

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 INTERNATIONAL ACADEMY OF STYLE,

4
5 Petitioner,

6 vs.

7 DIVISION OF INDUSTRIAL RELATIONS,
8 and the NEVADA DEPARTMENT OF
9 ADMINISTRATION, APPEALSOFFICER
10 SHEILA MOORE,

11 Respondents.

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Case No. : CV20-00445
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Elizabeth A. Brown
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12 **JOINT APPENDIX,**
13 **VOLUME I OF XI**

14
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(Chronological)

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1	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore filed 1/17/2020</i>	4/22/2020	JA1650- JA1651	X
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1	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 - <i>Order, Appeals Officer Moore, Filed 12/08/2017</i>	4/22/2019	JA1672- JA1673	X
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13	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Pre-Hearing Statement submitted on behalf of International Academy of Style filed on 6/28/2017</i>	4/22/2019	JA1687- JA1690	X
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1	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Motion for Continuance submitted on behalf of International Academy of Style filed on 4/19/2017</i>	4/20/2019	JA1699- JA1702	X
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19	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Pre-Hearing Statement of the Division of Industrial Relations filed 6/30/2017</i>	4/20/2019	JA1715- JA1717	X
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1	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Order, Appeals Officer Moore, filed on 5/4/2017</i>	4/20/2019	JA1724- JA1725	X
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7	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Motion for Continuance and Resetting submitted on behalf of International Academy of Style filed on 4/19/2017</i>	4/20/2019	JA1730- JA1735	X
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9	Original Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS) filed under District Court Case No. CV20-00445 – <i>Notice of Appeal and Order to Appear filed on 3/23/2017</i>	4/20/2019	JA1736- JA1737	X
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I declare under penalty of perjury that the foregoing is true and correct.

/s/ Bernadette Francis

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 *****

9 INTERNATIONAL ACADEMY OF STYLE,

10 Petitioner,

11 vs.

12 DIVISION OF INDUSTRIAL RELATIONS,
and the NEVADA DEPARTMENT OF
13 ADMINISTRATION, APPEALS OFFICER
SHEILA MOORE,

14 Respondents.
15

Case No.: _____

Dept. No.: _____

**PETITION FOR JUDICIAL
REVIEW**

16
17 Petitioner, INTERNATIONAL ACADEMY OF STYLE, by and through her attorney of record,
18 Jason D. Guinasso, Esq., and Hutchison & Steffen, PLLC, hereby requests that the Second Judicial
19 District Court of the State of Nevada review the Decision and Order of Appeals Officer Sheila Moore,
20 entered on February 20, 2020, in the case officially designated "In the Contested Matter of
21 INTERNATIONAL ACADEMY OF STYLE, Appeal Nos. 1702537-SYM & 1702545-SYM". A copy
22 of the referenced order is attached hereto as "**Exhibit No. 1.**" In support of this Petition, International
23 Academy of Style respectfully submits the following:

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25 ///

1 I.

2 JURISDICTION

3 1. This Court has jurisdiction to review the findings of fact and conclusions law of the
4 Nevada Department of Administration Appeals Officer Sheila Y. Moore. See NRS 616C.370; NRS
5 233B.130. In this regard, NRS 233B.130 provides that:

6 1. Any party who is:

7 (a) Identified as a party of record by an agency in an administrative proceeding; and

8 (b) Aggrieved by a final decision in a contested case,

9 is entitled to judicial review of the decision. Where appeal is provided within an agency, only
10 the decision at the highest level is reviewable unless a decision made at a lower level in the
11 agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an
12 agency in a contested case is reviewable if review of the final decision of the agency would not
13 provide an adequate remedy.

14 2. Petitions for judicial review must:

15 (a) Name as respondents the agency and all parties of record to the administrative proceeding;

16 (b) Be instituted by filing a petition in the district court in and for Carson City, in and for the
17 county in which the aggrieved party resides or in and for the county where the agency
18 proceeding occurred; and

19 (c) Be served upon:

20 (1) The Attorney General, or a person designated by the Attorney General, at the Office
21 of the Attorney General in Carson City; and

22 (2) The person serving in the office of administrative head of the named agency; and

23 (d) Be filed within 30 days after service of the final decision of the agency.***

24 6. The provisions of this chapter are the exclusive means of judicial review of, or judicial
25 action concerning, a final decision in a contested case involving an agency to which this chapter
applies.

2. This Petition has been timely filed in the Second Judicial District Court in and for
Washoe County.

21 II.

22 PARTIES

23 3. The Petitioner in this matter is International Academy of Style, ("IAS").

24 4. The Respondent in this matter is the Division of Industrial Relations, ("DIR").

5. IAS is the party of record to the administrative proceeding under review herein that has been “aggrieved” by the final decision of Appeals Officer Sheila Moore.

III.

