Arizona Department of Economic Security

Appeals Board

UNEMPLOYMENT INSURANCE TAX PROGRAM

APPEALS BOARD DECISIONS

3RD QUARTER 2024

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Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1934262-001-B

[redacted]

Petitioner

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

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.

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DECISION
DISMISSED

THE **PETITIONER**, [redacted], pursuant to a Joint Motion to Dismiss filed on July 12, 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 Petitioner and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 7/15/2024

APPEALS BOARD

[redacted]

ROBERT IRANI,
Administrative Law Judge

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

A copy of the foregoing was mailed on 7/15/2024
to:

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For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1953582-001-B

[redacted]

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 ***** September 3, 2024 *****.

DECISION
AFFIRMED

THE **PETITIONER** petitioned for a hearing from the Department's Reconsidered Determination issued on December 4, 2023, which affirmed the Department's Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages issued on April 4, 2023. The Reconsidered Determination held janitorial services performed by

individuals for the Petitioner (Janitors) 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 June 25, 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 Petitioner is an employer subject to the Employment Security Law of Arizona;

2. Whether services performed by individuals as a Janitor for the Petitioner constitute employment. Specifically, whether janitorial services performed by the Worker from January 1, 2021 through September 30, 2022 (audit period) constitute employment;

3. Whether remuneration paid by the Petitioner for such services constitutes wages; and

4. Whether the Petitioner is liable for Arizona Unemployment Insurance Taxes as of January 1, 2021.

The Department appeared through counsel and presented testimony from two witness. The Petitioner appeared at the scheduled hearing and presented testimony from one witness. Exhibits D15 through D16, P1 through P5, and A1 were admitted into evidence. Although marked and identified and an opportunity for objection given, the Appeal Tribunal, through inadvertence, did not formally receive Exhibits D1-D14 into evidence. This Board, pursuant to A.R.S. § 23-674(D), on its own motion, admits the exhibits 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 janitorial and maintenance company that operated within the State of Arizona during the audit period. It is a single-member limited liability company in good standing with the Arizona Corporation Commission.

2. The Petitioner has a written agreement with the Client to provide janitorial services at the Client's secure facility. Janitors do not perform services on the Petitioner's premises.

3. The Client prohibits the Petitioner from allowing any Janitor to

provide services at its facility unless the Janitor completes a background check and receives a security clearance.

4. The Client has issued security clearances to three workers to provide janitorial services for the Petitioner. They include the Petitioner, the Worker, and one other Janitor. The Petitioner guided the Worker through the background check and security clearance process.

5. The Worker did not engage the services of an assistant when providing janitorial services for the Petitioner. The Petitioner, the Client, and the Worker never contemplated the option of authorizing Janitors to hire their own assistant or substitute worker.

6. The Petitioner has a contractual obligation to provide janitorial services that meet the Client's quality standards. The Petitioner issues instructions to Janitors to ensure that the service results meet the Client's quality standards.

7. The Petitioner does not require Janitors to provide an oral or written report about the performance of their services.

8. If a Janitor was absent or otherwise unable to perform his duties, the Petitioner would arrange to cover the absence by either performing the services himself or having the third Janitor provide services. The Petitioner would not allow an individual he did not know to seek a security clearance from the Client and provide janitorial services under his contract.

9. The Petitioner has established an order of the areas to be cleaned within the Client's facility and a general routine for cleaning each area. He advises Janitors to follow the order and routine.

10. The Petitioner may discharge Janitors at any time without cause and without incurring legal liability.

11. The terms of the contract require the Petitioner to provide janitorial services on Monday, Wednesday, and Friday at any time within a specified range of hours each day. Some of the time slots are available for several hours a day. Time slots for specific, highly secure areas are more limited. The Client authorized the Petitioner to provide janitorial services at any time within the established periods.

12. The Petitioner selected the hours of work and developed a schedule. When the Petitioner hired the Worker, he told the Worker what days and hours he would work. During the audit period, the Worker provided services on Monday, Wednesday, and Friday. He began at

about 5:00 a.m. and worked until approximately 8:30 a.m. On occasion, he was able to leave early. The Worker also provided part-time care to a family member.

13. The Worker provided janitorial services for the Petitioner continuously from February 2019 to December 2022.

14. The Worker did not have prior janitorial experience when he was hired. He could not perform the janitorial services without receiving training. When the Worker began, the Petitioner gave him a tour of the facility and outlined his cleaning expectations. He accompanied the Worker the entire day and provided specific training about how to clean and perform other janitorial duties.

15. The Petitioner only needs Janitors to provide services on a part-time basis for approximately 15 hours per week. He does not require Janitors to work full-time.

16. The Client does not permit the Petitioner to bring any tools and materials into its secured facility other than floor cleaning equipment. The Client furnishes all other tools and materials necessary for Janitors to perform their services. The tools and materials include but are not limited to cleaning products, mops, towels, dusters, spray bottles, and squeegees. The Petitioner controls the ordering and inventory. Janitors do not provide any tools or materials.

17. Janitors do not incur any business, traveling, or incidental expenses in connection with the work. If the Petitioner asked a Janitor to purchase an item, the Petitioner would most likely reimburse him.

18. The Worker did not have a license to operate a business in Arizona. He did not advertise his services to the public or meet the Petitioner through an advertisement he placed to develop an independent business.

19. The Petitioner and the Worker negotiated the Worker's rate of pay, $1400 per month. The amount was a guaranteed flat fee without consideration of the total number of hours the Worker provided services. The Petitioner would have paid the Worker the same fee if the Worker was absent. The Petitioner regularly paid the monthly flat rate with occasional partial payments made during different periods. The Petitioner did not pay the Worker on the same day each month. Instead, the Petitioner delayed paying the Worker for his services until after he received the Client's payment.

20. Janitors do not have any recurring liabilities or obligations associated with a business. They do not pay any expenses such as wages, rent or other operating expenses.

21. Janitors have the right to end the services provided to the Petitioner at any time without incurring legal liability.

22. Janitors do not make any capital expenditures or invest in business assets necessary to perform their services for the Petitioner.

23. The Worker did not provide janitorial services to anyone other than the Petitioner during the time he provided services for the Petitioner.

24. When the Petitioner engaged the Worker to provide janitorial services, he did so for an indefinite period.

25. When the Petitioner engaged the Worker, he advised the Worker that he was a "contracted worker". The Worker signed a document drafted by the Petitioner which stated, "To each contracted worker [...] You are working as a contracted worker for [the Petitioner] and responsible of and for your taxes. Sincerely, [the Petitioner]". The document is dated February 19, 2019.

26. The Petitioner is contractually obligated to provide liability insurance and workers' compensation insurance. The Petitioner obtained and continues to pay for both insurance policies. Janitors are not required to carry liability or workers' compensation insurance.

27. During the audit period, the Petitioner issued an IRS Form 1099-NEC, Nonemployee Compensation, to the Worker.

28. The Petitioner issues Janitors a uniform shirt with the Petitioner's company logo and requires them to wear it when providing services.

29. The Petitioner is responsible for paying federal unemployment taxes on payments made to workers who provide janitorial services.

REASONING AND CONCLUSIONS OF LAW

It is the public policy of this state to provide economic security for unemployed workers and their families by dedicating reserves to be used for periods of unemployment. A.R.S. § 23-601. State law imposes on every employer for each calendar year an unemployment insurance excise tax with respect to wages paid for employment. The employer's contributions are payable on a quarterly basis and set aside in the state unemployment compensation fund.

In this case, the Petitioner disputes the Reconsidered Determination that held the Petitioner was an employer responsible for contributions and that assessed contributions for payments made for the performance of services during the audit period. The Petitioner contends that the services performed by Janitors, including those performed by the Worker during the audit period, do not constitute employment and that remuneration paid for the performance of those services does not constitute wages.

An employment relationship exists when the employer has the right to control the work process, as determined by evaluation of the totality of the circumstances and specific factors. The three categories of factors that provide evidence of the degrees of control and independence include behavioral control, financial control, and the type of relationship. Behavior control factors focus on who has the control or the right to control what the worker does and how the worker does the job. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right. Financial control factors focus on who controls the business aspects of the worker's job such as how the worker is paid, whether expenses are reimbursed and who provides tools and supplies. Important factors that reflect the type of relationship are those that illustrate how the business and the worker perceive their relationship.

The Arizona Revised Statutes and Arizona Administrative Code provide the legal authority and guidance to be used when determining whether an employment relationship exists. They read in relevant part as follows:

A.R.S. § 23-613. Employer

A. "Employer" means:

***

2. Any employing unit:

(a) That after December 31, 1971 for some portion of a day in each of twenty different calendar weeks, whether or not the weeks are or were consecutive, in either the current or the preceding calendar year, has or had in employment at least one individual irrespective of whether the same individual was in employment in each day. ...

A.R.S. § 23-614. Employing unit; temporary services employer; professional employer organization; definitions

A. "Employing unit" means an individual or type of organization, including a partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, [...] which has, or after January 1, 1936 had, one or more individuals performing services for it within this state. ...

A.R.S. § 23-615. 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 ...

A.R.S. § 23-613.01. 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. [Emphasis added.]

***

A.R.S. § 23-622. 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.

A.A.C. R6-3-1723. Employee defined

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.

***

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. ...

***

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.

***

Common Indicia of Control

Arizona Administrative Code R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. A.A.C. R6-3-1723(D) lists twelve common indicia of control to be considered when determining if an individual who performs services for an employing unit is performing them as an employee. A.A.C. R6-3-1723(D) provides in part as follows:

> 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.

Authority Over Individual's Assistants

Arizona Administrative Code R6-3-1723(D)(2)(a) provides as follows:

> Authority over individual's assistants. Hiring, supervising, and payment of the individual's assistants by the employing unit general 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.

In this case, the Worker did not engage the services of an assistant when providing his services.

In the Reconsidered Determination, the Department concluded that Janitors do not have the authority to hire, supervise, and pay assistants due to the Client's security requirements. Therefore, the factor is indicative of an employer-employee relationship.

During the hearing, the Petitioner admitted that, because of the Client's requirement for background checks and security clearances, Janitors would not be able to hire, pay or supervise an assistant. However, he argued that, due to the nature of the occupation, Janitors would typically not retain or utilize an assistant when providing the services.

The evidence of record establishes that the Petitioner, Client, and the Worker never discussed the possibility of allowing a Janitor to hire assistants. Because the option is not available, the question of who has the right to control a Janitor's assistant is not relevant.

Consequently, we find this factor to be neutral.

Compliance with Instructions

Arizona Administrative Code R6-3-1723(D)(2)(b) provides as follows:

> 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.

The Reconsidered Determination held that Janitors were required to comply with the Petitioner's instructions. A Department witness testified that the Petitioner gives Janitors a tour of the Client's facility and requires them to comply with his specific verbal instructions about how to meet his performance expectations.

