

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

PETITIONER:

Employer Account No. – 0476108
MEG SEGRETOS DANCE CENTRE
11336 W STATE ROAD 84 # 42
DAVIE FL 33325-4007

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 0023 4527 33-02**

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 18, 2014, 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 18th day of February, 2015.



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

2.19.15
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 19th day of February, 2015.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
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Reemployment Assistance Appeals
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By U.S. Mail:

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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. - 0476108
SEGRETO INC
MEG SEGRETO'S DANCE CENTRE
ATTN: MEG SEGRETO
11336 W SR 84 #42
DAVIE FL 33325-4007

**PROTEST OF LIABILITY
DOCKET NO. 0023 4527 33-02**

RESPONDENT:

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

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 April 18, 2014.

After due notice to the parties, a telephone hearing was held on December 10, 2014. The Petitioner was represented by its attorney. The Petitioner's Business Manager testified as a witness. The Respondent, represented by a Department of Revenue Senior Tax Specialist, appeared and testified. The Joined Party did not participate.

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 constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner, Segreto, Inc., is a corporation which operates a dance school. The Petitioner established liability for payment of unemployment compensation tax, now known as reemployment assistance tax, in 1979.
2. The Petitioner utilizes various individuals to teach the dance classes. Some of those individuals are classified as employees and some are classified as independent contractors. The major difference between the individuals classified by the Petitioner as independent contractors rather than employees is that the Petitioner is the primary source of income for the employees while the Petitioner is not the primary source of income for the independent contractors.

3. The Joined Party began performing services for the Petitioner as a dance teacher in 2008. The Joined Party is still currently teaching dance at the Petitioner's dance studio. The Joined Party is classified by the Petitioner as an independent contractor.
4. Dance instruction does not require any type of license or certification. Applicants for the position submit a resume from which the Petitioner determines whether or not the applicant is qualified to work as a dance instructor.
5. The Petitioner's regular hours of operation are from 3:30 PM until 9:30 PM on Monday through Friday and from 9:30 AM until 4:30 PM on Saturday. The dance lessons are taught at the Petitioner's dance studio.
6. At the time the Joined Party was engaged by the Petitioner, and periodically thereafter, the Joined Party informed the Petitioner what days and hours she was available to work. The Petitioner schedules the Joined Party to teach classes within the days and hours that she is available to work. Each scheduled class has a minimum of five students.
7. The Petitioner does not provide any training concerning how to teach the students. The Petitioner does not provide any instructions concerning how to teach and does not oversee or supervise the actual teaching of the classes. The Joined Party is not required to report the progress of the work to the Petitioner.
8. The classes are taught at the Petitioner's dance studio. The Petitioner provides the stereo equipment for playing music, however, the Joined Party provides the music that is played. The Petitioner does not reimburse the Joined Party for any expenses that the Joined Party might have.
9. The Petitioner currently pays the Joined Party \$75.00 per hour to teach dance classes, regardless of the number of students in the class. The Petitioner does not withhold payroll taxes from the pay. The Petitioner does not provide any fringe benefits such as health insurance, life insurance, paid vacations, paid sick days, or retirement benefits. Several years ago the Petitioner paid a Christmas bonus to the independent contractors but the Petitioner has discontinued that practice. At the end of the year the Petitioner reports the Joined Party's earnings paid by the Petitioner during the year to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
10. The Joined Party is free to hire others to teach the classes for her. If the Joined Party hires another individual to assist or teach the class, the Joined Party is responsible for paying that individual.
11. If the Joined Party is not available to teach a class at the scheduled time the Joined Party is free to reschedule the class for another date or time. The Joined Party is responsible for notifying the students of the rescheduled date and time.
12. The Joined Party is free to perform services as a dance teacher for other dance studios. The Petitioner has knowledge that the Joined Party regularly teaches dancing for the Petitioner's competitors.
13. The Joined Party has her own private students to which she teaches dance at the Petitioner's dance studio. The Petitioner charges the Joined Party \$25 per hour for use of the Petitioner's studio and equipment to teach the Joined Party's private students. The Petitioner's students who are taught by the Joined Party pay the Petitioner for the lessons. The Joined Party's private students pay the Joined Party for the lessons. The Petitioner has no control over, or knowledge of, the amounts which the Joined Party charges the private students for the lessons.
14. Effective June 10, 2013, the Joined Party formed a corporation, TOC Project, Inc. The Petitioner continues to pay the Joined Party as an individual for the lessons provided to the Petitioner's students.

15. The Joined Party filed a claim for reemployment assistance benefits effective January 26, 2014. When the Joined Party did not receive credit for her earnings with the Petitioner an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.
16. On April 18, 2014, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to August 5, 2010, and added the Joined Party's earnings, as reflected on the 1099 forms for 2012 and 2013, to the Petitioner's previously filed Employer's Quarterly Reports for 2012 and 2013. The Petitioner filed a timely protest by mail postmarked April 29, 2014.

Conclusions of Law:

17. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as dance teachers 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.
18. 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).
19. 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.
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. 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.
22. 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.
23. 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.
24. No competent evidence was presented concerning the agreement between the parties. The Petitioner's witness, the Business Manager, submitted a prehearing statement which states that there is no written agreement between the parties. The Business Manager testified that she was not present when the Joined Party was engaged by the Petitioner. Thus, the witness lacks personal knowledge of any verbal agreement. Contrary to the Business Manager's prehearing statement the business Manager testified that there is a written independent contractor agreement between the Joined Party and the Petitioner. The Petitioner did not present any written agreement as evidence. Section 90.952, Florida Statutes, provides that, "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph."
25. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
26. The Petitioner provides the place of work and substantially everything that is needed to perform the work. It was not shown that the Joined Party has significant expenses in connection with the work. The work performed by the Joined Party for the Petitioner is not separate and distinct from the Petitioner's business but is an integral and necessary part of the Petitioner's business. These facts point to an employment relationship.
27. The Joined Party is free to work for a competitor or to compete directly with the Petitioner. The Joined Party is not required to personally perform the work but is free to hire others to perform the work for her. These facts point decidedly to an independent contractor relationship.
28. The Joined Party uses her own knowledge and skill in determining how to teach the students. The Petitioner does not provide any training, does not instruct the Joined Party concerning how to perform the work, does not supervise the performance of the work, and does not require the Joined Party to report the progress of 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)
29. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an

employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

30. The facts of this case reveal that the Petitioner does not control, or attempt to control, the Joined Party concerning the means and manner used to teach dancing to the Petitioner's students. Thus, it is concluded that the Joined Party performed services as an independent contractor and that the Joined Party's earnings do not constitute insured employment.

Recommendation: It is recommended that the determination dated April 18, 2014, be REVERSED.

Respectfully submitted on January 12, 2015.



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.

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
January 12, 2015

Copies mailed to:
Petitioner
Respondent
Joined Party

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