Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1145282-001-B

In the Matter of:

xxxxx	AZ DES EA, UI TAX SECTION % KEVIN R SMITH CFP/CLA ASST ATTORNEY GENERAL SC 040A 1275 W WASHINGTON ST PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER,** through its authorized representative, petitioned for a hearing from the Department's decision letter issued on September 14, 2009, which held that the Employer "... did not file the missing reports until September 29, 2006, which was 29 days after the date of the Notice. ... the Notice of Estimated Assessment for delinquent Reports issued August 31, 2006 is final" because the letter from the Employer's CPA was filed past the deadline for the appeal to be considered timely. The Department's decision letter held as follows:

> ... on August 31, 2006, the Department sent the Notice via certified mail ... to your last known address of record ... The 15-day appeal period expired on September 15, 2006. Your CPA's letter requesting an appeal was filed on September 29, 2006, which is 14 days past the deadline for the appeal to be considered timely.

The petition for a hearing, or an appeal, having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724, 23-732(B), and 23-738. At the direction of the Appeals Board and following written notice to the parties, a telephone hearing was conducted before ROBERT T. NALL, an Administrative Law Judge, on November 10, 2009. At the scheduled time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely petition for reassessment or appeal following the NOTICE OF ESTIMATED ASSESSMENT FOR DELINQUENT REPORTS.
2. Whether the NOTICE OF ESTIMATED ASSESSMENT FOR DELINQUENT REPORTS became final during the interim period before the Employer filed a petition for reassessment.
3. Whether the Employer properly completed and submitted all delinquent reports within 15 days after the date of the NOTICE OF ESTIMATED ASSESSMENT FOR DELINQUENT REPORTS

See: A.R.S. §§ 23-724, 23-738, and Arizona Administrative Code, Section R6-3-1404.

A witness from the Tax Section of the Department appeared and testified. Counsel for the Department was present. Board Exhibits 1 through 6B were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On August 31, 2006, the Department mailed a NOTICE OF ESTIMATED ASSESSMENT FOR DELINQUENT REPORTS to the Employer's address of record (Bd. Exh. 1).
2. The Department previously had contacted the Employer via telephone on February 7, 15, and 22, 2006. The Department also communicated via e-mail to the Employer on February 15, 2006 and by a written notification mailed to the Employer's address of record on February 23, 2006.
3. On September 15, 2006, the Employer's authorized representative dated a responsive letter requesting reassessment (Bd. Exh. 2A). The responsive letter and supporting documents were filed, as shown by the postage meter mark, on September 29, 2006 (Bd. Exh. 2H), which was more than 15 days after the

NOTICE OF ESTIMATED ASSESSMENT FOR DELINQUENT REPORTS was served upon the Employer.

4. On September 15, 2009, the Department issued its decision on the timeliness of the Employer's petition for reassessment of an estimated assessment made by the Department. The Department held that because the Employer did not file its petition for reassessment within 15 days, "...the Notice of Estimated Assessment for Delinquent Reports issued August 31, 2006 is final." (Bd. Exh. 3B).

5. The Employer, through its accountants as authorized representatives, applied for a formal hearing in a letter dated and postage metered on September 22, 2009. In this letter, the only reason presented for filing a late petition for reassessment was: "In August, 2006, [the Employer] had just engaged my services to bring them current with all corporate filings. ... Travel out of the country had made filing timely difficult in the past for [the Employer]." (Bd. Exh. 4A).

6. The Employer did not specify what efforts the Employer had undertaken to ensure its appeal or petition for reassessment was filed within the time period allowed by law (Bd. Exh. 4A).

Arizona Revised Statutes § 23-732(B), provides in pertinent part:

> B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year ... [Emphasis added].

Arizona Revised Statutes § 23-738, provides in part as follows:

> Delinquency assessments; interest and penalties; petition for reassessment
>
> A. If an employer neglects or refuses to make a return as required by this chapter, the department shall make an estimate based upon information in its possession of the amount of contributions due from the employer for the period for which he failed to make a return, and shall assess the estimated amount against the delinquent employer. ... The department shall promptly notify the delinquent employer of any estimate.
>
> B. An employer against whom any delinquency assessment is made <u>may petition for reassessment within fifteen days after written notice of the assessment is served</u> personally or sent by certified mail to the employer's last known address. <u>If the petition for reassessment is not filed within fifteen days the amount of the assessment shall become final</u> and the lien imposed by section 23-745 shall attach. [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

> B. Petition for hearing or review
>
> 1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
>
> a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
>
> b. The rate of contributions (A.R.S. § 23-732); ...
>
> * * *

The record reveals that a copy of the NOTICE OF ESTIMATED ASSESSMENT FOR DELINQUENT REPORTS was sent by mail on August 31, 2006, to the Employer's last known address of record. The document included the following admonitions (Bd. Exh. 1):

> THIS ASSESSMENT WILL BE CANCELLED IF ALL DELINQUENT REPORTS INDICATED ABOVE ARE PROPERLY COMPLETED AND SUBMITTED WITHIN 15 DAYS OF THE DATE OF THIS NOTICE.
>
> This assessment becomes final unless a petition for reassessment is filed with this Department at the address sown above within 15 days of the date of this notice.

The Employer's petition for reassessment of the NOTICE OF ESTIMATED ASSESSMENT FOR DELINQUENT REPORTS was filed on September 29, 2006, which is more than 15 days from the date of the notice. The Employer's petition for reassessment, therefore, was not filed within the statutory time.

Arizona Administrative Code, Section R6-3-1404 provides in pertinent part:

> A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
>
> 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
>
> 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.
>
> * * *
>
> B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to:

Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

C. Any notice, report form, determination, decision, assessment, or other <u>document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address</u> if not served in person. ... [Emphasis added].

The Employer did not participate at the hearing and, thus, has offered no further explanation for filing a late petition for reassessment.

We conclude that the Employer had reasons to notify the Department of any change in its mailing address and to ensure that important mail was handled properly, because of pending assessments and delinquency assessments and liens, and because of potential charges to the Employer's experience rating account.

The Employer has offered no adequate explanation for filing a late petition for reassessment. The Employer did not meet the statutory requirement to avoid the assessment becoming final, because the Employer did not file a timely petition for reassessment. The mailing of the notice to the Employer commenced the time period to request reassessment, and the Employer was obligated to keep a current and accurate mailing address on record with the Department.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section

R6-3-1404(B) and would permit finding the petition for reassessment was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated August 25, 2006, regarding the late filing of the Employer's petition for reassessment.

The NOTICE OF ESTIMATED ASSESSMENT FOR DELINQUENT REPORTS dated August 31, 2006, remains in full force and effect.

DATED:

APPEALS BOARD

_____
MARILYN J. WHITE, Chairman

_____
WILLIAM G. DADE, Member

_____
ROBERT T. NALL, Acting Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: xxxxx Acct. No: xxxxx

(x) KEVIN R SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1154695-001-BR

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST, SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

D E C I S I O N
AFFIRMED UPON REVIEW

The **EMPLOYER** requests review of the Appeals Board decision issued on February 3, 2010, which affirmed the Department's Reconsidered Determination letter dated October 20, 2009. The Appeals Board held:

> Effective March 5, 2008, services performed by individuals as truck drivers constituted employment.
>
> All forms of remuneration paid to these individuals for such services constituted wages.

The request has been timely filed and the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-672(F).

In the request for review, the Employer reiterates its contention that an 18-wheeler truck can only be operated by a person possessing a CDL driver license.

The Employer contends that the "Compliance with instructions" test is impacted by the fact that "it is just not legal to drive a 18 wheeler truck without a CDL driver license." We conclude that the existence of a driving license requirement is common to most commercial driving, which often is acknowledged as an employment relationship. Thus, we conclude that the for-hire license requirement itself does nothing to establish an independent contractor relationship because the CDL license requirement is so commonplace in employment relationships.

In this case, the more crucial evidence established that the licensed drivers operated the Employer's vehicles on the Employer's behalf, with no ownership interest in the vehicle and no control over the rates charged to the Employer's customers. The essential test that defines the relationship is not merely compliance with motorist and safety laws, but who controlled the existence and flow of business with the customers. Clearly, the evidence established that Employer controlled the flow of business with its customers by establishing the rates and by collecting the charges for transporting its customer's loads. This showing of control indicates an employment relationship.

The Employer also contends that the Employer "... is not going to discharge an independent contractor just because they want to do that", regarding the "Right to Discharge" test. However, whether or not these relationships deteriorated to the point that a discharge actually occurred is not dispositive of the crucial test. The fact remains that no contract term was presented to prohibit the Employer from terminating any driver, or to penalize the Employer for terminating any of its drivers. The arrangement between the Employer and the drivers of its trucks did not have a prearranged expiration date, which would be common in a purely contractual relationship. The absence of any restriction upon the Employer's right to discharge a driver at any time shows control, and indicates an employment relationship.

The Employer contends further that: "All independent drivers know ... we've had a verbal and written agreement that they had to deliver in time and take the loads to the customers." However, existence of on-time performance expectations would be commonplace with both employees and contracted drivers. No evidence was presented to establish that only a contracted driver would have a verbal or written agreement to deliver loads to customers on time. As we explained in our prior decision, no evidence of any early-termination penalty was presented. The evidence regarding the "Obligation" factor shows control, and indicates an employment relationship.

In its prior decision, the Appeals Board adopted its own findings of fact, reasoning and conclusions of law. In arriving at the decision, the Appeals Board applied the appropriate law, A.R.S. §§ 23-615, 23-613.01, and 23-622, and Arizona Administrative Code, Sections R6-3-1723, and case law, to the facts in this case.

The Appeals Board found that the evidence did not establish an independent contractor relationship, under the tests and considerations required by law. The Appeals Board held that services performed by individuals as truck drivers constituted employment, and all forms of remuneration paid to these individuals for such services constituted wages.

The evidence established that all remuneration was for truck driving services, while no evidence was presented that any payment was reimbursement for any expenditure. No evidence was presented that any driver provided receipts for reimbursement. No evidence was presented that any driver submitted vendor invoices for driving services to the Employer. No evidence was presented documenting the intent of the parties to define the relationship between the Employer and its truck drivers as anything but employment. The Internal Revenue Service revenue ruling clearly is on point for its proposition that possession of a commercial driving license (CDL), or policies requiring little supervision of the drivers, does not necessarily establish that the CDL holder is an independent contractor (Tr. Pp. 17, 18; Exh. 5C). *See, Day v. Commissioner of Internal Revenue*, T.C. Memo 2000-375, 2000 Tx Ct. Memo LEXIS 444 (2000).

The Board's prior decision is fully supported by the greater weight of the credible and probative evidence of record.

THE APPEALS BOARD FINDS that:

1. The **EMPLOYER** has not submitted any newly-discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;

2. There was no prejudicial irregularity in the administrative proceedings on the part of the Department. Specifically, there was no material or prejudicial error in the admission or exclusion of evidence and no prejudicial errors of law were made at any hearing or during the progress of this matter;

3. There was no accident or surprise in the proceedings which could not have been prevented by ordinary diligence;

4. The Appeals Board's decision involved no abuse of discretion depriving any party of a full and fair hearing, and it was supported by the greater weight of the credible evidence and by applicable law;

5. All interested parties were notified of the filing of the request for review, and were allowed at least 15 days in which to respond. Accordingly,

THE APPEALS BOARD **AFFIRMS** its decision, there having been established no good and sufficient grounds which would cause us to reverse or modify that decision, or to order the taking of additional evidence.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

WILLIAM G. DADE, Member

ROBERT T. NALL, Acting Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision on review by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See,* Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures on filing an appeal, you must contact the Tax Court at (602) 506-3763.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

> C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
>
> D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
>
> 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
>
> 2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
>
> 3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.
>
> 4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

A copy of the foregoing was mailed by certified mail on to:

(x) Er: xxxxx Acct. No: xxxxx

(x) KEVIN R SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
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(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
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PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1150612-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST, SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

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DECISION
REVERSED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination letter issued on September 14, 2009, which affirmed the Determination of Unemployment Insurance Liability and the Determination for Employment or Wages. The Reconsidered Determination held that the Employer "... is liable for Arizona Unemployment Insurance Taxes under the Federal Unemployment Tax Act with coverage beginning January 1, 2004" and "... all forms of remuneration paid for such services constitutes wages."

The request for review or appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724 and 23-732(B). On behalf of the Appeals Board, a telephone hearing was conducted before ROBERT T. NALL, an Administrative Law Judge, on December 23, 2009. The Employer's owner and a witness for the Department testified. The

Department's counsel appeared at the hearing. Board Exhibits 1 through 13 were admitted into evidence. The scheduled issues to be considered were:

1. Whether the services performed by an individual as a medical transcriber constituted employment effective January 1, 2004, as defined in A.R.S. § 23-615.
2. Whether the services performed by the individual as a medical transcriber were exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
3. Whether all forms of remuneration paid to the individual for services as a medical transcriber, constitute wages as defined in A.R.S. § 23-622.
4. If the liability issues affecting the assessment have become final, whether the individual and amounts shown on the Notice of Assessment reports for the quarters ending "3/31/04 through 3/31/05", and potentially second quarter of 2005, are accurate.

See: The Employment Security Law of Arizona, specifically: A.R.S. §§ 23-613.01, 23-615, 23-617, 23-622, 23-724 and Arizona Administrative Code, Sections R6-3-1705 and R6-3-1723.

The APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. From 2003 through 2005, the Employer operated a medical transcription business in Florida, with a federal hospital as its particular primary client. In addition to the owner, approximately ten transcriptionists operated from their homes at a rate specified by the client at times pertinent to this case.
2. Transcriptionists could log into the client's system remotely, download recordings, complete their transcription, and then submit the transcription directly to the client (Tr. p. 34).
3. One of the former workers (C.C., hereinafter "Claimant"), filed a claim for Unemployment Insurance benefits asserting an employment relationship with the Employer.
4. The Claimant possessed her own personal computer with Internet access, and she already had taken a medical transcription course. She was referred by a very large Florida transcription business from which the Employer received business (Tr. pp. 25, 37-39, 60). She requested the opportunity

to perform transcriptions under tutelage of the Employer's owner, who allowed her to work from Arizona based upon a written "Independent Contractor" agreement dated April 5, 2003 (Tr. pp. 15, 37, 48; Bd. Exh. 8).

5. The Claimant was responsible for her own work product. She was allowed to work at her own speed and on her own schedule without training from the Employer or review by the Employer. Due to the Claimant's lack of experience and her limited capabilities, however, the Employer's owner had to double-check the Claimant's work and needed to correct 90% of the Claimant's transcription work. Deadlines imposed by the customer existed on the work to be completed, and the customer imposed controls on the amount of errors that would be accepted (Tr. pp. 16, 37, 44, 48-51, 66).

6. The Claimant told the Employer's owner that she was working for other businesses, including her work for a restaurant that was her last employer while she was learning the transcription industry and developing her own transcription business (Tr. pp. 29-33, 43, 59). The Claimant was free to work anywhere else.

7. The Claimant was completely on her own regarding her work. The Claimant was never admonished or disciplined. The Claimant made no separate investment into the Employer's business. The Claimant worked on transcriptions no more than 15-20 hours during any work week (Tr. pp. 29, 50-52).

8. Payment to the Claimant was on a piece work basis, based upon quantities of "lines" that were tracked by the client's system. The relationship ended when the customer's work was bought out by another transcription company and the Employer no longer had work the Claimant could access (Tr. pp. 53, 56, 57).

9. The employer issued a "1099-MISC" report for miscellaneous income paid to the Claimant during 2004 (Bd. Exh. 9).

10. When the Claimant filed a claim for Unemployment Insurance benefits, she listed the Employer among her base period employers. The Department adjudicated its status as a liable employer. The Claimant opined she had made a "big mistake" by listing the Employer's company (Tr. pp. 27, 43).

11. Pursuant to a field audit, the Department determined the payments made by the Employer to the Claimant were wages, and services were determined to be in employment, resulting in Notices of Assessment covering the period beginning March 31, 2004 through March 31, 2005 (Tr. p. 16; Bd. Exh. 10).

The Employer contends that the Claimant was an independent contractor and not its employee, and that payments were not wages. The employment status, and whether the pay constituted wages, remain in dispute in this case.

Arizona Revised Statutes § 23-615 defines "employment" as follows:

> "Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:
>
> 1. An individual's entire service performed within or both within and without this state if:
>
> (a) The service is localized in this state.
>
> (b) The service is not localized in any state but some of the service is performed in this state and:
>
> (i) The individual's base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled is in this state, or
>
> (ii) The individual's base of operations or place from which the service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state. Service shall e deemed localized within a state if the service is performed entirely within such state, or the service is performed both within and without such state but the service performed without the state is temporary or transitory in nature or consists of isolated transactions, and is incidental to the individual's service within the state. ...
>
> * * *

Arizona Revised Statutes § 23-613.01(A) provides as follows:

> Employee; definition; exempt employment
>
> A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing

the services and the result to be effected or accomplished, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.

3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

4. An individual if the employing unit demonstrates the individual performs services in the same manner as a similarly situated class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

Arizona Revised Statutes § 23-622(A) provides as follows:

A. "Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

Arizona Administrative Code, Section R6-3-1723 provides in pertinent part:

A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an

employee under this definition shall be determined by the preponderance of the evidence.

1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.

2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.

B. "Employee" as defined in subsection (A) does not include:

1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit "... solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.

a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.

b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.

c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The

> applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

We analyze the circumstances of the Claimant who performed transcription services. The Department's witness acknowledged that the intent of the parties was to establish an independent contractor relationship, based upon the language of the independent contractor agreement (Tr. p. 21; Bd. Exh. 8). The Department's analysis also acknowledged the Employer "... exercised a modicum of control" and concluded the Employer "... did not need to train" the Claimant (Bd. Exh. 10C). However, the Department's tax analyst concluded that the actual relationship favored more of an employer/employee relationship (Tr. p. 22). Uncontradicted evidence was presented that the Claimant was expected to name at least three other current clients in the field and that, since their initial contacts, the Claimant assured the Employer that the Claimant had other transcription-related accounts. Uncontradicted evidence was presented that the Claimant did not comply with the Employer's request to furnish an updated independent subcontractor agreement (Tr. pp. 23, 26, 31-33). Uncontradicted evidence was presented that the Claimant asked to become an employee, but the Employer consistently declined by explaining that the Employer was an independent subcontractor herself doing third-party transcription work for a large transcription company, and that the Employer did not have any employees (Tr. pp. 26, 27, 30).

Contrary to the assertion by the Department in its reconsidered determination, the evidence established that the Employer personally performed substantial transcription work as a subcontractor to the large transcription company and for other clients after this account was lost. The evidence contradicts the Department's conclusion that: "In the present case, without the transcription services of [the Claimant] and other medical transcribers, there would be no continuation of [the Employer's] business operations." (Tr. p. 56; Bd. Exh. 10E). Further, the Department acknowledged that the Claimant reported "... she would select jobs from the website, prepare the transcriptions, and return the documents ..." to the Employer (Tr. pp. 46, 47; Bd. Exh. 10D).

We conclude from the evidence that the Claimant's transcription services do not qualify as "exempt employment" listed in Arizona Administrative Code, Section R6-3-1723(C), largely because medical transcription was the business activity of the Employer. We conclude from the evidence that the transcription services are not solely subject to a provision of law regulating the organization, trade or business as specified in Arizona Administrative Code, Section R6-3-1723(B)(2). The contentions of the Employer, however, bring into issue whether the services of the Claimant were excluded from the definition of "Employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires consideration of the

statutes cited above, plus the factors specified in Arizona Administrative Code, Section R6-3-1723(A), (D), and (E).

Arizona Administrative Code, Section R6-3-1723(D)(2) identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

a. <u>Authority over Individual's Assistants</u>
Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

The Employer did not prohibit the use of assistants. However, no evidence was presented that any helpers were utilized by any of the transcribers, including the Employer in her own activities. This factor is neutral.

b. <u>Compliance with Instructions</u>
Control is present when the individual is required to comply with instructions about when, where or how he is to work. The control factor is present if the Employer has the right to instruct or direct.

The evidence establishes that the Employer neither possessed nor exercised any right to instruct or direct “when, where, or how” the Claimant did any work. Clearly, the Claimant did everything remotely from Arizona, while the Employer and its customer were in Florida. Nothing indicates they ever met. The

Claimant selected jobs from the client's website and used her own equipment to transcribe recordings entirely at her own pace (Tr. pp. 34, 38).

No evidence established that the Employer was responsible to the customer for satisfactory completion of the Claimant's work. The Employer admittedly double-checked and corrected the Claimant's transcription product, in an effort to protect her own reputation and her ongoing relationship with the client. However, the Employer did not control "when, where or how" the Claimant worked and she did nothing to control the complexity of the assignment. However, evidence established that the Employer would not have needed to be aware of any of the work if the Claimant had not been a fledgling transcriber with minimally satisfactory skills. No evidence reveals a right of substantial control. This factor indicates an independent, contractual relationship.

c. Oral or Written Reports

> If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the employing unit, it indicates control in that the worker is required to account for his actions.

Nothing indicates that the Claimant ever submitted any kind of report (Tr. p. 39). Records were kept by the customer, who set the payment rate and amount. The absence of any reporting requirement to the Employer is indicative of an independent contractor billing for vendor services. This factor shows absence of control, and indicates an independent contractor relationship.

d. Place of Work

> The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee.

The evidence establishes that all transcription services were performed online and off client premises. Nothing indicates that the Employer or the Claimant maintained commercial, business premises outside of a residence. This factor shows freedom from control, and indicates an independent relationship.

e. Personal Performance

> If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

The Employer testified that she did not tailor or pre-select any particular assignments to the Claimant, who indicated to the Department that she personally "... would select jobs from the website" (Bd. Exh. 10D). The

Employer did not rely upon an assessment of the Claimant's transcription skills to make assignments, although she found the Claimant's abilities disappointing. This factor shows minimal control, and indicates an independent relationship.

f. Establishment of Work Sequence

> If a person must perform services in the order set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the routine and schedules of the employing unit.

The Employer did not establish any work sequence. Transcribers logged in and obtained work (Tr. p. 34). This freedom shows an absence of control, and indicates independence.

g. Right to Discharge

> The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control.

The Department reasoned that the written Independent Contractor agreement on its face was clearly insufficient, because it "... does not describe the type of services [the Claimant] would be providing, how the Claimant would be compensated for her medical transcription services, the duration of the employment relationship, and each party's rights and legal obligations in the event of termination." We conclude the document clearly expresses an intent to be independent, rather than document substantial negotiations between the parties. As the Department noted, "... no employee type benefits such as paid leave or medical coverage were provided" but the Employer "... could, and did, discharge [the Claimant] at any time without incurring any liability ..." (Bd. Exh. 10D). The Department's reasoning did not consider the uncontradicted evidence that the relationship ended when the client's business was sold to another firm, leaving no way for the Employer or the Claimant to access the client's website to get work. We conclude this end to the business relationship was not a typical discharge. Rather, it was the end of business with the client that was the source of revenue for both the Employer and the Claimant.

This factor shows an absence of control, and indicates an independent relationship.

h. Set Hours of Work

> The establishment of set hours of work by the employing unit is indicative of control. This condition bars the worker from being master of his own time, which is the right of an independent worker.

The Claimant was allowed to select and to schedule her own work without any input from the Employer. No set hours were required. This factor shows an absence of control, and indicates independence.

i. Training

Training of an individual by an experienced employee working with him, or by required attendance at meetings, is indicative of control because it reflects that the Employer wants the service performed in a particular manner.

Nothing establishes that the Employer provided any training to the Claimant, who already had attended a medical transcription course. The Claimant told the field auditor "... that after taking an at-home course she was looking for part-time work over the Internet" (Bd. Exh. 10C). This factor shows an absence of control, and indicates independence.

j. Amount of Time

If the worker must devote his full time to the activity of the employing unit, it indicates control over the amount of time the worker spends working, and impliedly restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses.

The Employer did not require the transcriber's services full time. Rather, the Claimant selected her own work and acted on her own schedule. This freedom indicates an independent contractor relationship.

k. Tools and Materials

If an employing unit provides the tools, materials and wherewithal for the worker to do the job, it indicates control over the worker. Conversely, if the worker provides the means to do the job, a lack of control is indicated.

The Employer provided nothing to the Claimant, who used her own computer and Internet access (Tr. pp. 34, 60). The personal computer clearly was the major investment in this enterprise. This factor shows freedom from control and substantial investment by the Claimant, and indicates independence.

l. Expense Reimbursement

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

No evidence was presented that any expense reimbursement occurred or was permitted (Tr. p. 39). The costs of equipment and Internet access were

borne by both parties. Nothing indicated that any transcriber possessed the opportunity to charge the Employer for travel or incidental expenses. This factor shows an absence of control, and indicates independence.

The additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E) are equally appropriate for consideration in determining the relationship of the parties.

1. Availability to the Public
   Generally, an independent contractor makes his services available to the general public, while an employee does not.

The evidence does not include any indication that the Claimant actually advertised her services to the general public, or invested in business cards or business premises. The Employer, however, clearly expected the Claimant to be working for other transcription services and clearly asked the Claimant to disclose such other customers. The Employer believed the Claimant was doing transcription work for at least one other customer, and the Department presented no evidence to contradict that assumption. The Department did not contact the other workplace that the Claimant listed (Tr. pp. 31-33; Bd. Exhs. 8, 10D). Uncontradicted evidence demonstrates that the Claimant had another transcription customer. The arrangement establishes unrestricted freedom to work elsewhere, and indicates independence.

2. Compensation
   Payment on a job basis is customary where the worker is independent, whereas an employee is usually paid by the hour, week or month.

The Claimant was paid at "... $.07 per line transcribing medical records". The Department analyzed the Claimant "... was compensated for her services solely on a piece-work basis which is indicative of employment." (Tr. p. 35; Bd. Exh. 10C, 10D). The analysis is directly contrary to the administrative rule. Evidence implied that the rate was set by the customer, without any negotiation between the Claimant and the Employer. This factor shows absence of control, and indicates an independent relationship.

3. Realization of Profit or Loss
   An employee is generally not in a position to realize a profit or loss as a result of his services. An independent contractor, however, typically has recurring liabilities in connection with the work being performed. The success or failure of his endeavors depends in large degree upon the relationship of income to expenditures.

Nothing establishes the Claimant had any opportunity to realize a profit or a loss from the Employer's transcription business. Her success or failure was

entirely dependent upon her own control of her time usage and her expenses. She could not share in the Employer's profit or loss. This factor shows freedom from control, and indicates an independent relationship.

4. Obligation

An employee usually has the right to end the relationship with an Employer at any time without incurring liability. An independent worker usually agrees to complete a specific job.

No early-termination penalty was presented. The Employer could simply cease allowing the Claimant access to its client's web site at any time. The relationship ended when access to the client ended for both parties. Completion of the job was not required. This lack of an early-termination penalty or a specific term of the agreement shows naïve lack of negotiations or implicit trust. This factor is essentially neutral because the end of the relationship when the client became inaccessible was so obvious that it must be implied.

5. Significant Investment.

A significant investment in equipment and facilities would indicate an independent status of the individual making the investment. The furnishing of all necessary equipment and facilities by the employing unit would indicate the existence of an employee relationship.