The Petitioner denied that he instructs Janitors, specifically the Worker, because they are already highly proficient in the job when hired, do not require constant instruction or supervision, and primarily work alone. The Petitioner testified that he does not have the right to instruct how Janitors perform their duties because the Client controls what the quality standards are and requires that the standards are met. He testified that the Client has the control and that he is merely passing their expectations along to the workers, not giving instructions.

In general, having the right to issue instructions and direct how, when, and where to do the work is a significant behavioral control factor. However, Arizona law limits the Department's ability to consider this factor under certain

circumstances when conducting an employment relationship analysis. A.R.S. § 23-613.01 provides in part:

> Employee; definition; exempt employment
>
> H. For the purposes of determining employee status, the department shall consider all of the employment-related facts and may not base a determination on the facts that:
>
> ***
>
> 3. The services of the individual are subject to standards for quality, time or location required by a client or customer of the putative employing unit.

In this case, Janitors are required to comply with the Petitioner's instructions about how to perform their duties. Having this control would normally result in a finding that weighs in favor of an employer-employee relationship. However, the evidence of record establishes that the Petitioner is engaged in a written agreement with the Client to provide janitorial services that meet the Client's quality standards. The evidence establishes that, although the Petitioner issues instructions about how to perform the janitorial duties, he is issuing them to meet the Client's quality expectations. Under these circumstances, the Department is not permitted to consider the Petitioner's right to instruct or direct Janitors regarding how to perform their duties for this Client because their services are subject to the Client's quality standards.

Consequently, we find this factor to be neutral.

Oral or Written Reports

Arizona Administrative Code R6-3-1723(D)(2)(c) provides as follows:

> 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.

In this case, the Petitioner does not require Janitors to account for their actions by providing an oral or written report regarding the method of performing or executing their janitorial services. This indicates a lack of control by the Petitioner because Janitors are not required to account for their actions.

Consequently, we find this factor does not weigh in favor of an employer-employee relationship.

Place of Work

Arizona Administrative Code R6-3-1723(D)(2)(d) provides as follows:

> 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.

The evidence of record establishes that Janitors do not perform their services on the Petitioner's premises. Rather, the Client requires Janitors to perform their services at its facility. Although Janitors do not have control over their work location, the Department may not consider this fact when determining the employment status because the work location was subject to the Client's requirement. A.R.S. § 23-613.01(H)(3).

Consequently, we find this factor to be neutral.

Personal Performance

Arizona Administrative Code R6-3-1723(D)(2)(e) provides as follows:

> 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.

The Department concluded that the Petitioner requires Janitors to personally render their services because they are the only individuals with security clearance. A Department witness testified that the Petitioner, not the Janitor, would make arrangements to cover a Janitor's absence by using another Janitor that has already received a security clearance. The witness testified that employing units generally do not control who performs an independent contractor's services when the individual is not available.

During the hearing, the Worker testified that he believed he would have been unable to use a substitute to perform the services because the Client required any individual who provided services on its premises to have a security clearance. He testified that the Petitioner was the person who helped Janitors complete the background check and obtain the security clearance. He testified that it was the Petitioner's company, and that the Petitioner would not allow someone he did not know to perform services for him.

The Petitioner testified that the contract was in his name. He testified that because he received a security clearance from the Client and due to the nature of the services provided by the Janitors, it would likely have been most practical for him to perform the services himself if required. He admitted that the Client has provided security clearance for a third worker and that the third worker was available to perform services if another worker was absent.

The evidence of record establishes that the Client requires Janitors who perform services for the Petitioner to obtain the requisite security clearance. The evidence establishes that the Petitioner requires Janitors to personally perform their duties because he controls who may apply to the Client for a background check and receive security clearance, not the Janitors.

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

Establishment of Work Sequence

Arizona Administrative Code R6-3-1723(D)(2)(f) provides as follows:

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.

The Department alleged that the Petitioner reserved the right to direct the work sequence for providing janitorial services. A Department witness testified that the Petitioner controlled the order of the areas in the building to be cleaned.

The Petitioner denied the allegation. In his appeal, the Petitioner stated that some contracts require specific areas to be cleaned on a set schedule. He testified during the hearing that the Worker was not required to perform the janitorial services in a particular order. He stated that, based on the nature of the services provided, the Worker was free to use his own discretion in the order that he performed the work.

During the hearing, the Worker testified that the Petitioner showed him the cleaning routine and the route of the areas to be cleaned. He testified that he followed the instructions. The Worker's testimony was fact specific and presented without hesitation. We find the testimony to be credible.

The greater weight of the credible evidence establishes that the Petitioner asserts control that takes preference over the Janitors' own routines when performing the janitorial services. Consequently, we find this factor weighs in favor of an employer-employee relationship.

Right to Discharge

Arizona Administrative Code R6-3-1723(D)(2)(g) provides as follows:

> 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.

The evidence of record establishes that the Petitioner may discharge Janitors at-will and without cause, including during the performance of their services, without being liable for damages.

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

Set Hours of Work

Arizona Administrative Code R6-3-1723(D)(2)(h) provides as follows:

> 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.

In the Reconsidered Determination, the Department concluded that the Worker was required to perform the services during a specific window of time. As a result, this factor was indicative of the Petitioner's control because of the fixed work schedule. A Department witness testified that the Petitioner told the Worker when to be present and when to leave.

The Petitioner argued that the Client controls the work scheduling including but not limited to when work could be performed and limiting cleaning of high security areas to specific time slots. He testified during the hearing that the Client required the janitorial services to be provided within certain times of the day such as between 8:00 a.m. and 5:00 p.m. and that it was customary that janitorial services provided are time specific. The Petitioner further testified that the Worker ultimately controlled his own work schedule because he was able to choose the specific hours within the Client's set time slot to provide his services.

During the hearing, the Worker confirmed that the Client establishes the window of time during which cleaning is to occur; however, he denied that he had final control of his schedule. The Worker credibly testified that the Petitioner told him what days and hours he would work because the schedule already existed when he was hired. He testified that it would not have been acceptable for him to change his hours on a regular basis and he would have been required to explain why he was late or otherwise deviated from the schedule. When asked whether he could have left in the middle of his work and returned later that day to finish the job, he testified that he would have obtained the Petitioner's permission.

The best evidence establishes that the Client required the Petitioner's Janitors to provide services during a specific time frame. Ordinarily, this factor would be considered neutral because the Department may not consider the fact that a worker has set hours of work to be evidence of an employing unit's control when the time for providing the services is subject to a client's requirements. A.R.S. § 23-613.01(H)(3). However, the existence of an ability to choose the hours during which the services are provided within the Client's established time frame distinguishes this case from the general rule and is determinative of this issue. In this case, the evidence establishes that Janitors may not choose hours that meet their personal requirements. Rather, the Petitioner influences the choice of work hours and makes the final decision about when Janitors may provide services.

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

Training

Arizona Administrative Code R6-3-1723(D)(2)(i) provides as follows:

> 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.

During the hearing, a Department witness testified that the Petitioner controls a Janitor's performance by providing training. The witness testified that the Petitioner tells Janitors what is expected and how to do it including how to finish their work quickly. The witness testified that training was specifically required by the Worker because he had no prior janitorial experience.

The Petitioner denied the allegations. He testified that the Worker had prior experience and knew how to clean.

During the hearing, the Worker denied that he had prior janitorial experience. He credibly testified that he did not know anything about how to be a janitor and could not have walked in and started performing janitorial services without receiving any training. He testified that the Petitioner accompanied him during the entire first day of work and showed him how to clean. It was a new experience for him.

The evidence establishes that the Petitioner retains the right to provide training to ensure that janitorial services are performed in a particular method or

manner. This control factor relates to an employing unit's right to control the cleaning methods and differs from the right to instruct or direct a worker on how to perform their duties to meet a client's specific quality standards.

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

Amount of Time

Arizona Administrative Code R6-3-1723(D)(2)(j) provides as follows:

> 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.

The Department alleges that the Worker spent the majority of his time in furtherance of the Petitioner's usual course of business and did not own his own business. It argues that, as a result, this control factor weighs in favor of an employer-employee relationship. A Department witness testified that, even though the Worker provided services for the Petitioner on a part-time basis, he worked for the Petitioner the entire time he was available to work because he spent the rest of his time caring for a family member.

The Petitioner denied the Department's allegation and argued that Janitors have the ability to gain their own contracts and build their businesses because the work is only available on a part-time basis. The Petitioner and Worker credibly testified that the Petitioner did not require the Worker to work full-time.

The evidence of record establishes that the Petitioner only provides work on a part-time basis. As a result, Janitors have the opportunity to devote the remainder of their working time on other pursuits, including developing their own businesses or, as in this case, working as a part-time caregiver. The evidence does not establish that the amount of time required to perform the services restricts Janitors from engaging in other gainful work.

Consequently, we find this factor does not weigh in favor of an employer-employee relationship.

Tools & Materials

Arizona Administrative Code R6-3-1723(D)(2)(k) provides as follows:

> 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.

The Petitioner admits that Janitors do not provide any supplies when providing services. He testified that he provides floor cleaning equipment, and the Client provides all other tools and materials. The Petitioner alleges this factor is not indicative of an employment relationship because Janitors, as independent contractors, would have provided their own tools and materials had the Client not chosen to provide them instead. The Petitioner provided no evidence to support the allegation.

In general, furnishing the tools and materials to workers tends to show the existence of an employment relationship since the employer can control the worker's behavior and has financial control of some of the business aspects of the worker's job. By furnishing the necessary tools and materials, the employer can determine which tools the worker may use, where to purchase them, how much to spend on the tools, and, to some extent, in what order and how they shall be used.

The evidence establishes that Janitors do not provide any tools or materials for performing services. Although the Client purchases the majority of the tools and supplies, the evidence establishes that the Petitioner controls the ordering and amount of the inventory.

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

Expense Reimbursement

Arizona Administrative Code R6-3-1723(D)(2)(l) provides as follows:

> 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.

During the hearing, the Worker credibly testified that although he had not incurred any expenses while providing his services, he believed the Petitioner would have reimbursed him for any expenses incurred. The Worker testified that, had the Petitioner sent him to the store to purchase cleaning supplies, Petitioner would have repaid him. The Petitioner did not deny the allegation or present any evidence to rebut the testimony.

Controlling the expenses indicates the right to regulate and direct the worker's business activities. Although employees may incur unreimbursed expenses in connection with the services they perform for their employer, it is uncommon. The evidence of record establishes that workers do not incur any business, traveling, or incidental expenses when performing the janitorial services; however, the Petitioner would reimburse the workers if expenses were incurred.

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

Factors Indicative of Independence

Arizona Administrative Code R6-3-1723 provides guidance for determining whether an employer-employee relationship exists. A.A.C. R6-3-1723(E) lists the six common factors indicative of independence to be considered when determining if an individual who performs services for an employing unit is performing them as an independent contractor.

Availability to Public

Arizona Administrative Code R6-3-1723(E)(1) provides that:

> 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.

In the Reconsidered Determination, the Department concluded that this factor did not weigh in favor of independence. Based on statements provided during the investigation and an internet search, the Department found no

evidence that the Worker advertised his services to the public in furtherance of his own independent business.

