Unemployment Insurance Tax Program

Appeals Board Decisions – 2015

1st QUARTER OF
CALENDAR YEAR 2015

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1461108-001-B

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STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

March 30, 2015 ***.

DECISION

SET ASIDE (Department's Reconsidered Determination dated 6/10/2014)
SET ASIDE AND REMANDED (Determination of Liability for Employment or Wages dated 3/14/2014)
SET ASIDE AND REMANDED (Determination of Unemployment Insurance Liability dated 3/14/2014)

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination letter issued on June 10, 2014, which affirmed the Determination of Liability for Employment or Wages and the Determination of Unemployment Insurance Liability issued on March 14, 2014. The Reconsidered

Determination held that "the services of [sales representative JN] were correctly determined to constitute employment and all forms of remuneration paid for such services constitutes 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, which was convened on **December 19, 2014,** before Appeals Board Administrative Law Judge Eric T. Schwarz. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the services performed by individuals as sales representatives constituted employment effective July 1, 2013, as defined in A.R.S. § 23-615.
2. Whether the services performed by individuals as sales representatives are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
3. Whether all forms of remuneration paid to individuals for services as sales representatives constitutes wages as defined in A.R.S. § 23-622.

On the scheduled date of the hearing, the Employer appeared with two witnesses, one of whom testified. Counsel for the Department was present, and two witnesses for the Department appeared and testified. Board Exhibits 1 through 16 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS from the record that it is not possible to decide the issues presented because the Department has not established a rational or valid legal basis for the Department's disparate treatment of the two workers who were identified by the Department as having performed services as sales representatives for the Employer. As a result, the matter must be remanded to the Department for further action.

The Department issued a Determination of Liability for Employment or Wages on March 14, 2014, which specifically held that "sales representatives" were determined by the Department to be employees of the Employer (Bd. Exh. 4). That determination was prepared and issued by Department Field Auditor "CG" based upon CG's investigation into the employment status of the sales representatives (Bd. Exhs. 1, 2, 4).

In a narrative prepared by CG, she wrote, in part, as follows:

> No audit was conducted because the employer is based in New York. The employer does not have any presence in Arizona. All records are located in New York. ["ES"], Chief Financial Officer, ["TFG"] and authorized representative of the employer, emailed the information and documents with reference to **the workers here in AZ. According to him, they had two independent contractors who for a very short time performed services for them here in AZ. He further stated that they no longer have workers here in AZ. Copies of the contract agreements of the two workers were submitted. It was verified that the other worker owns a company called ["A LLC"]. Subject worker is determined to be a legitimate contractor** (Bd. Exh. 2B). [Emphasis added]

Additionally, we note that in a document entitled "Common Law Employment", CG indicated that "Services determined in employment" were "sales representatives", and she proceeded to use the plural term "sales representatives" seven more times in that document, along with using the plural term "workers" six times and the plural pronouns "they", "their", or "them" 11 times (Bd. Exhs. 2D, 2E).

Despite the fact that CG acknowledged that the Employer had two sales representatives providing services to the Employer in Arizona, CG only included one of the sales representatives, "JN", on the "REPORT OF WAGES PAID EACH EMPLOYEE" (Bd. Exh. 5B). In that report, CG did not include the second sales representative [hereinafter "sales representative X"] that she referenced in Board Exhibit 2B. We note that the Department's June 10, 2014 Reconsidered Determination only addresses sales representative JN and makes no reference to sales representative X.

CG did not appear at the Appeals Board hearing to explain or defend her investigation or her March 14, 2014 determinations. Based upon CG's written statements, the only logical conclusion to draw is that CG's only basis for simply declaring that sales representative X was a "legitimate contractor" was the fact that sales representative X had a Limited Liability Company [hereinafter "LLC"]. CG sets forth no other basis for this conclusion, and there is no indication that CG engaged in any type of thorough analysis regarding the actual working relationship between sales representative X and the Employer.

At the Appeals Board hearing, the Department was unable to articulate any basis for the disparate treatment of JN and sales representative X other than the fact that sales representative X had an LLC. This is illustrated by the following

exchange between the Administrative Law Judge and Department witness "TO", an Unemployment Tax Analyst:

> ALJ: 'It was verified that the other worker [sales representative X] owns a company called [A LLC]. [Sales representative X] is determined to be a legitimate contractor.' I'm just...I'm just trying to figure out here...did we have two people [JN and sales representative X] doing exactly the same thing under the exact the same agreement?
>
> TO: I do not know, your honor.
>
> ALJ: Did you think to look into that?
>
> TO: Well no, because we didn't...because the other person [sales representative X] I guess if you wanna call it that, the other one was a business and [A LLC] they actually had an LLC, and when I spoke to [JN] he said he didn't have a business. So he wasn't like [A LLC].
>
> ALJ: Well, my point I'm trying to get to is...if we have two people doing exactly the same thing, under exactly the same agreements, and exactly the same terms, and one is being paid directly in their name and one is being paid to an LLC, is it the Department's position that that factor alone, being paid to an LLC, makes it an independent contractor arrangement as opposed to an employer/employee relationship?
>
> TO: What I'm saying is we're not looking at the relationship with the [A LLC] because they are truly a legitimate business. So we don't question that relationship. When they don't have an LLC or corporation, we have to question the relationship.
>
> ALJ: **So anytime someone has an LLC, automatically they're not an employee?**
>
> TO: **Yes, your honor.** [Emphasis added]

Here, TO unequivocally admitted that the Department's position is that any worker who simply has an LLC is automatically considered not to be an employee by the Department, and that the Department does not even look at or

question the relationship between such a worker and any employer. TO reiterated this position later in the hearing when she testified that "if [the Employer] paid only LLC's they would have no more issues with the Department." Furthermore, these admissions substantiate the conclusion that CG never examined the actual relationship between sales representative X and the Employer before simply declaring that sales representative X was a "legitimate contractor".

The Department has failed to present any legal authorities to support this position, and the Board finds it untenable. Just as it is possible for a worker who does not have an LLC to be an independent contractor, it is also possible for a worker who has an LLC to be an employee. It is entirely dependent on the actual working relationship between the worker and the Employer, yet here the Department presented no evidence to establish that any such analysis was done regarding sales representative X.

The Department presented no evidence to establish that the circumstances under which JN provided services to the Employer differed in any way from circumstances under which sales representative X provided services to the Employer, other than the fact that sales representative X had an LLC while JN did not. The Board finds that that single difference alone is not sufficient to establish that JN and sales representative X should be treated differently by the Department when determining the employment status of the two workers. The Department established no rational basis for the disparate treatment of JN and sales representative X in this case and, therefore, the Department failed to establish a *prima facie* case sufficient to support the March 14, 2014 Determination of Liability for Employment or Wages.

Generally, the Board would set forth a detailed analysis of the 18 factors set out in Arizona Administrative Code, Sections R6-3-1723(D)(2) and R6-3-1723(E), regarding the relationship between the sales representatives and the Employer. However, the Board sees no reason to engage in that exercise here since the Department failed to carry its burden of proof and failed to establish a *prima facie* case to support the March 14, 2014 Determination of Liability for Employment or Wages, as the Department has failed to establish a rational basis for its disparate treatment of the two sales representatives who provided services to the Employer. Accordingly,

THE APPEALS BOARD **SETS ASIDE** the Department's Reconsidered Determination dated June 10, 2014, based upon the evidence of record.

THE APPEALS BOARD **SETS ASIDE** the Determination of Liability for Employment or Wages dated March 14, 2014, based upon the evidence of record.

THE APPEALS BOARD **SETS ASIDE** the Determination of Unemployment Insurance Liability dated March 14, 2014, based upon the evidence of record.

THE APPEALS BOARD **REMANDS** the matter to the Department for further investigation. We note that this matter involves, at most, two sales representatives who provided services to the Employer for a short period of time some years ago, and that the Employer no longer does business in Arizona. If the Department concludes that further expenditure of time and resources on this matter is warranted, it may issue a new determination from which a timely appeal may be taken by the party adversely affected. If the Department decides to follow that course of action, it should be prepared to explain in detail its analysis of the employment status of both JN and sales representative X, particularly if the Department treats them differently.

DATED: 2/27/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
   1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
      - If there is no postmark, the postage meter-mark on the envelope in which it is received.
      - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
   2. On the date it is received by the Department, if not sent by USPS.

   You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.

C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
   1. explains why the Appeals Board decision is wrong,
   2. cites the record, rules and other authority, and
   3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 2/27/2015
to:

(x) Er: ##### Acct. No: #####-000

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

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

By: __RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1444791-001-B

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STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

February 19, 2015 ***.

