Unemployment Insurance Tax Program

Appeals Board Decisions – 2016

1st QUARTER OF
CALENDAR YEAR 2016

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1500299-001-B

XXX T9	STATE OF ARIZONA E S A TAX UNIT % ELI GOLOB ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** April 25, 2016 *****.

DECISION
DISMISSED

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

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-732(A).

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

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

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

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

DATED: 3/24/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to

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

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
   1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
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   2. On the date it is received by the Department, if not sent by USPS.

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

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

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

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

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

A copy of the foregoing was mailed on 3/24/2016
to:

(x) Er: XXX T9 Acct. No: XXX-000

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1500282-001-B

XXX	STATE OF ARIZONA E S A TAX UNIT % ELI GOLOB ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** March 31, 2016 *****.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on April 29, 2015, which held in part

> ... the 15-day appeal period for the Assessments expired on Monday, March 2, 2015 whereby your appeal postmarked Friday, April 24, 2015 is 53 days late ... because the instant petition for reassessment is untimely your contention that the workers are independent contractors will not be addressed and the Department will proceed ...

The petition for hearing having been filed on time, the Appeals Board has jurisdiction in Unemployment Insurance (UI) tax rate matters pursuant to A.R.S. §§ 23-724(B) or 23-740.

THE APPEALS BOARD scheduled a hearing for February 24, 2016, before Appeals Board Administrative Law Judge **Robert T. Nall,** with written notice to the parties. The issues set for the telephone hearing were:

1. Whether the Employer filed a timely petition for reassessment by the Department.
2. Whether the Notice of Deficiency Assessment UC-018-A, became final during the interim period before the Employer filed a petition for reassessment.

An officer of the Employer appeared and testified at the Appeals Board hearing. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 8 were admitted into evidence.

Based upon the evidence of record, the Appeals Board finds no material error in the Department's April 29, 2015 decision (Bd. Exh. 2). We adopt the reasoning and conclusions of law as our own. The reasons and conclusions of law upon which the decision rests are founded upon a proper application of the law to the facts, which we find as follows:

1. On February 13, 2015, the Department mailed two "NOTICE OF ASSESSMENT" documents to the Employer's last known address of record (Bd. Exh. 1), by certified postal mail. A 15-day appeal deadline applied.
2. After the Employer received the Notices of Deficiency Assessment on February 17, 2015, its officer telephoned the Department and a worker agreed to mail a more detailed statement called an "UNEMPLOYMENT TAX/JOB TRAINING TAX STATEMENT". Following that discussion, the Employer erroneously believed that a 60-day appeal deadline applied. The Department mailed tax statements dated February 26, 2015 to the Employer, which did not include any wording about appeal rights (Bd. Exhs. 5, 6).
3. The Employer did not contact the Department again until its April 23, 2015 letter, which was postmarked April 24, 2015. The Employer appealed from "... the audit results as presented in the Arizona Department of Economic Security – Unemployment Tax/Job Training Tax Statement dated 2/26/2015" (Bd. Exh. 3).
4. On April 29, 2015, the Department issued its letter stating that the February 13, 2015 Notices of Assessment had become final

before the Employer's written appeal, and the provisions of A.R.S. § 23-740 are inapplicable (Bd. Exh. 2).

5. The Employer filed a timely request for a hearing, which explained that the Employer did not receive a statement of the assessment until late February, after requesting it from the Department. The Employer calculated that its appeal letter was due within a 60-day time frame (Bd. Exh. 1).

Arizona Revised Statutes § 23-738.01 provides in part as follows:

> **Deficiency assessment; petition for reassessment**
>
> A. If the department finds through its audit or claims-taking procedures that the return filed by an employer is deficient, <u>the department may compute the amount required to be paid on the basis of any information in its possession and make an assessment of the amount of the deficiency</u>. The department shall add to the deficiency assessment made under this section, subject to waiver for good cause shown, a penalty of one-tenth of one per cent of the difference between the wages paid during the quarter and the wages reported during the quarter, but not more than two hundred dollars and interest as prescribed by section 23-736. If the deficiency is due to fraud or an intent to evade payment of contributions, the department shall add to the amount due a penalty equal to twenty-five per cent of the amount due. The department shall promptly notify the employer of any deficiency.
>
> B. An employer against whom a deficiency assessment is made may petition for reassessment within fifteen days after written notice of the assessment is served personally or sent by certified mail to the employer's last known address. <u>If the petition for reassessment is not filed within fifteen days, the amount of the assessment becomes final and the lien imposed by section 23-745 attaches</u>. [Emphasis added].

The evidence of record reveals that the Department sent copies of the Deficiency Assessment Notices to the Employer's last known address of record, by certified mail on February 13, 2015. Each document incorporated the following instructions (Bd. Exh. 4):

> ... The amount of this assessment becomes final and the lien imposed by A.R.S. Section 23-745 shall attach unless written petition for reassessment is filed with the

> Department at the address shown above within 15 days of the date of this notice. ...

The Employer filed a petition for reassessment on April 24, 2015 (Bd. Exh. 2), which is more than 15 days after the date of the Deficiency Assessment Notices. The Employer's petition for reassessment, therefore, was filed after the appeal deadline had expired. We note that a 60-day appeal period applies to liability determinations under A.R.S. § 23-724(A), but the Employer withdrew its appeal to a liability determination on September 14, 2011 (Bd. Exh. 7). This case does not involve an appeal from a liability determination.

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

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

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

No worker for the Department is authorized to extend the appeal time regarding deficiency assessments, for any reason other than as expressly stated in Arizona Administrative Code, Section R6-3-1404. The Employer's witness acknowledged having received the deficiency assessment notice before the appeal deadline, but erroneously assumed that an appeal period applied other than the statutory fifteen days listed on the Notice of Assessment itself. The Employer's witness could not identify the name of a Department worker upon whom he relied, nor the date of a discussion about a document that specified the appeal deadline. Further, the Employer erroneously assumed that an explanatory billing statement carried appeal rights, but actually only the Notice of Assessment could be appealed starting on the date when it was mailed to the Employer.

In *Roman v. Arizona Department of Economic Security*, 130 Ariz. 581, 637 P.2d 1084 (App. 1981), the Arizona Court of Appeals specifically held at page 1085:

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

Further, in *Wallis v. Arizona Department of Economic Security*, 126 Ariz. 582, 617 P.2d 534, 537 (App. 1980), the Court of Appeals 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.

We conclude that similar rationale applies to the late filing of a petition for reassessment of a UI deficiency assessment. The Employer has not established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and permit finding that the Employer's petition for

reassessment was timely filed. The filing of a timely petition for reassessment is a jurisdictional requirement, before the UI tax assessment could be modified. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's April 29, 2015 decision that the February 13, 2015 Notices of Assessment became final before the Employer filed its petition for reassessment of the UI Tax deficiency assessments.

DATED: 3/1/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

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A copy of the foregoing was mailed on 3/1/2016
to:

(x) Er: XXX T9 Acct. No: XXX-000

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1500281-001-B

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** April 18, 2016 *****.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on June 1, 2015, which held in part

> ... The Determination of Unemployment Tax Rate for Calendar Year 2015 stated the following: "This determination becomes **FINAL** unless written request for reconsideration is filed within fifteen days of the above date." Your letter is 121 days past the deadline for the appeal to be considered timely.

> It is the Department's decision that the Determination of Unemployment Insurance Tax Rate issued on December 30, 2014 is final. ...

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in Unemployment Insurance (UI) tax rate matters pursuant to A.R.S. §§ 23-732(A).

THE APPEALS BOARD scheduled a hearing for February 24, 2016, before Appeals Board Administrative Law Judge **Robert T. Nall,** with written notice to the parties. The issues set for the telephone hearing were:

1. Whether the Employer filed a timely request for review or reconsideration by the Department.
2. Whether the Determination of Unemployment Tax Rate for Calendar Year 2015 became final during the interim period before the Employer filed a request for review.

An officer of the Employer appeared and testified at the Appeals Board hearing. Counsel for the Department was present, and a witness for the Department testified. Board Exhibits 1 through 5 were admitted into evidence.

Based upon the evidence of record, the Appeals Board finds no material error in the Department's June 1, 2015 decision (Bd. Exh. 3). We adopt the reasoning and conclusions of law as our own. The reasons and conclusions of law upon which the decision rests are founded upon a proper application of the law to the facts, which we find as follows:

1. On December 30, 2014, the Department mailed a DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2015 to the Employer's last known address of record (Bd. Exh. 1). A 15-day appeal deadline applied.
2. The Employer received the DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2015 at its post office box in Arizona, which its officer or one other person checks once or twice each week.
3. The Employer did not contact the Department until May 15, 2015, when its officer mailed a letter to the Department requesting review of the tax rate determination. The Employer offered no explanation for the late filing (Bd. Exh. 2).
4. On June 1, 2015, the Department issued its letter stating that the December 30, 2014 DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2015 became final before the Employer sent its request. The Department explained the UI tax rates assigned (Bd. Exh. 3).

5. The Employer filed a timely, written petition for hearing, which again offered no explanation for filing after the appeal deadline (Bd. Exh. 4).

Arizona Revised Statutes § 23-732(A), provides in part as follows:

> **Annual notice to employer of contribution rate; procedure for review and determination; quarterly notification; notification by electronic means**
>
> A. The department shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year. The determination shall become conclusive and binding on the employer unless, within fifteen days after the mailing of notice of the determination to the employer's last known address or in the absence of mailing, within fifteen days after delivery of the notice, the employer files an application for review and redetermination, setting forth the employer's reasons for application for review and redetermination. ... [Emphasis added].

The evidence of record reveals that the Department sent a copy of the DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2015 to the Employer's last known address of record, by mail on December 30, 2014. The document incorporated the following instructions (Bd. Exh. 1):

> ... This determination becomes final unless a written request for review is filed within 15 days of the mailing date as provided in Section 23-732, Arizona Revised Statues. The request should include your employer account number and a statement setting forth the reason(s) you consider this determination incorrect. ...

The Employer filed an application for review and redetermination on May 15, 2015 (Bd. Exh. 2), which is more than 15 days after the date of the December 30, 2014 DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2015 (Bd. Exh. 1). The Employer's application for review and redetermination, therefore, was filed after the appeal deadline had expired.

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

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.

* * *

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

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

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

* * *

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

The Employer's witness acknowledged having received the determination, but she was unsure when it arrived, She did not contend, however, that it was

not received in a timely manner. She acknowledged that she had no particular explanation for filing a late appeal.

In *Roman v. Arizona Department of Economic Security,* 130 Ariz. 581, 637 P.2d 1084 (App. 1981), the Arizona Court of Appeals specifically held at page 1085:

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

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> 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.

We conclude that similar rationale applies to the late filing of an application for review and redetermination of a UI tax rate, after a similar deadline that is imposed by a different statute. The Employer has not alleged and established any fact that would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and permit finding that the Employer’s application for review and redetermination was timely filed. The filing of a timely application for review and redetermination is a jurisdictional requirement for the Department to consider modifying the UI tax rate. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's June 1, 2015 decision that the December 30, 2014 DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2015 became final before the Employer filed its application for review and redetermination of the 2015 tax rate.

DATED: 3/17/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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(x) Er: XXX T9 Acct. No: XXX-000

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1492932-001-B

XXX T0

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

Employer

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** March 28, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Decision issued on September 19, 2014, which affirmed the July 9, 2014 Determination of Liability for Employment or Wages. A subsequent letter was sent by a Tax Analyst to the Employer on March 26, 2015, which reiterated the prior Reconsidered Decision as follows:

> ... The aforementioned reconsidered determination informed [the Employer] of the appeal rights related to the reconsidered determination and the time period in which to appeal pursuant to AR.S. § 23-724(G) ...

In the April 10, 2015 petition for hearing, the Employer requested relief as follows: "Redetermination of Indep Contractor & Right to Appeal". The petition for hearing having been filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724(B) or 23-740.

THE APPEALS BOARD scheduled a telephone hearing for February 24, 2016, before Appeals Board Administrative Law Judge **Robert T. Nall,** with written notice to the parties. The issues set for the hearing were:

> 1. Whether the Employer filed a timely petition for hearing by the Appeals Board, following the September 19, 2014 Reconsidered Determination. If no petition for hearing was timely filed, whether that Reconsidered Determination became final by operation of law.
>
> 2. Whether the documents filed by the Employer, prior to and including April 10, 2015, can be considered a petition for hearing by the Appeals Board regarding the September 19, 2014 Reconsidered Determination.

The Employer did not appear at the scheduled Appeals Board hearing. The Employer did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and two witnesses for the Department were present. Board Exhibits 1 through 9 were admitted into evidence.

Because the Employer did not appear at the scheduled Appeals Board hearing to pursue its appeal and to address the scheduled issues, a default was entered on the record.

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

> 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:
>
> * * *
>
> 4. <u>By default</u>, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision regarding the timeliness of the Employer's petition for hearing, nor on the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Appeals Board hearing to present evidence in support of its hearing request. The Employer's default means that insufficient evidence was presented to

support reversing or modifying the Department's September 19, 2014 Reconsidered Determination. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department's September 19, 2014 Reconsidered Determination remains in full force and effect.

The Employer has not established that it filed a timely request for hearing following the September 19, 2014 Reconsidered Determination, which remains in full force and effect.

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

DATED: 2/25/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

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

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

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

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

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

A copy of the foregoing was mailed on 2/25/2016
to:

(x) Er: XXX T0 Acct. No: XXX-000

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

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1492927-001-B

XXX T1	STATE OF ARIZONA E S A TAX UNIT % ELI GOLOB ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC #040A PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** April 25, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER,** through counsel, petitioned for a hearing from the Department's Reconsidered Determination issued on February 10, 2015, which held in part as follows:

> ... we conclude that [the Employer] is liable for unemployment insurance taxes on the basis of gross payroll of at least $1,500 in a calendar quarter as of January 1, 2010 and that the services performed by oxygen drivers were correctly determined to constitute

> employment and all remuneration paid for such services to constitute wages.
>
> Accordingly, this Reconsidered Determination affirms the Determination of Unemployment Insurance Liability and modifies the Determination of Liability for Employment or Wages, both issued on April 26, 2013, ... and affirming the oxygen drivers, and will also become final unless ...

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

THE APPEALS BOARD scheduled a telephone hearing for March 23, 2016, before Appeals Board Administrative Law Judge **Robert T. Nall,** with written notice to the parties.

The Employer did not appear at the scheduled Appeals Board hearing. The Employer did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and one witness for the Department was present. Board Exhibits 1 through 13 were admitted into evidence.

Because the Employer did not appear at the scheduled Appeals Board hearing to pursue its appeal and to address the scheduled issues, a default was entered on the record.

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

> 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:
>
> * * *
>
> 4. <u>By default</u>, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision regarding the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Appeals Board hearing to present evidence in support of its hearing request. The Employer's default means that insufficient evidence was presented to support reversing or modifying the Department's February 10, 2015 Reconsidered Determination. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's petition for hearing.

The Department's February 10, 2015 Reconsidered Determination remains in full force and effect.

The Employer has not established any error in the April 26, 2013 Determination of Liability for Employment or Wages. Thus, that Determination remains in full force and effect.

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

DATED: 3/24/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

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

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

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

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

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

A copy of the foregoing was mailed on 3/24/2016
to:

(x) Er: XXX T1 Acct. No: XXX-000

(x) Er's statutory agent: XXX

(x) ELI D GOLOB -- ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1492895-001-B

XXX T9

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

Employer

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** March 21, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for hearing from the Department's decision letter issued on February 20, 2015, which held that "... the Determination of Unemployment Insurance Tax Rate(s) issued December 30, 2014 is final" because the Employer's application for review was filed late. The Department's decision letter held as follows:

> ...This determination becomes **FINAL** unless written request for reconsideration is filed within fifteen days of

> the above date." Your letter is 33 days past the deadline for the appeal to be considered timely.

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-732.

THE APPEALS BOARD scheduled a telephone hearing for February 18, 2016, before Appeals Board Administrative Law Judge **Morris L. Williams, III,** with written notice to the parties. The issues set for the hearing were:

1. Whether the Employer filed a timely application for review and redetermination from the DETERMINATION OF UNEMPLOYMENT INSURANCE TAX RATE.
2. Whether the DETERMINATION OF UNEMPLOYMENT INSURANCE TAX RATE, became final during the interim period before the Employer filed an appeal.

The Employer did not appear at the scheduled Board hearing. The Employer did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was present. Because the Employer did not appear at the February 18, 2016 Appeals Board hearing to pursue its appeal, a default was entered on the record.

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

> 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:
>
> * * *
>
> 4. <u>By default</u>, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence.

The Employer's default means that insufficient evidence was presented to support reversing or modifying the Department's February 20, 2015 Decision letter. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department's February 20, 2015 Decision letter remains in full force and effect.

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

DATED: 2/18/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

William G. Dade

WILLIAM G. DADE, Member

MORRIS L. WILLIAMS III, Acting Member

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HOW TO REQUEST REOPENING OF THE HEARING

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

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

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

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

C. Your request to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing. A request for review will not be considered unless the Appeals Board sets aside this dismissal, and then issues a decision upon the merits of the request for hearing.

D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

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

A copy of the foregoing was mailed on 2/18/2016
to:

(x) Er: XXX T9 Acct. No: XXX-000

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

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

By: ___LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1482210-001-B

XXX T4	STATE OF ARIZONA E S A TAX UNIT % ELI GOLOB ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** April 25, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER**, petitioned for a hearing from the Department's Reconsidered Determination issued on February 10, 2015, which held in part:

> "Having determined that XXX succeeded/acquired the organization, trade, or business of XX, the experience rating account of XX was properly transferred to XXX"
>
> "Accordingly, this Reconsidered Determination affirms the Determination dated December 5, 2014 and will

> become final unless a written petition for a formal hearing is filed..."

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

THE APPEALS BOARD scheduled a telephone hearing for March 22, 2016, at 11:00 a.m. Mountain Standard Time, before Appeals Board Administrative Law Judge **Morris L. Williams, III,** with written notice to the parties. The issues set for the hearing were:

1. Whether the Employer was correctly determined to be a successor to a liable employer.
2. Whether the Employer's experience rating account was properly assigned a tax rate of ".02" percent for coverage beginning October 1, 2013.
3. Whether the predecessor firm's experience rating account was properly transferred to the Employer.

The Employer did not appear at the scheduled Board hearing. The Employer did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was present. Because the Employer did not appear at the March 22, 2016 Appeals Board hearing to pursue its appeal, a default was entered on the record.

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

> 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:
>
> * * *
>
> 4. <u>By default</u>, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence.

The Employer's default means that insufficient evidence was presented to support reversing or modifying the Department's February 10, 2015 Reconsidered Determination. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department's February 10, 2015 Reconsidered Determination remains in full force and effect.

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

DATED: 3/24/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

HOW TO REQUEST REOPENING OF THE HEARING

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

C. Your request to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing. A request for review will not be considered unless the Appeals Board sets aside this dismissal, and then issues a decision upon the merits of the request for hearing.

D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

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

A copy of the foregoing was mailed on 3/24/2016
to:

(x) Er: XXX T4 Acct. No: XXX-000

(x) ELI D GOLOB

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

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1482209-001-B

XXX T3

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

Employer

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION --- The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** March 14, 2016 *****.

DECISION
DISMISSED

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

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

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

> A. The Board or a hearing officer in the Department's Office of Appeals may informally dispose of an

appeal or petition without further appellate review on the merits:

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

We have carefully reviewed the record.

THE APPEALS BOARD FINDS there is no reason to withhold granting the request. The Appeals Board was not aware of a previously-filed withdrawal. Accordingly,

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

DATED: 2/11/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take

any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
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   You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

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

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   3. refers to specific hearing testimony and evidence.

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to:

(x) Er: XXX T3 Acct. No: XXX-000

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

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1482176-001-B

XXX T1	STATE OF ARIZONA E S A TAX UNIT % ELI GOLOB ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** April 14, 2016 *****.

DECISION
DISMISSED

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

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

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

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

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

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: 3/15/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

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(x) Er Rep: XXX

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PHOENIX, AZ 85007-2926

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1461132-001-B

XXX T1

Employer

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

Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** April 14, 2016 *****.

DECISION
REVERSED

THE **EMPLOYER**, through counsel, petitioned for a hearing from the Department's Reconsidered Determination issued on July 21, 2014, which affirmed the Determination of Liability for Employment or Wages dated September 29, 2011, and held that services performed by individuals as teachers, peer mentors, producers, editors, voice over/translators and miscellaneous media support personnel constitute employment, and that the remuneration paid for such services constitutes wages.

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

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **January 14, 2016**, before Appeals Board Administrative Law Judge Morris L. Williams, III. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Reconsidered Determination affirmation of the September 29, 2011 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was proper.
2. Whether the services performed by individuals as "teachers, peer mentors, producers, editors, voice over/translators and miscellaneous media support personnel" constitute employment, as defined in A.R.S. § 23-615.
3. Whether remuneration paid to individuals as "teachers, peer mentors, producers, editors, voice over/translators and miscellaneous media support personnel" constitute "wages", as defined in A.R.S. § 23-622.
4. Whether any of the individuals performing services as "teachers, peer mentors, producers, editors, voice over/translators and miscellaneous media support personnel" performed work that is exempt or is excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or under a decision of the federal government to not treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
5. Whether any of the individuals performing services as "teachers, peer mentors, producers, editors, voice over/translators and miscellaneous media support personnel" factually and legitimately were independent contractors for the quarters ending: 7/1/2008 through 6/30/11.

At the hearing, Employer's counsel appeared by telephone, and one Employer witness appeared by telephone and testified for the Employer. The Department was represented by counsel, and one witness testified for the Department. Board Exhibits 1 through 11 were admitted into evidence. We have carefully reviewed the record.

We note that the worker classification involving miscellaneous media support personnel will not be considered in this case.

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

1. The Employer is a non-profit company that provides media services.

2. Following a tax audit, the Department issued a Determination of Liability for Employment or Wages on September 29, 2011, which held that services performed by individuals as teachers, peer mentors, producers, editors, voice over/translators and miscellaneous media support personnel constituted employment for the quarters ending 9/30/2008 through 6/30/2011 (Bd. Exh. 3). The Department issued Notices of Assessments and Reports of Wages Paid Each Employee corresponding to the Determination of Liability for Employment or Wages (Bd. Exh. 4).

3. The Employer filed a timely request for reconsideration from the September 29, 2011 Determination of Liability for Employment (Bd. Exh. 7).

4. On July 21, 2014, the Department issued its Reconsidered Determination. The Department affirmed the Determination of Liability for Employment or Wages issued on September 29, 2011, and held that teachers, peer mentors, producers, editors, voice over/translators and miscellaneous media support personnel were properly determined to be employees and that their remuneration constituted wages (Bd. Exh. 8).

5. On August 20, 2014, the Employer filed a timely petition for hearing from the Department's Reconsidered Determination.

<u>Teachers:</u>

6. The Employer used teachers to provide instruction during media camp workshops. The teachers

signed Sub-Contractor Agreements with the Employer (Bd. Exh. 5; Tr. p. 34).

7. The Employer would send out an email to its members and non-members regarding contract opportunities to teach various workshops for clients in need of those services (Tr. pp. 42-44). The potential teacher would then contact the client directly to arrange the particulars of an assignment (Tr. p. 44). The teachers did not report back to the Employer after contacting the client.

8. The Employer developed curriculum that was used by the teachers. However, the teachers were not required to follow the curriculum developed by the Employer (Tr. p. 28). The teachers used the Employer's curriculum along with other teaching guides in performing their services. The teachers were not required to report to the Employer's executive director or the Employer's Board (Tr. p. 29).

9. The teachers were not required to perform their services on the Employer's premises. The teachers provided their services at the library and out in the community (Tr. pp. 27-29). The Employer had a written agreement with the library (Tr. p. 37). The teachers coordinated with the library to set the schedule of the workshop classes (Tr. p. 28). The workshop classes were normally over a four week period for at least two days a week.

10. The Employer did not provide training for the teachers, and the teachers were not required to personally perform their services. The teachers could use substitutes without approval from the Employer (Tr. p. 33).

11. The teachers used peer mentors as assistants, and a teacher could dismiss a peer mentor if the teacher deemed it necessary (Tr. p. 29). The peer mentors were paid a lump sum by the Employer.

12. The teachers were allowed to coordinate with the library to set the hours that the teacher would provide their services. The teachers also held full-

time jobs with other employers while performing their services with the Employer (Tr. p. 34)

13. The Employer did not instruct the teachers on how to perform their services or the order of implementing the teaching guides and curriculum.

14. The teachers were required to submit an invoice for payment, and the teachers were paid once a month on an hourly basis, in accordance with the grant or contract between the Employer and its client (Tr. pp. 31, 48). The teachers were paid from the Employer's account (Tr. p. 31).

15. The teachers incurred some expenses while performing their services, but the Employer did not reimburse the teachers for those expenses (Tr. p. 35).

16. Most teachers used their own equipment, but they also used the equipment provided by the Employer (Tr. p. 32).

17. The teachers could advertise their services to the public.

Peer Mentors:

18. The peer mentors were used as assistants for the teachers. The peer mentors were required to have previously participated in the workshops as students (Tr. p. 51). The peer mentors would be contacted by the Employer through email in order to make them aware of opportunities to assist the teachers (Tr. p. 51).

19. The peer mentors were required to submit a letter concerning why they would be a good peer mentor, and they were chosen by the teachers and the Employer's client (Tr. pp. 51, 52).

20. The peer mentors were not trained by the Employer, and they were exclusively instructed by the teachers (Tr. pp. 52, 53). The peer mentors provide their assistance during the hours set by the

teacher and the Employer's client. The teachers could dismiss the peer mentors (Tr. p. 55).

21. The peer mentors performed their services at the same locations as the teachers, and they were never left alone by the teachers (Tr. p. 54). The peer mentors used the same equipment used by the teachers (Tr. p. 55).

22. The peer mentors were paid a lump sum by the Employer, and they were not required to submit an invoice (Tr. pp. 50, 54).

