

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1069109-001-B

In the Matter of:

XXXXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
DISMISSED

THE **EMPLOYER** petitioned for a hearing from the Department's letter dated November 30, 2005, which referred to the late response by the Employer to the Notice to Employer, UB-110. The Department's letter also referred to the Employer's late application for reconsideration of the Notice of Benefit Charges, UB-602. The Department's letter contained the following rulings and instructions:

... the Notice to Employer, UB-110, was mailed to the address of record for your firm on 07/14/2005. A protest to payment of benefits was not returned timely, therefore, your response to the Notice of Benefit Charges, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant.

This determination on the untimeliness of your response becomes final unless an appeal is filed within fifteen (15) days after the date of this letter. ...

Arizona Revised Statutes (A.R.S.) § 23-732(B) provides that the Notice of Benefit Charges shall become final unless an application for redetermination is filed within fifteen (15) days of the date of the Notice. Department Regulation R6-3-1404 requires that the postmark date of the application be considered the date of mailing. Your application was postmarked October 25, 2005, 18 days after the date of the Notice. Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated October 7, 2005 must be held to be final.

This decision on the untimeliness of your application becomes final unless a written request for review by the Unemployment Insurance Appeals Board is filed within fifteen (15) days of the date of this letter. ...

* * *

The Employer's petition was dated December 19, 2005, and was filed by mail on December 20, 2005, according to the postmark. The Appeals Board has jurisdiction to consider the timeliness of the petition for review filed in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD FOUND that the taking of evidence was necessary to a proper adjudication of the issues under review. Accordingly, a telephone hearing was convened before ROBERT T. NALL, an Administrative Law Judge, on **Tuesday, August 12, 2008**. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely petition for review by the Appeals Board of the Department's letter.
2. If a timely petition for review was filed, whether the Employer filed a timely application for redetermination by the Department, pursuant to A.R.S. § 23-732(B).
3. If both a timely petition for review and a timely application for redetermination were filed, whether the Notice of Benefit Charges, UC-602, dated July 14, 2005, became final prior to the filing by the Employer of an application for reconsideration. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.

On the scheduled date of hearing, an Employer witness appeared and testified. Counsel for the Department and a witness for the Department also appeared. Exhibits 1 through 10E were admitted into evidence. We have carefully reviewed the record.

THE APPEALS BOARD FINDS that we are unable to proceed to a review on the merits of this case, because the Employer has failed to comply with the regulatory prerequisites that would entitle the Employer to a review of the Department's denial of its application for redetermination of a Benefit Charge Notice.

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

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

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

- B. Petition for hearing or review
 - 1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);

- b. The rate of contributions (A.R.S. § 23-732); ... [Emphasis added].

* * *

The record reveals that a copy of the decision of the Department was sent by mail on November 30, 2005, to the Employer's last known address of record. The petition to the Appeals Board, however, was filed, as indicated by the postmark, on December 20, 2005 (Bd. Exh. 2), which is more than 15 days from the date of the decision. The petition, therefore, was not filed within the statutory time.

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

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

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

* * *

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

* * *

In the petition, the Employer sought "... to protest paying any benefits for this previous employee." The Employer offered no explanation for filing a late petition for review (Exh. 1A). The Employer's witness attributed the previous late filing on October 24, 2005, to "probably" waiting for the accountant, but the witness wasn't here and did not "... know why it was so late." (Tr. p. 13). The letter was mailed to the Employer's post office box, which was its then-current last known address (Tr. p. 9). The Employer's witness offered no additional explanation for filing a late petition for review.

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

THE APPEALS BOARD **DISMISSES** this appeal. The decision of the Department issued on November 30, 2005, remains in full force and effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing by mail, by fax, or by Internet within 30 calendar days from the mailing date of the Appeals Board's decision. When filing by Internet, go to www.azui.com, and then click "File an Appeal". (The option of filing a request for review by Internet is only available to claimants at this time). The request for review is considered filed on the date: (A) shown by the postmark when mailed via the United States Postal Service to the Appeals Board, 1140 E. Washington Street, Box 14, [Suite 104], Phoenix, Arizona 85034, or to any public employment office in the United States or Canada; (B) received by fax at the Appeals Board's fax number: (602) 253-9473; or (C) received via the Internet. A written request for review may also be filed in person at the Appeals Board or delivered to the Appeals Board by a means other than the United States Postal Service. If the request for review is filed in person or delivered by a means other than the United States Postal Service, the request for review shall 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. An attorney authorized to practice law in the State of Arizona may represent any party. A duly authorized agent, who is charging a fee, but is not an attorney, may also represent any party, provided that an attorney authorized to practice law in the State of Arizona is responsible for and supervises such agent.
3. The request for review must be signed by the proper party, except when the request for review is filed via the Internet. A request for review filed by mail, by fax, or via the Internet must include a memorandum containing appropriate citations to the record, rules, and other authority, which states the reasons why the Appeals Board's decision is in error. Upon a claimant's or an employer's motion, and for good cause, the Appeals Board

may extend the time for filing a request for review. Any motion for an extension of time to submit a request for review must be filed within 30 days of the Appeals Board's decision.

