Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1006434-001-B

In the Matter of:

X

UI TAX SECTION
C/O ROBERT J. DUNN III
ASSISTANT ATTORNEY GENERAL
1275 W. WASHINGTON ST CFP/CLA
PHOENIX, AZ 85007-2926

Employer

Department

D E C I S I O N
DISMISSED

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

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

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

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

We have carefully reviewed the record.

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

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

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

ROBERT J. NALL, Acting Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

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

2. Parties may be represented in the following manner:

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

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

A copy of the foregoing was mailed on
to:

(x) Er: X Acct. No: X

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

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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1018221-001-B

In the Matter of:

X	STATE OF ARIZONA ESA - TAX UNIT % ROBERT DUNN III, ASSISTANT ATTORNEY GENERAL 1275 W WASHINGTON ST - CFP/CLA PHOENIX, AZ 85005-2926
Employer	Department

DECISION
AFFIRMED

THE **EMPLOYER** petitions for a hearing from a Decision Letter of the Department issued on August 15, 2006, which stated:

> ... that the Notice of Estimated Assessment for Delinquent Reports issued on April 11, 2006 for the quarters ending December 31, 2004, September 30, 2005 and December 31, 2005 is final and binding on X because the reports were not filed within the statutory period of 15 days.

The Employer filed a timely petition for hearing from the Department's Decision. The Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724(B), 23-672(D), and 23-738(B).

THE APPEALS BOARD gave notice to the parties, and held a telephone hearing before ROBERT T. NALL, an Administrative Law Judge, at **2:00 p.m.,** Mountain Standard Time, on **Wednesday, December 13, 2006**.

The issues noticed for hearing were the following**:**

A. Whether the Employer's petition for reassessment of the Department's delinquency assessment issued on April 11, 2006, was timely filed as permitted by provi-

sions of A.R.S. §23-738(B) and Arizona Administrative Code, Section R6-3-1404.

B. Whether the Department's delinquency assessment issued on April 11, 2006, has become final and the lien imposed by A.R.S. §23-745 has attached, pursuant to A.R.S. §23-738(B) and Arizona Administrative Code, Section R6-3-1404.

C. Whether statutory authority exists to grant the requested waiver of interest and penalties and, if authority to do so exists, whether not granting the requested waiver was an abuse of that discretion.

The Employer did not appear at the scheduled hearing. The Assistant Attorney General appeared, and two witnesses for the Department testified at the hearing. Twelve Board Exhibits were admitted into evidence.

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

1. A Notice of Estimated Assessment for Delinquent Reports was sent by certified mail on April 11, 2006, to the Employer's last known address of record, for each of the quarters ending December 31, 2004; September 30, 2005; and December 31, 2005. The Notice advised the Employer that the assessment would become final unless a petition for reassessment was filed with the Department within 15 days of the Notice. The Notice also stated that the assessment would be cancelled if all delinquent reports indicated on the Notice were properly completed and submitted within 15 days of the notice. (Bd. Exh. 9).

2. On May 30, 2006, the Employer filed three Unemployment Tax and Wage reports (UC-018) bearing a date of May 17, 2006. The Employer also filed a separate letter on May 30, 2006, requesting waiver of "... the interest and penalties". The Employer described the late and delayed filing as "... just a major oversight". (Bd. Exhs. 5-8).

3. On August 15, 2006, the Department issued a decision advising the Employer that the Notice of Estimated Assessment for Delinquent Reports was final and binding because the petition for reassessment was not filed within the required statutory period. (Bd. Exh. 4).

4. By letter postmarked August 25, 2006, the Employer filed a timely petition for review of the Department's decision denying the reassessment. (Bd. Exh. 3).

Arizona Revised Statutes § 23-738(B) provides:

> B. An employer against whom any delinquency 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. If the petition for reassessment is not filed within fifteen days the amount of the assessment shall become final and the lien imposed by § 23-745 shall attach.

In this case, the Employer could have filed a response, if the delinquent reports were filed within fifteen days after April 11, 2006. The Employer did not file any response until May 30, 2006, which is not within the 15-day time period permitted by law. The Employer did not appear at the hearing to explain any "extenuating circumstances" for the delay (Bd. Exh. 3A). The Employer did not file any additional documents for consideration by the Appeals Board. The only potential explanation advanced by the Employer was that the owner's mother had been diagnosed with cancer in November of 2004, and office procedures were not monitored until after her passing on April 19, 2006.

> I am very sorry that we let this get out of hand this way. I have some internal problems in my office that are just now coming to light. ... [After] April 19th 2006, and then as we started to get things back to normal that was when we noticed that a lot of things that I was told was being taken care of wasn't. (Bd. Exh. 5).

Arizona Revised Statutes § 23-738(B) is unambiguous, declaring that: "If the petition for reassessment is not filed within fifteen days the amount of the assessment shall become final and the lien imposed by § 23-745 shall attach." In the absence of a timely petition for reassessment, the Appeals Board is without authority to consider the merits of this matter. In addition, the Employer has presented no legal authorities that would permit the Department, or the Appeals Board, to "... waive the interest and penalties on our account and amend the estimated tax to be the actual tax per attached reports." (Bd. Exh. 5).

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

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

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

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

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

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

Arizona Administrative Code, Section R6-3-1404 provides in pertinent part 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.
>
> 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.
>
> 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.
>
> * * *
>
> 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].

Here, the Employer has asserted no reason for the late filing of the petition for reassessment which, if accepted as true, would establish a condition which would cause the Board to consider the request timely.

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

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

The evidence establishes that no petition for reassessment of the Notices of Estimated Assessment for Delinquent Reports issued on April 11, 2006, for the quarters in question was filed within the time prescribed by A.R.S. § 23-738(B). The Employer filed three quarterly reports bearing the date, May 17, 2006. The

Employer's undated letter and the reports were filed on May 30, 2006, which was beyond the appeal period. A petition filed outside the statutory period may be considered timely only if the untimely filing is due to Department error or misinformation, postal error, or a change of address when there is no reason to notify the Department of the change.

Based upon the evidence before us, the Appeals Board concludes that the Employer failed to timely file a petition for reassessment of the Notices of Estimated Assessment for Delinquent Reports issued on April 11, 2006. The Employer is not entitled to a hearing on the merit issues in this matter. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Decision of August 15, 2006.

The Notices of Estimated Assessment for Delinquent Reports issued on April 11, 2006, are final and binding on the Employer for the quarters ending December 31, 2004; September 30, 2005; and December 31, 2005.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

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

not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

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2. Parties may be represented in the following manner:

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

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

A copy of the foregoing was mailed on
to:

(x) Er: X Acct. No: X

(x) ROBERT DUNN III
Assistant Attorney General
1275 W Washington St
Phoenix, AZ 85007-2926

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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1002368-001-BR

In the Matter of:

X	ESA- TAX UNIT ROBERT DUNN III ASSISTANT ATTORNEY GENERAL, 1275 W. WASHINGTON ST CFP/CLA PHOENIX, AZ 85007-2926
Employer	Department

D E C I S I O N

AFFIRMED UPON REVIEW

The **EMPLOYER** requests review of the Appeals Board decision issued on December 7, 2006, which affirmed the Reconsidered Determination issued on October 27, 2005, and held that:

1. The Employer is liable for Arizona Unemployment insurance taxes beginning October 1, 2000, under A.R.S. § 23-613.

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

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

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

In the request for review, the Employer's owner (Tr. p. 27) contends that the Employer was a corporation, and that she should not be personally liable. We infer that the owner contends that, if the Department attempts to collect on a Notice of Assessment (such as Board Exh. 5), she should not be liable. The issue of the correctness of any Notice of Assessment is not before the Board in this case. In any event, the Appeals Board has no jurisdiction to determine what individuals or entities would be liable for obligations of the Employer.

The Employer contends that the business was started as a registry with nurses working under independent contractor agreements. The Employer contends that the nurses did not expect they would receive benefits, have taxes deducted from earnings, or that they would have workers compensation or unemployment benefits. The Claimant states that she paid an attorney to set up independent contractor agreements so that the work arrangements would be legal.

The issue is not whether the arrangement is legal or illegal, or whether workers accept or want a particular arrangement, but whether the individuals who performed services for the Employer were employees so as to constitute employment. Employment means any service of whatever nature performed by an employee for the person employing him. An 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. An employee does not include an independent contractor.

The Employer has the burden of proving that a worker is an independent contractor. The Department has established that the nurses were employees. The Employer has not met the burden of proof to establish that the nurses were independent contractors.

The existence of an independent contractor agreement is some evidence of the proposed arrangement. However, the actual practice under the contract is more important in determining the degree of control the Employer can assert and the degree of independence the worker actually has. "Control" as used in A.R.S. § 23-613.01, includes the <u>right to control</u> as well as <u>control in fact</u>.

