

**Arizona Department of
Economic Security**



Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

1ST QUARTER 2024

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**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1911356-001-B



STATE OF ARIZONA ESA TAX UNIT
c/o DONALD BAIER, ASST
ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

Petitioner

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION

The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD

The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

**DECISION
DISMISSED**

THE PETITIONER, [REDACTED], pursuant to a Joint Motion to Dismiss filed on January 4, 2024, has asked to withdraw its Petition for Hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A).

The Appeals Board has jurisdiction in this matter under 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: 1/4/2024

APPEALS BOARD

ROBERT IRANI,
Administrative Law Judge

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. 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 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. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 1/4/2024
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By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1939147-001-B



STATE OF ARIZONA ESA TAX UNIT
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Petitioner

Department

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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** March 11, 2024 *****.

DECISION
REQUEST TO REOPEN GRANTED

THE **PETITIONER** has filed a request to reopen the Appeals Board hearing that was scheduled for September 27, 2023 in Arizona Appeal No. T-1912121-001-B. The Appeals Board issued a decision in that case dismissing the Petitioner's appeal on September 28, 2023, because the Petitioner did not appear at the hearing.

The request to reopen the hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724 and 23-738. The Petitioner previously petitioned for hearing from the Department's Reconsidered Determination issued on March 30, 2023, which held that the services performed by [REDACTED] (the "Workers") constitute employment and all forms of remuneration paid for such services constitute wages.

Following notification to the parties, a telephone hearing was conducted before ROBERT IRANI, an Administrative Law Judge in Phoenix, Arizona, on December 20, 2023.

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

Whether the Petitioner had good cause for failing to appear at the September 27, 2023 hearing.

Authority: Arizona Revised Statutes ("A.R.S.") §23-681 and Arizona Administrative Code ("A.A.C") Section R6-3-1503.

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

1. On March 30, 2023, the Department issued a Reconsidered Determination that held that the services performed by the Workers constitute employment and all forms of remuneration paid for such services constitute wages.
2. On April 18, 2023, the Petitioner filed a timely request for an Appeals Board hearing of the March 30, 2023 Reconsidered Determination.
3. On June 6, 2023, the Appeals Board issued a Notice of Pre-Hearing Conference. The notice advised the parties that they were required to register for the conference and provided instructions on how to register.
4. On August 9, 2023, a pre-hearing conference was conducted. Both parties registered and appeared at the conference.
5. On August 17, 2023, the Appeals Board issued a Notice of Hearing for a hearing scheduled for September 27, 2023 at 9:30 a.m. The Notice of Hearing comprised 4 pages and included a page advising the parties of

the requirement to register for the hearing with instructions on how to register.

6. The Notice of Hearing received by the Petitioner did not include a page regarding the requirement to register for the hearing.
7. On September 27, 2023, the Department was registered and appeared for the hearing. The Petitioner had not registered and did not appear for the hearing.
8. A representative for the Petitioner had expected to receive a telephone call for the hearing at 9:30 a.m. on September 27, 2023. After approximately 10 minutes, the representative contacted the Department by telephone and was advised that because the Petitioner had not registered for the hearing, the case would be dismissed due to non-appearance.
9. On September 28, 2023, a Dismissal of Appeal was issued by the Appeals Board as a result of the Petitioner's non-appearance at the hearing.

REASONING AND CONCLUSIONS OF LAW

Arizona Revised Statutes, § 23-681(C) provides as follows:

- C. The department of economic security shall adopt rules:
 1. To set standards under which a party may be excused for failure to attend a hearing for good cause.
 2. To allow a party who failed to attend a hearing to file a written or electronic request to reopen the hearing.

Arizona Administrative Code, Section R6-3-1503(B), provides in part as follows:

- B. Appeal Tribunal hearings
 3. Failure of a party to appear
 - b. If the Appeal Tribunal issues a decision adverse to any interested party that failed to appear at a scheduled hearing,

that party may file one written request for a hearing to determine whether good cause exists to reopen the hearing. The interested party [...] shall list the reasons for the failure to appear.

* * *

- d. A party shall establish good cause warranting reopening of a case upon proof that both the failure to appear and failure to timely notify the hearing officer were either beyond the reasonable control of the nonappearing party or due to excusable neglect. [Emphasis added].