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

A copy of the foregoing was mailed on
to:

(x) Er: XXXXX Acct. No: XXXXX

(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-1030878-001-BR

In the Matter of:

XXX

AZ DES EA, UI TAX SECTION
% ROBERT J DUNN
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1275 W WASHINGTON ST - SC 040A
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Employer

Department

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DECISION
AFFIRMED UPON REVIEW

The **DEPARTMENT**, through counsel, requests review of the Appeals Board decision issued on January 17, 2008, which reversed the Reconsidered Determination issued by the Department on July 6, 2005, and held:

1. Effective January 1, 2000, services performed by individuals as pet-sitters does 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.
2. The remuneration paid to individuals for the services performed does not constitute **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 not liable** for Arizona Unemployment Insurance taxes on wages for the quarters ending March 31, 2000 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). As suggested by counsel for the business entity in this case in his response to the Department's request for review, we refer to the business entity as the "Business".

In the request for review, the Department, through counsel, contends that A.R.S. § 23-614(E) justifies its conclusion "... that workers who are not completely independent shall be deemed employees regardless of whether it is the temporary services employer or its client that is exerting control over the worker." Counsel summarizes that: "... control is a factor regardless of who is exercising it." However, the Department's counsel did not point out in what way the workers involved with this Business "... are not completely independent" of the Business. The Department's counsel did not point out what statute deems the Business in this case to be a "temporary services employer". From the evidence, we conclude the Department did not meet its burden to establish that labeling the Business as a "temporary services employer", would be proper.

The Department, through counsel, disagrees with the Appeals Board's analysis of control factors listed in Arizona Administrative Code, Section R6-3-1723(D). Specifically, the Department contends that instructions provided by the pet owners, rather than by the Business, "... clearly shows control exercised by the pet owners and favors finding an employment relationship." We conclude from the evidence that control exercised by the pet owners does not tend to establish an employment relationship between the pet sitters and the Business that is the subject of this case. The Reconsidered Determination in this case did not involve adjudicating any relationship between the pet owners and the pet sitters. Whatever relationship may exist between the pet owners and the pet sitters was not before the Appeals Board for consideration or for review, and has no pertinence to this case.

The Department, through counsel, contends that the "Oral or Written Reports" criterion favors finding an employment relationship. This contention seems based on existence of information used to prepare invoices to the client pet owners (Tr. p. 56; Bd. Exhs. 11, 17). We disagree, because merely expecting a checklist reporting dates on which services were performed is not an exercise of "control" unless the pet sitters are instructed by the Business to perform certain services on certain dates or in a certain manner. The Business did not supervise the work in any way (Tr. pp. 28, 42). The Department did not meet its burden to establish that any such instructions ever existed.

The Department, through counsel, contends that "... work was required to be performed on the pet owners' premises and the pet sitters lacked the requisite independence of action to perform their services at another location of their own choosing." Intriguingly, no citation to the evidence of record was presented to support this contention that the "Place of Work" criterion favors finding an employment relationship. Most of the drivers supply their own vehicles, automobile insurance, gas, computers and grooming supplies without any reimbursement from the Business (Tr. pp. 30, 31). If their client doesn't pay for services or if they perform a poor job and the client doesn't pay, then the worker does not get paid for the job (Tr. p. 31). The pet sitters work on their own schedules without instructions from the Business, and can obtain their own substitutes (Tr. pp. 42, 43). The clients provide codes and keys to access their premises directly to the pet sitters (Tr. pp. 73, 79, 80). The Business does not provide any place of work. We conclude from the evidence that, because the Business does not provide any place of work, this factor favors independence.

The Department, through counsel, contends that "real world circumstances for the pet sitters" meant that the "Right to Discharge" criterion favors classification as employment. However, the circumstances listed by counsel each would involve loss of a client and are not synonymous with "discharge" by the Business. Nothing in the evidence dictates that a pet sitter would be precluded from accepting work as a vendor for another client under the listed "real world circumstances", which would be the definition of a terminated business relationship. Terminability on 60 days of notice has never occurred, and the contract provision and expectation of "cause" are distinctly different from the discharge rights of an employer (Tr. pp. 74-77, 79; Bd. Exhs. 13, 18). The Department acknowledges that a one-year contract existed. We conclude that the Department did not meet its burden to establish that a "Right to Discharge" existed between the Business and the pet sitters, and we conclude that its absence favors independence.

