Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1009974-001-B

In the Matter of:

XXXXX X. XXXXXXX, XXXXXXXXX	ESA TAX UNIT
XXX XXXXXXX XXXXXXXXX	C/O ROBERT DUNN, ASSISTANT
XXXXXXX XXXXXXX, XXX.	ATTORNEY GENERAL CFP/CLSA
XXXX X. XXXX XXXX XXX. X-XXX	1275 WEST WASHINGTON
XXXXXXX, XX XXXXX-XXXX	PHOENIX, AZ 85007
Employer	Department

D E C I S I O N
DISMISSED

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

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

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

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
>
> 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record.

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

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

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. A request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1140 E. Washington, Box 14, [Suite 104], Phoenix, Arizona 85034. Telephone: (602) 229-2806. A request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

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

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal.

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

(x) Er: XXXXXXX XXXXXXXXX Acct. No: XXXXXXX-XXX
XXXXXXX XXXXXXX, XXX.

(x) ROBERT DUNN III
ASSISTANT ATTORNEY GENERAL, CFP/CLA
1275 W. WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007

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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1003078-001-B

In the Matter of:

XXXXXXX XXXXXXXX XXXXXXXX, X.X.X. XXXX X. XXXXXX XX., XXX. XXX XXXXXXXXXX, XX XXXXX-XXXX	ESA TAX UNIT C/O ROBERT DUNN, ASSISTANT ATTORNEY GENERAL 1275 W. WASHINGTON ST. PHOENIX, AZ 85007
Employer	Department

DECISION
AFFIRMED

THE **EMPLOYER** petitions for a hearing from the Reconsidered Determination issued October 25, 2005, which affirmed the Amended Tax Rate Notice of March 4, 2005, because the Employer's voluntary payment was not received by the Department until August 11, 2005, and did not comply with the provisions of A.R.S. 23-726 (C), so as to affect the tax rate for calendar year 2005.

The appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B).

At the direction of the Appeals Board, after proper notice, a hearing was held on July 28, 2006, in Phoenix, Arizona before William E. Good, an Administrative Law Judge, for the purpose of considering the following issue:

> Whether the Employer timely submitted a voluntary payment to the Tax Unit of the Department so as to affect the tax rate for calendar year 2005, pursuant to the provisions of A.R.S. 23-726 (C).

The following persons appeared at the hearing:

ROBERT DUNN	Department representative and witness
VIVIAN NAST	Department witness

The witnesses for the Department were sworn and testified. Documents in the file marked and identified as Board Exhibits 1 through 18 were admitted into evidence. The Employer appeared by letter in lieu of appearance.

We have carefully reviewed the entire record, including the exhibits admitted into evidence and the transcript of the Appeals Board hearing.

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

1. A Determination of Unemployment Tax Rate for Calendar Year 2005, of X.XX%, was sent by mail on January 4, 2005, to the Employer's last known address of record. The Determination also advised the Employer that "A VOLUNTARY PAYMENT OF $XXX.XX MAY BE MADE TO OBTAIN THE NEXT LOWER TAX RATE OF X.XX.... and SEE ADDITIONAL INSTRUCTIONS ON REVERSE. The reverse indicated that **Voluntary Payment remittance must be postmarked no later than January 31 of this year** (Tr. p. 8; Bd. Exh. 13).
2. On January 31, 2005, the Employer mailed a check for $XXX.XX to the Department (Bd. Exhs. 3, 18).
3. The Department took all such voluntary payments it received and caused computations to be made to reflect the payments. The voluntary payments are kept separate from other funds (Tr. p. 10).
4. As a result of the check received from the Employer, an amended Determination of Unemployment Tax Rate for Calendar Year 2005, of X.XX%, was sent by mail on February 28, 2005, to the Employer's last known address of record (Tr. p. 10-11; Bd. Exh. 14) .
5. On March 4, 2005, the Department discovered that the check which the Employer had sent on

January 31, 2005, was not honored by the bank on which it was drawn because the account was closed (Tr. pp. 12, 13; Bd. Exhs. 3, 18).

6. On March 4, 2005, an amended Determination of Unemployment Tax Rate for Calendar Year 2005, of X.XX%, was sent by mail to the Employer's last known address of record (Tr. pp. 12, 13; Bd. Exh. 15).

In this case, the Employer's voluntary payment was required to be made by January 31, 2005, in order to be timely. It was not filed until August 11, 2005.

Arizona Revised Statutes § 23-726 provides in pertinent part

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

Arizona Administrative Code, Section R6-3-1716 provides:

> Voluntary contributions
>
> Section 23-726 of the Employment Security Law of Arizona provides for an employer to make voluntary payments in addition to required contributions, which are credited to his account and included in the computation of the employer's experience rate.
> In conformity with this section, the Department of Economic Security prescribes:
>
> A. Separate accounting records of voluntary contributions shall be established for each employer making such contributions. Money so paid and credited may not be credited to the separate account of employer contributions required on wages paid. Voluntary contributions shall be in any amount desired by the employer and need not bear any relationship

to wages paid. When such voluntary payments have been received by the Department and credited in the voluntary contribution account of the employer, they may not be returned to the employer and shall be deposited in the trust fund of the Department.

B The Department shall supply on request of the employer, received before January 31 of any calendar year, information as to the effect of any voluntary contribution on the yearly contribution rate commencing January 1 of such calendar year. Any voluntary contribution received by the Department post marked on or before January 31 of any calendar year shall be used in computing the rate

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

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

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

* * *

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

> successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.
>
> * * *

Here, the Employer contends that its payment was timely and that it has sufficient funds to cover the check that was not honored by its bank. The issue is not whether the payment was timely submitted but whether it was complete when submitted. It is not a matter that can be settled by a late payment fee or penalty. The payment was due by January 31, 2005, in funds that are immediately available. Here, the funds were not available.

Based upon the evidence before us, the Board concludes that the Employer failed to timely file a voluntary payment to obtain a lower tax rate. The Employer's failure was not due to any of the conditions described in Arizona Administrative Code, Section R6-3-1404 (B). Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Decision of October 25, 2005.

The Amended Determination of Unemployment Tax Rate of X.XX%, issued March 4, 2005, for Calendar Year 2005, is final and binding on the Employer.

DATED:

APPEALS BOARD

_____
HUGO M. FRANCO, Chairman

_____
WILLIAM G. DADE, Member

_____
MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. A request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1140 E. Washington, Box 14, [Suite 104], Phoenix, Arizona 85034. Telephone: (602) 229-2806. A request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

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

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's

decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal.

A copy of the foregoing was mailed on
to:

(x) Er: XXXXXXX XXXXXXXX XXXXXXXX, Acct. No: XXXXXXX-XXX
X.X.X.

(x) ROBERT DUNN
Assistant Attorney General CFP/CLR
1275 W. Washington St.
Phoenix, AZ 85007-2926

(x) JOHN B. NORRIS, Chief of Tax
Employment Security Administration
P. O. Box 6028 - SITE CODE 911B
Phoenix, AZ 85005

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1006207-001-B

In the Matter of:

XXXXXX XXXX XXXXXXXXXX, XXX XXXXX X. XXXX XXXXX, XXXXX #X XXXXXXX, XX XXXXX	ESA, UI TAX SECTION, C/O ROBERT DUNN, ASSISTANT ATTORNEY GENERAL CFP/CLA 1275 W. WASHINGTON ST. PHOENIX, AZ 85007
Employer	Department

DECISION
AFFIRMED

THE **EMPLOYER** petitions for a hearing from a Decision of the Department issued February 16, 2006, which denied the Employer's application for redetermination of a benefit charge notice because the application was not timely filed and held that the Notice of Benefit Charges, dated October 7, 2005, was final. The Department also held that the Notice to Employer (Form UB-110) dated June 30, 2005, was final because it was not returned timely. The Appeals Board has no jurisdiction to review the matter of the Notice to Employer (Form UB-110). Only the Office of Appeals may review that matter at the request of the Employer

The Employer filed a timely appeal from the Department's Decision and the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-672(D) and 23-732(B).