ISSUES PRESENTED FOR JUDICIAL REVIEW

6. Petitioners submit the following issues for Judicial Review by this honorable Court:

a. Whether the Nevada Department of Business and Industry, Division of Industrial Relations (“DIR”), Workers’ Compensation Section’s March 14, 2017, Notice of Determination of Premium Penalty in the amount of \$16,390.94 is supported by the evidence and Nevada law.

b. Whether the Nevada Department of Business and Industry, Division of Industrial Relations (“DIR”), Workers’ Compensation Section’s March 14, 2017, Notice of Determination of Premium Penalty in the amount of \$251.10 is supported by the evidence and Nevada law.

c. Whether IAS was indeed in compliance with Nevada Law when they discontinued Worker's Compensation insurance for their Independent Contractors.

IV.

STANDARD OF REVIEW

7. Judicial review of a final decision of an agency must be conducted by the District Court without a jury and is confined to the record on appeal. NRS 233B.135(1).

8. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the Court. NRS 233B.135(2).

9. The burden of proof is on the party attacking the decision to show that the final decision is invalid. NRS 233B.135(2).

10. However, the District Court may set aside, in whole or in part, a final decision of an administrative agency where substantial right of the petitioner has been prejudiced because the final decision is in violation of statutory provisions, affected by other error of law, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary, capricious or characterized by abuse of discretion. NRS 233B.135(3).

11. IAS now petitions this Court for Judicial Review of the Appeals Officer's findings and fact and conclusions of law under NRS 233B.135(3). The Appeals Officer Decision has affected grievous errors of law, is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, and is otherwise arbitrary, capricious or characterized by abuse of discretion.

V.

APPEALS OFFICER'S LEGAL ERROR

12. The Appeals Officer erred as a matter of law when she affirmed the decisions of the DIR to impose premium penalties under Appeal Nos. 1702545-SYM & 1702537-SYM, finding that the Instructors working at the school are Employees rather than Independent Contractors.

13. DIR asserts in their closing argument that the Independent Contractor Agreements that establish the relationship between IAS and the cosmetology professionals are void under NRS 616B.609; however, this statute is not applicable to the Independent Contractor Agreements in this case because they are contracts that are specifically approved and contemplated in the definition of employee under the NIIA. In this regard, NRS 616A.105 defines, in pertinent part, “Employee” and “worker” as:

“every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed...”

NRS 616A.110 then expressly excludes certain persons from the definition of Employee. Importantly, NRS 616A.110(9)(c) expressly excludes any person who:

1 “[p]erforms pursuant to a written agreement with the person for whom the services are
2 performed which provides that the person who performs the services is not an employee for the
3 purposes of this chapter.”

4 **[Emphasis added]**.

5 14. The cosmetology professionals clearly satisfy this exclusion. Cosmetology professionals
6 acknowledge in a written agreement that they are not employees as defined in NRS 616A for purposes
7 of worker’s compensation coverage, but rather they are expressly exempted from the definition
8 pursuant to NRS 616A.110(9)(c). Specifically, they are excluded from the definition of employee
9 because they perform services pursuant to a “written agreement,” which expressly provides that
10 cosmetology professionals are not performing services as employees for purposes of NRS 616A.
11 Copies of proof of worker’s compensation coverage or a notice of sole proprietorship with no
12 employees are attached to the Agreements. Nothing in the Independent Contractor agreements
13 “modifies” IAS’s or the cosmetology professionals’ duties, responsibilities, or liabilities under the
14 NIIA. Accordingly, IAS is not required to maintain workers’ compensation coverage on the
15 cosmetology professionals they contract with because they are expressly excluded from the definition
16 of employee pursuant to NRS 616A.110(9)(c).

17 15. Applying NRS 616B.609 in the way suggested by DIR would lead to the absurd result of
18 nullifying all written agreements between employers and independent contractors in the State of
19 Nevada. DIR’s argument is not supported by the express provisions of Nevada’s workers’
20 compensation laws and should have been rejected by the Appeals Officer.

21 16. For purposes of Nevada’s worker’s compensation law, an “independent contractor” is
22 defined as:

23 . . . any person who renders service for a specified recompense for a specified result, under
24 the control of the person's principal as to the result of the person's work only and not as to
25 the means by which such result is accomplished.

1 NRS 616A.255. In determining whether an employer-employee relationship exists, in
2 addition to considering a written agreement, the courts apply a five-factor test, known as
3 “the control test,” giving equal weight to the following factors:

4 (1) the degree of supervision;

5 (2) the source of wages;

6 (3) the existence of a right to hire and fire;

7 (4) the right to control the hours and location of employment; and

8 (5) the extent to which the worker’s activities further the general business concerns of
9 the alleged employer.

10 Clark County v. State Indus. Ins. Sys., 102 Nev. 353, 354 (1986). In applying these five factors
11 to the cosmetology professionals, each factor weighs in favor of independent contractor classification.