In the appeal, the Petitioner asserted that he did not meet the Worker through an ad. Rather, the Worker was referred to him. During the hearing, the Petitioner testified that he was unaware if the Worker had advertised or made his services publicly available.

During the hearing, the Worker testified that he neither had a business license nor an office. He did not hire assistants and had not advertised his services to the public in any manner.

The extent to which an individual makes their services available to the relevant market is suggestive of how independent they are from the employing unit. Independent contractors take affirmative actions to notify the public that their services are available for hire and often hold a business license. In this case, the best evidence establishes that the Worker did not hold a business license and made no attempt to make his services available to the public on a continuing basis in furtherance of an independent business.

Consequently, we find this factor does not weigh in favor of independence.

Compensation on Job Basis

Arizona Administrative Code R6-3-1723(E)(2) provides as follows:

> 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.

The Department concluded that this factor did not weigh in favor of independence for several reasons. The Department found that that the Petitioner paid a flat monthly rate for the janitorial services with partial payments made during different periods, would have paid the Worker even though he was absent from work, and did not pay the Worker until the Client paid the Petitioner. The Department concluded that the uninterrupted regular payments fall within the statutory definition of wages paid to an employee. The Department argued that the Petitioner's payment practices do not support a finding that the Worker was an independent contractor because employing units generally do not pay

independent contractors for incomplete performance, such as failing to perform services due to an absence. The Department argued that it is not a common practice for an employing unit to withhold payments after independent contractors finish a job. Rather, independent contractors expect to be paid upon completion of the agreed upon services.

The Petitioner admitted that he paid the Worker a monthly flat fee to provide janitorial services, would most likely have paid the Worker if he was absent from work, and delayed paying the Worker until after receiving the Client's payment. However, the Petitioner denied that these factors restricted the Worker's independence. The Petitioner alleged that the Worker was an independent contractor because the Worker negotiated the amount of his fee

The greater weight of the credible evidence of record establishes that the Petitioner paid the Worker a flat fee every month throughout the 21-month audit period. Although independent contractors are often paid a flat fee, several factors exist in this case that distinguish the Petitioner's payments from a flat fee paid to an independent contractor. Payment of regular amounts at stated intervals is a strong indication that an employer-employee relationship exists. The employer assumes the hazard that the services performed will be in proportion to the regular payments, thus warranting an assumption that, to protect its investment, the employer has the right to direct and control the worker's performance. The employer expects the employee to meet the standards of diligence and attention to duty necessary to justify the regular payments. Payment of the entire fee despite an absence is equivalent to paid sick leave, a benefit commonly paid to employees, not independent contractors. In addition, delaying payment to a worker upon completion of a job is not characteristic of an independent contractor relationship. The fact that the Worker negotiated the rate of pay is not dispositive of a finding of independence because such negotiations are not limited to agreements between employing units and independent contractors. It is not uncommon for employees to negotiate their wages when contemplating an employment relationship with a potential employer.

We find that the predetermined monthly payments made for an extended period and the Petitioner's payment practices, are more indicative of an employee status than an independent contractor.

Consequently, we find this factor does not weigh in favor of independence.

Realization of Profit or Loss

Arizona Administrative Code R6-3-1723(E)(3) provides as follows:

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.

In the Reconsidered Determination, the Department stated that "all overhead and operating costs were borne solely by [the Petitioner] and or the [Petitioner's] contracted clients and, therefore, the janitorial services are not in a position to realize a profit or loss with respect to their services".

The Petitioner testified that he was not aware of the Worker having any operating expenses and did not dispute the Department's findings.

In this case, the evidence of record establishes that Janitors did not pay for rent or wages, or other operating expenses associated with a business and are not in a position to realize a profit or suffer a loss as a result of providing their services.

Consequently, we find this factor does not weigh in favor of independence.

Obligation

Arizona Administrative Code R6-3-1723(E)(4) provides as follows:

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.

In the Reconsidered Determination, the Department concluded that the Worker would not incur liability for failing to complete the job as agreed.

During the hearing, the Petitioner agreed that the Worker had the right to terminate the agreement at any time without ramification.

In this case, the evidence of record establishes that Janitors have the right to end their relationship with the Petitioner at any time without incurring legal liability.

Consequently, we find this factor does not weigh in favor of independence.

Significant Investment

Arizona Administrative Code R6-3-1723(E)(5) provides as follows:

> 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.

In the Reconsidered Determination, the Department concluded that the Worker did not have a significant investment in equipment related to providing janitorial services. Rather, the Petitioner had the significant investment because he had the established contracts with the Client.

During the hearing, the Worker testified that he did not own or have an investment in any equipment or premises used in the performance of his janitorial services. The Petitioner admitted that the Worker did not have an investment in performing the services. He did not dispute the Department's conclusions.

The evidence of record establishes that Janitors have no need to invest in any premises because they provide their services at the Client's facility and do not invest in equipment.

Consequently, we find this factor does not weigh in favor of independence.

Simultaneous Contracts

Arizona Administrative Code R6-3-1723(E)(6) provides as follows:

> 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.

In the Reconsidered Determination, the Department found that there was no evidence of any simultaneous contracts and that "based on a search of the internet, [the Worker] did not advertise his services to the public". A Department witness testified that the Worker did not receive payments of wages from any other employers during the audit period or have any contracts with other employing units. The witness testified that the Worker did not have a list of previous clients or any invoices with letterhead.

During the hearing, the Worker testified that he did not provide services for anyone else while working for the Petitioner. The Petitioner testified that he was not aware of any clients the Worker may have had within the audit period. He did not dispute the Department's conclusion.

The evidence of record establishes that the Worker did not engage in simultaneous contracts during the audit period when performing janitorial services for the Petitioner.

Consequently, we find this factor does not weigh in favor of independence.

Additional Considerations

Arizona Administrative Code R6-3-1723(F) provides guidance on additional considerations for determining if an individual performing services for an employing unit is an employee or may be independent.

Type of Relationship: Integration and Permanency

In ultimately determining that an employer-employee relationship exists between the Petitioner and Janitors, the Department considered the integration of janitorial services into the Petitioner's business and the continuing nature of the relationship between the Petitioner and Janitors. The Department held that the services provided by Janitors, including the Worker, were integral to the Petitioner's business and that the relationship was considered permanent.

When a worker's services are integrated into the business operation to such a degree that success or continuation of a business depends to an appreciable degree upon the worker's performance, the worker must necessarily be subject to a certain amount of control by the business. As the Petitioner provides janitorial and maintenance services, the services provided by Janitors are a key aspect of the Petitioner's regular business activity. Therefore, it is more likely that the Petitioner will have the right to direct and control the Janitors' activities. We

agree with the Department's determination that the level of integration between the Janitors' services and the Petitioner's business favors a finding that an employer-employee relationship exists.

An expectation to engage a worker indefinitely, rather than for a specific project or period, is generally considered evidence that the intent is to create an employer-employee relationship. In this case, the evidence establishes that the Worker provided services for the Petitioner on a continuous, part-time basis for approximately three years and ten months. Specifically, the Worker provided services and received payments from the Petitioner throughout the 21-month audit period. There is no evidence in the record to suggest that the Petitioner engages Janitors for a specific project or period. Rather, the evidence establishes that the Petitioner's goal is to hire Janitors for an indefinite period. The Petitioner's arrangement contemplates continuing work. Thus, the relationship is considered permanent even though the services are rendered on a part-time basis. We agree with the Department's determination that the permanency of the relationship between the Petitioner and Janitors favors a finding that an employer-employee relationship exists.

Type of Relationship: Contracts

The Petitioner has alleged that an independent contractor relationship exists because he and the Worker executed a contract.

The essential elements of a contract include an offer, acceptance, and consideration. An offer expresses a willingness to make a trade with an individual. An acceptance of an offer may be established with a signature. Consideration refers to something of value that is exchanged for that which is offered. The evidence of record establishes that the Worker signed a document on February 19, 2019; however, a review of the document reflects that it includes neither an offer of employment nor consideration (i.e., remuneration to be paid in exchange for providing janitorial services). Rather, the document constitutes the Worker's acknowledgement that he is responsible for paying his own taxes. Upon consideration of the evidence, we find that there is no written independent contractor agreement.

Consequently, we find that this factor does not establish that an independent contractor relationship exists.

Type of Relationship:
Liability Insurance and Workers' Compensation Insurance

In this case, the evidence establishes that the terms of the Client contract require the Petitioner to carry liability insurance and workers' compensation insurance. The evidence establishes that Janitors, including the Worker, are not

required to obtain the same coverage when performing services on the Client's premises.

General liability insurance protects a business from financial losses due to third-party claims of injury and damage. Workers' compensation is a disability compensation program which provides benefits to employees for a job-related illness or injury. We infer from the presence of the insurance requirements that the Client considers Janitors who provide services for the Petitioner to be the Petitioner's employees and not independent business entities.

Under Arizona law, it is mandatory for employers to secure workers' compensation insurance for their employees. Workers' compensation insurance is not required for an independent contractor. The fact that the Petitioner provides workers' compensation coverage for Janitors is a significant indicator that the Petitioner is an employer.

Consequently, we find that this factor favors a finding that an employer-employee relationship exists.

Type of Relationship: In General

In this case, the Petitioner argues that Janitors are independent contractors because he issues them a Form 1099-NEC, an Internal Revenue Service form used to report nonemployee compensation such as self-employment income.

The fact that an employing unit issues tax forms commonly used to report payments to an independent contractor is not dispositive of the issue of whether the employing unit is an employer liable for unemployment insurance. A determination of the true relationship between the employing unit and the worker is determined by a review of all the circumstances.

The evidence of record establishes that the Worker received the form and knew the Petitioner did not withhold taxes from his pay but did not believe that he was an independent contractor. The Worker testified that the business was the Petitioner's, and that the Petitioner not only controlled how he did his job but also required him to wear a shirt with the company name. We find that Janitors provide services under the Petitioner's name while wearing a uniform shirt with the Petitioner's logo. The evidence establishes workers' compensation insurance, a benefit only provided to employees, is available to Janitors.

Consequently, we find that these factors favor a finding that an employer-employee relationship exists.

Federal Unemployment Tax Act

Under Arizona law, "employment" for State unemployment insurance tax purposes includes services for which taxes may be imposed by the Federal Unemployment Tax Act. A.R.S. § 23-615(A)(10). Arizona Administrative Code R6-3-1723(G) provides as follows:

> An individual is an employee if he performs services which are subject to the Federal Unemployment Tax Act or performs services which are required by federal law to be covered by state law.

The Federal Unemployment Tax Act (FUTA), with state unemployment systems, provides for payments of unemployment compensation to workers who have lost their jobs. Most employers pay both a federal and a state unemployment tax. Only the employer pays FUTA tax. It is not withheld from the employee's wages.