At the direction of the Appeals Board, after proper notice, a hearing was held on August 4, 2006, in Phoenix, Arizona before William E. Good, an Administrative Law Judge, for the purpose of considering the following issues:

> Whether Employer's appeal from the Notice of Benefit Charges, dated October 7, 2005, was timely

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

The following persons appeared at the hearing:

ROBERT DUNN	Department counsel
VIVIAN NAST	Department witness

The Employer did not appear at the hearing. The witness for the Department was sworn and testified. Documents in the file marked and identified as Board Exhibits 1 through 21 were admitted into evidence.

We have carefully reviewed the entire record, including the exhibits admitted into evidence and the transcript of the Appeals Board hearing.

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

1. A Benefit Charge Notice for the calendar quarter ending September 30, 2005, was mailed to the Employer's last known address of record on October 7, 2005. The Notice advised the Employer that the Notice would become final unless a request for review was filed within 15 days of the mailing date as provided in A.R.S. § 23-732(B). (Although the Notice refers to a request for review, the designation in the statute is an “application for redetermination”) (Tr. pp. 5, 6; Bd. Exh. 1A).

2. In September of 1999, the Employer provided its mailing address to the Department. No change in that address was made until January 2006, when the Employer advised the Department that the suite number was not correct (Bd. Exhs. 4, 11).

3. On November 4, 2005, as indicated by the Department’s date stamp, the Employer filed, by fax, a request for review (Bd. Exh. 8).

4. On February 16, 2006, the Department issued a decision advising the Employer that the Benefit Charge Notice issued October 7, 2005, for the calendar quarter ending September 30, 2005, was final and binding because the application for redetermination was not filed within the required statutory period (Bd. Exh. 14).

5. By letter dated February 21, 2006, the Employer filed a timely appeal from the Department's decision finding the Benefit Charge Notice final for the calendar quarter ending September 30, 2005, unless the Employer filed a written appeal with the Appeals Board (Bd. Exh. 15).

Arizona Revised Statutes § 23-732(B) provides:

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

In this case, the Employer's application for reconsideration was required to be filed by October 24, 2005, in order to be timely, but it was not filed until November 4, 2005.

Arizona Revised Statutes § 23-732(B) is unambiguous, declaring that "such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes." In the absence of a timely application for redetermination**,** the Appeals Board is without authority to consider the merits of the matter.

The Arizona Court of Appeals has addressed the issue of timeliness of appeal from a prior determination, and has taken the position that the statutory prerequisites must be observed if an appeal is to be considered timely.

In Banta v. Arizona Department of Economic Security, 130 Ariz. 472, 636 P.2d 1254 (Ariz. App. 1981) the court was confronted with virtually the identical issue before us in this case, i.e., a late request for reconsideration under A.R.S. § 23-724(A). In that decision the court said:

... We therefore hold that a liability determination becomes final fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within this time the unit files a written request for reconsideration.

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

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

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

* * *

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

* * *

4. If submission is not considered timely ... the Department shall issue an appealable decision to the interested party. The decision shall contain the reasons therefor, a statement that

> the party has the right to appeal the decision, and the period and manner in which such appeal must be filed under the provisions of the Arizona Employment Security Law (emphasis added).

Here, the Employer has asserted no reason for the late filing of the application for redetermination which, if accepted as true, would establish a condition which would cause the Board to consider the application timely. The Employer had not notified the Department that its suite number was changed until it filed its appeal on November 4, 2005 (Tr. pp. 7-10; Bd. Exhs. 3, 4).

The court in Banta, supra, also addressed the application of Arizona Administrative Code, Section R6-3-1404(B), stating:

> The appellants have not established that their untimely request for reconsideration was the result of post office delay or other action. Their untimeliness, consequently, was inexcusable.

The evidence establishes that no application for redetermination of the quarterly Benefit Charge Notice was filed within the time prescribed by A.R.S. § 23-732(B). The Employer's letter dated November 4, 2005, was beyond the appeal period. An appeal filed outside the statutory period may be considered timely only if the late filing is due to Department error or misinformation, postal error, or a change of address when there is no reason to notify the Department of the change.

Based upon the evidence before us, the Board concludes that the Employer failed to timely file an application for redetermination of the quarterly Benefit Charge Notice October 7, 2005, and the Employer is not entitled to a review or hearing on the merit issues in this matter. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Decision of February 16, 2006.

The Benefit Charge Notice, issued October 7, 2005, for the calendar quarter ending September 30, 2005, is final and binding on the Employer.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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2. Parties may be represented in the following manner:

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

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A copy of the foregoing was mailed on
to:

(x) Er: XXXXXX XXXX XXXXXXXXXX , Acct. No: XXXXXXX-XXX XXX

(x) ROBERT DUNN,
Assistant Attorney General, CFP/CLA
1275 W. Washington St. - SITE CODE 040-A
Phoenix, AZ 85007-2926

(x) JOHN B. NORRIS, Chief of Tax
Employment Security Administration
P. O. Box 6028 - SITE CODE - 911B
Phoenix, AZ 85005

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-0900235-001-B

In the Matter of:

XXXXX XXX XXXXXXXX, XXX X/X XXXXXX X. XXXXXX XXXX X. XXXXXXXXXX XX., XXX. XXX XXXXXXX, XX XXXXX-XXXX	ESA TAX UNIT ROBERT DUNN III, ASSISTANT ATTORNEY GENERAL 1275 W. WASHINGTON ST. CFP/CLA PHOENIX, AZ 85007
Employer	Department

D E C I S I O N
DISMISSED

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

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

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

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an appeal or petition without further appellate review on the merits:
>
> 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record.

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

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

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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2. Parties may be represented in the following manner:

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

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal.

A copy of the foregoing was mailed on
to:

(x) XX: XXXXX XXX XXXXXXXX, XXX. Acct. No: XXXXXXX

(x) Robert Dunn
Assistant Attorney General
1275 W. Washington - SITE CODE 040A
Phoenix, AZ 85007

(x) John B. Norris, Chief of Tax
Employment Security Administration
P. O. Box 6028 - SITE CODE 911B
Phoenix, AZ 85005

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-0900225-001-BR

In the Matter of:

XXXXXXXX XXXXXX XXXXXXXXX	ESA TAX UNIT
XXXXXXXXXX, XX	C/O ROBERT DUNN III
X/X XXXXXXX & XXXXXXX, XXXX, XX	ASSISTANT ATTORNEY GENERAL
XXXX X. XXX XXXXXX, XXXXX X-XXX	1275 W. WASHINGTON- 040A
XXXXXXX, XX XXXXX-XXXX	PHOENIX, AZ 85007
Employer	Department

D E C I S I O N
AFFIRMED UPON REVIEW

The **DEPARTMENT,** through counsel**,** requests review of the Appeals Board decision issued on January 6, 2006, which **affirmed** that part of the Reconsidered Determination issued on March 9, 2005, and held that services performed by individuals as a Billing Processor constitute employment and remuneration paid to individuals constitutes wages for the services performed as a Billing Processor; and which **reversed** that part of the Reconsidered Determination issued on March 9, 2005, and held that services performed by individuals as Physicians Assistants (PA), Bookkeeper and Medical Advisor, do not constitute employment and that remuneration paid to Physicians Assistants, Bookkeeper and Medical Advisor does not constitute wages

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

In the request for review, the Department, through counsel, refers to A.R.S. § 23-614(a) for the definition of "professional employer organization". That definition concerns "who" the employer may be when it is already established that there is an employer-employee relationship. The statutes that decide that issue are A.R.S. §§ 23-615, 23-613.01, and 23-617, as indicated in the Notice of Hearing. Reference to A.R.S. § 23-614 is not helpful to determining whether PAs are independent contractors or employees.

Counsel also contends that Bd. Exh. 13 does not support finding of facts (FOF) 8, 9, 10, or 16, in the Board's decision and is contrary to Bd. Exhibits 4, 5, 6, and 7. We agree that Bd. Exh. 13, does not cover those findings, but we amend the citations to cite Bd. Exhs. 4, 5, 6 and 7, in lieu of the present citations.

Counsel contends that FOF 8 does not exist in Bd. Exh.13 and is contrary to the provisions of Bd. Exhs. 4, 5, 6, 7, 16. FOF 8 is correct and is supported by Bd. Exhs. 4, 5, 6 and 7, which state in pertinent part: "PA shall be responsible for all costs and expenses including, but not limited to, costs of equipment provided by PA".

