Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1038677-001-B

In the Matter of:

X

AZ DES EA, UI TAX SECTION
% ROBERT J DUNN
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST - S C 040A
PHOENIX, AZ 85007-2926

Employer

Department

DECISION
AFFIRMED

THE **EMPLOYER,** through its authorized representative, petitioned on November 7, 2005, for hearing from the Reconsidered Determination issued on October 26, 2005, which affirmed the Determination of Liability for Employment or Wages and Notice of Assessments issued by the Department on April 27, 2005. The Reconsidered Determination held in part that:

> ... the services performed by the worker at issue: [X], constituted employment and remuneration received constituted wages for the quarters ending March 31, 2004, June 30, 2004, September 30, 2004, and December 31, 2004.
>
> * * *
>
> ... sufficient factors of control as set forth in A.A.C. R6-3-1723(d)(2) are present here, and that the indicia of independence set forth in A.A.C. R6-3-1823(E) are notably absent. Consequently, the worker's services ... constituted employment and the remuneration paid to the worker constituted wages.

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

At the direction of the Appeals Board and following proper notice to all parties, a hearing was conducted before ROBERT T. NALL, an Administrative Law Judge, at **10:00 a.m.,** Mountain Standard Time, at 1140 E. Washington Street, [Suite 104], in Phoenix, Arizona, on **Thursday, July 19, 2007**. The issues set for hearing were:

1. Whether the employing unit is liable for Arizona Unemployment Insurance taxes pursuant to the Notice of Assessment Report dated April 27, 2005, for the quarters ending March 31, 2004; June 30, 2004; September 30, 2004; and December 31, 2004, pursuant to A.R.S. § 23-613.

2. Whether services performed by the individual constituted "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 the individual 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.

4. Whether the petition for hearing is valid, having been filed on behalf of the Employer entity pursuant to a limited Power of Attorney dated April 21, 2005. *See*, Rules of the Supreme Court of Arizona, Rule 31((d)(1).

The following persons appeared at the hearing: a Department witness who testified, and the Assistant Attorney General as the Department's counsel. The Employer did not appear at the scheduled hearing. At the hearing, Board Exhibits 1 through 18 were admitted into the record as evidence.

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

1. The Employer filed a joint tax application on September 7, 1990, for its operations in the industry of "real estate sales". The Employer started its business operations during June 1983. (Bd. Exh. 1). The Employer is incorporated in Arizona, and has operated with two individuals serving as its officers: a person who had been a licensed agent for nearly 30 years who served

as President/CEO/Treasurer, and another person who served as the Vice-President/Secretary (Bd. Exhs. 2-4, 6, 8).

2. The two corporate officers clearly were employees, who came into compliance amicably regarding assessments for all four quarters of tax year 2004 (Tr. p. 7; Bd. Exh. 6F).

3. During 2004, the Employer also paid three individuals for accounting, advertising, and promotional services. No questionable remuneration was found for these three persons (Bd. Exhs. 5D, 6F).

4. During 2004, the Employer also paid $29,355 to a fourth individual named "X", who worked exclusively for the Employer throughout 2004. She also performed services during 2003. She did not disclose existence of any other clients during most of 2004. She performed clerical duties under the instruction of the Employer's corporate president, which included: (a) setting up the office with real estate forms; (b) setting up the contract filing system; (c) inputting home listings; (d) setting up appointments with potential clients; (e) sending out mailers to targeted public recipients, and (f) helping with paperwork, filing and running errands. (Bd. Exhs. 5C, 6G, 8).

5. On at least nine occasions during 2004, the Employer paid bonuses to the clerical worker, X, in addition to weekly payments paid to her based upon hours she had worked for the Employer. The Employer paid X for working at least 30 hours per week throughout 2004. (Bd. Exhs. 5B, 6H)

6. The Employer issued a 1099 report for its 2004 payments to X, who wanted to be an independent contractor with secretary/receptionist duties, but who held a title of "Real Estate Administrative Marketing Assistance". The Employer's 1099 was the only 1099 report received by X for 2004 (Bd. Exhs. 6A, 6F, 6G, 8). The Department found: "This employer did not withhold any taxes from the wages paid to [X]. She could quit or be terminated at anytime without the employer incurring any liability. [X] is not licensed or bonded ...". (Bd. Exh. 6C).