As cited in the rule above, to establish good cause for nonappearance, a party must establish that the failure to appear was caused by circumstances beyond the party's reasonable control or by excusable neglect.

The Petitioner had registered and appeared for the initial pre-hearing conference conducted on August 9, 2023. However, the Notice of Hearing sent to the Petitioner for the subsequent September 27, 2023 hearing did not include the page stating the requirement for the parties to register for the hearing and the instructions on how to do so.

A witness for the Petitioner credibly testified that based on the Petitioner's prior registration and attendance at the pre-hearing conference, and not having received any information about the requirement to register for the subsequent hearing, he assumed that registration for the hearing was not required. The Petitioner's witness further testified that he was prepared for the September 27, 2023 hearing and was expecting a telephone call at 9:30 a.m. After waiting approximately 10 minutes, the Petitioner's witness testified that he contacted the Department by telephone and was informed that the case would be dismissed for non-appearance. The case notes support the testimony provided by the Petitioner's witness.

The Department confirmed that on the basis of the testimony and evidence presented, it was not going to oppose the request to reopen the hearing.

In this case, the Petitioner was unaware that a separate registration was required for the hearing on September 27, 2023, which resulted in the non-appearance. The failure of the Appeals Board to send a complete Notice of Hearing to the Petitioner was a matter outside of the Petitioner's control.

DECISION

We conclude that the Petitioner has established by a preponderance of the evidence that it had good cause for failing to appear at the September 27, 2023 hearing. **THE APPEALS BOARD GRANTS** the Petitioner's request to reopen the September 27, 2023 hearing.

Good cause having been established, the Appeals Board has jurisdiction to consider the Petitioner's appeal of the March 30, 2023 Reconsidered Determination. A new hearing will be scheduled to do so.

DATED: 2/8/2024

APPEALS BOARD

NANCY MILLER, Chairman

DENISE E. MOORE, Member

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. 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 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. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision 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 for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

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

- C. Any party aggrieved by a decision 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 or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision 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 or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision 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.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 2/8/2024
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By: LS
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1935222-001-B



STATE OF ARIZONA ESA TAX UNIT
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RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** April 8, 2024 *****.

DECISION
REVERSED

THE **PETITIONER** petitioned for a hearing from the Department's Reconsidered Determination issued on July 26, 2023, which affirmed the Department's Determination of Liability for Employment or Wages issued on April 13, 2018. The Reconsidered Determination held that services performed by individuals as job developers ("Workers") constitute employment and all forms of remuneration paid for such services constitute wages.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing for February 14, 2024. Appeals Board Administrative Law Judge Robert Irani presided over the hearing on that date, and all parties were given an opportunity to present evidence on the following issues:

- (1) Whether the services performed by the Workers for the Petitioner from January 1, 2016 through September 30, 2017 (the “audit period”) were employees; and
- (2) Whether payments the Petitioner made to the Workers during the audit period constitute wages.

The Petitioner appeared at the scheduled hearing and presented testimony from one witness. The Department appeared through counsel and presented testimony from two witness. Exhibits D1 through D13, P1 through P10, and A1 were admitted into evidence.

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

1. The Petitioner is a sole proprietorship that operated within the State of Arizona during the audit period.
2. The Petitioner is authorized by written agreement with the State of Arizona, Department of Economic Security (DES) to provide specific job development services to clients. The clients are State of Arizona clients, referred to the Petitioner by the DES.
3. The job development services provided to clients include disability related employment service, work adjustment training, career exploration, supported education, supported employment, job training, and rehabilitation instructional services.
4. The Petitioner does not establish the scope of the services provided to clients. The State of Arizona determines the specific service that is to be provided to a client.
5. The contract between the Petitioner and the State of Arizona requires monthly reporting by the Petitioner to the State.
6. Under the contract with the State of Arizona, the Petitioner is required to submit for approval the name of any individual providing job development services for the Petitioner.