The reason a worker and a potential employer may not merely decide to use an independent contractor arrangement is set out in two cases:

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

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

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

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

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

We have thoroughly examined the facts present in this case, including the factors that have the practical effect of preventing a nurse, assigned to a client by the Employer, from becoming employed by a client. We have considered the relevant law and administrative rules as they are applicable to those facts. We also have considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Section R6-3-1723(D) and (E), and conclude that the services performed by individuals as nurses constitute employment. In our analysis, there were no factors leading to a conclusion that the nurses were independent contractors. There were 12 factors leading to the conclusion that the nurses were employees. There were 6 factors that were not applicable, given the facts and the type of work performed.

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

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:

APPEALS BOARD

_____

MARILYN J. WHITE, Chairman

_____

HUGO M. FRANCO, Member

_____

WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your

disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision on review by the Appeals Board, is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. If you have questions about the procedures on filing an appeal, you must contact the Tax Court at (602) 506-3763.

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

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

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

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

(x) Er: X Acct. No: X

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

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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1006039-001-B

In the Matter of:

X	ESA TAX UNIT C/O ROBERT J. DUNN III ASSISTANT ATTORNEY GENERAL 1225 W. WASHINGTON ST CFP/CLA PHOENIX, AZ 85007-2976
Employer	Department

D E C I S I O N
DISMISSED

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

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

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

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

We have carefully reviewed the record.

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

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

DATED:

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HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

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

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to:

(x) Er: X Acct. No: X

(x) ROBERT J. DUNN, III
ASSISTANT ATTORNEY GENERAL
1275 W. WASHINGTON ST - 040A
PHOENIX, AZ 85007-2976

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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1008005-001-B

In the Matter of:

X	ESA TAX UNIT C/O ROBERT J DUNN III ASSISTANT ATTORNEY GENERAL 1225 W WASHINGTON ST CFP/CLA PHOENIX, AZ 85007-2976
Employer	Department

D E C I S I O N
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> 1. By withdrawal, if the appellant withdraws the appeal in writing or on the record at any time before the decision is issued; ... (emphasis added).

We have carefully reviewed the record.

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

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

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

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

2. Parties may be represented in the following manner:

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

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

A copy of the foregoing was mailed on
to:

Er: X Acct. No: X

(x) ROBERT J. DUNN, III
ASSISTANT ATTORNEY GENERAL
1275 W. WASHINGTON ST - 040A
PHOENIX, AZ 85007-2976

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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1002418-001-BR

In the Matter of:

X	E S A TAX UNIT C/O ROBERT DUNN III ASSISTANT ATTORNEY GENERAL 1275 W WASHINGTON ST CFP/CLA PHOENIX, AZ 85007-2926
Employer	Department

D E C I S I O N

AFFIRMED UPON REVIEW

The **EMPLOYER,** through counsel, requests review of the Appeals Board decision issued on December 1, 2006, which affirmed the Department's Decision of June 14, 2005, and held that the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued May 27, 2004, are final and binding on the Employer

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

In the request for review, the Employer, through counsel, contends that the Department failed to serve the Determinations on the last known address, or in the alternative, that the delay in submission was "...due to Department error or misinformation or other action of the post office."

Counsel contends that the dispute arose when a Notice to Employer about a worker, X, was mailed to a company in the same building as the Employer at the X address. Counsel contends that X was the Employer's address to which its mail is delivered and is the address that is registered with the Arizona Corporation Commission. The Department is not privy to the address used by other parties for mailing to the Employer, and does not rely on the address a business may have registered with the Arizona Corporation Commission. In conducting the

investigation about the correct employer for X, Department relied on information from X, and a 1099 form issued to X by the Employer and showing the PO Box (Bd. Exhs. 1A-4, 8A, 30). When an employer issues a form 1099, it is assumed that this is an address is one to which mail should be sent.

Counsel contends that the audit letter was sent on April 21, 2004 to the PO Box, but that notations on the letter indicate that the audit of May 10, 2004, would be conducted at the X address (Bd. Exh. 31). Counsel ignores the fact that an entity may have one address for mail and a different address for conducting business. It is obvious that an audit could not be conducted at a PO Box. The Department's knowledge of a physical address does not constitute notice of an entity's change of address for mailing purposes. In connection with the audit letter, the fact that the Employer received it at the PO Box, and was able to respond with a request for a new date and physical location indicates that the PO Box was still a good mailing address. Counsel contends that the Employer's receipt of other items mailed by the Department to the PO Box was fortuitous because another entity in the same building uses the PO Box. It may be that the other entity is the one that prepared the 1099 form which counsel now states was an "error". Any error in completing the form listing the Employer's address is imputed to the Employer.

Counsel also contends that the Employer responded to the Determinations within 13 days after receiving them. The 15 day time period for filing a timely response starts running when the Determinations were mailed to the last known address. They were mailed to the Employer's last known mailing address. If personal service was required by the statute, the Department would have had to secure a physical location for the Employer. Even if the Employer had not received the Determinations until after the fifteenth day, the Determinations would still have been correctly served on the Employer.

Counsel further contends that claims should be heard on their merits, and cites Cummins v. Dept of Econ Sec., 182 Ariz. 68, 70, 893 P.2d 68, 70 (App. 1995) for the proposition that "[c]laims *should* be heard on their merits if the failure to comply with a deadline or attend a hearing is of the type which can be said to be excusable." That citation is from Maldonado v. Arizona Department of Economic Security and Broadway Southwest Stores, 182 Ariz. 476, 897 P.2d 1362 (Ariz. App. 1994). It is not a holding in the case citing it. The Cummins court held that, because the appeal rights did not state that an appeal mailing date would be judged by the postmark, the document was timely filed, although postmarked one day late. Excusable neglect, from Maldonado was not part of the decision in Cummings.

Department error or postal error or delay is not present in this case. Counsel contends that there is an excusable situation. There is no "good cause" exception to the 15-day deadline for filing appeals found in A.R.S. § 23-671(D) or in Arizona Administrative Code, Section R6-3-1404. 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).

We find that this is equally applicable to cases arising under Arizona Revised Statutes § 23-724(A)

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

The envelope was addressed to the Employer at P O Box X, Phoenix, AZ 85080. The documents and the envelope were returned to sender with the notation "FORWARDING ORDER EXPIRED" (Bd. Exh. 9). The Department had only one mailing address of record for the Employer at the time it mailed the two Determinations. This was P O Box X, Phoenix, AZ 85080 (Tr. pp. 14, 15, 33, 36, 39-47, 64; Bd. Exhs. 1-3, 30, 31, 33, 36, 39).

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

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

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

> A. When the department makes a determination, which determination shall be made either on the motion of the department or upon application of an employing unit, that an employing unit constitutes an employer as defined in § 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in

> § 23-615 which is not exempt under § 23-617 or that remuneration for services constitutes wages as defined in § 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration (emphasis added).

Here, there were two Determinations mailed to the address that the Employer used as a mailing address. The Employer received the determinations on June 11, 2004, and could have filed timely appeals on that date. The Employer did not file appeals until June 24, 2004.

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

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

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

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

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

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

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

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Dissenting:

After reviewing the Employer's request for review of the Appeals Board's decision dated December 1, 2006, I am persuaded that the decision is incorrect. Accordingly, I respectfully dissent from the Affirmed Upon Review decision of the majority of the Board (hereafter called "the majority") wherein the majority affirms the previous Board decision dated December 1, 2006. I would reverse the Board decision dated December 1, 2006, for the reasons that follow.

This case involves whether the Employer filed a timely request for reconsideration of the Determination of Liability for Employment or Wages and the Determination of Unemployment Insurance Liability the Department issued on May 27, 2004 (Exhs. 7, 8). The Determinations were sent to the Employer by certified mail addressed to PO Box X, Phoenix, AZ 85080 (Exh. 9). The Employer did not receive the certified mail.

The Employer contends that the Department did not send the Determinations to the Employer's last known address, i.e., 1101-A, West X, Phoenix, Arizona 85027, which has been its address since it was incorporated in December 2002 (Tr. pp. 59-61). The Employer also asserts that the Arizona Corporation Commission document (Exh. 13), a copy of a Federal Deposit Coupon (Exh. 23), and its July 14, 2004 letter to the Department indicate that its last known address is 1101-A West X, not PO Box X.

Prior to mailing the Determinations to the Employer, the Department on April 21, 2004, sent a letter to the Employer indicating that it had scheduled on May 5, 2004, an audit of the Employer's financial records to determine if the Employer pays wages subject to unemployment insurance tax (Exh. 31). The letter was addressed to "PO Box X, Phoenix, AZ 85080." The Department obtained such address from a 1099 form that an unemployment insurance claimant, X, provided to the Department. The business that was using PO box X occupied the same building as the Employer, and the Employer received the Department's April 21, 2004 letter. The Employer called the Department to reschedule the audit to May 10, 2004, at 1101 West X, Suite A (Tr. p. 16). The audit was conducted on May 10, 2004. During the audit the Department auditor did not ask the Employer for its current mailing address. On May 27, 2004, the Department sent to the Employer a Determination of Liability for Employment or Wages and a Determination of Unemployment Insurance Liability (Exhs. 7, 8) by certified mail addressed to PO Box X.