DECISION
REVERSED

THE **EMPLOYER**, through counsel, petitioned for hearing from the Department's Reconsidered Determination issued on February 12, 2014, which affirmed the Determination of Liability for Employment or Wages issued on May 21, 2012. The Reconsidered Determination held that "the services of the homeworkers were correctly determined to constitute employment and all forms of remuneration paid for such services constitutes 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, which was convened on **July 24, 2014**, before Appeals Board Administrative Law Judge Eric T. Schwarz. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer had good cause for its nonappearance at the scheduled hearing on June 19, 2014.
2. Whether the services performed by individuals as homeworkers constituted employment effective January 1, 2011, as defined in A.R.S. § 23-615.
3. Whether the services performed by individuals as homeworkers are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
4. Whether all forms of remuneration paid to individuals for services as homeworkers constitutes wages as defined in A.R.S. § 23-622.

We note that the May 21, 2012 Determination of Liability for Employment or Wages listed four categories of workers: homeworkers, mailroom workers, temporary customer service workers, and probationary workers (Bd. Exh. 3). The Department's February 12, 2014 Reconsidered Determination, however, only addressed the employment status of the category known as homeworkers, and cited the following basis for that decision:

> In your [i.e., counsel for the Employer] letter you concede at the outset that services performed by individuals as mailroom workers, temporary customer service workers and probationary workers constitute employment and all forms of remuneration paid for such services constitute wages (Bd. Exhs. 7, 8A-G).

At the July 24, 2014 Appeals Board hearing, counsel for the Employer acknowledged that the only category of workers still disputed by the Employer is the category known as homeworkers (Tr. pp. 15, 16). Additionally, the Department and the Employer agree that two out-of-state workers, "AJ" and "DH", were not employees of the Employer (Tr. pp. 15, 16; Exhs. 7, 8A-G).

Therefore, this decision will be limited to examining the employment status of those individuals who performed services as homeworkers, excluding AJ and HD.

On July 24, 2014, counsel for the Employer and one Employer witness appeared and testified at the hearing. Counsel for the Department was present, and one witness testified for the Department. Board Exhibits 1 through 13 were admitted into evidence. We have carefully reviewed the record.

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

1. The Employer is a company that handles rebate applications submitted to its clients (Tr. p. 78). When the Employer receives mail-in rebate forms, it puts the mail from each promotion into batches, which the homeworkers then pick up from the Employer's place of business (Tr. p. 79). The homeworkers then enter the rebate data into the Employer's Internet "application", submit the completed data to the Employer, and return the processed mail batches to the Employer (Tr. p. 79).

2. On May 21, 2012, the Department issued a Determination of Liability for Employment or Wages which held that the "[s]ervices performed by individuals as Homeworkers . . . constitute employment" for the quarters ending March 31, 2011 through December 31, 2011 (Bd. Exh. 3). The Department also issued a Notice of Assessment and a Report of Wages Paid Each Employee that identified specific persons held to be employees and their wages for this period (Bd. Exh. 4A-F).

3. The Employer did not prohibit the use of assistants by the homeworkers, and some of the homeworkers used assistants (Tr. pp. 81-85).

4. The homeworkers received no instructions from the Employer regarding when or where to complete the work (Tr. pp. 91, 92, 99, 122). The only instruction given by the Employer regarding "how" a homeworker was to work was the instruction that the homeworker enter the pertinent data into the Employer's Internet "application" for submission (Tr. pp. 87-90, 95, 96). The homeworkers, however, were free to enter the data into the Internet application in any order they wished (Tr. pp. 95, 96).

5. The homeworkers were not required to submit either written or oral reports to the Employer (Tr. p. 91).

6. While most of the homeworkers performed their work at home, the homeworkers were free to perform their work anywhere they

chose so long as it was not on the Employer's premises (Tr. pp. 91, 92, 122).

7. The Employer was indifferent as to who completed any particular job (Tr. pp. 81-85, 92-95).

8. The Employer gave the homeworkers no instruction as to work sequence, and the homeworkers set their own schedules (Tr. pp. 95, 96, 99).

9. The Employer maintained the right to end its relationship with any of the homeworkers at any time without notice (Tr. pp. 96-98). Additionally, the homeworkers were free to end the relationship with the Employer at any time without penalty (Tr. pp. 97, 98).

10. The homeworkers were not required by the Employer to work any set number of hours by the Employer. The homeworkers were free to set their own hours, and they could work as much, or as little, as they wished (Tr. pp. 89, 99, 101, 116-119). The homeworkers were free to manage their time to work elsewhere, and free to work for other entities (Tr. pp. 101, 116-119; Bd. Exh. 6).

11. The homeworkers were presumed to be skilled and proficient at data entry and were not given any data entry training by the Employer (Tr. pp. 101-104). The only training provided by the Employer dealt with showing the homeworkers how to log on to the Employer's Internet application and discussing mail handling procedures. This training typically lasted only one to two hours (Tr. pp. 90, 101-104, 120, 121). The Employer did not provide any on-going training to the homeworkers after that (Tr. pp. 103, 104).

12. The Employer did not furnish the homeworkers with tools or materials (Tr. pp. 105, 106). The homeworkers provided their own computer, Internet connection, and travel (Tr. p. 105). The only thing the Employer provided to the homeworkers was access to its Internet application (Tr. pp. 105, 106, 113-115).

13. The homeworkers were not reimbursed by the Employer for any business or travelling expenses in the course of their work (Tr. pp. 106, 107).

14. The Employer did not prohibit the homeworkers from working for others, and at least some of the homeworkers, in fact, worked for others (Tr. pp. 101, 108, 109; Bd. Exh. 6). The "Homeworker Agreement" that the Employer entered into with the homeworkers states, in part: "[The homeworker] is not required to perform the described services exclusively for [the

Employer], and may also perform any other work of [the homeworker's] choice" (Bd. Exh. 6).

15. The homeworkers were compensated solely on a piece rate basis, typically 10 cents per submission, and were not paid by the hour, week, or month (Tr. pp. 99, 110; Bd. Exh. 6).

16. On April 9, 2014, a Notice of Appeals Board Telephone Hearing [hereinafter "the Notice"] setting a hearing date and time for June 19, 2014, at 9:00 a.m. was mailed to the Employer's counsel, "BH" (Bd. Exh. 10). BH received the Notice in a timely manner (Tr. pp. 8, 9).

17. When BH received the Notice, he mistakenly entered into his computer's calendar that the hearing was on Monday, June 23, 2014, rather than on Thursday, June 19, 2014 (Tr. pp. 9, 10; Bd. Exh. 11).

18. The Employer did not appear at the June 19, 2014 Appeals Board hearing because BH had erroneously entered the hearing date into his calendar as June 23, 2014 (Tr. pp. 9-14; Bd. Exh. 11). BH did not discover his error until the afternoon of June 19, 2014, by which time a default had already been entered against the Employer for failing to appear at the hearing that morning (Tr. p. 10; Bd. Exh. 11).

19. On June 26, 2014, the Employer, through counsel, filed a timely request to reopen the June 19, 2014 Appeals Board hearing (Bd. Exh. 11).

The initial issue to be addressed by the Board is whether the Employer established good cause for its nonappearance at the June 19, 2014 Appeals Board hearing, such that the Employer's request to reopen this case should be granted.

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

> The department of economic security shall adopt rules to set standards under which a party may be excused for failure to attend a hearing for good cause.

Arizona Administrative Code, Section R6-3-1503, provides in pertinent part as follows:

* * *

B. Appeal Tribunal hearings

* * *

3. Failure of a party to appear

a. If there is no appearance on behalf of an interested party at a scheduled hearing, the Appeal Tribunal may:

i. Adjourn the hearing to a later date; or

ii. Proceed to review the evidence of record and other admissible evidence as may be presented at the scheduled hearing, and make a disposition or decision on the merits of the case.

b. If a decision is issued adverse to any party that failed to appear at a scheduled hearing, that party may file 1 written request for a hearing to determine whether good cause exists to reopen the hearing. The request to reopen shall be filed within 15 calendar days of the mailing date of the decision or disposition and shall list the reasons for the failure to appear.

c. The Appeal Tribunal shall hold a hearing to determine whether there was good cause for the failure to appear and, in the discretion of the hearing officer, to review the merits of the case. Upon a finding of good cause for failure to appear at the scheduled hearing, the disposition or decision on the merits shall be vacated and the case rescheduled for hearing under R6-3-1502, unless the hearing on the merits is held concurrently with the good cause hearing.

d. Good cause warranting reopening of a case shall be established upon proof that both the failure to appear and failure to

> timely notify the hearing officer were beyond the reasonable control of the nonappearing party.
>
> * * *

In Maldonado v. Arizona Department of Economic Security, 182 Ariz. 476, 897 P.2d 1362 (App., 1994), the Court of Appeals held that the language in Arizona Administrative Code, Section. R6-3-1503(B)(3)(d), must be interpreted in such a way as to allow an "excusable neglect" standard to be considered in determining whether to reopen a hearing, similar to the test under Arizona Rule of Civil Procedure 60(c).