In the present case, the evidence of record establishes that the Petitioner is subject to paying FUTA taxes and has not been granted an exclusion for janitorial services provided by his workers. Consequently, we find this factor supports findings that Janitors are employees and janitorial services constitute employment.

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 Janitors, as required in A.A.C. R6-3-1723(D)(1), including the elements of control as to the result and over the method in which the services are performed and the elements of independence within the meaning of A.A.C. R6-3-1723(A), (D), and (E). Additional considerations were also examined by the Appeals Board pursuant to A.A.C. R6-3-1723(F) to determine whether an employer-employee relationship exists.

Considering the evidence as a whole, including credibility judgments relating to witness testimony, we find that the greater weight of the behavior and financial control factors and those related to the type of relationship between the Petitioner and Janitors favors a finding that an employer-employee relationship exists.

DECISION

THE APPEALS BOARD AFFIRMS the Reconsidered Determination issued on December 4, 2023.

We conclude that the Petitioner is an employer subject to the Employment Security Law of Arizona. All services performed by individuals as a Janitor

constitute employment and renumeration paid for those services constitutes wages.

We conclude that the Worker was an employee of the Petitioner for services provided as a Janitor and that all payments made to him for his services from January 1, 2021, through September 30, 2022, constitute wages.

We conclude that the Petitioner is liable for Arizona Unemployment Insurance Taxes. Coverage begins January 1, 2021.

DATED: 8/1/2024

APPEALS BOARD

[redacted]

NANCY MILLER, Chairman

[redacted]

DENISE E. MOORE, Member

[redacted]

PETER J. LANSDOWNE, Acting Member

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 8/1/2024 to:

(x) Er: [redacted] Acct. No: [redacted]

(x) DONALD BAIER
ASST ATTORNEY GENERAL
ARIZONA ATTORNEY GENERAL
2005 N CENTRAL AVE, MD 1911
PHOENIX, AZ 85004

(x) MARIA VAN RAALTE, CHIEF OF TAX
EMPLOYER APPEALS UNIT
UNEMPLOYMENT INSURANCE TAX SECTION
DEPARTMENT OF ECONOMIC SECURITY
P O BOX 6028
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By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1934056-001-B

[redacted]

Petitioner

STATE OF ARIZONA ESA TAX UNIT
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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) 771-9019.

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) 771-9019.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** September 23, 2024 *****.

DECISION
REQUEST TO REOPEN HEARING GRANTED
RECONSIDERED DETERMINATION REVERSED

THE PETITIONER petitioned for a hearing from the Department's Reconsidered Determination issued on July 31, 2023, which affirmed the Department's Determination of Unemployment Insurance Liability issued on October 31, 2022. The Reconsidered Determination held the Petitioner liable for Arizona Unemployment Insurance Tax pursuant to A.R.S. § 23-613 with coverage beginning on January 1, 2021.

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 March 13, 2024. Appeals Board Administrative Law Judge (ALJ) Robert Irani presided over the hearing on that date, and all parties were given an opportunity to present evidence on the following issue:

> Whether the Petitioner is an employing unit liable for Arizona Unemployment Insurance Tax with coverage beginning on January 1, 2021.

The Petitioner appeared through counsel at the scheduled hearing and presented testimony from three witnesses. The Department appeared through counsel and presented testimony from two witnesses. Exhibits A1, D1 through D11, and P1 through P9 were admitted into evidence.

On March 22, 2024, the State of Arizona ESA Tax Unit (the "Department") submitted a request to reopen the Appeals Board hearing that was held on March 13, 2024, to submit additional evidence based on new information presented at the initial hearing. The new information included the identification of alternate business names used by the Petitioner when conducting its business and the physical address of the business operations.

THE APPEALS BOARD finds that the Department's ability to submit rebuttal evidence at the hearing was significantly impaired by the lack of information. We conclude that the Department has established good cause under A.A.C. R6-3-1502(L)(5) to reopen the March 13, 2024 hearing to take additional evidence. We grant the request to reopen the hearing.

On May 7, 2024, Appeals Board ALJ Irani presided over the reopened hearing, and all parties were given an opportunity to present evidence on the issue limited to the Petitioner's business operations conducted under two other names and the physical address identified at the initial hearing.

The Petitioner appeared through counsel at the scheduled hearing and presented testimony from two witnesses. The Department appeared through counsel and presented testimony from one witness. Exhibits A2, D12 through D33, and P10 through P12 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 an Arizona limited liability company that operated within the State of Arizona during the audit period.

2. The Petitioner's single member is [redacted] (The [redacted] Board). The [redacted] Board is a domestic nonprofit corporation incorporated on February 11, 1994, doing business as a religious entity. It is exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code.

3. The [redacted] Board formed the Petitioner's organization as a missional church.

4. The Petitioner adopts the beliefs and faith of The Church of the Nazarene.

5. The Church of the Nazarene originated in North America in the 19th century. The official doctrines of The Church of the Nazarene are published in The Nazarene Manual, which establishes sixteen Articles of Faith. The Nazarene Manual provides the government and bylaws, history, doctrine, ritual, and policy of The Church of the Nazarene.

6. The Church of the Nazarene is a Christian denomination which combines episcopal and congregational polities to form a representative government. The General Assembly serves as the supreme doctrine-formulating, lawmaking, and elective authority of the Church of the Nazarene and meets every four years. The elected delegates of the District Assembly manage local matters and meet annually.

7. The Church of the Nazarene has ordained ministers. Ordained ministers of the Church of the Nazarene are required to complete a multi-year course of study service period before being ordained. The Church of the Nazarene has several educational institutions, including four-year universities, for the preparation of its ministers.

8. An ordained minister of The Church of the Nazarene serves as pastor for the Petitioner.

9. The Church of the Nazarene has literature in printed form and in electronic form, including but not limited to a "District Journal" and a directory of information for more than 60 churches. The Petitioner publishes assembly minutes and annual financial reports.

10. The Petitioner operates from a physical location in Casa Grande, Arizona.

11. The Petitioner sells donated items at its physical location. The Petitioner uses the proceeds from the sales to finance its activities.

12. The Petitioner routinely conducts religious services in the chapel at its physical location on a weekly basis. Additional forms of worship include

bible study, prayer meetings, ministering, sharing scripture, and sharing communion. The Petitioner also provides religious and ministry services at unconventional locations such as the international border between Arizona and Mexico.

13. The Petitioner has a congregation that includes individuals who attend the services regularly. There are attendees who are associated with other churches as well.

REASONING AND CONCLUSIONS OF LAW

State law imposes on every employer for each calendar year an Unemployment Insurance (UI) excise tax with respect to wages paid for employment. The issue properly before the Appeals Board is whether the Petitioner is subject to the Arizona UI excise tax within the meaning and intent of the Employment Security Law of Arizona.

The Arizona Revised Statutes provide in pertinent part as follows:

A.R.S. § 23-613. Employer

A. "Employer" means:

***

2. Any employing unit:

(a) That after December 31, 1971 for some portion of a day in each of twenty different calendar weeks, whether or not the weeks are or were consecutive, in either the current or the preceding calendar year, has or had in employment at least one individual irrespective of whether the same individual was in employment in each day.

(c) For which service in employment, as defined in section 23-615, subsection A, paragraph 6, 7 or 8 or section 23-615.01 is performed after December 31, 1977.

A.R.S. § 23-614. Employing unit

A. "Employing unit" means an individual or type of organization, including a partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, [...] which has, or after January 1, 1936 had, one or more individuals performing services for it within this state. ...

Qualification Under Arizona Revised Statutes § 23-615(B)(1), (2)

The Petitioner argues that it should be considered either a church or a religious organization pursuant to A.R.S. § 23-615, and thereby exempt from UI Tax liability in Arizona because services performed by its employees do not constitute employment.

Arizona Revised Statute § 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, and includes:

***

7. Service performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational or other organization, but only if both of the following conditions are met:

(a) The service is excluded from "employment" as defined in the federal unemployment tax act solely by reason of section 3306(c)(8) of that act.

(b) The organization had at least four individuals in employment for some portion of a day in each of twenty different weeks, whether or not the weeks were consecutive, within either the current or preceding calendar year, regardless of whether the individuals were employed simultaneously.

B. For purposes of subsection A, paragraphs 6, 7 and 8, the term "employment" does not apply to service performed for any of the following:

1. In the employ of a church or convention or association of churches, or an organization that is operated primarily for religious purposes, including educational and child care services that include religious instruction, and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

2. By a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by the order. [Emphasis added.]

In the Reconsidered Determination, the Department states that it does not agree the Petitioner "is both a church and a religious organization (ministry)." The Department references the Petitioner's Restated Articles of Organization at Article 6, under the heading "Purpose":

> This Company is organized exclusively for charitable, religious, educational, scientific, and literary purposes. The purposes of the Company are to own and/or operate ministry services [...]. All of the purposes and activities of this Company will be conducted consistent with the core tenets and doctrines of The Church of the Nazarene Inc [...]. Any activity which is inconsistent is prohibited.

With respect to [redacted], the Department cites A.R.S. § 23-615(B) and states:

> The fact that the [redacted] is a church is not in dispute. Therefore, while we agree that a church does not have to file an application with the IRS for tax exempt status as a nonprofit section § 501 (c)(3), the IRS has compiled a list of attributes associated with churches:
>
> > Distinct legal existence, recognize creed and form of worship, definite and distinct ecclesiastical government, formal code of doctrine and discipline, distinct religious history, membership not associated with any other church or denomination, organization of ordained ministers, ordained ministers selected after completing prescribed courses of study, literature of its own, established places of worship, regular congregations, regular religious services, Sunday school for the religious instruction of the young, and schools for the preparation of its ministers.

The Department states that "[a]ccording to these characteristics, [the Petitioner] falls squarely under the provisions of A.R.S. § 23-615(7)(a) and (b) regarding employment of an individual by a religious, charitable, educational or other organization." The Department argues that these organizations may not claim an exemption from Arizona UI Tax liability unless they receive formal recognition from the Internal Revenue Service (IRS) for tax-exempt status. As a result, the Petitioner is not exempt from UI Tax liability because it has not received tax-exempt status from the IRS. We are not aware of any legal authority, and we have not been cited to any, that requires the determination that an organization meets the definition of a "church" be made by the IRS. Therefore, we reject the Department's argument.

IRS List of Characteristics Attributed to a Church

The term "church" is not defined under the Federal Unemployment Tax Act (FUTA) or under state law in Arizona. While the term is not specifically defined in the Internal Revenue Code, the IRS has compiled a list of fourteen characteristics developed by the IRS and by court decisions to determine whether an organization is considered a church for federal income tax purposes. *See* Internal Revenue Serv., U.S. Dep't of the Treasury, Pub. No. 1828, Tax Guide for Churches & Religious Organizations (p. 33) (Rev. 8-2015), https://www.irs.gov/pub/irs-pdf/p1828.pdf. (IRS Tax Guide) This list of characteristics was also identified in the Reconsidered Determination by the Department.