7. The Workers and the Petitioner had agreed by written contract to an independent contractor relationship.
8. The Workers provided job development services to clients during the audit period for the Petitioner. The Petitioner also provided job development services to clients during the audit period.
9. The services provided by the Workers formed an integral part of the Petitioner's regular business activity.
10. The Workers were required to submit a monthly client progress report to the Petitioner. The Petitioner was required to submit the report to the State of Arizona.
11. The Workers had the authority to hire, supervise, and pay other individuals to assist in providing services to clients, subject to approval by the State of Arizona.
12. The Petitioner did not require the Workers to work a minimum number of hours, nor were the Workers required to work full-time hours.
13. The Workers were not required to, and did not, provide their services on the Petitioner's premises. The location was established by mutual agreement between the Workers and the clients.
14. The Workers' right to hire a replacement was subject to approval by the State of Arizona.
15. The Petitioner did not establish a work sequence for the Workers to perform their services.
16. The right to terminate the relationship between the Petitioner and the Workers was controlled under the terms of the subcontractor agreement. The subcontractor agreement stated that either party could terminate the agreement with a written notice of 10 working days upon the termination, for any reason.
17. The Petitioner did not set the hours of work for the Workers to perform their services. The Workers set their own hours for providing their services. The time for an appointment was reached by mutual agreement between the Workers and the clients.
18. The Petitioner did not provide any training or instruction on how the Workers were to perform their services, either orally or in writing. The Workers drew from their own expertise in the performance of their

services.

19. The Petitioner did not furnish the Workers with any tools or materials necessary for the performance of their services. The Workers furnished their own tools and materials when performing their services.
20. The Workers were not reimbursed by the Petitioner for any expenses they incurred while performing their services.
21. The Workers had invested in business assets and incurred business expenses consistent with the nature of their occupation.
22. The Workers were not prevented from performing work outside of the Petitioner's business.
23. The Workers were paid monthly on a job basis. The Workers could negotiate the rate of payment with the Petitioner.

REASONING AND CONCLUSIONS OF LAW

The Petitioner contends that the Workers were independent contractors and not employees for the period from January 1, 2016 through September 30, 2017. The issues in dispute in this case are the employment status of the Workers from January 1, 2016 through September 30, 2017, and whether the pay earned by the Workers during that period constituted wages.

Arizona Revised Statutes, § 23-615, provides in pertinent part as follows:

Employment; definition

- A. "Employment" means any service of whatever nature performed by an employee for the person employing the employee, including service in interstate commerce ...

Arizona Revised Statutes § 23-613.01 provides in pertinent part:

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. Indications of control by the employing unit include controlling the individual's hours of work, location of work, right to perform services for others, tools, equipment, materials, expenses and use of other workers

and other indicia of employment, 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 or control or subject to the right of direction, rule or control of an employing unit solely because of a law regulating the organization, trade or business of the employing unit.

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

Wages

- 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 as follows:

- 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 businessperson, 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.

* * *

- D. In determining whether an individual who performs services is an employee under the general definition of subsection (A), all material evidence pertaining to the relationship between the individual and the employing unit must be examined. Control as to the result is usually present in any type of contractual relationship, but it is the additional presence of control, as determined by such control factors as are identified in paragraph (2) of this subsection, over the method in which the services are performed, that may create an employment relationship.
1. The existence of control solely on the basis of the existence of the right to control may be established by such action as: reviewing written contracts between the individual and the employing unit; interviewing the individual or employing unit; obtaining statements of third parties; or examining regulatory statutes governing the organization, trade or business. In any event, the substance, and not merely the form of the relationship must be analyzed.
 2. The following are some common indicia of control over the method of performing or executing the services:
 - a. Authority over individual's assistants. Hiring, supervising, and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job. Sometimes, one worker may hire, supervise, and pay other workers. He may do so as the result of a contract in which he agrees to provide materials and labor and under which he is responsible only for the attainment of a result; in which case he may be independent. On the other hand, if he does so at the direction of the employing unit, he may be acting as an employee in the capacity of a foreman for or representative of the employer.

- b. Compliance with instructions. Control is present when the individual is required to comply with instructions about when, where and how he is to work. Some employees may work without receiving instructions because they are highly proficient in their line of work and can be trusted to work to the best of their abilities; however, the control factor is present if the employer has the right to instruct or direct. The instructions may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished.

- 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. Periodic progress reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion. Completion of forms customarily used in the particular type of business activity, regardless of the relationship between the individual and the employing unit, may not constitute written reports for purposes of this factor; e.g., receipts to customers, invoices, etc.