12 17. DIR also argued that the cosmetology professionals who contracted with IAS are in the
13 “same trade” as IAS. However, this argument fails because it is based on the mistaken assumption that
14 the cosmetology professionals were required to obtain an instructor license under NRS 644.395 and
15 NAC 644.105 and that having an instructor license was essential to IAS’s business operations as a
16 school. While it is true that each school of cosmetology must have two licensed instructors and one
17 additional licensed instructor for each 25 enrolled students, IAS has always satisfied this requirement
18 without having to rely on their contracts with cosmetology professionals.

19 18. Moreover, to determine whether an independent contractor is a statutory employee for
20 purposes of worker’s compensation coverage, the Nevada Supreme Court applies the Meers test.
21 Meers v. Haughton Elevator, 101 Nev. 283, 286, 701 P.2d 1006, 1007 (1985). However, DIR failed to
22 cite, apply, analyze or discuss this test in their closing argument. Under Meers, the Nevada Supreme
23 Court stated that the type of work performed by the independent contractor determines whether an
24 employment relationship exists. **Id.** The test is not whether the independent contractor’s activity is
25 useful, necessary or even absolutely indispensable to the statutory employer’s business; rather, the test

1 is whether that “indispensable activity” is, in that business, normally carried on through employees
2 rather than independent contractors. Id. This test is codified in NRS 616B.603, which states that an
3 employment relationship only exists if the parties are, “in the same trade, business, profession or
4 occupation.”

5 19. In addition to being “independent contractors”, the cosmetology professionals satisfy the
6 definition of “independent enterprises.” Pursuant to NRS 616B.603(2), an “independent enterprise” is
7 a person who holds himself out as being engaged in a separate business and holds a business license in
8 his own name or owns, rents, or leases property used in furtherance of his or her business.

9 20. All cosmetology professionals hold themselves out to be engaged in separate businesses
10 from IAS, including having their own business licenses in their own names and/or owning/renting
11 property in furtherance of their businesses. Therefore, the Appeals Officer committed an error as a
12 matter of law by holding that CCMSI’s denial of a second vocational rehabilitation program was lawful
13 and appropriate.

14 21. Therefore, the Appeals Officer committed an error as a matter of law by holding that
15 DIR’s premium penalties were lawful and appropriate.

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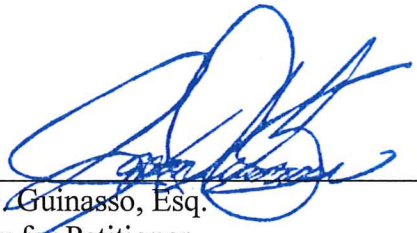
PRAYER FOR RELIEF

22. Petitioners respectfully request that this Court grant their Petition for Judicial Review and further instruct Appeals Officer to REVERSE DIR's premium penalties issued on March 14, 2017 under Appeal Nos. 1702537-SYM & 1702545-SYM.

AFFIRMATION

The undersigned does hereby affirm that the foregoing document filed in this matter does not contain the social security number of any person.

DATED this 10th day of March, 2020.



Jason D. Guinasso, Esq.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 500 Damonte Ranch Parkway, Suite 980, Reno, Nevada 89521.

On March 10, 2020, I served the following:

PETITION FOR JUDICIAL REVIEW

on the following in said cause as indicated below:

INTERNATIONAL ACADEMY OF STYLE BONNIE SCHULTZ & LONI CASTEEL 2295 MARKET STREET RENO, NV 89502 (VIA U.S. MAIL)	LEGAL SECTION DIVISION OF INDUSTRIAL RELATIONS 400 WEST KING STREET, SUITE 201 CARSON CITY, NV 89703 (VIA U.S. MAIL)
NEVADA DEPARTMENT OF ADMIN. APPEALS DIVISION 1050 E WILLIAM ST., SUITE 450 CARSON CITY, NV 89701 (VIA U.S. MAIL)	NEVADA DEPARTMENT OF ADMIN. PATRICK CATES, DIRECTOR 515 EAST MUSSEY ST., 3 RD FLOOR CARSON CITY, NV 89701 (VIA U.S. MAIL)
ATTORNEY GENERAL'S OFFICE 100 N CARSON STREET CARSON CITY, NEVADA 89701 (VIA U.S. MAIL)	DIVISION OF INDUSTRIAL RELATIONS 400 WEST KING STREET, SUITE 400 CARSON CITY, NV 89703 (VIA U.S. MAIL)

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 10, 2020, at Reno, Nevada.



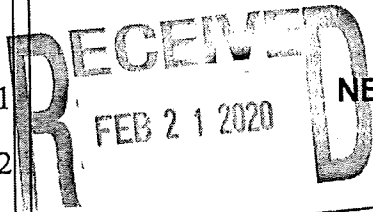
KATRINA A. TORRES

LIST OF EXHIBITS
PETITION FOR JUDICIAL REVIEW

EXHIBIT	DOCUMENT TITLE	# OF PAGES
Exhibit 1	Appeals Officer Decision, February 20, 2020	13

EXHIBIT 1

EXHIBIT 1



NEVADA DEPARTMENT OF ADMINISTRATION
BEFORE THE APPEALS OFFICER

FILED

FEB 20 2020

DEPT. OF ADMINISTRATION
APPEALS OFFICER

In the Contested Matter of:

Complaint No. 1706718

Appeal No. 1702537-SYM
1702545-SYM

INTERNATIONAL ACADEMY OF
STYLE

DECISION AND ORDER

This matter came on for hearing on November 6, 2018. The alleged employers, Loni Casteel ("Casteel") and Bonnie Schultz ("Schultz") dba International Academy of Style ("IAS") were represented by Jason Guinasso, Esq. Appearing on behalf of the Division of Industrial Relations ("DIR or "Division") was Donald C. Smith, Esq., Senior Division Counsel.