7. Some of the services performed by X were performed from her own home, but were under the direction of the corporate president. X did not negotiate her own salary, which was to be paid every week at the hourly rate of $15.00 that was established by the Employer, plus occasional bonuses as additional compensation. X did not advertise her own services to the general public throughout 2004. X did not claim or receive reimbursement for any expenses incurred as she performed services. (Bd. Exhs. 6G, 8, 9).

8. Expenses paid by X included her gas, cell phone, fax line, and Internet bill. She did not retain any log of services performed or hours spent, because she discarded her time tracking records (Bd. Exh. 8B). X had no investment in the business of the Employer, and the business provided the X with materials needed to perform her assigned tasks. The Employer allowed X to perform tasks on her own schedule. (Bd. Exh. 9).

9. A Determination of Liability for Employment or Wages was issued to the Employer on April 27, 2005 (Bd. Exh. 7).

10. Following a tax audit, the Department concluded and confirmed by a "Reconsidered Determination", that X was an employee of the Employer, and that remuneration paid to her constituted payment of wages for the quarters ending March 31, 2004; June 30, 2004; September 30, 2004; and December 31, 2004. The Department assessed taxes for all four quarters of 2004, plus penalties and interest (Bd. Exh. 13).

The Employer contended that X "... made herself available to no less than six (6) other real estate agents ... worked primarily from her home and had full control over the hours she work and the hours she billed for." (Bd. Exh. 12B). However, the documents faxed by its authorized representative on December 7, 2005, are completely without foundation, and lack the explanatory support necessary to make them relevant to the issues under consideration (Bd. Exh. 16A-T). We note that nothing in Board Exhibit 16 represents any date in the first seven months of 2004, and nothing demonstrates any correspondence with the Employer.

The Employer did not present any credible, authenticated documentation identifying any other work performed by X during 2004 for anybody other than the Employer, and it did not present any documented "... agreement that Ms. [X] is to be treated as an independent contractor." The Employer did not present any billings or time records to itself from X, and it presented no supporting documents to demonstrate that her work "... is taken on a job by job basis in which she has the determination of the jobs priority and the method in which the job is accomplished." (Bd. Exh. 12B). Nothing established that X ever sought a taxpayer identification as an entity, ever billed anybody else for her services during 2004, ever sought a business license, ever had anybody substitute for her or perform any work under her, or avoided any behavioral controls. As its authorized representative, the Employer's accountant described her work as "receptionist" (Bd. Exh. 12A).

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 provides in part as follows:

> Employee; definition; exempt employment
>
> A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:
>
> 1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation.
>
> 2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the organization, trade or business of the employing unit.
>
> 3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.
>
> * * *
>
> D. The following services are exempt employment under this chapter, unless there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection A of this section, which is distinct from any evidence of direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:
>
> 1. Services which are not a part or process of the organization, trade or business of an employing unit and which are performed by an individual who is not treated by the employing

unit in a manner generally characteristic of the treatment of employees.

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

Arizona 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. <u>The existence of independence shall be determined by the preponderance of the evidence</u>.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit ". . . solely because of a provision of law regulating the organization, trade or business of the employing unit". 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: (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): (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant

investment in the facilities used by him; and (6) whether the individual has simultaneous contracts with other persons or firms.

The State bears the burden of proving the employment status and designation as wages. In this case, the Employer did not appear at the scheduled hearing and presented nothing to contradict the credible testimony of the Department's witness. 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.