Regarding the "Set Hours of Work" criterion, the Department, through counsel, argues that "... the pet owners' right to establish appointment times is sufficient evidence of control. This factor indicates an employment relationship." Uncontradicted testimony established "... the time they get there is up to the sitter" (Tr. p. 53). However, no pet owner is a party to this case. The analysis in this case must be limited to the relationship between the Business and the pet sitters whom the Department contends are employees. The Department's contention is not supported by the evidence.

Regarding the "Training" criterion, the Department, through counsel, contends that "... some amount of training" evidences the Business held concerns for how the services are to be performed. However, uncontradicted evidence established that the Business "... does not contract with individuals who are not certified to perform CPR on pets, nor do they contract with individuals who are not experienced in caring for animals." (Tr. pp. 57, 58). Sometimes pet sitters

would need to administer medications and injections (Tr. p. 63), yet no evidence indicates that the Business trained them to do so. The evidence establishes that the pet sitters were veterinary technicians already (Tr. pp. 77, 78; Bd. Exhs. 13, 18). The alleged “training” to which counsel refers in the request for review is not supported by the evidence. We conclude that its absence favors independence.

Regarding the “Tools and Materials” factor, the Department, through counsel, confuses the provision of food and medication by the pet owner with the Business in this case. No evidence establishes that the Business provided any food or medication to a pet sitter, nor that the contract between the Business and a pet sitter required the Business to provide anything. Contrary to the Department’s contention, the absence of any tools and materials provided by the Business favors independence.

Similarly, the Department, through counsel, confuses “... the purchase of items for the animals” and potential reimbursement by the pet owners, with the relationship between pet sitters and the Business that is at issue in this case. No evidence establishes that the Business reimbursed the pet sitters. The absence of “Expense Reimbursement” by the Business favors independence.

Regarding factors of independence, the Department, through counsel, contends that the Board and the Business “... fails to identify a single example of how a pet sitter has held themselves out to the public for independent services.” This contention ignores credible, uncontradicted testimony that a pet sitter had a contract with someone else to perform services as an independent contractor and did, in fact, “... work for a significant number of non-company clients during the time period at issue, and ... found that the most economical advertising was referrals from existing ... clients.” (Tr. pp. 71, 72). We conclude from the evidence that the “Availability to Public” factor of independence is amply demonstrated by unrefuted evidence.

Similarly, the Department, through counsel, contends that the “Board has failed to note so much as a single case where a pet sitter has engaged in a simultaneous contract with a third party for similar services”, and contends the factor of “Simultaneous Contracts” clearly shows a lack of independence. The uncontroverted evidence that a specific pet sitter in fact did work for a significant number of non-company clients during the time period at issue (Tr. pp. 71, 72) satisfies this factor. We conclude that the evidence demonstrates a pet sitter engaged in a simultaneous contract with a third party for similar services, and the Department’s contention is invalidated by that evidence. We conclude the “Simultaneous Contracts” factor favors independence.

The Department’s counsel contends that the concept of “Profit or Loss” was misapplied. Credible, uncontradicted evidence indicated that the ability of pet sitters to realize a profit is affected by the number and type of assignments

they accept and by the sequence or order in which they perform those assignments (Tr. p. 67; Bd. Exh. 15). Credible, uncontradicted evidence established that pet sitters "... actually have the option available to them to offer a reduced price from less than what's on the suggested price list ... And, if they did, it would ... come out of their share ..." (Tr. p. 49). Clearly, control over price and expenses, and therefore net income, lies with the pet sitter but not with the Business. We conclude the evidence establishes that pet sitters had the potential for realizing profit or loss, and favors independence.

Regarding the "Significant Investment" factor, the Department, through counsel, contends that the absence of significant investment indicates an employment relationship rather than remains neutral. We concur that absence of significant investment favors employment. However, no significant investment was needed by a pet sitter to perform the duties requested by the pet owners. We note the evidence strongly suggest that, if a significant investment had become necessary, it likely would have come from the pet sitter and not from the Business.

In arriving at the decision, the Appeals Board applied the appropriate law, A.R.S. §§ 23-724(B), 23-615, 23-613, 23-613.01(A), and 23-622(A), and Arizona Administrative Code, Sections R6-3-1723 and R6-3-1705(B), and case law, to the facts in this case and found the services provided as pet sitters were not employment, the individuals were not employees of the Business, remuneration paid to individuals by the Business was not wages, and the Business is not liable for Arizona Unemployment Insurance taxes on wages for the quarters ending March 31, 2000 through December 31, 2001, under A.R.S. § 23-613.

The Appeals Board concluded that many of the factors upon which the original tax auditor based his conclusions were not factually supported by the evidence, and indeed were contradicted by the evidence. Specifically, the auditor concluded that pet-sitters are trained for a week and implied that the business owners give pet-sitters keys and security codes to the pet owner premises (Tr. pp. 11-19). The field auditor did not meet with any of the pet-sitters (Tr. p. 20), and the factual or evidentiary basis underlying his conclusions was not adequately specified. These underlying factors are contradicted by the evidence.