23. The peer mentors were allowed to have other jobs and provide services to other companies (Tr. p. 55).

Producers, Editors and Voice/Over Translators (hereinafter "workers"):

24. The Employer did not train or instruct the workers concerning how to perform their services.

25. The workers were not required to personally perform their services (Tr. p. 59). The workers determined when and where they would perform their services (Tr. pp. 59, 60).

26. The workers used their own equipment (Tr. p. 60)

27. The workers were made aware of opportunities through emails from the Employer, and they signed Sub-Contractor Agreements (Tr. pp. 60-62). The workers were not obligated to respond to the emails (Tr. p. 63).

28. The Employer had no influence over the sequence of work, and the Employer had no input as to the final product submitted by the workers (Tr. pp. 62, 63).

29. The workers hired and supervised assistants if they needed assistance (Tr. p. 63). The Employer had no supervisory authority over the worker's assistants (Tr. p. 64).

30. The workers did not check in with the Employer about any progress being made in performing their services; they only had to complete the project by a deadline (Tr. p. 64).

31. The workers were not reimbursed by the Employer for any expenses incurred (Tr. p. 65).

32. Most workers advertised their services to the public, and at least one worker had his own business (Tr. pp. 65, 66).

The Employer contends that the teachers, peer mentors, and workers were independent contractors and not employees from the period July 1, 2008 through June 30, 2011. The issues in dispute in this case are the employment status of the teachers, peer mentors and workers from July 1, 2008 through June 30, 2011, and whether the pay earned by the teachers, peer mentors, and workers during that period constituted wages.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this

subsection shall be determined in the same manner as if no such designated reference had been made.

* * *

D. In determining whether an individual who performs services is an employee under the general definition of subsection (A), all material evidence pertaining to the relationship between the individual and the employing unit must be examined. Control as to the result is usually present in any type of contractual relationship, but it is the additional presence of control, as determined by such control factors as are identified in paragraph (2) of this subsection, over the method in which the services are performed, that may create an employment relationship.

1. The existence of control solely on the basis of the existence of the right to control may be established by such action as: reviewing written contracts between the individual and the employing unit; interviewing the individual or employing unit; obtaining statements of third parties; or examining regulatory statutes governing the organization, trade or business. In any event, the substance, and not merely the form of the relationship must be analyzed.

The primary issue in this case is whether the services that were provided by the teachers, peer mentors, and workers from July 1, 2008 through June 30, 2011, were excluded from the definition of "employee" by qualifying as "independent contractors" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provisions cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the teachers, peer mentors, and workers. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the

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

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

In determining that the teachers, peer mentors, and workers were employees, the Department, in its Reconsidered Determination, analyzed this case by considering behavioral controls, financial controls and the relationship of the parties.

In support of its conclusion that the behavioral controls mandated a finding of an employer-employee relationship, the Department stated that “some of the workers perform services at the business location. The workers were provided all tools and equipment to perform their services. Some of workers were required to follow the curriculum created by [the Employer] and were under the supervision of teachers. The workers performed all services personally and did not hire any assistants.”

The Employer witness, Ms. M, credibly testified that teachers performed their services at the library and out in the community (Tr. pp. 27-29). The teachers performed some of their services at the Employer’s location, but not exclusively. Ms. M also testified that the teachers were not required to follow the curriculum developed by the Employer (Tr. p. 28). The teachers used their own equipment along with some equipment provided by the Employer (Tr. p. 32). The producers, editors, and translators also used their own equipment (Tr. p. 60). The peer mentors were exclusively supervised by the teachers (Tr. pp. 52, 53). Ms. M also testified that the teachers, producers, editors, and translators were not required to personally perform their services (Tr. pp. 33, 59). The producers, editors, and translators also hired assistants who were not supervised by the Employer (Tr. pp. 63, 64).

Based on the evidence provided by the Employer, we find that the category of behavioral control favors a finding that the teachers, peer mentors, producers, editors and translators were independent contractors.

In support of its conclusion that the financial controls mandated a finding of employer-employee relationship, the Department stated, "[the] workers have no significant investment in tools, supplies or equipment relevant to the services performed and had no ongoing expenses associated with the services performed." As noted earlier, the teachers used their own equipment, along with the equipment provided by the Employer. Ms. M testified that the teachers, producers, editors, and translators did incur expenses, but the Employer did not reimburse them for those expenses.

The evidence of record establishes that the teachers, producers, editors, and translators submitted invoices for payment to the Employer. The teachers were paid once a month in accordance with a grant procured by the Employer or the contract between the Employer and its client. The peer mentors were paid on a lump sum basis.

The Department also determined that there was no evidence that the workers advertised their services to the general public. Ms. M testified that the teachers also held full-time jobs while performing services for the Employer. She also testified that some producers, editors, and translators did advertise their services to the public, and, in fact, one worker had his own business.

Based on the evidence provided by the Employer, we find that the category of financial control also favors a finding that the teachers, peer mentors, producers, editors, and translators were independent contractors.

In support of its conclusion that the relationship of the parties mandated a finding of an employer-employee relationship, the Department noted that the teachers, producers, editors, and translators signed a Sub-Contractor Agreement with no provision for termination. As a result, the Department concluded that the Employer had a right to discharge the workers. The Department also found that the worker's services were integral to the Employer's business.

Ms. M testified that the teachers were obligated to complete a class, and the producers, editors and translators were obligated to complete a project by a deadline. However, the Employer was not involved in monitoring the worker's progress in completing their projects. As noted earlier, the teachers, producers, editors, and translators were sent group emails about potential projects, and they were not obligated to respond to the emails. The teachers could dismiss the peer mentors if necessary. However, the Employer did not supervise or instruct the peer mentors.

Based on the evidence provided by the Employer, we find that factors reviewed under the category of relationship of the parties favors a finding that the teachers, peer mentors, producers, editors and translators were independent contractors.

We conclude that the Department did not meet its burden to establish that the teachers, peer mentors, producers, editors, and translators were employees of the Employer from the period of July 1, 2008 through June 30, 2011. We also conclude that all payments to the teachers, peer mentors, producers, editors, and translators for services did not constitute wages, by operation of A.R.S. § 23-622(A).

The evidence of independent contractor status outweighs the evidence of employee status. Therefore, we find that the teachers, peer mentors, producers, editors, and translators were not employees of the Employer from July 1, 2008 through June 30, 2011, but rather, the teachers, peer mentors, producers, editors, and translators performed services for the Employer pursuant to an independent contractor relationship. Therefore, we find that all payments to the teachers, peer mentors, producers, editors, and translators for services from July 1, 2008 through June 30, 2011, did not constitute wages by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **REVERSES** the Reconsidered Determination issued July 21, 2014.

From July 1, 2008 through June 30, 2011, services performed by individuals as teachers, peer mentors, producers, editors, and translators did not constitute employment, because the parties had an independent contractor relationship.

All forms of remuneration paid to the teachers, peer mentors, producers, editors, and translators for such services from July 1, 2008 through June 30, 2011, did not constitute wages.

DATED: 3/15/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

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

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1461102-001-B

XXX T1	STATE OF ARIZONA E S A TAX UNIT % ELI D GOLOB ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC #040A PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** April 7, 2016 *****.

DECISION
AFFIRMED

THE **EMPLOYER,** through a letter signed by its President, petitioned for a hearing from the Department's Reconsidered Determination issued on May 21, 2014, which held in part:

> ... the Department did not err in concluding the services performed by the workers constituted employment and all remuneration paid for such services ... constituted wages.
>
> Accordingly, this Reconsidered Determination affirms the Determination of Liability for Employment or Wages issued

> on February 20, 2014 and will also become final unless a written petition for hearing is filed ...

In part, the Department's February 20, 2014 Determination described services or remuneration as follows:

> **A.R.S. § 23-613.01: caregivers.**
>
> **A.R.S. § 23-615: services performed by corporate officers.**
>
> **All forms of remuneration paid for these services constitute wages. This Determination includes the individuals and amounts shown on the attached Notice of Assessment Report(s) for the quarters ending: 03-31-2013 through 12-31-2013.**

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

With proper notice to the parties, a telephone hearing was convened before ROBERT T NALL, an Administrative Law Judge, on December 16, 2015. All parties were given an opportunity to present evidence on the following issues:

1. Whether the Reconsidered Determination's affirmation of a February 20, 2014 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was proper.
2. Whether the services performed by individuals as "caregivers" and as "corporate officers" constitute "employment", as defined in A.R.S. §§ 23-613.01 and 23-615.
3. Whether remuneration paid to individuals as "caregivers" and as "corporate officers" constitutes "wages", as defined in A.R.S. § 23-622.
4. Whether any of the individuals performing services as "caregivers" and as "corporate officers" performed work that is exempt, or is excluded from Arizona Unemployment Insurance (UI) coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
5. Whether any of the individuals performing services as "caregivers" and as "corporate officers" factually and legitimately were independent contractors for the specified quarters.

6. The correct name and official office of each corporate officer, with the dates of service at pertinent times.

Board Exhibits 1 through 22, and 24, were admitted into evidence. One witness testified for the Department, which was represented by counsel. Two witnesses testified for the Employer, which was represented by counsel. Two observers also attended.

At the hearing, counsel conceded that the four persons identified as corporate officers are statutory employees, and were not independent contractors. Each was issued W-2s reflecting their wages (Tr. pp. 19-21). Accordingly, the issues in dispute are narrowed to consider the proper classification of the caregivers at the pertinent times.

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

1. The Employer is a caregiving agency in Arizona, which is contracted through insurance companies to provide non-medical assistance to Arizona Health Care Cost Containment System Long Term Care (AHCCCS ALTCS) patients. The Employer tries to match qualified patients with a caregiver to assist with the activities of daily living (Tr. pp. 22-24, 38-40, 50).
2. From 2008 through 2012, all caregivers were treated as employees by the Employer. Effective January 1, 2013, the work duties remained the same but caregivers no longer were provided with training, state-mandated certifications, or supplies such as medical gloves, under a 1-page independent contractor document prepared by an accountant. Caregivers were free to work elsewhere including other caregiving agencies, in addition to providing services to the Employer's clients (Tr. pp. 23-25, 39, 46, 57; Bd. Exh. 3).
3. The "Independent Contractor" document took the form of a letter describing business opportunities, and did not include any reference to amount or method of payment, duration of the agreement, specific duties, or penalties for improper completion or early termination (Bd. Exh. 3).
4. The Employer performed intake documentation and home visits, before assigning a caregiver to a patient and creating a "care plan" and a schedule of what needs to be done each day in the client's residence, to be followed by each caregiver. The Employer periodically reviewed the placement at least every 90 days, in preparation for an annual state audit (Tr. pp. 36-38, 52-55).

5. Insurers or the state required accurate timekeeping records, which the caretakers maintained and which caretakers were required to return to the Employer. Throughout 2013, these timecard and activity daily log sheets continued to be signed by the client, and by caretakers in the "EMPLOYEE SIGNATURE" space, which incorporated: "IMPORTANT FOR EMPLOYEE: By executing this form employee agrees to terms and conditions on employee copy and certifies this form is true and accurate" (Tr. pp. 34, 35, 41, 55-57; Bd. Exh. 3).

6. No federal ruling has been received that classifies the caretakers as non-employees (Tr. p. 40).

7. On October 28, 2013, the Employer filed its protest when a caretaker had claimed Unemployment Insurance (UI) benefits. The Employer did not deny that she was its employee receiving wages through October 1, 2013. The Employer confirmed her report that she had been laid off, but the Employer also referred to its review of a client complaint that she was not providing the care he needed. Regarding a different caretaker, the Employer protested that she was "still working part time" in its protest filed January 14, 2014, but listed her as a "1099 contractor" whose two clients had passed away (Tr. pp. 41-47; Bd. Exhs. 5, 8).

8. Although at least three other caretaker agencies had converted from employees to independent contractors, other caretaker agencies continue to classify their caretakers as employees. The only change made by the Employer, when converting its employees to independent contractors, was ceasing to provide training and supplies to caretakers, effective January 1, 2013 (Tr. pp. 46-51).

9. No caretaker could use a substitute, or a subcontractor (Tr. pp. 56, 57).

10. The Employer bills for services performed by the caretakers at rates established by the state agency, then pays caretakers on an hourly basis but at varying rates (Tr. pp. 59-61).

11. On February 20, 2014, a UC-016-A Determination of Liability for Employment or Wages was issued for services performed by individuals as "caregivers" and as "corporate officers". Also, Notice of Assessment Reports were issued for the quarters ending March 31, 2013 through December 31, 2013 (Bd. Exhs 10, 11).

12. The Employer filed a timely request for reconsideration of the Determination of Liability for Employment or Wages. The

Employer also filed a timely request for hearing following the Department's Reconsidered Determination.

Arizona Revised Statutes § 23-613.01(A) and (E) provide in part as follows:

Employee; definition; exempt employment

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

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

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

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

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

* * *

E. The following services are exempt employment under this chapter, unless there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection A of this section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:

1. Services which are not a part or process of the organization, trade or business of an employing unit and which are performed by an individual who is not treated by the employing unit in a manner generally characteristic of the treatment of employees.

2. Services performed by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit. ... [Emphasis added].

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

> "Employment" means any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce, and includes:
>
> 1. An individual's entire service performed within or both within and without this state if:
>
> (a) The service is localized in this state.
>
> (b) The service is not localized in any state but some of the service is performed in this state ...
>
> * * *

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

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

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

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

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

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

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

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

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

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

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

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

c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same

> manner as if no such designated reference had been made. [Emphasis added].

After considering the evidence and testimony of record, we concur with the Department's analysis within the Reconsidered Determination. The elements of control exercised by the Employer over the caretakers are more characteristic of employment, than of independent contractor status. Although some caretakers may also work in group homes or in private placement, their opportunity to do so would exist either in employment or as an independent business and this factor is not dispositive regarding proper classification. None of the caretakers is conducting an independent business through advertising to the public, maintenance of office premises, contracting for penalties upon early termination, or other activities characteristic of independence.

Although numerous laws and regulations of the home health care industry exist, no significant change in these laws separates the admitted employment prior to January 1, 2013, and the purported independent contractor status thereafter. During both time periods, the caretakers were required to obtain their own certifications and fingerprint clearances necessary to perform their assignments. No legal authorities require that caretakers be separately licensed and operate their own businesses as independent contractors. The Employer's witness acknowledged that some other caregiver agencies continue operations under an employee relationship, much as the Employer did before 2013. He also testified that caregivers who work with their own family members do not need to be fingerprinted, and that at least one such caregiver worked with her brother. Thus, the laws peculiar to this industry requiring fingerprint clearance are not dispositive of the classification issue.

Counsel contends that four of the nine indicia of control listed in the Reconsidered Determination are false, while the remaining five are required by law. We have based our findings of fact solely upon the evidence of record and, therefore, we have omitted reliance upon reimbursement, or requiring uniforms, blood pressure kits, and stethoscopes. No evidence of caretakers advertising their services was presented. However, substantial evidence establishes that the Employer would remove a caretaker upon a client complaint, without any penalty for early termination. The caretaker services are integral to the business of a caregiver agency. Testimony established that the caretakers could not have assistants or substitutes or subcontractors, and must submit time records in order for the Employer to pay the caregivers at hourly rates. The Employer uses the time records to support its billable hours, and accomplishment of the care program it establishes and imposes upon each caregiver. These elements of employment outweigh the factors that could favor independence, and no exception to employment status was established.

The pertinent statute, A.R.S. § 23-619 provides an elegantly simple definition: "'Insured work' means employment for employers." This statute

impacts upon the scheduled issues. The wording of the Employer's requests for reconsideration, hearing, and other memoranda indicates that the Employer also seeks an exception from the general rule that work is in employment. Therefore, the Employer bears the burden to sufficiently prove its contentions that the worker in question was in an independent contractor relationship rather than an employee earning wages. During 2013, at least two caretakers claimed UI benefits alleging the Employer did not provide them ongoing work, which supports the conclusion that these caretakers did not view themselves as independent contractors under contract with the Employer.

In common with other "classification" issues, the burden of proof is upon the party who seeks to benefit by fitting into an exception to the well-established legal presumption. Regarding allegations that an independent contractor exception to insured work applies to a particular set of factual circumstances, the presumptions must be that services and work are performed under "employment", and remuneration for such services constitutes "wages". 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), clearly ruled that all sections of the Employment Security Law should be given the long-established liberal construction, in an effort to include as many types of employment relationships as possible. The Court held:

> 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. ADES*, 128 Ariz. 504, 627 P.2d 235 (App. 1981). The Court ruled:

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

The Court in *Dearing v. ADES*, 121 Ariz. 203, 205(Ariz. Ct. App.1978), cited legal presumptions of long standing and intent:

> The Arizona Supreme Court has held that the words defined in the Act, such as "employer", "employment" and "wages", are used as broad terms of description, <u>indicative of the legislative intent to give a wide and liberal effect to the Act's goal of alleviating unemployment</u>. *Gaskin v. Wayland*, 61 Ariz. 291, 148

> P.2d 590 (1944). As such, they have a much broader meaning than when they are used by the majority of the states in their unemployment acts and in the Federal Unemployment Tax Act, 26 U.S.C. Sec. 3301, *et seq.*, which follow the common law definitions. *Arizona Department of Economic Security v. Little*, 24 Ariz.App. 480, 539 P.2d 954 (1975). [Emphasis added].

The concepts of urging an exception to the general rule, and statutory construction, were addressed more recently in *Robbins v. ADES*, 232 Ariz. 21, 300 P.3d 556 (2013). The Court of Appeals dealt with pertinent statutes and ruled that the meaning of the exclusion language is found by using the legislative intent and plain wording.

Throughout 2013, the Employer required the caretakers to sign daily time records that specified they were employees. The caretakers were required to follow a care plan and schedule prepared by the Employer. The caretakers are integral to the Employer's business plan, since attendant care services must be performed and accounted for before the Employer could bill for its revenue. The business had a history of employing caretakers over several years, then perfunctorily and unilaterally elected to change their classification from employees to independent contractors, without a significant change in the way caretakers performed their services. Its president testified that the only changes were ceasing to provide materials and training, and signing a letter that did not include the basic terms of a contractual relationship. The evidence of record does not establish that any of the caretakers actually operated an independent business.

The behavioral controls established by this evidence are characteristic of employment. The financial controls are characteristic of employment. The relationship of the parties is not defined by an actual "contract" incorporating crucial terms that reflect negotiation of rights by the parties such as duration, method of payment, or penalties for nonperformance. Thus, the relationship since January 1, 2013 is more characteristic of the pre-existing employment relationship than a genuine arms-length negotiation between business partners. As the Department pointed out, the issuance of Form 1099-Miscellaneous income reports to the caretakers is not a dispositive factor under federal rulings, or under Arizona's statutes and administrative rules.

We conclude that the services performed by caretakers do not qualify as "exempt employment" listed in A.R.S. § 23-613.01(E) and Arizona Administrative Code, Section R6-3-1723(C), largely because these tasks comprise the business activity of the Employer and the involvement was too extensive to be considered "isolated or occasional transactions". We conclude from the evidence that these services are not solely subject to a provision of law regulating the organization, trade or business as specified in Arizona Administrative Code, Section R6-3-1723(B)(2).

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination dated May 21, 2014.

All services performed by the four corporate officers constituted employment by the Employer. Remuneration paid to the corporate officers constituted wages.

Effective January 1, 2013, services performed by the caregivers constituted employment by the Employer. Remuneration paid to the caregivers constituted wages.

DATED: 3/8/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

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

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

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

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

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

A copy of the foregoing was mailed on 3/8/2016
to:

Er: XXX T1 Acct. No: XXX-000

(x) XXX

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1449676-001-BR

XXX T1	STATE OF ARIZONA E S A TAX UNIT % ELI GOLOB ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS --- The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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RIGHT TO APPEAL TO THE COURT OF APPEALS

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** March 28, 2016 *****.

DECISION
AFFIRMED UPON REVIEW

The **EMPLOYER** through counsel, requests review of that part of the Appeals Board decision issued on August 27, 2015, which affirmed the Reconsidered Determination in part, and held:

> From January 1, 2008 through December 31, 2009, services performed by individuals as telemarketers/ appointment setters, constituted employment.
>
> All forms of remuneration paid to the telemarketers for such services from January 1, 2008 through December 31, 2009, constituted wages.

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

In the request for review, counsel contends that the Board's finding of neutrality regarding the hiring of assistants is incorrect. Under Fact No. 16, the Employer did not prohibit the telemarketers from hiring assistants and, thus, the Employer contends that whether they utilized assistants "does not matter" so this factor weighs in favor of finding an independent contractor relationship. We conclude the most important factors do not include something that never happened. However, even if options to utilize assistants or substitutes instead of personal performance were unrestricted, the other and more crucial factors do not suffice to meet the Employer's burden of proof to establish an exemption from the general presumption that all workers are employees who receive wages.

Counsel also contends that the Employer's two simple requirements to follow a script and to provide daily communication fall short of demonstrating control over the "when, where or how" of fulfilling the telemarketing services. Counsel points to findings that the Employer allowed the telemarketers to select the number of hours they worked, and that the telemarketers could work from any place with a telephone.

We disagree. We concurred with the Department's position that continual enforcement of at least three requirements demonstrated actual control. The Employer demanded its workers must follow its prescribed script, must constantly be available to receive e-mails, and must send at least one daily e-mail report to the Employer. The Employer restricted what telemarketers could say or could promise on the Employer's behalf. Without exception, the Employer required its telemarketers to submit daily reports in addition to: "Communicate with us every day by email to check in while working". The Employer also required its telemarketers to commit to checking their email and responding to any and all emails sent to them daily (Bd. Exh. 7B). Contrary to the summarizing contention that the only contacts between a telemarketer and the Employer were receiving a calling list plus an email to let the Employer know the telemarketer was still alive, the evidence of record establishes much more significant contacts (Bd. Exh. 7B).

Further, the Employer required the telemarketers to maintain a bank account for direct deposit of payments. According to the owner, one worker voluntarily quit her part-time job as an appointment setter and another part-time worker stopped showing up for work in the middle of a job, so consequently he is not eligible for further "contract work" but she is (Bd. Exhs. 7, 10). These outcomes evidence that the Employer or any telemarketer could terminate their agreement at any time without incurring a substantial penalty, which is characteristic of employment. A truly independent contractor would be subject to a penalty as liability for unfinished performance.

Part-time job status is not dispositive of whether a worker is an independent contractor or an employee, nor is working two jobs to earn a supplemental income. Whether a telemarketer had another job elsewhere is not dispositive on the pertinent classification issue. Supplemental income could be earned either through a secondary job or an independent business.

The evidence of record does not establish that any telemarketer actually held himself or herself out to the public as a business entity (Tr. p. 15). No telemarketer incurred business-only expenses such as obtaining office premises or related business equipment, business loans, business liability or errors and omissions insurance, business or transaction licenses and certifications, business tax enrollment, merchant banking accounts, advertising, or business cards. The absence of evidence that any telemarketer actually conducted an independent business with an established clientele, which could have included the Employer to whom the telemarketer would submit an invoice for services rendered, favors employment status.

Upon review, we agree with counsel that not scheduling a routine or set hours of work is a factor indicating independence. We also agree that payment on a piecework basis, rather than by the hour, could be more typical of independent contractor status than employment, although the Employment Security Law of Arizona recognizes that salaried or commissioned jobs also could pay based on a piecework or per job basis rather than hourly pay. This is why the method of calculating payment is not dispositive or is "neutral" on the classification issue.

However, we disagree with the contention that the right to terminate with little or no notice and without penalty is "neutral", because this right to act unilaterally is characteristic of employment and seldom is tolerated in a genuinely arms-length contractual negotiation. We also disagree with the contention that "only one" training meeting is not a factor of control, because the administrative rule recognizes that requiring any training in order to be paid for doing the assignment is not characteristic of independent contractor status.

In our modern society, a telephone, a computer, and Internet access are typically available to most people. Each such "tool" is amenable to largely personal usage, and its availability or actual use to fulfill the Employer's requirements does not constitute a significant investment dedicated to a business purpose. No telemarketer demonstrated investment in a business to show profit or loss. By contrast, the "cold calling list" and the script required by the Employer to be used on its behalf were intrinsic to the telemarketing assignment. Appointments were crucial to the Employer's business model. The requirements to follow a script, to remain accessible by email, and to report substantiate factors of control.

We review and evaluate the totality of factors, based upon the evidence of record. Merely counting them is insufficient analysis of the overall relationship.

The Employer did not meet its burden of proof to establish independent contractor status of its telemarketers, which would be an exception to the presumption that all work is encompassed by “employment” and all remuneration for services is “wages”. *See, Arizona Department of Economic Security v. Little*, 24 Ariz. App 480, 539 P.2d 954 (1975), and *Warehouse Indemnity Corporation v. Arizona Department of Economic Security*, 128 Ariz. 504, 627 P.2d 235 (App. 1981),

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

THE APPEALS BOARD FINDS that:

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

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

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

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

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

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

DATED: 2/25/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

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

you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

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

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

A copy of the foregoing was mailed on 2/25/2016
to:

Er: XXX T1 Acct. No: XXX-000

(x) Er's Representative: XXX

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1444777-001-B

XXX T1	STATE OF ARIZONA E S A TAX UNIT % ELI GOLOB ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** April 28, 2016 *****.

DECISION
REVERSED IN PART and AFFIRMED IN PART

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination issued on January 31, 2014, which held in part as follows:

> ... we find the services performed by individuals as counselors and billing staff constitute employment and the remuneration paid for such services constitutes wages.
>
> Accordingly, this Reconsidered Determination affirms the Determination of Unemployment Insurance liability and

> the Determination of Liability for Employment or Wages, both issued on June 21, 2012 ...