Counsel contends that FOF 9 is incorrect because PAs are not required to provide liability insurance for its services. Counsel's contention is correct, and we delete this finding. We note that, whether the PA must provide liability insurance is not a factor under Arizona Administrative Code, Section R6-3-1723(D) for consideration of determining whether PAs are independent contractors or employees.

Regarding FOF 10, counsel contends that the record indicates the PAs never hired any assistants, which indicates an employment relationship rather than an independent contractor relationship. This FOF is correctly stated, and it is supported by Bd. Exhs. 4, 5, 6 and 7.

Regarding FOF 16, counsel argues that PA's promise of indemnification is immaterial because XXXX is obligated to pay for malpractice insurance for PAs, which would be the primary source of indemnity for liability incurred by XXXX as a result of PA's conduct. Counsel's argument lacks merit. PAs indemnification to XXXX indemnifies XXXX from PA's acts causing liability to XXXX. If any PA causes liability to XXXX, the alleged victim would probably sue XXXX and the offending PA. Any damages that XXXX would be required to pay as a result of a lawsuit could be recovered from the offending PA under paragraph 11 of XXXX's and PA's agreement. Consequently, PA's indemnification to XXXX is not material.

Counsel offers contrary contentions on the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2) to which we respond:

a. <u>Authority over Individual's Assistants</u>

Counsel contends that no PA hired an assistant and since authorization was required, it indicates the right to control.

Although paragraph 8(b) of PA's agreement indicates that PAs agree to provide worker's compensation insurance for PAs' employees and agents, XXXX'X and PA's agreement does not require PAs to hire employees and the agreement does not mention nor require XXXX'X authorization for PAs to hire employees to help PAs perform their duties.

We still consider this factor significant in determining that the parties' relationship was that of independent contractor

b. Compliance with Instructions

Counsel contends that the contract between XXXX and the hospital and between XXXX and PAs gives XXXX the right to control.

PAs are subject to specific rules of practice under the authority of their licensing agency and must adhere to generally accepted medical practices in performing their duties. There is no provision in the contract the indicates that XXXX has the right to impose any specific method of performing the services.

Here, the PA is required to follow both the policies and procedures of XXXX and its client, XXXXXXXX XXXXXX XXXXXXXX (XXXXXX). Whether there are such policies and procedures is not material. The contract provides the right of control over the result, but not the specific methodology to be used. The PA is required to follow established medical procedures and this requirement is a function of the licensure, not of XXXX. In addition, by law, a PA must always be supervised by a physician. These factors indicate that the right to control the methods used by the PA is the result of a "provision of law", not the contract provisions. Consequently, PAs are not employees as provided under Arizona Administrative Code, Section R6-3-1723(B).

We still consider that this factor indicates an independent contractor relationship.

C .Oral or Written Reports

Counsel contends that both the XXXX'X contract with the PAs, and the XXXX contract with XXXXXX, require written reports detailing the procedures used in treating patients.

Because the Hospital requires the physicians, who require PAs to use the hospital's forms to prepare reports of all medical examinations, treatments, and procedures, does not indicate hospital control. What is indicated is the hospital's desire to have a standard format for such reports so that the hospital can comply with its duty to maintain such reports. The reports that the PAs must prepare are form reports required to satisfy sound documentation of medical procedures and treatment of patients. The Department ignores the importance to the hospital to have detailed reports of patients' treatment. Moreover, such reports are prepared for the hospital, not XXXX.

We still consider this factor significant in determining the parties' relationship was of an independent contractor nature.

d. Place of Work

Counsel contends that because the PA do not bring patients to a location where they have privileges, they are subject to control by XXXX and XXXXXX.

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

The nature of the work means that a central location is selected and is not a control factor.

We still consider this factor significant in establishing the existence of an independent contractor.

e. Personal Performance

Counsel contends that by requiring personal performance, no greater control factor could be found.

Although PAs cannot assign their rights, duties and responsibilities to another PA without XXXX consent, we find that XXXX'X consent is required because XXXX is concerned with the PA's qualifications and experience to perform their duties and responsibilities consistent with medical procedures in emergency medical care.

It is reasonable and logical for XXXX to have the authority to control what PAs are sent to provide services to its client, XXXXXX. XXXX has a contractual obligation which could be abrogated by the use of lesser qualified individual PAs. In addition, XXXX'X right to refuse to allow a substitute PA, serves as a mechanism to limit XXXX'X potential legal liability because, if a highly experienced PA assigns his contract to a less experienced PA, XXXX'X concern is not control, but legal liability.

We still think that this factor is neutral with respect to determining whether an employer-employee relationship exists between the parties. We certainly do not find that the facts show an employment relationship.

f. Establishment of Work Sequence

Counsel contends that the right to control factor is still present and establishes an employer employee relationship if not neutral.

Here the PA is free to follow his or her own patterns of work, subject only to medical triage judgments and work flow, and the requirements of a supervising physician. XXXX does not require any particular sequence of tasks designed to reach the completion, but expects each PA to exercise medically sound, professional judgment in performing all duties. Any control over the work sequence is established by the medical profession or is a function of law. The right to control is elusive because of the triage factors and medical procedures that must be followed by all medical practitioners providing emergency room services.

We still think that this factor indicates an independent contractor relationship.

g. Right to Discharge

Counsel contends that the contractual right to terminate a PA with no notice is evidence of control because it is similar to an employment at will doctrine.

The ability to terminate does not relieve the PA from liability, which is usually not present in an employment situation.

XXXX'X right to require the PA to continue providing services even if terminated "until such time as the patients being treated by PA no longer require its services", indicates discharge is not the remedy, but a possible lessening of liability. No employee could be required to continue working after being fired.

Here, although each party may terminate the contract on 30 days prior written notice. XXXX may terminate the agreement with PA "for cause". The enumerated causes involve the PA's ability to provide PA services consistent with established medical procedures and XXXX's concern about its liability for PA's services. Each party is liable for obligations and liabilities. An employee is normally not monetarily liable after a "discharge", for failure to have performed job obligations.

We still consider this factor significant in determining that the parties' relationship is that of independent contractor.

h. Set Hours of Work

Counsel contends that the PA is not able to miss a shift and do the work at another time.

The subject matter of the work precludes that option. However, a PA does not have to sign up for the shift and could obtain a substitute if one were unable to do a shift. There is no minimum number of shifts it would have to accept in order to remain under contract. The Department's argument that a physician in private practice is master of his own time because he can cancel his appointments to go play golf has no practical reality. The Department concedes that such behavior might result in loss of income and patient patronage.

Here, schedules are posted, but a PA is free to accept or reject any shift. Once accepted, the PA must personally cover that shift unless he finds a replacement as provided under paragraph 2(b) of the contract. A PA, individually, controls the days, times and hours he will perform services for XXXX. The PA is a master of his own time.

We still consider this factor significant in determining that the parties' relationship was that of independent contractor

i. Training

Counsel contends that the obligation of a PA to attend meetings is a control factor.

XXXX is an Arizona corporation. XXXX'X contract with PAs does not mention training because XXXX does not provide training. A PA's weekly meetings with a physician refers to his supervising physician, a live person, not XXXX, a corporation.

We still consider this factor significant in determining that the parties' relationship was that of independent contractor.

j. Amount of Time

Counsel contends that the factor should be neutral since some PA's work long hours and some short hours.

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

Some PAs spend extensive time performing services for XXXX, while others devote less time. The election is made by the PA and there is no time restriction that prevents a PA from doing other gainful work of any kind. The PA has the freedom to work as much or as little as he wishes.

We still consider this factor significant in determining that the parties' relationship was that of independent contractor.

k. Tools and Materials

XXXXXXX XXXXXXXX XXXX XXX XXXXXXXXX XXXXXXX XXXX "XXXX shall furnish sufficient physical facilities, staff, equipment, and supplies for the operation of the facilities".

Most of the tools, facilities, and equipment for performing the work are not furnished by the PA. The nature of the work indicates that a PA would not normally furnish these work-related items regardless of the arrangement. It would be extremely impractical to expect a PA to provide hospital

equipment or facilities in order to perform services. The hospital provides, at no cost to the physician "Group", all equipment, facilities, supplies, utilities, telephone service, laundry, linen, and janitorial services. The nature of the hospital's emergency room facilities demonstrates the practical realities that compel a hospital, a physician and a PA to arrange for providing medical care that accommodates their separate services.