Nothing indicates that X used paid assistants or was allowed to utilize a substitute for the tasks assigned by the Employer. The nature of the work involves personal services by highly-experienced or trained individuals. This factor indicates an employment relationship.

b. Compliance with Instructions

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

The nature of the duties were specified by the Employer, who was a licensed real estate salesperson. The Employer expected to be informed when tasks were deemed completed, and nothing indicated that the Employer paid X without being presented an accounting or record of which tasks were completed or missed. These elements of control are not affected by where the tasks were performed, even if X did her work from her own home. This factor indicates an employment relationship.

c. Oral or Written Reports

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

The task assignments came from the Employer. Nothing indicates that X initiated any tasks independently. The Employer paid her by the hour, based upon a report of how many hours were spent on assigned tasks. This factor indicates an employment relationship.

d. Place of Work

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

The Employer and X contended that tasks assigned to X by the Employer were performed off the Employer's premises without direct supervision. However, the Employer's willingness to allow its work to be performed off-premises does not negate or outweigh all the other indicators of project control by the Employer, such as acknowledgement that all materials or supplies were provided by the Employer and the Employer's statement: "I know what she does for me as I tell her what I need her to do by phone, fax or email. ... I'm organized and easy to get along with and [X] likes to do my work ... so she probably gives my work priority." (Bd. Exh. 9). This factor indicates an employment relationship.

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.

Only X was entitled to provide services as the Employer assigned tasks. Substitution was not possible. This factor indicates an employment relationship.

f. Establishment of Work Sequence

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

The Employer allowed X freedom to prioritize her various assignments without specifying "... when she does it." (Bd. Exhs. 9, 12B). The reduced control inherent in this factor indicates independence.

g. Right to Discharge

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

The Employer could replace X at any time without incurring a penalty. No contractual penalty is specified for termination, including liquidated damages, as would be common in an independent relationship (Bd. Exh. 6C). This factor indicates an employment relationship.

h. Set Hours of Work

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

Irregular hours were permitted on a task-specific basis. 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 by the Employer because X already possessed the appropriate skills and experience. 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 she chooses.

The Employer paid X for no less than 30 hours of work for any week during 2004. For many weeks, X told the Employer she had worked 40 hours and she was paid 40 hours. The rate at which X was paid remained the same, as she was paid bonuses in hopes she would not ask for a higher hourly rate. Unrebutted, credible evidence established that X worked full-time for the Employer over most of 2004. This factor indicates an employment relationship.

k. Tools and Materials

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

All necessary materials were supplied by the Employer. X provided all tools. This factor is neutral.

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.

All necessary materials were supplied. No evidence was presented that expenses were reimbursable. This factor indicates employment.

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.

Nothing indicates that X advertised her services, offered business cards or her own letterhead, sought a business license, maintained her own business premises or office hours held out to the public, or contacted the public on her own behalf during most or all of 2004. This factor indicates an employment relationship.

2. Compensation

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

Payment was calculated on an hourly labor or per procedure basis, based upon a report of hours expended by X. This factor indicates control and an employment relationship.

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 Employer neither asked nor allowed X to invest anything beyond her personal time and efforts. Enhanced efforts beyond the requested assignments by the Employer would not result in a higher payment, and nothing indicates that X could suffer a loss from rejection of her work product or from lack of success by the Employer. This factor indicates control and an employment relationship.

4. Obligation

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

The Employer could discharge X, and she could quit, at any time without penalty. The lack of liquidated penalties for non-completion indicates an employment relationship.

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 sole investment implied by the evidence involved personal time and efforts plus transportation, cell phone, fax line and Internet or e-mail access. Many citizens possess these same communication tools without business purposes. No tools or expenses were designated solely for business purposes. Such investments were neither particularly large nor significant. Arizona law did not require X to be licensed or bonded to perform the tasks assigned to her by the Employer. This factor indicates an employment relationship.

6. Simultaneous Contracts

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

The Employer did not restrict X from working elsewhere. This factor is neutral, since nothing indicates she worked elsewhere during 2004.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), other factors not specifically identified in subsections of the rule also may be considered. 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. All sections, including the taxing section, should be given a liberal interpretation ... [Emphasis added].