- d. Place of work. Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has control, especially when the work is of such a nature that it could be done elsewhere. A person working in the employer's place of business is physically within the employer's direction and supervision. The fact that work is done off the premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee. In

some occupations, the services are necessarily performed away from the premises of the employing unit. This is true, for example, of employees in the construction trades, or employees who must work over a fixed route, within a fixed territory, or at any outlying work station.

- e. Personal performance. If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not only in getting a desired result, but, also, in who does the job. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.
- f. Establishment of work sequence. If a person must perform services in the order of sequence 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 established routines and schedules of the employing unit. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently. It is sufficient to show control, however, if the employing unit retains the right to do so.
- 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 employing unit exercises control through the ever present threat of dismissal, which causes the

worker to obey any instructions which may be given. The right of control is very strongly indicated if the worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make his services available to the public on a continuing basis. An independent worker, on the other hand, generally cannot be terminated as long as he produces an end result which measures up to his contract specifications. Many contracts provide for termination upon notice or for specified acts of nonperformance or default and may not be indicative of the existence of the right to control. Sometimes, an employing unit's right to discharge is restricted because of a contract with a labor union or with other entities. Such a restriction does not detract from the existence of an employment relationship.

- h. Set hours of work. The establishment of set hours of work by the employing unit is a factor indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.
- i. Training. Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner. This is especially true if the training is given periodically or at frequent intervals. An independent worker ordinarily uses his own methods and receives no training from the purchaser of his services.

- j. Amount of time. If the worker must devote his full time to the activity of the employing unit, the employing unit has 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. Full time does not necessarily mean an 8-hour day or a 5- or 6-day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. These conditions should be considered in defining "full time". Full-time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels him to devote all of his working time to that business, or he may not be permitted to work for anyone else, and to earn a living he necessarily must work full time.

- k. Tools and materials. The furnishing of tools, materials, etc. by the employing unit is indicative of control over the worker. When the worker furnishes the tools, materials, etc., it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

- 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. Consideration must be given to the fact some independent professionals and consultants require payment of all expenses in addition to their fees.

E. Among the factors to be considered in addition to the factors of control, such as those identified in subsection (D), when determining if an individual performing services may be independent when paragraph (1) of subsection (B) is applicable, are:

1. Availability to public. The fact that an individual makes his services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways. For example, he may have his own office and assistants, he may display a sign in front of his home or office, he may hold a business license, he may be listed in a business directory or maintain a business listing in a telephone directory, he may advertise in a newspaper, trade journal, magazine, or he may simply make himself available through word of mouth, where it is customary in the trade or business.
2. Compensation on job basis. An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour. Payment on a job basis may involve periodic partial payments based upon a percent of the total job price or the amount of the total job completed. The guarantee of a minimum salary or the granting of a drawing account at stated intervals, with no requirement for repayment of the excess over earnings, tends to indicate that existence of an employer-employee relationship.
3. Realization of profit or loss. An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position. Opportunity for profit or loss may be

established by one or more of a variety of circumstances; e.g.:

- a. The individual has continuing and recurring significant liabilities or obligations in connection with the performance of the work involved, and success or failure depends, to an appreciable degree, on the relationship of receipts to expenditures.
 - b. The individual agrees to perform specific jobs for prices agreed upon in advance, and pays expenses incurred in connection with the work, such as wages, rents or other significant operating expenses.
4. **Obligation.** An employee usually has the right to end his relationship with his employer at any time he wishes without incurring liability, although he may be required to provide notice of his termination for some period in advance of the termination. An independent worker usually agrees to complete a specific job. He is responsible for its satisfactory completion and would be legally obligated to make good for failure to complete the job, if legal relief were sought.
5. **Significant investment.** A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their trade. If the worker makes a significant investment in facilities, such as a vehicle not reasonably suited to personal use, this is indicative of an independent relationship. A significant expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship.

6. Simultaneous contracts. If an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms. It is possible, however, that a person may work for a number of people or firms and still be an employee of one or all of them. The decisions reached on other pertinent factors should be considered when evaluating this factor.

F. Whether the preponderance of the evidence is being weighed to determine if the individual performing services for an employing unit is an employee under the general definition of employee contained in subsection (A), or may be independent when paragraph (1) of subsection (B) is applicable, the factors considered shall be weighed in accordance with their appropriate value to a correct determination of the relationship under the facts of the particular case. The weight to be given to a factor is not always constant. The degree of importance may vary, depending upon the occupation or work situation being considered and why the factor is present in the situation. Some factors may not apply to occupations or situation, while there may be other factors not specifically identified herein that should be considered.