We still consider this factor significant in determining that the parties' relationship was that of independent contractor.

i. Expense Reimbursement

Counsel contends that it is XXXX that is obligated to provide medical malpractice insurance.

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Paragraph 7 of the PA's agreement require them to be responsible for all costs or expenses in performing their services such as equipment, fees, fines, licenses, bonds, and all other costs of doing business. Under Paragraph 8 of the PA's agreement, they are responsible for providing worker's compensation for themselves and employees they employ.

This factor indicates an independent contractor relationship.

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

1. Availability to the Public

Counsel contends that there was no evidence that any PA was able to work simultaneously to provide PA services for another entity and that XXXX'X ability to direct night shifts limit that capability.

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

Here, just as with set hours of work or amount of time, some PAs are positively available to the public, but not all are.

The test here is not whether there is a control factor, but whether there is a positive practice of making his or her services available to the general public on a continuing basis. The nature of the PA's work, and the law which governs it, precludes a PA from offering services to the public. Some professionals offer their professional services to other professionals only, not the general public.

The absence of making his or her services available to the general public on a continuing basis is a function of the legal requirements for this type of work. That the worker is free to perform services for another entity which offers emergency room services to the public supports a finding that the worker is an independent contractor.

2. Compensation

Counsel contends that payment on an hourly basis shows a lack of independence.

Here, the PA is paid on an hourly basis. We note that XXXX does not bill patients for the services on an hourly basis, but on a "job basis", which is a standard, accepted medical practice. The PAs are being compensated for the time they spend performing services and making themselves available at the client's location. This is no different than hourly charges paid to lawyers, accountants or landscapers. The mere fact that compensation is paid based upon hours worked and billed does not control the nature of the relationship. We also note that the PA is being paid on an hourly basis because the nature of the service rendered does not lend itself to convert the PA's skills to a job basis billing as a hospital usually does.

We find that the absence of payment on a job basis is not a significant element in finding whether PAs are independent contractors.

3. Realization of Profit or Loss

Counsel contends that there are no potentials for profit or loss.

An employee is generally not in a position to realize a profit or loss as a result of his services. An independent contractor, however, typically has recurring liabilities in connection with the work being performed. The success or failure of his

endeavors depends in large degree upon the relationship of income to expenditures. Under paragraph 7 of the PA's agreement, they are responsible for all costs and expenses in performing their services. Under paragraph 14 of the PA's agreement, they are responsible for withholding income taxes, and social security taxes from their income, and they are are responsible for obtaining and paying for health, disability, and life insurance premiums and paying for retirement benefits. The PA's responsibilities are liabilities and, in relationship to their income, establishes that they are in a position to realize profits or suffer a loss

We still find this factor is neutral as to whether an employer/employee relationship exists.

4. Obligation

Counsel contends that the PA does not incur an obligation for failure to perform or in walking off the job.

An employee usually has the right to end the relationship with an employer at any time without incurring liability. An independent worker usually agrees to complete a specific job. The specific job for the PA is to provide services at the emergency room of the hospital for a 12-month contractual period. Under paragraph 10 (c) of the PA's agreement, XXXX may seek immediate injunctive relief against any PA who breaches the terms of the agreement. For instance, under paragraph 9(A)(1) of the agreement, PAs must give to XXXX 30 days advance written notice (some PAs 90 days) to terminate their services. The PAs would be liable for damages for terminating their services before the 30 days advance notice.

We consider this factor significant in determining that the parties' relationship was that of independent contractor.

5. Significant Investment.

Counsel contends that the admitted lack of significant investment should not be labeled as "Not a determinative element", as the Board reasons.

Here, the PA has no significant investment. This is the result of the nature of the work, the ability to acquire the necessary

equipment and facilities and the costs of such acquisition. It is not a practical consideration in this situation. The lack of investment by the PA is a function of the type of work performed under the contract between XXXX and XXXXXX. It would not be practical for each of the PAs to make their own "significant investment" in order to establish an element as an independent contractor.

We find that absence of significant investment is not a determinative element in finding that the worker is an employee or an independent contractor. Rather, it is neutral in this case.

6. Simultaneous Contracts

Counsel contends that Simultaneous Contracts is not a control factor and should not be judged under the same reasoning, but should be judged on the basis of whether there are, in fact, Simultaneous Contracts.

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

The evidence adduced clearly established that a PA is not prohibited from entering into similar contracts for services with any number of other entities. The Department and XXXX, in referring to PAs, stipulated that many PAs perform services at other emergency rooms and that the PAs' agreement does not restrict them from performing services elsewhere (Bd. Exh. 13). Moreover, during 2001 and 2002, more than 80% of the PAs provided services to other entities (Bd. Exh. 13). As with many other factors, it is not the existence, or lack thereof, of the factor, but the parties' right to do so or not at the parties' discretion. Here, PAs may fully exercise, at their discretion, whether they will contract with other entities, and to what extent.

We find that the absence of simultaneous contracts is not a significant element in finding that the unrestricted right to enter into such simultaneous contracts, and that in 2001 and 2002, over 80% of the PAs had simultaneous contracts, is a significant factor in finding that the worker is an independent contractor.

In the analysis in our prior decision, that we affirm upon review, we have not determined the status of those performing services by merely counting the factors, but by weighing the factors and determining the importance of certain factors and ignoring those factors that are neutral. The **control** factors considered in determining whether a worker is an employee are considered in Arizona Administrative Code, Section R6-3-1723(D). One of the strongest control factors arises by operation of the law that a PA must be supervised by a physician. Had XXXX chose to fulfill its contract with XXXXXX by using only physicians, that particular control factor would not be present. But what remains significant is that the supervision factor arises as a provision of law and a necessary part of the licensing of a PA. That does not, of itself, create an employment relationship – just as the exclusive use of physicians does not eradicate the control factor. Here, XXXX, a corporate entity, the purported employer does not technically exercise that type of "operational control" over its contracted PAs. Supervising physicians have that control, but there is no implicit or explicit requirement that the supervising physician be affiliated with XXXX.

In a case where an employing unit contends that it is not an employer and the Department contends that it is, the Department has the burden of proof, by the preponderance of the credible evidence, to establish that an employment relationship exists. As noted, it is not an arithmetic calculation, but an analysis of pertinent elements under Arizona Administrative Code, Section R6-3-1723(D). In this case, the Department did not satisfy the burden of proof.

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 **DEPARTMENT**, through counsel, has not submitted any newly-discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;

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

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

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

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

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

DATED:

APPEALS BOARD

_____
MARILYN J. WHITE, Chairman

_____
HUGO M. FRANCO, Member

_____
WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

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. If you have questions about the

procedures on filing an appeal, you must contact the Tax Court at (602) 506-3763.

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

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

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

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

(x) Er: XXXXXXXX XXXXXX XXXXXXXXX Acct. No: XXXXXXX-XXX
XXXXXXXXXX, XX

(x) ROBERT DUNN III
Assistant Attorney General
1275 W. Washington - 040A
Phoenix, AZ 85007

(x) JOHN B. NORRIS Chief of Tax
Employment Security Administration
P. O. Box 6028 - 911B
Phoenix, AZ 85005

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1002418-001-B

In the Matter of:

XXX XXXXXXXX XXX. % XXXXXXXX X. XXXXXX, XXX. XXXX X. XXXXXXX XXX. XXX. XXXX XXXXXXX, XX XXXXX	E S A, TAX UNIT % ROBERT DUNN III ASSISTANT ATTORNEY GENERAL, CFP/CLA 1275 W. WASHINGTON ST. PHOENIX, AZ 85007
Employer	Department

DECISION
AFFIRMED

THE **EMPLOYER**, through counsel, petitions for a hearing from a Decision of the Department issued June 14, 2005, which held that the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued May 27, 2004, are final and binding because the requests for reconsideration were not filed within the statutory period.

The Employer filed a timely petition for hearing from the Department's Decision and the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-672(D) and 23-724(A).