In interpreting the term "excusable neglect", as expressly included in Ariz. R. Civ. P. 60(c), Appellate Courts have held that such standard does not apply if the action occurred because of a party's mere neglect, inadvertence or forgetfulness without a reasonable excuse therefor, Daou v. Harris, 139 Ariz. 353, 678 P.2d 934 (1984). The term "excusable neglect" is not synonymous with carelessness, Ulibarri v. Gerstenberger, 178 Ariz. 151, 871 P.2d 698 (App. 1993), and a party claiming excusable neglect must have promptly sought relief, Baker Intern. Associates, Inc. v. Shanwick Intern. Corp., 174 Ariz. 580, 851 P.2d 1379 (App. 1993). The standard for determining whether an action constitutes "excusable neglect" is whether the neglect involves an error such as might be made by a reasonably prudent person who attempted to handle a matter in a prompt and diligent fashion. Beal v. State Farm Mutual Automobile Insurance Co., 151 Ariz. 514, 729 P.2d 318 (App. 1986).

At the July 24, 2014 Appeals Board hearing, counsel for the Employer, "BH", testified credibly that the Employer failed to appear at the Appeals Board hearing scheduled for June 19, 2014, because he personally miscalendared the hearing date by erroneously entering into his computer's calendar that the hearing was scheduled for June 23, 2014 (Tr. pp. 8-14). BH's testimony was unrefuted.

In the Maldonado case cited above, the Arizona Court of Appeals specifically held that it was "excusable neglect", and therefore good cause for nonappearance, when a party's failure to appear at a scheduled hearing was caused by that party's error in entering on the party's calendar the incorrect time for a hearing. The Appeals Board follows the Arizona Court of Appeals' holding in Maldonado when such a fact pattern occurs.

Under the circumstances of this case, we conclude that the Employer has established good cause for its nonappearance at the Appeals Board hearing scheduled for June 19, 2014. The Employer's failure to appear was due to "excusable neglect" and involved an error such as might be made by a reasonably prudent person who attempted to handle a matter in a prompt and

diligent fashion. Therefore, under Maldonado, the Employer had good cause for its nonappearance at the June 19, 2014 Appeals Board hearing.

Having found that the Employer established good cause for its nonappearance at the hearing scheduled for June 19, 2014, the Board will now address the issue of the employment status of the homeworkers.

The Employer contends that the homeworkers were independent contractors and not employees. The employment status of the homeworkers, and whether their pay constituted wages, are in dispute in this case.

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

> "Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:
>
> 1. An individual's entire service performed within or both within and without this state if:
>
> (a) The service is localized in this state. ...
>
> * * *

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

> A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:
>
> 1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
>
> 2. An individual subject to the direction, rule or control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
>
> 3. An individual or class of individuals that the federal government has decided not to and

does not treat as an employee or employees for federal unemployment tax purposes.

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

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

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

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

A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.

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

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

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

1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person,

independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.

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

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

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

   c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

* * *

The primary issue pertaining to the homeworkers is whether the services of the homeworkers were excluded from the definition of “employee” by qualifying as an “independent contractor” pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provision cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the homeworkers. We further consider

the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

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

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

a. Authority over Individual's Assistants

Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

The Employer did not prohibit the use of assistants by the homeworkers, and some of the homeworkers used assistants (Tr. pp. 81-85). There is no evidence in the record to indicate that the Employer paid for any assistants for the homeworkers. This factor shows an absence of control, and indicates an independent relationship.

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or 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 homeworkers received no instructions from the Employer regarding when or where to complete the work (Tr. pp. 91, 92, 99, 122). The only instruction given by the Employer regarding "how" a homeworker was to work was that the homeworker enter the data into the Employer's Internet "application" for submission (Tr. pp. 87-90, 95, 96). The homeworkers, however, were free to enter the data into the Internet application in any order they wished (Tr. pp. 95, 96). By a preponderance of the evidence of record, this factor shows an absence of control, and indicates an independent relationship.

c. Oral or Written Reports

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

The homeworkers were not required to submit either written or oral reports to the Employer (Tr. p. 91). This factor shows an absence of control, and indicates an independent relationship.

d. Place of Work

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

While most of the homeworkers performed their work at home, the homeworkers were free to perform their work anywhere they chose so long as it was not on the Employer's premises (Tr. pp. 91, 92, 122). This factor shows an absence of control, and indicates an independent relationship.

e. Personal Performance

If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. The employing unit is interested not only in getting a desired result, but, also, in who does the job. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

The Employer was indifferent as to who completed any particular job (Tr. pp. 81-85, 92-95). This factor shows an absence of control, and indicates an independent relationship.

f. Establishment of Work Sequence

If a person must perform services in the order of sequence set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the 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 Employer gave the homeworkers no instruction as to work sequence (Tr. pp. 95, 96, 99). The homeworkers set their own schedules (Tr. pp. 95, 96, 99). As the homeworkers were free to establish their own work sequence, this factor shows an absence of control, and indicates an independent relationship.

g. Right to Discharge

The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control. The employing unit exercises control through the ever present threat of dismissal, which causes the worker to obey any instructions which may be given. The right of control is very strongly indicated if the worker may be terminated with little or no notice, without cause, or for failure to use specified methods, and if the worker does not make his services available to the public on a continuing basis.

The Employer maintained the right to end its relationship with any of the homeworkers at any time without notice (Tr. pp. 96-98). Since the homeworkers

could be dismissed with no notice, they did not possess the rights that one would expect in a contractual relationship. This factor shows control, and indicates an employment relationship.

h. Set Hours of Work

> The establishment of set hours of work by the employing unit is a factor indicative of control. This condition bars the worker from being master of his own time, which is a right of the independent worker. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.

The homeworkers were free to set their own hours (Tr. pp. 99, 101, 116-119). The homeworkers could work as much, or as little, as they wished (Tr. pp. 89, 99, 101, 116-119). The evidence of record does not establish that the Employer had any control over when the homeworkers performed their work. This factor shows an absence of control, and indicates an independent relationship.

i. Training

> Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, is a factor of control because it is an indication that the employer wants the services performed in a particular method or manner.

The homeworkers were presumed to be skilled and proficient at data entry and were not given any data entry training by the Employer (Tr. pp. 101-104). The only training provided by the Employer dealt with showing the homeworkers how to log on to the Employer's Internet application and discussing mail handling procedures, which typically lasted only one to two hours (Tr. pp. 90, 101-104, 120, 121). The Employer did not provide any on-going training to the homeworkers after that (Tr. pp. 103, 104). A preponderance of the evidence of record does not establish that the Employer wanted the services performed in a particular method or manner. This factor shows an absence of control, and indicates an independent relationship.

j. Amount of Time

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

The evidence of record does not establish that the homeworkers were required to work any set number of hours by the Employer. The homeworkers

were free to work as much, or as little, as they wished (Tr. pp. 89, 99, 101, 116-119). The homeworkers were free to manage their time to work elsewhere, and free to work for other entities (Tr. pp. 101, 116-119; Bd. Exh. 6). This factor shows an absence of control, and indicates an independent relationship.

k. Tools and Materials

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

The Employer did not furnish the homeworkers with tools or materials (Tr. pp. 105, 106). The homeworkers provided their own computer, Internet connection, and travel (Tr. p. 105). The only thing the Employer provided to the homeworkers was access to its Internet application (Tr. pp. 105, 106, 113-115). This factor shows an absence of control by the Employer, and indicates an independent relationship.

l. Expense Reimbursement

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses. Consideration must be given to the fact some independent professionals and consultants require payment of all expenses in addition to their fees.

The homeworkers were not reimbursed by the Employer for any business or travelling expenses in the course of their work (Tr. pp. 106, 107). This factor shows an absence of control by the Employer, and indicates an independent relationship.

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

l. Availability to the 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.

The Employer did not prohibit the homeworkers from working for others, and at least some of the homeworkers, in fact, worked for others (Tr. pp. 101, 108, 109; Bd. Exh. 6). The "Homeworker Agreement" that the Employer entered into with the homeworkers states, in part: "[The homeworker] is not required to perform the described services exclusively for [the Employer], and may also perform any other work of [the homeworker's] choice" (Bd. Exh. 6). This factor shows an absence of control, and indicates an independent relationship.

2. Compensation on Job Basis

An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent.

The homeworkers were paid on a piece rate basis, typically 10 cents per submission, and were not paid by the hour, week, or month (Tr. pp. 99, 110; Bd. Exh. 6). This factor shows an absence of control, and indicates an independent relationship.

3. Realization of Profit or Loss

An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position.

The record does not establish that the homeworkers were subject to any recurring liabilities or expenses connected with the work. As such, the homeworkers had no viable concerns of balancing receipts against expenditures. Therefore, this factor is neutral.

4. Obligation

An employee usually has the right to end his relationship with his employer at any time without incurring liability. 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.

The homeworkers were free to end the relationship with the Employer at any time without penalty (Tr. pp. 97, 98). This factor indicates an employment relationship.