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

With proper notice to the parties, a telephone hearing was convened before ROBERT T NALL, an Administrative Law Judge, on March 3, 2015 and March 11, 2015. All parties were given an opportunity to present evidence on the following issues:

1. Whether the Reconsidered Determination affirmation of the June 21, 2012 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY and the June 21, 2012 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was proper.
2. Whether the services performed by individuals as "counselors and billing staff" constitute "employment", as defined in A.R.S. § 23-615.
3. Whether remuneration paid to individuals as "counselors and billing staff" constitutes "wages", as defined in A.R.S. § 23-622.
4. Whether any of the individuals performing services as "counselors and billing staff" performed work that is exempt or is excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or under a decision of the federal government to not treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
5. Whether any of the individuals performing services as "counselors and billing staff" factually and legitimately were independent contractors for the quarters ending: 6/30/2011 through 3/31/2012.

Board Exhibits 1 through 24 were admitted into evidence. One witness testified for the Department, which was represented by counsel. Three witnesses testified for the Employer, which was represented by counsel.

The Appeals Board concludes that the analysis is distinctly different regarding the counselors, who are individually licensed in a closely regulated industry, and the billing staff. Accordingly, we separate our discussion.

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

1. The Employer is a mental and behavioral health care clinic in Arizona that provides mental health care services to its clients. In 2010, a professional limited liability company replaced the original sole proprietorship (Bd. Exhs. 8-10).

2. An independent contractor agreement was signed with each therapist or counselor (Tr. p. 76; Bd. Exhs. 6, 15, 22) except its owner, who serves as Clinical Director. As behavioral health professionals, the therapists were personally responsible for developing a treatment plan for each client, using independent judgment regarding whatever therapeutic methods and means the therapist and the client deemed most appropriate. Each therapist could compete with the Employer, and was not controlled by the Employer regarding the manner or means of providing therapies, or prescribing medications (Tr. p. 22).

3. The therapists gained supervised work experience, while supervised by the Employer and its owner as a licensed behavioral health entity (Tr. pp. 27, 73, 127, 151). The therapists and the Employer intended independent contractor status under the licensing, confidential relationship, and auspices of the Arizona Board of Behavioral Health Examiners, and while complying with provisions of A.R.S. §§ 32-3251 and 32-3283, and Arizona Administrative Code, Sections R4-6-101 and R4-6-210(3).

4. In anticipation of an expansion to an intensive outpatient or substance abuse counseling program, the Employer adopted a set of policies and procedures that was based upon a local hospital's manual. However, no contract for intensive outpatient or substance abuse counseling services arose and many provisions of those written policies were never implemented (Tr. pp. 82, 159-164).

5. Starting May 2011, the therapists or counselors did not work full time and provided the Employer their hours of availability for purposes of scheduling clients. Counseling services were performed on the Employer's premises in office space provided by the Employer, with payment to counselors for each session scheduled. Counselors submitted a ledger to the Employer in order to be paid (Tr. p. 23). The Employer provided neither tools nor directives. Regular, unpaid meetings occurred with the Clinical Director to provide supervision, primarily as a resource and as required by licensing provisions (Tr. pp. 29, 46, 49, 166). Some therapists maintained jobs or training

positions with other behavioral health entities, where similar services were performed.

6. A billing specialist also worked with the clinic during the second, third, and fourth quarters of 2011 and the first quarter of 2012. She did not sign any independent contractor agreement, and she never presented a bill for services. She is described as a "stay-at-home mom" who provided all services personally. She is the Clinical Director's daughter-in-law, and sometimes would answer the telephone a few hours a day. She had her own computer, but the Employer provided her with other equipment and premises necessary to perform billing and accounting functions (Tr. pp. 155-158).

7. On June 21, 2012, a Determination of Unemployment Insurance Liability was issued and a tax rate was assigned to the Employer for 2011 and 2012 (Bd. Exh. 2).

8. On June 21, 2012, a Determination of Liability for Employment or Wages was issued for services performed by individuals as "Independent Counselor" and as "Billing Staff". Also, Notice of Assessment Reports were issued for the quarters ending June 30, 2011 through March 31, 2012 (Bd. Exhs. 3, 4).

9. The Employer filed a timely request for reconsideration of the Determination of Liability for Employment or Wages. The Employer also filed a timely request for hearing following the Department's Reconsidered Determination (Bd. Exhs. 5, 10, 11).

Arizona Revised Statutes § 23-613.01(A) and (E) provide in part as follows:

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

* * *

E. The following services are exempt employment under this chapter, unless <u>there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection A of this section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:</u>

1. Services which are not a part or process of the organization, trade or business of an employing unit and which are <u>performed by an individual who is not treated by the employing unit in a manner generally characteristic of the treatment of employees</u>.

2. Services performed by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit. ... [Emphasis added].

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

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

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

(a) The service is localized in this state.

(b) The service is not localized in any state but some of the service is performed in this state ...

* * *

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

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

Arizona Administrative Code, Section R4-6-101 provides in part as follows:

Definitions

In addition to the definitions set forth at A.R.S. § 32-3251, the following definitions apply to this Chapter, unless otherwise specified:

* * *

"Agency" means the Arizona Board of Behavioral Health Examiner's administrative office.

* * *

"Behavioral health entity" means any organization, agency, business, or professional practice, including a for-profit private practice, that provides assessment, diagnosis, and treatment to individuals, groups or families for behavioral health related issues.

* * *

"Client" means a patient who receives behavioral health services from a person licensed pursuant to A.R.S. § 32-3251 *et seq*.

* * *

"Direct supervision" means immediate responsibility and oversight for all services provided by a supervisee.

* * *

"Group clinical supervision" means clinical supervision provided by a clinical supervisor to two but no more than six supervisees.

* * *

"Independent contractor" means a licensed behavioral health professional whose contract to provide services on behalf of a behavioral health entity qualifies for independent contractor status under the codes, rules and regulations of the Internal Revenue Service of the United States.

"Independent practice" means engaging in the practice of marriage and family therapy, professional counseling, social work or substance abuse counseling without direct supervision.

* * *

"Individual clinical supervision" means clinical supervision provided by a clinical supervisor to one supervisee.

* * *

"License" means written authorization issued by the Board to engage in the practice of behavioral health in Arizona.

"Licensee" means an individual holding a current license issued by the Board to practice behavioral health in Arizona.

* * *

"Practice of behavioral health" means the practice of marriage and family therapy, professional counseling, social work and substance abuse counseling pursuant to A.R.S. § 32-3251 *et seq*.

* * *

"Practice of substance abuse counseling" means the professional application of general counseling theories, principles and techniques as specifically adapted, based on research and clinical experience, to the specialized needs and characteristics of persons who are experiencing substance abuse, chemical dependency and related problems and to the families of those persons. ...

* * *

"Supervised work experience" means practicing clinical social work, marriage and family therapy, professional counseling, or substance abuse counseling for remuneration or on a voluntary basis under direct supervision.

* * *

"Treatment plan" means a description of the specific behavioral health services that a licensee will provide to a client that is documented in the client record.

Arizona Administrative Code, Section R4-6-210 provides in part as follows:

Supervision Requirements – General

In addition to the specific supervision requirements contained in Articles 4, 5, 6, and 7:

* * *

2. A supervisee may not acquire supervised work experience in a professional setting which the supervisee operates or manages or in which the supervisee has an ownership interest.
3. Supervised work experience acquired as an independent contractor must include the following:
   a. The supervisee has entered into a written contract to provide services for a behavioral health entity;

b. The supervisee receives an appropriate level of direct supervision from the contracting behavioral health entity, as determined by the Board;

c. The supervisee is paid by the contracting behavioral health entity and receives no payment directly from clients;

d. The supervisee provides services to clients who are advised in writing that they are clients of the contracting behavioral health entity.

e. The written contract between the contracting behavioral health entity and the supervisee provides that the supervisee is required to comply with the contracting behavioral health entity's clinical policies and procedures, including its code of ethics and record-keeping procedures; and

f. The written contract between the contracting behavioral health entity and the supervisee provides that all client records belong to the contracting behavioral health entity and remain the contracting behavioral health entity's property at the termination of the contract between the contracting behavioral health entity and the supervisee.

* * *

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. <u>An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person,</u>

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. [Emphasis added].

A. No federal Safe Haven applies to this case

No federal ruling was presented that classified either occupation as a matter of federal law, and no audit or other action by the Internal Revenue Service (IRS) was presented. In a post-hearing brief, the Employer's counsel contends that the Employer had a reasonable basis to treat its counselors as independent contractors and, thus, is entitled to “Safe Haven” pursuant to the three tests of Public Law 95-600, Section 530. Counsel contends that treatment of therapists and counselors as independent contractor is a long-standing practice in the industry of counseling, social work, and psychology.

However, the relief from tax penalties provided by Section 530 does not prescribe whether a worker is an employee receiving wages, or an independent contractor. Because of its terms and its purpose, relief under the Revenue Act of 1978, Section 530, does not constitute any exception from Unemployment Insurance tax liability. The Safe Haven provides relief for discreet periods during which the Employer reasonably treated a worker as an independent contractor. By its terms, the relief from penalties for past-due employment taxes is not a federal determination that any of the workers ever was an independent contractor and not an employee.

Section 530 expressly provides a safe haven only for federal employment tax purposes. A ruling granting relief from penalties does not affect other consequences of the reclassification of workers under the common law standard. Rev. Proc. 85-18, 1985-1 C.B. 518, 1985 WL 279023 (1985), *Crew One Productions, Inc. v. State*, 149 S.W. 3d at 96. Section 530 relief does not absolve an employer from state unemployment insurance tax liability. *Professional Samplers, Inc v South Carolina Employment Security Commission*, 334 S.C. 392, 397-400, 513 S.E.2d 374, 377-379 (S.C. Ct.App. 1999), and *Mid Vermont Christian School v. Department of Employment and Training*, 178 Vt. 448, 885 A.2d 1210 (2005). The legislative policy considerations in *Crew One Productions, supra* at 99-100, are equally applicable in Arizona because Tennessee statutes express the same policies as Arizona, which are to protect workers who are involuntarily unemployed, through liberally interpreting unemployment compensation statutes in favor of employment. The Employer's contention of safe haven is immaterial, because no federal government decision exemption applies to this case. *See*, A.R.S. § 23-613.01(A)(3) The Employer did not establish that the federal government has decided not to treat any worker as an employee for federal unemployment tax purposes.

B. Counselors qualify for an exception to employment

More than one specific exception to employment status is prescribed by Arizona Administrative Code, Section R6-3-1723. Although the Employer consistently has contended that Independent Contractor status applies pursuant to Subsection (B)(1), we conclude that the licensing requirements render the provisions of Subsection (B)(2) clearly applicable. The only job of counselors was to provide counseling services (Tr. p. 81).

According to the evidence of record, the counselors and therapists are operating through the Employer, as a mental and behavioral health clinic, "... solely because of a provision of law regulating the organization, trade or business of the employing unit". The Department's analysis in its Reconsidered Determination did not consider the "Independent Contractor" definition and provisions governing mental and behavioral health treatment licensure. The licensing body expressly requires a written contract and supervision, while incorporating provisions defining such arrangements as independent contracting status. We conclude that the parties intended to comply with the licensing

requirements. Nothing in the evidence establishes that the parties deviated from the licensing requirements for their industry, which are embodied in Arizona Administrative Code, Sections R4-6-201 and R4-6-210(3).

According to the evidence, the Employer's clinic is designed to fully comply with, and to accommodate, the supervision requirements associated with direct client contact in the practice of behavioral health, as defined in A.R.S. § 32-3251. In practice, the clinic satisfies the Employment Security Law of Arizona's requirement that the counselors function under their contracts as independent therapists, solely because of a provision of law regulating the organization, trade or business of the employing unit. We conclude that the exemption applies, and the counselors are not employees of the Employer.

C. The billing specialist does not qualify for an exception to employment, and she properly is classified as an employee who receives wages

The pertinent statute, A.R.S. § 23-619 provides a simple definition: "'Insured work' means employment for employers." This statute impacts upon the scheduled issues. The wording of the Employer's requests for reconsideration, hearing, and other memoranda indicates that the Employer also seeks an exception from the general rule that work is in employment. Therefore, the Employer bears the burden to prove its contentions that the worker in question was an independent contractor rather than an employee earning wages.

In common with other "classification" issues, the burden of proof is upon the party who seeks to benefit by fitting into an exception to the well-established legal presumption. Regarding allegations that an independent contractor exception to insured work applies to a particular set of factual circumstances, the presumptions must be that services and work are performed under "employment", and remuneration for such services constitutes "wages". 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), clearly ruled that all sections of the Employment Security Law should be given the long-established liberal construction, in an effort to include as many types of employment relationships as possible. The Court held:

> 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. ADES*, 128 Ariz. 504, 627 P.2d 235 (App. 1981). The Court ruled:

> 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].

The Court in *Dearing v. ADES*, 121 Ariz. 203, 205 (Ariz. Ct. App.1978), cited legal presumptions of long standing and intent:

> The Arizona Supreme Court has held that the words defined in the Act, such as "employer", "employment" and "wages", are used as broad terms of description, indicative of the legislative intent to give a wide and liberal effect to the Act's goal of alleviating unemployment. *Gaskin v. Wayland*, 61 Ariz. 291, 148 P.2d 590 (1944). As such, they have a much broader meaning than when they are used by the majority of the states in their unemployment acts and in the Federal Unemployment Tax Act, 26 U.S.C. Sec. 3301, *et seq.*, which follow the common law definitions. *Arizona Department of Economic Security v. Little*, 24 Ariz.App. 480, 539 P.2d 954 (1975). [Emphasis added].

The concepts of urging an exception to the general rule, and statutory construction, were addressed more recently in *Robbins v. ADES*, 232 Ariz. 21, 300 P.3d 556 (2013). The Court of Appeals dealt with pertinent statutes and ruled that the meaning of the exclusion language is found by using the legislative intent and plain wording. The Court found that the pertinent statutes provided an exclusion from UI insured work by elected officials, through furthering:

> ... a legislative intent to treat tribal employment the same as 'other service' when it comes to both benefit amounts and benefit conditions.

The billing and accounting services were performed by a single individual, who personally performed all services using the tools and equipment provided by the Employer. No written agreement to serve as an independent contractor has been presented. The evidence does not establish that the Clinical Director's daughter held herself out to the public, or advertised, as an independent business to provide any services, including billing and accounting.

The right to behavioral control, through expecting accurate and timely billing and accounting, was demonstrated. The billing specialist did not have

any ownership or substantial investment in the business and, therefore, could not realize a profit or suffer a loss related to the work performed. Characteristic expenses of an independent business were not established, such as office expense, utilities, advertising, or significant investment in tools or equipment. No stipulated damages or other penalty prevented either party from terminating the working relationship, which is characteristic of employment. The provision of billing and accounting services is integral to the business, which obviously relies upon billing its clients for therapeutic services rendered so that the counselors could be paid for their services.

We conclude that the Employer did not meet its burden of proof by establishing that the billing specialist met an exception. Thus, the billing specialist was an employee of the Employer, and remuneration paid to her constituted wages.

THE APPEALS BOARD **REVERSES IN PART** the Reconsidered Determination dated January 31, 2014.

Services performed by the counselors and therapists did not constitute employment by the Employer. The counselors and therapists were not common law employees of the Employer. Remuneration paid to the counselors and therapists was not wages.

THE APPEALS BOARD **AFFIRMS IN PART** the Reconsidered Determination dated January 31, 2014.

Effective with the Second Quarter of 2011, services performed by the billing specialist constituted employment by the Employer. Remuneration paid to the billing specialist constituted wages.

DATED: 3/29/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

C. Your request for review must be in writing, signed by you or your representative and filed on time. The request for review must also include a written statement which:
   1. explains why the Appeals Board decision is wrong,

2. cites the record, rules and other authority, and
3. refers to specific hearing testimony and evidence.

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

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

A copy of the foregoing was mailed on 3/29/2016
to:

(x) Er: XXX T1 Acct. No: XXX-000

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

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1409143-001-B

XXX T1

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

Employer

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** March 14, 2016 *****.

DECISION
AFFIRMED

THE **EMPLOYER,** through counsel, petitioned for a hearing from the Department's Reconsidered Determination issued on September 17, 2013, which held in part as follows:

> ... we conclude that services performed by the workers at issue were correctly determined to constitute employment and all remuneration paid for such services to constitute wages.

> This Reconsidered Determination affirms the Determination of Liability for Employment or Wages issued November 1, 2012, and will become final ...

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

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **September 17, 2014**, before Appeals Board Administrative Law Judge ROBERT T. NALL. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the October 30, 2013 Reconsidered Determination affirming the November 1, 2012 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was proper.
2. Whether the services performed by individuals as "Cleaning and Maintenance persons" and as "corporate officers" constitute employment, as defined in A.R.S. §§ 23-613.01 and 23-615.
3. Whether remuneration paid to individuals as "Cleaning and Maintenance persons" and as "corporate officers" constitutes "wages", as defined in A.R.S. § 23-622.
4. Whether any of the individuals performing services as "Cleaning and Maintenance persons" and as "corporate officers" performed work that is exempt or is excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or under a decision of the federal government to not treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
5. Whether any of the individuals performing services as "Cleaning and Maintenance persons" and as "corporate officers" factually and legitimately were independent contractors for the quarters ending: September 30, 2011 through September 30, 2012.
6. Impact of applicable licensure, bonding, or insurance requirements upon employment status.

At the hearing, the Employer’s counsel appeared by telephone, and three witnesses testified for the Employer. The Department was represented by counsel, and one witness testified for the Department. Board Exhibits 1 through 29 were admitted into evidence. We have carefully reviewed the record.

We note that, during the hearing, the Employer acknowledged that the corporate officer and president, “DS”, always has been a W-2 employee who receives wages (Tr. pp. 7, 38). A manager, “JV”, also is an employee who has received wages since 2013 (Tr. pp. 61, 70, 73). The Employer acknowledged that all Cleaning persons were treated as uncontested employees receiving wages prior to the Third Quarter of 2011, at which time the Employer changed its business model and retained different accountants (Tr. p. 21). Accordingly, our analysis will focus on the employment classification issue between the Employer and the Cleaning persons, commencing with the Third Quarter of 2011.

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

1. The Employer is an Arizona corporation that has provided residential and commercial cleaning services to the public since 2000. Its sole owner is its corporate officer (Tr. pp. 25, 64; Bd. Exh. 21).

2. Prior to the third Quarter of 2011, the Employer treated all of its "Cleaning and Maintenance persons" as employees (Tr. pp. 28, 29; Bd. Exh. 12). They drove company vehicles to the Employer’s clients, and used supplies and equipment provided by the Employer as they performed services for the Employer’s clientele. The workers turned in timesheets, were paid wages, and worked in teams at hours scheduled and locations assigned by the Employer. The Employer possessed and exercised its right to progressively discipline workers, who included “SO”.

3. Commencing with the third Quarter of 2011 through the date of hearing, the Employer ceased providing cleaning supplies and equipment to the Cleaning Persons whom it calls “subcontractors” (Bd. Exh. 12). These workers were allowed to clean for any clients, using their own vehicles, equipment, and supplies without reimbursement from the Employer for mileage. The Employer ceased scheduling the cleaning projects, and ceased telling the Cleaning persons when to clean the client premises. The Employer returned its motor vehicles as part of its owner’s personal bankruptcy, and offered to rent or lease out vacuums as “hard equipment” to the Cleaners at rates based upon the pay they earned each week (Tr. pp. 30-34, 90).

4. Commencing with the third Quarter of 2011 through the date of hearing, the Employer paid its Cleaning persons at a set rate per job or location, no matter how long the job required. Helpers or substitutes could be hired without approval from the Employer, which would split payments if one person filled in for another. In event of emergency, the company president occasionally performed cleanings herself.

5. The president would initiate a first visit with a client. Thereafter, the Employer's manager performs quality checks at homes to ascertain that customer requirements have been met, according to a "blueprint" or "profile" provided by the Employer to notify each subcontractor what the client wanted or areas excluded from cleaning (Tr. pp. 75-81, 93, 97).

6. As of May 10, 2013, the Employer's web site specified that the owner of the company guarantees all of the services provided. The website stated: "As the owner of the company I hire, train, supervise, and yes, even clean my customers' homes. The assurance you will receive as a customer is that you will know who is in your home!" Similar language also was publicly posted as of December 14, 2012 (Bd. Exh. 22).

7. The Employer advertised for subcontractors since August 2011. By e-mail or otherwise, the Employer would offer the premises of its client to the Cleaning workers for their cleaning services. The Cleaning workers either would pick up a check from a client made out to the Employer, or clients would pay the Employer by credit card to the Employer's merchant account. The Employer undertook to track receivables and payables (Tr. pp. 57-59, 99).

8. The Employer's commercial accounts always were employee based, as the Employer schedules commercial Cleaning workers and the Employer provides supplies through a different corporation. Residential customers have been told about the subcontractor status only upon inquiry (Tr. pp. 60-63).

9. Starting August 1, 2011, contractor agreements were signed by various Cleaning workers (Tr. pp. 74-66, 94; Bd. Exhs. 6, 13).

10. Between August 2011 and her hire as its manager during 2013, one Cleaner had her own clients outside of the Employer's business. She made her own schedule of house cleaning, and she brought in other workers whom she paid directly. On occasion, that Cleaner believed she lost money through paying substitutes or helpers to assist her. She used her own residence to store materials, and she never arranged business premises, business insurance, nor business licenses. To her knowledge, none of the other Cleaners advertised themselves as business owners seeking clients and all of the other Cleaners worked out of their own homes (Tr. pp. 73-75, 83-86, 92).

11. At least one Cleaner is allowed to stop working for the Employer any time she wants, without penalty. She never negotiated the payment price with a customer (Tr. p. 92, 95).

12. The Department conducted an audit of the Employer's business records (Tr. p. 104; Bd. Exhs. 15, 17, 20).

13. When "SO" filed a claim for Unemployment Insurance (UI) benefits on July 11, 2012, the Employer responded in its protest that her last day was June 22, 2012, and submitted copies of Form 1099-MISCs issued to SO for 2011 and 2012. A benefit assignment resulted in August 2012 from her filing (Tr. p. 10, 115; Bd. Exhs. 9, 10). The Employer's counsel acknowledged that, at the time she applied for benefits, SO was an employee of the Employer who had been discharged for cause (Tr. pp. 14, 15).

14. Following a tax audit, the Department issued a Determination of Liability for Employment or Wages dated November 1, 2012, which held the services performed by "Cleaning and Maintenance persons", and by corporate officers, constitute employment", and all forms of remuneration paid for these services are wages. The Department also issued notices of assessment for the quarters ending September 30, 2011 through September 30, 2012 (Bd. Exhs. 18-20, 29).

15. Following a request for reconsideration, the Department issued its Reconsidered Determination. The Employer filed a timely petition for hearing from the Department's Reconsidered Determination, and participated in the Appeals Board hearing.

The Employer contends that all of its "Cleaners and Maintenance persons" were independent contractors, and were not employees, as of August 1, 2011 and thereafter. The issues remaining in dispute concern the proper classification of the "Cleaners and Maintenance persons" (hereafter "Cleaners"), and whether all forms of remuneration paid to these individuals constituted wages.

Arizona Revised Statutes § 23-613.01 provides in part as follows:

> A. "Employee" means <u>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</u>, except employee does not include:
>
> 1. <u>An individual who performs services as an independent contractor</u>, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.

* * *

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. [Emphasis added].

* * *

Arizona Revised Statutes § 23-614 provides in part as follows:

Employing unit; temporary services employer; professional employer organization; definitions

A. "Employing unit" means an individual or type of organization, including a partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor of any of the foregoing, or the legal representative of a deceased person, which has, or subsequent to January 1, 1936 had, one or more individuals performing services for it within this state. ...

* * *

C. Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit is engaged by the employing unit for all the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work.

* * *

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

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

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

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

* * *

4. Service performed by any officer of a corporation.

* * *

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

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

Arizona Revised Statutes § 23-725(A) provides as follows:

> Employer coverage; termination; election of coverage
>
> A. Except as provided in subsections D and E of this section, an employing unit that is or becomes an employer subject to the provisions of this chapter within any calendar year shall be deemed an employer during the whole of the calendar year.

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. <u>Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence</u>.
>
> 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.

* * *

D. In determining whether an individual who performs services is an employee under the general definition of subsection (A), all material evidence pertaining to the relationship between the individual and the employing unit must be examined. Control as to the result is usually present in any type of contractual relationship, but it is the additional presence of control, as determined by such control factors as are identified in paragraph (2) of this subsection, over the method in which the services are performed, that may create an employment relationship.

1. The existence of control solely on the basis of the existence of the right to control may be established by such action as: reviewing written contracts between the individual and the employing unit; interviewing the individual or employing unit; obtaining statements of third parties; or examining regulatory statutes governing the organization, trade or business. In any

> event, the substance, and not merely the form of the relationship must be analyzed.

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

The APPEALS BOARD FINDS no material error in the Department's Reconsidered Determination, after finding that the evidence does not establish payment to Cleaners of hourly wages after August 1, 2011. The reasons and conclusions of law upon which the decision rests are founded upon a proper application of the law. The evidence of record supports the analysis, reasoning, and conclusions. We adopt the Department's analysis and reasoning as our own.

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

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

Our analysis recognizes that some factors favor independence. Witnesses testified that they were allowed to use substitutes or assistants, but would have to split or share the payment for services rendered. The Employer acknowledged that, upon request, the payments for services rendered could be split. Two witnesses acknowledged reluctantly using relatives or others as assistants, despite reducing personal income. The Employer's president testified that she not only usually completed the first cleaning for a new client herself, but she would do the cleaning herself later in an emergency. The owner expressed no interest in who was working with the Cleaners, nor when cleaning services were performed. Therefore, we find the "Authority over Individual's Assistants" factor favors independence.

The Cleaners were not required to personally perform services on a schedule set by the Employer. The Employer's clients set the hour restrictions, if any, to be worked. For the most part, the Cleaners could set and change their own appointments to perform services with no input from the Employer. Cleaners could provide similar services for others during the same timeframe that they provided services to the Employer's clients. Tools and materials were not provided at the Employer's expense, and no expense reimbursement was available. Therefore, the "Personal Performance", "Establishment of Work Sequence", "Set Hours of Work", "Amount of Time", "Tools and Materials", "Expense Reimbursement", "Availability to the Public", "Compensation on Job Basis", and "Simultaneous Contracts" factors show a relaxation of control, and indicate independence. The Employer ceased providing vehicles, materials, or equipment as of August 2011. These practices favor independence.