At the time the Department sent the certified mail to the Employer, the forwarding order for PO Box X had expired (Exh. 9), and the certified mail was returned to the Department on June 6, 2004 (Exh. 11, p. 2). PO Box X was the post office box of Franchise Signs, Inc., a business entity separate from the Employer, but both the Employer and Franchise occupied the same building (Tr. pp. 62, 63). CB, an office manager/bookkeeper, prepared 1099 forms for three companies, including the Employer. A receptionist prepared the 1099s for the companies, but they were not proofread for the correct address. CB indicated that PO Box X on the Employer's 1099 form for unemployment claimant, X, "was a major screw-up" (Tr. pp. 64, 72).

Although PO Box X was not the Employer's mailing address, the Employer received the Determinations by regular mail on June 11, 2004 (Tr. pp. 72, 73). The company that used PO Box X occupied the same building as the Employer. On June 24, 2004, the Employer, by counsel, mailed to the Department a request for reconsideration of the Determinations (Exh. 15), which was thirteen days from June 11, 2004, the date the Employer actually received the Determinations. The Department by letter dated June 14, 2005, virtually a year later, responded to the Employer's request (Exh. 11). In the letter, the Department stated, among other things, that the Employer did not file its request within the statutory time period of fifteen days from the date of the Determinations and that under Arizona Administrative Code, Section R6-3-1404(B) the Employer's request could not be considered timely.

The majority concluded that the Employer failed to timely request reconsideration of the Determinations that the Department issued on May 27, 2004. I disagree. I find that the Employer's request for reconsideration of the Determinations was timely because: (1) under A.R.S. §23-724(A), the Department failed to serve the Determinations by certified mail addressed to the Employer's last known address; and (2) under Arizona Administrative Code,

Section R6-3-1404(B), the Employer did not delay from May 27, 2004, in submitting its request for reconsideration of the Determinations because the Department erred by sending the certified mail to PO Box X, instead of the Employer's last known address, i.e., 1101-A West X.

Under A.R.S. § 23-724(A), the Department is required to serve the Determinations on the Employer by certified mail addressed to the Employer's last known address. A.R.S. § 23-724(A) provides as follows:

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

In 1977 Mercury Coupe, I.D. #7A93S623012 License Number 300TMI (CA) State v. Gallarzo, 129 Ariz. 378, 631 P.2d 533 (1981), the Supreme Court of Arizona considered the Arizona Department of Public Safety's requirement to mail a copy of a forfeiture notice to the last known address of the defendant. The State argued that it complied with the statute requiring it to mail a copy of the notice of forfeiture by sending the notice to the address stated in the departmental report of the arresting officers. Gallarzo pointed out that the Tijuana, Mexico address was not his last known address. That his last known address was the address stated in his bail release form. After considering other case law regarding an interpretation of last known address, the Court said:

> The interpretation we prefer requires the State to use reasonable diligence in ascertaining the last address of the claimant or owner. ***Requiring the State in a forfeiture proceeding to exercise due diligence to ascertain the last address of the owner is consistent with the requirements of due process. (citation omitted). In Mullane it was held that the due process clause of the United States Constitution demands that the notice given be that which is 'reasonably calculated under all the circumstances to apprise interested parties of the

> pendency of the action.' In forfeiture proceedings, this goal can be met by requiring the State to use reasonable diligence in ascertaining the last known address of the known claimants. Id, 129 Ariz. at 381, 631 P.2d at 536.

Here, the Department, as the State did in Gallarzo, failed to use reasonable diligence to ascertain the Employer's last known address. Contacting the Employer to ask for its current mailing address would have been the most commonsense direct way for the Department to have used reasonable diligence to ascertain the Employer's last known address. Contacting the Arizona Corporation Commission would have been the most commonsense indirect way to use reasonable diligence for the Department to ascertain the Employer's last known address. See, A.R.S. §§ 10-501 and 10-502. Moreover, when the Department conducted the audit at the Employer's place of business on May 10, 2004, the Department could have used reasonable diligence to ascertain the Employer's current address by asking the Employer for its current mailing address. Since the Department knew that it would be mailing the Determinations by certified mail, reasonable diligence should have compelled the Department to ascertain the Employer's current mailing address while conducting the audit on May 10, 2004.

The Department did not comply with A.R.S. §23-724(A) because it did not serve the Employer by certified mail addressed to the Employer's last known address. As the Court said in Gallarzo,supra, "It was the duty of the State to comply with the applicable statutory provision and provide [defendant] with the notice the law requires." Id, 129 Ariz. at 382, 631 P.2d at 537. Here, as in Gallarzo, it was the duty of the Department to comply with the applicable statutory provision, i.e., A.R.S. §23-724(A), and provide the Employer with the notice the statute requires. Since the Department did not comply with the statute, the Determinations did not become final fifteen days from May 27, 2004, because the Determinations become final only after the Determinations are served by certified mail addressed to the last known address of the Employer. The fifteen-day period for the Determinations to become final had not begun to run because the Department had not sent the certified mail addressed to the last known address of the Employer, as required by A.R.S. §23-724(A). The Employer actually received the Determinations by regular mail on June 11, 2004, and the Employer responded to the Determinations within fifteen days from June 11, 2004. Accordingly, since the Determinations had not become final, the Employer's request for reconsideration of the Determinations was timely filed.

In addition to the foregoing, under Arizona Administrative Code, Section R6-3-1404(B), the Employer's request for reconsideration of the Determinations was timely because the Department erred by failing to mail the Determinations to the Employer's last known address. The Department's error was the result of its failure to use reasonable diligence to ascertain the Employer's current address. Arizona Administrative Code, Section R6-3-1404(B) provides as follows:

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.

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.

4. If submission is not considered timely, and the subject matter is one for which Chapter 4, Title 23, A.R.S., provides administrative appeal rights, the Department shall issue an appealable decision to the interested party. The decision shall contain the reasons therefor, a statement that the party has the right to appeal the decision, and the period and manner in which such appeal must be filed under the provisions of the Arizona Employment Security Law. (emphasis added).

The Department erred by sending the Determinations to PO Box X. The error occurred because of the Department's misinformation about the Employer's last known address. The Department obtained the PO Box X address from a 1099 form provided by an unemployment insurance claimant, X. The Department did

not attempt to verify whether PO Box X was the Employer's last known address. Even though the Employer is a corporation, the Department did not check with the Arizona Corporation Commission to obtain the Employer's last known address or the address of the Employer's statutory agent, despite the Employer's requirement to maintain its current address on file with the Commission.

The Department also relied on an Arizona Joint Tax Application (Exh. 39) that it received on May 26, 2004, which indicated that the Employer's mailing address was PO Box X, rather than its physical address, 1101 W. X #A, which was also indicated on the Application. The Department merely compounded its error about the Employer's last known address by relying on the mailing address information on the Application. The Department's reliance was misplaced. The Department's witness conceded that the Application does not indicate that any officer of the Employer provided the information indicated on the Application or that any officer of the Employer signed the Application. The Department's witness did not know who provided the information on the Application (Tr. pp. 43-45).

Before May 27, 2004, the Department did not receive any correspondence or any document directly from the Employer indicating that its address was PO Box X. Instead, the Department relied on other sources, except the Arizona Corporation Commission where the Employer is required to maintain its correct address on file with the Commission. Moreover, the Department never asked the Employer for its correct mailing address, even though it should have done so on May 10, 2004, when it conducted the audit of the Employer at the Employer's physical address at 1101-A West X.

In essence, the department contends that it has the right to rely on the mailing address indicated by third party sources rather than use reasonable diligence to ascertain the Employer's current mailing address by contacting the Employer directly and asking for the Employer's current address. The Department's contention is unreasonable and contrary to the reasonable diligence required by the Court in Gallarzo, supra. As a result, the Department erred in sending the Determinations by certified mail to PO Box X, instead of the Employer's last known address, 1101-A West X.

For the foregoing reasons, I respectfully dissent. I find that the Appeals Board should reverse the Appeals Board decision dated December 1, 2006, because: (1) the Department did not use reasonable diligence to ascertain the Employer's current address and as a result, the Department failed to serve the Employer by certified mail addressed to the Employer's last known address, as required by A.R.S. §23-724(A); and (2) under Arizona Administrative Code, Section 1404(B), the Department erred by sending the Determinations by certified mail to PO Box X, instead of the Employer's last known address, 1101-

A West X. Accordingly, I find that the Employer timely filed its request for reconsideration of the Determinations.

WILLIAM G. DADE, Member

Dissenting

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

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision on review by the Appeals Board, is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. If you have questions about the procedures on filing an appeal, you must contact the Tax Court at (602) 506-3763.

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

> C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.

D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:

1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.