Regarding the issues in this case, a liberal interpretation opposes restricting access to Unemployment Insurance benefits for a worker who has separated from a job through no fault of the worker. Nothing in this case establishes that X applied for benefits, but designating her situation as independent contractor status would prevent her from using her income as wages and potentially from receiving Unemployment Insurance benefits.

In this case, the factors that tend to support the Employer's contention of independent contractor relationship with X during any quarter of 2004 include: (1) the implied lack of performance reviews by the Employer; and (2) the implied lack of performance instructions provided to X by the Employer.

Factors that are characteristic of independence also include: (3) the absence of scheduled hours for work set by the Employer; (4) the lack of extensive training and meetings with the Employer; (5) the ability to enter into simultaneous contracts elsewhere; and (6) permission to work from home. However, we conclude that the evidence of employee status or temporary employment service status outweighs these factors.

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

* * *

> C. Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit shall be deemed to be engaged by the employing unit for all the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work. ...
>
> D. Notwithstanding any other provision of this chapter, whether an individual or entity is the employer of specific employees shall be determined by section 23-613.01, except as provided in subsections E and G of this section with respect to a leasing employer or a temporary services employer. [Emphasis added].

* * *

The facts of this case do not establish that the relationship fits such exceptions to the control requirements of Arizona Revised Statutes, § 23-613.01. We conclude that the State met its burden to establish that these requirements were met, particularly because the Employer set the assignments, set the rate of pay, paid X from its own accounts, and had other employees.

We conclude that the factors tending to support an employer/employee relationship in this case include: (a) the lack of any statutory exclusion from employee status; (b) payment based on hours expended upon tasks assigned by the Employer "... as I tell her what I need her to do by phone, fax or email" (Bd. Exh. 9); (c) award of bonuses by the Employer to supplement X's income, which would be unlikely in a purely independent contractor relationship; (d) the lack of any license or professional liability requirement imposed upon X; (e) the requirement to personally perform assigned tasks and the lack of paid assistants; (f) the lack of any advertising of her business to the public by X; and (g) the lack of significant investment by X in the Employer's enterprise. We find that no risk of loss to X, or no potential for increasing her income through greater efforts, was demonstrated beyond the opportunity for bonuses to be paid at the discretion of the Employer. In addition, no contract or other document specified

an independent contractor relationship with X. The Employer is inconsistent with its treatment of its other employees as compared to other clearly independent professionals.

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 the Employer expressly restricted X from working elsewhere, and the fact that both parties provided tools and materials to complete the work. These factors were neutral in this case.

We have thoroughly examined the factors established by the evidence in this case, and we have considered the relevant law and administrative rules as they are applicable to the relevant evidence. 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 business enterprise consists of licensed real estate sales, and the Employer paid X on an hourly basis plus bonuses at its discretion, for performing clerical tasks. We conclude that the relationship was demonstrated to be other than an independent contractor relationship.

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 X based upon hours worked upon tasks assigned by the licensed real estate professional by means of phone or fax or e-mail, according to an established rate of payment. We conclude from the evidence that such remuneration paid to X during the four quarters of 2004 constituted wages, as contemplated by the applicable statutes and administrative rules. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination issued on October 26, 2005 (Bd. Exh. 13).

The Determination of Liability for Employment or Wages issued on April 27, 2005, stands unmodified.

1. Services performed by X throughout 2004 constituted **Employment** as defined in A.R.S. §§ 23-613.01, 23-615 or 23-617, and that individual was an **Employee** within the meaning of A.R.S. § 23-613.01 and Arizona Administrative Code, Section R6-3-1723.
2. The remuneration paid to X 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 March 31, 2004 through December 31, 2004, under A.R.S. § 23-613.

The Notice of Assessments issued on April 27, 2005, stands unmodified.