As discussed in "k. Tools and Materials" above, the Claimant and the Employer each invested in their own training, their own computer, and their own Internet access (Tr. p. 36). These assets easily could be used by either individual at any time for personal or for business purposes, and certainly could be used to work for other clients. These items were not demonstrated to constitute an investment in equipment to be used by another person. The Employer did not furnish any equipment or facilities. This factor establishes lack of control, and indicates an independent relationship.

6. Simultaneous Contracts

An individual who works for a number of people or companies at the same time may be considered an independent contractor because he is free from control by one company. However, the person may also be an employee of each person or company depending upon the particular circumstances.

As discussed in "l. Availability to the Public" above, the Employer's witness testified that the Claimant was permitted and expected to work for others simultaneously. No evidence was presented to show that the Claimant was restricted from working for another transcription service, and credible evidence established that the Employer believed the Claimant also worked for another transcription service (Tr. pp. 31-33). This factor indicates independence.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered. One such factor is the operation of the Claimant entirely in Arizona, and the operations of the Employer and the customer entirely in Florida (Tr. p. 44). The Department did not address this issue throughout its analysis. We conclude the lack of evidence that the Claimant and the Employer ever met, or ever were in the same State, does not weigh towards an employment relationship (Tr. p. 38). Because the Claimant filed an initial claim for Unemployment Insurance benefits in Arizona, the Department had jurisdiction to consider whether anyone she listed as base-period employers actually was an employer. We conclude further that the existence of a 1099-MISC reporting "Nonemployee compensation" with zero deductions is a factor that should have been given weight towards an independent, "sub contractor paying her own taxes" relationship (Tr. pp. 36, 40, 43, 44; Bd. Exh. 9). The Claimant's acknowledgement that she made a mistake by listing the Employer as a source of wages, also should have been given weight in analyzing the relationship of the parties.

The arrangements with several other "stay at home mothers" who performed transcriptions in a similar manner, but who presumptively understood that they were independent contractors operating their own transcription businesses, also should have been considered (Tr. pp. 40, 41, 46, 54-56). The arrangement with the Claimant was not "isolated or occasional transactions". See, Arizona Administrative Code, Section R6-3-1723(C)(2)(b).

We conclude that no remuneration paid to the Claimant constituted wages. Rather, the evidence establishes that all remuneration was for piece work transcription services.

We cannot affirm the Reconsidered Determination of the Department because of the substantial evidence of an independent contractor relationship. (Tr. p. 39; Bd. Exh. 10). The Claimant was not an employee of the Employer during 2004 or 2005. We conclude that all remuneration for her services did not constitute wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **REVERSES** the Reconsidered Determination dated October 20, 2009.

Effective January 1, 2004, services performed by the Claimant as a medical transcriptionist did not constitute employment by the Employer, because the parties had an independent contractor relationship.

None of the remuneration paid to the Claimant constituted wages.

DATED:

APPEALS BOARD

_____
MARILYN J. WHITE, Chairman

_____
WILLIAM G. DADE, Member

_____
ROBERT T. NALL, Acting Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: xxxxx Acct. No: xxxxx

(x) KEVIN R SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1138466-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST, SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for hearing from the Department's decision letter issued on July 8, 2009, which held that "... the Benefit Charge Notice dated April 10, 2009 must be held to be final" because the Employer's application for redetermination was filed late. The Department's decision letter held as follows:

> ... Your application was postmarked/telefaxed on April 29, 2009, 19 day(s) after the date of the Notice. Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated April 10, 2009 must be held to be final. ...

The petition for a hearing, or an appeal, having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724, 23-732(B), and 23-738. At the direction of the Appeals Board and following written notice to the parties, a telephone hearing was conducted on November 10, 2009, before ROBERT T. NALL, an Administrative Law Judge. At the scheduled time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for reconsideration or appeal following the BENEFIT CHARGE NOTICE.
2. Whether the BENEFIT CHARGE NOTICE, UC-602(A), became final during the interim period before the Employer filed an application for reconsideration.

See: A.R.S. § 23-732 and Arizona Administrative Code, Section R6-3-1404.

A witness from the Tax Section of the Department appeared and testified. Counsel for the Department was present. Board Exhibits 1 through 6B were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On April 10, 2009, the Department mailed a BENEFIT CHARGE NOTICE to the Employer's address of record (Bd. Exh. 1).
2. On April 29, 2009, the Employer filed its response, indicating: "We have submitted a protest and have not yet heard a response" (Bd. Exh. 2). The response was filed by fax and was handwritten on the BENEFIT CHARGE NOTICE. Its filing date was more than 15 days after the BENEFIT CHARGE NOTICE was served upon the Employer.
4. On July 8, 2009, the Department issued its decision on the timeliness of the Employer's application for redetermination regarding the BENEFIT CHARGE NOTICE. The Department held that because the Employer did not file its application for redetermination within 15 days, "...the Benefit Charge Notice dated April 10, 2009 must be held to be final." (Bd. Exh. 3).
5. The Employer applied for a formal hearing by filing its letter on July 22, 2009. In this letter, the Employer did not submit any reason for filing a late application for redetermination (Bd. Exh. 4). The Employer did not specify what efforts the Employer had undertaken to ensure that its appeal or

application for redetermination was filed within the time period allowed by law.

Arizona Revised Statutes § 23-732(B), provides in pertinent part:

> B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, <u>in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes</u>. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

> B. Petition for hearing or review
>
> 1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
>
> a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
>
> b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The record reveals that a copy of the BENEFIT CHARGE NOTICE was sent by mail on April 10, 2009, to the Employer's last known address of record. The document included the following admonitions (Bd. Exhs. 1, 2):

> PROTEST RIGHTS: The charges shown will become conclusive and binding, pursuant to A.R.S. § 23-732(B), unless a written request for review is filed within 15 days of the mailing date shown above.

The Employer's request for review, or application for redetermination, was filed by fax on April 29, 2009, which is more than 15 days from the date of the BENEFIT CHARGE NOTICE. The Employer's request for review, therefore, was not filed within the statutory time.

Arizona Administrative Code, Section R6-3-1404 provides in pertinent part:

> A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
>
> 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
>
> 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.
>
> * * *
>
> B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at

a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

C. Any notice, report form, determination, decision, assessment, or other <u>document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address</u> if not served in person. ... [Emphasis added].

The Employer did not participate at the hearing and, thus, has offered no further explanation for filing a late request for review, which also is called an application for redetermination.

We conclude that the Employer had reasons to notify the Department of any change in its mailing address and to ensure that important mail was handled properly, because of pending assessments and delinquency assessments and liens, and because of potential charges to the Employer's experience rating account.

The Employer has offered no adequate explanation for filing a late request for review or application for redetermination. The Employer did not meet the statutory requirement to avoid the BENEFIT CHARGE NOTICE becoming final, because the Employer did not file a timely request for review, or application for redetermination. The mailing of the notice to the Employer commenced the time period to request review, and the Employer was obligated to keep a current and accurate mailing address on record with the Department.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding that its application for redetermination was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated July 8, 2009, regarding the late filing of the Employer's application for redetermination.

The BENEFIT CHARGE NOTICE dated April 10, 2009, remains in full force and effect.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

WILLIAM G. DADE, Member

ROBERT T. NALL, Acting Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: xxxxx Acct. No: xxxxx

(x) xxxxx

(x) KEVIN R SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1150609-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST, SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION

AFFIRMED

THE **EMPLOYER** petitioned for hearing from the Department's decision letter issued on October 2, 2009, which held that "... the Benefit Charge Notice dated July 10, 2009 must be held to be final" because the Employer's application for redetermination was filed late. The Department's decision letter held as follows:

> ... Your application was postmarked/telefaxed on August 03, 2009, 24 day(s) after the date of the Notice. Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated July 10, 2009 must be held to be final. ...

The petition for a hearing, or an appeal, having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724 and

23-732(B). At the direction of the Appeals Board and following written notice to the parties, a telephone hearing was conducted on December 2, 2009 before ROBERT T. NALL, an Administrative Law Judge. At the scheduled time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for reconsideration or appeal following the BENEFIT CHARGE NOTICE.
2. Whether the BENEFIT CHARGE NOTICE, UC-602(A), became final during the interim period before the Employer filed an application for reconsideration.

See: A.R.S. § 23-732 and Arizona Administrative Code, Section R6-3-1404.

A witness from the Tax Section of the Department appeared and testified. Counsel for the Department was present. Board Exhibits 1 through 7B were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On July 10, 2009, the Department mailed a BENEFIT CHARGE NOTICE to the Employer's address of record (Bd. Exh. 1).
2. On August 3, 2009, the Employer filed its response, indicating: "This person never worked for me. ... I sent the letter long time ago to dispute it. I faxed it many times." (Bd. Exh. 2). The response was filed by fax and was handwritten on the BENEFIT CHARGE NOTICE. Its filing date was more than 15 days after the BENEFIT CHARGE NOTICE was served upon the Employer.
4. On October 2, 2009, the Department issued its decision on the timeliness of the Employer's application for redetermination regarding the BENEFIT CHARGE NOTICE. The Department held that because the Employer did not file its application for redetermination within 15 days, "...the Benefit Charge Notice dated July 10, 2009 must be held to be final." (Bd. Exh. 3).
5. The Employer applied for a formal hearing by filing its letter dated and mailed October 15, 2009. In this letter, the Employer did not submit any reason for filing a late application for redetermination (Bd. Exh. 4). The Employer did not specify what efforts the Employer had undertaken to ensure that its appeal or application for redetermination was filed within the time period allowed by law.

Arizona Revised Statutes § 23-732(B), provides in pertinent part:

> B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

> B. Petition for hearing or review
>
> 1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
>
> a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
>
> b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The record reveals that a copy of the BENEFIT CHARGE NOTICE was sent by mail on July 10, 2009, to the Employer's last known address of record. The document included the following admonitions (Bd. Exhs. 1, 2):

> PROTEST RIGHTS: The charges shown will become conclusive and binding, pursuant to A.R.S. § 23-732(B), unless a written request for review is filed within 15 days of the mailing date shown above.

The Employer's request for review, or application for redetermination, was filed by fax on August 3, 2009, which is more than 15 days from the date of the BENEFIT CHARGE NOTICE. The Employer's request for review, therefore, was not filed within the statutory time.

Arizona Administrative Code, Section R6-3-1404 provides in pertinent part:

> A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
>
> 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
>
> 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.
>
> * * *
>
> B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at

a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

C. Any notice, report form, determination, decision, assessment, or other <u>document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address</u> if not served in person. ... [Emphasis added].

The Employer did not participate at the hearing and, thus, has offered no further explanation for filing a late request for review, which also is called an application for redetermination.

We conclude that the Employer had reasons to notify the Department of any change in its mailing address and to ensure that important mail was handled properly, because of pending assessments and delinquency assessments and liens, and because of potential charges to the Employer's experience rating account.

The Employer has offered no adequate explanation for filing a late request for review or application for redetermination. The Employer did not meet the statutory requirement to avoid the BENEFIT CHARGE NOTICE becoming final, because the Employer did not file a timely request for review or application for redetermination. The mailing of the notice to the Employer commenced the time period to request review, and the Employer was obligated to keep a current and accurate mailing address on record with the Department.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and that would permit finding its application for redetermination was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated October 2, 2009, regarding the late filing of the Employer's application for redetermination.

The BENEFIT CHARGE NOTICE dated July 10, 2009, remains in full force and effect.

DATED:

APPEALS BOARD

_____
MARILYN J. WHITE, Chairman

_____
WILLIAM G. DADE, Member

_____
ROBERT T. NALL, Acting Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: xxxxx Acct. No: xxxxx

(x) KEVIN R SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1169390-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % LAUREN J LOWE ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on December 18, 2009, which stated that "...the Benefit Charge Notice dated 10/09/2009 must be held to be final" because the Employer's application for redetermination was not filed within 15 days of the date of the Notice, and the Employer did not establish a "good and sufficient reason for the delay in submitting the application" for redetermination.

The Employer's response letter, date-stamped December 28, 2009, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled a telephonic hearing, which was convened on **September 2, 2010,** before Appeals Board Administrative Law Judge S. Rabin. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination following the Benefit Charge Notice.

2. Whether the Benefit Charge Notice became final during the interim period before the Employer filed an application for redetermination.

See: A.R.S. § 23-732 and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, one Employer representative/witness testified. An additional Employer's witness was also present but did not testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 5 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on October 9, 2009 (Bd. Exh. 1A).

2. The Employer's application for redetermination was mailed to the Department on October 28, 2009 (Bd. Exhs. 2A-2B). The Employer included no reason for filing a late application (Bd. Exhs. 2A-2B).

3. On December 18, 2009, the Department issued its decision on the timeliness of the Employer's application for redetermination (Bd. Exhs. 3, 4D). The Department held that, "[s]ince your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated 10/09/2009 must be held to be final" (Bd. Exhs. 3, 4D).

4. On December 28, 2009, the Employer petitioned for a hearing (Bd. Exh. 4A).

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

* * *

B. <u>The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes.</u> A redetermination or

> denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year. (emphasis added)
>
> * * *

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

> * * *
>
> B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)
>
> 1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
> 2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
> 3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.
>
> * * *

During the hearing, the Employer's witness conceded that the application for redetermination was not filed in a timely manner. The Benefit Charge Notice clearly stated the 15-day time limitation for filing an appeal. The Notice explained that "[t]he charges shown will become conclusive and binding,

pursuant to A.R.S. § 23-732(B), unless a written request for review is filed within 15 days of the mailing date…" (Bd. Exh. 1).