2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

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

(x) Er: X. Acct. No:

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

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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1018221-001-BR

In the Matter of:

X	STATE OF ARIZONA ESA - TAX UNIT % ROBERT DUNN III, ASSISTANT ATTORNEY GENERAL 1275 W WASHINGTON ST – CFP/CLA PHOENIX, AZ 85007-2926
Employer	Department

D E C I S I O N
DISMISSED

The **EMPLOYER** requests review of the decision of the Appeals Board issued on March 1, 2007, which affirmed the Department's Decision of August 15, 2006, and held:

> The Notices of Estimated Assessment for Delinquent Reports issued on April 11, 2006, are final and binding on the Employer for the quarters ending December 31, 2004; September 30, 2005; and December 31, 2005.

We have carefully reviewed the record, and

THE APPEALS BOARD FINDS that we are unable to proceed to a review on the merits of this case.

Arizona Revised Statutes § 23-672(F) states in pertinent part:

> A party dissatisfied with the decision of the appeals board may file a request for review within thirty days from the date of the decision, which shall be a written request and memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations

of the record, rules and other authority. Upon motion, and for good cause, the appeals board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal ... (emphasis added).

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

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

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

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.

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.

* * *

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 record reveals that a copy of our previous decision was sent by mail on March 1, 2007, to the Employer's last known address of record. A request for review of that decision had to be filed by April 2, 2007. Neither a request for review nor a request for an extension of time to file the request for review was filed within this time. The request for review was postmarked, and therefore was filed, pursuant to Arizona Administrative Code, Section R6-3-1404, on April 11, 2007.

In the request for review, the Employer notes that he is "... in the unfortunate position of missing a phone hearing. This was a hearing that I requested ...". He explains that his accountant advised him there had been a phone hearing set up for him:

> ... to explain what transpired within our office during these time frames. I did not see, or do not remember seeing any letter sent to me in regards to this phone hearing, I apologize for this oversight sincerely. ... We have had all of the addresss's [sic] changed back to our P.O. Box.

The Employer offers no further explanation for filing a late request for review.

The Employer has not alleged any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B), and permit finding the request for review timely filed. Therefore, the Employer has failed to meet the statutory requirements for review. Accordingly,

THE APPEALS BOARD **DISMISSES** the request for review. The Appeals Board decision issued on March 1, 2007, remains in full force and effect.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

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

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision on review by the Appeals Board, is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. If you have questions about the procedures on filing an appeal, you must contact the Tax Court at (602) 506-3763.

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

C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.

D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:

1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.

2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

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

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

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

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

By: _____
For The Appeals Board –

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1031507-001-B

In the Matter of:

X	E A, TAX UNIT C/O ROBERT J DUNN III ASSISTANT ATTORNEY GENERAL 1275 W WASHINGTON ST CFP/CLA PHOENIX, AZ 85007-2926
Employer	Department

D E C I S I O N
DISMISSED

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

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

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

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

We have carefully reviewed the record.

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

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

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

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

2. Parties may be represented in the following manner:

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

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

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

(x) Er: X Acct. No: X

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

(x) JOHN B. NORRIS, CHIEF OF TAX
EMPLOYMENT ADMINISTRATION
P. O. BOX 6028 SITE CODE - 911B-2
PHOENIX, AZ 85005

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1020118-001-B

In the Matter of:

X	STATE OF ARIZONA ESA–TAX UNIT % ROBERT DUNN III, ASSISTANT ATTORNEY GENERAL 1275 W. WASHINGTON ST - CFP/CLA PHOENIX, AZ 85007-2926
Employer	Department

DECISION
AFFIRMED

THE **EMPLOYER,** through counsel, petitions for hearing from the Reconsidered Determination issued by the Department on June 19, 2006, which affirmed the Department's Determination of Unemployment Insurance Liability (Exh. 7), and the Department's Determination of Liability for Employment or Wages (Exh. 8), issued on May 2, 2006, and held that services performed by individuals as salesperson constitute employment and remuneration paid to individuals for such services constitutes wages.

The reconsidered Determination also specified that:

> ... remuneration received constituted wages for the quarters ending June 30, 2003, September 30, 2003, December 31, 2003, March 31, 2004, June 30, 2004, September 30, 2004, December 31, 2004, March 31, 2005, June 30, 2005, and September 30, 2005. (Bd. Exh. 4).

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

At the direction of the Appeals Board and following proper notice to all parties, a hearing was conducted on January 17, 2007, in Phoenix, Arizona, before ROBERT T. NALL, Administrative Law Judge, for the purpose of receiving evidence in order to consider the following issues:

A. Whether the employing unit is liable for Arizona Unemployment Insurance taxes beginning with the quarter ending June 30, 2003, under A.R.S. § 23-613.

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

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

The following persons appeared at the hearing: two Employer witnesses who testified, Employer's counsel, two Department witnesses who testified, and the Assistant Attorney General as the Department's counsel. At the hearing, Board Exhibits 1 through 17G were admitted into the record as evidence.

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

1. The Employer operated as a Limited Liability Corporation that is licensed by Arizona to resell manufactured homes in manufactured housing communities. Its owner has operated under a manufactured housing broker license since May 2000 (Tr. pp. 22, 23; Bd. Exh. 11).

2. All of the persons who were authorized to sell manufactured homes under the Broker of Manufactured Homes or Mobile Homes license maintained by the Employer's owner, were themselves separately licensed by Arizona to sell manufactured housing units. Specifically, all were licensed by the Office of Manufactured Housing as part of the Arizona Department of Fire, Building and Life Safety (name effective July 1, 2006) under A.R.S. §§ 41-2141, *et seq.,* and Arizona Administrative Code, Sections R-4-34-101, *et seq.* (Tr. pp. 22, 27, 51, 52; Bd. Exh. 10).

3. Most of the licensed manufactured housing salespersons who acted on behalf of the Employer worked from their own homes, occasionally listing and showing manufactured homes for sale in established residential parks. The Employer did not provide them an office, computers or a place to work. Whenever a customer listed for sale or purchased a manufactured home, the licensed manufactured home salespersons would prepare an exclusive listing agreement or a purchase agreement using customized forms that were provided by the Employer in order

to meet State legal requirements. The Employer paid each licensed manufactured home salesperson a commission upon completion of the purchase transaction. (Tr. pp. 27-35, 40, 46-49, 60; Bd. Exhs. 12, 13).

4. Three licensed manufactured housing salespersons also participated in selling newly-manufactured homes from the factory, commencing August 2003 through January 2006. The new manufactured housing sales business was operated during that period from an office provided by the Employer, wherein the salespersons used a computer provided by the Employer. These manufactured home salespersons showed model display manufactured homes provided by the Employer. The newly-manufactured home selling business operated under the trade name of "X", which was used by the Employer during that period (Tr. pp. 24, 29, 44, 45, 52-54, 63-70).

5. The Employer operates under a manufactured housing broker's license. That broker simultaneously operates a separate real estate company. She has maintained an office and a designated real estate broker's license to sell real estate properties since May 2002 (Tr. pp. 23, 30, 42). Because the sale of real estate is not permitted under any license to sell manufactured homes or mobile homes, none of the licensed manufactured home salespersons were allowed by the Employer to sell real estate. The licensed manufactured housing salespeople sold only the manufactured home itself (Tr. pp. 50, 51, 55-57).

6. All of the licensed manufactured home salespersons lived in residential manufactured home parks. All were retired. None of the licensed salespersons made any significant monetary investment in the sales enterprise (Tr. pp. 30, 31, 34, 36).

7. Licensed manufactured home salespersons are prohibited from working for more than one licensed broker at any time. They could utilize a substitute salesperson on occasion, if that person was also licensed. If the licensed salesperson left the Employer to work with a different broker or manufactured home reseller, the salesperson was free to take their manufactured home sales license with him or her (Tr. pp. 30, 31, 34, 36).

8. The broker, under whose license the Employer operates, treated the manufactured home licensed salespeople essentially the same as the licensed real estate salespeople who worked separately under her real estate broker's license. This meant that she did not deduct taxes from their commission earnings and she did not report them as employees (Tr. p. 43).

9. The Employer entered into written "independent contractor agreements" with the licensed manufactured home salespersons.

These documents were authored by the broker or by her husband (Tr. pp. 43-46; Bd. Exh. 14).

10. On May 31, 1983, the Office of Manufactured Housing promulgated its Bulletin #83-9 entitled: "Prohibition of Independent Contractor Sales Persons Agreements". (Bd. Exh. 10). The prohibition has not been lifted or amended, and remains in effect currently. In part, the licensing authority cautioned licensees that:

> Any agreement which severs the necessary employer/employee relationship between dealer/ broker and sales personnel violates state licensing laws and rules and regulations for both parties. ... it is necessary that one who has been certified as being competent to be a qualifying party, actually be in active and direct control of the work being performed.

11. Applicable laws require the participation of a licensed manufactured housing broker in any sales transaction. A licensed manufactured housing salesperson cannot complete a valid sales transaction, without the involvement and approval of a duly-licensed manufactured housing broker.

12. The Employer issued a Miscellaneous Income document, IRS report form 1099, identifying a total of $13,350 the Employer paid to one of the licensed manufactured home salespersons during 2004. (Tr. p. 72).