The following documents were entered into evidence:

IAS's Documentary Exhibit #1 was marked as Exhibit "1."

IAS's Documentary Exhibit #2 was marked as Exhibit "2."

IAS's Documentary Exhibit #3 was marked as Exhibit "3." Pages 159-166 are excluded.

IAS's Documentary Exhibit #4 was marked as Exhibit "4."

IAS's Documentary Exhibit #5 was marked as Exhibit "5."

IAS's Documentary Exhibit #6 was marked as Exhibit "6."

IAS's Documentary Exhibit #7 was marked as Exhibit "7."

Division's Evidence Packet filed in 1702537-SYM was marked as Exhibit "8."

Division's Evidence Packet filed in 1702545-SYM was marked as Exhibit "9."

Division's Supplemental Evidence Packet was marked as Exhibit "10."

1 The issues at the hearing were whether the Division was correct in its determination letters
2 dated March 14, 2017 assessing two premium penalties against IAS pursuant to NRS 616D.200 for
3 allegedly operating without workers' compensation coverage for the periods December 21, 2010
4 through November 30, 2015 and from December 1, 2016 through December 30, 2016.

5 Based upon the documentary evidence, the testimony of Loni Casteel and the arguments of
6 counsel, the undersigned Appeals Officer, finds and concludes as follows:

7 **FINDINGS OF FACT**
8

9 1. IAS is a school of cosmetology licensed with the Nevada Board of Cosmetology
10 whose mission statement is to "reach all students and equip them with the skills they need to be
11 successful in the professional industry of cosmetology to mentor students to have a command of
12 skills so they can make a positive difference in the world." Exhibit "8" at 47.

13 2. In 2014, the Attorney General of the State of Nevada conducted an investigation into
14 IAS. Exhibit "9" at 3-40. a criminal complaint, Case No. RCR2015-083504, was filed by the
15 Attorney General for a misdemeanor violation of NRS 616D.200(3)(a) for not maintain workers'
16 compensation insurance for its employees for the period of December 21, 2010 through September
17 2, 2015. *Id* at 39-40. IAS completed the terms of the deferred prosecution agreement on March 17,
18 2016 and on October 19, 2016, charges were dismissed. Exhibit 9 at 38, 57.

19 3. IAS obtained workers' compensation for the business effective December 1, 2015.
20 Exhibit 8 at 7. However, IAS failed to renew its workers' compensation insurance policy effective
21 December 1, 2016. Exhibit "8" at 10

22 4. On December 14, 2016, the Division notified IAS by mail to its owners Schultz and
23 Casteel that the business was required to maintain workers' compensation insurance. Failure to
24 provide evidence of workers' compensation insurance or evidence the school was out of business
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1 or had no employees would result in further action taken by the State including a premium penalty
2 pursuant to NRS 616D.200(1). Exhibit "8" at 95.

3 5. IAS' attorney called the Division to request a two week extension and advised that
4 there was a "formal agreement with DIR. Do not need to cover instructors as they all work at other
5 salons." Exhibit "8" at 96. A new policy of insurance was obtained effective December 31, 2016.
6 *Id.* at 98.

7 6. On December 30, 2016, DIR investigators visited the business at approximately
8 10:59 a.m. Exhibit "8" at 146-147. The doors were locked with a sign posted reading that the
9 business was closed through January 1, 2017. Investigators posted a Stop Work Order. A woman
10 inside the building noticed the sign and identified herself as Char and stated she was an employee.
11 *Id.* Char contacted one of the owners, Bonnie Schultz, who arrived at the business. Ms. Schultz
12 stated they have independent contractors, not employees. Investigators informed Ms. Schulz that
13 the independent contractors did not meet the criteria for an exemption from workers'
14 compensation. For example, the investigators mentioned two individuals, Amber Larosa and
15 Maggie Rosado did not have cosmetology licenses. Ms. Schultz stated Ms. Larosa was not a
16 cosmetologist but rather performed admissions and financial aid tasks for the school. *Id.*
17 Investigators confirmed that IAS reinstated workers' compensation insurance that same day and
18 removed the Stop Work Orders. *Id.*

19 7. The Division issued a determination dated March 14, 2017 to impose a premium
20 penalty in the amount of \$16,390.94 for a lapse in coverage from December 21, 2010 through
21 November 30, 2015. Exhibit "9" at 1-2. IAS appealed the determination on March 20, 2017. *Id.* at
22 1-2.