* * *

Arizona Revised Statutes, § 23-1602, provides in pertinent part as follows:
Determination of employment relationship; prohibition

Except for the enforcement of chapter 2, article 10 of this title, any supervision or control exercised by an employing unit to comply with any statute, rule or code adopted by the federal government, this state or a political subdivision of this state or any requirement of licensing, professional or ethical standards may not be considered for the purposes of determining the independent contractor or employment status of any relationship or individual for the purposes of this title. This section does not otherwise affect any investigatory or enforcement authority related to the determination of the independent contractor or employment status of any relationship as provided by this title or federal law.

* * *

In weighing the evidence and applying the law to the facts in this case, the Appeals Board considered evidence of the substance, not merely the form, of the relationship between the Petitioner and the Workers, as required in A.A.C. Section R6-3-1723(D)(1), including the elements of control and independence within the meaning of A.A.C. Sections R6-3-1723(A)(1), (D), and (E). Additional considerations were also examined by the Appeals Board pursuant to A.A.C. Section R6-3-1723(F) to determine whether an employer-employee relationship exists.

Common Indicia of Control

Arizona Administrative Code, Section R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. Section R6-3-1723(D)(2) lists the common indicia of control to be considered in any determination.

Authority Over Individual's Assistants

Pursuant to A.A.C. Section R6-3-1723(D)(2)(a), the hiring, supervising, and payment of an individual's assistants by the employing unit generally shows control over the individuals on the job.

In this case, the Workers had the authority to hire, supervise, and pay their own assistants in the performance of their services, subject to the approval of the State of Arizona. During the hearing, the witness for the Petitioner credibly testified that the Workers did have the authority to hire, supervise and pay their own assistants. However, under the contract with the State of Arizona, the Petitioner was required to submit the name of any individual that provided job development services for the Petitioner to the State for approval.

As the obligation is required by the State of Arizona, it may not be considered a factor of control pursuant to A.R.S. § 23-1602.

Consequently, we find this factor to be neutral.

Compliance with Instructions

Pursuant to A.A.C. Section R6-3-1723(D)(2)(b), control is present when an individual is required to comply with instructions about when, where and how to work.

In the Transmittal Report, the Field Auditor acknowledged that the Workers were proficient in their line of work and could be trusted to work to the best of their abilities. The evidence of record also established that the Workers had not received prior training by the Petitioner and were not supervised during the performance of their services. During the hearing, the witness for the Petitioner credibly testified that the Workers did not receive any instruction from the Petitioner about how to perform their services. Further, the location and time set for an appointment was established through mutual agreement between the Workers and the clients.

Consequently, we find this factor to weigh in favor of an independent contractor relationship.

Oral or Written Reports

Pursuant to A.A.C. Section R6-3-1723(D)(2)(c), 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 their actions.

The evidence of record establishes that the Workers were required to report to the Petitioner on a monthly basis. Specifically, the subcontractor agreement states that the Workers “will record mandatory daily and accumulative monthly data to be turned into [the Petitioner] on a monthly basis or as requested”.

During the hearing, the witness for the Petitioner credibly testified that pursuant to the agreement with the State of Arizona, the Petitioner was required to provide monthly reporting that indicated specific client progress. The witness for the Petitioner further stated that the Workers only reported information that was required by the State.

The contract with the State of Arizona states that “[t]he Contractor shall report to the Department in the manner prescribed”. A copy of a “Monthly Progress Report” was submitted into evidence as an example of the reporting requirement.

As the obligation is required by the State of Arizona, it may not be considered a factor of control under A.R.S. § 23-1602.

Consequently, we find this factor to be neutral.

Place of Work

Pursuant to A.A.C. Section R6-3-1723(D)(2)(d), work performed on the employing unit's premises implies that the employer has control, whereas work that is performed away from the employer's premises implies some freedom from control.

In this case, the Workers were not required to, and did not, provide their services at the Petitioner's premises for client appointments. Instead, the location for an appointment was established through mutual agreement between the Workers and the clients, as confirmed by the credible testimony of the Petitioner's witness.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Personal Performance

Pursuant to A.A.C. Section R6-3-1723(D)(2)(e), if the services must be rendered personally, it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not only in getting a desired result, but in who does the job.