The Employer contends that its commissioned manufactured housing salespeople, whose employment is in dispute in this case, are independent contractors, rather than employees. Specifically, the Employer contends that their efforts as commissioned salespeople, who maintain individual licenses to sell manufactured housing units, should be accorded the same exemption from "employee" status that is provided by statute for licensed real estate salespeople (Tr. p. 54; Bd. Exh. 6). The Employer also contends that the Office of Manufactured Housing bulletin is not intended to determine taxable status for the broker and the licensed salespeople (Tr. pp. 57-62; Bd. Exh. 10). The Employer does not cite any case law, or any other legal provision including federal government exemption, expressly applicable to these circumstances.

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 ...

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

Employee; definition; exempt employment

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

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

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

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

* * *

Arizona Revised Statutes § 23-617 provides in part as follows:

"Exempt employment" means employment not considered in determining whether an employing unit constitutes an "employer" under this chapter and includes:

* * *

12. Service performed by an individual for an employing unit as an insurance producer, if all such service performed by the individual for such employing unit is performed for remuneration solely by way of commission.

* * *

14. Service performed by an individual for an employing unit as a licensed real estate broker or a licensed cemetery broker or a licensed real estate salesman or licensed cemetery salesman, if all such service performed by the individual for such em-

ploying unit is performed for remuneration solely by way of commission, except that any service performed as a real estate broker, a cemetery broker, a real estate salesman or a cemetery salesman for an employing unit to which the provisions of section 23-750 apply is not exempt employment.

* * *

18. Casual labor not in the course of the employer's trade or business.

19. Service performed by an individual for an employing unit as a securities salesman, if all such service performed by the individual for such employing unit is performed for remuneration solely by way of commission, ...

* * *

22. Service performed by individuals solely to the extent that the compensation includes commissions, overrides or profits realized on sales primarily resulting from the in-person solicitation of orders for or making sales of consumer goods in the home, ...

23. Services performed by an individual for an employing unit in the preparation of tax returns and related schedules and documents, if all such services are performed for remuneration solely by way of commissions, independent of the control of the employing unit, ... [Emphasis added].

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 affected 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].

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

When applying the guidelines set forth in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes consideration of the following factors:

a. Authority over Individual's Assistants

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

None of the licensed salespersons used paid assistants. This factor is neutral, with no impact on the crucial issue.

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or how he is to work. The control factor is present if the Employer has the right to instruct or direct.

The Employer is a licensed broker who must remain legally responsible for all sales transactions. Control exists in every finalized sales transaction. This factor demonstrates employment.

c. Oral or Written Reports

If regular oral or written reports bearing upon the method in which the services are performed must be submitted to

the employing unit, it indicates control in that the worker is required to account for his actions.

Contract forms containing mandatory language are provided by the Employer as essential elements of every listing and every finalized sale. The practice, however, is that the broker becomes involved when completing the sales transaction without routine interim progress reports. This factor indicates independence.

d. Place of Work

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

For three licensed salespersons, the work was performed on premises and indicates control. For all other licensed salespersons, work was performed entirely off the Employer's premises, thus indicating independence.

e. Personal Performance

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

Any licensed salesperson was entitled to substitute another licensed salesperson without the broker's prior consent. This factor indicates independence.

f. Establishment of Work Sequence

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

Sales transactions require certain specified steps necessary in the industry, such as a valid listing agreement or "Employment Agreement" (Exhs. 12G, 12V, 12Y), and exchanges of offers, counteroffers, and disclosures. Finalization requires participation by the Employer as the licensed broker. Missing crucial steps in the mandatory sequence could trigger additional costs and could invalidate a transaction. This factor indicates employment.

g. Right to Discharge

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

The licensed broker retains the statutory right to deny consent or authorization, and always could preclude the licensed salesperson from using the business name and crucial documents. No contractual penalty is specified for termination, including liquidated damages. This factor indicates employment.

h. Set Hours of Work

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

The practice allowed each licensed manufactured housing salesperson to keep irregular hours. This factor indicates independence.

i. Training

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

No formal training was undertaken because all workers already possessed the required salesperson license. This factor indicates independence.

j. Amount of Time

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

The practice allowed each licensed salesperson to work irregular hours at will. No minimum level of time or periodic effort was specified by the licensed broker. The only prohibition was working simultaneously with another licensed broker. This factor indicates independence.

k. Tools and Materials

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

The only tools and materials involved were the contractual documents provided by the Employer, which contains language that the Employer is required by law to ensure exists throughout each completed sales transaction. No worker provided the means to do the job. This factor indicates employment.

i. Expense Reimbursement

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

No expenses were reimbursable. This factor indicates independence.

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

l. Availability to the Public

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

All licensed salespeople were prohibited by law from simultaneously working with another licensed broker. Although any member of the public would be a potential customer, no sales of manufactured housing were available without the auspices of a licensed broker. This factor indicates employment.

2. Compensation

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

Payment was calculated strictly on a commissioned sales basis. This factor indicates independence, but is not dispositive because employees often work on commission.

3. Realization of Profit or Loss

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

The licensed salespersons were not required to invest anything beyond their personal time and efforts. Enhanced efforts would not result in a higher commission, and lack of diligence would not reduce the commission amount. This factor indicates employment.

4. Obligation

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

Each licensed salesperson could cease efforts at any time without penalty to the Employer. The lack of liquidated penalties for non-completion indicates employment.

5. Significant Investment.

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

The licensed salespersons were not required or permitted to invest anything beyond their personal time and efforts. This factor indicates employment.

6. Simultaneous Contracts

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

All licensed salespeople were prohibited by law from simultaneously working with another licensed broker. Although any member of the public would be a potential customer, no sales of manufactured housing were available without the auspices of a licensed broker. This factor indicates employment.

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

One such crucial factor in this case is the complete absence of any legal authority for treating persons who are licensed to sell manufactured housing as subject to the exemption specifically afforded to persons who are licensed to sell real estate. Licensed real estate salespersons enjoy exemption from employee status pursuant to Arizona Revised Statutes § 23-617(14), and Arizona Administrative Code, Section R6-3-1725. The existence of exemptions specifically listed for other industries confirms that the Arizona Legislature deliberately set aside and authorized special non-employee status for licensed real estate salespeople. The Legislature also specifically and deliberately set aside other enumerated industries such as insurance, securities, tax returns and direct sales of consumer goods in the home. The Unemployment Insurance taxation treatment is similar to enumerated exemptions for professional athletes, elected officials, students, clergy, and prison inmates.

None of these specifically-listed exemptions applies to the industry in which the Employer and its salespersons admittedly engaged. The statutes and rules confirm that the Arizona Legislature deliberately did not include licensed manufactured housing salespersons in any listed exemption from employment status. Thus, we conclude that no exemption from employment status can be extended to the licensed retail sales of manufactured homes. No evidence was presented demonstrating that manufactured home salespersons undertake the substantial course of study and pass a comprehensive examination required of licensed real estate salespersons. Unless the factors required to be considered yield an obvious conclusion otherwise, a decision to include a similar industry for which the Legislature already set forth specifically-mandated requirements yet did not include amongst a list of exempted industries, would be fiat not authorized by the Arizona Legislature.

In addition, the Arizona licensing authority expressly has prohibited the application of independent contractor status between a licensed manufactured homes broker and all licensed salespersons engaged in the sale of manufactured homes for that broker. The licensing authority warned that professional discipline potentially could arise from claims of independent contractor status, due to the essential control over the entire manufactured home sales process that must be exercised by the licensed broker.

Prior existence of this written prohibition (Bd. Exh. 10) cuts to the heart of the arguments by the Employer and its counsel that the Employer exercised no control at all over activities by the licensed salespersons of manufactured homes. The prohibition of independent contractor status in this industry minimizes the value of the written independent contractor agreements drafted by the Employer and presented in this case. The Arizona licensing authority requires the licensed manufactured housing broker to exercise control over the sales transaction, and to exercise control over the licensed manufactured housing

salespersons whose status is the subject of this appeal. This factor not only is strongly indicative of control, but extends further by conclusively establishing that the relationship must be that of employer and employee.

We conclude that the industry-specific legal mandate upon the licensed manufactured home broker to exercise control is an essential characteristic of this business relationship. As a license requirement, control must be maintained throughout the process of selling manufactured homes. The legal requirement trumps all other concerns and considerations regarding the issue before us on review. Thus, payments for services rendered in this industry cannot be payments to an independent contractor, and necessarily constitute 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), made it clear 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, when 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. Arizona Department of Economic Security*, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where 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].

In this case, the factors that tend to support the Employer's contention of independent contractor relationship include the existence of signed "independent contractor agreements" (Bd. Exh. 17), existence of a professional license requirement, the consistent payment of commissions followed by a Form 1099, the lack of micromanaged sales activities, the lack of paid assistants, the ability to terminate the arrangement at any time, the opportunity to hire a similarly-licensed substitute, and the ability of licensed salespersons to work from their homes.