23 8. The Division issued a determination to impose a premium penalty of \$251.10 for
24 the lapse of insurance from December 1, 2016 through December 30, 2016 on March 14, 2017.
25 Exhibit "8" at 1-4. IAS appealed the determination on March 20, 2017. *Id.* at 157.
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1 9. On June 9, 2017, the Division amended its March 20, 2017 determination assessing
2 a premium penalty from December 21, 2010 through December 1, 2015 to December 31, 2010
3 through December 1, 2015 for a corrected premium penalty of \$16,190.15.

4 10. IAS argued that all of its personnel are independent contractors. On December 20,
5 2016, IAS' counsel sent to the Division copies of Certificates of Liability Insurance for Maggie
6 Rosado aka Maggie Vong, Amber Larosa, Charissa Banks, Mychel Christian, Laura Hartman,
7 Jeannine Achter, Meledie Wolf, and Melissa Wolf. However, those policies were general liability
8 insurance rather than workers' compensation insurance. Exhibit "9" at 43-51. Moreover, the
9 policies all had effective dates ranging from October 19, 2016 through November 1, 2016, after the
10 first lapse period expired on December 1, 2015.

11 11. In preparation for the hearing of these appeals, IAS produced additional Certificates
12 of Liability Insurance for Ashley Singer, Faustine Flamm, and Cheyanna Wolf. Exhibit "6" at 349-
13 572. However, in addition to not being workers' compensation policies, the effective dates of the
14 certificates were also after the expiration of the first lapse. *Id.*

15 12. In addition, IAS produced "Independent Instructor Agreements ("Agreements"), W-
16 9 forms, Nevada State and Reno business licenses for Charissa Banks, Melissa Wolf, Meledie
17 Wolf, Laura Hartman, Jeannine Achter, Maggie Rosado aka Maggie Vong, Mychel Christian,
18 Ashley Singer, Faustine Flamm, and Cheyanna Wolf. Exhibit "6." Likewise, none of these
19 Agreements was dated during the first lapse period from 2010 through 2015.

20 13. Said Agreements purported to declare each instructor an independent contractor.
21 Each contractor declared that he or she provided cosmetology services, hair design services,
22 licensed instructor services and aesthetician and/or nail technology services. Exhibit "6." Each
23 contract claimed that while IAS was an educational facility licensed pursuant to NRS 644.380 to
24 conduct a school of cosmetology, it further claimed to abrogate the legal requirements of a school
25 of cosmetology denoted in NRS 644.395 which requires IAS to maintain a staff of at least two
26 licensed instructor and other requirements. *Id.*

14. The Agreements required the Instructor to pay a monthly chair rental agreement to IAS while one did not [Ashley Singer] Exhibit "6" at 513. Each Agreement contained a Schedule of Services wherein it states, "Instructor must perform services under this Agreement for IAS students during IAS regularly scheduled hours unless Instructor and student(s) agree in writing to hours outside of normal IAS hours." Exhibit "6," various. Each Agreement contained a schedule during which the Instructor was to work between Tuesday and Saturday with hours ranging from 8:45 a.m. to 10:30 p.m. In addition, IAS stated in the Agreement that "IAS will not be responsible for cancellations, substitutions or modifications to the above schedule under this Agreement." See, e.g., *Id.* at 541. Moreover, "student complaints regarding an Instructor not fulfilling any promises or requirements under this Agreement may subject Instructor to a breach of this Agreement and any liabilities that arise out of said breach." *Id.*

15. The Agreement also required that "actual service of instruction provided to students under this Agreement must be performed by Instructor personally, as the services agreed to are specialized in nature based on Instructor's own personal experience, skill and knowledge." *Id.*

16. At the hearing of this matter, Loni Casteel testified that IAS opened in 1998 and started using salon workers in the same year. She claimed that IAS always had agreements dating back to 1998 but said agreements were not produced. She testified that the instructors set their own schedules; that they can teach at other schools but usually do not do so. Some do product demonstrations. She also testified that the instructors perform no other tasks and that a no show does not have any effect on the instructor. She herself testified that her responsibilities include student aid and instructor for nails. The co-owner Bonnie Schultz also instructs in hair and skin.

17. Ms. Casteel testified that in 1998, IAS had 25 students and from 2010 through 2015 had 50 students. She testified she changed contracts in 2015-2016 because of an unemployment compensation claim filed by one of the instructors.

18. IAS argued that NRS 616A.110(9)(c) expressly excludes employees who perform services pursuant to a written agreement and that since the instructors had written agreements with IAS about the services they provided, they are not employees.

1 19. Based upon the probative, relevant and substantial evidence in the record, the
2 Appeals Officer finds the instructors do not solicit or sell products and do not receive remuneration
3 based on sales, NRS 616A.110(9) does not apply to exclude the instructors as employees of IAS.