Due to the nature of this work, the Cleaners performed services at various job sites. No specialized training was required. Therefore, we find the "Place of Work" and "Training" factors neutral. None of the Cleaners made significant investments in order to pursue a profit opportunity. None was required to provide their own vacuum cleaners, which would be among the more expensive job-related tools. Prices were set by the Employer rather than negotiated, although one witness was able to get a higher rate for certain jobs due to distance traveled. Thus, the "Significant investment" and "Realization of Profit or Loss" factors were neutral.

Other factors also establish a right to control. The Employer studiously prepared a blueprint, checklist, or profile for each client, and contractually expected all work to be performed according to those directives (Exh. 6). At least one person was discharged following customer complaints. One of the witnesses urged the clients to contact her directly with their concerns. The directives appear to include frequency of cleaning so that client payments could be collected from clients, and payment for services could be issued weekly. The Employer's web site implied to clients that supervision would be provided. Therefore, the "Compliance with Instructions" factor shows a right to control, and indicates an employment relationship.

The Cleaners were not required to submit invoices in order to be paid for services rendered, since the Employer accepted responsibility for monitoring progress on jobs and receivables. Often, the Cleaners would collect a check payable to the Employer, which indicates a principal and agency authorization, or which constitutes an assigned task. These practices indicate employment.

Further, either party could terminate at any time without incurring liquidated damages or a penalty, and the Employer not only possessed but actually exercised its right to discharge "OS" during June 2012. The right of control is very strongly indicated if the worker may be terminated with little or no notice, with or without cause, and if the worker does not make his services available to the public on a continuing basis. None of the Cleaning and Maintenance persons advertised themselves to the public, or maintained business licenses, business premises, or business insurance. The Employer and the Cleaners had the right to terminate their agreement at will without any legal obligations or penalties, and without an expectation of advance notice. Therefore, the "Right to Discharge" and "Obligations" factors show the absence of arms-length negotiation with minimal expression of limitations by contract, are characteristic of employment, and favor employment.

Behavioral Controls are exercised in this business, as demonstrated by the Employer's own descriptions of its business practices on its website. At times pertinent to this case, the owner consistently announced to the public:

> I guarantee all of the services provided. As the owner of the company I hire, train, supervise, and yes, even clean my customers homes. The assurance you will receive as a customer is that you will know who is in your home! ...
>
> * * *
>
> If at all possible one employee per house. ... I changed this process about two years ago and have found that the response from the customer and employee a positive one. ... Each employee takes on more responsibility and care of the home each visit. ... I, the owner, train each employee in my customer's homes. Since I am the one who takes the estimate and meets with the customer this is crucial ... If an employee is sick or out on vacation I am the one who fills in for them. ... (Exh. 22).

The Employer's witnesses agreed that the owner set a blueprint or profile for each client's premises, which every Cleaner was expected to follow. Not only did the contract require "strict accordance" with plans and specifications as particularly specified in the Checklists and Customer Profiles, but work was required to commence within 1 day after written notice and "Subcontractor shall not deliver any materials to the job site or commence work until notified to do

so by Contractor" (Exh. 6). We conclude that the behavioral controls support employment.

Financial Controls also exist in this business arrangement. The contract requires weekly payments for services performed including extra work (Exh. 6), regardless of whether the owner is paid. The Employer established all rates, and the only indication of any negotiation was a request for higher payment due to distance. The lack of significant investment by any Cleaner, combined with the severely limited potential for negotiating or bidding for locations or prices, distinguish this relationship from an actual "independent contractor" relationship.

Relationship of the Parties involves services that is intrinsic to the Employer's business. Obviously, the business of a cleaning company requires somebody to perform the cleaning for clients. The business expanded beyond the ability of a single person to perform all services, and admittedly was run on an employment basis for several months. The Employer's web site consistently identifies Cleaners as employees, not as subcontractors (Exh. 6). As the Department pointed out in its Reconsidered Determination, case law provides that the existence of skeletal contracts signed by several Cleaners is not dispositive of whether they actually were acting as independent contractors, rather than employees. We conclude that, if any Cleaner wanted to be independent, then that Cleaner would advertise herself to the public as a business, would track her own work performed, would invoice the Employer regularly, would have a business and transaction license, would obtain business insurance, and would arrange some sort of penalty for early termination. None of these activities was established, although each is typical of a truly independent business.

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

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

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

> The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial

> legislation. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

We conclude that the evidence of independent contractor status does not outweigh the evidence of employee status. The Employer did not meet its burden of proof to establish an exception from the general rules including all workers in employment, and all remuneration as wages. Therefore, we find that the corporate officer and the Cleaners were employees of the Employer from August 1, 2011. We conclude that all remuneration for services were wages by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination issued November 11, 2013.

The corporate officer always was an employee.

From August 1, 2011, services performed by individuals as Cleaners and Maintenance workers constituted employment.

All forms of remuneration paid to the corporate officer and to individuals as Cleaners and Maintenance workers for such services from August 1, 2011, constituted wages.

DATED: 2/11/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits

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

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

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

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

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

A copy of the foregoing was mailed on
to:

Er: XXX T1 Acct. No: XXX-000

(x) Er. Rep: XXX

(x) Dept. Rep: ELI D GOLOB and CHRISTINA HAMILTON
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1395982-001-BR

XXX T1	STATE OF ARIZONA E S A TAX UNIT % ELI GOLOB ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS --- The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE SUS BENEFICIOS --- The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 771-9036.

RIGHT TO APPEAL TO THE COURT OF APPEALS

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** March 24, 2016 *****.

DECISION
AFFIRMED UPON REVIEW

The **EMPLOYER** through counsel, requests review of that part of the Appeals Board decision issued on October 22, 2015, which affirmed the Reconsidered Determination, as modified, and held:

> Effective with the Second Quarter of 2011, services performed by "Auto Parts Delivery Drivers and Warehouse workers" constituted employment by the Employer. The names "included" on the Notice of

> Assessment are not necessarily the only persons affected. Remuneration paid to the "Auto Parts Delivery Drivers and Warehouse workers" constituted wages.

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

In the request for review, the Employer's counsel correctly summarizes the Department's ruling that the Employer functioned as a "temporary services employer" when it sent hundreds of parts drivers and couriers to perform daily services for its various automotive shop client firms. The Department's Reconsidered Determination ruled that A.R.S. § 23-614 classifies such workers as employees of the Employer. That analysis has been affirmed, as modified regarding the starting date of classifying the drivers as employees receiving wages. The evidence did not establish that any of the parts drivers and couriers conducted a separate auto parts delivery business, independent of their assignments from the Employer. Their services on behalf of the Employer's clients were intrinsic to the Employer's core business of assigning persons to pick up and to deliver auto parts on behalf of the Employer's client firms.

However, the legal analysis posited by counsel as "a single dispositive issue" does not recognize that the Appeals Board specified its affirmation was effective with the Second Quarter of 2011. The Appeals Board ruled that the starting date of proper analysis as a temporary services employer of such employees is the tax audit process beginning on March 29, 2011. The Appeals Board expressly modified the Reconsidered Determination accordingly, because persons who previously had been told they were classified as independent contractors would not be impacted for prior periods, "... and the Department's ruling should not cover any quarter prior to the 2nd Quarter of 2011." Thus, the Employer's contention on page six that the Employer is made "... responsible for payment of unemployment insurance to individuals deemed independent contractor by DES as far back as 2002 ..." overbroadly interprets our ruling.

A. Proper application of the Employment Security Law statutes

In the request for review, counsel for the Employer contends that, by its terms, A.R.S. § 23-614 does not create a path to classifying workers as employees, rather than independent contractors. Counsel contends this statute should be interpreted merely as identifying whether a client firm or the temporary service business is the proper employer of a worker. Counsel contends that, as a matter of law, the control factors of A.R.S. § 23-613.01 must be addressed and analyzed before concluding that these parts drivers and couriers are classified as employees receiving wages from the Employer, rather than as independent contractors operating their own separate businesses. Counsel also contends that prior rulings bound the Department in 2011, and thereafter.

We disagree. The nature of the Employer's core business, as explained in the 2011 audit process, is providing pickup and delivery services to its client firms, according to the testimony by the Employer's witnesses. Control over the parts drivers and couriers to whom the Employer's dispatchers assign such delivery services is not a necessary analysis or factor because the function and operation of the Employer's business is as a temporary services employer, which is defined by law. Analysis of control factors and master/servant factors is neither mandated nor dispositive in such a situation, because the clear language of pertinent laws recognizes that temporary services employers characteristically leave to their client firms the privilege of specifying where, how, or when the workers dispatched to those clients will perform work assignments. A worker who disagrees or who declines a client firm's assignment may choose to seek other work, either through their temporary services employer with a different client firm, or elsewhere, usually without incurring a negotiated penalty for nonperformance.

We conclude that a truly independent contractor could be held liable for not completing the contracted performance according to the terms of a valid contract. A truly independent contractor would be able to negotiate pricing and other conditions of work. A truly independent contractor would hold himself out to the public as a separate business, while acquiring proper licensing and insurance and bonding, or at least could simultaneously contract with multiple vendors. These factors were not established by the evidence of record in this case, which instead establishes work for a temporary services employer that assigned its workers.

The temporary services employer definition in A.R.S. § 23-614(I)(2) is met when the Employer collects for services from its client firms, and pays its workers accordingly without permitting significant price negotiations and without using an invoice method. This pattern exists in the relationships between the Employer and its parts drivers and couriers, and is fundamentally characteristic of employment by the Employer.

The request for review also imputes a Legislative intent to amendments of A.R.S. § 23-614, while asserting that "... its application was misunderstood by DES causing the Legislature to clarify the provision at issue." Nothing authoritative is cited by the Employer in support of these statements by counsel regarding the reasons or intent behind the amendments. Due to lack of citations, these contentions seem speculative, and contrary to the legislative fact sheet and history cited by the Department's counsel in the responsive memorandum. We conclude that the Arizona and federal statutes harmonize adequately, as applied by the Reconsidered Determination ruling that we have affirmed and modified.

From the evidence of record, we conclude that the Employer had actual or constructive knowledge of the parts delivery tasks performed by the auto parts delivery drivers. The provisions of Arizona Revised Statutes § 23-614(C) were

met in this case. We incorporate by reference the discussions in our prior decision of pertinent case law relating to statutory construction, and the statutes.

Contrary to these contentions by the Employer, the definition of "temporary services employer" found in A.R.S. § 23-614(I)(2) is expressly excepted from determinations of employment under A.R.S. § 23-613.01, because of the language in A.R.S. § 23-614(D): "... except as provided in subsections E and G of this section with respect to a professional employer organization or a temporary services employer." In its most recent amendments, the Legislature specified numerous factors within A.R.S. § 23-614(I)(2)(a) through (g), upon which a party could base a claim that this statutory definition does not apply. Each of these factors was established by the evidence.

The Employer does not dispute any finding of fact. The Employer also does not contest its own acknowledgement that at least nine of its drivers actually were employees. We do not find a sufficiently reasonable distinction between those nine drivers and the other drivers, to justify disparate classification of some as employees, and others not. We conclude that this evidence overwhelms the assertion that one driver may have paid her son as an occasional helper, while the Employer paid nothing to any helper. The Employer's assumption that other drivers may have used helpers is unsupported. Contrary to the contention, nothing in our prior decision directs that this driver should be paid anything. We expressly pointed out that eligibility for Unemployment Insurance (UI) benefits was never at issue in this case. Eligibility of any driver for UI benefits should not be implied from our prior decision, and the "practical examples" discussed in the request for review do not establish reversible error regarding the Employer's responsibility as a taxpayer to treat its drivers as employees.

B. The Internal Revenue Service letter regarding: "Section 530 relief applies to the taxpayer's drivers/couriers"

With the request for review, the Employer has submitted a December 31, 2014 letter from an Internal Revenue Service (IRS) revenue agent. This letter could not have been presented at the hearings, which concluded July 23, 2013. For clarity of discussion, we conclude that this three-page document should become part of the record. This Board, pursuant to A.R.S. § 23-674(D), on its own motion, admits the December 31, 2014 letter into evidence as **Board Exhibit 30**.

In a response to the Employer's request for review, counsel for the Department has explained multiple reasons why relief under the Revenue Act of 1978, Section 530, does not constitute any exception from Unemployment Insurance tax liability. We concur with this analysis, and we incorporate by reference the case law and analysis regarding all five points discussed. The Safe Harbor provides relief for discrete periods during which the Employer reasonably treated a worker as an independent contractor. The IRS letter applies

to March 2011 through December 2011. By its terms, the relief from penalties for past-due employment taxes is not a federal determination that any of the workers ever was an independent contractor and not an employee (Bd. Exh. 30).

The Employer's contention must fail, because no "federal government decision exemption, A.R.S. § 23-613.01(A)(3)" applies to this case. The Employer did not establish that the federal government has decided not to treat any driver as an employee for federal unemployment tax purposes.

C. Contention that due process of law was denied

Counsel contends that the Department bears the burden of proving that no exception was established to the general presumption of employment. The pertinent laws contradict this contention. Any entity seeking more favorable tax treatment bears the burden to establish applicability of an exception under A.R.S. §§ 23-601, 23-619 and 23-622, and pursuant to case law we previously cited. The Department has a responsibility to consider whether a liability ruling shall be revised, pursuant to A.R.S. § 23-724, particularly when a substantial and material change has arisen in the facts upon which the prior ruling relied.

Counsel also contends that the Employer had no opportunity to present evidence that its drivers were independent contractors, and that the Employer could not have adduced evidence that its drivers were independent contractors because such evidence was irrelevant. The contention that due process of law was denied ignores the fact that a hearing was conducted at the Employer's request, at which the Employer was given the opportunity to establish that its workers were independent contractors.

In the Employer's December 30, 2011 request for reconsideration, counsel stated as grounds for appeal that persons "... were or are properly characterized as independent contractors rather than employees", and alleged a denial of due process during the audit when the Tax Unit determined that the Employer was an Employing Unit under Arizona law, or at least was a Professional Employer Organization (PEO), prior to any meeting with the Employer's representatives (Bd. Exh. 5). This echoed the November 2, 2011 request by counsel for reconsideration, which reiterated objections raised previously and which again asserted both independent contractor status and denial of due process by the Field Auditor (Bd. Exh. 7). The Employer was not surprised by the State's position.

We find no basis in the record to support the Employer's contentions that due process of law was denied. The essential elements of due process were observed. Advance notification of the issues to be addressed at the scheduled hearing, with instructions, were sent to the parties. The Employer was given the opportunity to be heard before an impartial administrative law judge on behalf of the Appeals Board, and the opportunity to respond to any allegations, rebut any unfavorable testimony, cross-examine witnesses, object to the admission of

documentary or other evidence, and present closing statements. Throughout the hearing process, the Employer was assisted by counsel. Alleged independent contractor status was discussed before, during, and after the hearing.

At the hearing, the Employer had ample opportunity to contest the temporary service employer designation. As counsel for the Department has pointed out in the responsive memorandum, the Department requested a copy of the contract between the Employer and its clients but received no response. Thus, opportunity to present pertinent documentation was encouraged, rather than denied.

Similarly, we conclude that the evidence and the procedural history negate the allegations of an arbitrary and capricious process or result. The Appeals Board is entitled not to rely upon the legal opinion reached by the Employer's manager (discussed in a footnote to the request for review), particularly when more compelling evidence is available and a credible witness with expertise in the field of classification presented contrary analysis. The new factors leading to an end of the independent contractor status for drivers involved actual interviews, and an actual field audit, followed by extensive assistance of counsel through a formal evidentiary hearing. The Employer's own acknowledgement that at least nine of its drivers actually were employees further contradicts its allegations that rulings, with results matching its own reviews, were arbitrary and were capriciously tainted by a denial of due process.

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

THE APPEALS BOARD FINDS that:

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

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

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

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

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

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

DATED: 2/23/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

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

you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

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

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

A copy of the foregoing was mailed on 2/23/2016
to:

Er: XXX T1 Acct. No:XXX-000

(x) Er rep: XXX

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: __LS_____
For The Appeals Board

2nd QUARTER OF
CALENDAR YEAR 2016

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1513740-001-B

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

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

June 20, 2016 *.**

DECISION
DISMISSED

THE **EMPLOYER,** through counsel, has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A). The request was made on the record, during the hearing conducted on May 18, 2016.

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

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

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

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

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

DATED: 5/19/2016

APPEALS BOARD

NANCY MILLER, Acting Chairman

WILLIAM G. DADE, Acting Chairman

ROBERT NALL, Acting Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the

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

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

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

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

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

A copy of the foregoing was mailed on 5/19/2016
to:

(x) Er: XX Acct. No: XX T9

(x) xx

(x) ELI D GOLOB, ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1513736-001-B

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

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** June 23, 2016 *****.

DECISION
DISMISSED

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

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

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

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

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: 5/24/2016

APPEALS BOARD

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

, Acting Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not

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2. cites the record, rules and other authority, and
3. refers to specific hearing testimony and evidence.

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

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

A copy of the foregoing was mailed on 5/24/2016
to:

(x) Er: XX Acct. No: XX T1

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1506596-001-B

XX

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

Employer

Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** May 5, 2016 *****.

DECISION
DISMISSED

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

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

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

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

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

THE APPEALS BOARD **DISMISSES** the Employer's petition for hearing. 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: 4/5/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take

any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

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   2. cites the record, rules and other authority, and
   3. refers to specific hearing testimony and evidence.

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

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

A copy of the foregoing was mailed on 4/5/2016
to:

Er: XX Acct. No: XX T1

(x) XX

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1502966-001-B

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

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** June 20, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER**, petitioned for a hearing from the Department's Reconsidered Determination issued on August 12, 2015, which held that services performed by the carpet cleaner, handyman, landscaper, locksmith, roofer, home securing, repairman, maid service, property maintenance, and salesperson were correctly determined to constitute employment and all remuneration paid for such services constituted wages.

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

THE APPEALS BOARD scheduled a telephone hearing for May 19, 2016, at 9:00 a.m. Mountain Standard Time, before Appeals Board Administrative Law Judge **Morris L. Williams, III,** with written notice to the parties.

The Employer did not appear at the scheduled Board hearing and did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was present. Because the Employer did not appear at the May 19, 2016 Appeals Board hearing to pursue its appeal, a default was entered on the record.

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

> 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:
>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence.

The Employer's default means that insufficient evidence was presented to support reversing or modifying the Department's August 12, 2015 Reconsidered Determination. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department’s August 12, 2015 Reconsidered Determination remains in full force and effect.

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

DATED: 5/19/2016

APPEALS BOARD

NANCY MILLER, Acting Chairman

WILLIAM G. DADE, Member

MORRIS L. WILLIAMS III, Acting Member

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

HOW TO REQUEST REOPENING OF THE HEARING

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

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

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

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

C. Your request to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing. A request for review will not be considered unless the Appeals Board sets aside this dismissal, and then issues a decision upon the merits of the request for hearing.

D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

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

A copy of the foregoing was mailed on 5/19/2016
to:

(x) Er: XX Acct. No: XX T1

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

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

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1502955-001-B

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

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** June 20, 2016 *****.

DECISION
DISMISSED

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

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

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

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

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

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

DATED: 5/19/2016

APPEALS BOARD

WILLIAM G. DADE, Acting Chairman

NANCY MILLER, Member

ROBERT NALL, Acting Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to

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

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

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

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

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

A copy of the foregoing was mailed on 5/19/2016
to:

Er: XX Acct. No: XX T1

(x) XX

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1502950-001-B

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

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

July 18, 2016 *.**

DECISION
DISMISSED

THE **EMPLOYER**, petitioned for a hearing from the Department's Reconsidered Determination issued on April 30, 2015, which held that the services performed by individuals as manager, assistant manager, leasing consultant, maintenance supervisors and maintenance tech constitute employment and all forms of remuneration paid for such services constitute wages.

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

THE APPEALS BOARD scheduled a telephone hearing for June 9, 2016, at 10:00 a.m. Mountain Standard Time, before Appeals Board Administrative Law Judge **Morris L. Williams, III,** with written notice to the parties.

The Employer did not appear at the scheduled Board hearing and did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was present. Because the Employer did not appear at the June 9, 2016 Appeals Board hearing to pursue its appeal, a default was entered on the record.

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

> 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:
>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the timeliness of the Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence.

The Employer's default means that insufficient evidence was presented to establish that the Employer filed a timely petition for hearing from the Department's April 30, 2015 Reconsidered Determination. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department’s April 30, 2015 Reconsidered Determination remains in full force and effect.

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

DATED: 6/16/2016

APPEALS BOARD

JANET L. FELTZ, Chairman

NANCY MILLER, Member

WILLIAM G. DADE, Member

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

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

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

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

A copy of the foregoing was mailed on 6/16/2016
to:

(x) Er: XX Acct. No: XX T0

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

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

By: ___LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1502945-001-B

XX

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

Employer

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION --- The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** July 18, 2016 *****.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing following the Department's Reconsidered Determination issued on July 21, 2015, which held in part as follows:

> ... we find that [the Employer] is liable for Arizona Unemployment Insurance Taxes as a temporary services employer under the provisions of A.R.S. § 23-614(I)(2) and that the services performed by individuals as software

developers and application testers constitute employment and all remuneration paid for such services constitutes wages.

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

THE APPEALS BOARD FOUND that the taking of evidence is necessary to a proper adjudication of the issues under review. With proper notice to the parties, a telephone hearing was convened on **April 6, 2016** before **ROBERT T. NALL,** an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Reconsidered Determination properly affirmed the June 12, 2013 DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY, and DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES.
2. Whether the services performed by individuals as “Software Developer & Application Testers” constitute "employment” and are not exempt or excluded by law from Arizona Unemployment Insurance (UI) coverage.
3. Whether all remuneration paid to individuals as “Software Developer & Application Testers” constitutes "wages", as defined in A.R.S. § 23-622.
4. Whether any of the individuals performing services as “Software Developer & Application Testers” performed work or services for the Employer that is exempt or is excluded from Arizona UI coverage under A.R.S. §§ 23-613.01, 23-615, or 23-617, or under a decision of the federal government to not treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
5. Whether any of the individuals performing services as “Software Developer & Application Testers” factually and legitimately were independent contractors, during the time period shown by the Notice of Assessment Reports for the quarters ending 06/30/2012 through 12/31/2012.
6. Whether the Employer is liable for Arizona UI Taxes due to functioning as a temporary services employer under the provisions of A.R.S. § 23-614(I)(2).

Board Exhibits 1 through 12 were admitted into evidence. A witness testified for the Department, which was represented by counsel. One witness testified for the Employer.

The burden of proof is upon the party who seeks to benefit by an exception to the well-established legal presumption that services and work are performed under "employment", and remuneration for such services constitutes "wages". 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), clearly ruled that all sections of the Employment Security Law should be given the long-established liberal construction, in an effort to include as many types of employment relationships as possible. 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).

A.R.S. § 23-614(D) specifies certain exceptions to A.R.S. § 23-613.01 for a temporary services employer:

> Notwithstanding any other provision of this chapter, whether an individual or entity is the employer of specific employees shall be determined by section 23-613.01, <u>except as provided in subsections E and G of this section with respect to a professional employer organization or a temporary services employer</u>. The exceptions to the definition of employee prescribed in section 23-613.01, subsection A apply to determinations made pursuant to subsections E, F, G and H of this section. [Emphasis added].

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

1. The Employer is incorporated. The owners are its Chief Executive Officer (CE) and his wife, who is the Chief Financial Officer (CFO). Since 2008, their business has provided software consulting services to financial institution clients. No licensure or certification is required for such work.

2. For a specific assignment starting in February 2013, the CEO engaged ("AS"), the wife of a good friend to perform software testing for his client. Until the client hired her directly a few months later, the Employer paid AS from its own accounts. In order to be paid, AS periodically submitted a timesheet reflecting the hours she worked, and she was paid on an hourly basis when the Employer approved the time. Her assignments were made by the financial institution client, using its equipment and software and according to its scheduled assignments. She worked under a Contract Services Agreement that included a work schedule tailored to her assignments, which the Employer considered an agreement to a scope of work with timelines to deliver that scope of work. The Employer

required AS to provide proof of liability insurance, and only deliver work to the Employer's client. The Employer did not provide AS with training or tools to test the software application. AS could not negotiate the pay rate or the terms, and she was issued a 1099-MISC form reporting that she was paid $38,410 by the Employer for her services during 2013 (Tr. pp. 19-; Bd. Exhs. 8, 12).

3. For another specific assignment starting in August or September of 2012, the CEO engaged another friend ("PA") to perform software testing for the same financial institution client. Until that project finished in December 2012, the Employer paid PA from its own accounts. In order to be paid, PA periodically submitted a timesheet reflecting the hours she worked, and she was paid on an hourly basis at a rate that she negotiated with the Employer. Her assignments were made by the financial institution client, using its equipment and software and according to its scheduled assignments. She worked under a Contract Services Agreement that included a work schedule tailored to her assignments, which the Employer considered an agreement to a scope of work with timelines to deliver that scope of work. The Employer required AS to provide proof of liability insurance, and only deliver work to the Employer's client under strict security protocols required by the financial industry. She worked primarily from her home, and PA was issued a 1099-MISC form reporting that she was paid $43,464.56 by the Employer for her services (Tr. pp. 25-30; Bd. Exhs. 8).

4. For a variety of small assignments with financial clients other than his major financial institution client, the CEO engaged a freelance worker, "EL", over a period of years. EL worked on multiple projects for clients of the Employer until 2014. He also worked on his own for clientele independently of the Employer. The Employer paid EL from its own accounts. The Employer required EL to provide proof of liability insurance. The Employer issued to EL a 1099-MISC form reporting that he was paid $36,182.38 by the Employer for his services (Tr. pp. 30-35; Bd. Exh. 8).