Factors that are characteristic of independence include the absence of set hours for work, the lack of extensive training and meetings, the lack of office space provided to all but three of the licensed manufactured home salespersons,

and the freedom to work any hours with any potential customer. However, we conclude that the evidence of employee status outweighs these factors.

Although the individual licensed manufactured home salespersons were not necessarily required to comply with instructions about when, where or how the salesperson was to perform their essential duties, the control factor is present in this case because the Employer has the right to instruct or direct any licensed manufactured housing salesperson. The Employer's consent as a licensed broker is a legally required and essential ingredient to every completed sales transaction. Liabilities arising from defects and departures from instructions could run to the Employer, as the licensed broker who oversaw and who authorized the sales transaction. The Employer, operating with or as a licensed broker, was required to include certain mandatory steps and language in each transaction with the public.

An argument could be made that the licensed manufactured home salespersons are subject to the broker's direction, rule or control ". . . solely because of a provision of law regulating the organization, trade or business of the employing unit". We agree that this is a regulated industry in which all sales for a fee require a licensed broker, who is the qualifying party for any licensed manufactured home salesperson. The Employment Security Law of Arizona applies an exception provision:

> ... 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." Arizona Revised Statutes § 23-613.01(A)(2) and Arizona Administrative Code, Section R6-3-1723(B)(2).

We perceive a plethora of legitimate reasons why a fee-charging salesperson must be under the control and supervision of a licensed broker, including but not limited to the potential for incomplete disclosures, fraud and overreaching, or other behaviors that could make one person or entity liable for damages incurred by another. The definitive requirement, "solely" by reason of provisions codifying professional requirements, is not met by the evidence in this case.

The licensing agency phrased the distinction succinctly in 1983, by recognizing a far more inclusive and more extensive obligation exists to the public as follows:

> The law clearly requires a qualifying party for a license to have active and direct supervision and direct responsibility for all operations of that particular licensed business. An "independent contractor" by the very nature of that status would not be under the control or responsibility of the qualifying party for the license. (Bd. Exh. 10).

We conclude that the factors tending to support an employer/employee relationship in this case include: the lack of any statutory exclusion from employee status when other industries are specifically excluded, the provision of an office plus a computer and other supplies to at least three licensed salespersons, the legal prohibition against working simultaneously for more than one licensed broker, the lack of significant investment by the licensed manufactured home salespersons, the lack of recurring liabilities or expenditures by the licensed salespersons thereby averting an independent profit or loss risk to the salesperson, the provision of customized sales documents by the broker to facilitate all sales, the existence of control required by law and by the licensing authority, and the licensing authority's specific prohibition of independent contractor status between a licensed broker and licensed salespeople.

We find that absence of significant investment, coupled with insulation from the risk of loss inherent in such business investment, are determinative elements in finding that the workers were employees rather than independent contractors. Similarly, we find that the exclusivity of the work efforts, as each licensed manufactured home salesperson always was legally prohibited from working simultaneously for any other broker, is a determinative element in finding that the workers were employees rather than independent contractors. We find that the provision of an office, model homes, name badges, logo shirts, and a computer to the three licensed manufactured home salespersons who were allowed to sell new manufactured homes is another determinative element in finding that the workers were employees rather than independent contractors.

The Employer, through counsel, implies that the broker's relationship with the three licensed manufactured home salespeople who sold new homes should be treated differently from the similar arrangement with those licensed manufactured home salespersons who always sold used manufactured homes. However, the provision of useful tools and materials was not limited to the three newly-manufactured home salespeople. The broker admittedly provided customized forms essential to commencing and completing each sales transaction, to all salespersons. The broker testified that she did so in order to fulfill her own license obligations to ensure that certain mandatory language

must be included in all sales listings and contracts. No evidence was presented that any salesperson chose to express independence by redrafting different selling documents. Further, the licensing authority makes no material distinction between licensed sales of new and used manufactured homes.

We find that the payment on a per-job basis by commissions, rather than some other method of calculation, does not require a conclusion that this relationship is with independent contractors. Similarly, the existence of independent contractor agreements remains a device useful to allow an argument that the relationship is not employment. However, by law the licensed manufactured home salesperson cannot be truly independent in their actions. The licensed manufactured home salesperson cannot legitimately sell new or used manufactured homes for a fee, without the involvement of one licensed broker for each such effort. Certain mandatory language is required. None of the licensed manufactured home salespersons could hold their services out to the general public directly, because the involvement of one licensed broker is required by law. Simultaneous contracts with more than one broker are prohibited. Hence, these factors favor employment status.

The enumerated factors that are not directly applicable to our considerations, based upon the evidence presented in this case, include the absence of evidence that any compensatory payment was designated as hourly wages, and lack of assistants over whom the individuals could exercise authority. These factors are neutral in this case.

We have thoroughly examined the factors established as present by the facts in this case, and we have considered the relevant law and administrative rules as they are applicable to those facts. We have considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Subsections R6-3-1723(D) and (E). We conclude that the existence of signed "independent contractor agreements" does not define the relationship involved in this industry, and does not remove the relationship from employment status for taxation purposes. The legal requirements of the licenses involved carry far more weight than whatever paperwork the licensees chose to sign (Exh. 14). We conclude that the services performed by individuals as licensed salespersons of manufactured homes, under the Employer's manufactured home broker license, constitute employment.

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

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

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

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

In this case, the Employer paid commissions to the licensed salespersons, based upon their consummated sales of manufactured homes (Bd. Exh. 13). We conclude from the evidence that such remuneration constitutes wages as contemplated by the applicable statutes and administrative rules. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination issued on June 19, 2006.

1. Services performed by individuals as licensed manufactured home salespersons constitute **Employment** as defined in A.R.S. §§ 23-613.01, 23-615 or 23-617, and such individuals are **Employees** within the meaning of A.R.S. § 23-613.01 and Arizona Administrative Code, Section R6-3-1723.
2. The remuneration paid to individuals for the services performed constitutes **Wages** within the meaning of A.R.S. § 23-622, which must be reported and on which state taxes for unemployment insurance are required to be paid.

3. The Employer **is liable** for Arizona Unemployment Insurance taxes on wages for the quarters ending June 30, 2003, September 30, 2003, December 31, 2003, March 31, 2004, June 30, 2004, September 30, 2004, December 31, 2004, March 31, 2005, June 30, 2005, and September 30, 2005, under A.R.S. § 23-613.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

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

2. Parties may be represented in the following manner:

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

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

A copy of the foregoing was mailed on
to:

Er: X Acct. No: X

(x) Er. Rep.: JAMES C. FRISCH
KING & FRISCH, P.C.

(x) ROBERT DUNN, III, ASSISTANT ATTORNEY GENERAL
1275 W WASHINGTON
PHOENIX, AZ 85007-2926

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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1038691-001-B

In the Matter of:

X	EA, UI TAX SECTION C/O ROBERT J DUNN CFP/CLA ASSISTANT ATTORNEY GENERAL 1275 W WASHINGTON ST O40A PHOENIX, AZ 85007-2926
Employer	Department

DECISION
AFFIRMED

THE **EMPLOYER** petitions for a hearing from a Decision of the Department issued May, 15, 2006, which held that the Determination of Unemployment Insurance Liability, issued August 2, 2005, finding the Employer was a successor to part of a business of a liable employer, is final and binding because the request for reconsideration was not filed within the statutory period.

The Employer filed a timely petition for a hearing from the Department's Decision and the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-672(D), 23-733, and 23-724(A).

At the direction of the Appeals Board, a hearing was held on July 13, 2007, in Phoenix, Arizona, before William E. Good, Administrative Law Judge, for the purpose of considering the following issue, of which all parties were properly noticed:

> Whether the is Employer's request for reconsideration of the determination of Unemployment Insurance liability dated August 2, 2005, was timely filed.

The following persons were present at the hearing:

KATHERINE WHALEY	Department witness
ROBERT DUNN	Department counsel
X	Employer

At the hearing, the witnesses were sworn and testified. Board Exhibits No. 1 through 56 were admitted into the record as evidence.

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

1. A Determination of Unemployment Insurance Liability was sent by certified mail on August 2, 2005, to the Employer's last known address of record. The Determination informed the Employer that it was successor to part of a business of a liable employer. The Determination also advised the Employer that the Determination would become final unless written request for reconsideration wasfiled within fifteen days of the date of the Determination (Tr. pp. 13, 14, 17; Bd. Exh. 12). To be timely, a request for a reconsidered determination had to be filed by August 17, 2005.

2. By letter postmarked September 10, 2005, the Employer filed a request for reconsideration (Tr. pp. 14-16; Bd. Exhs. 16, 17).

3. On May 15, 2006, the Department issued a decision advising the Employer that the Determination of Unemployment Insurance Liability, issued August 2, 2005, finding the Employer was a successor to a part of the business of a liable employer, was final and binding because the request for reconsideration was not filed within the statutory period (Bd. Exh. 43).