Arizona Revised Statutes § 23-732(B) requires that an application for redetermination be filed "within fifteen days after mailing". The Employer filed its application for redetermination 19 days after the mailing date on the Notice. Pursuant to Arizona Administrative Code, Section R6-3-1404(B), the only acceptable reasons for filing a late application for redetermination are Department error or misinformation, delay or other action of the United States Postal Service or its successor, or delay in submission because the Employer changed its mailing address at a time when there would have been no reason to notify the Department of the address change.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated December 18, 2009, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Employer did not file an application for redetermination of the Benefit Charge Notice within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated October 9, 2009, remains in full force and effect.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

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2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record,

rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: xxxxx Acct. No: xxxxx

(x) LAUREN J LOWE
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1188740-001-B

In the Matter of:

x	STATE OF ARIZONA E S A TAX UNIT % LAUREN J LOWE ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION

AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on February 23, 2010, which stated that "...the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010 must be held to be final" because the Employer's application for redetermination was not filed within 15 days of the date of the Determination, and the Employer did not establish a "good and sufficient reason for the delay" in submitting the application for redetermination.

The Employer's response letter, postmarked March 9, 2010, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled an in-person hearing, which was convened on **September 2, 2010,** before Appeals Board Administrative Law

Judge S. Rabin. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
2. Whether the Determination of Unemployment Tax Rate for Calendar Year 2010, UC-603, became final during the interim period before the Employer filed an application for redetermination.

See: A.R.S. § 23-732(A) and Arizona Administrative Code, Section R6-3-1404(B).

On the scheduled date of the hearing, one Employer representative/witness testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 5 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2010 to the Employer's address of record on January 4, 2010 (Bd. Exh. 1).
2. The Employer's application for redetermination was faxed on February 1, 2010 (Bd. Exh. 2). The Employer included no reason for filing a late request (Bd. Exh. 2).
3. On February 23, 2010, the Department issued its decision on the timeliness of the Employer's request for redetermination (Bd. Exh. 3). The Department held that, "[s]ince your appeal was not filed within fifteen (15) days, and because you have not established a good and sufficient reason for the delay in submitting the appeal, the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010 must be held to be final" (Bd. Exh. 3).
4. On March 9, 2010, the Employer petitioned for a hearing (Bd. Exhs. 4A, 4B). The Employer asserted that "[t]he reason for the delay in submitting the appeal is that (the Employer) is a fairly new business, and we had never dealt with this type of issue" (Bd. Exh. 4A). The Employer was unaware of the filing deadline due to overlooking that information, which was included on the determination.

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

* * *

B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year. (emphasis added)

* * *

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

> 3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.
>
> * * *

In the Employer's appeal letter, as well as in the testimony of its witness, the Employer explained that the late filing of its application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010 was due to the Employer's not realizing that the Employer had only 15 calendar days in which to file its application. The Determination clearly stated the 15-day time limitation for filing an appeal. The Determination explained that "[t]his determination becomes final unless a written request for review is filed within 15 days of the mailing date..." (Bd. Exh. 1).

Arizona Revised Statutes § 23-732 (B) requires that an application for redetermination be filed "within fifteen days after mailing". The Employer filed its application for redetermination 28 days after the mailing date on the Determination. Pursuant to Arizona Administrative Code, Section R6-3-1404(B), the only acceptable reasons for filing a late application for redetermination are Department error or misinformation, delay or other action of the United States Postal Service or its successor, or delay in submission because the Employer changed its mailing address at a time when there would have been no reason to notify the Department of the address change.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated February 23, 2010, regarding the late filing of the Employer's application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010.

The Employer did not file an application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010 within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Determination of Unemployment Tax Rate for Calendar Year 2010, dated January 4, 2010, remains in full force and effect.

DATED:

APPEALS BOARD

_____
MARILYN J. WHITE, Chairman

_____
HUGO M. FRANCO, Member

_____
WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: x Acct. No: x

(x) LAUREN J LOWE
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1188745-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION

DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's three decision letters dated October 15, 2009, which referred to the late response by the Employer to a Benefit Charge Notice, UC602A, issued July 10, 2009. Each of the three letters stated that "[s]ince your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated July 10, 2009 must be held to be final."

The Employer's petition was dated October 13, 2009, but was filed by facsimile on February 16, 2010. The Appeals Board has jurisdiction to consider the timeliness of the petition for review filed in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **August 30, 2010,** before Appeals Board Administrative Law Judge

Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issue:

> 1. Whether the Employer's petition to the Appeals Board for a hearing and review from the Department's decisions on late filing issued on October 15, 2009, should be considered timely filed.
>
> *See*: A.R.S. § 23-732(B), and Arizona Administrative Code, Sections R6-3-1404 and R6-3-1506.

On the scheduled date of hearing, an Employer witness appeared and testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 7 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS that we are unable to proceed to a review on the merits of this case, because the Employer has failed to comply with the regulatory prerequisites that would entitle the Employer to a review of the Department's denial of its application for redetermination of a Benefit Charge Notice.

Arizona Revised Statutes § 23-732(B), provides in pertinent part:

> B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. <u>A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board</u>. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

> B. Petition for hearing or review
>
> 1. Any interested party to a reconsidered determination or a denial of application for

> reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
>
> a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
>
> b. The rate of contributions (A.R.S. § 23-732); ... [Emphasis added].
>
> * * *

The record reveals that the Department's three decision letters were sent by mail on October 15, 2009, to the Employer's last known address of record (Bd. Exh. 5). The petition to the Appeals Board, however, was filed by facsimile on February 16, 2010 (Bd. Exh. 6), more than 15 days from the date of the decisions. The petition, therefore, was not filed within the statutory time.

Arizona Administrative Code, Section R6-3-1404 provides in part:

> A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
>
> 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
>
> 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.
>
> * * *
>
> B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified

> statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
>
> * * *

In the petition, the Employer contended that it "wasn't able to protest, in time, for the three individuals who quit their jobs, but are receiving Unemployment benefits" because "[t]he letters were sent to me, but to a wrong address" (Bd. Exh. 6). At the hearing, the Employer's witness testified that the Department's three letters were all mailed to the Employer's correct address and he received them about two days after they were mailed (Tr. pp. 17, 18, 24, 28). The Employer's witness testified that he faxed an appeal the same day he received the letters (Tr. p. 18). The Employer's witness testified that he was not sure when he faxed it, but the fax was sent just one time (Tr. p. 20). The Employer's witness believed that he sent the fax within fifteen days of October 15, 2009 (Tr. p. 22). When questioned further, the Employer's witness testified that the letter was faxed on October 8, 2009 (Tr. p. 27). The Employer's witness was unsure how he could have filed a petition for a hearing on October 8, 2009, when the Department's decision letters were not mailed until October 15, 2009, but he believed that the October 8 fax may have been in response to another document (Tr. pp. 27-29). Although the Employer's witness earlier testified that he had sent the fax only once, he contradicted this statement by testifying that he faxed documents a second time at the request of a Department employee (Tr. p. 33). The Employer's witness did not know when he sent this second fax (Tr. p. 34). The Department received only one response to the three decision letters, specifically the Employer's fax received on February 16, 2010 (Tr. p. 31; Bd. Exh. 6).

Under Arizona Administrative Code, Section R6-3-1404(B), an appeal or petition filed beyond the statutory period shall be considered timely filed if the delay is the result of: (1) Department error or misinformation, (2) delay or other action by the Postal Service, or (3) the individual changing his mailing address at a time when there would have been no reason to notify the Department of the address change. Here, the Employer presented vague and inconsistent testimony as to when it filed the petition for hearing. The Employer has not established any fact which would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the petition for review timely filed. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition. The three decisions of the Department issued on October 15, 2009, remain in full force and effect.

DATED:

APPEALS BOARD

_____
MARILYN J. WHITE, Chairman

_____
HUGO M. FRANCO, Member

_____
WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
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(x) Er: xxxxx Acct. No: xxxxx

(x) KEVIN SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1188718-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION

AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on March 15, 2010, which stated that "...the 'Determination of Unemployment Insurance Tax Rate for Calendar Year 2010' is final" because the Employer's application for review and redetermination was not filed within the statutory period.

The Employer's response letter, submitted by facsimile on March 24, 2010, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **August 30, 2010,** before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.

2. Whether the Determination of Unemployment Tax Rate for Calendar Year 2010, UC-603, became final during the interim period before the Employer filed an application for redetermination.

See: A.R.S. § 23-732(A) and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, no Employer witnesses appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 5 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2010 to the Employer's address of record on January 4, 2010 (Bd. Exh. 1).

2. The Employer's application for redetermination was faxed on March 11, 2010 (Bd. Exh. 2). The Employer stated no reason for filing a late request (Bd. Exh. 2).

3. On March 15, 2010, the Department issued its decision on the timeliness of the Employer's request for redetermination (Bd. Exh. 3). The Department's decision stated that, among other things, because A.R.S. § 23-732 provides that the assigned tax rate becomes final unless a request for review is submitted within fifteen days after the Determination's mailing date, "...the 'Determination of Unemployment Insurance Tax Rate for Calendar Year 2010' is final" (Bd. Exh. 3).

4. On March 24, 2010, the Employer petitioned for a hearing (Bd. Exhs. 4). The Employer asserted that "[t]his is an official written request for reconsideration of my tax rate, and also complies with your issue of timeliness" (Bd. Exh. 4). The Employer did not explain why the March 11, 2010 application for redetermination was not timely filed.

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

A. The department shall promptly notify each employer of the employer's rate of contributions as

determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board. (emphasis added)

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at

> a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)
>
> 1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
> 2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
> 3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.
>
> * * *

On January 4, 2010, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2010 to the Employer. The Employer filed an application for redetermination by the Department on March 11, 2010, over fifteen days after the Determination was mailed. The Employer did not state a reason for the late filing in either the application for redetermination or the petition for hearing. The Employer provided no additional information at the Appeals Board hearing.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated March 15, 2010, regarding the late filing of the Employer's application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010.

The Employer did not file an application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010 within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(A).

The Determination of Unemployment Tax Rate for Calendar Year 2010 dated January 4, 2010, remains in full force and effect.

DATED:

APPEALS BOARD

_____
MARILYN J. WHITE, Chairman

_____
HUGO M. FRANCO, Member

_____
WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

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3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: xxxxx Acct. No: xxxxx

(x) KEVIN R SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1169391-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % LAUREN J LOWE ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on October 2, 2009, which stated that "...the Benefit Charge Notice dated July 10, 2009 must be held to be final" because the Employer's application for redetermination was not filed within 15 days of the date of the Benefit Charge Notice, and the Employer did not establish a "good and sufficient reason for the delay" in submitting the application for redetermination.

The Employer filed its petition for hearing on October 20, 2009, more than 15 days from the date of the Department's October 2, 2009 decision letter. The Appeals Board has jurisdiction to consider the timeliness of the petition for review filed in this matter pursuant to A.R.S. § 23-732(B).

Because the petition for hearing was filed more than 15 days from the date of the Department's October 2, 2009 letter, the Appeals Board scheduled a telephonic hearing, which was convened on **September 2, 2010,** before Appeals

Board Administrative Law Judge S. Rabin. At that time, all parties were given an opportunity to present evidence on the following issue:

1. Whether the Employer filed a timely petition for hearing from the October 2, 2009 letter from the Department.

See: A.R.S. § 23-732(B) and Arizona Administrative Code, Sections R6-3-1404 and R6-3-1506.

On the scheduled date of the hearing, one Employer representative/witness testified. A second Employer witness also testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on July 10, 2009 (Bd. Exh. 1).
2. On July 14, 2009, the Employer contacted the Department by telephone to request a change of address (Bd. Exh. 5A).
3. The Employer's application for redetermination was mailed on July 28, 2009 (Bd. Exhs. 2A-C). The Employer contended in its application that the Notice was sent to "an incorrect address" (Bd. Exh. 2A).
4. On July 28, 2009, the Employer submitted a signed Report of Changes to the Department (Exh. 5B). The Report contained the same address as supplied by the Employer by telephone on July 14, 2009 (Exhs. 5A-B).
5. On October 2, 2009, the Department issued its decision on the timeliness of the Employer's application for redetermination (Bd. Exh. 3). The Department held that, "[s]ince your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated July 10, 2009 must be held to be final" (Bd. Exh. 3). The letter was mailed to the address provided by the Employer on July 14 and 28, 2009 (Bd. Exhs. 3, 5A-B).
6. The Employer received the Department's October 2, 2009 letter on or about October 6, 2009. On October 20, 2009, the Employer petitioned for a hearing (Bd. Exhs. 4A, 4D). The Employer asserted that "[t]he original notice was sent to an incorrect address" (Bd. Exh. 4A). The Employer contacted the

Department due to confusion, but did not attempt to clarify how the Department counts the 15-day appeal period.

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

* * *

B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year. (emphasis added)

* * *

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

One Employer witness testified that the late filing of its petition for an Appeals Board hearing was because "we are trying to run a business here". The other Employer witness testified "time must have gotten away". The Employer witness further testified that the letter did not specify "calendar days" rather than "business days", and the Employer functions based on "business days".

Arizona Revised Statutes § 23-732 (B) requires that a petition for hearing be filed "within fifteen days after mailing". The Employer filed its petition for hearing 18 days after the mailing date on the decision letter. Pursuant to Arizona Administrative Code, Section R6-3-1404(B), the only acceptable reasons for filing a late petition for hearing are Department error or misinformation, delay or other action of the United States Postal Service or its successor, or delay in submission because the Employer changed its mailing address at a time when there would have been no reason to notify the Department of the address change.

The Employer has repeatedly contended that the Department sent various documentation to an incorrect address. The original Benefit Charge Notice was sent to an incorrect address. However, the Department mailed the October 2, 2009 decision letter to the Employer's correct address of record. The Employer mailed its late petition for hearing using letterhead and an envelope that contained the same address for the Employer as used by the Department. The reason for the late filing of the petition for hearing was not due to Department error such as using an incorrect mailing address. Both Employer's witnesses implied that the petition for hearing was mailed after the statutory time frame due to the general demands of the Employer's business.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the petition for an Appeals Board hearing timely filed. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition. The October 2, 2009 decision letter, as well as the July 10, 2009 Benefit Charge Notice, remain in full force and effect.