5. A fourth worker, "MO", filed claims for Unemployment Insurance (UI) benefits. The Employer expected MO to work as a programmer, tester, and offshore coordinator and lead for its major financial institution client, for six months starting August 13, 2012. MO was to be paid every two weeks at the rate of $40 per hour, upon approval of his timesheets by the client. The written work schedule required MO to spend 6-7 core hours onsite from 9 a.m. to 3 p.m., plus 1-2 hours working

with an offshore team. MO was assigned to represent the Employer while on the work site. The Employer would pay MO from its own accounts. In order to be paid, MO was required to submit his timesheets for billable or non-billable hours on time. The written contract required two weeks' notice for termination. Within a week, however, the client asked that MO be removed from its account due to his criminal history revealed by its background check. The Employer then terminated MO.

6. The Department investigated and concluded that the Employer acted as a temporary help firm with respect to these four workers.

7. The Employer promptly paid the tax assessment portion based upon MO's wages of $2,080 but, in a separate proceeding, protested the eligibility of MO for UI benefits.

8. The Employer's timely request for reconsideration following the Determination of Unemployment Insurance Liability mentioned three workers, but did not include MO (Bd. Exhs. 4, 8).

9. The Employer also filed a timely request for hearing following the July 21, 2015 Reconsidered Determination. In that letter, the Employer contended that EL never worked for the financial institution client with which the Employer had a master services agreement. In that letter, the Employer sought reversal of charges based upon wages paid to AS, PA, and EL, but the Employer did not specifically appeal any determination regarding MO (Bd. Exhs. 6, 9, 10).

The Employer disputes the Department's analysis that it acted as a temporary services employer. The Employer acknowledges that its owners are employees.

Arizona Revised Statutes § 23-561 provides in part as follows:

> Definitions
>
> In this article, unless the context otherwise requires:
>
> * * *
>
> 11. "Temporary help services" means services by a person consisting of:
>
> (a) Recruiting and hiring the person's own employees.

(b) Finding other organizations that need the services of employees who are recruited and hired by the person.

(c) Assigning employees to perform work for other organizations to support that organization's workforces, including covering employee absences, skill shortages or seasonal workloads or performing special assignments or projects.

(d) Customarily attempting to reassign the employees to other organizations when the employees complete each assignment.

* * *

Arizona Revised Statutes § 23-614 provides in part as follows:

Employing unit; temporary services employer; professional employer organization; definitions

A. "Employing unit" means an individual or type of organization, including a partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor of any of the foregoing, or the legal representative of a deceased person, which has, or subsequent to January 1, 1936 had, one or more individuals performing services for it within this state. ...

* * *

C. <u>Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit is engaged by the employing unit for all the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work</u>. Notwithstanding any other provision of this chapter except for section 23-612.01, an individual who performs services in or for a particular employing unit is not in the employment of such employing unit if such individual's wages for services in or for the particular employing unit are paid by another employing unit, and if the contributions required by

this chapter on such wages are paid by such other employing unit.

D. Notwithstanding any other provision of this chapter, whether an individual or entity is the employer of specific employees shall be determined by section 23-613.01, except as provided in subsections E and G of this section with respect to a professional employer organization or a temporary services employer. The exceptions to the definition of employee prescribed in section 23-613.01, subsection A apply to determinations made pursuant to subsections E, F, G and H of this section.

E. A professional employer organization or a temporary services employer that contracts to supply a worker to perform services for a customer or client is the employer of the worker who performs the services. A customer or client who contracts with an individual or entity that is not a professional employer organization or a temporary services employer to engage a worker to perform services is the employer of the worker who performs the services. Except as provided in subsection F of this section, an individual or entity that is not a professional employer organization or a temporary services employer, that contracts to supply a worker to perform services to a customer or client and that pays remuneration to the worker acts as the agent of the employer for purposes of payment of remuneration.

F. In circumstances that are in essence a loan of an employee to another employer and the direction and control of the manner and means of performing the services changes to the employer to whom the employee is loaned, the loaning employer continues to be the employer of the employee if the loaning employer continues to pay remuneration to the employee, whether or not reimbursed by the other employer. If the employer to whom the employee is loaned pays remuneration to the employee for the services performed, that employer is considered the employer for the purposes of any remuneration paid to the employee by the employer, regardless of whether the loaning employer also pays remuneration to the employee.

G. A professional employer organization shall report and pay all required contributions to the unemployment compensation fund using the state employer account number and the contribution rate of the professional employer organization.

* * *

I. For the purposes of this section:

1. "Professional employer organization" has the same meaning prescribed in section 23-561.

2. "Temporary services employer" means an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and that performs all of the following:

(a) Negotiates with clients or customers for such matters as the time of work, the place of work, the type of work, the working conditions, the quality of services and the price of services.

(b) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.

(c) Retains the authority to assign or reassign a worker to other clients or customers if a worker is determined unacceptable by a specific client or customer.

(d) Assigns or reassigns the worker to perform services for a client or customer.

(e) Sets the rate of pay of the worker, whether or not through negotiation.

(f) Pays the worker from its own account or accounts.

(g) Retains the right to hire and terminate workers. [Emphasis added].

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

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

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

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

We conclude that the Employer operated as a temporary services employer with regard to the software developers and application testers. The Employer negotiated rates with its clients. The Employer paid each worker from its own accounts, and required a timesheet to be approved by its clients. The Employer retained the right to terminate each worker, and the contractual terms drafted by the Employer did not impose a penalty for termination.

The Employer screened its workers on behalf of its clients. According to the evidence and testimony, the Employer itself considered each worker as dealing with specific assignments or "scope of work" controlled by its client firm or firms, and as directed by the Employer's clients (Exh. 8).

The overall relationships with software developers and application testers that are established by the evidence of record are not independent contractor relationships. The Employer acted as a temporary services employer, and all remuneration paid to the "software developers and application testers" is wages subject to reporting as employment.

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination dated July 21, 2015.

Services performed by the software developers and application testers listed in the Notice of Assessment constituted employment by the Employer. Remuneration paid to the software developers and application testers constituted wages.

DATED: 6/17/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

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

A copy of the foregoing was mailed on 6/17/2016
to:

(x) Er: XX Acct. No: XX T1

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1502929-001-B

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

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** July 18, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination dated April 16, 2015, which held that services of pet groomers were correctly determined to constitute employment and all forms of remuneration paid for such services constitute wages.

The Appeals Board has jurisdiction to consider the timeliness of the Employer's petition for a hearing pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was held on June 9, 2016, before Appeals Board Administrative Law Judge Morris L. Williams, III. At that time, all parties were given an opportunity to present evidence on the following issue:

1. Whether the Employer's petition to the Appeals Board for a hearing and review from the Department's reconsidered Determination issued on April 16, 2015, should be considered timely filed.

On the scheduled date of the hearing, two Employer witnesses appeared by telephone to testify. Counsel for the Department appeared in-person and a witness for the Department appeared in-person to testify. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS that we are unable to proceed to a review of the merits of this case, because the Employer has failed to comply with the statutory prerequisites that would entitle the Employer to a review of the Department's April 16, 2015 Reconsidered Determination.

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

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

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

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

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

> B. Petition for hearing or review
>
> 1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. ...
>
> * * *
>
> 2. The petition must be filed within 30 days (unless the time is extended for good cause) after mailing of the reconsidered determination or denial thereof involving one of the following issues:
>
> * * *
>
> c. Services performed for or in connection with the business or the employing unit constitute employment (A.R.S. § 23-724);
>
> d. Remuneration for services constitute wages (A.R.S. § 23-724) ... [Emphasis added].
>
> * * *
>
> g. Liability of successor employer for predecessor's unpaid contributions (A.R.S. § 23-733)

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

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

The evidence of record establishes that the Department's Reconsidered Determination was sent by certified mail on April 16, 2015, to the Employer's correct last known address of record (Bd. Exh. 3). The deadline to file a timely petition for hearing was May 18, 2015. The Employer received the Reconsidered Determination on April 20, 2015. The petition to the Appeals Board, however, was filed on August 25, 2015 (Bd. Exh. 5). The petition was filed more than 30 days from the mailing date of the Reconsidered Determination.

In its petition, the Employer makes no contentions relating to the reason it did not file a timely petition for hearing before the Appeals Board (Bd. Exh. 5).

At the Appeals Board hearing, the Employer witness testified that she received the April 16, 2015 Reconsidered Determination on or about April 20, 2015. The Employer witness also testified that she did not realize that she had 30 days to file a petition for hearing because she did not read the paragraph in the Reconsidered Determination which contained the Employer's appeal rights. The Employer witness stated that she did not notice the appeal rights because she was focused on the contents of the Reconsidered Determination. The Employer witness delivered the Reconsidered Determination to her accountant in mid-August 2015, which was beyond the appeal deadline. The Employer's accountant filed a petition for hearing on behalf of the Employer on August 25, 2015.

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

THE APPEALS BOARD **DISMISSES** the Employer's petition for a hearing.

The Reconsidered Determination issued April 16, 2015, remains in effect.

DATED: 6/16/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

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3. refers to specific hearing testimony and evidence.

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

A copy of the foregoing was mailed on 6/16/2016
to:

(x) Er: XX Acct. No:XX T0

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

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1502926-001-B

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

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** May 12, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination issued on July 13, 2015

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

With notice to both parties, an Appeals Board hearing was convened before ROBERT T. NALL, an Appeals Board Administrative Law Judge, on **Wednesday, March 30, 2016**. All parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely petition for hearing following the Reconsidered Determination issued by the Department.
2. Whether the Reconsidered Determination became final during the interim period before the Employer filed a petition for hearing.

Six Board Exhibits were admitted into evidence without objection. A witness for the Tax Section of the Department appeared and testified, and the Department was represented by counsel. Two witnesses for the Employer appeared and testified.

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

1. On July 13, 2015, the Department mailed its Reconsidered Determination to the Employer's mailing address of record (Bd. Exh. 3).
2. On August 13, 2015, the Employer mailed a petition for hearing to the Department. The document was dated August 13, 2015, and the postal service neither cancelled the postage stamps nor affixed a postmark date to the envelope.
3. The Employer enclosed a written statement dated July 30, 2015.

Arizona Revised Statutes § 23-724(B), provides as follows:

> B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. <u>The reconsidered determination shall become final with respect to the employing unit thirty days after written notice of the reconsidered determination is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review</u>. The department may for good cause extend the period within which the written petition is to be submitted. [Emphasis added].

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

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

The record reveals that a copy of the Reconsidered Determination was mailed to the Employer's address of record on July 13, 2015. To be timely, a petition for hearing or review needed to be filed by August 12, 2015. The

Employer did not date her petition for hearing until August 13, 2015, which was the date she filed it by mail.

The Employer has not established any fact that invokes the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permits finding its petition for hearing was timely filed. Because the Employer did not file a timely petition for hearing, the Department's July 13, 2015 Reconsidered Determination has become final. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department's July 13, 2015 Reconsidered Determination remains in effect.

DATED: 4/12/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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to:

(x) Er: XX Acct. No: XX T0

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1500288-001-B

XX

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

Employer

Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** June 23, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER**, petitioned for a hearing from the Department's decision letter issued on August 12, 2015, which held that the Employer's written request for reconsideration was not filed on time, and the Determination of Unemployment Tax Rate for Calendar Year 2015, remains in effect.

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

THE APPEALS BOARD scheduled a telephone hearing for May 24, 2016, at 11:00 a.m. Mountain Standard Time, before Appeals Board Administrative Law Judge **Morris L. Williams, III,** with written notice to the parties.

The Employer did not appear at the scheduled Board hearing and did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was present. Because the Employer did not appear at the May 24, 2016 Appeals Board hearing to pursue its appeal, a default was entered on the record.

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

> 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:
>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence.

The Employer's default means that insufficient evidence was presented to support reversing or modifying the Department's May 14, 2015 decision letter. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department’s May 14, 2015 decision letter remains in full force and effect.

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

DATED: 5/24/2016

APPEALS BOARD

WILLIAM G. DADE, Acting Chairman

NANCY MILLER, Member

MORRIS L. WILLIAMS III, Acting Member

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

HOW TO REQUEST REOPENING OF THE HEARING

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

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

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

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

C. Your request to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing. A request for review will not be considered unless the Appeals Board sets aside this dismissal, and then issues a decision upon the merits of the request for hearing.

D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

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

A copy of the foregoing was mailed on 5/24/2016
to:

(x) XX Acct. No: XX T3

(x) ELI D GOLOB

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

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

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1482204-001-B

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

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** May 31, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER**, through counsel, petitioned for a hearing from the Department's Reconsidered Determination issued on November 24, 2014, which held that services performed by auctioneers were correctly determined to constitute employment and all remuneration paid for such services constituted wages.

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

THE APPEALS BOARD scheduled a telephone hearing for April 26, 2016, at 11:00 a.m. Mountain Standard Time, before Appeals Board Administrative Law Judge **Morris L. Williams, III,** with written notice to the parties. The notice to the Employer was sent to the Employer's counsel at his correct address of record.

The Employer did not appear at the scheduled Board hearing and did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was present. Because the Employer did not appear at the April 26, 2016 Appeals Board hearing to pursue its appeal, a default was entered on the record.

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

> 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:
>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence.

The Employer's default means that insufficient evidence was presented to support reversing or modifying the Department's November 24, 2014 Reconsidered Determination. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department's November 24, 2014 Reconsidered Determination remains in full force and effect.

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

DATED: 4/28/2016

APPEALS BOARD

JANET L. FELTZ, Chairman

NANCY MILLER, Member

WILLIAM G. DADE, Member

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

HOW TO REQUEST REOPENING OF THE HEARING

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

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

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

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

C. Your request to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing. A request for review will not be considered unless the Appeals Board sets aside this dismissal, and then issues a decision upon the merits of the request for hearing.

D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

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

A copy of the foregoing was mailed on 4/28/2016
to:

(x) Er: XX Acct. No: XX T1

(x) Er Rep: XX

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

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1476536-001-B

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

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** May 23, 2016 *****.

DECISION
DISMISSED

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

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

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

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

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

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

DATED: 4/21/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The

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HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

A copy of the foregoing was mailed on 4/21/2016
to:

Er: XX Acct. No: XX T4

(x) Er Rep: XX

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

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

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1476530-001-B

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

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** June 6, 2016 *****.

DECISION

AFFIRMED IN PART AND REVERSED IN PART

THE **EMPLOYER,** through counsel, petitioned for a hearing from the Department's August 22, 2014 Reconsidered Determination, which held in part:

> ... we find that [the Employer] exercised control over the Workers by a preponderance of the evidence whereby services constituted employment and all remuneration paid for such services to (sic) constituted wages.
>
> Accordingly, this Reconsidered Determination affirms the Determinations of Liability for Employment or Wages

> issued October 14, 2011, and will become final unless a written petition for hearing is filed ...

The Department's October 14, 2011 Determination described services or remuneration as follows:

> ... Services performed by individuals as massage therapists, aestheticians, nail technicians, resort sales and spa planner constitute employment. All forms of remuneration paid to these individuals constitute wages.

Regarding the Limited Liability Company, the October 14, 2011 Determination includes the individuals and amounts shown on the attached Notice of Assessment Report(s) for the first two quarters of 2011.

Regarding the Owners Association, another October 14, 2011 Determination includes the individuals and amounts shown on the attached Notice of Assessment Report(s) for the time period including the third quarter of 2008 through the fourth quarter of 2010.

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

With proper notice to the parties, a telephone hearing was convened before **ROBERT T. NALL,** an Administrative Law Judge, on December 17, 2015. The parties were given an opportunity to present evidence on the following issues:

1. Whether the Reconsidered Determination's affirmation of each October 14, 2011 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was proper.
2. Whether the services performed by individuals as "massage therapists, aestheticians, nail technicians, resort sales and spa planner" constitute "employment", as defined in A.R.S. § 23-615.
3. Whether remuneration paid to individuals as "massage therapists, aestheticians, nail technicians, resort sales and spa planner" constitutes "wages", as defined in A.R.S. § 23-622.
4. Whether any of the individuals performing services as "massage therapists, aestheticians, nail technicians, resort sales and spa planner" performed work that is exempt or is excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.

5. Whether any of the individuals performing services as "massage therapists, aestheticians, nail technicians, resort sales and spa planner" factually and legitimately were independent contractors for the specified quarters.

6. The correct, official name of each Employer, and the actual working relationship between these entities or organizations at pertinent times.

Board Exhibits 1 through 28 were admitted into evidence. One witness testified for the Department, which was represented by counsel. The Employer was represented by counsel. Two witnesses testified for the Employer, one of whom serves as the general manager of the limited liability company, as its president, and as owner of the property.

At the hearing, the Employer conceded that those persons in resort sales and spa planner positions have been employees since 2009. The Employer did not contest the Department's ruling that these persons were employees who received wages during the pertinent calendar quarters at issue. Accordingly, the issues in dispute are limited to consider the proper classification of the massage therapists, aestheticians, and nail technicians at the pertinent times. The Employer referred to these persons collectively as "therapists".

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

1. The entity that paid the massage therapists, aestheticians, and nail technicians from its accounts is an Arizona Limited Liability corporation ("LLC"), which has operated an 85-room resort or "boutique hotel" in Arizona since 2003. The LLC also does business as an athletic club and as an owners' association for timeshares, neither of which are separate legal entities. Another building incorporating several rooms as space for spa-related services was constructed adjoining the resort in 2006, and the spa was operated as an amenity of the resort until the spa was closed in July 2015.

2. The Employer established and published a menu of spa treatment services, and set prices for such services to be performed in the Employer's facilities. A former therapist became a part-time employee in 2009 and, as the Employer's spa planner, she arranged for guests to receive spa services on an appointment-only basis, either in a guest room or at the designated spa facility.

3. The Employer placed ads seeking applicants for on-call independent contractor services. Each applicant had to present a resume, and each therapist had to have valid insurance and appropriate licensing as required by law in order to perform

massage therapy, aesthetic services, or nail technician services. The spa manager was on the Employer's payroll, and confirmed the asserted credentials before providing a list of qualified therapists to the resort's front desk, then arranging appointments matching guests with qualified therapists on an on-call basis with no set schedule.

4. The spa manager also investigated customer complaints and, after investigation, sometimes a therapist would not be paid. Too many legitimate complaints would trigger removal of a therapist from the on-call list. Two therapists were removed due to not appearing for agreed-upon appointments.

5. Upon performing therapy services, each technician was paid a commission, at percentage rates which varied according to the procedures performed. In addition to a mandatory minimum gratuity, the commissions were included in the Employer's printed fee schedule, which also described each procedure (Tr. p. 21). When a service fee was discounted or reduced, the commission to the therapist also would be reduced. The spa was open to the public in addition to resort guests, but all payments for services were made through the resort (Tr. p. 54).

6. Therapists could decline or accept an offered service appointment. A therapist who accepted an appointment would perform services personally. If unable to perform personally, then either the next person on the approved list was offered the work, or the guest's appointment was rescheduled by the spa planner. Assistants are not applicable in the therapy industry.

7. The Employer provided facilities and equipment, in addition to towels, massage lotions, nail polishes, and oils. The Employer's spa brochures and ads did not list therapists by name. Therapists on the approved list could not rent or reserve space from the Employer. No training was provided by the Employer, although the Employer provided optional, suggested body treatment guidelines for efficiency (Tr. pp. 52-54).

8. The Employer did not require therapists to wear a uniform, to follow a particular therapy protocol, to work a regular schedule, nor to track their work time. Using a proprietary line of products was emphasized. Checking in at the front desk was required, and sufficed as proof of service. (Bd. Exh. 20).

9. Most therapists worked other jobs at other locations. Some worked under similar on-call arrangements with other spas, salons, or hotels (Tr. p. 23; Bd. Exh. 3).

10. The Employer required therapy services to be performed during its normal business hours. Therapists were prohibited from soliciting clientele.

11. After an aesthetician filed claims seeking Unemployment Insurance (UI) benefits, the Department conducted a field audit (Bd. Exh. 2). No federal ruling exists that classifies the therapists as non-employees, and the therapists and Employer did not sign a contract defining their relationship.

12. On October 14, 2011, two Determinations of Liability for Employment or Wages were issued for services performed by individuals as massage therapists, aestheticians, and nail technicians, and Notices of Assessment were issued.

13. The Employer filed a timely request for reconsideration of the two Determinations of Liability for Employment or Wages. The Employer also filed a timely request for hearing following the Department's Reconsidered Determination.

Arizona Revised Statutes § 23-613.01(A) and (E) provide in part as follows:

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

* * *

E. The following services are exempt employment under this chapter, unless <u>there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection A of this section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:</u>

1. Services which are not a part or process of the organization, trade or business of an employing unit and which are <u>performed by an individual who is not treated by the employing unit in a manner generally characteristic of the treatment of employees</u>.

2. Services performed by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit. ... [Emphasis added].

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

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

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

(a) The service is localized in this state.

(b) The service is not localized in any state but some of the service is performed in this state ...

* * *

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

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

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

> A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.
>
> 1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
>
> 2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.
>
> B. "Employee" as defined in subsection (A) does not include:
>
> 1. <u>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</u>. The existence of independence shall be determined by the preponderance of the evidence.
>
> 2. <u>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".</u> 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. [Emphasis added].

The pertinent statute, A.R.S. § 23-619, specifies exceptions to its otherwise simple definition: "'Insured work' means employment for employers." The Employer's requests for reconsideration, hearing, and other memoranda indicate that the Employer seeks an exception from the general rule that work is performed in an employment relationship. Therefore, the Employer bears the burden to sufficiently prove its contentions that the workers in question were in an independent contractor relationship.

The Employer established that each therapist was free to decline any offered assignment or client, which we conclude is characteristic of independence and highly unlikely in an employment situation. The elements of control exercised by the Employer over the therapists are minimal and do not intrude into the actual performance of any spa therapy services. Operating the spa required that therapists provide their services at the convenience of clientele, and in a manner akin to a recognized trade, skill, or occupation. Payment by piecework or on commission also is characteristic of independence, and no time records were required to be presented for payment. The therapists were free to hold other jobs or to perform therapies for other businesses and at other locations. However, their opportunity to work other jobs would exist either in employment or as an independent business and this factor is not dispositive regarding proper classification.

Although numerous laws and regulations applied to the therapists' practice, the spa itself and therapists were expected to maintain applicable licenses and

certifications. The personal licenses of each therapist were maintained in the Employer's premises (Tr. p. 65). The therapists did not collect fees or tips from clients, as all money from guests or clients flowed through the Employer's accounts. All charges including minimum gratuities were set by the Employer, not by any therapist, which is a factor of control. Because no therapist could rent the space, all therapists were treated in the same way. Therapists could not set their own hours and each had to work as arranged with a client at the Employer's premises.

Substantial evidence establishes that the Employer would end the contractual relationship by removing a therapist after investigating a client complaint, without any penalty for early termination. The therapy services are integral to the business of a resort spa. Testimony established that the therapists could not have assistants or substitutes or subcontractors and must provide services personally, which is characteristic of a professional trade or occupation.

Other considerations tend to support the Employer's position. Any therapist could refuse any assignment for any reason. Therapists had to maintain their own liability insurance and any required licensing. Neither training nor directives on how to perform therapies was provided, because each therapist already was licensed or certified as an expert in that occupation or trade. No minimum of weekly hours or provision of services was required. Payment was not by the hour as is characteristic of employment, but was on a piece rate basis according to a menu of charges.

The spa needed qualified therapists, all of whom were licensed in their trade or occupation, as an integral part of the Employer's business plan for its spa. The evidence establishes that a spa cannot function without qualified and licensed therapists to provide therapy services. However, these therapists agreed to work completely on-call at the customer's convenience, within the Employer's facility, which is distinctly different from a spa that caters to walk-in or regular customers. We conclude that the freedom to refuse any assignment outweighs the behavioral controls established by this evidence. The financial controls are inconclusive, because neither the Employer nor any of the therapists exercised substantial negotiations or variations upon an established menu of charges.

No written contract with any therapist was presented in this case, but all of the participants implicitly agreed to certain practices, including providing service only at premises that the Employer provided, adherence to a client's appointment time and selections while providing personal spa therapy services, prohibiting solicitations for services elsewhere, inapplicability of assistants or substitutes to these types of highly personal therapies, and mandating a particular price already incorporating a minimum gratuity.

The evidence establishes the type of business relationship that the Employment Security Law of Arizona has excluded from "employment" by addressing work performed as independent contractors, or in a capacity characteristic of an independent profession, trade, skill or occupation. *See*, A.R.S. 23-613.01(A)(1). We conclude that the services performed by therapists qualify as "exempt employment" listed in A.R.S. § 23-613.01(E) and Arizona Administrative Code, Section R6-3-1723(C), largely because the therapists were free to reject any task or assignment in a manner that could be seen as insubordination inconsistent with the controls applied within an employment relationship. Further, the spa therapies were performed in a trade or occupation for which the therapists maintained their own insurance, training, and licensing.

THE APPEALS BOARD **AFFIRMS IN PART** the Reconsidered Determination dated August 22, 2014. As conceded by the Employer, all services performed by the resort sales person and by the spa planner constituted employment by the Employer. Remuneration paid to these individual constituted wages.

THE APPEALS BOARD **REVERSES IN PART** the Reconsidered Determination dated August 22, 2014. Effective with the third quarter of 2008, services by the therapists as massage therapists, aestheticians, and nail technicians were performed in an independent contractor or trades relationship with the Employer. Remuneration paid to the therapists did not constitute wages.

DATED: 5/6/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the

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A copy of the foregoing was mailed on 5/6/2016
to:

Er: XX Acct. No: XX T1

Er: XXX Acct. No: XX

(x) Counsel for Employer: XX

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA – SITE CODE 040A

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

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1476512-001-B

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

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** May 16, 2016 *****.

DECISION
DISMISSED

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

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

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

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

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: 4/14/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The

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

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
   1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
      - If there is no postmark, the postage meter-mark on the envelope in which it is received.
      - If not postmarked or postage meter-marked or if the mark is not readable, on the date entered on the document as the date of completion.
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B. You may represent yourself or have someone represent you. If you pay your representative, that person either must be a licensed Arizona attorney or must be supervised by one. Representatives are not provided by the Department.