5. Significant Investment.

> A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their particular 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.

The evidence of record does not establish that either the Employer or the homeworkers made any real investment, much less a "significant" investment, "in facilities used" by the homeworkers in performing their services. This is because the nature of the services provided, data entry into an Internet application, does not require any such investment. Therefore, this factor is neutral.

6. Simultaneous Contracts

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

The "Homeworker Agreement" that the Employer entered into with the homeworkers states, in part: "[The homeworker] is not required to perform the described services exclusively for [the Employer], and may also perform any other work of [the homeworker's] choice" (Bd. Exh. 6). The Employer did not prohibit the homeworkers from working for others, and at least some of the homeworkers, in fact, worked for others (Tr. pp. 101, 108, 109; Bd. Exh. 6). The evidence of record does not establish that the Employer placed any limitations on where a homeworker may contract for their services. This factor shows an absence of control, and indicates an independent relationship.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long

established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

> The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [*See* A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

> The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In accord with the Employment Security Law of Arizona, we conclude that the evidence of independent contractor status far outweighs the evidence of employee status as to the homeworkers.

The homeworkers were not employees of the Employer, effective January 1, 2011. Rather, they performed services pursuant to an independent contractor relationship. We conclude that all payments to the homeworkers for their services did not constitute wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD FINDS that the Employer established good cause for its nonappearance at the Appeals Board hearing scheduled for June 19, 2014.

THE APPEALS BOARD **REVERSES** the Department's Reconsidered Determination dated February 12, 2014.

From January 1, 2011 through December 31, 2011, services performed by individuals as homeworkers did not constitute employment, because the parties had an independent contractor relationship.

None of the remuneration paid to the homeworkers from January 1, 2011 through December 31, 2011, constituted wages.

DATED: 1/20/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

ROBERT NALL, Acting Member

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HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
   1. On the date of its postmark, if mailed through the United States Postal Service (USPS).

- If there is no postmark, the postage meter-mark on the envelope in which it is received.
- If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.

2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.

C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
1. explains why the Appeals Board decision is wrong,
2. cites the record, rules and other authority, and
3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 1/20/2015
to:

Er: ##### Acct. No: #####-000

(x) Er Rep: #####
ATTORNEY AT LAW

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

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

By: ____RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1444790-001-B

#####

STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** April 24, 2015 *****.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination issued on February 10, 2014, which affirmed the Determination of Liability for Employment or Wages issued on July 16, 2012. The Reconsidered Determination held that "services performed by individuals as counselors constitute employment and the remuneration paid for such services constitutes 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, which was originally convened on **May 1, 2014,** and was reconvened on **May 20, 2014,** before Appeals Board Administrative Law Judge Eric T. Schwarz. On those dates, all parties were given an opportunity to present evidence on the following issues:

1. Whether the services performed by individuals as counselors constituted employment effective January 1, 2010, as defined in A.R.S. § 23-615.
2. Whether the services performed by individuals as counselors are exempt or excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat the individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
3. Whether all forms of remuneration paid to individuals for services as counselors constitutes wages as defined in A.R.S. § 23-622.

On the scheduled dates of the hearing, one Employer witness appeared and testified. Counsel for the Department was present, and one witness for the Department appeared and testified. Board Exhibits 1 through 18 were admitted into evidence. We have carefully reviewed the record.

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

1. The Employer's company provided behavioral health services to clients through the services of its workers known as Behavioral Health Crisis Counselors [hereinafter "Counselors"] (Tr. pp. 20, 133, 134, 144-150; Bd. Exhs. 10, 12). The Counselors were required to comply with all of the requirements contained in the Employer's 29-page Crisis Services Agreement [hereinafter "CSA"] and the Employer's 80-plus-page Policies and Procedures [hereinafter "P&P"] (Tr. pp. 134, 135, 159, 160). The Employer ceased operations in March 2012 (Tr. p. 11).

2. The Counselors did not hire, supervise, or pay any assistants. The CSA states that the Counselors' "obligations under this Agreement may not be assigned or transferred to any other person, firm, or corporation without prior written consent of" the Employer (Bd. Exh. 10 p. 3). Each Counselor "was responsible for filling their own schedule" solely by contacting the Employer's other Counselors if he was unable to work a scheduled shift (Tr. p. 138).

3. The required instructions contained in the CSA included, but were not limited to, an 11-item list of what the Counselors' "crisis services will include", and the requirements that the Counselors "must furnish services that permit the [Employer] to comply with all applicable Medicare Conditions of Participation and Standards for contracted services for which [the Employer] is responsible" and "must meet the same standards for quality that [the Employer] would have to meet if services were provided by [the Employer]" (Bd. Exh. 10 pp. 1, 5). The P&P contained specific instructions that the Counselors were required to follow for providing such services identified as "Emergency Rooms Crisis Consult Protocol", "Protocol for Emergency Room Transfers to other providers", "Emergency Services", "Client Records", and "Admission Process and Delivery System" (Bd. Exh. 12 pp. 26-31, 41-43).

4. The CSA states, in part: "The assigned Clinical Care Coordinator is the direct supervisor to the COUNSELOR" [Emphasis in original] (Bd. Exh. 10 p. 18).

5. The Counselors were required to submit written reports to the Employer after every call they responded to on behalf of the Employer (Tr. pp. 149, 154, 177; Bd. Exhs. 10, 12). The Counselors primarily performed their services at locations other than the Employer's place of business (Tr. pp. 39, 40, 134, 173).

6. The Employer had the right to discharge the Counselors at any time and without any notice (Bd. Exh. 10 pp. 2, 3, 10, 17; Bd. Exh. 12 pp. 17-19). The P&P states that a Counselor "may be discharged 'at will' by the [Employer]" (Bd. Exh. 12 p. 17).

7. The Employer required the Counselors to commit to set hours of work every month, and those monthly schedules were set at least two weeks prior to the beginning of each month (Tr. pp. 137-140; Bd. Exh. 10 p. 2). Additionally, the Employer imposed discipline on the Counselors for failing to properly respond to calls from the Employer during their scheduled work hours, including placing Counselors on "probationary periods", dropping Counselors to "last in rotation" for scheduled weeks, or termination (Bd. Exh. 10 p. 17).

8. If a Counselor did not receive any calls from the Employer during a scheduled shift, then the Counselor would not be paid any money (Tr. pp. 141, 142). All full-time Counselors were required to work either Christmas or Thanksgiving every year (Tr. pp. 167, 168; Bd. Exh. 12 p. 23).

9. The Employer provided training to the Counselors during "orientation" and throughout the term of the working relationship between the Counselors and the Employer (Tr. pp. 161-163, 168-170; Bd. Exh. 10 pp. 16, 18; Bd. Exh. 12 pp. 8-16). Additionally, the Counselors were required by the Employer to attend mandatory meetings (Bd. Exh. 10 p. 18).

10. The Counselors could work either full-time or part-time for the Employer (Tr. p. 138; Bd. Exh. 10 p. 2). The Counselors were free to seek other employment when not working for the Employer (Tr. pp. 118, 119). The Counselors did not have independent businesses, but some of the Counselors were employees of other employers (Tr. pp. 61, 70).

11. The Counselors were generally paid 30% of the billable fees the Employer received from insurance companies for the services Counselors provided to clients (Tr. pp. 150, 151; Bd. Exh. 10 pp. 2, 23-29). If a client had no insurance and did not pay for the services, the Counselor received a flat fee from the Employer, while the Employer received nothing (Tr. p. 152).

12. The Counselors faced no meaningful expenses directly connected with the work, such as wages, rents, or other ongoing operating costs. The Counselors were subject to no significant recurring liabilities or obligations connected with the performance of the

work and, therefore, had no viable concerns of balancing receipts against expenditures.

13. The Counselors could terminate their working relationship with the Employer at any time without penalty (Tr. p. 120; Bd. Exh. 10 p. 2; Bd. Exh. 12 p. 17).

14. The Counselors did not make any significant investment to perform services for the Employer, other than maintaining their licenses. The Counselors were required to possess their licenses before they began performing services for the Employer. The Counselors provided their own vehicles for work, but those vehicles were also available for personal use (Tr. p. 117). The Employer did not provide any equipment for use by the Counselors (Tr. p. 117).

15. In the section entitled "Terminations", the Employer's P&P specifically states that Counselors are subject to "a layoff" when "a reduction in force is necessary or if one or more positions are eliminated" (Bd. Exh. 12 p. 18). Regarding "layoffs", the P&P also states that the Counselors have an "anniversary date" (Bd. Exh. 12 p. 18). Furthermore, the P&P specifically states that the Counselors may receive severance pay in the form of "one week pay ***for each year of employment with***" the Employer up to a maximum of four weeks [Emphasis added] (Bd. Exh. 12 p. 18).