DATED:

APPEALS BOARD

_____
MARILYN J. WHITE, Chairman

_____
HUGO M. FRANCO, Member

_____
WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: xxxxx Acct. No: xxxxx

(x) LAUREN J LOWE
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1188742-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % LAUREN J LOWE ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on December 18, 2009, which held that "...[s]ince your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated October 09, 2009 must be held to be final. This decision will become final unless you file a written petition for hearing before [sic] Department of Economic Security Appeals Board within fifteen (15) days of the date of this letter."

The Employer filed its petition for hearing on January 8, 2010, more than 15 days from the date of the Department's December 18, 2009 decision letter. The Appeals Board has jurisdiction to consider the timeliness of the petition for review filed in this matter pursuant to A.R.S. § 23-732(B).

Because the petition for hearing was filed more than 15 days from the date of the Department's December 18, 2009 letter, the Appeals Board scheduled a telephonic hearing, which was convened on **September 2, 2010,** before Appeals Board Administrative Law Judge S. Rabin. At that time, all parties were given an opportunity to present evidence on the following issue:

1. Whether the Employer filed a timely petition for hearing by the Appeals Board.

See: A.R.S. § 23-732(B), and Arizona Administrative Code, Sections R6-3-1404 and R6-3-1506.

On the scheduled date of the hearing, one Employer representative/witness testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on October 9, 2009 (Bd. Exh. 1). The address was the Employer's accountant's office.
2. The Employer's application for redetermination was mailed on October 27, 2009 (Bd. Exhs. 3A-B). The Employer did not request to change its address of record with the Department on its application.
3. On December 18, 2009, the Department issued its decision on the timeliness of the Employer's application for redetermination (Bd. Exh. 4). The Department held that, "[s]ince your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated October 9, 2009 must be held to be final" (Bd. Exh. 4). The letter was mailed to the Employer's address of record (Bd. Exh. 4).
4. The Employer received the Department's December 18, 2009 letter on or about January 1 or 2, 2010, when the letter was forwarded to the Employer from its accountant's office. On January 8, 2010, the Employer petitioned for a hearing (Bd. Exh. 5A). The January 8, 2010 petition included a request to update the Employer's mailing address.

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

* * *

B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year. (emphasis added)

* * *

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

(emphasis added)

* * *

Arizona Revised Statutes § 23-732 (B) requires that a petition for hearing be filed "within fifteen days after mailing". The Employer filed its petition for hearing 21 days after the mailing date on the decision letter. Pursuant to Arizona Administrative Code, Section R6-3-1404(B), the only acceptable reasons for filing a late petition for hearing are Department error or misinformation, delay or other action of the United States Postal Service or its successor, or delay in submission because the Employer changed its mailing address at a time when there would have been no reason to notify the Department of the address change.

The Employer witness testified that the Benefit Charge Notice was sent to the old address of its accountant. The Employer's application for redetermination did not request to change the Employer's address of record with the Department. The Employer did not notify the Department until January 8, 2010, that the Department should use a different mailing address. Furthermore, the Employer's witness testified that the decision letter was forwarded to the Employer and received on January 1 or 2, 2010. No evidence was presented as to why the Employer did not contact the Department or file its petition for hearing on the date the decision letter was received, which would have been within the 15 day appeal period. The Employer waited six or seven days to file its petition for hearing. Even if we were to accept as fact the Employer's allegation that the Department erred by using an incorrect address, the Employer did not promptly contact the Department regarding its mailing address and its petition for hearing. The Employer's delay was unreasonable, and therefore, we find the petition for hearing was not timely filed.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the petition for an Appeals Board hearing timely filed. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition. The December 18, 2009 decision letter, as well as the October 9, 2009 Benefit Charge Notice, remain in full force and effect.

DATED:

APPEALS BOARD

_____
MARILYN J. WHITE, Chairman

_____
HUGO M. FRANCO, Member

_____
WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

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United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

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   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

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(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1213047-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's reconsidered determination dated September 14, 2009, which affirmed in part and reversed in part the Department's Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages issued November 16, 2007.

The Employer's petition was dated February 8, 2010, and filed the same day, according to the postmark. The Appeals Board has jurisdiction to consider the timeliness of the petition for review filed in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **September 27, 2010,** before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issue:

1. Whether the Employer's petition to the Appeals Board for a hearing and review from the Department's reconsidered determination issued on September 14, 2009, should be considered timely filed.

See: A.R.S. § 23-724, and Arizona Administrative Code, Sections R6-3-1404 and R6-3-1506.

On the scheduled date of hearing, no Employer witnesses appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 7 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS that we are unable to proceed to a review on the merits of this case, because the Employer has failed to comply with the regulatory prerequisites that would entitle the Employer to a review of the Department's reconsidered determination.

Arizona Revised Statutes § 23-724, provides in pertinent part:

A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.

B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. <u>The reconsidered determination shall become final with respect to the employing unit thirty days after written notice of the reconsidered determination is served personally, by electronic transmission or by</u>

> mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. The department may for good cause extend the period within which the written petition is to be submitted. If the reconsidered determination is appealed to the appeals board and the decision by the appeals board is that the employing unit is liable, the employing unit shall submit all required contribution and wage reports to the department within forty-five days after the decision by the appeals board. [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

> B. Petition for hearing or review
>
> 1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. ...
>
> * * *
>
> 2. The petition must be filed within 30 days (unless the time is extended for good cause) after mailing of the reconsidered determination or denial thereof involving one of the following issues:
>
> a. An employing unit constitutes an employer (A.R.S. § 23-724);
>
> * * *
>
> c. Services performed for or in connection with the business or the employing unit constitute employment (A.R.S. § 23-724);
>
> d. Remuneration for services constitute wages (A.R.S. § 23-724) ... [Emphasis added].

The record reveals that the Department's reconsidered determination was sent by mail on September 14, 2009, to the Employer's last known address of record (Bd. Exh. 5). The petition to the Appeals Board, however, was filed, as

indicated by the postmark, on February 8, 2010 (Bd. Exh. 6I), more than 30 days from the date of the reconsidered determination. The petition, therefore, was not filed within the statutory time.

Arizona Administrative Code, Section R6-3-1404, provides in part:

> A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
>
> 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
>
> 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.
>
> * * *
>
> B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
>
> * * *

In the petition, the Employer states it "did not file a timely appeal" from the reconsidered determination and contends it had good cause for filing late (Bd. Exh. 6A). The petition was signed by the Employer's President (Bd. Exhs. 4A, 6B). In the petition, the President describes the Employer as "a personal service company in which I hold my real estate broker's license" (Bd. Exh. 6B). The President contends that he did not timely file the petition for cause (Bd. Exh. 6A). Specifically, the President states he was hospitalized on October 4

after a recurrence of sepsis, for which he had previously been hospitalized over Christmas 2008 and Easter 2009 (Bd. Exh. 6A). In support of this contention, the Employer submitted hospital emergency room documents indicating the President was admitted on October 4, 2009.

In considering whether services constitute employment or whether remuneration for services constitute wages, under A.R.S. § 23-724 and Arizona Administrative Code, Section R6-3-1506(B)(2), a petition for hearing or review on those issues must be filed within thirty days after mailing of the reconsidered determination, unless the time is extended for good cause. Here, the Employer contends it had good cause for not timely filing the petition for hearing or review because the Employer's President was hospitalized on October 4, 2009. The last day for the Employer to have timely filed a petition within the thirty day deadline was October 14, 2009. The Employer failed to present any evidence as to when the President was released from the hospital. The Employer has not established that the President's hospitalization on October 4, 2009, prevented the Employer from filing a petition by the deadline of October 14, 2009. Moreover, the petition was not filed until February 8, 2010, 117 days after the deadline for timely filing. The Employer has not established why it needed nearly four months beyond the statutory deadline to file its petition. The Employer has not established good cause to grant an extension of the thirty day filing period allowed under A.R.S. § 23-724 and Arizona Administrative Code, Section R6-3-1506(B)(2).

Under Arizona Administrative Code, Section R6-3-1404(B), an appeal or petition filed beyond the statutory period shall be considered timely filed if the delay is the result of: (1) Department error or misinformation, (2) delay or other action by the Postal Service, or (3) the individual changed his mailing address at a time when there would have been no reason to notify the Department of the address change. Here, the Employer has not established any fact which would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the petition for review timely filed. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition. The reconsidered determination issued September 14, 2009, remains in full force and effect.

DATED:

APPEALS BOARD

_____
WILLIAM G. DADE, Chairman

_____
HUGO M. FRANCO, Member

_____
MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

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3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) xxxxx Acct. No: xxxxx

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(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1213054-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST, SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

D E C I S I O N
DISMISSED

THE **EMPLOYER,** through counsel, has asked to withdraw its petition for hearing pursuant to A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724. Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED:

APPEALS BOARD

WILLIAM G. DADE, Chairman

HUGO M. FRANCO, Member

MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

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(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1213011-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

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DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on March 30, 2010, which held that the "Determination of Liability for Employment or Wages" must be held to be final because the Employer did not file a written application for redetermination within 15 calendar days of the mailing date.

The Employer's response letter, postmarked April 15, 2010, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled a telephonic hearing, which was convened on **September 14, 2010,** before Appeals Board Administrative Law Judge S. Rabin. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
2. Whether the Determination of Liability for Employment or Wages, UC-016A, became final during the interim period before the Employer filed an application for redetermination.

See: A.R.S. § 23-724 and Arizona Administrative Code, Sections R6-3-1404.

On the scheduled date of the hearing, one Employer representative/witness testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 7 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Determination of Unemployment Insurance Liability to the Employer's address of record on August 31, 2009 (Bd. Exh. 1A). The Determination was sent by certified mail (Bd. Exh. 1B). The Employer's address of record was the address of its representative (Bd. Exh. 1A).
2. The Employer's representative received the Determination on or before September 9, 2009, before the end of the appeal period (Bd. Exh. 4C).
3. The Employer's application for redetermination was faxed on October 9, 2009 (Bd. Exh. 2). The Employer's representative included no reason for filing a late application.
4. On March 30, 2010, the Department issued its decision on the timeliness of the Employer's application for redetermination (Bd. Exhs. 5A-B). The Department held that the Employer's application for redetermination was "24 days beyond the deadline for the appeal to be considered timely" (Bd. Exh. 5B).
5. On April 15, 2010, the Employer petitioned for a hearing (Bd. Exh. 6A). The Employer asserted that the reason for the delay in submitting the application for redetermination was that "we spent several days doing our due diligence" and "went over the time limit" because the Employer was requesting documents from storage (Bd. Exh. 6A).

Arizona Revised Statutes, Section 23-724, provides in pertinent part:

> A. When the department makes a determination, which determination shall be made either on the motion of the department or upon application of an employing unit, that an employing unit constitutes an employer as defined in § 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in § 23-615 which is not exempt under § 23-617 or that remuneration for services constitutes wages as defined in § 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration. (emphasis added)

* * *

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

* * *

> B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)
>
> 1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

In the Employer's appeal letter, as well as in the testimony of its witness, the Employer explained that the late filing of its application for redetermination was because the Employer was searching through its business records to verify its contention that an employee named in a "Report of Wages Paid to Each Employee" never worked for the Employer. The Determination of Liability for Employment or Wages clearly stated the 15-day time limitation for filing an appeal. The determination explained that "[t]his determination becomes **FINAL** unless [sic] written request for review is filed ...within fifteen (15) days after the date of this determination..." (Bd. Exh. 1A).

Pursuant to Arizona Revised Statutes § 23-724 (A), a determination "shall become final with respect to the employing unit fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit." The determination was sent by certified mail and received in a timely manner by the Employer's representative. The Employer filed its application for redetermination over five weeks after the mailing date on the determination. Pursuant to Arizona Administrative Code, Section R6-3-1404(B), the only acceptable reasons for filing a late application for redetermination are Department error or misinformation, delay or other action of the United States Postal Service or its successor, or delay in submission because the Employer changed its mailing address at a time when there would have been no reason to notify the Department of the address change. The Employer's contention that it needed additional time to review its business records does not meet the criteria in Arizona Administrative Code, Section R6-3-1404(B).

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated March 30, 2010, regarding the late filing of the Employer's application for redetermination of the Determination of Liability for Employment or Wages.

The Employer did not file an application for redetermination within the time period allowed, pursuant to Arizona Revised Statutes § 23-724(A).

The Determination of Liability for Employment or Wages, dated August 31, 2009, remains in full force and effect.

DATED:

APPEALS BOARD

_____
WILLIAM G. DADE, Chairman

_____
HUGO M. FRANCO, Member

_____
MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) xxxxx Acct. No: xxxxx

(x) KEVIN R SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1213083-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on March 1, 2010, which stated that "the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010 must be held to be final" because the Employer's application for redetermination was filed late.

The Employer's response letter, filed by mail on March 4, 2010, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **September 27, 2010,** before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.

2. Whether the Determination of Unemployment Tax Rate for Calendar Year 2010, UC-603, became final during the interim period before the Employer filed an application for redetermination.

See: A.R.S. § 23-732(A) and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, a witness appeared on behalf of the Employer and presented testimony. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 5 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2010 to the Employer's address of record on January 4, 2010 (Bd. Exh. 1).
2. The Employer's application for redetermination was filed by mail on January 21, 2010 (Bd. Exh. 2). The Employer stated no reason for filing a late request (Bd. Exh. 2A).
3. On March 1, 2010, the Department issued its decision on the timeliness of the Employer's request for redetermination (Bd. Exh. 3). The Department's decision stated that, among other things, because A.R.S. § 23-732 provides that the assigned tax rate becomes final unless a written request for review is submitted within fifteen days after the Determination's mailing date, "...the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010 must be held to be final" (Bd. Exh. 3).
4. On March 4, 2010, the Employer petitioned for a hearing (Bd. Exh. 4). The Employer stated that:

   > I sent a letter, and I Was [sic] informed that it was 2 days late. I apologize for the late letter, I was thinking I was within the 15 days but come to find out I was incorrect.