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   1. explains why the Appeals Board decision is wrong,
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   3. refers to specific hearing testimony and evidence.

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

A copy of the foregoing was mailed on 4/14/2016
to:

(x) Er:XX Acct. No: XX T1

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

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1461113-001-B

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

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** May 16, 2016 *****.

DECISION
REVERSED

THE **EMPLOYER**, through counsel, petitioned for a hearing from the Department's Reconsidered Determination issued on June 10, 2014, which affirmed the Determination of Liability for Employment or Wages dated September 9, 2011, and held that services performed by individuals as salesmen and installers constitute employment, and that the remuneration paid for such services constitutes wages.

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

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **January 28, 2016**, before Appeals Board Administrative Law Judge Morris L. Williams, III. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Reconsidered Determination affirmation of the June 10, 2014 DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was proper.
2. Whether the services performed by individuals as "salesmen and installers" constitute employment, as defined in A.R.S. § 23-615.
3. Whether remuneration paid to individuals as "salesmen and installers" constitutes "wages", as defined in A.R.S. § 23-622.
4. Whether any of the individuals performing services as "salesmen and installers" performed work that is exempt or is excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or under a decision of the federal government to not treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
5. Whether any of the individuals performing services as "salesmen and installers" factually and legitimately were independent contractors for the specified quarters.

At the hearing, Employer's counsel appeared by telephone, and two Employer witnesses appeared by telephone and testified for the Employer. The Department was represented by counsel, and one witness testified for the Department. Board Exhibits 1 through 10 and 12 were admitted into evidence. We have carefully reviewed the record.

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

1. The Employer is a wholesaler who sells wood, carpet, tile and flooring (Tr. p. 58).

2. Following a tax audit, the Department issued a Determination of Liability for Employment or Wages on September 9, 2011, which held that

services performed by individuals as "salesmen and installers" constitute employment from January 1, 2009 through December 31, 2009 (Bd. Exh. 2). The Department issued Notices of Assessment and Reports of Wages Paid Each Employee corresponding to the Determination of Liability for Employment or Wages (Bd. Exh. 3).

3. The Employer filed a timely request for reconsideration from the September 24, 2011 Determination of Liability for Employment (Bd. Exh. 5).

4. On June 10, 2014, the Department issued its Reconsidered Determination. The Department affirmed the Determination of Liability for Employment or Wages issued on September 9, 2011, and held that salesmen and installers were properly determined to be employees and that their remuneration constituted wages (Bd. Exh. 6).

5. On July 9, 2014, the Employer filed a timely petition for hearing from the Department's Reconsidered Determination.

<u>Installers:</u>

6. The Employer would contact the installers and ask if they were available to take a job or the installers would be contacted directly by the salesmen about an installation job (Tr. pp. 17, 32, 95, 96).

7. If the installer accepted the job, the Employer would send a work order to the installer that described the job and when the job would start (Tr. pp. 18). The Employer would supply the materials and have the materials delivered to the job site (Tr. p. 20). The installers used their own tools and equipment, and they used their own transportation (Tr. pp. 18, 19).

8. The installers did not report to the Employer concerning their progress on a particular job (Tr. p. 39). The installers set their own hours of work and informed the Employer when the job was completed (Tr. pp. 19, 29, 32). The installers did

not receive training from the Employer, and they were not given instructions by the Employer as to how to complete a job (Tr. pp. 19, 70).

9. The installers personally performed the jobs, and they did not hire assistants (Tr. pp. 21, 27, 28). Some installers had their own businesses, and they provided installation services for other companies at any time without penalty (Tr. pp. 22, 29, 31, 72, 73). The installers were responsible for any damage they caused while performing their services (Tr. pp. 24, 25, 45).

10. The installers did not have a written agreement with the Employer (Tr. p. 24).

11. The installers would submit an invoice to the Employer, and they were paid a negotiated rate from the Employer's business account (Tr. pp. 19, 30, 45).

12. The Employer did not reimburse the installers for any business expenses incurred while performing their services (Tr. pp. 30, 31).

13. The Employer was not obligated to use the installers for jobs, and the installers were not obligated to accept any jobs offered by the Employer (Tr. pp. 38).

14. The installers invested in their own tools and equipment (Tr. p. 39).

15. The installers could advertise their services to the public.

16. The Employer owner allowed some installers to perform services under his contractor's license (Tr. p. 61).

<u>Salesmen:</u>

17. The salesmen had their own businesses and performed their services for other companies (Tr. pp. 59, 60, 81). The salesmen used their own office equipment and supplies, and they used their

own transportation (Tr. p. 59). The Employer provided the salesmen with work orders (Tr. p. 102).

18. The salesmen would "run their businesses" through the Employer by bringing orders to the Employer, and the Employer would provide an avenue for the purchase of materials and the installation of those materials, if the salesmen wanted a recommendation from the Employer (Tr. pp. 59, 60, 63).

19. The salesmen could use any wholesaler or recommend any installers to complete their sales (Tr. p. 64). The Employer had at least four salesmen who "ran" their jobs through the Employer (Tr. pp. 64, 65).

20. The salesmen did not have a written contract with the Employer, and the salesmen were not required to meet sales quotas (Tr. p. 65). In addition, the Employer did not provide leads to the salesmen (Tr. p. 79).

21. The salesmen set their own hours for work, and the Employer had no control over the salesmen's work hours or quality of work (Tr. pp. 65-67).

22. The use of salesmen is not integral to the success of the Employer's business (Tr. pp. 67, 78).

23. The salesmen submitted an invoice to the Employer, and they were paid from the Employer's account after a job was completed (Tr. pp. 69, 71, 80).

24. The salesmen were not trained by the Employer, and the Employer did not provide instructions to the salesmen on how to make sales (Tr. p. 70).

25. In most cases, the salesmen's jobs were already sold before they contacted the Employer, and the salesmen would search for the best deal among wholesalers and installers (Tr. p. 76).

26. The salesmen were not reimbursed by the Employer for any incurred business expenses (Tr. pp. 80, 81).

27. The salesmen had no obligation to use the Employer to get materials, and they could stop using the Employer at any time without penalty (Tr. pp. 82, 100).

The Employer contends that the salesmen and installers were independent contractors and not employees for the period January 1, 2009 through December 31, 2009. The issues in dispute in this case are the employment status of the salesmen and installers from January 1, 2009 through December 31, 2009, and whether the pay earned by salesmen and installers during that period constituted wages.

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

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

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

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

organization, trade or business of the employing unit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

D. In determining whether an individual who performs services is an employee under the general definition of subsection (A), all material evidence pertaining to the relationship between the individual and the employing unit must be examined. Control as to the result is usually present in any type of contractual relationship, but it is the additional presence of control, as determined by such control factors as are identified in paragraph (2) of this subsection, over the method in which the services are performed, that may create an employment relationship.

1. The existence of control solely on the basis of the existence of the right to control may be established by such action as: reviewing written contracts between the individual and the employing unit; interviewing the individual or employing unit; obtaining statements of third parties; or examining regulatory statutes governing the organization, trade or business. In any event, the substance, and not merely the form of the relationship must be analyzed.

The primary issue in this case is whether the services that were provided by salesmen and installers from January 1, 2009 through December 31, 2009, were excluded from the definition of "employee" by qualifying as "independent contractors" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provisions cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the installers and salesmen. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

Under Arizona Administrative Code, Section R6-3-1723(A)(1), control includes the right to control as well as control in fact. Arizona Administrative Code, Section R6-3-1723(D)(2), identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h)

the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

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

In determining that salesmen and installers were employees, the Department, in its Reconsidered Determination, analyzed this case by considering behavioral controls, financial controls and the relationship of the parties.

We will consider the installers and salesmen separately.

Installers:

In support of its conclusion that the behavioral controls mandated a finding of an employer-employee relationship between the installers and the Employer, the Department concluded that the installers were told when and where to perform services, and they were provided with materials from the Employer (Exh. 6). The Department also found that the installers personally performed their services and did not hire assistants (Exh. 6).

The Employer witness, Mr. L, a former installer, credibly testified that installers would perform their services at the customer’s location and the installers would coordinate with the customer about when the job would be completed (Tr. pp. 18, 32). The Employer would send the materials to be installed to the customer’s location (Tr. pp. 20, 40). The installers set their own hours of work on jobs (Tr. p. 29). The installers personally performed their services and they did not hire assistants (Tr. pp. 21, 27, 28). The installers were not trained by the Employer, and the Employer did not provide any instruction to the installers (Tr. p. 19). The installers would not report to the Employer during the job, but they would let the Employer know when the job was completed (Tr. p. 39). The installers were responsible for any damage they caused while performing their services (Tr. p. 45). The installers used their own equipment and tools, and they used their own transportation (Tr. pp. 18, 19).

Based on our review of all the evidence, we find that the category of behavioral control favors a finding that installers were independent contractors.

In support of its conclusion that the financial controls mandated a finding of an employer-employee relationship between the installers and the Employer, the Department concluded that the installers did not have their own contractor's licenses. The Department also noted that there was no evidence of a significant investment by the installers, and they did not incur business expenses (Exh. 6). The Department also held that the installers did not advertise their services and did not have simultaneous contracts (Exh. 6).

Some installers did not have their own contractor's licenses, but the Employer allowed them to work under his contractor's license in order to protect the installers from fines or criminal charges (Tr. pp. 33, 34, 61, 62). Mr. L testified that he invested in hand tools, $5,000 in sanding equipment, and $2,500 in saws (Tr. p. 39). As noted earlier, the installers used their own tools and equipment, and they used their own transportation (Tr. pp. 18, 19). Mr. L also testified that the installers did incur expenses, but the Employer did not reimburse them for those expenses (Tr. pp. 30, 31). In addition, some installers had their own businesses, and they performed installation services for other companies (Tr. pp. 22, 29, 31, 72, 73). The installers submitted an invoice to the Employer for payment, and they were paid a negotiated rate by the Employer from its account (Tr. pp. 19, 30, 45).

We find that the category of financial control also favors a finding that installers were independent contractors.

In support of its conclusion that the relationship of the parties mandated a finding of an employer-employee relationship between the installers and the Employer, the Department noted that there was no written agreement between the installers and the Employer, and both parties could terminate the working relationship (Exh. 6). The Department also concluded that the Employer had a right to discharge the workers and that the installers' services were integral to the Employer's business (Exh. 6).

Mr. L testified that the installers were obligated to complete a job, and they would coordinate with the customer concerning how long it would take to complete the job (Tr. pp. 25, 32). The Employer was not involved in monitoring the installers' progress in completing their jobs (Tr. p. 18). The installers would inform the Employer when the job was completed (Tr. p. 19). The Employer was not obligated to use the installers for jobs, and the installers were not obligated to accept any jobs offered by the Employer (Tr. pp. 38). The evidence of record also established that the services provided by the installers were not an integral part of the Employer's business (Tr. p. 67).

We find that the factors reviewed under the category of relationship of the parties favor a finding that the installers were independent contractors.

Salesmen:

In support of its conclusion that the behavioral controls mandated a finding of an employer-employee relationship between the salesmen and the Employer, the Department concluded that the salesmen were provided with pricing guidelines and all sales were subject to Employer approval (Exh. 6). The Department also found that the salesmen personally performed their services and did not hire assistants (Exh. 6).

The Employer witness, Mr. E, the Employer owner, credibly testified that the salesmen used a price sheet provided by the mill where the materials were stored (Tr. pp. 86, 87). Accordingly, the salesmen were not provided with pricing guidelines by the Employer. Mr. E also testified that in most cases the sales had already been made when the salesmen brought them to him (Tr. p. 76). As a result, the sales made by the salesmen were not subject to Employer approval. The salesmen had their own businesses and they performed their services for other wholesale companies (Tr. pp. 59, 60, 74, 81). The Employer did not set sales quotas for the salesmen, and they set their own hours of work (Tr. pp. 65, 66). The Employer also did not provide leads to the salesmen (Tr. p. 79). The salesmen were not trained by the Employer, and the Employer did not provide any instruction to the salesmen (Tr. p. 70). The salesmen used their own office supplies and equipment, and they used their own transportation (Tr. p. 59).

We find that the category of behavioral control favors a finding that the salesmen were independent contractors.

In support of its conclusion that the financial controls mandated a finding of an employer-employee relationship between the salesmen and the Employer, the Department held that the salesmen were paid a commission on sales with the rate being established by the Employer (Exh. 6). The Department also noted that there was no evidence of a significant investment in supplies or equipment by the salesmen or incurred business expenses by the salesmen (Exh. 6). The Department also concluded that the salesmen did not advertise their services and did not have simultaneous contracts (Exh. 6).

Mr. E credibly testified that it was common practice for the salesmen to send the Employer an invoice for payment, and the Employer would pay the salesmen from its account (Tr. p. 71). There was no set pay schedule and no set amount for payment to the salesmen (Tr. p. 69). The salesmen were paid what remained after the Employer's 10% was subtracted and the installer was paid (Tr. pp. 70, 90-97). Mr. E also testified that he had no financial control over the salesmen (Tr. p. 69). The salesmen negotiated their own sales with the

customer without input from the Employer, and they could search for the best deal among wholesalers and installers (Tr. p. 76). As noted earlier, the salesmen used their own office supplies and equipment, and they used their own transportation (Tr. p. 59). As a result, we find that the salesmen made a significant investment in supplies and equipment and incurred business expenses. The Employer did not reimburse the salesmen for any incurred business expenses (Tr. pp. 80, 81). Also, as mentioned earlier, the salesmen had their own businesses and they performed their services for other wholesale companies (Tr. pp. 59, 60, 74, 81).

We find that the category of financial control also favors a finding that salesmen were independent contractors.

In support of its conclusion that the relationship of the parties mandated a finding of an employer-employee relationship between the salesmen and the Employer, the Department found that there was no written agreement between the salesmen and the Employer, and both parties could terminate the working relationship (Exh. 6). The Department also concluded that the Employer had a right to discharge the salesmen and that the salesmen's services were integral to the Employer's business (Exh. 6).

There was no written agreement between the salesmen and the Employer (Tr. p. 65). However, as noted earlier, the salesmen were not required to meet sales quotas, and they were not provided leads by the Employer (Tr. pp. 65, 79). The salesmen had no obligation to use the Employer to get materials, and they could stop using the Employer at any time without penalty (Tr. pp. 82, 100). The Employer also was not obligated to allow the salesmen to "run" their business through the Employer (Tr. p. 100). Mr. E testified that the Employer's business is not dependent upon the success of salespeople (Tr. p. 78). Accordingly, the services provided by salesmen were not an integral part of the Employer's business.

We find that the factors reviewed under the category of relationship of the parties favor a finding that the salesmen were independent contractors.

We conclude that the evidence of independent contractor status outweighs the evidence of employee status. Therefore, we find that the salesmen and installers were not employees of the Employer from January 1, 2009 through December 31, 2009, but rather, the salesmen and installers performed services for the Employer pursuant to an independent contractor relationship. We further conclude that all payments to the salesmen and installers for their services from January 1, 2009 through December 31, 2009, did not constitute wages by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **REVERSES** the Department's Reconsidered Determination issued June 10, 2014.

From January 1, 2009 through December 31, 2009, services performed by individuals as salesmen and installers did not constitute employment, because the parties had an independent contractor relationship.

All forms of remuneration paid to the salesmen and installers for such services from January 1, 2009 through December 31, 2009, did not constitute wages.

DATED: 4/14/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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A copy of the foregoing was mailed on 4/14/2016
to:

(x) Er: XX Acct. No: XX T1

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

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1461108-001-BR

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

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO APPEAL TO THE TAX COURT

Under Arizona Revised Statutes, § 41-1993, the last date to file an Application for Appeal is ***** July 11, 2016 *****.

CORRECTED DECISION
SET ASIDE UPON REVIEW (Appeals Board No. T-1461108-001-B)
AFFIRMED (Department's Reconsidered Determination issued June 10, 2014)

THE **DEPARTMENT** requests review of the Appeals Board decision issued on February 27, 2015, which set aside and remanded the matter to the Department for further investigation involving two sales representatives, namely Mr. JN and Mr. X.

However, after further review and based on the all of the available evidence, we find that our prior decision was in error because the Department

properly excluded any analysis concerning Mr. X, because Mr. X was incorporated as a Limited Liability Company and was paid as such, therefore his relationship with the Employer was not at issue in this case. Accordingly, our analysis will focus on the relationship between JN and the Employer.

The request for review was filed on time and the Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **December 19, 2014,** before Appeals Board Administrative Law Judge Eric T. Schwarz. At that time, all parties were given an opportunity to present evidence on the following issues:

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

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

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

1. The Employer sells credit card processing services and related equipment (Tr. p. 3). The Employer uses sales representatives who meet with potential clients and attempt to sell the potential clients these services and equipment (Tr. pp. 12, 13).
2. The Employer and the sales representative (hereinafter “JN”) had a signed Independent Sales Agent-Hybrid Agreements (Bd. Exh. 8). This agreement had a one year term, and allowed either party to terminate the agreement with advance written

notice, 90 days prior to the anniversary date of the signed agreement (Bd. Exh. 8).

3. Upon being hired by the Employer, JN was required to participate in mandatory online training for two days (Tr. pp. 13, 14, 37). JN was also required to participate in various other mandatory trainings during his employment (Tr. pp. 21, 31, 32).

4. JN worked from his home, and he used his own computer, cell phone and other office equipment (Tr. p. 32). The Employer provided JN with the equipment to be sold to its customers (Tr. p. 38).

5. JN was required to purchase business cards using the Employer's template (Tr. p. 38; Bd. Exh. 7).

6. The Employer set the prices for its services and equipment sold to its customers (Tr. pp. 20, 21).

7. JN was assigned to a manager, and he had to report to his manager multiple times during the day (Tr. p. 14). The Claimant also had to submit oral reports to his manager (Tr. pp. 30, 31).

8. The Employer set the appointments for JN, and it set the time and place of the appointments (Tr. pp. 1, 2-5, 16). JN was required to comply with the time and place of the appointments on a daily basis (Tr. pp. 1, 2-5, 16, 32). JN was also provided coaching from his manager on how to be more effective during a sales meeting with a customer (Tr. pp. 30, 31). During a sales meeting, JN would have his manager on the phone, and JN was required to have the customer fill out an application if a deal was reached for the customer to use the Employer's services (Tr. pp. 14, 15, 18).

9. JN was also required to help the customer set up the purchased equipment for the customer (Tr. pp. 23, 26, 33).

10. JN would access the agent portal daily to get his list of appointments, and he was informed as to when and where the appointments would take place (Tr. p. 14).

11. JN was supervised by the Employer (Tr. p. 29).

12. JN was paid a commission, set by the Employer, on his sales from services and equipment sold (Tr. p. 40). JN was paid from the Employer's accounts (Tr. p. 29).

13. The services provided by JN were integral to the Employer's business as a sales company (Tr. p. 42, 43).

14. JN was required to personally perform his services, and his services were performed during the Employer's business hours (Tr. p. 33). The Employer set appointments for JN from 8 a.m. until 5 p.m. on Mondays through Fridays (Tr. p. 37).

15. JN could not hire assistants to help him provide his services to the Employer (Tr. pp. 33, 34).

16. The Employer decided JN's work sequence (Tr. p. 34).

17. The Employer did not reimburse JN for any expenses he incurred (Tr. p. 39).

18. JN did not operate his own independent business, and he did not advertise his services to the public (Tr. p. 40). JN also did not work for any other companies while working for the Employer (Tr. p. 43).

19. Following a tax audit, the Department issued a Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages on March 14, 2014. The Department held that the services performed by JN as a sales representative constituted employment and the remuneration paid to JN constituted wages. (Bd. Exhs. 3 & 4). The Department issued a Notice of Assessment and a Report of Wages Paid Each Employee corresponding to the Determination of Liability for Employment or Wages (Bd. Exh. 5).

20. The Employer filed a timely request for reconsideration from the March 21, 2014 Determination of Liability for Employment or Wages, and the Determination of Unemployment Insurance Liability issued on March 14, 2014 (Bd. Exh. 6).

21. On June 10, 2014, the Department issued its Reconsidered Determination. The Department affirmed the Determination of Liability for Employment or Wages, and the Determination of Unemployment Insurance Liability and held that the services of JN were correctly determined to be employment and all forms of remuneration paid for his services constitute wages (Bd. Exh. 10).

22. On June 26, 2014, the Employer filed a timely petition for hearing from the Department's Reconsidered Determination.

23. A hearing was held on December 19, 2014, and following that hearing the Appeals Board issued its decision on February 27, 2015. That decision set aside and remanded this matter for further investigation.

24. On March 5, 2015, the Department filed a request to review our previous decision. On April 22, 2015, the Department filed a supplement to its request for review.

In arriving at its decision, the Department, in its Reconsidered Determination issued June 10, 2014, applied the appropriate law, A.R.S. §§ 23-615, 23-613.01 and 23-622(A), as well as Arizona Administrative Code, Section R6-3-1723, to the facts in this case and found that the services of JN were correctly determined to be employment and all forms of remuneration paid for his services constitute wages.

The primary issue in this case is whether the services provided by JN, from July 1, 2013 through September 30, 2013, were excluded from the definition of "employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provisions cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the sales representatives. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

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

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

In determining that JN was an employee, the Department, in its Reconsidered Determination, analyzed this case by considering behavioral controls, financial controls and the relationship of the parties.

In support of its conclusion that the behavioral controls mandated a finding of an employer-employee relationship between JN and the Employer, the Department concluded that the Employer provided JN with three to four appointments each day, and required him to submit reports to his area manager after each appointment (Bd. Exh. 8). In addition, the Department held that JN was provided with mandatory online training by the Employer, and he was provided access to the agent portal to manage his appointments and accounts (Bd. Exh. 8). The Department determined that JN was required to order business cards with the Employer's name and information included on it, and he was required to personally perform his services and did not hire any assistants (Bd. Exh. 8).

The Department witness, JN, credibly testified that the Employer provided him with several daily pre-set appointments, and he would access the agent portal to find out when and where his appointments were located (Tr. pp. 1, 2-5, 14, 16). JN also testified that he was required to: submit oral reports to his manager multiple times throughout the day (Tr. pp. 14, 30, 31); take a two day online training course upon being hired; and to take mandatory trainings each week throughout his employment (Tr. pp. 13, 14, 21, 31, 32, 37). JN testified that it was mandatory for him to have a business card that used the Employer's template (Tr. p. 38; Bd. Exh. 7). He was required to personally perform his services, and he could not hire any assistants (Tr. pp. 33, 34).

Based on our review of all the evidence, we find that the category of behavioral control favors a finding that JN was an employee.

In support of its conclusion that the financial controls mandated a finding of an employer-employee relationship between JN and the Employer, the Department concluded that JN had no significant investment in tools, supplies or equipment, and he had no ongoing expenses (Bd. Exh. 10). The Department found that JN was paid a commission and bonus from the Employer's accounts, and the Employer set the rate of JN's commission (Bd. Exh. 10). The Department held that there was no evidence that JN advertised his services to the public, and he was prohibited from selling any products or services from other companies without the Employer's written consent (Bd. Exh. 10). The Department also noted that any indicia of independence regarding a significant investment, unreimbursed expenses and opportunity for profit or loss was notably absent (Bd. Exh. 10).

JN testified that he had no significant investment in tools, supplies or equipment (Tr. p. 43). JN worked from home and used his own office equipment (Tr. p. 32). JN also testified that: the Employer did not reimburse him for

expenses; he was paid a commission, set by the Employer, on his sales of services and equipment; he was paid from the Employer's accounts; he did not advertise his services to the public and he did not perform services for other companies while working for the Employer (Tr. pp. 29, 39, 40, 43).

We find that the category of financial control also favors a finding that JN was an employee.

In support of its conclusion that the relationship of the parties mandated a finding of an employer-employee relationship between JN and the Employer, the Department noted that there was a written agreement between the JN and the Employer, and both parties could terminate the working relationship without penalty (Exhs. 8 & 10). The Department concluded that the Employer did, in fact, terminate JN when it stopped providing appointments to JN (Bd. Exh. 10). The Department also held that JN's services were an integral part of the Employer's business and JN had no other contracts with other companies (Bd. Exh. 10).

JN and the Employer had a signed written agreement (Bd. Exh. 8). However, such contracts are not conclusive as to the nature of a work relationship, and we must look at the actual practice of the parties which supplemented the written agreement. *See* Arizona Department of Economic Security v. Employment Security Commission, 66 Ariz. 1, 182 P.2d 83 (1947). Therefore, we must analyze the nature of the work relationship between the Employer and JN.

JN testified that the Employer had a right to discharge him at any time, and did discharge him (Tr. p. 35). JN stated that the Employer stopped booking appointments for him and stopped taking his calls because he did not meet the standard win/loss ratio for appointments the Employer expected (Tr. p. 35). JN also testified that he was able to end his relationship with the Employer at any time without penalty (Tr. p. 42). Because the Employer's business was selling products and services to its customers, we find that JN's services as a sales representative were integral to the Employer's business. As noted earlier, JN testified that he did not advertise his services to the public and he did not work for any other companies while working for the Employer (Tr. pp. 42, 43).

We find that the factors reviewed under the category of relationship of the parties favor a finding that JN was an employee.

We conclude that the evidence of employee-employer status outweighs the evidence of independent contractor status. Therefore, we find that JN was an employee of the Employer from July 1, 2013 through September 30, 2013. We further conclude that all payments to JN for his services from July 1, 2013 through September 30, 2013, constitute wages by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **SETS ASIDE UPON REVIEW** our prior decision issued on February 27, 2015, based upon the evidence of record.

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

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

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

From May 1, 2013 through September 30, 2013, services performed by an individual as a sales representative constituted employment.

All forms of remuneration paid to the sales representative for such services from May 1, 2013 through September 30, 2013, constituted wages.