4. By letter postmarked May, 30, 2006, the Employer filed a petition for a hearing or review of the Department decision (Bd. Exhs. 44, 45).

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

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

In this case, the Employer had until August 17, 2005, to file a timely request for a reconsidered determination of the August 2, 2005 Determination of Unemployment Insurance Liability. The Employer did not file such a request until September 10, 2005.

Arizona Revised Statutes § 23-724(A), made applicable by Arizona Administrative Code, Section R6-3-1713(C) is unambiguous, declaring that the determination "... shall become final ... ." In the absence of a timely request for reconsideration, the Appeals Board is without authority to interpret the statute other than according to its terms.

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

In Wallis v. Arizona Department of Economic Security, 126 Ariz. 582, 617 P. 2d 534 (Ariz. App. 1980) the court, interpreting A.R.S. § 23-773(B) held that a determination issued by a claims deputy becomes "final" unless there is a timely appeal to that determination. The court stated:

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

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

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

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

> A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
>
> 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion (emphasis added).
>
> * * *
>
> B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

* * *

> 4. If submission is not considered timely ... the Department shall issue an appealable decision to the interested party. The decision shall contain the reasons therefor, a statement that the party has the right to appeal the decision, and the period and manner in which such appeal must be filed under the provisions of the Arizona Employment Security Law (emphasis added).
>
> 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).

Here, the Employer has asserted no reason for the late filing of the request for reconsideration which, if accepted as true, would establish a condition which would cause the Board to consider the request timely.

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

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

The evidence establishes that no request for reconsideration of the Determination issued August 2, 2005, was filed within the time prescribed by A.R.S. § 23-724(A). The Employer's letter postmarked September 10, 2005, was beyond the appeal period. A request for reconsideration filed outside the statutory period may be considered timely only if the late filing is due to Department error or misinformation, postal error, or a change of address when there is no reason to notify the Department of the change.

Based upon the evidence before us, the Board concludes that the Employer failed to file a timely request for reconsideration of the Determination of Unemployment Insurance Liability issued August 2, 2005, and is not entitled to a hearing on the merit issues in this matter. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Decision of May 15, 2006.

The Determination of Unemployment Insurance Liability, issued August 2, 2005, is final and binding on the Employer.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

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

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

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

A copy of the foregoing was mailed on
to:

(x) Er: X Acct. No: X

(x) ROBERT J DUNN III
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, 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-1032685-001-B

In the Matter of:

X	EA TAX UNIT C/O ROBERT DUNN III ASST ATTY GENERAL- CFP/CLA 1275 W WASHINGTON ST SITE CODE 040A PHOENIX, AZ 85007-2926
Employer	Department

D E C I S I O N
DISMISSED

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

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

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

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

We have carefully reviewed the record.

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

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

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

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2. Parties may be represented in the following manner:

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

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

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

(x) Er: X Acct. No: X

(x) ROBERT J DUNN III
ASSISTANT ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON – SITE CODE 040A
PHOENIX, AZ 85007-2926

(x) JOHN NORRIS, CHIEF OF TAX
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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-1034930-001-B

In the Matter of:

X	EA UI TAX SECTION ROBERT J DUNN III ASSISTANT ATTORNEY GENERAL CFP/CLA 1275 W WASHINGTON – SITE CODE 040A PHOENIX, AZ 85007-2926
Employer	Department

DECISION

REVERSED IN PART
SET ASIDE IN PART

THE **EMPLOYER** petitions from the Reconsidered Determination issued by the Department on February 13, 2007, which affirmed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued April 7, 2005. Those Determinations held that the Employer is liable for Arizona Unemployment Insurance Taxes on the basis of gross payroll of at least $1,500 in a calendar quarter beginning January 1, 2003, and that services performed by individuals as telemarketing agents, constitute employment, and remuneration paid to those individuals constitutes wages.

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

At the direction of the Appeals Board, a hearing was held on June 14. 2007**,** in Phoenix, Arizona, before William E. Good, an Administrative Law Judge, for the purpose of considering the following issues, of which all parties were properly noticed:

1. Whether the employing unit is liable for Arizona unemployment insurance taxes beginning January 1, 2003, under A.R.S. § 23-613.

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

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

The following persons were present at the hearing:

ROBERT DUNN	Department representative
ALEX FAVELA	Department witness
X	Employer representative and witness
X	Employer witness
X	Employer witness

At the hearing, the witnesses were sworn and testified. Board Exhibits No. 1 through 15 were admitted into the record as evidence.

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

1. The Employer engaged the services of individuals to perform tasks as telemarketers to convince customers to take tours offered by certain resorts who hoped to sell interest in real property, such as a “time share”, to the potential customers (Tr. pp. 25, 28).

2. The telemarketers received a flat fee from the Employer in the form of a personal business check, for each “customer” that agreed to take the tour, provided the customer fit the resort’s profile. The profile required the customer to be a married couple within a certain age group. If a prospective customer was not accepted by the resort, the telemarketers did not receive any compensation. (Tr. pp. 30-34, 45, 48).

3. All the telemarketers had previously performed the same duties for resorts themselves and, in some

cases, had been employees of a particular resort (Tr. p. 29).

4. The Employer provided the workers with the needs of certain resorts and the worker used their own leads to contact potential customers for the tours (Tr. pp. 27, 33, 62, 63).

5. The resort paid a flat fee to the Employer for each customer. The Employer paid the worker a negotiated flat amount, reserving the difference for itself (Tr. pp. 34, 35).

6. Workers worked from their own homes (Tr. pp. 25, 35, 41).

7. The Employer advised workers of the needs of certain resorts. Workers were free to work on their own if they independently knew of a resort's needs for time share customers (Tr. p. 37).

8. The Employer provided the workers with Federal "Do Not Call" lists so the workers and the Employer would not be liable for calling potential customers who were on the Do Not Call lists (Tr. pp. 31, 37, 40, 41, 60, 61).

9. When a worker arranged a tour, the worker faxed his or her own reservation form to the Employer for transmittal to the resort (Tr. p. 41).

10. The workers did not receive a training guide from the Employer. The Employer did not provide supplies or reimburse workers for expenses which included charges for long distance telephone calls (Tr. pp. 41, 47).

11. Workers were free to perform similar services for other agencies or on their own, if they had some contact with resorts needing the services (Tr. pp. 44-46).

12. Approximately 50 workers performed the telemarketing service for the Employer. They were issued Federal W-9 forms and were given 1099 forms each year (Tr. p. 53).

13. The owner had her own materials to be certain she followed the resort's wishes. Those materials were not given to the workers (Tr. pp. 43, 57, 58, 62).

14. The owner passed along the information to telemarketers she assigned for a particular job so the telemarketers would know what type of potential customers to contact (Tr. pp. 63, 64).

15. The Employer ceased doing business in 2005, after receiving the Notice of Assessment (Tr. pp. 69, 70; Bd. Exh. 6).

The Employer contends that telemarketers, whose employment is in dispute in this case, are independent contractors and not employees.

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

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

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

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

organization, trade or business of the employing unit.

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

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

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

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

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

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

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

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

> independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.
>
> 2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit ". . . . solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.
>
> a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.
>
> b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
>
> c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

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

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

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

a. Authority over Individual's Assistants

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

The nature of the services did not require or contemplate the use of assistants.

We find that authority over individual's assistants is not a determinative element in finding that the worker is an employee or an independent contractor.

It is neutral in this case.

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or how he is to work. The control factor is present if the Employer has the right to instruct or direct.

Here, the individuals worked from their own homes and decided how much work they wished to perform.

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

c. Oral or Written Reports

If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the

employing unit, it indicates control in that the worker is required to account for his actions.

No reports were required by the Employer. The only communication about performance was the reservation submittal.

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

d. Place of Work

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

The workers provided their own methods of work free from control by the Employer who was interested only in the result.

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

e. Personal Performance

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

The worker may have had anyone make the telephone calls that would have generated a reservation.

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

f. Establishment of Work Sequence

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

The sequence of work, after the worker learned of the opportunity, was set by the worker.

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

g. Right to Discharge

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

Here, there was no evidence that the Employer or the worker could have done other than terminate any contract that may have been formed by the parties.

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

h. Set Hours of Work

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

The worker chose the amount of time spent on performing the services and when the services would be performed.

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

i. Training

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

The workers here all had prior experience in arranging tours. The Employer did not engage in training.

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

j. Amount of Time

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

Workers were free to perform services for others or to work on their own for potential clients.

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

k. Tools and Materials

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

The workers provided their own equipment and supplies.

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

i. Expense Reimbursement

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

Workers absorbed all incidental expenses in performing the work.

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

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

l. Availability to the Public

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

The workers were free to work for others.

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

2. Compensation

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

Here, the workers were paid on a job basis because that was the manner in which the Employer was paid for the services performed

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

3. Realization of Profit or Loss

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

A worker could have realized a loss based on work performed for a client of the Employer, but rejected because the customer did not meet the client's needs. A worker could realize a profit or loss by controlling expenses and performing more work to absorb fixed costs.