At the direction of the Appeals Board, after proper notice, a hearing was held on August 23, 2006, in Phoenix, Arizona before William E. Good, an Administrative Law Judge, for the purpose of considering the following issue:

> Whether the Employer filed timely requests for reconsideration, the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued May, 27, 2004, under A.R.S. §

724(A) and Arizona Administrative Code, Section R6-3-1404 (A)(B)(C)

The following persons appeared at the hearing:

XXXXX XXXX	Employer witness
XXXXXXXX XXXXXX	Employer counsel
XXXXX XXXXXX	Department witness
XXXX XXXXXXX	Department witness (did not testify)
ROBERT DUNN III	Department counsel

The witnesses for the Employer and the Department were sworn and testified. Documents in the file, marked and identified as Board Exhibits 1 through 39, were admitted into evidence.

We have carefully reviewed the entire record, including the exhibits admitted into evidence and the transcript of the Appeals Board hearing.

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

1. A Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages, were sent by certified mail on May 27, 2004, to the Employer's last known address of record. The Determinations advised the Employer that the Determinations would become final unless written request for reconsideration was filed within fifteen days of the date of the Determinations (Bd. Exhs. 7-10).

2. The envelope was addressed to the Employer XX X.X. XXX XXXXX, XXXXXXX, XX XXXXX. The documents and the envelope were returned to sender with the notation "FORWARDING ORDER EXPIRED" (Bd. Exh. 9). The Department had only one mailing address of record for the Employer at the time it mailed the two Determinations. This was X.X. XXX XXXXX, XXXXXXX, XX XXXXX (Tr. pp. 14, 15, 33, 36, 39-47, 64; Bd. Exhs. 1-3, 30, 31, 33, 36, 39).

3. The Employer received the two Determinations on June 11, 2006 (Tr. pp. 72, 73; Bd. Exhs. 14, 15).

4. On June 24, 2004, as indicated by the date of the document, the Employer filed a request for reconsideration (Tr. p. 12; Bd. Exh. 15).

5. On June 14, 2005, the Department issued a decision advising the Employer that the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, were final and binding because the request for reconsideration was not filed within the statutory period (Bd. Exh. 11).

6. By letter postmarked July 13, 2005, the Employer filed a petition for a hearing or a review of the Department decision (Bd. Exh. 21).

Arizona Revised Statutes § 23-724(A) provides:

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

Arizona Revised Statutes § 23-724(A) is unambiguous, declaring that the determination "... shall become final ... ." In the absence of a timely request for reconsideration, the Appeals Board is without authority to consider the merits of this matter.

The Arizona Court of Appeals has addressed the issue of timeliness of appeal from a prior determination, and has taken the position that the statutory prerequisites must be observed if an appeal is to be considered timely.

In Wallis v. Arizona Department of Economic Security, 126 Ariz. 582, 617 P.2d 534 (Ariz. App. 1980) the Court, interpreting A.R.S. § 23-773(B), held that

a determination issued by a claims deputy becomes "final" unless there is a timely appeal to that determination. The court stated:

> We must assume that the legislature meant what it said, and therefore hold that where the statutory prerequisites for finality to a deputy's determination are established, that decision becomes "final", unless a timely appeal is perfected.

In Banta v. Arizona Department of Economic Security, 130 Ariz. 472, 636 P.2d 1254 (Ariz. App. 1981) the Court was confronted with virtually the identical issue before us in this case, i.e., a late request for reconsideration under A.R.S. § 23-724(A). In that decision the Court said:

> ... We therefore hold that a liability determination becomes final fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within this time the unit files a written request for reconsideration.

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

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

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

The Court in Banta, supra, also addressed the application of Arizona Administrative Code, Section R6-3-1404(B), stating:

> The appellants have not established that their untimely request for reconsideration was the result of post office delay or other action. Their untimeliness, consequently, was inexcusable.

The evidence establishes that no request for reconsideration of the Determinations issued May 27, 2004, was filed within the time prescribed by A.R.S. § 23-724(A). The Employer's letter, mailed June 24, 2004, was beyond the appeal period. A petition filed outside the statutory period may be considered timely only if the late filing is due to Department error or misinformation, postal error, or a change of address when there is no reason to notify the Department of the change. In the petition for hearing filed July 13, 2005, the Employer addresses the issue of the Determinations which is not before the Board for review because the Employer did not file a timely request for reconsideration.

Regarding the reason for the late filing of the request for reconsideration, we note that the last known address in the Department's records was the Post Office Box listed by the Employer on the Joint Tax Application (Bd. Exh. 39). The Employer, through counsel, did not address that issue in the petition to the Board. In the late request for reconsideration, and in her closing at the hearing, the Employer's counsel contended the Employer did not receive the Determinations until June 11, 2004, and that the Employer's correct address was XXXX-X, XXXXXXX XX., XXXXXXX, XX XXXXX-XXXX. We also note that the Employer could still have filed a timely request for reconsideration on June 11, 2004, and asked could have requested an extension of time to file a supplement.

The Department is able to rely on the mailing address for the Employer for notices. The fact that the audit was conducted at the location where business was conducted, does not alter the mailing address until the Employer takes action to change that address. The Employer took no such action prior to the issuance of the Determinations. The information relied on by the Department included a

2003 “1099” form issued by the Employer and using the same mailing address (Bd. Exh. 30), and a letter mailed to the same address on April 21, 2004, requesting an audit and scheduling the appointment for the audit. That letter must have reached the Employer to enable the date of the audit to be changed at the Employer’s request (Bd. Exh. 31).

Based upon the evidence before us, the Board concludes that the Employer failed to timely request reconsideration of the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued May 27, 2004, and the Employer is not entitled to a hearing on the merit issues in this matter. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Decision of June 14, 2005.

The Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued May 27, 2004, are final and binding on the Employer.

DATED:

APPEALS BOARD

_____
MARILYN J. WHITE, Chairman

_____
HUGO M. FRANCO, Member

_____
WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable

action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. A request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1140 E. Washington, Box 14, [Suite 104], Phoenix, Arizona 85034. Telephone: (602) 229-2806. A request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

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

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal.

A copy of the foregoing was mailed on
to:

(x) Er: XXXXXXXX X. XXXXXX, XXX. Acct. No: XXXXXXX

(x) Robert Dunn
Assistant Attorney General
1275 W. Washington - 040A
Phoenix, AZ 85007

(x) John B. Norris, Chief of Tax
Employment Security Administration
P. O. Box 6028 Site Code - 911B
Phoenix, AZ 85005

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1002368-001-B

In the Matter of:

XXXXXX XXXXXXX XXXXXXXX X/X XXXXXX X. XXXXX, XXX XXXX X. XXX XX., XXX. X XXXXXXXX, XX XXXXX	ESA- TAX UNIT ROBERT DUNN III, ASSISTANT ATTORNEY GENERAL, 1275 W. WASHINGTON ST. CFP/CLA PHOENIX, AZ 85007-2926
Employer	Department

DECISION
AFFIRMED

THE **EMPLOYER**, through counsel, petitions for a hearing from the Reconsidered Determination issued October 27, 2005, which affirmed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued December 10, 2001, which held that the Employer is liable for Arizona Unemployment Insurance Taxes on the basis of gross payroll of at least $1,500 in a calendar quarter, beginning October 1, 2000, and that services performed by individuals as **nurses**, constitute employment, and remuneration paid to those individuals constitutes wages.

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

At the direction of the Appeals Board, a hearing was held on September 14, 2006, in Phoenix, Arizona, before William E. Good, an Administrative Law Judge, for the purpose of considering the following issues, of which all parties were properly noticed:

1. Whether the employing unit is liable for Arizona Unemployment insurance taxes beginning October 1, 2000, under A.R.S. § 23-613.

2. Whether services performed by individuals as **nurses** constitute employment as defined in A.R.S. § 23-615, and are not exempt or excluded from coverage under A.R.S. §§ 23-613.01, 23-615, or 23-617.

3. Whether remuneration paid to individuals for such services constitutes wages as defined in A.R.S. § 23-622, which must be reported and on which State taxes for unemployment insurance are required to be paid.