DATED: 6/9/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to

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

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision on review by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures on filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

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

> C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.
>
> D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:
>
> 1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
>
> 2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action

within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

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

A copy of the foregoing was mailed on 6/9/2016
to:

(x) Er: XX Acct. No: XX T1

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

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1449667-001-BR

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

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS
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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE SUS BENEFICIOS
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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under Arizona Revised Statutes, § 23-672, the last date to file an appeal is

***** June 2, 2016 *****.

HEARING IS REOPENED

THE **EMPLOYER**, through counsel, requested a reopening of the hearing that was properly scheduled for September 10, 2015.

The request to reopen was filed on time and the Appeals Board has jurisdiction in this matter under A.R.S. § 23-724.

THE APPEALS BOARD scheduled a telephone hearing, which was convened on April 7, 2016, before Appeals Board Administrative Law Judge Morris L. Williams, III. On the date of the hearing, the Employer appeared and was represented by counsel. Counsel for the Department was present, and one witness for the Department appeared. Board Exhibits 1 through 4 were admitted into evidence.

The issue before the Board during the hearing was whether the Employer established good cause for its nonappearance at the scheduled hearing on September 10, 2015.

The applicable rules do not make provisions for establishing good cause for nonappearance at a hearing in UI Tax matters. We conclude that the principles of the regulation in the UI benefits program that provide for good cause for nonappearance at a hearing are applicable in these circumstances.

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

B. APPEAL TRIBUNAL HEARINGS

* * *

3. Failure of Party to Appear

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

i. Adjourn the hearing to a later date; or

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

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

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

d. Good cause warranting reopening of a case shall be established upon proof that both the failure to appear and failure to timely notify the hearing officer were beyond the reasonable control of the nonappearing party.

e. A party may obtain only 1 hearing to determine if good cause exists to reopen a case.

   i. If a party does not appear at the scheduled good cause hearing, a party may file a written request for review to determine whether good cause exists for failure to appear at both the good cause hearing and the original hearing on the merits.

   ii. If a case is reopened upon a finding of good cause, and the party fails to appear at the time and date of the new hearing, the party may file a written request for review to determine whether good cause exists for failure to appear at the new hearing.

f. A request for review shall state the reasons for the party's failure to appear. The party shall attach copies of any documentation supporting the request.

g. The Appeal Tribunal shall review the request and the evidence of record to determine whether there is good cause to reopen the hearing on the issue of good cause or on the merits and shall issue a decision accordingly.

h. Any interested party may appeal to the Unemployment Insurance Appeals Board from the

decision of a hearing officer that denies reopening for lack of good cause as defined in subsection (B)(3)(d). The appeal shall be in writing and filed within 15 calendar days from the date of mailing of the decision denying reopening. If the Unemployment Insurance Appeals Board reverses the denial to reopen, the case shall be remanded to the Appeal Tribunal and rescheduled for hearing on the merits in accordance with R6-3-1502.

i. If an appellant fails to appear or waive appearance, the Appeal Tribunal may enter a default disposition in accordance with R6-3-1502(A)(4) without further right to appeal except as provided in this Section.

The Employer bears the burden of proving that it had good cause for its failure to appear at the prior hearing. There are two possible ways to establish good cause for the Employer's nonappearance. First, under Arizona Administrative Code, Section R6-3-1503(B)(3)(d), good cause is established upon proof that both the failure to appear and the failure to timely notify the Appeal Tribunal of the inability to appear were "beyond the reasonable control of the nonappearing party."

Secondly, in Maldonado v. Arizona Department of Economic Security, 182 Ariz. 476, 897 P.2d 1362 (App. 1994), the Court of Appeals held that the language in Arizona Administrative Code, Section R6-3-1503(B)(3)(d), must be interpreted in such a way as to allow an "excusable neglect" standard to be considered in determining whether to reopen a hearing, similar to the test under Arizona Rule of Civil Procedure 60(c). As required under Arizona Administrative Code, Section R6-3-1503(B)(3)(d), in order to establish good cause for its nonappearance under Maldonado, the Employer must prove that both its failure to appear and its failure to timely notify the Appeal Tribunal of any inability to appear were due to "excusable neglect."

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

in a prompt and diligent fashion. Beal v. State Farm Mutual Automobile Insurance Co., 151 Ariz. 514, 729 P.2d 318 (App. 1986).

The evidence of record establishes a Notice of Hearing, which scheduled a hearing on September 10, 2015, was mailed to the Employer's correct address of record on July 10, 2015 (Bd. Exh. 1). During the hearing, the Employer owner, Mr. A, credibly testified that he did not receive the Notice of Hearing (Tr. pp. 6, 7). Mr. A also testified that he checks the mail daily (Tr. p. 6). Mr. A stated that he has had problems with receiving his mail in the past, and his mail is mistakenly delivered to his neighbor often (Tr. pp. 7-9). Mr. A also testified that his neighbor delivered the Dismissal to him (Tr. p. 7). Mr. A stated that someone from his business has spoken with the Postal service about the problems receiving his mail, and that person was told that the Postal service would talk to the mailman (Tr. p. 8).

Based on all the evidence presented, we find that the Employer owner did not appear at the hearing because he did not receive the Notice of Hearing. Therefore, we find that the Employer's failure to appear was beyond its reasonable control, as required under Arizona Administrative Code, Section R6-3-1503(B)(3)(d). Accordingly, the Employer has established good cause for its nonappearance at the scheduled hearing on September 10, 2015.

DECISION

The Employer has established good cause for its nonappearance at the scheduled hearing on September 10, 2015.

A hearing on the merits of the Employer's appeal will be scheduled by the Appeals Board.

A different case number shall be assigned to the case involving the merits of the Employer's appeal.

DATED: 5/3/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

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

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

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

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

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

A copy of the foregoing was mailed on 5/3/2016
to:

Er: XX Acct. No: XX T7

(x) Er Rep: XX

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

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1426079-001-B

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

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** May 9, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER**, petitioned for a hearing from the Department's decision letter issued on September 26, 2013, which affirmed the Notice of Assessments issued June 20, 2013.

The Appeals Board has jurisdiction in this matter under A.R.S. § 23-740.

THE APPEALS BOARD scheduled a telephone hearing for April 7, 2016, at 9:00 a.m. Mountain Standard Time, before Appeals Board Administrative Law Judge **Morris L. Williams, III,** with written notice to the parties. The Employer received the Notice of Hearing.

The Employer did not appear at the scheduled Board hearing and did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was present. Because the Employer did not appear at the April 7, 2016 Appeals Board hearing to pursue its appeal, a default was entered on the record.

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

> 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:
>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence.

The Employer's default means that insufficient evidence was presented to support reversing or modifying the Department's September 26, 2013 decision letter. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department’s September 26, 2013 decision letter remains in full force and effect.

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

DATED: 4/7/2016

APPEALS BOARD

WILLIAM G. DADE, Acting Chairman

NANCY MILLER, Member

MORRIS L. WILLIAMS III, Acting Member

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

HOW TO REQUEST REOPENING OF THE HEARING

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

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

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

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

C. Your request to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing. A request for review will not be considered unless the Appeals Board sets aside this dismissal, and then issues a decision upon the merits of the request for hearing.

D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

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

A copy of the foregoing was mailed on 4/7/2016
to:

(x) Er: XX Acct. No: XX T6

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

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

By: __LS_____
For The Appeals Board

3rd QUARTER OF
CALENDAR YEAR 2016

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1513744-001-B

XXX	STATE OF ARIZONA E S A TAX UNIT % MELISSA HENRY ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

*****September 12, 2016*****.

DECISION
DISMISSED

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

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

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

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

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: 8/11/2016

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

, Acting Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the

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

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
   1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
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   You may send requests for review to the Appeals Board, 1951 W. Camelback Road, Suite 465, Phoenix, AZ, 85015, or to any public assistance office in Arizona. You may also file a written request for review in person at the above locations.

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

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

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

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

A copy of the foregoing was mailed on 8/11/2016
to:

(x) Er: XXX Acct. No:XXX T1

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

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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1510840-001-B

XXX	STATE OF ARIZONA E S A TAX UNIT % MELISSA HENRY ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** August 15, 2016 *****.

DECISION
DISMISSED

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

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

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

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

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: 7/14/2016

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

, Acting Member

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

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

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

3. refers to specific hearing testimony and evidence.

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

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

A copy of the foregoing was mailed on 7/14/2016
to:

(x) Er: XXX Acct. No: XXX T1

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

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

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1510839-001-B

XXX	STATE OF ARIZONA E S A TAX UNIT % MELISSA HENRY ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

*****September 12, 2016*****.

DECISION
DISMISSED

THE **EMPLOYER**, petitioned for a hearing from the Department's Reconsidered Determination issued on November 13, 2015, which held that the services of the yoga instructors and manager were correctly determined to constitute employment and all forms of remuneration paid for such services constitute wages.

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

THE APPEALS BOARD scheduled a telephone hearing for August 11, 2016, at 8:30 a.m. Mountain Standard Time, before Appeals Board Administrative Law Judge **Morris L. Williams, III,** with written notice to the parties.

The Employer did not appear at the scheduled Board hearing and did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was present. Because the Employer did not appear at the August 11, 2016 Appeals Board hearing to pursue its appeal, a default was entered on the record.

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

> 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:
>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence.

The Employer's default means that insufficient evidence was presented to support reversing or modifying the Department's November 13, 2015 Reconsidered Determination. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department’s November 13, 2015 Reconsidered Determination remains in full force and effect.

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

DATED: 8/11/2016

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

, Acting Member

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

HOW TO REQUEST REOPENING OF THE HEARING

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

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

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

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

C. Your request to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing. A request for review will not be considered unless the Appeals Board sets aside this dismissal, and then issues a decision upon the merits of the request for hearing.

D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

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

A copy of the foregoing was mailed on 8/11/2016
to:

(x) Er: XXX Acct. No: XXX T1

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

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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1508597-001-B

XXX	STATE OF ARIZONA E S A TAX UNIT % MELISSA HENRY ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** August 18, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER**, petitioned for a hearing from the Department's Reconsidered Determination issued on October 19, 2015, which held that the Employer's written request for reconsideration was not filed on time, and the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages dated April 16, 2015, remain in effect.

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

THE APPEALS BOARD scheduled a telephone hearing for July 19, 2016, at 11:00 a.m. Mountain Standard Time, before Appeals Board Administrative Law Judge **Morris L. Williams, III,** with written notice to the parties.

The Employer did not appear at the scheduled Board hearing and did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was present. Because the Employer did not appear at the July 19, 2016 Appeals Board hearing to pursue its appeal, a default was entered on the record.

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

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>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence.

The Employer's default means that insufficient evidence was presented to support reversing or modifying the Department's October 19, 2015 Reconsidered Determination. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department’s October 19, 2015 Reconsidered Determination remains in full force and effect.

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

DATED: 7/19/2016

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

, Acting Member

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

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A copy of the foregoing was mailed on 7/19/2016
to:

(x) Er: XXX Acct. No: XXX T

(x) MELISSA HENRY

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

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1506611-001-B

XXX	STATE OF ARIZONA E S A TAX UNIT % MELISSA HENRY ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** August 15, 2016 *****.

DECISION
DISMISSED

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

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

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

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

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: 7/14/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits

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

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

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

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

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

A copy of the foregoing was mailed on 7/14/2016
to:

(x) Er: XXX Acct. No. XXX

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

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

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1506589-001-B

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

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** August 22, 2016 *****.

DECISION
REVERSED

THE **EMPLOYER,** through counsel, petitioned for a hearing from the Department's Reconsidered Determination issued on September 11, 2015, which held in part as follows:

> ... The Notice of Assessment included services performed by ranch hands as well as an in-house bookkeeper. ... Regarding the ranch hands, administrative finality dictates that [the Employer] is precluded from raising the issue of worker classification ... we do not agree with

> your position that the ranch hands are performing services of an isolated or occasional nature that constitute exempt employment. ... this Reconsidered Determination ... modifies the Notice of Assessment, as noted above. ...

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724(B) and 23-740.

With proper notice to the parties, a telephone hearing was convened before **Robert T. Nall,** an Administrative Law Judge, on **Wednesday, May 18, 2016.** All parties were given an opportunity to present evidence on the following issues:

1. Whether the September 11, 2015 Reconsidered Determination properly affirmed that portion of the June 12, 2015 NOTICE OF ASSESSMENT, as modified, which related to the ranch hands.
2. Whether the NOTICE OF ASSESSMENT, as modified by excluding two other persons, properly calculated the amount of wages paid for services performed by specified individuals who worked as ranch hands.
3. Whether any of the individuals performing services as "ranch hands" performed work or services that is exempt or is excluded from Arizona UI coverage under A.R.S. §§ 23-613.01, 23-615, or 23-617, or under a decision of the federal government not to treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
4. Whether any of the individuals performing services as "ranch hands" factually and legitimately were performing services only through isolated or occasional transactions, during the time period shown by the Notice of Assessment Report for the Calendar Year 2013.

Board Exhibits 1 through 7 were admitted into evidence. Counsel for the Employer appeared, and one witness testified on behalf of the Employer. Counsel for the Department also appeared, and one witness testified on behalf of the Department.

By agreement, two individuals were removed from the assessment. Also by stipulation and agreement, one ranchhand, “Kyle C”, who received payment of $700 during only the 4th quarter of 2013, was removed from the assessment (Bd. Exh. 2). His approximate seven days of work were conceded to be “isolated and occasional” in nature. The amounts paid to the remaining persons were not disputed.

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

1. The Employer is a working cattle ranch in Arizona, which seasonally hires workers to move cattle from one area to another, brand cattle, and assist with calving.

2. A local labor force of ranchhands or "cowboys" has existed for decades in the areas ranched by the Employer. Individuals routinely perform seasonal tasks, without training or directives. Individual ranchhands generally arrive with their own vehicle and trailer, horse, saddle, ropes, and herding dog. Word of mouth draws their seasonal assistance. Many ranchhands operate their own ranches, and assist neighbors as needed.

3. During 2013, ranchhands or "cowboys" customarily worked for the Employer for a flat rate of $50 per half day or $100 per day, when ranch work became available. Reimbursement of expenses was not offered, and no written contracts were executed.

4. During the reporting period, seven ranchhands received payments from the Employer during more than one calendar quarter. Payments ranged from $75 to one individual in 2nd Quarter 2013; $150 for each of two individuals in 3rd Quarter 2013; and $1,900 paid to another individual in 4th Quarter 2013.

5. The Department issued a Notice of Assessment to the Employer on June 12, 2015, for calendar year 2013.

6. Several ranchhands were not included in the Notice of Assessment, as their services and payments fell within a single calendar quarter only, and were conceded to be isolated or occasional transactions.

7. The Employer, through counsel, filed a timely request for hearing following the Department's September 11, 2015 Reconsidered Determination (Bd. Exhs. 4, 5).

Arizona Revised Statutes § 23-613.01(A) and (C) provide in part as follows:

Employee; definition; exempt employment

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

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

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.

* * *

C. The following services are exempt employment under this chapter, unless <u>there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection A of this section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:</u>

1. Services which are not a part or process of the organization, trade or business of an employing unit and which are performed by an

individual who is not treated by the employing unit in a manner generally characteristic of the treatment of employees.

2. Services performed by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit. ... [Emphasis added].

* * *

Arizona Revised Statutes § 23-617, provides in part as follows:

Exempt employment; definition

"Exempt employment" means employment not considered in determining whether an employing unit constitutes an "employer" under this chapter and includes:

1. Agricultural labor as defined in section 23-603 unless the labor is performed for an employing unit that after December 31, 1977 either:

   (a) For some portion of a day, but not necessarily simultaneously, in each of twenty different calendar weeks, whether or not the weeks are or were consecutive, in either the current or the preceding calendar year, employed in agricultural labor at least ten individuals irrespective of whether the same individuals were employed in each day.

   (b) In any calendar quarter in either the current or preceding calendar year paid cash wages of twenty thousand dollars or more for agricultural labor.

* * *

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

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

* * *

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

> A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.
>
> 1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
>
> 2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.
>
> B. "Employee" as defined in subsection (A) does not include:
>
> 1. <u>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</u>. The existence of independence shall be determined by the preponderance of the evidence.
>
> 2. <u>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</u>

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. [Emphasis added].

C. The following services are exempt employment under this Chapter, unless there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection (A) of this Section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:

* * *

2. Services by an individual for an employing unit through isolated or occasional transactions, regardless of whether such services are a part or process of the organization, trade or business of the employing unit.

a. The phrase “isolated or occasional has its commonly understood meaning. The intent of the relationship between the employing unit and the individual performing the services is to be considered with the intent of the parties being that it is on a permanent basis or for a long period; e.g., an individual employed who either quits or is discharged after a brief period of employment, would not be considered an isolated or occasional transaction regardless of how brief the period of employment may be.

> b. An individual who performs services on less than thirteen days in a calendar quarter will be presumed to be performing isolated or occasional transactions. An individual who performs services on thirteen days or more in a calendar quarter will be presumed not to be performing isolated or occasional transactions. In all cases in which there is a standing or continuing arrangement with an individual to perform required services on either a regularly scheduled basis or on call as requested, it will be presumed the individual is not performing isolated or occasional transactions. [Emphasis added].

* * *

Counsel for the Employer contends that work by these ranchhands as cowboys is exempt because their services are only provided by these particular helpers during seasonal agricultural efforts and, thus, are merely "isolated or occasional services". Counsel contends that there is no continuing or standing arrangement to perform services on a regularly scheduled basis, or on call. Counsel contends that most individual cowboys are nomadic or have full-time jobs elsewhere, and all provide their own equipment without need for training, tools, reimbursement, or direction.

The Department's witness reasoned that whenever an individual is paid during more than one quarter, such services by definition have an ongoing nature and cannot be "isolated or occasional services". Other workers performing similar tasks were excluded from classification as employees because they did not perform work for the Employer during two consecutive calendar quarters.

A reading of the plain language of Arizona Administrative Code Section R6-3-1723(C)(2)(b) does not support the Department's conclusion that any ranchhand who performs services in more than one quarter cannot be considered to have performed "isolated or occasional services". The Department's position would result in the illogical outcome that a ranchhand who worked for twelve days in a single quarter for the Employer would be considered to have performed "isolated or occasional services", while a ranchhand who performed one day of work in each of two quarters would not. We interpret the regulation to mean that a worker who works fewer than thirteen days in each calendar quarter will be presumed to be performing isolated or occasional services and the employment will thus be considered exempt, so long as the other requirements of Arizona Administrative Code Section R6-3-1723(C) are met.

We further conclude that the Employer has established that it did not exert direction, rule or control of the ranchhands sufficient to satisfy the definition of an employee under Arizona Administrative Code Section R6-3-1723(A). The Employer also presented unrebutted testimony that it has no standing or continuing arrangement with these ranchhands to perform services on either a regularly scheduled basis, or on call as requested.

The seven individuals remaining at issue performed isolated or occasional services and qualified as exempt. None is properly classified as employed by the Employer. Their presumptive employment was rebutted by credible evidence of only isolated or occasional services. Their compensation is not wages. We conclude that, with regard to these individuals, the Employer met its burden to establish that their services are sufficiently isolated or occasional to overcome the presumption that all work for the business is classified as employment. We conclude that the exemption applies, and these ranchhands or cowboys were not employees of the Employer during the period at issue. The assessment is modified accordingly.

THE APPEALS BOARD **REVERSES** the Reconsidered Determination issued on September 11, 2015.

The ranchhands or cowboys identified in the June 12, 2015 Notice of Assessment were improperly classified as employees. Each of these eight persons shall be removed from the assessment.

The two women identified in the Notice of Assessment were properly removed by the Reconsidered Determination.

DATED: 7/22/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

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

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A copy of the foregoing was mailed on 7/22/2016
to:

Er: XXX Acct. No: XXX-000 T5

(x) XXX

(x) ELI D GOLOB
ASSISTANT ATTORNEY GENERAL CFP/CLA

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

By: _LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1500294-001-B

XXX	STATE OF ARIZONA E S A TAX UNIT % MELISSA HENRY ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** October 3, 2016 *****.

DECISION
REVERSED AND REMANDED

THE **EMPLOYER** petitioned for a hearing from the Department's decision letter issued on April 15, 2015, which held that the Determination of Liability for Employment or Wages issued January 16, 2015, is final because the Employer's request for reconsideration was not filed within the 60-day appeal period.

The Employer filed a timely petition for hearing to the Appeals Board. The Appeals Board has jurisdiction to consider this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, for **April 21, 2016**. Appeals Board Administrative Law Judge Morris L. Williams, III presided over the hearing on that date, and all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely written request for reconsideration of the Determination of Liability for Employment or Wages issued January 16, 2015.
2. Whether the Determination of Liability for Employment or Wages became final during the interim period before the Employer filed a request for reconsideration.

On the scheduled date of the hearing, the Employer's counsel and one Employer witness appeared by telephone to testify. Counsel for the Department appeared in-person and a witness for the Department appeared in-person to testify. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

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

1. On January 16, 2015, the Department sent, by certified mail, a Determination of Liability for Employment or Wages to the Employer's correct address of record (Bd. Exh. 1).
2. The determination was made available for pick up at the Employer's post office box on January 18, 2015 (Bd. Exh. 2).
3. The Employer retrieved the determination from its post office box on January 29, 2015 (Bd. Exh. 2).
4. On March 20, 2015, the Employer's counsel submitted the Employer's request for reconsideration (Bd. Exh. 3).
5. On April 15, 2015, the Department issued a decision letter which held that, because the Employer's request for reconsideration was not filed within 60 days of the date of the determination, the Determination of Liability for Employment or Wages dated January 16, 2015, had become final (Bd. Exh. 4).

6. The Employer filed a petition for hearing on May 5, 2015 (Bd. Exh. 5).

The issue properly before the Board is whether the Employer's request for reconsideration was filed on time.

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

> A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, that an employing unit constitutes an employer as defined in section 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, <u>the determination shall become final with respect to the employing unit sixty days after written notice is served personally, by electronic transmission or by certified mail if the determination was made on the basis of section 23-613.01</u>, or by first class mail if the determination was made by any other basis, addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration. [Emphasis added].

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

* * *

> B. <u>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.</u>

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

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

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

* * *

C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the Department, it shall be considered as having been served on the addressee on the date it is personally delivered or remailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts. [Emphasis added].

On January 16, 2015, the Department mailed, by certified mail, a Determination of Liability for Employment or Wages to the Employer's correct address of record (Bd. Exh. 1). The determination was made available for pick up at the Employer's post office box on January 18, 2015 and the Employer retrieved the determination from its post office box on January 29, 2015 (Bd. Exh. 2). The Employer witness, Ms. TD, testified that after she received the determination she made a copy of it and shared it with her two partners (Tr. p. 12). After discussing the determination, the Claimant and her partners hired legal counsel (Tr. pp. 12-15). On March 20, 2015, the Employer's counsel submitted the Employer's request for reconsideration (Bd. Exh. 3).

On April 15, 2015, the Department issued a decision letter which held that, because the Employer's request for reconsideration was not filed within 60 days of the date of the determination, the Determination of Liability for Employment or Wages dated January 16, 2015, had become final (Bd. Exh. 4). Specifically, in its decision letter, the Department noted that the Determination of Liability

for Employment or Wages becomes final unless written request for reconsideration is filed within sixty days of the date on the Determination of Liability for Employment or Wages (Bd. Exh. 4). However, in the appeal rights section of the Determination of Liability for Employment or Wages, it states, "This determination becomes **FINAL** as provided by A.R.S. §23-724 unless written request for reconsideration is filed with this Department within sixty (60) days after the Determination Date indicated above." (Bd. Exh. 1).

A.R.S § 23-724(A), states that the determination shall become final with respect to the employing unit sixty days after written notice is served "personally, by electronic transmission or by certified mail." As noted earlier, the Department sent the January 16, 2015 determination by certified mail. The Employer received the determination, by certified mail, on January 29, 2015 (Bd. Exh. 2).

The language contained in A.R.S § 23-724(A) contradicts the language cited in the appeal rights section of the January 16, 2015 determination and the language used in the Department's April 15, 2015 decision letter. Under A.R.S § 23-724(A), the Employer has 60 days after service by certified mail within which to file a timely request for reconsideration. However, according to the appeal rights contained in the determination, the Employer has 60 days from the date of the determination within which to file a timely request for reconsideration.

The Department contends that Arizona Administrative Code, Section R6-3-1404(C), governs service on the employing unit. Under Arizona Administrative Code, Section R6-3-1404(C), the determination is considered to have been served on the Employer on January 16, 2015, the date of the document and the date of mailing. In this case, we find that the Employer did not have a clear understanding of when the deadline to file a timely request for reconsideration would expire because the appeal rights contained in the determination misstate the provisions of A.R.S. § 23-724(A). The appeal rights section of the determination states that the deadline to file an appeal is 60 days from the date of the determination. However, A.R.S § 23-724(A), which is cited in the appeal rights section of the determination, states that the deadline is 60 days after actual service by certified mail, which we conclude is the day the determination was received by the employing unit.

Under the provisions of Arizona Administrative Code, Section R6-3-1404(B), the only reasons that will allow this Board to consider the Employer's request for reconsideration as timely filed include: delay or other action of the United States Postal Service, Department error or misinformation, or a change of the Employer's address at a time when there would have been no reason for it to notify the Department of the address change. In this case, we find that the confusion regarding the correct deadline date is due to Department error. As a result, the Employer has established facts that would invoke the provisions of

Arizona Administrative Code, Section R6-3-1404(B), and permit finding that the March 20, 2015 request for reconsideration was timely filed.

THE APPEALS BOARD **REVERSES** the Department's decision letter dated April 15, 2015.

The Employer filed a timely written request for reconsideration within the statutory time period allowed.

THE APPEALS BOARD **REMANDS** the matter to the Tax Department to issue a reconsidered determination on the merits of the Employer's request for reconsideration from which a timely appeal may be taken by the party adversely affected. In the absence of such appeal, the new decision will be the final administrative decision of this agency.