I. Distinct legal existence

The IRS Tax Guide states that a distinct legal existence is a characteristic that is generally attributed to a church.

The legal entity of the Petitioner is a single member limited liability company incorporated in the State of Arizona. The Petitioner's single member is [redacted] The Petitioner's Restated Articles of Organization state that the Petitioner is an Arizona limited liability company that is "Member Managed" and that the name of the member is "[redacted], an Arizona nonprofit corporation."

During the hearing, a witness for the Petitioner, the District Superintendent of [redacted] (Superintendent), credibly testified that [redacted] was "essentially the same" as The Advisory Board of the Arizona Church of the Nazarene, Inc., as "[redacted] is the legal name for the corporation." The Superintendent further testified that "the [Petitioner] was formed by our district as a missional church. I'm the President of the corporation, [redacted]."

In this case, the Petitioner has a distinct legal existence as a single member limited liability company in the State of Arizona.

Consequently, we find the Petitioner has this characteristic attributed to a church.

II. Recognized creed and form of worship

A recognized creed and form of worship is identified in the IRS Tax Guide as a characteristic that is generally attributed to a church.

The Petitioner contends that the Petitioner's creed is stated in The Church of the Nazarene Manual (The Nazarene Manual) and that forms of worship include study of the bible and prayer. The Nazarene Manual provides the government and bylaws, history, doctrine, ritual, and policy of The Church of the Nazarene.

During the hearing, a witness for the Petitioner, a reverend who provides pastoral services for the Petitioner (Pastor), credibly testified that The Church of the Nazarene is a Christian denomination, and that the Petitioner adopts beliefs and faith of The Church of the Nazarene. The Nazarene creed includes, for example, belief in one God, the Creator of all things, who reveals Himself as Father, Son and Holy Spirit. The Pastor further testified that forms of worship included regular church services, bible study, and prayer meetings.

The Superintendent testified that the form of worship for a missional church, such as the Petitioner, included ministering, holding services, prayer, sharing scripture, and sharing communion.

In this case, the Petitioner adopts the beliefs and faith of The Church of the Nazarene. It has a recognized creed, as stated in The Nazarene Manual, and forms of worship that include regular church services, bible study, prayer meetings, sharing scripture, and sharing communion.

Consequently, we find the Petitioner has this characteristic attributed to a church.

III. Definite and distinct ecclesiastical government

A definite and distinct ecclesiastical government is identified in the IRS Tax Guide as a characteristic that is generally attributed to a church.

The Petitioner contends that the Petitioner adopts the governmental ecclesiastical structure of The Church of the Nazarene as stated in its formational documents. The Nazarene Manual includes the government and

bylaws, ritual, doctrines, and policy of The Church of the Nazarene. The Church of the Nazarene combines episcopal and congregational polities to form a representative government. The General Assembly serves as the supreme doctrine-formulating lawmaking and elective authority of The Church of the Nazarene.

During the hearing, the Superintendent testified that "a General Assembly occurs typically every four years [that] determines our polity, any governance issues, policies, procedures, our theology, our doctrine. We have elected delegates from all of the districts globally that come together, over a thousand delegates [and] so we meet to discuss those and decide. There is a District Assembly where the local churches elect delegates and come together annually to vote on any Board members, Committee members, and any matters related to the District."

In this case, the Petitioner has a definite and distinct ecclesiastical government which it has adopted from The Church of the Nazarene.

Consequently, we find the Petitioner has this characteristic generally attributed to a church.

IV. Formal code of doctrine and discipline

A formal code of doctrine is identified in the IRS Tax Guide as a characteristic that is generally attributed to a church.

The Petitioner contends that its doctrine is stated in The Nazarene Manual and that the Petitioner adopts the Articles of Faith of The Church of the Nazarene.

The official doctrines of The Church of the Nazarene are published in The Nazarene Manual, which establishes sixteen Articles of Faith as a guiding principle for living Christianity. The Articles of Faith include the following: one eternal self-existent God manifest in a Trinity; the divinity of Jesus and the Holy Spirit; the authority of the Bible; Original and Personal Sin; the work of atonement; prevenient grace; the need for repentance; justification, regeneration, and adoption; entire sanctification; the church; creedal baptism; the Lord's Supper for all believers; divine healing; the return of Jesus Christ; and the resurrection of the dead.

In this case, the Petitioner has a formal code of doctrine, adopting the Articles of Faith of The Church of the Nazarene encompassed in The Nazarene Manual.

Consequently, we find the Petitioner has this characteristic generally attributed to a church.

V. Distinct religious history

A distinct religious history is identified in the IRS Tax Guide as a characteristic that is generally attributed to a church.

The Petitioner contends that The Church of the Nazarene is a Christian denomination that emerged in North America in the 19th-century and is presently headquartered in Kansas. As with all Nazarene churches, the Petitioner contends that it adopts The Nazarene Manual as its governing document with the history of The Church of the Nazarene contained therein.

During the hearing, the Superintendent provided testimony regarding the religious history of the Petitioner, stating that "[T]he Church of the Nazarene came together in 1908. Phineas Bresee was key founder [who] operated ministries to homeless, alcoholics [and] he provided homes for unwed mothers. They also provided healthcare at the time for transient populations, so compassionate ministries are part of our DNA as The Church of the Nazarene and that carries forward today."

The Pastor testified during the hearing that he was as an ordained minister in The Church of the Nazarene and that he and his missional church [the Petitioner] were part of the Nazarene denomination.

In this case, the Petitioner has been functioning as a religious entity for 80 years with a distinct religious history which it has been adopted from The Church of the Nazarene.

Consequently, we find the Petitioner has this characteristic generally attributed to a church.

VI. Membership not associated with any other church or denomination

Membership not associated with any other church or denomination is identified in the IRS Tax Guide as a characteristic that is generally attributed to a church.

The Petitioner states that it is a Nazarene church, but because of its constituency being transient, it does not focus on people becoming formal "members" but rather regular attenders. During the hearing, the Superintendent testified that the Petitioner's congregation were "typically people who are lower income [...] many are addicted, have issues with drugs."

However, witnesses for the Petitioner testified that there were attenders who were associated with other churches as well.

Consequently, we find the Petitioner does not have this characteristic generally attributed to a church.

VII. *Organization of ordained ministers*
VIII. *Ordained ministers selected after completing prescribed courses of study*

The IRS Tax Guide identifies organization of ordained ministers and ordained ministers selected after completing prescribed courses of study as characteristics that are generally attributed to a church.

The Petitioner contends that The Nazarene Manual contains the requirements for the ordination of ministers and the prescribed courses of study for ordination. The Petitioner also contends that its own pastor is an ordained minister of The Church of the Nazarene.

The Superintendent testified during the hearing that he appointed the Pastor to serve as a pastor for the Petitioner and that "he is an ordained elder, a minister in good standing of our District." The Pastor confirmed that "he has been an ordained minister in The Church of the Nazarene since 1996 and was appointed pastor of the church called The Lighthouse upon the formation of [redacted]."

The Superintendent also testified that The Church of the Nazarene ordained ministers, stating that "they may go to one of our four-year universities [and that there were] additional courses required for them to be ordained and they are also required to have a certain number of years of service before we would ordain them." The Superintendent stated that the process generally took about "seven to eight years" and that they had "to be done in ten years [as there was] a maximum." The Superintendent elaborated on the process of ordaining the ministers stating that "a General Superintendent is the one that lays hands on the candidates and ordains them but the District supervises all of their training through our Credentials Board and our Ministerial Studies Board."

The Pastor provided testimony on his own experience for becoming an ordained minister in The Church of the Nazarene, stating that "it took five years of studies [and] several interviews with the Credentials Board and the various Boards of The Church of the Nazarene, as well as two years of full-time service before I could be ordained."

In this case, we find the Petitioner to possess characteristics of an organization of ordained ministers and ordained ministers selected after completing prescribed courses of study.

IX. Literature of its own

The IRS Tax Guide identifies literature of its own as a characteristic that is generally attributed to a church.

The Petitioner contends that its literature is drawn from The Church of the Nazarene which is in both printed and electronic form and has been available for decades.

During the hearing, the Superintendent provided testimony regarding a publication called the District Journal, which "lists all of our organized churches and our unorganized churches, our church type missions. It lists directory information for the sixty-three churches including their staff and officers. It lists the minutes of our annual District assembly, and it lists our annual financial reports [...] and a list of all of our licensed and ordained ministers. The Superintendent also confirmed that the publication was published annually.

Consequently, we find the Petitioner has this characteristic generally attributed to a church.

X. Established places of worship

The IRS Tax Guide identifies established places of worship as a characteristic generally attributed to a church.

The Petitioner contends that its services are held both at its established physical location and in less conventional settings that are outside its established physical location.

During the hearing, witnesses for the Petitioner provided a physical address in Casa Grande, Arizona, of the building in which the Petitioner held its services.

The Superintendent testified that, in addition to carrying weekly services at its physical location, the Petitioner "as a missional church must be flexible enough to be able to minister in situations that are not within the four walls of the church." The Superintendent provided examples of instances in which there were "chaplains who are working on the southern border of Arizona [who] may hold a service out under a tree with immigrants coming across the border [...] that minister in hospice [or] go to different persons homes when there's hospice care there."

During the hearing, the Pastor noted the frequency that services were provided inside its physical location versus "outside of the Petitioner's actual

location", testifying that "the outreach is once a month and the in-reach, that is what we have actually at the chapel, is every week."

In this case, the Petitioner has an established place of worship.

Consequently, we find this characteristic has been met by the Petitioner.

XI. Regular congregations
XII. Regular religious services

The IRS Tax Guide identifies regular congregations and regular religious services as characteristics generally attributed to a church.

The Petitioner contends that it holds its services and bible studies on a weekly basis for its congregation and that, because its demographic is unique in its focus on the homeless, widows, and the disadvantaged, it tries to minister to whoever comes on any given week.

During the hearing, the Pastor described the regularity of the religious services conducted, stating that "church services were held on Thursday nights at 6:30 p.m. [and that] everything that happens in a regular traditional church service" takes place. The Pastor further testified that "we open with a prayer, we have music, we have a message, and we have a closing [and that] everybody gets either a bible track or a bible itself." The Pastor further testified that he also held weekly bible studies every Tuesday at 8:00 a.m. at the same location that the church services were held.

The Pastor testified that its congregation included "ones that do not go into traditional churches" and provided examples that included transients, undocumented workers, and individuals struggling with drug addictions. The Pastor also stated that teenagers and children also attended the services and that the congregation included other individuals who simply wanted to be part of the congregation and attended regularly, who "come every week [and that] we do have established people come as well."

A witness for the Petitioner who provided bookkeeping services (Bookkeeper) for the Petitioner testified that she personally attended services that were held by the Petitioner. The Bookkeeper testified that she attended "over several times [...] over 20 probably plus times [and that services were held] weekly. Sometimes two to three times a week but the regular was the twice a week." The Bookkeeper further testified that the congregation comprised "probably 20 to 30 people, a mixed variety of homeless [...] a lot of elderly there, a couple families such as mine, [and that] they opened with music, prayer, offerings and then the pastor gave a sermon."