4 20. Next, IAS argued that the instructors are engaged in an independent enterprise and
5 should have been classified as independent contractors and not employees. The Division argued
6 that IAS was a licensed school of cosmetology which was required to have at least two licensed
7 instructors on premises, are in the same trade or business, and therefore, the instructors are
8 employees pursuant to NRS 616B.603.

9 21. The Appeals Officer finds that the substantial, probative and relevant evidence
10 shows that the instructors are clearly furthering the operation of the business of the school by
11 providing the instruction necessary to qualify as a cosmetology school. The instructors are clearly
12 in the same trade business, occupation or profession as Ms. Casteel and Ms. Schultz. *See, also,*
13 *Meers v. Houghton Elevator*, 101 Nev. 283, 701 P.2d 1006 (1985) defining the "normal work" test.

14 22. IAS further argues that the instructors are independent contractors pursuant to NRS
15 616A.255 and the five factor test enunciated in *Clark County v. SIIS*, 102 Nev. 353 (1986). The
16 five factors to be weighed in *Clark County* to determine independent contractor status are (1) the
17 degree of supervision; (2) the source of wages; (3) the existence of a right to hire and fire; (4) the
18 right to control the hours and location of employment; and (5) the extent to which the worker's
19 activities further the general business concerns of the alleged employer.

20 23. The Appeals Officer finds the testimony of Loni Casteel was self-serving and
21 appeared scripted and therefore not found to be credible. Furthermore, the witness statements in
22 Exhibit 5 were nearly verbatim and obviously prepared by the same individual and therefore were
23 given no weight. IAS must ensure that the instructors are providing proper instruction according to
24 the guidelines of the Board of Cosmetology. To do so, some amount of supervision is necessary.
25 Second, the source of wages come from IAS. Simply designating a specific account does not
26 negate this fact. A certain amount of money is set aside from student tuition to provide for
27 compensation to the instructors similar in fashion to corporation setting aside a certain amount of
28

1 profit for the compensation of employees. Third, IAS argues that it does not have a right to hire
2 and fire. Clearly, IAS has the right to sever a relationship with an instructor that is not teaching
3 according to the guidelines of the Board of Cosmetology. Fourth, IAS controls the location of
4 employment since the instruction must be done at the school. The instructor is not allowed to
5 provide the instruction at a salon or residence. The hours are controlled by the school as two
6 instructors are required to be present at all times. Lastly, obviously the instructors are furthering the
7 business concerns of the school they provide instruction for, including Ms. Casteel and Ms. Schultz
8 who also both instruct students. Therefore, the instructors are not independent contractors.

9 24. The doctrine of *res judicata*, also known as issue preclusion, does not apply. The
10 Division was not a party to the prosecutorial actions taken by the Attorney General in Case No.
11 RCR2015-083504. *Res judicata* requires identical issues and identical parties.

12 25. Likewise, the doctrine of laches does not apply. A premium penalty was assessed
13 for failure to have workers' compensation coverage from December 1, 2010 to November 30,
14 2015. The determination notifying IAS of the premium penalty was dated March 14, 2017. No
15 statute requires the Division to issue a premium penalty within a certain timeframe. Fifteen
16 months is not an extensive period of time in which to investigate of an employer-employee
17 relationship. Lastly, IAS was not disadvantaged by the delay.

18 26. IAS incorrectly argues that equitable estoppel applies due to the fact that the
19 Division honored an agreement with the State during the prosecution. No evidence exists for this
20 assertion. Furthermore, equitable estoppel requires the party asserting the estoppel be ignorant of
21 the true state of the facts in the matter. Although IAS may not have understood the law regarding
22 the requirement to carry workers' compensation coverage for its employees, they were not ignorant
23 of any facts in this matter.

24 27. Much of IAS's argument surrounds the fact that it had an agreement in place with
25 its instructors, NRS 616B.609 renders void any agreement designed to modify liability under
26 Chapters 616A to 616D of the NRS.

28. The Appeals Officer finds that the probative, substantial and relevant evidence demonstrates that the premium penalty for the amended period of December 31, 2010 through November 30, 2015 in the amount of \$16,390.94 was properly calculated using the correct class codes for each individual instructor and staff. Exhibit "9" at 59-64, 73-85.

29. The Appeals Officer finds that the probative, substantial and relevant evidence demonstrates that the premium penalty for the period of December 1, 2016 through December 30, 2016 in the amount of \$251.10 was properly calculated using the correct class codes for each individual instructor and staff.

30. Any finding of fact more properly construed to be a conclusion of law shall be so deemed and vice versa.

CONCLUSIONS OF LAW

1. **NRS 616B.633 Applicability to all employers who employ at least one employee.** Where an employer has in his service *any employee* under a contract of hire, except as otherwise expressly provided in chapters 616A to 616D, inclusive, of NRS, the terms, conditions and provisions of those chapters are conclusive, compulsory and obligatory upon both employer and employee.

NRS 616B.633 [Emphasis added].