16. The P&P states that Counselors "earn two (2) weeks of PTO per year" (Bd. Exh. 12 p. 22). PTO stands for "personal time off", and the Counselors do not actually "earn" PTO but are simply granted two weeks of unpaid PTO each year that they can use to request time off from their set schedules (Tr. pp. 164-167).

The Employer contends that the Counselors were independent contractors and not employees. The employment status of the Counselors and whether their pay constituted wages are in dispute in this case.

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

> "Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:

1. An individual's entire service performed within or both within and without this state if:

(a) The service is localized in this state. ...

* * *

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

A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:

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

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

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

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

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

A. "Wages" means all remuneration for services from whatever source, including commissions, bonuses and fringe benefits and the cash value of all remuneration in any medium other than cash. The

reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the department.

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

A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.

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

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

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

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

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

organization, trade or business of the employing unit.

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

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

c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

* * *

To support its contention that the Counselors were independent contractors, the Employer provided a copy of the "Crisis Services Agreement" that the Counselors signed (Bd. Exh. 10). However, such a contract is not conclusive as to the nature of a work relationship, and we must look at the actual practice of the parties which supplemented the written agreement. *See* Arizona Department of Economic Security v. Employment Security Commission, 66 Ariz. 1, 182 P.2d 83 (1947). Therefore, we must analyze the circumstances of the Counselors.

The primary issue here is whether the services of the Counselors were excluded from the definition of "employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provision cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the Counselors. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any;

(b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

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

Applying the guidelines provided in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

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

The Employer presented no evidence to establish that any of the Counselors hired, supervised, or paid their own assistants. Additionally, the CSA specifically states that Counselors' "obligations under this Agreement may not be assigned or transferred to any other person, firm, or corporation without prior written consent of" the Employer (Bd. Exh. 10 p. 3). Furthermore, at the Appeals Board hearing, the Employer admitted that each Counselor "was responsible for filling their own schedule", solely by contacting the Employer's other Counselors, if he was unable to work a scheduled shift (Tr. p. 138). This establishes that the Counselors were not able to simply send assistants in their place to cover assignments for the Employer. This factor shows control, and indicates an employment relationship.

b. Compliance with Instructions
Control is present when the individual is required to comply with instructions about when, where or 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.

At the Appeals Board hearing, the Employer admitted that the Counselors were required to comply with all of the requirements contained in the 29-page CSA and the 80-plus-page P&P (Tr. pp. 134, 135, 159, 160). On its face, it strains credulity for the Employer to contend that the Counselors were not required to comply with the Employer's instructions when the Counselors were bound by all of the requirements contained in over 100 pages of Employer-produced documents. The required instructions contained in the CSA included, but were not limited to, an 11-item list of what the Counselors' "crisis services will include", and the requirements that the Counselors "must furnish services that permit the [Employer] to comply with all applicable Medicare Conditions of Participation and Standards for contracted services for which [the Employer] is responsible" and "must meet the same standards for quality that [the Employer] would have to meet if services were provided by [the Employer]" (Bd. Exh. 10 pp. 1, 5).

Additionally, there were extensive, detailed, step-by-step instructions contained in the P&P that the Counselors were required to follow for providing such services identified as "Emergency Rooms Crisis Consult Protocol", "Protocol for Emergency Room Transfers to other providers", "Emergency Services", "Client Records", and "Admission Process and Delivery System" (Bd. Exh. 12 pp. 26-31, 41-43). Furthermore, the CSA specifically states: "The assigned Clinical Care Coordinator is the direct supervisor to the COUNSELOR" [Emphasis in original] (Bd. Exh. 10 p. 18). This factor shows control and the right to instruct or direct, and indicates an employment relationship.

c. Oral or Written Reports

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

The Counselors were required to submit written reports to the Employer after every call they responded to on behalf of the Employer (Tr. pp. 149, 154, 177; Bd. Exhs. 10, 12). This factor shows control, and indicates an employment relationship.

d. Place of Work

The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee. In some occupations, the services are necessarily performed away from the premises of the employing unit.

The Counselors primarily performed their services at locations other than the Employer's place of business (Tr. pp. 39, 40, 134, 173). The work locations were based on necessity due to the nature of the Counselors' services. This factor suggests neither control nor lack of control, and is therefore considered neutral.

e. Personal Performance

> If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Personal performance might not be indicative of control if the work is 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.

As set forth above, the Employer presented no evidence to establish that any of the Counselors hired, supervised, or paid their own assistants. Additionally, the CSA specifically states that Counselors' "obligations under this Agreement may not be assigned or transferred to any other person, firm, or corporation without prior written consent of" the Employer (Bd. Exh. 10 p. 3). Furthermore, at the Appeals Board hearing, the Employer admitted that each Counselor "was responsible for filling their own schedule" solely by contacting the Employer's other Counselors if he was unable to work a scheduled shift (Tr. p. 138). The evidence of record establishes that the Counselors were not able to hire a substitute without the Employer's knowledge or consent, and shows an expectation by the Employer that the work be performed personally by the Counselors as opposed to being assigned to a worker in the Counselors' employ. The Employer's expectation of personal performance shows control, and indicates an employment relationship.

f. Establishment of Work Sequence

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

The Counselors were professionals skilled in their jobs. However, for the reasons set forth in this decision regarding the factors in Arizona Administrative Code, Section R6-3-1723(D)(2)(b) and (h), a preponderance of the evidence of record establishes that the Counselors were not simply free to follow their own patterns of work and, instead, were required to follow routines and schedules of

the Employer. This factor shows control, and indicates an employment relationship.

g. Right to Discharge

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

The Employer had the right to discharge the Counselors at any time and without any notice (Bd. Exh. 10 pp. 2, 3, 10, 17; Bd. Exh. 12 pp. 17-19). In fact, the P&P specifically states that a Counselor "may be discharged 'at will' by the" Employer (Bd. Exh. 12 p. 17). This is particularly damning for the Employer. The concept of "at will" is associated with employment relationships and not independent contractor relationships, and the Employer's inclusion of that term in the P&P further emphasizes the control the Employer exercised over the Counselors. Since the Counselors could not require advance notice that the relationship would end, they did not possess the rights an independent contractor would expect in a contractual relationship. This factor shows control, and indicates an employment relationship.

h. Set Hours of Work

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

The Employer required the Counselors to commit to set hours of work every month, and those monthly schedules were set at least two weeks prior to the beginning of each month (Tr. pp. 137-140; Bd. Exh. 10 p. 2). Additionally, the Employer imposed discipline on the Counselors for failing to properly respond to calls from the Employer during their scheduled work hours, including placing Counselors on "probationary periods", dropping Counselors to "last in rotation" for scheduled weeks, or termination (Bd. Exh. 10 p. 17). Furthermore, the Employer admitted that if a Counselor did not receive any calls from the Employer during a scheduled shift, then the Counselors would not be paid any money (Tr. pp. 141, 142). Finally, all full-time Counselors were required to work either Christmas or Thanksgiving every year (Tr. pp. 167, 168; Bd. Exh. 12 p. 23).

The evidence of record establishes that the Counselors were not the masters of their own time. The Counselors were required to work set hours by the Employer and were entirely dependent upon the Employer providing them with calls during their scheduled shifts in order to earn any money. The Counselors were certainly unable to commit their scheduled shift times with the Employer to other work endeavors lest they be called by the Employer. This factor shows control, and indicates an employment relationship.

i. Training

Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, indicates control because it reflects that the Employer wants the services performed in a particular manner.

The Employer provided training to the Counselors during "orientation" and throughout the term of the working relationship between the Counselors and the Employer (Tr. pp. 161-163, 168-170; Bd. Exh. 10 pp. 16, 18; Bd. Exh. 12 pp. 8-16). Additionally, the Counselors were required by the Employer to attend mandatory meetings (Bd. Exh. 10 p. 18). This factor shows control, and indicates an employment relationship.

j. Amount of Time

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

The Counselors could work either full-time or part-time for the Employer (Tr. p. 138; Bd. Exh. 10 p. 2). As such an arrangement could be the same for either an employment or an independent relationship, this factor is neutral.

k. Tools and Materials

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

The nature of the Employer's business did not generally require the Counselors or the Employer to furnish "tools" or "materials", as those terms are commonly defined. Therefore, this factor is neutral.

l. Expense Reimbursement

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

The evidence of record does not establish that any expense reimbursement occurred. This factor shows an absence of control, and indicates an independent relationship.

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

l. Availability to the 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.

The Counselors were free to seek other employment when not working for the Employer (Tr. pp. 118, 119). However, this circumstance does not indicate independence as it would hold true for any employment situation. The Department's witness testified that she found no evidence that any of the Counselors had independent businesses, but that some of the Counselors were employees of other employers (Tr. pp. 61, 70). The Employer presented insufficient credible evidence to refute that testimony. Additionally, although some of the Counselors performed other jobs as employees, the Employer presented insufficient credible evidence to establish that any of the Counselors had their own office or assistants, held a business license, advertised, or otherwise engaged in an independently established business. Based on the evidence of record, this factor indicates an employment relationship.

