of \$400 per week, plus an additional \$15 per week for any additional client that the Joined Party was able to secure to the Petitioner. Duties of the Joined Party set out in the agreement included marketing, interviewing new staff, answering the telephone, timely submission of paperwork, staff training, quality assurance visits, monthly and quarterly client reports, review of staff work to maintain compliance with any statutory requirements, and serving as a back-up field worker providing care to clients when necessary. The agreement advised that compensation might drop if there was a decrease in the number of clients.
4. The Joined Party worked primarily from her home. This was an attractive feature of the arrangement for the Joined Party, because it gave the Joined Party flexibility to perform services and simultaneously deal with domestic problems such as her daughter being sick, without having to take large amounts of time off. The Petitioner's telephone system was set to transfer calls to the Joined Party's telephone starting at 9 a.m. each weekday, until 5 p.m. The Joined Party received calls on her cell phone. This business use of her cell phone did not require any extra payment beyond the regular cell phone subscription. Over the course of a work day the Joined Party would receive calls from clients, from field workers, and from potential clients. This continued even when the Joined Party had to personally fill in for a field worker who was unable to fulfill an assignment and no other substitute could be found. The Joined Party would take calls while providing services to the client. Many of the callers asked for the president of the Petitioner. The Joined Party would attempt to resolve whatever the issue was, sometimes at the request of the president. When there was no issue that the Joined Party could resolve, she would take a message for the president, and relay the message either by a telephone call to the president or by email.
5. The Joined Party used her own computer for email. She used her own printer for any documentation that needed to be printed out. The Petitioner occasionally supplied printer ink to the Joined Party.
6. The Petitioner has created brochures to be used in marketing its services. The Joined Party would distribute the brochures and speak to representatives in various likely facilities, such as hospitals or other places. The Joined Party would speak to individuals such as social workers who might be able to refer clients. The Joined Party would also send brochures by fax. Sometimes the president of the Petitioner would suggest a possible potential customer for the Joined Party to send a fax to. The Joined Party would call potential clients sometimes.
7. In addition to marketing efforts for the Petitioner, the Joined Party briefly engaged in marketing efforts for another firm, which operated an assisted living facility. The president of the Petitioner introduced the Joined Party to the representative of the assisted living facility. The Joined Party earned \$50 per week for three weeks from that firm, distributing marketing materials for that firm while she distributed marketing materials for the Petitioner.
8. In addition to marketing, the Joined Party would visit clients from time to time to evaluate the services that the home care field workers were providing. The Joined Party sometimes would show a field worker how to perform a particular task for a client. Field workers were supposed to submit time sheets each week, countersigned by the client, showing what and when services had been performed. Different timesheets were required for different kinds of home care services. The Joined Party sometimes had to provide information about which time sheet should be used and how it should be properly completed. The time sheets were submitted to the president of the Petitioner by the field workers. The president would be aware of the activities of the Joined Party based on daily telephone conversations or emails, and by receiving monthly client summaries from the Joined Party.

9. The Joined Party was paid \$400 per week for each week that she performed services for the Petitioner in 2013. No taxes were deducted from the pay.
10. The Joined Party did not secure any new client for the Petitioner. The Petitioner did not lose any clients. On or about August 30, 2013, the president of the Petitioner advised the Joined Party that in light of the lack of new customers the Petitioner would only pay the Joined Party \$350 per week instead of \$400 per week. The Joined Party declined to accept the change in the agreement and did not work for the Petitioner after August 30, 2013.

Conclusions of Law:

11. 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.
12. 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.
13. 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.
14. 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).
15. 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).

16. 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.

17. 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.

18. The agreement between the Petitioner and the Joined Party did not expressly state whether the Joined Party was an employee or an independent contractor. The Petitioner did not treat the Joined Party as an employee in connection with Federal income or other taxes, but this is a weak indicator of status, in light of the obvious financial incentive that a firm might have to reduce the cost of taxes. But though it is a weak indicator, it is still some evidence, especially where, as here, the worker does not object to the lack of withholding and deductions for taxes.
19. In her work as executive assistant, the Joined Party worked primarily from home, or at the location of some client of the Petitioner. The Joined Party used her own equipment, and the Petitioner generally did not reimburse the Joined Party for the use of that equipment.
20. The working arrangement was such that the president of the Petitioner was not able to monitor, much less control, the day-to-day activities of the Joined Party. The Joined Party was on a schedule, in the sense that telephone calls to the Petitioner were transferred to the Joined Party instead for a set period of time each working day. Having to meet a work schedule implies some control by the party who sets the schedule. But in this case, the Joined Party could and did engage in other activities while performing her work as executive assistant. The Joined Party, not the Petitioner, determined what degree of attention she was going to devote to services to the Petitioner: i.e. whether the Joined Party focused exclusively on the services for the Petitioner, or whether the services were provided while the Joined Party was also dealing with family matters or engaging in other activities. Working according to a standard schedule does not, in this case, show control by the Petitioner over how the Joined Party did her work.
21. The Joined Party was not required to provide services exclusively to the Petitioner, and the Joined Party for a short time provided some of the same marketing services to another company and to the Petitioner simultaneously. Where there are similar arrangements with several parties, it tends to reduce the control any one recipient of services can exert over the provider; and this is the effect even when there is simply the potential for services to be provided to many recipients. This factor of exclusivity is not among those listed in Cantor v. Cochran, but that list is explicitly not an exhaustive list. The element of exclusivity or not is important in determining status in a number of cases; for example, VIP Tours of Orlando, Inc. v. Dept. of Labor and Employment Security, 449 So.2d 1307 (Fla. 5th DCA 1984)(tour guides provided services to several different tour companies and could decide which tour to accept or not: found to be independent contractors); Florida Gulf Coast Symphony, Inc. v. Dept. of Labor and Employment Security, 386 So.2d 259 (Fla. 2nd DCA

1980)(professional musicians were independent contractors notwithstanding being led by a conductor when performing in the orchestra; the services in the orchestral performance were among many activities in the profession); compare, University Dental Health Center, Inc. v. Agency for Workforce Innovation, 89 So.3d 1139 (Fla. 4th DCA 2012)(dentist found to be an employee: though not controlled in the exercise of his professional skill and judgment, his patients were exclusively the employer's patients and he could not choose which to treat and which not to treat).

22. When there is a relation of independent contractor to principal, the principal is interested primarily in obtaining certain results. In this case, that element is shown in the circumstances leading to the end of the association between the Petitioner and the Joined Party. The dependence of pay to the Joined Party on new clients was part of the agreement from the beginning. The Joined Party did not obtain any new clients and the Petitioner therefore proposed to modify the agreement to reflect that failure of expectation. There was an absence of attempts to control the Joined Party's methods of obtaining new clients—no insistence on the Joined Party contacting a certain number of prospective customers each week, for example; no formulation of an express marketing plan for the Joined Party to follow.

23. The evidence shows that even though the Joined Party worked as an integral part of the Petitioner's business, the methods of working were under the control of the Joined Party rather than the Petitioner, and therefore the Joined Party was an independent contractor and not an employee.

Recommendation: It is recommended that the determination dated December 3, 2013, finding the Joined Party in her capacity of executive assistant to be an employee, be REVERSED.

Respectfully submitted on February 25, 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:
February 25, 2014*

Copies mailed to:

Petitioner

Respondent

Joined Party

Joined Party:

ASHLEE M SMITH
7712 LOOKOUT POINT DRIVE
JACKSONVILLE FL 32210--2581

Other Addresses:

WILLA DENNARD
DEPARTMENT OF REVENUE
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

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