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

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. The 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. A written 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 request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 229-2806.

A copy of the foregoing was mailed on
to:

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

(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-1069098-001-B

In the Matter of:

X

STATE OF ARIZONA ESA TAX UNIT
% ROBERT DUNN III
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST SC 040A
PHOENIX, AZ 85007-2976

Employer

Department

D E C I S I O N
DISMISSED

THE **EMPLOYER,** through its authorized representative, 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 Employer's 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, or subsequent to, the Employer's withdrawal.

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

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. The 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. A written 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 request for review is a prerequisite to any further appeal. If you have any questions about filing a written request for review, call the Appeals Board at (602) 229-2806.

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

(x) 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

By: _____
For The Appeals Board

Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1031509-001-BR

In the Matter of:

X

STATE OF ARIZONA E S A TAX UNIT
% ROBERT DUNN III
ASST ATTORNEY GENERAL CFP/CLA
1275 W WASHINGTON ST, SC 040A
PHOENIX, AZ 85007-2976

Employer

Department

D E C I S I O N
AFFIRMED UPON REVIEW

The **EMPLOYER** requests review of the Appeals Board decision issued on February 29, 2008, which affirmed the Reconsidered Determination of Liability for Employment or Wages issued by the Department on June 27, 2002, and held:

1. The employing unit is liable for Arizona Unemployment Insurance taxes under A.R.S. § 23-613, pursuant to:
   a. the NOTICES OF ASSESSMENT dated June 27, 2002; and
   b. the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES dated June 27, 2002, for the quarters ending June 30, 1999 through December 31, 2001.
2. The services performed by individuals as landscapers and maintenance workers constituted "employment" effective April 1, 1999 to the present, 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. All forms of remuneration paid to individuals for such services constitutes "wages", as defined in A.R.S. § 23-

622, which must be reported and upon which State taxes for Unemployment Insurance are required to be paid.

4. The Employer **is liable** for Arizona Unemployment Insurance taxes on wages for the quarters ending June 30, 1999 through December 31, 2001, under A.R.S. § 23-613.

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 does not cite to the evidence of record by exhibit number or by page of the transcript. The only reference to any legal authority by the Employer is its reference to the Registrar of Contractors requirement that all individual projects over $1000 must have a license, without a citation to the source of its quotation or to the law.

Instead, the Employer contends that, after eliminating neutral factors, more factors listed in our prior decision indicated independence than indicated employment. The Employer also contends that it provided items to the field auditor that were not offered or admitted as evidence at the scheduled hearing. Further, the Employer seeks to distinguish between its contracted work for home owner associations (HOAs) and its belatedly-asserted "... extra HOA work outside the contract and individual home owners". The Employer contends that its primary business involves property management of homes, rather than HOA common area maintenance. Contrary to such contention, nothing establishes that the laborers met that definition by performing "casual labor" outside the Employer's typical business. Contrary to the Employer's new assertion, no credible evidence establishes existence of "extra HOA work outside the contract" in any amount. Rather, the Employer's witnesses acknowledged that its clients were required by law to deal directly and solely with the Employer under a written contract with the Employer, because the Employer is a registered and licensed contractor.

In the request for review, the Employer submits additional information and arguments that were not presented at the Appeals Board hearing. The Employer has offered no reason for submitting the information and arguments after the hearing. On review, this Board confines itself to the record established at the hearing. This Board elects not to allow the introduction of additional information, unless it can be shown that such information could not have been presented at the hearing with the exercise of due diligence, or unless the facts of the case establish some unusual circumstances which would justify supplementing the record and deciding the case on a new record.

This record does not establish either ground. In addition, the late-submitted information must be relevant to the only issues properly before us on review, which involve the specific factors established by law for resolving the Employer's appeal from the Reconsidered Determination of Liability for

Employment or Wages. *See*, A.R.S. § 23-674(D). The references to activities of other agencies have no bearing on the applicable provisions of laws regarding the Employer's status as an employer and its payment of wages. Here, the Employer had sufficient notice of the issues to be addressed at the scheduled hearing to have previously produced the information now submitted for inclusion in the record. The Appeals Board will not exercise its discretion to supplement this record under the facts of this case.