The following persons were present at the hearing and gave sworn testimony:

XXXX XXXX	Employer witness
XXX XXXXX	Employer counsel
XXX XXXXXXX	Employer witness
ROBERT J. DUNN	Department counsel
XXXXX XXXXXX	Department witness
XXXX XXXXXXX	Department witness

At the hearing, and by subsequent agreement of the parties, Board Exhibits No. 1 through 31 were admitted into the record as evidence.

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

1. The Employer, X XXXX XXXXXXXXXX, provides the services of various types of Health Care Workers (nurses) to client health care facilities, the nurses are required to be licensed according to their specialty. The Employer has approximately XX such workers on its availability list at any time (Tr. pp. 23, 27, 56, 72: Bd. Exhs. 20, 21).

2. The clients inform the Employer of the client's needs for nursing services, and the Employer calls nurses to check their availability. Nurses sent to a facility use the Employer's time sheets to record their time at the client, and fax the sheets to the Employer each Monday. The Employer pays the nurse an hourly wage ranging from $XX to $XX per hour, each subsequent Friday. Nurses are forbidden from working overtime hours for a client, unless the Employer, not the client, has given permission (Tr. pp. 23, 31-33, 61; Bd. Exhs. 20, 21, 23).

3. The Employer insists that nurses enter into independent contractor agreements with the Employer (Tr. pp. 28, 29; Bd. Exh. 20).

4. With some exceptions, where the client objects to the Employer's form of agreement, the Employer and the clients enter into an agreement with clients, using the Employer's form (Tr. pp. 31, 71; Bd. Exh. 21).

5. The Employer provides no training for the nurses, and nurses are not required to attend meetings or file reports with Employer. The clients may require reports from the nurses (Tr. pp. 33, 75).

6. If a nurse, who had agreed to a specific assignment, could not report for that assignment, the nurse was required to report that problem to the Employer at least two hours before the start of the assignment. The Employer would attempt to obtain a substitute for the client. Nurses are not able to use substitutes at their own discretion (Tr. pp. 34, 35, 36, 62, 74; Bd. Exhs. 20, 23).

7. The Employer did not tell nurses how to perform services for the client, or in what sequence, but left that factor to each client. The Employer requires nurses to wear medically specific uniforms at each client, and specifies "white closed toe shoes" and that "No dangling earrings or sharp edged finger rings may be worn", and that "fingernails should be short with natural nail coloring. Hair should be worn back away from your face." Nurses are required to wear a badge with the Employer's name and telephone number (Tr. pp. 34, 37, 38, 48-50, 57, 58; Bd. Exh. 23).

8. The Employer does not prevent nurses for working for other employers or facilities. If a client hires a nurse who was on assignment from the Employer, the client must pay a recruitment fee of $X,XXX to the Employer, if the client has not given certain notice and engaged that nurse's services from the Employer, for a minimum number of hours (Bd. Exh. 21).

9. The business that obtained the Employer's list of clients and nurses in XXX XXXX (XXXX), treats the nurses as employees (Tr. pp. 50, 51, 94-97, 100, 101). According to the Department records, several nurses who have performed services for the Employer have also performed services for other medically related facilities that were not clients of the Employer, and for temporary help firms that furnish their employees to medical facilities. These services were performed as employees and the workers received base period wages used for determining eligibility for the receipt of unemployment insurance benefits (Bd. Exhs. 25-29).

10. Neither the Employer nor the nurse furnishes tools to be used at the client. Any tools or equipment needed by the nurse are furnished by the client (Tr. p. 64).

11. Clients require the Employer to provide liability insurance, and the clients require the Employer to indemnify it against any claims mad because of a nurse's negligence and to indemnify the client against any claim made by a nurse for "wages or benefits" (Bd. Exh. 21).

12. The Employer requires liability insurance from the nurses, but does not enforce this requirement (Bd. Exh. 20).

13. The Employer has the right to terminate the agreement and the nurse's services for cause without prior written notice (Bd. Exh. 20).

14. The Employer has a gross payroll of at least $1,500 in a calendar quarter (Bd. Exhs. 2-5).

The Employer contends that it has no employees and that nurses, whose employment is in dispute in this case, are independent contractors and not employees.

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

> "Employment" means any service of whatever nature performed by an employee for the person employing him,

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

> Employee; definition; exempt employment
>
> > A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:
> >
> > > 1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristics of an independent profession, trade, skill or occupation.

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

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

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

Arizona 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:

> 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.
>
> 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.

Arizona Administrative Code, Section R6-3-1723(D)(2) identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e)

requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

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

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

a. 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 nurse is not permitted to have assistants perform duties for the nurse or to substitute for the nurse at the client.

This factor is indicative of **an employer/employee 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. The control factor is present if the Employer has the right to instruct or direct.

Although the Employer does not control the method of performing the services, the Employer requires the nurse to wear the Employer’s badge and to comply with an apparel and personal appearance code. The Employer has the right to control the performance of services by the nurse but defers that right to the client

This factor is indicative of **an employer/employee 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 Employer does not require regular or written reports, but has the right do so.

This factor is indicative of **an employer/employee relationship**.

d. Place of Work

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

The Employer does not have any facility at which the work could be performed. The nurse does not decide where the work is to be performed.

We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.

e. Personal Performance

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

The nurse is not able to hire a substitute, but must tell the Employer if the nurse is not able to keep an assignment.

This factor is indicative of **an employer/employee relationship**.

f. Establishment of Work Sequence

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

While the Employer is not able to set the sequence of work, because it is at the client's facility, the Employer has the right to set the sequence which it has deferred to the client as a practical matter. Much of the sequence of work is controlled by recognized standards of medical practice.

This factor is indicative of **an employer/employee 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 has the right to terminate the agreement and the nurse's services for cause without prior written notice.

We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employer or independent contractor.

h. Set Hours of Work

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

The nurses have the discretion of accepting or rejecting an assignment. However, once the assignment is accepted, the nurse must adhere to the hours, rather than complete the work on the nurse's own schedule.

This factor is indicative of **an employer/employee relationship.**

i. Training

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

The Employer offers no training and requires no meetings. The nurse has already been trained and must still follow any training instituted by the client.

We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.

j. Amount of Time

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

The nurse is free to accept other work so long as the schedule is followed.

This factor is indicative of **an employer/employee relationship.**

k. Tools and Materials

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

Neither the Employer nor the nurse provides any tools. Any tools or equipment need is provided by the client.

We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.

i. 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 nurse is not entitled to expense reimbursement and has no expense connected with performing the services for the employer (Bd. Exh. 20).

We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.

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

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

The nurse performs services for other employers while not performing services for the Employer. The nurse does not offer services to other facilities, other than as an employee.

This factor is indicative of **an employer/employee relationship**.

2. Compensation

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

The nurse is paid on an hourly basis and the Employer does not permit the nurse to work overtime for the client without specific permission. Where overtime is the subject of permission or not, the arrangement is for one of employment, where the Employer is interested in the costs of employment, not just the end result.

This factor is indicative of **an employer/employee relationship**.

3. Realization of Profit or Loss

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

Here, the nurse has no way of realizing a profit or suffering a loss, based on costs or efficiency. The only way to absorb fixed costs is to work more hours for the Employer.

This factor is indicative of **an employer/employee relationship**.

4. Obligation

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

Here, there is no provision holding the nurse liable for ending the arrangement or negligence in performing the services for the client.

This factor is indicative of **an employer/employee relationship**.

5. Significant Investment.

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

The nurse has no significant investment in providing the services for the client. While some providers having an independent status have no significant investment, there is a significant investment in facilities by the client. The nurse merely uses the facility.

We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.

6. Simultaneous Contracts

> An individual who works for a number of people or companies at the same time may be considered an independent contractor because he is free from control by one company. However, the person may also be an employee of each person or company depending upon the particular circumstances.
>
> The Employer has not established that any nurse worked for other companies in the capacity of an independent contractor. There is no evidence that any nurse advertised such services as an independent contractor.
>
> This factor is indicative of **an employer/employee relationship**.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered.

One such factor in this case is that the type of business engaged in by the Employer, is either a referral business where a registry enables nurses to find temporary employment by a client who pays the nurse, or a temporary help firm, that assumes the status of employer so the client may engage a nurse and dispense with their services at will.