In this case, we find that the Petitioner had a regular congregation and held regular religious services.

Consequently, we find the Petitioner has these characteristics generally attributed to a church.

XIII. Sunday schools for the religious instruction of the young

Sunday schools for the religious instruction of the young is identified in the IRS Tax Guide as a characteristic that is generally attributed to a church.

The Petitioner states that its demographic focus is unique in that it provides services for the homeless, widows, and the disadvantaged.

During the hearing, the Pastor testified that there were teenagers and children who attended services.

However, in this case, there is insufficient evidence to establish that the Petitioner had implemented Sunday schools for religious instruction of the young.

Consequently, we find the Petitioner does not have this characteristic generally attributed to a church.

XIV. Schools for the preparation of its ministers

The IRS Tax Guide identifies schools for the preparation of its ministers as a characteristic that is generally attributed to a church.

The Petitioner contends that it is part of the Nazarene denomination and that its ministers are prepared through educational institutions that include universities.

During the hearing, the Superintendent testified that The Church of the Nazarene had nine educational institutions in the United States and "had another 20-some educational institutions globally." The Superintendent further testified that The Church of the Nazarene ordained ministers, testifying that "they may go to one of our four-year universities [...] before we ordained them."

The Pastor testified during the hearing that he "has been an ordained minister in The Church of the Nazarene since 1996 and was appointed pastor of the church called [redacted] upon the formation of [redacted]." In describing his own experience for becoming an ordained minister in The Church of the Nazarene, the Pastor stated that "it took five years of studies [and] several interviews with the Credentials Board and the various Boards of

The Church of the Nazarene, as well as two years of full-time service before I could be ordained."

In this case, we find that the Petitioner does have schools for the preparation of its ministers.

Consequently, we find the Petitioner has this characteristic generally attributed to a church.

Additional Case Law

In the Reconsidered Determination, the Department identifies the fourteen attributes developed by the IRS to determine whether an organization is considered a church. However, the Department also asserts that courts have found that "among the most important of the 14 criteria are the requirements of 'regular congregations' and 'regular religious services.'" (*Foundation of Human Understanding v. United States*, 614 F.3d 1383 (Fed. Cir. 2010)." The Department further asserts that "[a]lthough fundamental to determining whether an organization is a church, religious purposes alone do not serve to establish it as a church. Equally important are the means by which its religious purposes are accomplished" and cites several cases including *Church of the Eternal Life & Liberty, Inc.*, 86 T.C. 916, 294 (1986) and *Spiritual Outreach Soc. v. C.I.R.*, 927 F.2d 335, 339 (8th Cir. 1991), with regard to an established congregation.

In *Church of the Eternal Life & Liberty, Inc.*, the Tax Court states:

> A church is a coherent group of individuals and families that join together to accomplish the religious purposes of mutually held beliefs. In other words, a church's principal means of accomplishing its religious purposes must be to assemble regularly a group of individuals related by common worship and faith.

Some courts have also ruled that a religious organization must serve an associational role to qualify as a church. In *American Guidance Foundation, Inc. v. United States*, a district court articulated the associational test:

> At a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship.
>
> [...]
>
> Unless the organization is reasonably available to the public in its conduct of worship, its educational instruction, and its promulgation of doctrine, it cannot fulfill this associational role.

With respect to whether the Petitioner had a congregation that assembled regularly, witnesses for the Petitioner testified that the Petitioner held its church

services regularly on Thursday nights at 6:30 p.m. and held its bible studies regularly on Tuesday mornings at 8:00 a.m. at the Petitioner's established location in Casa Grande.

The Petitioner's congregation was described by the Petitioner's witnesses to include individuals that may not go to traditional churches, in addition to other individuals who also formed part of the congregation. The witnesses also confirmed that there were people who regularly attended the services held by the Petitioner.

The Petitioner's witnesses testified that the joining together of people for worship was the primary purpose of all the Petitioner's activities. The religious services that were held by the Petitioner at its established location were described to include "everything that happens in a regular traditional church service" including prayer, music, a message, and a closing.

In this case, we find that the Petitioner held regular religious services and had a regular congregation. The bringing of people together for worship was not merely an incidental part of the activities of the Petitioner. The services held by the Petitioner were attended in person at an established location, where congregants had the opportunity to interact and associate with each other in worship.

Consequently, based on a preponderance of evidence, we find the Petitioner qualifies as a church based on the additional case law considered.

The Church of the Nazarene does not consider the Petitioner a Church

The Department contends that the Arizona District Church of the Nazarene itself does not consider the Petitioner to be a church based upon the Department's review of publicly available information.

In the Reconsidered Determination, the Department states that the Petitioner is recognized as a "project/ministry" and not a church by the District Advisory Board, which also recommended that the Petitioner among several others receive a "10% Giving approval or certification" and that the Board had made a disclaimer regarding the entities listed.

During the hearing, a witness for the Petitioner testified that "there's a reason why we call it a missional church, because in our polity we don't treat it financially the same as we do fully organized churches who can support themselves, but in terms of the work of a church, that's what this is." The witness confirmed that the essential difference between a fully organized Church of the Nazarene and a missional church such as the Petitioner was that a fully organized church had to have its own Advisory Board and be self-sufficient whereas a missional church needed to depend on outside financial donations to

sustain itself. The Petitioner witness also confirmed that The Church of the Nazarene deemed all its churches, including the Petitioner, to be a church.

Consequently, based on a preponderance of evidence, we find The Church of the Nazarene does consider the Petitioner to be a church.

Primary Function of the Petitioner

The Department asserts that to be a church, religious services must be the primary function of the entity, not merely incidental. In this case, the Department determined that the primary function of the Petitioner was not to operate a church, but rather a Christian ministry that operated a food bank and sold furniture, appliances and other items with the proceeds going to support both local and international ministries. Additionally, upon reviewing the Petitioner's social media pages, the Department found all activity to be consistent with furniture and appliance retail sales and food distribution.

During the hearing, witnesses for the Petitioner testified that the Petitioner sold donated items at its physical location and that money from those sales were used to fund the operations of the Petitioner.

A witness for the Petitioner testified that while a fully organized church can support itself through tithes and offerings, a missional church, such as the Petitioner, "has to raise our own funds [and] we don't get tithes and offerings to speak of, so we have to raise our own income to function."

The Petitioner's witness also confirmed that all the funds generated through the sales of the donated items were used to "pay for the operations of the church itself [and that the Petitioner] has always struggled to pay its own bills, to keep the building, even."

A Petitioner witness also testified that the primary function of the Petitioner was dedicated to operating as a church and that "everything we do, no matter what it is, it's to get the message of Christ out. Whether it's selling a stick of furniture or appliance or somebody at a church service, or somebody coming for help, it's all one thing, it's to share the gospel of Jesus Christ."

In this case, we find that the primary function of the Petitioner was not furniture and appliance retail sales, and food distribution. While the Petitioner did sell the donated items it received, the proceeds through the sales were used to support its primary function, which was to provide religious services.

Arizona Joint Tax Application

In the Reconsidered Determination, the Department states that support for the Department's position is the Petitioner's Joint Tax Application dated

October 1, 2020 and signed by "[redacted]", which stated that the Petitioner was liable for federal unemployment taxes under FUTA. The Department also states that this information was further corroborated by the Federal Form W-2 Wage and Tax Statement provided by the Petitioner to an individual who had previously provided services for the Petitioner. Pursuant to A.R.S. § 23-615(10), the Department states that "if an employing unit is liable for FUTA, then the employing unit is also liable for SUTA."

During the hearing, the Bookkeeper testified that all the information on the joint tax application was an error and there were Social Security numbers, names and addresses that were unidentifiable by any of the Petitioner's staff, personnel or attorney. Ultimately, the Petitioner contends that it does not know who or how the forms were sent, but that any submissions were made in error.

In this case, there is not sufficient evidence to establish that the Petitioner should not be considered a church under A.R.S. § 23-615(B)(1).

Disregarded Entity and 501(c)(3) Status

The Petitioner argued that it is exempt from Unemployment Insurance Tax liability because it is a disregarded entity and because it qualifies as a § 501(C)(3) organization. Because we have determined that the Petitioner is exempt as a church, we find it unnecessary to address these additional arguments made by the Petitioner.

Conclusion

We conclude that the Petitioner has established by a preponderance of evidence that it is a church, based on our consideration of the fourteen characteristics developed by the IRS and the relevant case law. There is not additional evidence sufficient to establish that the Petitioner should not be considered a church under Arizona Revised Statutes § 23-615(B)(1).

DECISION

We conclude that the preponderance of evidence establishes that the Petitioner is a church. Therefore, pursuant to A.R.S. § 23-615(B)(1), the Petitioner is not liable for Unemployment Insurance Taxes under A.R.S. § 23-613. Accordingly,

THE APPEALS BOARD **REVERSES** the Department's July 31, 2023 Reconsidered Determination that held the Petitioner liable for Unemployment Insurance Taxes pursuant to A.R.S. § 23-613 with coverage beginning on January 1, 2021.

DATED: 8/23/2024

APPEALS BOARD

[redacted]

NANCY MILLER, Chairman

[redacted]

DENISE E. MOORE, Member

[redacted]

PETER J. LANSDOWNE, Acting 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) 771-9019; 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) 771-9019 with any questions.

A copy of the foregoing was mailed on 8/23/2024
to:

Er: [redacted] Acct. No: [redacted]

(x) [redacted]

(x) DONALD BAIER
ASST ATTORNEY GENERAL
ARIZONA ATTORNEY GENERAL
2005 N CENTRAL AVE
MAIL DROP 1911
PHOENIX, AZ 85004

(x) MARIA VAN RAALTE, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P O BOX 6028
PHOENIX, AZ 85005-6028

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1964246-001-B
Appeals Board No. T-1964260-001-B
Appeals Board No. T-1964262-001-B

[redacted]

STATE OF ARIZONA ESA TAX UNIT

C/O DONALD BAIER, ASST AG
CFP/CLA SECTION
ARIZONA ATTORNEY GENERAL
2005 N CENTRAL AVE
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.

RIGHT TO APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** October 15, 2024 *****.

DECISION
AFFIRMED

THE **PETITIONER** petitioned for a hearing from the Department's Reconsidered Determination issued on November 30, 2023, which affirmed the

Department's Determination of Unemployment Insurance Liability on May 26, 2023, to [redacted], and a Determination of Unemployment Insurance Liability on January 6, 2023, to [redacted] and [redacted] (Determinations). The Reconsidered Determination held [redacted], [redacted], and [redacted] liable for UI tax on the basis of gross payroll of at least $1500 in a calendar quarter or employment of at least one employee for 20 weeks with a [redacted]% rate.

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 issues properly before this Board are:

(1) Whether the Petitioner is liable as a successor entity for the tax liability and tax rate of a predecessor entity; and

(2) Whether the Petitioner is liable for unemployment insurance tax on the basis of gross payroll of at least $1500 in a calendar quarter or employment of at least one employee for 20 weeks with a 2% rate.