In its prior decision, the Appeals Board adopted its own findings of fact, reasoning and conclusions of law. In arriving at the decision, the Appeals Board applied the appropriate law, A.R.S. §§ 23-615, 23-617, 23-622(A), and 23-613.01(A), and Arizona Administrative Code, Sections R6-3-1723 and R6-3-1705(B), and case law, to the facts in this case, and issued its decision.

Contrary to the Employer's contention, the analysis required by applicable laws is not a mere counting game. The detailed analysis of each crucial factor expressed in our prior decision clearly conveys the requirements of law. The Employer's references, asserting that "independent businesses" existed, unreasonably ignore the paucity of evidence establishing that any of its workers operated any independent businesses. The Employer was afforded ample opportunity to establish that the persons it hired to perform projects operated independent businesses, or held themselves out to the public as independent contractors. The evidence produced (specifically, the absence of business cards or contracts or business licenses or business premises or business utilities) clearly was insufficient to establish the existence of independent businesses outside the employment relationship of the Employer with its laborers.

The Employer belatedly contends that contracts, or other documents, were provided to the field auditor. However, the Employer did not take the opportunity afforded at the hearing to present any documents that would tend to support an inference that it had independent contractor agreements with any of its laborers. The Employer's witness testified that contracts were entered on an annual basis, but did not specify whether the contracts to which he referred were with its clients or with other persons (Tr. p. 56). The inference is that the Employer contracted annually with its HOA customers, but was paid differently from quarter to quarter. Further, the Employer's witness testified: "... we provide no tools and they know they're going to ... lose their job if they don't do a good job" but the Employer would simply reassign the worker to another project if an HOA did not want that worker to return (Tr. pp. 59, 64, 65). He testified that sometimes he buys supplies for use by "... the guys", and then the Employer bills the HOA (Tr. p. 60).

The Employer contends that the laborers identified by and addressed by our previous decision, should be lumped together with actual independent businesses such as "electricians, plumbers, pool maintenance, bricklayers, mason, concrete workers, roofers, and pest control companies that we use in our Winter Visitor

Property Management". To the contrary, unlicensed laborers who operate under the Employer's contract with its clients, and who are paid "commissions" from the client's payments to the Employer, differ substantially from such actual businesses. Many such businesses would operate under their own business licenses or might be registered contractors. The Employer has missed the point of the Department's Reconsidered Determination and our previous decision. Specifically, the situations involving laborers addressed in our decision are distinctly different from the use of actual independent businesses who clearly have contractual relationships with others, but also have a contractual relationship with the Employer.

The Employer acknowledged that it does business as a licensed landscape contractor who must remain legally responsible for all sales transactions, particularly because its clients are required by law to pay a licensed landscape contractor for the services rendered (Tr. pp. 57, 63). The Employer did not pay any of its laborers, who actually performed the physical tasks pursuant to the Employer's contracts with its clients, until the worker provided time records. The Employer called its payment to its laborers a "commission" (Tr. p. 51). If an HOA client did not like a laborer, the Employer would "move him out" or "... put him in a different slot or just have reduced hours, whatever he wants to do" so the worker would not actually be fired (Tr. pp. 65, 66). The Employer's witness acknowledged the amounts reported as paid to its laborers were accurate (Tr. p. 54). The Employer's witness testified that none of the people listed on the reports of wages were licensed contractors (Tr. p. 49).

Legally, such payments are wages. Legally, the workers who perform the labor needed for the Employer to fulfill its contracts with its clients are employees. The Employer would adjust the hours or re-assign a worker elsewhere if a HOA client did not like the laborer's work. The essential factors of control by the Employer were adequately established by the uncontroverted evidence in this case.

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

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

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

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