While the Petitioner did not require the Workers to personally perform their services, pursuant to the agreement with the State of Arizona, any individual performing the services for the Petitioner was required to be screened and approved by the State of Arizona. During the hearing, the witness for the Petitioner credibly testified that while the Petitioner was not concerned with who provided the services, the State of Arizona required individuals engaging in the performance of the services to be identified and approved by the State of Arizona's central registry.

As the obligation is required by the State of Arizona, it may not be considered a factor of control under A.R.S. § 23-1602.

Consequently, we find this factor to be neutral.

Establishment of Work Sequence

Pursuant to A.A.C. Section R6-3-1723(D)(2)(f), if a person must perform services in the order of sequence set by the employing unit, it indicates the worker is subject to control.

In this case, a work sequence for the Workers to perform their services had not been established by the Petitioner. The Workers had not been instructed by

the Petitioner to perform their services in any particular order of sequence. During the hearing, the witness for the Petitioner credibly testified that the Workers relied on their own experience and expertise to determine the sequence of the services provided.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Right to Discharge

Pursuant to A.A.C. Section R6-3-1723(D)(2)(g), the right of control is very strongly indicated if a worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make their services available to the public on a continuing basis. The right to discharge is distinguished from the right to terminate a contract; many contracts provide for termination upon notice or for specified acts of nonperformance or default and may not be indicative of the existence of the right to control.

In the Reconsidered Determination, the Department identified that either party was able to end the working relationship with 10-day notice. The Department also stated that the Workers could be terminated if absent for three or more consecutive workdays without notice, unless a reasonable excuse was offered and accepted by the Petitioner.

The subcontractor agreement states that “either party may terminate this agreement with a written notice of 10 working days upon the termination, for any reason, of any other agreement between subcontractor and [the Petitioner]”. During the investigation, the Petitioner had also submitted a copy of its policy and procedure agreement to the Department which provides examples of impermissible conduct and performance that includes “absence for three (3) or more consecutive workdays without notice, unless a reasonable excuse is offered and accepted by the [Petitioner]”. However, during the hearing, the witness for the Petitioner testified that she could not recall whether the Workers had ever seen or been aware of the policy, and that there was no record of a Worker ever actually receiving a copy of the agreement.

While a contract may have been entered into between the parties, the right of control is indicated in this case, as the Workers could have been terminated with little or no notice, or without cause. Additionally, there is not sufficient evidence to conclude that the Workers had made their services available to the public on a continuing basis during the audit period. While the witness for the Petitioner testified that no restrictions had been placed on the Workers to advertise or make their services available to the public, she was unaware if the Workers had actually advertised or made their services available to the public.

Consequently, we find this factor weighs in favor of an employer-employee relationship.

Set Hours of Work

Pursuant to A.A.C. Section R6-3-1723(D)(2)(h), the establishment of set hours of work by the employing unit is a factor indicative of control.

The Petitioner did not set the hours for the services to be performed by the Workers. During the hearing, the witness for the Petitioner credibly testified that the Petitioner did not establish fixed hours for the services to be performed and that the Workers were free to set their own schedule. An appointment time was established by mutual agreement between the Workers and the clients.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Training

Pursuant to A.A.C. Section R6-3-1723(D)(2)(i), the training of an individual is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner.

In this case, the Workers were experienced in their field and had not received any training by the Petitioner. During the hearing, the Petitioner's witness credibly testified that the Workers did not require training and had not received training by the Petitioner as the Workers were experienced and drew from their own expertise to determine how they would provide their services.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Amount of Time

Pursuant to A.A.C. Section R6-3-1723(D)(2)(j), control by the employing unit is indicated if a worker must devote their full time to the activity of the employing unit, impliedly restricting the worker from doing other gainful work.

In this case, the Petitioner did not establish the amount of time the Workers were required to provide their services and they were not required to work full-time or a minimum number of hours. During the hearing, the witness for the Petitioner credibly testified that the Petitioner did not require the Workers to work a fixed number of hours or work on a full-time basis for the Petitioner. The Workers were able to work as little or as much as they liked and were also free to elect whether to provide services at all for a particular client.