2. Compensation on Job Basis

> An employee is usually, but not always, paid by the hour, week or month; whereas, payment on a job basis is customary where the worker is independent.

Generally, the Counselors were paid 30% of the billable fees the Employer received from insurance companies for the services Counselors provided to clients (Tr. pp. 150, 151; Bd. Exh. 10 pp. 2, 23-29). If a client had no insurance and did not pay for the services, the Counselor received a flat fee from the Employer while the Employer received nothing (Tr. p. 152). While there is evidence to indicate that the fees collected were essentially based on hourly rates for various services rendered, the evidence of record weighs slightly in

favor of payment on a job basis and provides some indication of an independent relationship.

3. Realization of Profit or Loss
   An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is an employee is not in such a position.

The Counselors had no opportunity to realize a profit or a loss from the business. The Counselors faced no meaningful expenses directly connected with the work, such as wages, rents, or other ongoing operating costs. The Counselors were subject to no significant recurring liabilities or obligations connected with the performance of the work and, therefore, had no viable concerns of balancing receipts against expenditures. This factor shows control, and indicates an employment relationship.

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

The Counselors could terminate their working relationship with the Employer at any time without penalty (Tr. p. 120; Bd. Exh. 10 p. 2; Bd. Exh. 12 p. 17). The lack of liquidated penalties for non-completion indicates an employment relationship.

5. Significant Investment.
   A significant investment by a person in facilities used by him in performing services for another tends to show an independent status. On the other hand, the furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status on the part of the worker. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are provided by employees as a common practice in their particular 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.

The evidence of record does not establish that the Counselors made any significant investment to perform services for the Employer, other than maintaining their licenses. We note that the Counselors were required to possess their licenses before they began performing services for the Employer, and there

was no evidence presented regarding any costs associated with maintaining those licenses. The Counselors provided their own vehicles for work, but those vehicles were also available for personal use (Tr. p. 117). The Employer did not provide any equipment for use by the Counselors, and the work performed by the Counselors was done almost exclusively at premises not owned or rented by the Employer or the Counselors (Tr. pp. 39, 40, 117, 134, 173). As neither the Counselors nor the Employer made a significant investment in facilities used by the Counselors, this factor is neutral.

6. Simultaneous Contracts

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

As previously discussed regarding Arizona Administrative Code, Section R6-3-1723(E)(1), the evidence of record does not establish that the Counselors had contracts with other companies for their services, although some appear to have been employees of other companies. This factor indicates an employment relationship.

Although the 18 factors set forth in Arizona Administrative Code, Section R6-3-1723(D)(2) and (E), strongly weigh in favor of employment on their own, pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered. We find one such factor to be the role of the Counselors within the Employer's business model. The Employer's business consists of providing behavioral health counselling services to clients. The services provided by Counselors are not ancillary to the services offered by the Employer, but rather their services constitute a vital and substantial component of the Employer's services. This degree of reliance upon the services of the Counselors indicates an employment relationship.

The Board also finds significant a number of provisions included by the Employer in its P&P. In the section entitled "Terminations", the Employer's P&P specifically states that Counselors are subject to "a layoff" when "a reduction in force is necessary or if one or more positions are eliminated" (Bd. Exh. 12 p. 18). Regarding "layoffs", inexplicably the P&P also states that the Counselors have an "anniversary date" (Bd. Exh. 12 p. 18). Furthermore, the P&P specifically states that the Counselors may receive severance pay in the form of "one week pay ***for each year of employment with***" the Employer up to a maximum of four weeks [Emphasis added] (Bd. Exh. 12 p. 18). In addition to

the obvious reference by the Employer to the Counselors' years "of employment with" the Employer, all of these factors indicate an employment relationship.

Finally, in a section entitled "Vacation Leave & Holiday Pay", the P&P states that Counselors "earn two (2) weeks of PTO per year" (Bd. Exh. 12 p. 22). At the Appeals Board hearing, the Employer testified that PTO stands for "personal time off" and that Counselors do not actually "earn" PTO but are simply granted 2 weeks of unpaid PTO each year that they can use to request time off from their set schedules (Tr. pp. 164-167). The fact that Counselors were required to request time off from the Employer, and were limited by the Employer as to how much time they could take off, is anathema to the concept of an independent contractor relationship and indicates control by the Employer and employment.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long established liberal construction in an effort to include as many types of employment relationships as possible, when the Court stated:

> The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [*See* A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where the Court stated:

> The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

In accord with the liberal interpretation required by the Employment Security Law of Arizona, we conclude that the evidence of employee status far outweighs the evidence of independent contractor status.

The Counselors were employees of the Employer, effective January 1, 2010. We conclude all payments to the Counselors for their services constituted wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination dated February 10, 2014.

From January 1, 2010 through December 31, 2011, services performed by individuals as Counselors constituted employment.

All forms of remuneration paid to these individuals for such services constituted wages.

DATED: 3/25/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:

1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
   - If there is no postmark, the postage meter-mark on the envelope in which it is received.
   - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
2. On the date it is received by the Department, if not sent by USPS.

You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.

C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:

1. explains why the Appeals Board decision is wrong,
2. cites the record, rules and other authority, and
3. refers to specific hearing testimony and evidence.

D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 3/25/2015
to:

(x) Er: ##### Acct. No: #####

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

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

By: __RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1437870-001-B

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STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

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 FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

March 25, 2015 ***.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination issued on November 18, 2013, which affirmed the October 18, 2013 Determination of Unemployment Insurance Liability, and held that the Employer (hereinafter "TMS") was properly determined to have acquired or succeeded the organization, trade, or business of the predecessor #### and that the experience rating account of ####. was properly transferred to "TMS".

The petition for a hearing having been timely filed, the Appeals Board has jurisdiction in this matter under A.R.S. § 23-733(B).

THE APPEALS BOARD scheduled a telephone hearing for October 21, 2014, before Appeals Board Administrative Law Judge **Denise C. Sanchez**. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer was properly determined liable for Arizona Unemployment Insurance Taxes pursuant to A.R.S. § 23-613.

2. Whether the Employer's experience rating account was properly assigned a tax rate of "5.0" percent for coverage beginning August 19, 2013.

On the scheduled date of the hearing, two Employer witnesses appeared and testified. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 8 were admitted into evidence. We have carefully reviewed the record.

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

1. On August 16, 2013, Employer "TMS", a corporation, entered into a Private Sale Agreement for the acquisition of inventory, accounts and equipment of ####. (Bd. Exhs. 3B-3I).

2. Per the Private Sale Agreement, "TMS" acquired property belonging to ####, 36, 40- 42).

3. ####, an architectural sheet metal company, ceased operating its business on August 18, 2013. On August 19, 2013, "TMS" began its operation in the same trade (Tr. pp. 32, 40).

4. Prior to ceasing operations, #### had 56 employees on its payroll (Bd. Exh. 4A). On August 19, 2013, "TMS" hired 44 out of the 56 #### employees to continue operating the business (Tr. pp. 14, 15, 31, 32).

5. Initially, "TMS" used the same building facilities as ####. Unable to reach a leasing agreement with

the landlord, "TMS" moved out of the building after 22 days (Tr. p. 33, 34, 39).

6. At the time of acquisition, #### had approximately three or four projects that were unfinished. "TMS" approached those customers and negotiated new contracts to complete the outstanding projects (Tr. pp. 14, 34, 35).

7. On October 18, 2013, the Department issued a Determination of Unemployment Insurance Liability that held "TMS" was a successor to a liable employer. The determination also held that "TMS'" tax rate was based on its predecessor's experience rating (Bd. Exh. 2).

8. Following a request for reconsideration filed by "TMS" on November 4, 2013, the Department issued its Reconsidered Determination on November 18, 2013 (Bd. Exhs. 3A, 6A-6C). The Reconsidered Determination affirmed the October 18, 2013 Determination of Unemployment Insurance Liability, and held that "TMS" had "... succeeded to or acquired the organization, trade or business, or substantially all of the assets of ####, that the experience rating account of #### was properly transferred to TMS; and that TMS is equally liable for the Unemployment Insurance indebtedness of ####" (Bd. Exh. 6C).

9. On December 16, 2013, "TMS" filed a petition for hearing disputing the determinations. "TMS" also requested a waiver of liability (Bd. Exh. 7A).

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 <u>in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof</u>, 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 [Emphasis added].

B. ... 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.

C. If the successor employer was an employer subject to this chapter prior to the date of acquisition of an organization, trade or business, or substantially all of the assets thereof, his rate of contributions for the remainder of the calendar year in which the acquisition occurred shall be his rate as previously assigned for the calendar year in which the acquisition occurred. ...