5. The Employer filed its application for redetermination late because the Employer had little experience in responding to the Department and the Employer wanted to further research the basis for why the Employer sought review of its tax rate.
6. Prior to filing the application for redetermination, the Employer's office manager called the Department on January 11 and 15, 2010, to ask questions regarding its tax rate. During the conversation on January 15, 2010, the Department informed the

Employer that it was almost out of time to file a timely application for redetermination.

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

> A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board. (emphasis added)

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

* * *

> B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified

> statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)
>
> 1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
> 2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
> 3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.
>
> * * *

On January 4, 2010, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2010 to the Employer. The Employer filed an application for redetermination by the Department on January 21, 2010, over fifteen days after the Determination was mailed. The Employer filed the application for redetermination late because the Employer was inexperienced in working with the Department and wanted to further research the issue.

As stated in the Determination of Unemployment Tax Rate for Calendar Year 2010, the "determination becomes final unless a written request for review is filed within 15 days of the mailing date" (Exh. 1). We infer that the Employer contends the Board should consider the Employer's application for redetermination to have been timely filed based upon the Employer's lack of experience with the Department and the Employer's decision to further research the matter.

There is no "good cause" exception to the 15-day deadline for filing an application for redetermination found in A.R.S. § 23-732(A) or in Arizona Administrative Code, Section R6-3-1404. In Roman v. Arizona Department of Economic Security, 130 Ariz. 581, 637 P.2d 1084 (App. 1981), the Arizona Court of Appeals specifically held, regarding the timeliness of filing an appeal from a Decision of Appeal Tribunal, at page 1085:

> The language of A.R.S. § 23-671(C) [now A.R.S. § 23-671(D)], unambiguously states that the Appeals Tribunal decision shall become final unless within fifteen days an appeal is filed. There is no statutory authority for a "good cause" exception to this rule. Thus, to interpret A.C.R.R. [now A.A.C.] R6-3-1404 as appellant urges would amount to an amendment of the statute contrary to the legislative intent. Ferguson v. Arizona Department of Economic Security, 122 Ariz. 290, 594 P.2d 544 (App. 1979).

This Board takes guidance from the Court of Appeals decision in concluding that as there is no good cause exception to a late-filed petition for review, similarly, there is no good cause exception to permit finding as timely the Employer's late-filed application for redetermination. For a late application for redetermination to be considered timely, the late filing must be attributable to one of the exceptions set forth in Arizona Administrative Code, Section R6-3-1404(B).

The evidence of record does not establish that any of the provisions of Arizona Administrative Code, Section R6-3-1404(B), would apply in this case. The record contains no evidence that the Employer's delay in filing an application for redetermination resulted from error or misinformation by the Department, any action by the United States Postal Service, or a change in the Employer's address. The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated March 1, 2010, regarding the late filing of the Employer's application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010.

The Employer did not file an application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010 within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(A).

The Determination of Unemployment Tax Rate for Calendar Year 2010 dated January 4, 2010, remains in full force and effect.

DATED:

APPEALS BOARD

_____
WILLIAM G. DADE, Chairman

_____
HUGO M. FRANCO, Member

_____
MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is

considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: xxxxx Acct. No: xxxxx

(x) KEVIN R SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1213086-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION

AFFIRMED

The **EMPLOYER** petitioned for hearing from the Department's March 26, 2010 letters to the Employer, which held that the January 15, 2010 "Benefit Charge Notice" must be held to be final because the Employer did not file its three written applications for redetermination within 15 calendar days of the mailing date.

The Employer's response letters, faxed April 9, 2010, were timely petitions for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled a telephonic hearing, which was convened on **September 14, 2010,** before Appeals Board Administrative Law Judge S. Rabin. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed timely applications for redetermination of the January 15, 2010 Benefit Charge Notice.
2. Whether the Benefit Charge Notice became final during the interim period before the Employer filed its applications for redetermination.

See: A.R.S. § 23-732(A) and Arizona Administrative Code, Sections R6-3-1404.

On the scheduled date of the hearing, counsel for the Department was present, and a witness for the Department testified. No appearance was made by the Employer. Board Exhibits 1 through 5 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on January 15, 2010 (Bd. Exh. 1).
2. The Employer's three applications for redetermination were faxed on February 22, 2010 (Bd. Exhs. 2A-C). The Employer explained in its written applications for redetermination that the late filing of the applications was because the Employer's office was "shut down and all my records were confiscated" (Bd. Exhs. 2A-C).
3. On March 26, 2010, the Department issued its decisions on the timeliness of the Employer's applications for redetermination (Bd. Exhs. 3A-C). The Department held in each decision that, "[s]ince your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice must be held to be final" (Bd. Exhs. 3A-C).
4. On April 9, 2010, the Employer petitioned for a hearing (Bd. Exhs. 4A-C). The written petitions for hearing asserted that the Employer "did not receive mail in time to respond" (Bd. Exhs. 4A-C).

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

* * *

B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year. (emphasis added)

* * *

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

> 3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.
>
> * * *

In the Employer's applications for redetermination, the Employer explained that the late filing was due to the Employer's records being "confiscated in the 'lockout'" (Bd. Exhs. 2A-C). The Determination explained that "[t]his determination becomes final unless a written request for review is filed within 15 days of the mailing date..." (Bd. Exh. 1). Arizona Revised Statutes § 23-732 (B) requires that an application for redetermination be filed "within fifteen days after mailing". The Employer filed its applications for redetermination 38 days after the mailing date on the Benefit Charge Notice. Pursuant to Arizona Administrative Code, Section R6-3-1404(B), the only acceptable reasons for filing a late application for redetermination are Department error or misinformation, delay or other action of the United States Postal Service or its successor, or delay in submission because the Employer changed its mailing address at a time when there would have been no reason to notify the Department of the address change.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the applications for redetermination timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision letters dated March 26, 2010, regarding the late filing of the Employer's applications for redetermination of the Benefit Charge Notice.

The Employer did not file the three applications for redetermination of the Benefit Charge Notice within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice, dated January 15, 2010, remains in full force and effect.

DATED:

APPEALS BOARD

_____
WILLIAM G. DADE, Chairman

_____
HUGO M. FRANCO, Member

_____
MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

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2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

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(x) KEVIN R SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
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(x) JOHN NORRIS CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1213049-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
SET ASIDE AND REMANDED

THE **EMPLOYER** petitioned for a hearing from the Department's reconsidered determination letter issued on March 17, 2010, which held that the Employer's request for reconsideration was not timely filed. The Department's reconsidered determination letter further held that:

> [T]his Reconsidered Determination affirms the Determination of Unemployment Insurance Liability, the Determination of Liability for Employment or Wages and the Notice of Assessment(s) issued April 30, 2009 and will become final unless a written petition for a hearing on the issue of timeliness only is filed with the Department of Economic Security Appeals Board within thirty (30) days of the date of this Reconsidered Determination (Bd. Exh. 5E).

The Employer filed a timely petition for hearing by mail on March 24, 2010. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **September 27, 2010,** before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer, through counsel, filed a timely request for reconsideration by the Department.
2. Whether the Determination of Unemployment Insurance Liability, the Determination of Liability for Employment or Wages, and the Notice of Assessment(s) issued April 30, 2009, became final during the interim period before the Employer, through counsel, filed a request for reconsideration.

See: A.R.S. § 23-724 and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, counsel for the Employer appeared and testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 16 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On April 30, 2009, the Department mailed a Determination of Unemployment Insurance Liability, a Determination of Liability for Employment or Wages, and Notices of Assessment for Calendar Years 2007 and 2008 to the Employer's address of record (Tr. pp. 15-17; Bd. Exhs. 1-3).
2. Counsel for the Employer mailed a request for reconsideration to the Department on May 13, 2009 (Tr. pp. 37-41; Bd. Exhs. 4, 9-11, 13, 14). The envelope containing the request for reconsideration was properly addressed, bore the correct postage for its weight, and was hand-delivered to a United States Postal Service employee by counsel for the Employer (Tr. pp. 37-41; Bd. Exhs. 4P, 9).
3. Counsel for the Employer subsequently contacted the Department (Tr. p. 40). A Department employee told counsel for the Employer to e-mail the request for reconsideration (Tr. p. 40).

Counsel for the Employer e-mailed the request for reconsideration to the Department on June 3, 2009 (Bd. Exh. 4).

4. The Department received the request for reconsideration by e-mail on June 3, 2009 (Tr. p. 18; Bd. Exh. 4).

5. On March 17, 2010, the Department issued a Reconsidered Determination (Tr. p. 21; Bd. Exh. 5). The Reconsidered Determination held that "the appeal filed via e-mail on June 3, 2009 under A.A.C. R6-1404(A)(2) was untimely" (Tr. p. 21; Bd. Exh. 5).

Arizona Revised Statutes, Section 23-724, provides in pertinent part:

> A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, <u>the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration</u>. (Emphasis added).

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

> A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
>
> 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark,

of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (Emphasis added)

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

On April 30, 2009, the Department mailed a Determination of Unemployment Insurance Liability, a Determination of Liability for Employment or Wages, and Notices of Assessment for Calendar Years 2007 and 2008 to the Employer's address of record. Counsel for the Employer mailed a request for reconsideration to the Department on May 13, 2009. The Department's records

fail to show that this request for reconsideration was received by the Department. Counsel for the Employer resubmitted the request for reconsideration by e-mail on June 3, 2009, and the Department considered the e-mail to constitute a late filing of a request for reconsideration.

Under A.R.S. § 23-724, the determinations mailed by the Department on April 30, 2009 would become final unless a request for reconsideration was filed by May 15, 2009, fifteen days from the date of mailing. Pursuant to Arizona Administrative Code, Section R6-3-1404(A), a request for reconsideration that is sent to the Department by any means other than the United States Postal Service is considered filed on the date it is received. Here, the Department first received the Employer's request for reconsideration by e-mail on June 3, 2009, more than fifteen days after the date the determinations were mailed.

Pursuant to Arizona Administrative Code, Section R6-3-1404(B), a late request for redetermination will be considered timely filed when the delay in filing is attributable to Department error or United States Postal Service delay or other action. Here, counsel for the Employer hand-delivered a properly addressed and stamped envelope containing the Employer's request for redetermination to the United States Postal Service on May 13, 2009. A Postal Service employee received the request for redetermination from the Employer's counsel.

The Department correctly contends that under Arizona Administrative Code, Section R6-3-1404(B), any exception that would lead to considering a late filing as timely must be found "to the satisfaction of the Department." Here, the Employer has presented sworn testimony from its counsel that he hand-delivered the request for redetermination to the United States Postal Service on May 13, 2009 (Tr. pp. 37-41). Counsel for the Employer further provided this information in a written statement (Bd. Exh. 13). The Employer presented a copy of the affidavit of mailing, signed by the Employer's counsel, stating that the original and one copy was mailed on May 13, 2009 (Bd. Exh. 9). Employer's counsel provided a word processing document history indicating that the request for reconsideration was last modified on May 13, 2009 at 3:08 p.m. (Bd. Exh. 14 at p. 2). All of this evidence supports a finding that the Employer mailed a copy of the request for reconsideration on May 13, 2009 to the Department. The Department has presented no evidence to rebut the Employer's assertion that a request for reconsideration was mailed on May 13, 2009, other than the Department's contention that it was not received.

There is an inference that a letter properly addressed, stamped and mailed will be delivered to the addressee. State v. Mays, 96 Ariz. 366, 395 P.2d 719 (1964). The Arizona Supreme Court, in Reddell v. Industrial Commission, 111 Ariz. 313, 528 P.2d 1254 (1974), took judicial notice of the declining efficiency of the United States Postal Service and declined to presume prompt delivery of items properly mailed. However, the decline in efficiency is not to the degree to

overcome the probative weight a properly addressed document should be accorded. Here, the evidence of record established that a properly addressed and stamped letter was mailed by the Employer's counsel to the Department on May 13, 2009. Adopting the inference permitted by Mays, the Board finds that the Employer's request for reconsideration was received by the Department. Without evidence of a postmark date to consider, the Board finds the Employer's request was filed on May 13, 2009. The Board also finds that the Department's lack of any record of the request for reconsideration must be attributed to Department error, a basis for finding a late appeal timely filed, pursuant to Arizona Administrative Code, Section R6-3-1404(B).

However, the Board finds equally credible the testimony of both counsel for the Employer and the Department's witness. The evidence of record established that counsel for the Employer mailed a request for reconsideration on May 13, 2009. While the letter was properly addressed and stamped, the Department did not receive the letter. The Department received the request for reconsideration in an e-mail on June 3, 2009. Therefore, the Employer's request for reconsideration was filed late on June 3, 2009. The late filing was the direct result of the United States Postal Service's failure to properly deliver the request for reconsideration that was mailed May 13, 2009. As such, Arizona Administrative Code, Section R6-3-1404(B), applies to the Employer's late request for reconsideration. The Employer's request for reconsideration shall be considered timely filed. Accordingly,

THE APPEALS BOARD **SETS ASIDE** the Department's decision dated March 17, 2010, based upon the evidence of record.

The Employer filed a timely request for reconsideration of the Determination of Unemployment Insurance Liability, the Determination of Liability for Employment or Wages, and the Notice of Assessment(s) issued April 30, 2009. The Employer is entitled to a Reconsidered Determination by the Department addressing the merits of the Employer's request for reconsideration.