Therefore, the Workers freedom established that they were able to work when and for whom they chose.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Tools & Materials

Pursuant to A.A.C. Section R6-3-1723(D)(2)(k), the furnishing of tools and materials can be indicative of the employing unit's control over the worker. Additionally, a lack of control is not established when a worker provides tools or supplies that are customarily furnished by the workers in the trade.

In this case, the Petitioner had not furnished any of the tools or materials necessary for the Workers to perform their services. During the hearing, the witness for the Petitioner credibly testified that the Workers used their own tools and materials, including laptops, telephones, pens, stationary, fingerprint clearance card, printer, and software, when providing their services. The witness also confirmed that the Petitioner had not furnished any tools or materials that were necessary for the Workers to perform their services.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Expense Reimbursement

Pursuant to A.A.C. Section R6-3-1723(D)(2)(l), payment by the employing unit of a 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.

In this case, the Workers were not reimbursed for any expenses incurred while performing their services. During the hearing, the Petitioner's witness credibly testified that the Workers were responsible for all incidental expenses that were incurred in the performance of their services, including any traveling expense. The Petitioner paid the Workers on a per job basis.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Factors Indicative of Independence

Arizona Administrative Code, Section R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. Section R6-3-

1723(E) lists the common factors indicative of independence to be considered in any determination.

Availability to Public

Pursuant to A.A.C. Section R6-3-1723(E)(1), independence is exhibited when a worker makes their services available to the general public on a continuing basis. Examples of availability to the public include having an office, hiring assistants, displaying signs, holding business licenses, having business listings in directories, advertising in print materials, or engaging in word-of-mouth advertising when it is customary.

During the hearing, the witness for the Department testified that based on a search on the internet, the Department had concluded that the Workers had not advertised their services to the public. The witness for the Petitioner testified that while the Workers were free to provide their services to other clients or agencies and were not restricted by the Petitioner from advertising or providing their services to the public, she was unaware if the Workers had actually advertised or made their services publicly available.

Consequently, as the Workers had not been restricted from advertising or making their services available to the general public on a continuing basis, but because there is not sufficient evidence to establish that the Workers had actually done so, we find this factor to be neutral in light of the evidence available.

Compensation on Job Basis

Pursuant to A.A.C. Section R6-3-1723(E)(2), an employee is usually paid by the hour, week or month, while an independent contractor is generally paid on a job basis. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour.

The evidence of record establishes that the Workers were paid on a job basis, computed by the number of required hours to perform the service at a fixed rate per hour. During the hearing, the witness for the Petitioner credibly testified that a predetermined lump sum amount was typically established through negotiation with the Workers. The Workers were paid monthly, based on the number of hours of services provided. In this case, the Workers were paid on a per job basis and the amount of compensation was determined in conjunction with input from the Workers.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Realization of Profit or Loss

Pursuant to A.A.C. Section R6-3-1723(E)(3), an independent contractor is generally in a position to realize a profit or suffer a loss as a result of their services, while an employee is not in such a position. Opportunities for profit or loss can include whether the worker has recurring liabilities or obligations and whether the worker pays expenses such as wages, rent or other significant operating expenses.

The Department concluded that the Workers did not realize a profit or a loss in the performance of their services for the Petitioner. In the Reconsidered Determination, the Department states that "there is no evidence that [the Workers] have continuing and recurring significant liabilities in connection with the performance of the work". The Department also determined that the vehicle and general office equipment used by the Workers in the performance of their services did not constitute significant expenses. During the hearing, the witness for the Petitioner testified that the Petitioner itself operated from home and worked from a home office. The Petitioner also used a vehicle to meet with clients that could also be used for personal use. Based on the nature of the occupation, these were the typical opportunities for profit or loss that could be expected to be realized by the Workers.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Obligation

Pursuant to A.A.C. Section R6-3-1723(E)(4), an employee usually has the right to end their employment at any time without incurring liability, although notice of the termination for some period in advance may be required. An independent contractor is usually obligated to complete a specific job, typically controlled by the terms of a contract.

In this case, the Workers' right to terminate the relationship was governed under the terms of the subcontractor agreement. However, the termination clause of the subcontractor agreement included a provision that allowed either party to terminate the agreement for any reason with written notice of 10 working days upon the termination. In accordance with Section R6-3-1723(E)(4), an employee usually has the right to end their relationship with the employer at any time without incurring liability, although the employee may be required to provide notice of the termination for some period in advance of the termination. This is the scenario in the present case.