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

4. Obligation

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

The parties could end the relationship for any reason. There was no evidence that the parties were prevented from civil actions for breach of the relationship.

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

5. Significant Investment.

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

No significant investment was required by either party.

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

6. Simultaneous Contracts

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

The evidence did not establish that the workers had simultaneous contracts, although there was no prohibition on that practice.

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

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

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

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

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

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

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

Compliance with Instructions, Oral or Written Reports, Training Compensation, Simultaneous Contracts, Personal Performance, Right to Discharge, Set Hours of Work, Amount of Time, Obligation, Tools and Materials, Realization of Profit or Loss, Place of Work, Establishment of Work Sequence, Expense Reimbursement.

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

Authority over Individual's Assistants, Significant Investment, , Availability to the Public.

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

We have thoroughly examined the facts present in this case and have considered the relevant law and administrative rules as they are applicable to those facts. We have considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Section R6-3-1723(D) and (E), and conclude that the services performed by individuals as telemarketing agents do not constitute employment.

Having found that services performed by individuals as telemarketing agents do not constitute employment, we set aside that part of the Reconsidered

Determination that found that remuneration paid to individuals for the services performed, constitutes wages. Accordingly,

THE APPEALS BOARD **REVERSES** that part of the Reconsidered Determination issued on February 13, 2007, which found that Employer is liable for Arizona Unemployment Insurance Taxes on the basis of gross payroll of at least $1,500 in a calendar quarter beginning January 1, 2003, and that services performed by individuals as telemarketing agents, constitute employment.

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

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

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your

disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

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

2. Parties may be represented in the following manner:

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

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

A copy of the foregoing was mailed on
to:

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(x) ROBERT J DUNN III
ASSISTANT ATTORNEY GENERAL CFP/CLA
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(x) JOHN NORRIS, 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-1038700-001-B

In the Matter of:

X	X
Employer	Department

DECISION
AFFIRMED

The **EMPLOYER**, through counsel, petitions for a hearing from the Reconsidered Determination issued March 22, 2004, which affirmed the Amended Determinations of Unemployment Tax Rates for calendar years 1999 and 2000, issued on September 13, 2001.

The appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-732(A).

We have carefully reviewed the record in this case, and have considered the contentions raised in the petition.

In its initial review of this case, the Board determined that the taking of additional evidence was necessary to a proper adjudication of the issue of the correctness of the Amended Determinations of Unemployment Tax Rate for Calendar Years 1999 and 2000.

A hearing was held on August 7, 2007, at 10:00 a.m., before William E. Good, an Administrative Law Judge, to take evidence on the following issue:

> Whether the Determination of Unemployment Insurance Tax Rate for Calendar Years 1999 and 2000, issued September 13, 2001, is correct.

The following persons appeared at the hearing:

X Employer witness

X Employer witness
X Employer witness
X Employer counsel
KATHERIN WHALEY Department witness
ROBERT DUNN Department counsel

The witnesses present at the hearing were sworn and gave testimony. Documents marked and identified as Board Exhibits 1 through 38 were admitted into evidence.

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

1. A Determination of Unemployment Insurance Liability was sent by certified mail on January 15 1999, to the Employer's last known address of record. The Determination informed the Employer that it was a successor to a liable employer (X) and that its tax rate was based upon its predecessor's experience rating account. That had been transferred to the Employer, and the Employer would be held equally liable for any taxes, penalties or interest due and unpaid by the predecessor (Tr. p. 18; Bd. Exh. 5).

2. A Determination of Unemployment Insurance Liability was sent by certified mail on January 15 1999, to the Employer's last known address of record. The Determination informed the Employer that it was successor to another liable employer (X) and that its tax rate was based upon its predecessor's experience rating account. That had been transferred to the Employer, and the Employer would be held equally liable for any taxes, penalties or interest due and unpaid by the predecessor (Tr. p. 18; Bd. Exh. 6).

3. A Determination of Unemployment Insurance Liability was sent by certified mail on January 15 1999, to the Employer's last known address of record. The Determination informed the Employer that it was successor to another liable employer (X) and that its tax rate was based upon its predecessor's experience rating account. That had been transferred to the Employer, and the Employer would be held equally liable for any taxes, penalties

or interest due and unpaid by the predecessor (Tr. p. 18; Bd. Exh. 7).

4. The Employer filed a late request for reconsideration of those determinations and they became final (Tr. pp. 18, 19, 23; Exh. 8).

5. Despite the Employer's late appeals from the Determinations of Liability, and based on the Employer's assertion that the Employer's letter of January 7, 1999 (Tr. p. 17; Bd. Exh. 2) was not correct, the Department amended the previously issued Determinations of Unemployment Tax Rate for Calendar Years 1999 and 2000. The Department did this by reversing the transfers and stating the true functions of the Employer (Tr. pp. 32, 33).

6. An Amended Determination of Unemployment Tax Rate for Calendar Year 1999 was sent by mail on September 13, 2001, to the Employer's last known address of record. The prior tax rate had been .75%. The amended Tax Rate was 2.70%. This was because the Employer had not reported any wages for the period in question, and had a zero reserve ratio. The Determination advised the Employer that the Determination would become final unless a written request for review was filed within 15 days of the mailing date as provided in A.R.S. § 23-732 (Tr. pp. 24-26; Bd. Exh. 12).

7. An Amended Determination of Unemployment Tax Rate for Calendar Year 2000 was sent by mail on September 13, 2001, to the Employer's last known address of record. The Employer's prior tax rate for 2000 was .87%. The amended rate was 1.61%. The Determination advised the Employer that the Determination would become final unless a written request for review was filed within 15 days of the mailing date as provided in A.R.S. § 23-732 (Tr. pp 22, 24; Bd. Exh. 11).

8. On September 26, 2001, the Employer filed a timely request for review of both Amended Determinations of Unemployment Tax Rate (Bd. Exh. 13).

9. On March 22, 2004, the Department issued a decision advising the Employer that the Amended Determinations of Unemployment Tax Rates for Calendar Years 1999 and 2000 were correctly computed (Bd. Exhs. 19, 20). The Employer timely appealed (Bd. Exh. 21).

10. The Reserve balance for the Employer as of June 30, 1998, was $X. The Unemployment Insurance taxes paid by the Employer for the period June 30, 1998 through July 31, 1999, were $X. The Employer's share of charges for benefits paid from June 30, 1998 through July 31, 1999, was $0.00. The reserve balance as of June 30, 1999, was $X. Dividing this reserve balance by the average taxable payroll of the Employer for the three year period ending June 30, 1999, ($X), gives a reserve ratio of 1.29. The adjusted tax rate for 2000, for such a reserve ratio, is 1.61% (Bd. Exhs. 9-11).

The issue properly before the Board is whether the Determination (sic) of Unemployment Insurance Tax Rate for Calendar Years 1999 and 2000, issued September 13, 2001, is (sic) correct.

Arizona Revised Statutes § 23-732(A) provides in pertinent part:

> The department shall promptly notify each employer of his rate of Contributions as determined for any calendar year. The determination shall become conclusive and binding upon the employer unless, within fifteen days after the mailing of notice thereof to his 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 his reasons therefor. The department shall reconsider the rate... . The Employer shall be promptly notified of the department's denial of his application, or of the department's redetermination... .

Arizona Revised Statutes § 23-729, provides in pertinent part:

> If an employer's account has been chargeable with benefits throughout the twelve consecutive calendar month period ending on June 30 of the preceding calendar year, the employer shall have a rate computed in accordance with section 23-730. ...

Arizona Revised Statutes § 23-730, provides in pertinent part:

> For calendar year 1985 and each calendar year thereafter, variations from the standard rate of contribution shall be determined in accordance with the following requirements:
>
> * * *

In this case, the evidence of record establishes that the figures on Board Exhibits 11 and 12 are correct. The Employer did not dispute the figures, but did object to the parts of the payroll being attributed to the Employer. The Department used the information given to it by the Employer just prior to issuance of the September 13, 2001 Amended Determinations (Tr. p. 20; Bd. Exhs. 9, 10). For 2000, an unadjusted rate was obtained from paragraph 2 of Arizona Revised Statutes § 23-730, in effect at the time. Thereafter, an adjusted rate of 1.61% was obtained from the adjustment method of Arizona Revised Statutes § 23-730, in effect at the time. Accordingly,

THE APPEALS BOARD **AFFIRMS** the decision of the Department based upon the evidence of record.

The Employer's application for review and redetermination of the Determination of Unemployment Tax Rate for Calendar Years 1999 and 2000 was properly denied. The Employer's tax rate for calendar year 1999 is 2.70%. The Employer's tax rate for calendar year 2000 is 1.61%.

DATED:

APPEALS BOARD

_____
WILLIAM G. DADE, Chairman

_____
HUGO M. FRANCO, Member

_____
MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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2. Parties may be represented in the following manner:

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

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

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By: _____
For The Appeals Board