The parties waived their right to an evidentiary hearing and agreed to have this matter decided by the Appeals Board based solely on the parties' written submissions. In accordance with the July 18, 2024, Order Granting Written Submission, the parties filed a Stipulated Statement of Facts, on August 8, 2024, the Petitioner filed its Legal Brief on August 8, 2024, and the Department filed its Legal Brief on August 8, 2024.

The parties offered exhibits A through U. The Appeals Board admits in evidence all the exhibits offered by the parties.

THE APPEALS BOARD FINDS the following facts based upon the record and the Stipulated Statement of Facts of the parties:

1. The Petitioner is [redacted], [redacted], and [redacted] ([redacted] Entities). The [redacted] Entities are Arizona limited liability companies in the business of owning and operating health care facilities.

2. The Department is a State Agency charged with the imposition, assessment, and collection of Arizona Unemployment Insurance taxes (UI Taxes).

3. Prescott Nursing Land Owner, LLC (Prescott Land Owner) was fee owner of a certain parcel of land known as: [redacted] Dougherty Street, Prescott, Arizona 86305 (Prescott ALF Land); and [redacted] Dougherty

Street, Prescott, Arizona 86305 (Prescott SNF Land).

4. Prescott Land Owner leased the Prescott ALF Land to Boulder Gardens Assisted Living, LLC (Prescott ALF Operator) on which Prescott ALF Operator operated an assisted living facility known as the Boulder Gardens Assisted Living Center (Prescott ALF Business).

5. Pioneer Health Employment Inc., an Arizona corporation, is a Professional Employee Organization or PEO that is in the business of "employment for skilled nursing facilities" (PHE).

6. On or about January 1, 2015, PHE hired all personnel employed by Prescott ALF Operator working for the Prescott ALF Business and leased those employees back to Prescott ALF Operator, leaving Prescott ALF Operator with no employees. As a result, the Department suspended Prescott ALF Operator's UI Tax Employer Account.

7. Prescott Land Owner leased the Prescott SNF Land to Prescott Nursing and Rehabilitation Center, LLC (Prescott SNF Operator) on which Prescott SNF Operator operated a skilled nursing facility known as the Prescott Nursing and Rehabilitation Center (Prescott SNF Business).

8. On or about January 1, 2015, PHE hired all personnel employed by Prescott SNF Operator for the Prescott SNF Business and leased those employees back to Prescott SNF Operator, leaving Prescott SNF Operator with no employees. As a result, the Department suspended Prescott SNF Operator's UI Tax Employer Account.

9. PMHC-Green Valley, LP (PMHC) was fee owner of a certain parcel of land known as [redacted] N. La Cañada Drive, Green Valley, Arizona, 85614 (Santa Rita SNF Land).

10. PMHC leased the Santa Rita SNF Land to Santa Rita Care Center, LLC (Santa Rita SNF Operator) on which Santa Rita SNF Operator operated a skilled nursing facility known as the Santa Rita Care Center (Santa Rita SNF Business).

11. On or about January 1, 2015, PHE hired all personnel employed by Santa Rita SNF Operator for the Santa Rita SNF Business and leased those employees back to the Santa Rita SNF Operator, leaving Santa Rita SNF Operator with no employees. As a result, the Department suspended/closed Santa Rita SNF Operator's UI Tax Employer Account.

12. Prescott Land Owner, Prescott ALF Operator, Prescott SNF Operator, and [redacted] ([redacted]) entered into a Purchase and Sale Agreement dated February 28, 2022 for

the purchase and the sale of the Prescott Land and all business and personal property used in connection with the operation of the Prescott ALF Business and the Prescott SNF Business (Prescott PSA).

13. Concurrent with the execution of the Prescott PSA, Prescott ALF Operator, PHE, and [redacted] entered into an Operations Transfer Agreement for the orderly transition of operational and financial responsibility for the Prescott ALF Business from Prescott ALF Operator to [redacted] (Prescott ALF OTA).

14. Under the Prescott ALF OTA, PHE was required to terminate the personnel employed by PHE and leased to Prescott ALF Operator for the Prescott ALF Business (Prescott ALF Staff), and [redacted] was required to use commercially reasonable efforts to hire at least 85% of the Prescott ALF Staff.

15. Pursuant to the Prescott ALF PSA and the Prescott ALF OTA, [redacted] acquired the business and personal property used in connection with the operation of the Prescott ALF Business effective June 1, 2022.

16. Pursuant to the Prescott ALF OTA, PHE terminated the employment of the Prescott ALF Staff and [redacted] hired the Prescott ALF Staff, effective June 1, 2022.

17. Concurrent with the execution of the Prescott PSA, Prescott SNF Operator, PHE, and [redacted] entered into an Operations Transfer Agreement for the orderly transition of operational and financial responsibility for the Prescott SNF Business from Prescott SNF Operator to [redacted] (Prescott SNF OTA).

18. Under the Prescott SNF OTA, PHE was required to terminate the personnel employed by PHE and leased to Prescott SNF Operator for the Prescott SNF Business, and [redacted] was required to use commercially reasonable efforts to hire at least 85% of the Prescott SNF Staff.

19. Pursuant to the Prescott SNF PSA and the Prescott SNF OTA, [redacted] acquired the business and personal property used in connection with the operation of the Prescott SNF Business effective June 1, 2022.

20. Pursuant to the Prescott SNF OTA, PHE terminated the employment of the Prescott SNF Staff and [redacted] hired the Prescott SNF Staff, effective June 1, 2022.

21. PMHC, Santa Rita SNF Operator, and [redacted], an Arizona limited liability company ([redacted]) entered into a Purchase and Sale Agreement dated February 28, 2022 for the purchase and sale of the Santa Rita SNF Land and all business and personal property used in connection with the operation of the Santa Rita SNF Business (Santa Rita SNF PSA).

22. Concurrent with the execution of the Santa Rita SNF PSA, Santa Rita SNF Operator, PHE, and [redacted] entered into an Operations Transfer Agreement for the orderly transition of operational and financial responsibility for the Santa Rita SNF Business from Santa Rita SNF Operator to [redacted] (Santa Rita SNF OTA).

23. Under the Santa Rita SNF OTA, PHE was required to terminate the personnel employed by PHE and leased to Santa Rita SNF Operator for the Santa Rita SNF Business (Santa Rita SNF Staff) and [redacted] was required to use commercially reasonable efforts to hire at least 85% of the Santa Rita SNF Staff.

24. Pursuant to the Santa Rita SNF PSA and the Santa Rita SNF OTA, [redacted] acquired the business and personal property used in connection with the operation of the of Santa Rita SNF Business.

25. Pursuant to the Santa Rita SNF OTA, PHE terminated the employment of the Santa Rita SNF Staff and [redacted] hired the Santa Rita SNF Staff, effective February 1, 2023.

26. On or about June 13, 2022, PHE and [redacted] submitted to the Department an Application and Agreement for Severable Portion Experience Rating Transfer pertaining to the transfer of the Prescott ALF Staff from PHE, as predecessor employer, to Haven Health Prescott ALF, as the successor employer, effective June 1, 2022.

27. On or about June 13, 2022, PHE and [redacted] submitted to the Department an Application and Agreement for Severable Portion Experience Rating Transfer pertaining to the transfer of the Prescott SNF Business from PHE, as predecessor employer, to [redacted], as the successor employer, effective June 1, 2022.

28. On or about May 26, 2023, PHE and [redacted] submitted to the Department an Application and Agreement for Severable Portion Experience Rating Transfer pertaining to the transfer of the Santa Rita SNF Staff from PHE, as the successor employer, effective February 1, 2023.

29. The Department denied the [redacted], [redacted] and [redacted] Applications to Transfer as follows: "Your request for a transfer of a portion of the experience rating account of Pioneer Heath Employment, Inc. [PHE] for the referenced accounts is denied because you do not meet the requirements as a successor employer per A.R.S. §23-733. PHE is a Professional Employee Organization (PHO) who contracts to lease employees only. They did not own any part of the business you acquired and therefore there in no transfer of experience available because you are not successor to that business.

30. On January 1, 2022, the Department issued to [redacted] a superseding Determination of Unemployment Insurance Liability with a UI Tax Rate of [redacted]% for 2022 and 2023, effective April 1, 2022 (Determination – [redacted]).

31. On January 1, 2022, the Department issued to [redacted] a superseding Determination of Unemployment Insurance Liability with a UI Tax Rate of [redacted]% for 2022 and 2023, effective April 1, 2022 (Determination - [redacted]).

32. On May 26, 2022, the Department issued to [redacted] a superseding Determination of Unemployment Insurance Liability with a UI Tax Rate of [redacted]% for 2023, effective January 1, 2023 (Determination - [redacted]).

33. On August 30, 2023, the [redacted] Entities requested a reconsidered determination of the Department's denial of the [redacted] Applications to Transfer.

34. On November 30, 2023, the Department issued its Reconsidered Determination affirming the Department's denial of the [redacted] Applications to Transfer.

35. On December 14, 2023, the Petitioner filed its petition appealing the Reconsidered Determination to the Appeals Board.

REASONING AND CONCLUSIONS OF LAW

Arizona uses a "reserve ratio" system to determine the tax rates for an employer. A new employer (other than a successor to a liable employer) is assigned a tax rate of 2% for a minimum of two calendar years. An employer may be eligible for a higher or lower tax rate depending on:

1. The amount of taxes paid;

2. The amount of unemployment benefits paid to former employees and charged to the employer; and

3. The average size of the employer's annual taxable payroll.

An employer's experience rate is determined by the reserve ratio. The ratio is calculated each year by adding the taxes paid in and subtracting the benefit payments from the accumulated reserve and then dividing by the employer's average taxable payroll. The average taxable payroll is the average of up to three fiscal years depending on how long the employer has paid wages. The reserve ratio, which can be either positive or negative, determines the rate an employer will be assigned. The tax liability and tax rate of a predecessor entity can be transferred to the successor entity.

In this case, the Petitioner disputes the Reconsidered Determination that held [redacted], [redacted], and [redacted] liable for UI tax on the basis of gross payroll of at least $1500 in a calendar quarter or employment of at least one employee for 20 weeks with a [redacted]% rate.

The Petitioner contends that, under A.R.S. §§ 23-613 and 23-733, the Department should have determined each of the [redacted] Entities' UI tax rates based upon being a successor employer to Pioneer Health Employment Inc.

Arizona Revised Statutes § 23-613, provides in pertinent part:

Employer

A. "Employer" means:

***

2. Any employing unit:

(a) That after December 31, 1971 for some portion of a day in each of twenty different calendar weeks, whether or not the weeks are or were consecutive, in either the current or the preceding calendar year, has or had in employment at least one individual irrespective of whether the same individual was in employment in each day.

(b) That after December 31, 1971 in any calendar quarter in either the current or preceding calendar year, paid for

service in employment wages of one thousand five hundred dollars or more. ...