Consequently, despite the parties having entered into a subcontractor agreement, we find this factor weighs in favor of an employer-employee relationship.

Significant Investment

Pursuant to A.A.C. Section R6-3-1723(E)(5), independence is exhibited when a worker invests in facilities used to perform services for another. Conversely, the furnishing of all necessary facilities by the employing unit tends to indicate a lack of independence by the worker. Facilities include equipment or premises necessary for the work.

The Department concluded that the Workers did not have a significant investment in business assets necessary to perform their services. In this case, the Workers did not have their own commercial offices or facilities. In the Reconsidered Determination, the Department also held that the vehicle used in providing services to the clients could also be suited for personal use, and that the general office equipment purchased by the Workers to provide their services did not constitute a significant expense. However, the investments made by the Workers were typical based on the nature of the occupation and consistent with the investments made by the Petitioner itself. The witness for the Petitioner credibly testified that the Petitioner did not have its own commercial office or facility, but rather operated from a home office. The Petitioner also used a vehicle to meet with clients that could also be used for personal use. In this case, the Workers had invested in business assets that were consistent with the nature of their occupation.

Consequently, we find this factor weighs in favor of an independent contractor relationship.

Simultaneous Contracts

Pursuant to A.A.C. Section R6-3-1723(E)(6), if an individual works for a number of persons or firms at the same time, it indicates an independent status because, in such cases, the worker is usually free from control by any of the firms.

During the hearing, the witness for the Petitioner testified that the Workers had been free to provide their services to other clients or agencies. However, the witness was unaware if the Workers had actually provided their services to the public while providing services for the Petitioner.

Consequently, as the Workers were not restricted from providing their services to the general public, but because there is not sufficient evidence to establish that the Workers had done so, we find this factor to be neutral in light of the evidence available.

Additional Considerations

Arizona Administrative Code, Section R6-3-1723(F) provides guidance on additional considerations for determining whether an employer-employee relationship exists.

In support of its conclusion that mandated a finding of an employer-employee relationship between the Workers and the Petitioner, the Department concluded that the services provided by the Workers were integral to the Petitioner's business.

As the Petitioner provides job development services under contract with the State of Arizona, the services provided by the Workers formed an integral part of the Petitioner's regular business activity. Consequently, we agree with the Department's determination that the integration of the Worker's services favor a finding that supports an employer-employee relationship.

In the Reconsidered Determination, the Department also recognized the subcontractor agreement between the Petitioner and the Workers.

In this case, the parties had intended an independent contractor relationship and there had been a written contractual agreement between the Workers and the Petitioner that established such a relationship. The language of the subcontractor agreement entered into by the Petitioner and the Workers itself is clear with respect to the contemplated relationship between the parties.

Such intent was also evidenced through the credible testimony of the Petitioner's witness. In addition, the Petitioner did not at any time monitor or restrict the Workers' job performance, and the Workers were free to provide their services to other parties without restriction by the Petitioner.

Consequently, we find that the additional considerations reviewed favor a finding that the Workers were independent contractors.

DECISION

We conclude that the preponderance of evidence of independent contractor status outweighs the evidence of employee status. Therefore, we find that the Workers were not employees of the Petitioner from January 1, 2016 through September 30, 2017, but rather, the Workers performed services for the Petitioner pursuant to an independent contractor relationship. We further conclude that all payments to the Workers for their services from January 1, 2016 through September 30, 2017, did not constitute wages by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **REVERSES** the Department's July 26, 2023 Reconsidered Determination that found that from January 1, 2016 through September 30, 2017, services performed by the job developers constituted employment. From January 1, 2016 through September 30, 2017, services performed by these workers did not constitute employment, because the parties had an independent contractor relationship. All forms of remuneration paid to these workers for such services did not constitute wages.

DATED: 3/7/2024

APPEALS BOARD

NANCY MILLER, Chairman

DENISE E. MOORE, Member

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. 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 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. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision 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 for filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3442**.

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

- C. Any party aggrieved by a decision 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 or electronic transmission of the decision. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision 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 or electronic transmission of the appeals board's decision. Failure to bring the action within thirty days after the date of mailing or electronic transmission of the appeals board's decision 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.

Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 3/7/2024

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