This factor is indicative of **an employer/employee relationship**.

Another factor exists when a client hires a nurse who was on assignment from the Employer. If that happens, the client must pay a recruitment fee of $X,XXX to the Employer if the client has not given certain notice and engaged that nurse's services from the Employer in a minimum number of hours. It is an employment situation where an employee is subject to restrictions on whether to continue working for an employer rather than performing services for another user. The restriction imposed on the client is also a restriction on the nurse.

This factor is indicative of **an employer/employee 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 it 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 it 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).

There are no factors that tend to support the Employer's contention of independent contractor relationship.

The factors that tend to support an employer/employee relationship include:

> Authority over Individual's Assistants, Compliance with Instructions, Oral or Written Reports, Personal Performance, Establishment of Work Sequence, Set Hours of Work, Amount of Time, Availability to the Public, Compensation on job basis, Realization of Profit or Loss, Obligation, Simultaneous Contracts.

The factors that not applicable in this case are:

> Place of Work, Training, Tools and Materials, Expense Reimbursement, Significant Investment, Right to Discharge.

We have thoroughly examined the facts present in this case, including the factors that have the practical effect of preventing a nurse, assigned to a client by the Employer, from becoming employed by a client. We have considered the relevant law and administrative rules as they are applicable to those facts. We have considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Section R6-3-1723(D) and (E), and conclude that the services performed by individuals as nurses constitute employment.

We also find that, based on the quarterly wages of those we find as employees, the Employer is liable for Arizona Unemployment insurance taxes.

Arizona Revised Statutes § 23-622(A) defines "wages" as:

> "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. ...

Arizona Administrative Code, Section R6-3-1705(B) provides in pertinent part:

> The name by which the remuneration for employment, or potential employment as provided in ... [A.A.C. R6-3-1705(G)], is designated or the basis on which the remuneration is paid is immaterial. It may be paid in cash or in a medium other than cash, on the basis of piece work or percentage of profits, or it may be paid on an hourly, daily, weekly, monthly, annual or other basis. The remuneration may also be paid on the basis of an estimated or agreed upon amount in order to resolve an issue arising out of an employment or potential employment relationship. .

In this case, such remuneration constitutes wages as contemplated by the applicable statutes and administrative rule. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination issued on October 27, 2005.

1. The Employer is liable for Arizona Unemployment insurance taxes beginning XXXXXXX X, XXXX, under A.R.S. § 23-613.

2. Services performed by individuals as nurses constitute employment as defined in A.R.S. §§ 23-613.01, 23-615 or 23-617, and such individuals are employees within the meaning of A.R.S. § 23-613.01 and Arizona Administrative Code, Section R6-3-1723.

3. The remuneration paid to individuals for the services performed, constitutes wages within the meaning of A.R.S. § 23-622, which must be reported and on which state taxes for unemployment insurance are required to be paid.

DATED:

APPEALS BOARD

_____
MARILYN J. WHITE, Chairman

_____
HUGO M. FRANCO, Member

_____
WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. A request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1140 E. Washington, Box 14, [Suite 104], Phoenix, Arizona 85034. Telephone: (602) 229-2806. A request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

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

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal.

A copy of the foregoing was mailed on
to:

(x) Er: X/X XXXXXX X. XXXXX, XXX Acct. No: XXXXXXX-XXX

(x) ROBERT DUNN
ASSISTANT ATTORNEY GENERAL
1275 W. WASHINGTON ST., CFP/CLA
PHOENIX, AZ 85007-2926

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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1005515-001-B

In the Matter of:

XXXXXXXX XXXXXXXXXX. XXX XXXXXXXX X/X XXXXXX X. XXXXX XXX. XXXXXXX & XXXXX XXXXXXX XXXX XXX XXX XXXXX XXXXXXX XXX. XXXXXXX, XX XXXXX-XXXX	ESA TAX UNIT C/O ROBERT DUNN ASSISTANT ATTORNEY GENERAL 1275 WEST WASHINGTON CFP/CLA PHOENIX, AZ, 85007
Employer	Department

DECISION
REVERSED IN PART
SET ASIDE IN PART

THE **EMPLOYER**, through counsel, petitions for a hearing from the Reconsidered Determination issued by the Department on January 25, 2006, which affirmed the Department's Determination of Liability for Employment or Wages issued November 30, 2005, which held that services performed by individuals as off-duty police officers (ODPO) constitute employment and remuneration paid to individuals for such services constitutes wages.

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

At the direction of the Appeals Board, a hearing was held on September 11, 2005, in Phoenix, Arizona, before William E. Good, Administrative Law Judge, for the purpose of considering the following issues, of which all parties were properly noticed:

1. Whether the Employer is liable for Arizona Unemployment insurance taxes beginning [January 1, 2004], under A.R.S. § 23-613.

2. Whether services performed by individuals as off-duty police officers constitute employment as defined in A.R.S. § 23-615, and are not exempt or excluded from coverage under A.R.S. §§ 23-613.01, 23-615, or 23-617.

3. Whether remuneration paid to individuals for such services constitutes wages as defined in A.R.S. § 23-622, which must be reported and on which State taxes for unemployment insurance are required to be paid.

The following persons were present at the hearing:

XXXXXXXX XXXXXX	Employer witness
XXXXXXX XXXX	Employer witness
XXXXXX XXXXX	Employer Counsel
XXXXX XXXXXX	Department witness
XXXX XXXX	Department witness
ROBERT J. DUNN	Department Counsel

At the hearing, witnesses were sworn and testified, and Board Exhibit Nos. 1 through 27, were admitted into the record as evidence.

At the hearing, issue No. 1 was deleted from consideration because the parties stipulated that the Employer is already liable for Arizona Unemployment Insurance taxes for other covered workers.

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

1. Since 1996, the Employer has used the services of ODPO to patrol the interior and parking lot of a XXXX XXXX business it conducts at a location in Phoenix, Arizona (Tr. pp. 76-78).

2. Because the ODPO are police officers employed by the City of Phoenix Arizona, (CITY), the use of ODPO by the Employer and other users of the services are governed by specific rules (Bd. Exh. 26).

3. Among those rules, is the general statement that: “The officers that are hired by you are to provide you with the same service they would provide the public while in an on-duty capacity.”

4. Other rules of the City are:

> Officers are not to enforce the rules and regulations of a private employer as a condition of their employment, or at any time while employed by a private employer.
>
> Officers will not enter into any written or verbal contract with any private employer.
>
> Officers will wear their Department uniform at all times while employed with a private employer unless written permission is obtained from a Phoenix Police Precinct/Division Commander.
>
> The salary for officers is determined by the officer and not the Phoenix Police Department (Bd. Exh. 26).

5. If an entity, including the City of Phoenix, wants to use an ODPO, the entity must contact the Off-Duty Work Sergeant (ODWS), with a memo describing the conditions and the number of ODPO required. If the request is approved, a "work number" is assigned to the approved location (Tr. pp. 14, 24, 42, 43). The need for ODPO is posted at police stations (Tr. pp. 36, 41, 42, 63).

6. For every 4 to 5 ODPO assigned to a location, a sergeant is also needed. The sergeant also acts as a coordinator in case an extra ODPO or a substitute is needed. Substitutes do not require an employer's approval (Tr. pp. 14, 24-26).

7. When an ODPO, who reports for a shift the officer has volunteered for, an Employer tells the officer of any expected problems. The ODPO knows the areas he is expected to patrol (Tr. pp. 15, 21, 70, 71, 84). The ODPO is free to take breaks or meals whenever he chooses (Tr. pp. 21-23, 26, 27). The ODPO does not make reports to the Employer, other than as a courtesy, when the ODPO, in the capacity of a police officer, has

handled a matter involving the Employer's business (Tr. pp. 30, 32, 49, 50, 80-84).

8. The ODPO is always subject to be called to be on –duty by events at the Employer or by the local precinct. The Employer has agreed to this (Tr. pp. 16, 28, 29, 77-79; Bd. Exh. 26).

9. The ODPO is paid an hourly rate negotiated with the Employer and invoices the Employer. These rates vary from $XX to $XX per hour. When invoicing the Employer for services, the ODPO deducts from the calculations, the time the ODPO is considered to have reverted to an on-duty mode (Tr. pp. 17, 18, 28, 29, 32, 34, 35; Bd. Exh 26).