THE APPEALS BOARD **REMANDS** the matter to the Department to issue a new Reconsidered Determination, pursuant to A.R.S. § 23-724(B), addressing the merits of the Employer's request for reconsideration. If adversely affected by the new Reconsidered Determination, the Employer may file a timely petition for hearing or review. In the absence of such petition, the new Reconsidered Determination will be the final administrative decision of this agency.

DATED:

APPEALS BOARD

_____
WILLIAM G. DADE, Chairman

_____
HUGO M. FRANCO, Member

_____
MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: xxxxx Acct. No: xxxxx

(x) KEVIN R SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
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(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1220408-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % SAMANTHA BLEVINS ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

D E C I S I O N
DISMISSED

THE **EMPLOYER**, through counsel, has asked to withdraw its petition for hearing pursuant to A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

* * *

We have carefully reviewed the record. The evidence of record establishes that on July 28, 2010, the Employer, through counsel, appealed the June 28, 2010 Reconsidered Determination. On November 12, 2010, the Employer's counsel withdrew the appeal in writing. Pursuant to Arizona Administrative Code, Section R6-3-1502(A)(1), the Board may dispose of an appeal without further appellate review on the merits when an appellant withdraws the appeal in writing. Accordingly,

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED:

APPEALS BOARD

WILLIAM G. DADE, Chairman

HUGO M. FRANCO, Member

S. RABIN, Acting Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record,

rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

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(x) SAMANTHA BLEVINS
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(x) JOHN NORRIS CHIEF OF TAX
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PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1233433-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for hearing from the Department's September 7, 2010 letter to the Employer, which held that the July 16, 2010 "Benefit Charge Notice" is final because the Employer did not file its written application for redetermination within 15 calendar days of the mailing date.

The Employer's response letter, postmarked September 13, 2010, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled a telephonic hearing, which was convened on **December 15, 2010,** before Appeals Board Administrative Law Judge S. Rabin. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination of the July 16, 2010 Benefit Charge Notice.

2. Whether the Benefit Charge Notice became final during the interim period before the Employer filed its application for redetermination.

See: A.R.S. § 23-732 (B) and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, one Employer representative/witness testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 5 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on July 16, 2010 (Bd. Exh. 1).
2. The Employer's application for redetermination was mailed on August 3, 2010 (Bd. Exhs. 2A-2C). The Employer's application stated that a Department employee told the Employer the Department "didn't receive my fax on this employee", so the Employer resubmitted an application by mail (Bd. Exh. 2B).
3. On September 7, 2010, the Department issued its decision on the timeliness of the Employer's application for redetermination (Bd. Exh. 3). The Department held that, "[s]ince your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated 07-16-2010 must be held to be final" (Bd. Exh. 3).
4. On September 13, 2010, the Employer petitioned for a hearing (Bd. Exhs. 4A-4C). The Employer asserted that a timely application was faxed to the Department (Bd. Exhs. 4A, 4C). The Employer further contended that he "followed up with a call" to the Department, he was told his fax had not been received, and he then filed a second application by mail (Bd. Exhs. 4A, 4C).

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

* * *

B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year. (emphasis added)

* * *

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

> 3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.
>
> * * *

In the Employer's petition for hearing, as well as in the testimony of its witness, the Employer contended that the application for redetermination, which was mailed on August 3, 2010, after the filing deadline, was a second application for redetermination. The Employer contended that a timely application was previously submitted to the Department by fax.

Arizona Revised Statutes § 23-732 (B) requires that an application for redetermination be filed "within fifteen days after mailing". The parties agree that the application for redetermination mailed on August 3, 2010, was filed after the deadline (Bd. Exhs. 3, 4C). The issue before the Board is whether the Employer first filed a timely application for redetermination prior to the filing deadline.

The Employer's witness testified that the Benefit Charge Notice was received by the Employer in a timely manner. The witness further testified that he faxed a timely application for redetermination to the Department. The witness had no recollection of the date on which he sent the fax or the number to which the fax was transmitted. Furthermore, the witness testified that he called the Department to verify receipt of his fax, but he could not recall with whom he spoke at the Department. The witness could not remember whether he received a confirmation from his fax machine that the fax was transmitted successfully.

Pursuant to Arizona Administrative Code, Section R6-3-1404(B), the only acceptable reasons for filing a late application for redetermination are Department error or misinformation, delay or other action of the United States Postal Service or its successor, or delay in submission because the Employer changed its mailing address at a time when there would have been no reason to notify the Department of the address change. The Employer contends that a timely application for redetermination was faxed to the Department. The Employer has not substantiated this contention. The witness was unable to provide any evidence that a timely application was ever faxed. He had no recollection of the fax number used or the date on which the fax was sent. The Employer has further conceded that the application for redetermination that was postmarked August 3, 2010, was not a timely application for redetermination.

The Employer has not alleged and established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated September 7, 2010, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Employer did not file an application for redetermination of the Benefit Charge Notice within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated July 16, 2010, has become final and remains in full force and effect.

DATED:

APPEALS BOARD

WILLIAM G. DADE, Chairman

HUGO M. FRANCO, Member

S. RABIN, Acting Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

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2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: xxxxx Acct. No: xxxxx

(x) KEVIN SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
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(x) JOHN NORRIS CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
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PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1233444-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

D E C I S I O N

DISMISSED

THE **DEPARTMENT**, through counsel, has filed a motion to dismiss this matter and vacate any future hearings pursuant to A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A). The basis for the motion is that the Department and the Employer have agreed to resolve the matter by way of a conditional withdrawal that the Employer submitted to the Department.

The request for review or appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724 and 23-733.

The Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A), provides in pertinent part:

A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

* * *

3. By stipulation, if the parties agree on the record or in writing at any time before the decision is issued, subject to approval by the Appeals Tribunal ...

We have carefully reviewed the record. The evidence of record establishes that on August 18, 2010, the Employer, through counsel, petitioned for a hearing from the July 19, 2010 Reconsidered Determination. In a letter dated December 2, 2010, the Employer, through counsel, approached the Department offering a conditional withdrawal of its appeal. The Department, through counsel, filed a motion to dismiss this matter on December 14, 2010. The motion is based upon the parties "hav[ing] resolved the matter as evidenced by the [December 2, 2010] letter from the Employer's counsel." Pursuant to Arizona Administrative Code, Section R6-3-1502(A)(3), the Board may dispose of an appeal without further appellate review on the merits when the parties agree in writing. Accordingly,

THE APPEALS BOARD FINDS there is no reason to deny granting the motion. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the motion to dismiss or subsequent thereto.

DATED:

APPEALS BOARD

_____
WILLIAM G. DADE, Chairman

_____
HUGO M. FRANCO, Member

_____
MARK H. PRENY, Acting Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

Er: xxxxx Acct. No: xxxxx

(x) Er Rep.: xxxxx

(x) KEVIN R. SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1213006-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

D E C I S I O N
DISMISSED

THE **EMPLOYER**, through its representative, has asked to withdraw its petition for hearing pursuant to A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724.

Arizona Administrative Code, Section R6-3-1502(A) provides in pertinent part:

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:

1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

* * *

We have carefully reviewed the record. The evidence of record establishes that on March 24, 2010, the Employer, through its representative, appealed the February 22, 2010 Reconsidered Determination. On November 16, 2010, the Employer's representative withdrew the appeal in writing. Pursuant to Arizona Administrative Code, Section R6-3-1502(A)(1), the Board may dispose of an appeal without further appellate review on the merits when an appellant withdraws the appeal in writing. Accordingly,

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. Accordingly,

THE APPEALS BOARD **DISMISSES** the petition. Any scheduled hearing is cancelled. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED:

APPEALS BOARD

WILLIAM G. DADE, Chairman

HUGO M. FRANCO, Member

S. RABIN, Acting Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

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3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record,

rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed by certified mail on
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(x) KEVIN SMITH
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1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1213002-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's March 30, 2010 Reconsidered Determination letter to the Employer, which held that that "this Reconsidered Determination affirms the Department's action of February 18, 2010 to return your voluntary payment for being postmarked after the January 31, 2010 deadline."

The Employer's response letter, postmarked April 5, 2010, was a timely petition for hearing. The Appeals Board has jurisdiction to consider this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled an in-person hearing, which was convened on **October 6, 2010,** before Appeals Board Administrative Law Judge S. Rabin. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer made a timely voluntary payment to the Department.
2. Whether the rate determination dated January 4, 2010 will remain on the account.

See: A.R.S. § 23-726 and Arizona Administrative Code, Section R6-3-1404

On the scheduled date of the hearing, one Employer representative/witness testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 9 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2010 to the Employer's address of record on January 4, 2010 (Bd. Exh. 1). The Determination listed a tax rate of 2.35% (Bd. Exh. 1). The Determination informed the Employer that "a voluntary payment of $974.92 may be made to obtain the next lower tax rate of 2.08" (Bd. Exh. 1). The Employer received the Determination prior to January 31, 2010, but the Determination may have remained in an employee's mailbox for a few days before it was opened.
2. On February 16, 2010, the Employer mailed a check for $974.92 made payable to the Department (Bd. Exhs. 2A-B).
3. On February 18, 2010, the Department returned the voluntary payment. The accompanying letter stated that "voluntary payments received after January 31st are untimely and cannot be used for rate computation" (Bd. Exh. 3).
4. On February 27, 2010, the Employer resubmitted the check and requested an exception to the January 31, 2010 deadline (Bd. Exhs. 4A-C).
5. On March 2, 2010, the Department returned the voluntary payment a second time (Bd. Exh. 5). The accompanying letter again stated that "voluntary payments received after January 31st are untimely and cannot be used for rate computation" (Bd. Exh. 5).
6. On March 8, 2010, the Employer sought to appeal the March 2, 2010 Determination letter (Bd. Exh. 6A).
7. On March 30, 2010, the Department issued a Reconsidered Determination, which found that the voluntary payment "was

postmarked February 16, 2010, which is beyond the allowable timeframe for accepting the payment" (Bd. Exh. 7A). The voided check was returned to the Employer a third time (Bd. Exhs. 7B-C).

8. On April 5, 2010, the Employer petitioned for a hearing (Bd. Exh. 8A).

Arizona Revised Statutes, Section 23-726, provides in pertinent part:

Contributions; voluntary payment

A. Contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this chapter with respect to wages for employment. The contributions shall become due and be paid by each employer to the commission for the fund in accordance with such regulations as the commission prescribes, and shall not be deducted, in whole or in part, from the wages of individuals in the employer's employ.

B. In the payment of contributions, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more in which case it shall be increased to one cent.

C. An employer may make voluntary payments in addition to the contributions required under this chapter, which shall be credited to his account in accordance with commission regulation. <u>The voluntary payments shall be included in the employer's account as of the employer's most recent computation date if they are made on or before the following January 31.</u> Voluntary payments when accepted from an employer will not be refunded in whole or in part. (emphasis added)

* * *

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

* * *

B. <u>The submission of any payment</u>, appeal, application, request, notice, objection, petition, report, or other information or document <u>not within the specified</u>

statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

Arizona Revised Statutes, Section 23-726, requires that voluntary payments be included in the employer's account as of the employer's most recent computation date if they are made on or before the following January 31. The Employer did not submit its voluntary payment until February 16, 2010. The Employer sought an exception to the January 31, 2010 statutory deadline. In its February 26, 2010 letter to the Department, the Employer's human resources/payroll manager wrote that she "was not aware payment had to be submitted by [sic] January 31, 2010 deadline" (Bd. Exh. 4A). She testified that she did not initially read the back side of the Determination of Unemployment Tax Rate for Calendar Year 2010. The back of the determination specifically stated in boldface type that "[v]oluntary payment remittance must be postmarked no later than January 31, of this year" (Bd. Exh. 1B).

Pursuant to Arizona Administrative Code, Section R6-3-1404, a voluntary payment made after January 31 is considered timely only if the delay is caused by error of the Department, misinformation provided by an agent of the Department, error or delay by the Postal Service, or a change of address when the individual had no reason to notify the Department of the change. There is no other acceptable reason for finding timely a voluntary payment made after January 31. The Employer has not alleged that the late payment was due to one

of the exceptions permitted under the applicable administrative code. Accordingly, the Employer's voluntary payment was not paid within the statutorily-mandated timeframe.

THE APPEALS BOARD **AFFIRMS** the March 30, 2010 Reconsidered Determination. The Employer's voluntary payment was postmarked after the January 31, 2010 deadline. The 2.35% tax rate, as listed on the January 4, 2010 Determination of Unemployment Tax Rate for Calendar Year 2010, will remain on the account.

DATED:

APPEALS BOARD

_____
WILLIAM G. DADE, Chairman

_____
HUGO M. FRANCO, Member

_____
MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

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(x) KEVIN R SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
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PHOENIX, AZ 85007-2926

(x) JOHN NORRIS CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1188733-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on February 23, 2010, which stated that "...the 'Determination of Unemployment Insurance Tax Rate for Calendar Year 2010' must be held to be final" because the Employer's application for review and redetermination was not filed within the statutory period.

The Employer's response letter, filed by mail on March 8, 2010, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing, for **August 30, 2010,** before Appeals Board Administrative Law Judge Mark H. Preny. At that time, the Employer did not appear but requested a postponement of the hearing. With no objection by the Department, the telephone hearing was rescheduled for **September 27, 2010**. On that date, a hearing was convened and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.

2. Whether the Determination of Unemployment Tax Rate for Calendar Year 2010, UC-603, became final during the interim period before the Employer filed an application for redetermination.

See: A.R.S. § 23-732(A) and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, no Employer witnesses appeared to testify. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. On January 4, 2010, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2010 to the Employer's address of record (Bd. Exh. 1).

2. The Employer's application for redetermination was filed by mail on January 20, 2010 (Bd. Exh. 2). The Employer stated no reason for filing a late request (Bd. Exh. 2A).