* * *

D. Any individual or organization, including the types of organizations described in section 23-614, whether or not an employing unit, which in any manner acquires the organization, trade or business, or substantially all of the assets thereof, shall be liable, in an amount not to exceed the

reasonable value, as determined by the department, of the organization, trade, business or assets acquired, for any contributions, interest and penalties due or accrued and unpaid by such predecessor employer, except that the department may waive the successor's liability for such unpaid amounts if a determination that the predecessor was subject to this chapter had not been made as provided in section 23-724 prior to the date of acquisition, and such liability on the part of the successor would be against equity and good conscience.

Arizona Administrative Code, Section R6-3-1703(C), provides as follows:

C. Report of changes. Each employer as defined in A.R.S. § 23-613 shall promptly notify the Department in writing of any change in its business operations. Changes include: the acquisition or disposal of all or any part of the business operations or assets; a change in business name or address; bankruptcy or receivership; or any other change pertaining to the operation or ownership of the business operations. The notification shall include the date of change, and the name, address, and telephone number of the person, firm, corporation or official placed in charge of the organization, trade or assets of the business.

Arizona Administrative Code, Section R6-3-1713, provides in pertinent part as follows:

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. ... [Emphasis added].

B. Special provisions

1. An individual or employing unit shall be determined a successor under the provisions of A.R.S. § 23-733(A) and receive the experience rating account of the predecessor when the organization, trade or business acquired or succeeded to constitutes all of the predecessor's employment generating enterprise upon which the experience rating account was primarily established without regard to those factors retained by the predecessor which represent:

   a. Exempt employment; or

   b. Employment necessary for the liquidation of the trade or business; or

   c. Employment arising from the activities establishing another trade or business; or

   d. Employment as a result of an organization, trade or business succeeded to or acquired within two calendar days of the date of transfer of the enterprise upon which the experience rating account is based.

   * * *

C. Transfer of entire business

1. When the Department determines that an individual or employing unit is a successor and shall inherit the experience rating account of the predecessor as provided in A.R.S. § 23-733(A), the determination shall be subject to the same provisions as determinations made in accordance with A.R.S. § 23-724.

2. When the experience rating account is transferred to the successor, the successor's account shall be charged with benefits

determined chargeable as a result of the employment in the organization, trade or business acquired, and the successor's contribution rate shall be determined in accordance with A.R.S. § 23-733(C) for the calendar year beginning on the date of acquisition.

* * *

E. Liability for predecessor's debt

1. Notwithstanding subsections (A) and (B) above, when an individual or employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets of an employer as defined in A.R.S. § 23-613, the successor shall be equally liable along with the predecessor for the contributions, interest and penalties due or accrued and unpaid by the predecessor as provided in A.R.S. § 23-733(D).

Here, the only issue to be resolved is whether "TMS" was properly determined to be a successor employer, causing the experience rating account of #### to be transferred to "TMS". The evidence establishes that despite acquiring the business through a third-party lender, the transfer of ####'s business to "TMS" was of substantially all the assets of a liable employer. Analysis of the factors constituting acquisition or transfer of a business clearly supports this conclusion.

The tests for successor transition are set forth in A.R.S. § 23-733(A), and are supplemented by implementation factors in Arizona Administrative Code, Section R6-3-1713, and by case law including *Levy v. Arizona Department of Economic Security*, 132 Ariz. 1, 643 P.2d 704 (1982). Specifically, other factors that are considered in determining if a business has been acquired or succeeded to include the continuity of management, ownership, employees, or procedures; change of identity, capacity to continue a similar business; and interruption of the business during the transfer.

We conclude that there was a continuity of ownership and management between the two corporations. Both corporations operated in the architectural sheet metal trade. The business continued operating without interruption after the acquisition date.

We also conclude that "TMS" acquired substantially all of the assets previously held by ####. Included in the acquisition was the temporary use of the place of business, 44 out of 56 employees, customers, unfinished projects, goodwill, tools, and fixtures. These factors support a finding consistent with successorship because "TMS" continued the business that the predecessor, ####, had operated.

Therefore, we find that the transfer of ####' experience rating account to "TMS" is required. We conclude "TMS" has not presented sufficient evidence to refute the Department's finding of successor status. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Reconsidered Determination dated November 18, 2013, regarding the successor status of the Employer.

The experience rating account of #### was properly transferred to "TMS".

DATED: 2/23/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

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HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
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D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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(x) Er: #####
Acct. No: #####-000

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL
CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926
SITE CODE 040A

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1435179-001-B

#####

STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

Department

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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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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** March 16, 2015 *****.

DECISION
DISMISSED

THE **EMPLOYER,** through counsel, 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].

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

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

DATED: 2/12/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

ROBERT NALL, Acting Member

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
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D. If you need more time to file a request for review, you must apply to the Appeals Board before the appeal deadline and show good cause.

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

A copy of the foregoing was mailed on 2/12/2015
to:

Er: ##### Acct. No: #####-000

(x) #####

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

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

By: ___RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1435170-001-B

#####

STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

February 5, 2015 ***.

DECISION
DISMISSED

THE **EMPLOYER** 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).

At the December 9, 2014 Appeals Board hearing, following a prehearing conference, the Employer requested to withdraw its petition.

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

THE APPEALS BOARD **DISMISSES** the petition. The scheduled hearing is cancelled.

This decision does not affect any agreement entered into between the Employer and the Department.

DATED: 1/6/2015

APPEALS BOARD

Gary R. Blanton

GARY R. BLANTON, Chairman

Janet L. Feltz

JANET L. FELTZ, Member

Eric T. Schwarz

ERIC T. SCHWARZ, 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) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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

A copy of the foregoing was mailed on 1/6/2015 to:

(x) Er: #####
Acct. No: #####-000

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL
CFP/CLA
1275 W WASHINGTON
PHOENIX AZ 85007-2926
SITE CODE 040A

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

By: ___RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1416761-001-B

#####

STATE OF ARIZONA E S A TAX UNIT
% ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is *******

March 16, 2015 ***.

DECISION
DISMISSED

THE **EMPLOYER**, through counsel, 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).

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

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

DATED: 2/13/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

MORRIS L. WILLIAMS III, Acting Member

take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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

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

By: __RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1413601-001-BR

#####

STATE OF ARIZONA E S A TAX UNIT
℅ ELI GOLOB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS --- 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 SOBRE SUS BENEFICIOS --- 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 OF APPEAL TO THE ARIZONA TAX COURT

Under Arizona Revised Statutes § 41-1993, the last date to file an Application for Appeal is ***** March 30, 2015 *****.

DECISION
AFFIRMED UPON REVIEW

THE **EMPLOYER**, through counsel, requests review of the Appeals Board decision issued on May 14, 2014, which affirmed the Reconsidered Determination issued on April 3, 2013, and held:

> From January 1, 2010 through March 31, 2012, services performed by individuals as technicians constituted employment.
>
> All forms of remuneration paid to these individuals for such services constituted wages.

The request was filed on time, and the Appeals Board has jurisdiction in this matter under A.R.S. § 23-672(F).

In the request for review, the Employer, through counsel, contends that the Board "failed to rule" on three separate "issues" it describes as "Tax Rate", "Interest", and "Penalty". The Board is at a loss to understand these contentions. The Board did not "rule" on these issues because they are not before the Board at this time. That is why these issues were not included in the Notice of Appeals Board Telephone Hearing (Bd. Exh. 8), and why no attempt was made to develop a record regarding these issues at the Appeals Board hearing.

The Employer also contends that it was denied due process simply because the Board's prior decision did not specifically discuss every "factor" set forth in Arizona Administrative Code, Section 6-3-1723(D)(2) and (E). The Employer cites no legal authority to support this contention, and we find no basis in the record to support the Employer's contention that due process of law was denied.

The United States Supreme Court has stated that the fundamental requirement of due process is the "opportunity to be heard at a meaningful time and in a meaningful manner". Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed. 2d 18 (1976). Inherent in that fundamental requirement is the right to a hearing and notice of the issues to be addressed. There is no specific requirement, however, that a decision rendered after the hearing be issued in any particular manner so long as the basic requirements of the right to present evidence, cross-examine witnesses, and have an impartial administrative law judge are satisfied. The essential elements of due process were observed. The Employer was given the opportunity to be heard before an impartial administrative law judge, and the opportunity to respond to any allegations, rebut any unfavorable testimony, cross-examine witnesses, and object to the admission of documentary or other evidence.

Under A.R.S. § 23-672, the Appeals Board is a legislatively constructed component of the Department. The legislature has directed, in A.R.S. § 23-724, that the Board's duties include entertaining appeals of reconsidered liability determinations. The Board has acted in accordance with its statutorily prescribed duties.