Arizona Revised Statutes § 23-733, provides in pertinent part:

Transfer of employer experience rating accounts to successor employer; liability of successor

A. When any employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of section 23-613, prior to such acquisition, and continues such organization, trade or business, the account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination.

B. An employing unit which succeeds to or acquires a distinct and severable portion of an organization, trade or business may apply for transfer of the account of the portion by filing with the department not later than one hundred eighty days after the date of acquisition a written application for transfer, approved in writing by the predecessor, except that for good cause shown the department may extend the time for filing the application. The account of the acquired portion shall be transferred to the successor as of the date of acquisition only if the successor continues to operate the acquired portion and submits necessary information establishing the separate identity of the account within thirty days after the request for the necessary supporting payroll information is mailed to the successor by the department, except that for good cause shown the department may extend the time for submitting such supporting information. The predecessor and successor employers shall be promptly notified of the determination made upon the application which shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the parties' files with the department a written request for reconsideration. When timely request for reconsideration is filed, a reconsidered determination shall be made. The reconsidered determination shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the employing units involved files with the department a written petition for hearing. When timely petition for hearing is filed, the parties

> shall be afforded an opportunity for hearing and thereafter furnished with a decision. The decision shall become final unless a petition for review is filed as provided in section 23-672. ...

The Petitioner alleges that PHE was a "co-employer of the individuals working at Santa Rita, Boulder Gardens and Prescott Nursing" and that PHE "was fully operating several nursing facilities and performing business for them". The Petitioner states that the PHE employees "performed each and every job function of the former entities and that the former entities would not have been able to operate otherwise." The Petitioner notes, as example, that "the Executive Director of each of the former entities, each of whom were required to hang their administrator's license physically in the buildings operated by PHE. Without said licenses, the Former Entities would not have legally been permitted to operate, provide care, or lease employees".

We agree that under Arizona's Professional Employer Organizations statute, A.R.S. § 23-561 et seq., PHE is considered a co-employer. However, PHE's status as a co-employer does not establish that PHE was involved in the management or operation of the Former Entities' businesses. As stipulated by the parties as fact, PHE is a Professional Employee Organization that is in the business of "employment for skilled nursing facilities." Consequently, PHE's business is leasing employees, not operating a nursing facility. Further, PHE had not entered into a Purchase and Sale Agreement with the Haven Entities and was only a party pursuant to the Operations Transfer Agreement.

On February 28, 2022, Prescott Land Owner, Prescott ALF Operator, Prescott SNF Operator, and [redacted] entered into a Purchase and Sale Agreement for the purchase and the sale of the Prescott Land and all business and personal property used in connection with the operation of the Prescott ALF Business and the Prescott SNF Business (Prescott PSA). On February 28, 2022, PMHC, Santa Rita SNF Operator, and [redacted] entered into a Purchase and Sale Agreement for the purchase and sale of the Santa Rita SNF Land, and all business and personal property used in connection with the operation of the Santa Rita SNF Business (Santa Rita SNF PSA). [redacted], [redacted], and [redacted] acquired the business and personal property used in connection with the operation of the Prescott ALF Business, Prescott SNF Business, and Santa Rita SNF Business, respectively. PHE was not a party to either the Prescott PSA or the Santa Rita SNF PSA.

Concurrent with the execution of the Prescott PSA and the Santa Rita SNF PSA: Prescott ALF Operator, PHE, and [redacted] entered into an Operations Transfer Agreement (Prescott ALF OTA); Prescott SNF Operator, PHE, and [redacted] entered into an Operations Transfer Agreement (Prescott SNF OTA); and Santa Rita SNF Operator, PHE, and [redacted] entered into an Operations Transfer Agreement (Santa Rita SNF

OTA). Pursuant to the terms of the Prescott ALF OTA, Prescott SNF OTA, and Santa Rita SNF OTA, PHE was required to terminate the employment of the employees previously leased to the [redacted] Entities by PHE, while the [redacted] Entities were required to use commercially reasonable efforts to hire at least 85% of the personnel.

In this case, there is no evidence to suggest that the [redacted] Entities succeeded or acquired PHE, or substantially all of its assets. PHE was only required to terminate the personnel that it had previously leased to the [redacted] Entities, with the [redacted] Entities using commercially reasonable efforts to hire at least 85% of the personnel. However, there is nothing to suggest that PHE did not continue its operations with other customers after the acquisitions by the [redacted] Entities. Consequently, the evidence in this case does not establish a succession to or acquisition of all, or substantially all the assets of a predecessor, pursuant to A.R.S. § 23-733(A).

Further, there is no evidence to suggest that the [redacted] Entities acquired a distinct and severable portion of PHE's business, pursuant to A.R.S. § 23-733(B). According to the terms of the Prescott ALF OTA, Prescott SNF OTA, and the Santa Rita SNF OTA, the [redacted] Entities were only required to hire a percentage of the formerly leased PHE employees. The [redacted] Entities did not acquire any assets or resources that PHE used to support the leasing of those employees, such as office buildings and facilities, etc. In this case, the [redacted] Entities simply acquired a percentage of the PHE employees that had been previously leased, based on the requirement to use commercially reasonable efforts to hire at least 85% of the employees. Consequently, the evidence in this case does not establish that the [redacted] Entities acquired a distinct and severable portion of PHE pursuant to A.R.S. § 23-733(B).

Regarding business transfers, Arizona Administrative Code § R6-3-1713, provides in pertinent part:

A. General

1. The manner in which an organization, trade or business is acquired or succeeded to is not determinative of successor status. Business may be acquired or succeeded to "in any manner" which includes, but is not limited to, acquisition by purchase, lease, repossession, bankruptcy proceedings, default, or through the transfer of a third party.

2. An "organization, trade or business" as used in A.R.S. §§ 23-613 and 23-733(A) through (D) is acquired if the factors of an employer's organization, trade or business succeeded to are sufficient to constitute an entire existing operating business unit as distinguished from the acquisition of merely dry assets from which a new business may be built. The question of whether an organization, trade or business is acquired is

determined from all the factors of the particular case. Among the factors to be considered are:

a. The place of business

b. The trade name

c. The staff of employees

d. The customers

e. The goodwill

f. The inventory

g. The accounts receivable/accounts payable

h. The tools and fixtures

i. Other assets.

3. For the purpose of determining successorship status under A.R.S. §§ 23-613(A)(3) and 23-733(A) or (B), an individual or employing unit who in any manner acquires or succeeds to all or a part of an organization, trade or business from an employer as defined in A.R.S. § 23-613 shall be deemed the successor employer provided the organization, trade or business is continued. Continuation of the organization, trade or business shall be presumed if the normal business activity was not interrupted for more than 30 days before or after the date of transfer. ...

Pursuant to § R6-3-1713(A)(2), an "organization, trade or business" is acquired if the factors of an employer's organization, trade or business succeeded to are sufficient to constitute an entire existing operating business unit. Among the factors to be considered are the place of business, the trade name, the staff of employees, the goodwill, the inventory, the accounts/receivable/accounts payable, the tools and fixtures, and other assets.

In this case, the [redacted] Entities did not acquire the place of business, trade name, goodwill, accounts/receivable/accounts payable, tools and fixtures, or other assets from PHE. Regarding the acquisition of PHE's staff of employees or customers, the [redacted] Entities were only required to use commercially reasonable efforts under the terms of the Prescott ALF OTA, Prescott SNF OTA, and Santa Rita SNF OTA, to hire at least 85% of the personnel that had previously been leased to the [redacted] Entities by PHE. Further, there is no evidence that PHE discontinued its operations in leasing personnel to other customers.

Consequently, an analysis of the factors to be considered under § R6-3-1713(A)(2) indicates that an entire existing operating business unit was not sold to the [redacted] Entities or acquired by the [redacted] Entities.

Under § R6-3-1713(A)(3), a successor to all or part of an organization, trade or business under A.R.S. §§ 23-613(A)(3) and 23-733(A) or (B) is deemed the successor employer provided the organization, trade, or business is continued. Here, as stipulated by the parties, PHE is a Professional Employee Organization that is in the business of "employment for skilled nursing facilities." The [redacted] Entities, on the other hand, are in the business of owning and operating health care facilities. Consequently, PHE's business generating enterprise was not operating a nursing facility but rather leasing employees, which was not continued.

In *Conference Resource Specialists of Arizona, Inc. v. Department of Economic Security Appeals Board*, 199 Ariz. 314, 317-18, 18 P.3d 108, 111-12 (App. 2001) (*Conference Resource Specialists)*, the Arizona Court of Appeals determined that A.A.C. R6–3–1713(A)(3) did not provide or imply that any identifiable fraction or component of an organization, trade or business could be deemed equivalent to the organization, trade or business itself, stating that "[t]he introductory clause of the first sentence of R6–3–1713(A)(3) refers to both subsections (A) and (B) of A.R.S. section 23–733. In turn, section 23–733(A) concerns succession to or acquisition of an entire organization, trade or business, or substantially all its assets, whereas section 23–733(B) concerns succession to or acquisition of "a distinct and severable portion" of an organization, trade or business [and that reference] to "a part of" an organization, trade or business simply applies the general "continuation" principles of that provision to the transfer of an account for a distinct, severable portion of an employing unit."

In addressing the "staff of employees" factor under § R6-3-1713(A)(2), the Court of Appeals stated that the "employees certainly were distinct from the employing unit but plainly not "severable" from it. Indeed, the status of an employer's "staff of employees" is only one of nine distinct factors to be considered in determining whether an "organization, trade or business" has been acquired".

The tests for successor transition are set forth in A.R.S. § 23-733(A) and § 23-733(B) and are supplemented by implementation factors in Arizona Administrative Code, Section R6-3-1713 and by case law, including *Conference Resource Specialists*. In this case, the [redacted] Entities did not acquire all, or substantially all of PHE's assets within the meaning of A.R.S. § 23-733(A), nor did it acquire a distinct and severable portion of PHE's business within the meaning of A.R.S. § 23-733(B). The hiring of a percentage of former PHE employees by the [redacted] Entities is not an acquisition sufficient to constitute an entire existing operating business unit. We conclude the Petitioner has not

presented sufficient evidence to establish successor status. Furthermore, the Petitioner has not disputed that the [redacted] Entities had gross payroll of at least $1500 in a calendar quarter or employment of at least one employee for 20 weeks. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Reconsidered Determination dated November 30, 2023, regarding the successor status of [redacted], [redacted], and [redacted].

[redacted], [redacted], and [redacted] are liable for UI tax on the basis of gross payroll of at least $1500 in a calendar quarter or employment of at least one employee for 20 weeks with a [redacted]% rate.

DATED: 9/13/2024

APPEALS BOARD

[redacted]

NANCY MILLER, Chairman

[redacted]

DENISE E. MOORE, Member

[redacted]

PETER J. LANSDOWNE, Acting Member

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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 9/13/2024 to:

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By: _LS_____
For The Appeals Board