3. On February 23, 2010, the Department issued its decision on the timeliness of the Employer's request for redetermination (Bd. Exh. 3). The Department's decision stated that, among other things, because A.R.S. § 23-732 provides that the assigned tax rate becomes final unless a request for review is submitted within fifteen days after the Determination's mailing date, "...the 'Determination of Unemployment Insurance Tax Rate for Calendar Year 2010' must be held to be final" (Bd. Exh. 3).

4. On March 8, 2010, the Employer petitioned for a hearing (Bd. Exh. 4). The Employer asserted that it "put the original letter in the mailbox on the 18th or 19th of February [sic] and cannot explain the reason for a postmark of the 20th."

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

> A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. <u>The determination shall become conclusive and binding</u>

on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board. (emphasis added)

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if

the mark is illegible, on the date entered on the document as the date of completion.

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

On January 4, 2010, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2010 to the Employer. The Employer filed an application for redetermination by the Department on January 20, 2010, over fifteen days after the Determination was mailed. In the petition for hearing, the Employer stated that the application was placed "in the mailbox on the 18th or 19th of February." Despite the Employer's contention, the document was postmarked on January 20, 2010. The Employer provided no additional information at the Appeals Board hearing.

The Employer has alleged, but not established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated February 23, 2010, regarding the late filing of the Employer's application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010.

The Employer did not file an application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010 within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(A).

The Determination of Unemployment Tax Rate for Calendar Year 2010 dated January 4, 2010, remains in full force and effect.

DATED:

APPEALS BOARD

WILLIAM G. DADE, Chairman

HUGO M. FRANCO, Member

MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your

disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

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3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

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PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1188723-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

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Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on March 4, 2010, which held that "... the Determination of Unemployment Insurance Tax Rate for calendar year 2010 must be held to be final" because the Employer's application for redetermination was not filed within the statutory period.

The Employer's response letter, filed by mail on March 10, 2010, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(A).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **August 30, 2010,** before Appeals Board Administrative Law Judge Mark H. Preny. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.

2. Whether the Determination of Unemployment Tax Rate for Calendar Year 2010, UC-603, became final during the interim period before the Employer filed an application for redetermination.

See: A.R.S. § 23-732(A) and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, counsel for the Employer appeared, and the Employer presented testimony from two witnesses. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 10 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2010 to the Employer's address of record on January 4, 2010 (Tr. pp. 10, 11; Bd. Exh. 1).

2. The Employer filed an application for redetermination dated January 27, 2010 (Tr. p. 11; Bd. Exh. 2). In the application for redetermination, the Employer stated, "I recognize that our appeal falls outside the deadline for your consideration; however, since I have been in touch with representatives of your department in an effort to resolve this issue, I would hope that you would consider this appeal as timely" (Tr. pp. 11, 12; Bd. Exh. 2A).

3. On March 4, 2010, the Department issued its decision on the timeliness of the Employer's request for redetermination (Tr. p. 12; Bd. Exh. 3). Among other things, the Department's decision stated:

> The Determination of Unemployment Insurance Tax Rate for calendar year 2010 dated January 4, 2010 states, "This determination becomes final unless a written request for review is filed within 15 days of the mailing date as provided in Arizona Revised Statutes § 23-732." Your request for a review of your tax rate is dated January 27, 2010, which is eight days beyond the deadline for the appeal to be considered timely. Since your appeal was not filed within fifteen (15) days and because you have not

established a good and sufficient reason for the delay in submitting the appeal, the Determination of Unemployment Insurance Tax Rate for calendar year 2010 must be held to be final. (Bd. Exh. 3).

4. On March 10, 2010, the Employer petitioned for a hearing (Tr. p. 13; Bd. Exh. 4). The Employer asserted that "we have been working with staff in your department regarding the issue of our tax rate for a number of months" (Bd. Exh. 4A).

5. Prior to the Department's issuance of the Determination of Unemployment Tax Rate for Calendar Year 2010, the Employer engaged in correspondence with the Department inquiring about the Employer's classification for unemployment tax purposes (Tr. pp. 23, 24, 32-34, 41-43; Bd. Exhs. 7, 8). At some point after the deadline to file an application for redetermination of the Determination of Unemployment Tax Rate for Calendar Year 2010, the Employer's President spoke to a Department employee who told her that the issue of the Employer's classification could be addressed if the Employer filed an appeal from the Determination of Unemployment Tax Rate for Calendar Year 2010 (Tr. pp. 22, 26-31, 35, 36). The Employer did not appeal the Determination of Unemployment Tax Rate for Calendar Year 2010 originally because the Employer believed that the issue it wanted reviewed was its classification, not its tax rate (Tr. pp. 28, 30). The Employer's President testified she had not seen the Determination of Unemployment Tax Rate for Calendar Year 2010 until after the deadline to file a timely appeal (Tr. pp. 37, 38).

6. The Employer's Director of Human Resources received the Determination of Unemployment Tax Rate for Calendar Year 2010, but did not file an appeal nor show it to the Employer's President until after the deadline to file a timely request for redetermination (Tr. pp. 31, 40, 41, 43, 44, 46, 48).

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

> A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. <u>The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's</u>

reasons for application for review and redetermination. The department shall reconsider the rate, but no employer shall in any proceeding involving the employer's rate of contributions or contribution liability contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to section 23-773, and determined to be chargeable to the employer's account pursuant to section 23-727, except on the ground that the services on the basis of which the benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the determination, redetermination or decision or to any other proceedings under this chapter in which the character of the services was determined. The employer shall be promptly notified of the department's denial of the employer's application, or of the department's redetermination, both of which shall become final unless within fifteen days after mailing or delivery of notification an appeal is filed with the appeals board. (emphasis added)

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

On January 4, 2010, the Department mailed a Determination of Unemployment Tax Rate for Calendar Year 2010 to the Employer. The Employer filed an application for redetermination by the Department on January 27, 2010, over fifteen days after the Determination was mailed.

The Employer had previously engaged in correspondence with the Department regarding the Employer's classification for tax purposes. The evidence of record does not establish what prompted the Employer to question its tax classification status around October 2009, however, no Determination had been issued by the Department around this time from which the Employer could have filed a timely request for redetermination. An appealable determination was not issued by the Department until the Determination of Unemployment Tax Rate for Calendar Year 2010 was mailed on January 4, 2010. Though the Employer received the determination, the Employer took no action until after the expiration of the deadline for filing an application for redetermination.

The Employer's President testified that the Employer did not initially appeal the Determination of Unemployment Tax Rate for Calendar Year 2010 because the Employer believed the issue was not the tax rate but rather the Employer's classification. However, the imposed tax rate represented the substantive effect of any classification. If the Employer believed the tax rate to have been based upon a faulty premise, the Employer was responsible for filing a timely application for redetermination.

As stated in the Determination of Unemployment Tax Rate for Calendar Year 2010, the "determination becomes final unless a written request for review is filed within 15 days of the mailing date" (Exh. 1). We infer that the Employer contends the Board should consider the Employer's application for redetermination to have been timely filed based upon the Employer's earlier correspondence with the Department regarding its classification and the Employer's belief that a different issue was posed by the Determination of Unemployment Tax Rate for Calendar Year 2010.

There is no "good cause" exception to the 15-day deadline for filing an application for redetermination found in A.R.S. § 23-732(A) or in Arizona Administrative Code, Section R6-3-1404. In Roman v. Arizona Department of Economic Security, 130 Ariz. 581, 637 P.2d 1084 (App. 1981), the Arizona Court

of Appeals specifically held, regarding the timeliness of filing an appeal from a Decision of Appeal Tribunal, at page 1085:

> The language of A.R.S. § 23-671(C) [now A.R.S. § 23-671(D)], unambiguously states that the Appeals Tribunal decision shall become final unless within fifteen days an appeal is filed. There is no statutory authority for a "good cause" exception to this rule. Thus, to interpret A.C.R.R. [now A.A.C.] R6-3-1404 as appellant urges would amount to an amendment of the statute contrary to the legislative intent. Ferguson v. Arizona Department of Economic Security, 122 Ariz. 290, 594 P.2d 544 (App. 1979).

This Board takes guidance from the Court of Appeals decision in concluding that as there is no good cause exception to a late filed petition for review, similarly, there is no good cause exception to permit finding as timely the Employer's late filed application for redetermination. For a late application for redetermination to be considered timely, the late filing must be attributable to one of the exceptions set forth in Arizona Administrative Code, Section R6-3-1404(B).

The evidence of record does not establish that any of the provisions of Arizona Administrative Code, Section R6-3-1404(B), would apply in this case. The record contains no evidence that the Employer's delay in filing an application for redetermination resulted from either a change in the Employer's address or any action by the United States Postal Service. The Employer contends that Code Section R6-3-1404(B) applies because the Employer was told by the Department that it could file an appeal late and still receive a substantive review. However, even if a Department employee erroneously led the Employer to believe that its late application for redetermination would be considered on its merits, such Department error does not fall within the exceptions of Arizona Administrative Code, Section R6-3-1404(B). Code Section R6-3-1404(B) does not apply because the Employer had already exceeded the deadline for filing a timely application for redetermination when the Department allegedly gave the misinformation. Once the deadline for timely filing an application for redetermination had passed, any subsequent error or misinformation by the Department cannot be considered the cause for the Employer's late filing.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated March 4, 2010, regarding the late filing of the Employer's application for

redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010.

The Employer did not file an application for redetermination of the Determination of Unemployment Insurance Tax Rate for Calendar Year 2010 within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(A).

DATED:

APPEALS BOARD

_____
MARILYN J. WHITE, Chairman

_____
HUGO M. FRANCO, Member

_____
WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

Er: xxxxx Acct. No: xxxxx

(x) Er Rep.: xxxxx

(x) KEVIN R SMITH
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028 - SITE CODE 911B
PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1213009-001-B

In the Matter of:

xxxxx	STATE OF ARIZONA E S A TAX UNIT % KEVIN R SMITH ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2976
Employer	Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination issued on April 15, 2010, which affirmed the December 14, 2009 Determination of Liability for Unemployment or Wages and held that the decision would "become final unless a written petition for a hearing is filed with the Department of Economic Security Appeals Board within thirty (30) days of the date of this letter."

The Employer filed its petition for hearing on May 20, 2010, more than 30 days from the date of the Department's April 15, 2010 Reconsidered Determination. The Appeals Board has jurisdiction to consider the timeliness of the petition for hearing filed in this matter pursuant to A.R.S. § 23-732(B).

Because the petition for hearing was filed more than 30 days from the date of the Department's April 15, 2010 Reconsidered Determination, the Appeals Board scheduled a telephonic hearing, which was convened on **September 14, 2010,** before Appeals Board Administrative Law Judge S. Rabin. At that time, all parties were given an opportunity to present evidence on the following issue:

1. Whether the Employer filed a timely petition for hearing from the April 15, 2010 Reconsidered Determination from the Department.

See: A.R.S. § 23-732(B), and Arizona Administrative Code, Sections R6-3-1404 and R6-3-1506.

On the scheduled date of the hearing, counsel for the Department was present, and a witness for the Department testified. The Employer did not participate in the hearing. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. The Department mailed a Determination of Liability for Employment or Wages to the Employer's address of record on December 14, 2009 (Bd. Exh. 1).
2. The Employer's application for redetermination was mailed on December 21, 2009 (Bd. Exhs. 3A-B).
3. On April 15, 2010, the Department issued its Reconsidered Determination, which affirmed the December 14, 2009 Determination of Liability for Unemployment or Wages (Bd. Exhs. 4A-F).
4. On May 20, 2010, the Employer petitioned for a hearing (Bd. Exhs. 5A-B). The petition provided no explanation for the late filing of the petition.

Arizona Administrative Code, Section R6-3-1506, provides in pertinent part as follows:

Contribution cases

* * *

B. Petition for hearing or review

* * *

2. The petition must be filed within 30 days (unless the time is extended for good cause) after mailing of the reconsidered determination or denial thereof involving one of the following issues: (emphasis added)

a. An employing unit constitutes an employer (A.R.S. § 23-724);

* * *

c. Services performed for or in connection with the business of the employing unit constitute employment (A.R.S. § 23-724);

d. Remuneration for services constitute wages (A.R.S. § 23-724);

* * *

Arizona Administrative Code, Section R6-3-1404, provides in pertinent part:

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change. (emphasis added)

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

Arizona Administrative Code, Section R6-3-1506, requires that a petition for hearing "must be filed within 30 days (unless the time is extended for good cause) after mailing of the reconsidered determination." The Employer filed its petition for hearing 35 days after the mailing date on the Reconsidered Determination. Pursuant to Arizona Administrative Code, Section R6-3-1404(B), the only acceptable reasons for filing a late petition for hearing are Department error or misinformation, delay or other action of the United States Postal Service or its successor, or delay in submission because the Employer changed its mailing address at a time when there would have been no reason to notify the Department of the address change.

The Employer provided no explanation in its petition for hearing regarding why the petition was filed late. Furthermore, the Employer did not appear at the September 14, 2010 hearing to provide testimony on this issue. Without any information regarding why the Employer's petition for hearing was not filed within 30 days, we cannot find good cause to extend the deadline for filing the petition for hearing.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the petition for an Appeals Board hearing timely filed. Accordingly,

THE APPEALS BOARD **DISMISSES** this appeal. The April 15, 2010 Reconsidered Determination, as well as the December 14, 2009 Determination of Liability for Employment or Wages, remain in full force and effect.

DATED:

APPEALS BOARD

_____
WILLIAM G. DADE, Chairman

_____
HUGO M. FRANCO, Member

_____
MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 347-6343.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. The request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. A written request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

   An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 347-6343.

A copy of the foregoing was mailed on
to:

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(x) JOHN NORRIS, CHIEF OF TAX
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PHOENIX, AZ 85005-6028

By: _____
For The Appeals Board