In a related contention, the Employer contends that the "Board must reveal the weighing process" regarding every factor set forth in Arizona Administrative Code, Section 6-3-1723(D)(2) and (E), "[o]therwise, it is impossible to know how best to exercise one's right to challenge the decision." Again, the Employer cites no legal authority to support this contention, and it is without merit. It seems self-evident that the best way to challenge the Board's prior decision would be to actually address, and to attempt to refute, the Board's analysis

contained in that decision. In this case, however, the Employer's request for review is silent regarding the clear and explicit reasoning and conclusions set forth by the Board.

The primary basis for the Board's prior decision is quite simple. The Employer's owner freely admits, and the Employer's Technician Handbook confirms, that the technicians are prohibited from working with any other garage door repair company while they are working for the Employer (Feb. 19, 2014 Tr. pp. 108, 116, 123, 124; Bd. Exh. 11, p. 4). The Board concluded that it is not possible for a technician to be classified as an "independent contractor", rather than an "employee", when the Employer prohibits the technicians from providing their services to any other business. As clearly expressed in the Board's prior decision:

> The hallmark of being an "independent contractor" is the ability to perform one's particularized services for multiple businesses simultaneously. Here, the Employer's own testimony, and the Employer's own Technician Handbook, establish that the technicians are entirely *dependent* on the Employer. The Employer has absolute control over the technicians' ability to perform their services, as they are prohibited from providing those services to anyone other than the Employer. No serious argument can be made that the technicians are "independent contractors" in any sense of that term, given the control the Employer has over the technicians' ability to ply their services.

In the request for review, the Employer has not even attempted to refute this position. The Employer has not offered a single legal argument, or even an explanation, for how it believes a worker who is prohibited by a business from providing services to any other businesses can actually be an "independent contractor" for Unemployment Insurance Tax purposes. The only logical explanation for the Employer's failure to specifically address this key question is that the Employer recognizes that there is no valid argument to make to the contrary.

Therefore, instead of addressing the Board's reasoning head on, the Employer's only attack against the Board's reliance on the "non-compete" stranglehold that the Employer has on the technicians is to contend that the Board's prior decision "assigned 'dispositive' weight to a factor that was not enumerated" in Arizona Administrative Code, Section 6-3-1723(D)(2) and (E), and to contend that "[n]othing in the Board's regulations allows the Board to assign dispositive weight to a factor nowhere mentioned in the regulations . . . ." These contentions fail.

First, the undisputed fact that the Employer prohibits the technicians from providing their services to any other garage door repair companies while they are working for the Employer clearly falls under at least two of what the Employer refers to as the "enumerated" factors: Arizona Administrative Code, Section 6-3-1723(E)(1) "Availability to public" and Arizona Administrative Code, Section 6-3-1723(E)(6) "Simultaneous contracts". Second, the Employer's implication that the factors "enumerated" in Arizona Administrative Code, Section 6-3-1723(D)(2) and (E), are an all-inclusive list and sacrosanct is contrary to the law.

Arizona Administrative Code, Section 6-3-1723(F), provides in pertinent part as follows:

> ...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 particular situation. **Some factors may not apply to particular occupations or situations, *while there may be other factors not specifically identified herein that should be considered*.** [Emphasis added]

Contrary to the Employer's contention, Code Section 6-3-1723(F) clearly allows for "factors" not specifically "enumerated" in Arizona Administrative Code, Section 6-3-1723(D)(2) and (E), to be considered.

We note that, in the request for review, the Employer makes a passing reference to the fact that the Board set forth three additional reasons, other than the "non-compete" reason, for why the Board found the technicians to be employees rather than independent contractors. The Employer wrote: "Here, all of the indicia that the Board's Decision relied upon (non-compete, uniform shirts, [Employer] advertisements on trucks, and on-call for one day per week) are mere indicia of a **generalized control** by [the Employer] . . . ." [Emphasis in original] However, the Employer fails to mention "uniform shirts, [Employer] advertisements on trucks, and on-call for one day per week" again, fails to dispute the Board's finding of their existence, and fails to set forth any argument regarding how the Board erred in any way by relying on those factors.

Furthermore, the Employer's use of the term "generalized control" is puzzling. The Employer attempted to contrast that with yet another term it invented, "specialized control". The Employer uses these terms as if they were terms of art with some special, recognized meaning. They are not. The Employer does not define the terms, and cites no legal authority to support its use of these terms. The Employer has failed to establish any validity or applicability of these manufactured terms to the case at hand.

Finally, the Employer contends that, even if the technicians are not "independent contractors", they should be considered to be "agents" and not "employees". This is the first time in these proceedings that the Employer has raised this argument, and it is without merit. From the request for review, we infer that the Employer is referring to language contained in Arizona Revised Statutes § 23-613.01(A)(1) and Arizona Administrative Code, Section R6-3-1723(B)(1).

Arizona Revised Statutes § 23-613.01(A)(1) states:

> 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.

Arizona Administrative Code, Section R6-3-1723(B)(1), states:

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

First, the Employer misstates the law. In the request for review, the Employer contends that the "exception" contained in the statute and rule applies to "agents working in a capacity characteristic of an independent profession, trade, skill, or occupation." In fact, neither the statute nor the rule states that. Second, it is immaterial in any event.

It is instructive to note that Arizona Revised Statutes § 23-613.01(A)(1) clearly emphasizes the word "independent". Additionally, Arizona Administrative Code, Section R6-3-1723(B)(1), which closely mirrors yet expands on the language contained in Arizona Revised Statutes § 23-613.01(A)(1), uses the term "independent" five times in its first sentence, and the term "independence" in its second sentence. This perfectly illustrates the crucial issue in this case, which is whether the technicians were truly "independent" of the Employer. As explained in the Board's prior decision, the technicians are not "independent" in any sense of that term. The technicians are not independent contractors, they are not independent business persons, they are not independent agents, they are not independent consultants, and they do not perform services in a capacity characteristic of an independent profession, trade, skill or occupation.

The Employer has yet to specifically address the Board's reasoning in the Board's prior decision. The Employer has failed to make a persuasive argument for how these technicians can be considered "independent" when they are prohibited from working for any other garage door repair companies while they work for the Employer, while they are required to wear uniform shirts bearing the Employer's logo (and required to pay for the shirts), while they are required to drive vehicles bearing the Employer's logo (and required to pay for the advertisements), and while they are required to be "on call" for the Employer one night per week.

The Employer has presented nothing in its request for review that would cause the Board to reconsider its prior decision. The undisputed facts and reasoning set forth in the Board's prior decision so overwhelmingly establish an employment relationship that it is not possible to conceive of any constellation of the other factors that could overcome them and result in finding an independent contractor relationship.

The hallmark of being an "independent contractor" is the ability to perform one's particularized services for multiple businesses simultaneously. Here, the technicians are entirely *dependent* on the Employer for their livelihood. The Employer has absolute control over the technicians' ability to perform their services, as they are prohibited from providing those services to any business other than the Employer. The technicians are not "independent" in any sense of that term, given the control the Employer has over the technicians' ability to ply their services.

Additionally, the fact that the technicians are required to be walking, driving advertisements for the Employer, and that they must pay for that privilege out of their own pockets, further demonstrates the extensive control the Employer exercises over the technicians. A true independent contractor would be free to market his own services, not to advertise or market for another. Likewise, the fact that the technicians are required to be "on call" to service the Employer's customers one night per week until midnight is anathema to the concept of being an independent contractor. A true independent contractor is the master of his own time, while an employee is subject to the scheduling controls of his employer such as mandated weekly late night "on call" duty.

In arriving at the prior decision, the Appeals Board applied the appropriate law, A.R.S. §§ 23-724(B), 23-615, 23-613.01, and 23-622(A), as well as Arizona Administrative Code, Section R6-3-1723, and case law, to the facts in this case and found the services performed by individuals as technicians constitute employment, remuneration paid to such individuals by the Employer constitutes wages, and the Employer is liable for Arizona Unemployment Insurance taxes on wages for the quarters ending March 31, 2010 through March 31, 2012.

The Board thoroughly examined the factors established by the facts in this case, and considered the relevant law and administrative rules as they are applicable to those facts. The Board has considered the evidence as it relates to the factors set out in Arizona Administrative Code, Subsections R6-3-1723(D) and (E). In reaching its decision, the Board is mindful of the holdings in Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), and Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975) which provide for a liberal interpretation of the Arizona Employment Security Act. The Board concludes that the weight of the evidence establishes that the services performed by technicians constituted employment of these individuals by the Employer.

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

THE APPEALS BOARD FINDS that:

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

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

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

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

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

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

DATED: 2/27/2015

APPEALS BOARD

GARY R. BLANTON, Chairman

JANET L. FELTZ, Member

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision on review by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See,* Arizona Revised Statutes, §§ 12-

901 to 12-914. If you have questions about the procedures on filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

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

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

for review under section 23-672 or 41-1992 and a decision on review has been issued.

A copy of the foregoing was mailed on 2/27/2015 to:

Er: ##### Acct. No: #####-000

(x) Er Rep: #####

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

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

By: ___RR_____
For The Appeals Board