DATED: 8/8/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please

let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 771-9036; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

HOW TO ASK FOR REVIEW OF THIS DECISION

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

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

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

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

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

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

A copy of the foregoing was mailed on 9/1/2016
to:

(x) Er: XXX Acct. No: XXX T9
% XXX

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

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

By: __RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1482206-001-B

###	STATE OF ARIZONA E S A TAX UNIT % MELISSA HENRY ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST SC 040A PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

*****May 25, 2016*****.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for hearing from the Department's Reconsidered Determination issued on January 28, 2015, which affirmed the Determination of Liability for Employment or Wages issued on July 25, 2013. The Reconsidered Determination held that "services performed by individuals as behavioral health evaluators constitute employment and the remuneration paid for such services constitutes wages."

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

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **March 31, 2016,** before Appeals Board Administrative Law Judge Morris L. Williams, III. On that date, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Reconsidered Determination's affirmation of the July 25, 2013 Determination of Liability for Employment or Wages was proper.
2. Whether the services performed by individuals as “behavioral health evaluators” constitute "employment", as defined in A.R.S. § 23-615.
3. Whether remuneration paid to individuals as “behavioral health evaluators” constitutes "wages", as defined in A.R.S. § 23-622.
4. Whether any of the individuals performing services as “behavioral health evaluators” performed work that is exempt or is excluded from Arizona Unemployment Insurance coverage under A.R.S. §§ 23-613.01, 23-615, 23-617, or a decision of the federal government to not treat that individual, class of individuals, or similarly situated class of individuals as an employee or employees for Federal Unemployment Tax purposes.
5. Whether any of the individuals performing services as “behavioral health evaluators” factually and legitimately were independent contractors for the specified quarters.

On the scheduled date of the hearing, one Employer witness appeared and testified. Counsel for the Department was present, and one witness for the Department appeared and testified. Board Exhibits 1 through 11 were admitted into evidence. We have carefully reviewed the record.

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

1. The Employer’s company provided licensed behavioral health evaluators (hereinafter “evaluators”) to its clients, which were three local hospitals (Tr. pp. 6-8). The evaluators performed behavioral health assessments for patients of the Employer’s clients (Tr. pp. 6-8). The Employer

creates its pool of evaluators through word of mouth, and many of the evaluators performed the same services for other companies (Tr. pp. 8, 14, 24).

2. The evaluators signed a Sub-Contract Agreement (Bd. Exh. 7). In accordance with the agreement, the evaluators agreed to be subject to the supervision of the Employer (Bd. Exh. 7). The evaluators also agreed to abide by the Employer's rules, regulations and practices, including those concerning work schedules (Bd. Exh. 7). The evaluators did not make their services available to the general public on a continuing basis.

3. The work schedules were set one month in advance, and the evaluators were allowed to trade shifts with other evaluators without permission from the Employer (Tr. pp. 13, 14). The work shifts were set by the hospitals and the hospitals required 24-hour coverage by an evaluator (Tr. pp. 11, 13). The evaluators were contacted directly by the hospitals, and they could decide which shifts they wanted and they were not required to accept shifts (Tr. pp. 9, 11, 12). The Employer was required to cover all shifts that were not covered by the evaluators (Tr. p. 17).

4. After an evaluator accepted a shift, the evaluator was "on call," and if he/she received a call from the hospital, he/she had one hour to arrive at the hospital (Tr. p. 25).

5. Prior to providing services to the Employer's clients, the evaluators would go to the hospital with one of the Employer partners in order to get oriented to the Employer's and client's processes (Tr. p. 20). The evaluators were required to personally perform their services, and each evaluator had to be approved by the Employer's clients (Tr. pp. 21, 22).

6. The Employer provided the evaluators with health assessments and the evaluator would fill out an assessment after interviewing a patient and the evaluator would then send a copy of the assessment to the Employer for billing purposes (Tr. p. 27). The evaluators also filled out log sheets and sent those to the Employer as well (Tr. p. 38). The health assessments were only performed in the hospitals (Tr. pp. 24, 25).

7. The evaluators performed 3-4 assessments per shift and the evaluators were paid $100 per shift regardless of whether any assessments were performed (Tr. pp. 28, 29).

8. The evaluators discussed the results of their assessments with the Employer, and they were required to contact the Employer if they decided that a patient could go home (Tr. p. 18). The evaluators were not allowed to let a patient go home without approval from an Employer partner (Tr. p. 28).

9. The evaluators were required to have a Master's Degree and to be board certified (Tr. p. 16). They were also required to carry malpractice insurance and have a fingerprint card (Tr. p. 16).

10. The evaluators used their own cellphones, automobiles and laptops (Tr. pp. 16, 17).

11. The evaluators did not hire or supervise any assistants (Tr. pp. 23, 33).

12. The Employer was paid a certain amount per assessment by the hospitals, and the Employer would pay the evaluators from that amount and keep the remaining amount as profit (Tr. p. 10). The evaluators were paid from the Employer's accounts, and they were not allowed to negotiate their pay rate (Tr. p. 30).

13. The evaluators could terminate their working relationship with the Employer with four weeks notice without penalty (Bd. Exh. 7).

14. The Employer had a right to terminate the sub-contract agreement (Bd. Exh. 7).

15. The evaluators did not have any significant investment in the facilities used to perform business for the Employer (Tr. p. 48).

16. The evaluators had no realization of profit or risk of loss as a result of their relationship with the Employer (Tr. p. 49).

17. Some evaluators had other full-time employment (Tr. pp. 24, 46).

18. The Employer did not reimburse the evaluators for any expenses they incurred (Tr. p. 31).

19. The services performed by the evaluators were an integral part of the Employer's business (Tr. p. 51).

The primary issue in this case is whether the services provided by behavioral health evaluators, from June 30, 2010 through March 31, 2013, were employment pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires application of the statutes and code provisions cited above. As directed by Arizona Administrative Code, Section R6-3-1723(D)(1), our review is of the substance, not merely the form, of the relationship between the Employer and the evaluators. We further consider the issues of control and independence in light of the specific factors set forth in Arizona Administrative Code, Section R6-3-1723(D) and (E).

In arriving at its decision, the Department, in its January 28, 2015 Reconsidered Determination, applied the appropriate law, A.R.S. §§ 23-615, 23-613.01 and 23-622(A), as well as Arizona Administrative Code, Section R6-3-1723, to the facts in this case and found that the services of the behavioral health evaluators were correctly determined to be employment and all forms of remuneration paid for their services constituted wages.

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

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

In determining that evaluators were employees, the Department, in its Reconsidered Determination, analyzed this case by considering behavioral controls, financial controls and the relationship of the parties.

Behavioral Controls

In support of its conclusion that the behavioral controls mandated a finding of an employer-employee relationship between the evaluators and the Employer, the Department concluded that the Employer provided the evaluators with a monthly schedule of eight or twelve hour shifts and they were required to arrive at the hospital within one hour of receiving a call from the hospital (Bd. Exh. 9). In addition, the Department held that the evaluators were required to personally perform all services and they were required to notify the Employer if they were unavailable for a shift. The evaluators were required to complete a risk assessment for each patient, and the assessment was submitted to the Employer. The Department also determined that the Employer provided training to the evaluators and the evaluators were "shadowed" by Mr. B, a partner of the Employer, prior to providing services on their own.

The credible evidence of record establishes that the evaluators were required to personally perform their services, and they did not have any assistants (Tr. p. 48). Each evaluator had to be approved by the Employer's client (Tr. pp. 21, 22). Prior to providing services to the Employer's clients, the evaluators would go to the hospital with one of the Employer partners to get oriented to the processes of the Employer and the clients (Tr. p. 20). The evaluators were "on call" and they were required to arrive at the hospital within one hour after being called by the hospital (Tr. p. 48). The evaluators were required to complete a risk assessment for each patient, and the assessment was submitted to the Employer for billing purposes (Tr. p. 27). The evaluators also completed and submitted a log sheet to the Employer (Tr. p. 38). If the evaluators decided to discharge a patient after completing the risk assessment, the evaluator had to contact the Employer for approval (Tr. pp. 18, 28).

In addition, although the evaluators and the Employer had a signed "sub-contractor agreement," under the terms of that agreement the evaluators agreed to be subject to the general supervision of and act pursuant to the orders, advice and direction of the Employer (Bd. Exh. 7). The evaluators also agreed to perform any and all duties now and later assigned to the evaluators by the Employer, and agreed to abide by the Employer's rules, regulations and practices, including those concerning work schedules (Bd. Exh. 7).

Based on our review of all the evidence, we find that the category of behavioral control favors a finding that behavioral health evaluators were employees.

Financial Controls

In support of its conclusion that the financial controls mandated a finding of an employer-employee relationship between the evaluators and the Employer, the Department concluded that the Employer set the rate of pay with no input from the evaluators and the evaluators were paid per assessment from the Employer's accounts (Bd. Exh. 9). The evaluators were also paid $100 if they were on-call and the hospital did not call them in to do any assessments. In addition, the Department held that the evaluators did not have a significant investment in tools, supplies or equipment relevant to the services performed (Bd. Exh. 9). The Department held that there was no evidence that the evaluators advertised their services, and some evaluators have a history of employment with companies that provide the same services (Bd. Exh. 9). The Department also noted that the evaluators are unable to realize a profit or suffer a loss related to the services performed by the evaluators for the Employer.

The credible evidence of record established that the evaluators had no significant investment in tools, supplies or equipment used to perform their services (Tr. p. 48). The evaluators had no realization of profit or loss for the performance of their service (Tr. p. 49). The evaluators were not reimbursed for expenses and they used their own computers, cell phones and transportation (Tr. pp. 31, 16, 17). The Employer was paid a certain amount per assessment by the hospital, and the Employer would pay the evaluators from that amount and keep the remaining amount as profit (Tr. p. 10). The evaluators were paid per assessment from the Employer's accounts, and they were not allowed to negotiate their pay rate (Tr. p. 30). The evaluators performed 3-4 assessments per shift and if no assessments were done, the evaluator was still paid $100 per shift (Tr. pp. 28, 29).

Based on the foregoing evidence of record, we find that the category of financial control also favors a finding that the evaluators were employees.

Relationship of the Parties

In support of its conclusion that the relationship of the parties mandated a finding of an employer-employee relationship between the evaluators and the Employer, the Department noted that there was a written sub-contractor agreement between the evaluators and the Employer (Bd. Exh. 7). However, such contracts are not conclusive as to the nature of a work relationship, and we must look at the actual practice of the parties which supplemented the written agreement. *See* Arizona Department of Economic Security v. Employment Security Commission, 66 Ariz. 1, 182 P.2d 83 (1947). Therefore, we must analyze the nature of the work relationship between the Employer and the evaluators.

Pursuant to the agreement, the Employer retained the right to terminate the agreement, and the evaluators could terminate their working relationship with the Employer after providing four weeks notice (Bd. Exh. 7). The Department determined that there was a continuing relationship between the parties and the services provided by the evaluators were an integral part of the Employer's business even though some workers had other full-time employment. The services provided by the evaluators are a significant part of the Employer's core business.

The credible evidence of record established that, pursuant to the agreement, the parties could provide notice, four weeks in advance, to terminate the agreement, and the evaluators could stop taking shifts without penalty (Tr. pp. 31, 32; Bd. Exh. 7). Even though some evaluators had other full-time employment, they still had a continuing relationship with the Employer. Because the Employer's business was to provide licensed behavioral health evaluators to its clients, we find that the evaluators' services were integral to the Employer's business. Accordingly, we find that the factors reviewed under the category of relationship of the parties favor a finding that the evaluators were employees.

Conclusion

Based on the credible evidence of record, we conclude that the evidence of employee-employer status outweighs the evidence of independent contractor status. Therefore, we find that the evaluators were employees of the Employer from June 30, 2010 through March 31, 2013. We further conclude that all payments to the evaluators for their services during this period, constituted wages by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Reconsidered Determination dated January 28, 2015, based upon the evidence of record.

THE APPEALS BOARD **AFFIRMS** the Determination of Liability for Employment or Wages dated July 25, 2013, based upon the evidence of record.

From June 30, 2010 through March 31, 2013, services performed by individuals as behavioral health evaluators constituted employment.

All forms of remuneration paid to behavioral health evaluators for such services from June 30, 2010 through March 31, 2013, constituted wages.

DATED: 4/25/2016

APPEALS BOARD

GARY R. BLANTON, Chairman

WILLIAM G. DADE, Member

JANET L. FELTZ, Member

, Acting Member

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

HOW TO ASK FOR REVIEW OF THIS DECISION

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1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
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Call the Appeals Board at (602) 771-9036 with any questions

A copy of the foregoing was mailed on 4/25/2016
to:

(x) Er: xxx Acct. No: XXX T1

(x) MELISSA HENRY
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1245436-001-RBR

XXX

Claimant

STATE OF ARIZONA E S A TAX UNIT
c/o ELI GOLUB
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST, SC 040A
PHOENIX, AZ 85007-2976

Employer

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION REGARDING YOUR CLAIM FOR BENEFITS
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 347-6343.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD SOBRE SUS BENEFICIOS
The Department of Economic Security suministra ayuda de los idiomas gratis. Para recibir ayuda en su idioma preferido, por favor comunicarse con la oficina de apelaciones (602) 347-6343.

DECISION
SET ASIDE (Appeals Board No. T-1245436-001-BR)
SET ASIDE (Appeals Board No. T-1245436-001-B)

Pursuant to the **ORDER** of the Arizona Court of Appeals, Division One, in No. 1 CA-TX 15-0002, dated May 19, 2016, the Appeals Board has reviewed the record to determine whether the Employer has established good cause for its failure to appear at the Appeals Board hearing of December 5, 2011.

We find that it is not necessary to hold a hearing regarding the the issues remanded to us by the Court. The hearing the Board held on August 7, 2012 addressed the issues the Court of Appeals has directed the Board to consider. Based upon that record, we make the following findings of fact:

THE APPEALS BOARD FINDS:

1. On November 9, 2011, the Appeals Board mailed a Notice of Hearing scheduling a hearing for December 5, 2011, to the Employer's correct mailing address by regular mail (Bd. Exh. 12).

2. The Employer did not receive the Notice of Hearing (Transcript of August 7, 2012 hearing, p. 6).

The Court directed the Appeals Board to resolve two issues of fact. First, we must determine whether the Notice of Hearing was properly addressed. Based on the testimony of the Employer that his mailing address at the time the Notice was mailed matches the address contained on the November 9, 2011 Notice of Hearing, we conclude that the Notice was properly addressed.

We next consider whether it can be established that delivery of the Notice actually occurred. The Notice was not mailed by certified mail or other form of delivery that would document actual delivery of the Notice to the Employer. The only evidence regarding delivery is the Employer's denial of receipt. Pursuant to *Lee v. State*, 218 Ariz. 235 (2008), we conclude that insufficient evidence exists in the record from which to conclude that the Notice of Hearing was actually delivered.

We therefore conclude that good cause has been shown for the Employer's failure to appear at the December 5, 2011 hearing. Accordingly,

THE APPEALS BOARD **SETS ASIDE** its decision on review issued November 8, 2012, which denied the Employer's request to reopen the Appeals Board hearing of December 5, 2011.

THE APPEALS BOARD **SETS ASIDE** its decision issued January 17, 2012, which affirmed the Department's July 26, 2010 decision regarding the successor status of the Employer, and held that the experience rating account of "TDLF" was properly transferred to "DL".

The Appeals Board will assign a new case number and schedule a new hearing before a different Board Administrative Law Judge, at which the issues will be:

1. Whether the Employer was correctly determined to be a successor to a liable employer.

2. Whether the Employer's experience rating account was properly assigned a tax rate of 5.25% for coverage beginning September 1, 2009.

The new Administrative Law Judge shall conduct a hearing in accordance with A.R.S. § 23-733(B) and Arizona Administrative Code Section R6-3-1502 et seq. At the completion of the hearing, pursuant to A.R.S. § 23-672(E), the Appeals Board shall issue a new decision from which a timely appeal may be taken by the party adversely affected.

DATED:

APPEALS BOARD

JANET L. FELTZ, Chairman

WILLIAM G. DADE, Member

NANCY MILLER, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service or activity. For example, this means if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. To request this document in alternative format or for further information about this policy, please contact the Appeals Board Chairman at (602) 347-6343; TTY/TDD Services: 7-1-1. • Free language assistance for DES services is available upon request.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision on review by the Appeals Board is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. *See*, Arizona Revised Statutes, §§ 12-901 to 12-914. If you have questions about the procedures on filing an appeal, you must contact the Arizona Tax Court at 125 W. Washington Street in Phoenix, Arizona 85003-2243. Telephone: **(602) 506-3776**.

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

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

may appeal to the court of appeals or supreme court as provided by law.

4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

A copy of this Decision was mailed on
to:

(x) Er: XXX Acct. No: XXX T7

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

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

By: __LS_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1524295-001-B

XXX	STATE OF ARIZONA E S A TAX UNIT c/o IAN ABAIE ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
The Department of Economic Security provides language assistance free of charge. For assistance in your preferred language, please call our Office of Appeals (602) 771-9036.

IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** October 13, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A). The request was made on the record, during the hearing conducted on September 7, 2016 as a result of a settlement reached between the parties. The terms of the settlement were set forth on the record at the time of the hearing.

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

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

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

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

THE APPEALS BOARD **DISMISSES** the petition. No further proceeding in this matter will be scheduled. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 9/13/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to

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

HOW TO ASK FOR REVIEW OF THIS DECISION

A. Within 30 calendar days after this decision is mailed to you, you may file a written request for review. We consider the request for review filed:
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   3. refers to specific hearing testimony and evidence.

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

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

A copy of the foregoing was mailed on 9/13/2016
to:

(x) Er: XXX Acct. No: T1

(x) IAN ABAIE
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

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

By: __RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1524295-001-B

XXX	STATE OF ARIZONA E S A TAX UNIT c/o IAN ABAIE ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** October 13, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A). The request was made on the record, during the hearing conducted on September 7, 2016 as a result of a settlement reached between the parties. The terms of the settlement were set forth on the record at the time of the hearing.

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

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

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

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

THE APPEALS BOARD **DISMISSES** the petition. No further proceeding in this matter will be scheduled. This decision does not affect any agreement entered into between the Employer and the Department, either concurrently with the withdrawal or subsequent thereto.

DATED: 9/13/2016

APPEALS BOARD

Janet L. Feltz

JANET L. FELTZ, Chairman

Nancy Miller

NANCY MILLER, Member

William G. Dade

WILLIAM G. DADE, Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to

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(x) IAN ABAIE
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1275 W WASHINGTON
PHOENIX, AZ 85007-2926

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

By: __RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1524289-001-B

XXX

STATE OF ARIZONA E S A TAX UNIT
c/o MELISSA HENRY ASST
ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2926

Employer

Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
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IMPORTANTE --- ESTA ES LA DECISIÓN DEL APPEALS BOARD
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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** October 11, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER** has asked to withdraw its petition for hearing under A.R.S. § 23-674(A) and Arizona Administrative Code, Section R6-3-1502(A). The request was made by fax transmission on September 1, 2016.

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

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

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

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

THE APPEALS BOARD **DISMISSES** the petition. The hearing scheduled for September 21, 2016 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: 9/8/2016

APPEALS BOARD

JANET L. FELTZ, Chairman

NANCY MILLER, Member

PETER J. LANSDOWNE, Acting Member

Equal Opportunity Employer/Program • Under Titles VI and VII of the Civil Rights Act of 1964 (Title VI & VII), and the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008, the Department prohibits discrimination in admissions, programs, services, activities, or employment based on race, color, religion, sex, national origin, age, disability, genetics and retaliation. The Department must make a reasonable accommodation to allow a person with a disability to

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

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

By: _RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1522442-001-B

XXX	STATE OF ARIZONA E S A TAX UNIT % MELISSA HENRY ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST PHOENIX, AZ 85007-2926
Employer	Department

IMPORTANT --- THIS IS THE APPEALS BOARD'S DECISION
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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** October 11, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's Reconsidered Determination dated January 20, 2016, which held that services provided by the foreman and floor installers were correctly determined to constitute employment and all forms of remuneration paid for such services constitute wages.

The Appeals Board has jurisdiction to consider the timeliness of the Employer's petition for a hearing pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was held on September 1, 2016, before Appeals Board Administrative Law Judge Morris L. Williams, III. At that time, all parties were given an opportunity to present evidence on the following issue:

> 1. Whether the Employer's petition to the Appeals Board for a hearing and review from the Department's Reconsidered Determination issued on January 20, 2016, should be considered timely filed.

On the scheduled date of the hearing, two Employer witnesses appeared in-person to testify. Counsel for the Department appeared in-person and a witness for the Department appeared in-person to testify. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS that we are unable to proceed to a review of the merits of this case, because the Employer has failed to comply with the statutory prerequisites that would entitle the Employer to a review of the Department's January 20, 2016 Reconsidered Determination.

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

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

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

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

> B. Petition for hearing or review
>
> 1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. ...
>
> * * *
>
> 2. The petition must be filed within 30 days (unless the time is extended for good cause) after mailing of the reconsidered determination or denial thereof involving one of the following issues:
>
> * * *
>
> c. Services performed for or in connection with the business or the employing unit constitute employment (A.R.S. § 23-724);
>
> d. Remuneration for services constitute wages (A.R.S. § 23-724) ... [Emphasis added].
>
> * * *
>
> g. Liability of successor employer for predecessor's unpaid contributions (A.R.S. § 23-733)

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

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

The evidence of record establishes that the Department's Reconsidered Determination was sent by certified mail on January 20, 2016, to the Employer's correct last known address of record (Bd. Exh. 3). The Employer received the Reconsidered Determination on January 22, 2016 (Bd. Exh. 4). The deadline to file a timely petition for hearing was February 19, 2016. However, the petition to the Appeals Board was filed on April 5, 2016 (Bd. Exh. 5). Therefore, the petition was filed more than 30 days from the mailing date of the Reconsidered Determination.

In its petition, the Employer acknowledges that his petition for hearing was late. However, the Employer makes no contentions regarding the reason for the late filing (Bd. Exh. 5).

At the Appeals Board hearing, the Employer witness, Mr. T, and his wife, Mrs. T, both testified that the January 20, 2016 Reconsidered Determination was received. In fact, Mrs. T signed for the determination on January 22, 2016. Mr. T also testified that he read the appeal rights contained in the determination, and he was aware that he had 30 days to file a petition for hearing with the Appeals Board. Within one week of receiving the determination, the Employer witnesses took the document to have someone translate the determination into Spanish. Although Mr. and Mrs. T had the determination translated into Spanish within one week of receiving it, they did not prepare the petition for hearing until March 22, 2016. Further, the petition was not filed until April 5, 2016, when it was hand-delivered to the Office of Appeals. Mr. T testified that the petition for hearing was filed late because he "made a mistake."

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

THE APPEALS BOARD **DISMISSES** the Employer's petition for a hearing.

The Reconsidered Determination issued January 20, 2016, remains in effect.

DATED: 9/8/2016

APPEALS BOARD

JANET L. FELTZ, Chairman

NANCY MILLER, Member

MORRIS L. WILLIAMS III, Acting Member

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1275 W WASHINGTON
PHOENIX, AZ 85007-2926

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

By: ___RR_____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1513751-001-B

XXX	STATE OF ARIZONA E S A TAX UNIT % MELISSA HENRY ASST ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON ST PHOENIX, AZ 85007-2926
Employer	Department

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RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Under A.R.S. § 23-672(F), the last date to file a request for review is ***** October 11, 2016 *****.

DECISION
DISMISSED

THE **EMPLOYER**, petitioned for a hearing from the Department's Reconsidered Determination issued on November 9, 2015, which held that the services provided by substitute teachers and substitute teacher assistants/aides were correctly determined to constitute employment and all forms of remuneration paid for such services constitute wages.

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

THE APPEALS BOARD scheduled a telephone hearing for September 1, 2016, at 8:30 a.m. Mountain Standard Time, before Appeals Board Administrative Law Judge **Morris L. Williams, III,** with written notice to the parties.

The Employer did not appear at the scheduled Board hearing and did not present a written statement pursuant to Arizona Administrative Code, Section R6-3-1502(K), as a letter in lieu of appearance. Counsel for the Department was present, and a witness for the Department was present. Because the Employer did not appear at the September 1, 2016 Appeals Board hearing to pursue its appeal, a default was entered on the record.

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

> 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:
>
> * * *
>
> 4. By default, if the appellant fails to appear or waives appearance at the scheduled hearing. [Emphasis added].

THE APPEALS BOARD FINDS no reason to issue a decision on the merits of the Employer's petition for hearing. The Employer did not appear at the scheduled Board hearing to present evidence.

The Employer's default means that insufficient evidence was presented to support reversing or modifying the Department's November 9, 2015 Reconsidered Determination. Accordingly,

THE APPEALS BOARD **DISMISSES** the Employer's request for hearing.

The Department’s November 9, 2015 Reconsidered Determination remains in full force and effect.

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

DATED: 9/8/2016

APPEALS BOARD

JANET L. FELTZ, Chairman

NANCY MILLER, Member

MORRIS L. WILLIAMS III, Acting Member

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HOW TO REQUEST REOPENING OF THE HEARING

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

1. On the date of its postmark, if mailed through the United States Postal Service (USPS).
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2. On the date it is received by the Department, if not sent by USPS.

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

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

C. Your request to reopen the hearing must be in writing, must be signed by you or by your representative, and must be filed on time. Only if a request to reopen the hearing is granted upon a finding that you have established good cause for your nonappearance, will a new hearing be scheduled on the merits of the original request for hearing. A request for review will not be considered unless the Appeals Board sets aside this dismissal, and then issues a decision upon the merits of the request for hearing.

D. If you need more time in order to file a request to reopen the hearing, you must apply to the Appeals Board before the appeal deadline. You must show good cause for your requested extension of time. No extension past the statutory deadline date will exist, unless the Appeals Board grants permission.

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

A copy of the foregoing was mailed on 9/8/2016
to:

(x) Er: XXX Acct. No:T0

(x) MELISSA HENRY

ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

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

By: _____RR_____
For The Appeals Board