2. **NRS 616D.200 Failure of employer to provide, secure and maintain compensation: Procedure for determination and appeal; penalty.**

1. If the Administrator finds that an employer within the provisions of NRS 616B.633 has *failed to provide and secure compensation as required by the terms of chapters 616A to 616D, inclusive, or chapter 617 of NRS or that the employer has provided and secured that compensation but has failed to maintain it*, he shall make a determination thereon and may charge the employer an amount equal to the sum of:

(a) *The premiums that would otherwise have been owed to a private carrier pursuant to the terms of chapters 616A to 616D, inclusive, or chapter 617 of NRS, as determined by the Administrator based upon the manual rates adopted by the Commissioner, for the period that the employer was doing business in this state without providing, securing or maintaining that compensation, but not to exceed 6 years; and*

(b) *Interest at a rate determined pursuant to NRS 17.130 computed from the time that the premiums should have been paid.*

↪ The money collected pursuant to this subsection must be paid into the

Uninsured Employers' Claim Account.

2. The Administrator shall deliver a copy of his determination to the employer. An employer who is aggrieved by the determination of the Administrator may appeal from the determination pursuant to subsection 2 of NRS 616D.220.

NRS 616D.200 [Emphasis added].

3. **NRS 616A.110 "Employee": Persons excluded.** "Employee" excludes:

1. Any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his or her employer.

2. Any person engaged as a theatrical or stage performer or in an exhibition.

3. Musicians when their services are merely casual in nature and not lasting more than 2 consecutive days, and not recurring for the same employer, as in wedding receptions, private parties and similar miscellaneous engagements.

4. Any person engaged in household domestic service, farm, dairy, agricultural or horticultural labor, or in stock or poultry raising, except as otherwise provided in chapters 616A to 616D, inclusive, of NRS.

5. Any person performing services as a voluntary ski patroller who receives no compensation for his or her services other than meals, lodging, or use of the ski tow or lift facilities.

6. Any person who performs services as a sports official for a nominal fee at a sporting event that is amateur, intercollegiate or interscholastic and is sponsored by a public agency, public entity or private, nonprofit organization. As used in this subsection, "sports official" includes an umpire, referee, judge, scorekeeper, timekeeper or other person who is a neutral participant in a sporting event.

7. Any member of the clergy, rabbi or lay reader in the service of a church, or any person occupying a similar position with respect to any other religion.

8. Any real estate broker, broker-salesperson or salesperson licensed pursuant to chapter 645 of NRS.

9. Any person who:

(a) Directly sells or solicits the sale of products, in person or by telephone:

(1) On the basis of a deposit, commission, purchase for resale or similar arrangement specified by the Administrator by regulation, if the products are to be resold to another person in his or her home or place other than a retail store; or

(2) To another person from his or her home or place other than a retail store;

(b) Receives compensation or remuneration based on sales to customers rather than for the number of hours that the person works; and

(c) Performs pursuant to a written agreement with the person for whom the services are performed which provides that the person who performs the services is not an employee for the purposes of this chapter.

4. **NRS 616D.200 Failure of employer to provide, secure and maintain compensation: Procedure for determination and appeal; penalty.**

1. If the Administrator finds that an employer within the provisions of NRS 616B.633 has failed to provide and secure compensation as required by the terms of chapters 616A to 616D, inclusive, or chapter 617 of NRS or that the employer has provided and secured that compensation but has failed to maintain it, the Administrator shall make a determination thereon and may charge the employer an amount equal to the sum of:

(a) The premiums that would otherwise have been owed to a private carrier pursuant to the terms of chapters 616A to 616D, inclusive, or chapter 617 of NRS, as determined by the Administrator based upon the manual rates adopted by the Commissioner, for the period that the employer was doing business in this State without providing, securing or maintaining that compensation, but not to exceed 6 years; and

(b) Interest at a rate determined pursuant to NRS 17.130 computed from the time that the premiums should have been paid.

↪ The money collected pursuant to this subsection must be paid into the Uninsured Employers' Claim Account

5. **NRS 616A.255 "Independent contractor" defined.** "Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of the person's principal as to the result of the person's work only and not as to the means by which such result is accomplished.

6. **NRS 616A.210 "Employee": Subcontractors and employees.**

1. Except as otherwise provided in NRS 616B.603, subcontractors, independent contractors and the employees of either shall be deemed to be employees of the principal contractor for the purposes of chapters 616A to 616D, inclusive, of NRS.

2. If the subcontractor is a sole proprietor or partnership licensed pursuant to chapter 624 of NRS, the sole proprietor or partner shall be deemed to receive a wage of \$500 per month for the purposes of chapters 616A to 616D, inclusive, of NRS.

3. This section does not affect the relationship between a principal contractor and a subcontractor or independent contractor for any purpose outside the scope of chapters 616A to 616D, inclusive, of NRS.

7. **NRS 616B.603 Independent enterprises.**

1. A person is not an employer for the purposes of chapters 616A to 616D, inclusive, of NRS if:

(a) The person enters into a contract with another person or business which is an independent enterprise; and

(b) The person is not in the same trade, business, profession or occupation as the independent enterprise.