10. The ODPO is required to wear the police uniform, and may not wear any kind of an Employer's identification. An on-duty police sergeant regularly inspects work number sites to ensure compliance with this rule (Tr. pp. 17, 18; Bd. Exh. 26).

11. An ODPO may, and some do, work for other entities as an ODPO. An ODPO may not enforce the rules and regulations of a private employer as a condition of the ODPO's employment, or at any time while employed by a private employer (Bd. Exh. 26). If an ODPO is asked by an entity to perform services, and the entity does not already have a work number issued by the ODWS, the ODPO informs the entity of the requirements. An ODPO may indicate that he or she will be glad to perform services, if and when, the entity has obtained a work number (Tr. pp. 59, 60; Bd. Exh. 26).

12. The Employer provides a radio to the ODPO for communication on-site with any of the Employer's employees. The ODPO monitors the police radio supplied by the CITY, since the ODPD is subject to being called back on-duty (Tr. pp. 17, 18, 88).

13. The Employer provides no training for an ODPO (Tr. p. 57); makes no reimbursement for any ODPO's expenses (Tr. p. 85); and can cease using the ODPO services (Tr. p. 65).

It is the position of the Employer that ODPO, whose employment is in dispute in this case, are independent contractors and not employees.

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

> "Employment" means any service of whatever nature performed by an employee for the person employing him,

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

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

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

Arizona 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.

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

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

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

a. 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.

Here, the ODPO is not permitted by the City to have assistants when performing as an ODPO.

We find that authority over individual's assistants is not a determinative element in finding that the worker is an employee or an independent contractor. **Rather, it is neutral in this case**.

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. The control factor is present if the Employer has the right to instruct or direct.

In this case, the Employer has no power, and does not exercise any control, over the way the ODPO performs the duties. The ODPO knows what is to be done and the Employer and ODPO only communicate for information purposes.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor.**

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. enforce the rules and regulations of a private employer as a condition of their employment, or at any time while employed by a private employer

The ODPO only informs the Employer about incidents of which the Employer should be aware, but does not need to inform the

Employer of the manner in which the ODPO performed the duties.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

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.

Here, the ODPO has only one place to perform the work; the Employer's premises for which security is contracted. City regulations prevent the parties from having work performed for the Employer at other premises unless covered by a work number.

We find that the place of work is not a determinative element in finding that the worker is an employee or an independent contractor. **Rather, it is neutral in this case**.

e. Personal Performance

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

The ODPO may have a substitute perform services for which the ODPO agreed to perform. The Employer has no power to prevent such substitution.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor.**

f. Establishment of Work Sequence

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

The ODPO knows the sequence in which the work is to be performed and is master of his or her own time during the shift selected by the ODPO. It is the ODPO who sets the pattern of work.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor.**

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.

Here, the ODPO may decide to not continue taking a shift originally taken. The ODPO may feel morally obligated to provide a substitute as the ability of other ODPOs to obtain work with the Employer through the ODWS could be jeopardized.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor.**

h. Set Hours of Work

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

The ODPO may take as many or as few shifts of the work number authorized by the ODWS, as the ODPO wishes.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

i. Training

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

There is no training as the City advises prospective users of ODPO: "The officers that are hired by you are to provide you

with the same service they would provide the public while in an on-duty capacity."

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

j. Amount of Time

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

ODPOs are able to take as few or as many shifts as they wish and they are able to obtain substitutes for shifts.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

k. Tools and Materials

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

The only tool provided to the ODPO, by the Employer, is a radio for communication with employees of the Employer. The ODPO needs a police radio in case of being summoned back on-duty.

We find that tools and materials is not a determinative element in finding that the worker is an employee or an independent contractor. **Rather, it is neutral in this case**.

i. Expense Reimbursement

Payment by the Employer 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.

There are no expenses for which the parties contemplate reimbursement.

We find that absence of expense reimbursement is not a determinative element in finding that the worker is an employee or an independent contractor**. Rather, it is neutral in this case.**

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

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

Nothing prevents an ODPO from working for another employer that complies with City rules for using an ODPO, and nothing prevents an ODPO, from performing other type services for any employer.

The absence of making his or her services available to the general public on a continuing basis is a function of the CITY's requirement for this type of work. That the worker is free to perform services for another entity which complies with the CITY's requirement supports a finding that the worker is an **independent contractor.**

2. Compensation

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

Although the ODPO is paid on an hourly basis, that is the only practical way of determining the value of the services performed.

We find that the absence of payment on a job basis is not a significant element in finding whether an ODPO is an **independent contractor**.

3. Realization of Profit or Loss

An employee is generally not in a position to realize a profit or loss as a result of his services. An independent contractor, however, typically has recurring liabilities in connection with

the work being performed. The success or failure of his endeavors depends in large degree upon the relationship of income to expenditures.

The ODPO is not providing material components plus labor and has no assistants. Therefore, only skill is being provided. That does not mean that the ODPO is an employee.

We find that Realization of Profit or Loss is not a determinative element in finding that the worker is an employee or an independent contractor. **Rather, it is neutral in this case**.

4. Obligation

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

As with the right to discharge, the Employer may simply cease to use the ODPO skills

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

5. Significant Investment.

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

No significant investment is required by either party in the performance of the services.

We find that absence of significant investment is not a determinative element in finding that the worker is an employee or an independent contractor. **Rather, it is neutral in this case.**

6. Simultaneous Contracts

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

person may also be an employee of each person or company depending upon the particular circumstances.

Here, the typical ODPO cannot advertise the services, but many do other jobs, through the ODWS, although they may not work in the capacity of an employee, because the City does not permit such services to be performed where the user has rules and policies

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered.

One such factor in this case is:

The CITY requirement that any ODPO perform services only in uniform, and be prepared to abandon the performance during the time the ODPO has reverted to on-duty status because of an incident at the work number site or because of being recalled to on-duty status by the CITY.

We consider this factor significant in determining that the parties' relationship was that **of independent contractor**.

The factors that tend to support the Employer's contention of independent contractor relationship include:

Compliance with Instructions, Oral or Written Reports, Personal Performance, Establishment of Work Sequence, Right to Discharge, Set Hours of Work, Training, Amount of Time, Availability to the Public, Obligation, Compensation, Simultaneous Contracts.

The factors that are not applicable in this case or are neutral:

Authority over Individual's Assistants, Place of Work, Tools and Materials, Expense Reimbursement, Realization of Profit or Loss, Significant Investment,

There are no factors that tend to support an employer/employee relationship

We have thoroughly examined the facts present in this case and have considered the relevant law and administrative rules as they are applicable to

those facts. We have considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Section R6-3-1723(D) and (E), and conclude that the services performed by individuals as off-duty police officers, do not constitute employment.

Having found that services performed by individuals as off-duty police officers do not constitute employment, we set aside that part of the Reconsidered Determination that found that remuneration paid to individuals for the services performed, constitutes wages. Accordingly,

THE APPEALS BOARD **REVERSES** the Reconsidered Determination issued on January 25, 2006.

Services performed by individuals as off-duty police officers do not constitute employment as defined in A.R.S. §§ 23-613.01, 23-615 or 23-617, and such individuals are not employees within the meaning of A.R.S. § 23-613.01 and Arizona Administrative Code, Section R6-3-1723.

THE APPEALS BOARD **SETS ASIDE** that part of the Reconsidered Determination regarding remuneration.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print

materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. A request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1140 E. Washington, Box 14, [Suite 104], Phoenix, Arizona 85034. Telephone: (602) 229-2806. A request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.

2. Parties may be represented in the following manner:

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

3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal.

A copy of the foregoing was mailed on
to:

(x) Er: Rep: XXXXXX X. XXXXX, XXX., Acct. No: XXXXXXX

(x) ROBERT DUNN
ASSISTANT ATTORNEY GENERAL
1275 W. WASHINGTON - 040A
PHOENIX, AZ 85007

(x) JAMES B. NORRIS, CHIEF OF TAX
EMPLOYMENT SECURITY ADMINISTRATION
P. O. BOX 6028 - 911B
PHOENIX, AZ 85005

By: _____

For The Appeals Board