2. As used in this section, "independent enterprise" means a person who holds himself or herself out as being engaged in a separate business and:

(a) Holds a business or occupational license in his or her own name; or

(b) Owns, rents or leases property used in furtherance of the business.

3. The provisions of this section do not apply to:

(a) A principal contractor who is licensed pursuant to chapter 624 of NRS.

(b) A real estate broker who has a broker-salesperson or salesperson associated with the real estate broker pursuant to NRS 645.520.

4. The Administrator may adopt such regulations as are necessary to carry out the provisions of this section.

8. **NRS 616A.350 "Trade, business, profession or occupation of his or her employer" defined.** "Trade, business, profession or occupation of his or her employer" includes all services tending toward the preservation, maintenance or operation of the business, business premises, or business property of the employer.

9. **NRS 644.395 Staff of instructors.** Each school of cosmetology shall maintain a staff of at least two licensed instructors and one additional licensed instructor for each 25 enrolled students, or major portion thereof, over 50 students. A school of cosmetology must have at least two licensed instructors present and teaching at any time while the school is open. Persons instructing pursuant to provisional licenses issued pursuant to NRS 644.193 are considered instructors for the purposes of this section.

10. **NAC 644.105 Instructors; badges; limitation on practice by certain students.** (NRS 644.110, 644.395, 644.408)

4. No instructor in a licensed school of cosmetology may, during the hours in which he or she is on duty as an instructor, devote his or her time to the public or to the private practice of cosmetology for compensation. Each instructor shall devote the instructor's full time during the hours he or she is on duty as an instructor to instructing students.

11. **NRS 616B.609 Devices modifying liability void; exception.**

1. Except as otherwise provided in subsection 2:

(a) A contract of employment, insurance, relief benefit, indemnity, or any other device, does not modify, change or waive any liability created by chapters 616A to 616D, inclusive, of NRS.

(b) A contract of employment, insurance, relief benefit, indemnity, or any other device, having for its purpose the waiver or modification of the terms or liability created by chapters 616A to 616D, inclusive, of NRS is void.

2. Nothing in this section prevents an owner or lessor of real property from requiring an employer who is leasing the real property from agreeing to insure the owner or lessor of the property against any liability for repair or maintenance of the premises.

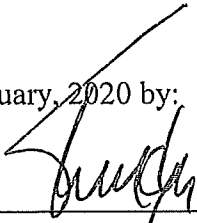
12. The Appeals Officer concludes that the imposition of the premium penalty as amended of \$16,190.19 for the period of December 31, 2010 through November 30, 2015 was proper.

13. The Appeals Officer concludes that the imposition of the premium penalty as amended of \$251.10 for the period of December 1, 2016 through December 30, 2016 was proper.

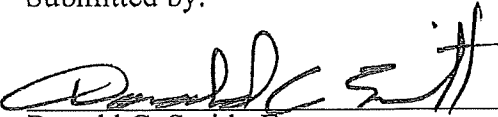
ORDER

Based on the findings of fact and the conclusions of law in Appeal Nos. 1702537-SYM and 1702545-SYM, the Appeals Officer **AFFIRMS** the Divisions Determinations dated March 14, 2017 as amended to impose two premium penalties in the amounts of \$16,190.19 and \$251.10, respectively.

IT IS SO ORDERED this 19th day of February, 2020 by:


Sheila Y. Moore, Esq.
Appeals Officer

Submitted by:


Donald C. Smith, Esq.
Senior Division Counsel
Division of Industrial Relations
3360 W. Sahara Ave., Ste. 250
Las Vegas, NV 89102

NOTICE: Pursuant to NRS 233B.130, should any party desire to appeal this final determination of the Appeals Officer, a Petition for Judicial Review must be filed with the District Court within thirty (30) days after the service by mail of this Decision.

CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing **DECISION AND ORDER** was deposited into the State of Nevada Interdepartmental mail system, **OR** with the State of Nevada mail system for mailing via United States Postal Service, **OR** placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, 1050 E. Williams Street, Suite 450, Carson City, Nevada, 89701 to the following:

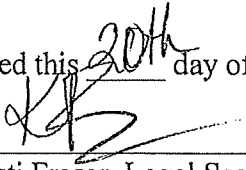
INTERNATIONAL ACADEMY OF STYLE
BONNIE SCHULTZ & LONI CASTEEL
2295 MARKET ST
RENO, NV 89502

JASON GUINASSO, ESQ
HUTCHISON & STEFFEN
500 DAMONTE RANCH PKWY STE 980
RENO NV 89511

LEGAL SECTION
DIVISION OF INDUSTRIAL RELATIONS
400 WEST KING STREET STE 201
CARSON CITY, NV 89703

DIVISION OF INDUSTRIAL RELATIONS
400 W KING ST STE 400
CARSON CITY NV 89703

Dated this 20th day of February, 2020.



Kristi Fraser, Legal Secretary II
Employee of the State of Nevada