We have thoroughly examined the factors established 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" in this case, which consistently were followed in practice, was a major factor towards removing the relationship from employment status for taxation purposes. We conclude that the services performed by individuals as pet-sitters do not constitute employment.

In this case, the Employer paid fees to the pet-sitters for pet-sitting services, according to an established schedule of fees that the pet sitters could reduce or modify. We conclude from the evidence that such remuneration to independent contractors does not constitute wages as contemplated by the applicable statutes and administrative rules.

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

THE APPEALS BOARD FINDS that:

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

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

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

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

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

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

DATED:

APPEALS BOARD

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: XXXXX

Acct. No: XXXXX

(x) XXXXX Attorney for the Business

(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-1073572-001-B

In the Matter of:

XXXXX

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

Employer

Department

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DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Reconsidered Determination issued on April 9, 2008, which noted the tax rate notice was issued on January 4, 2008, and affirmed the Department's action of February 25, 2008, "... to return your voluntary payment for being postmarked after the January 31, 2008 deadline." The Reconsidered Determination held as follows:

Department records indicate that on January 4, 2008, [the Taxpayer] was issued a tax rate notice for calendar year 2008. ... Included in the voluntary payment instructions is a bolded sentence "**Voluntary payment remittance must be postmarked no later than January 31, of this year.**"

Arizona Revised Statutes (A.R.S.) § 23-726.C. contains the following provisions relating to voluntary payments.

* * *

Your voluntary payment was postmarked February 20, 2008, which is beyond the allowable timeframe for accepting the payment.

Therefore, this Reconsidered Determination affirms the Department's action of February 25, 2008 to return your voluntary payment for being postmarked after the January 31, 2008 deadline. ...

The petition 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, on July 22, 2008. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the employing unit made a timely voluntary payment remittance, in order to lower the assigned tax rate from 5.40% under A.R.S. § 23-726(C).
2. Whether the employing unit remains liable at the assigned rate of 5.40% for the tax period addressed by the "DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2008" notice dated January 4, 2008, under A.R.S. §§ 23-613 AND 23-730.

The following persons appeared at the hearing: two witnesses for the Employer, one of whom did not testify; a Department witness; and the Assistant Attorney General as the Department's counsel. At the hearing, Board Exhibits 1 through 9 were admitted into the record as evidence (Tr. p. 5).

We have carefully reviewed the record, and

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

1. The Employing Unit filed a voluntary payment for its Experience Rating Account on February 20, 2008, in the amount of \$X,XXX.XX. The Employer's check to the Department was dated February 20, 2008. The Employing Unit hoped the payment would permit lowering its 2008 rate from 5.40% to 2.08% (Tr. p. 6; Exh. 3).
2. On January 4, 2008, the Department issued a DETERMINATION OF UNEMPLOYMENT TAX RATE FOR CALENDAR YEAR 2008 to the Employer, which included: "A VOLUNTARY PAYMENT OF \$X,XXX.XX MAY BE MADE TO

OBTAIN THE NEXT LOWER TAX RATE OF 2.08.” The document included the following instruction: Voluntary payment remittance must be postmarked no later than January 31, of this year. ... Mail to Arizona Department of Economic Security, Experience Rating Unit ...” (Exh. 2).

3. On February 25, 2008, the Department returned the voluntary payment to the Employer, and held the rate shown on the rate determination dated January 4, 2008, will remain on the account (Exh. 4).
4. The Employer filed a timely appeal on March 7, 2008 (Exh. 5).
5. The Department issued its Reconsidered Determination, affirming the action of returning the voluntary payment and not changing the tax rate (Exh. 6).
6. The Employer filed a timely petition for a hearing, explaining that the Employer substantially increased its presence in Arizona during 2008 and contending that it viewed a “... higher rate for the remainder of the year” as an inequitable penalty (Exh. 7).
7. The Employer did not submit a voluntary payment prior to January 31, 2008, because its controller did not realize that making the payment on time would save the Employer “... so much money.” (Tr. pp. 6, 8).

Arizona Revised Statutes, § 23-726, provides in part as follows:

Contributions; voluntary payment

- A. Contributions shall accrue and become payable by each employer for each calendar year in which the employer is subject to this chapter with respect to wages for employment. The contributions shall become due and be paid by each employer to the commission for the fund in accordance with such regulations as the commission prescribes, and shall not be deducted, in whole or in part, from the wages of individuals in the employer's employ.

* * *

- C. An employer may make voluntary payments in addition to the contributions required under this chapter that shall be credited to the employer's account in accordance with commission regulation. The voluntary payments shall be included in the employer's account as of the employer's most recent

computation date if they are made on or before the following January 31. Voluntary payments when accepted from an employer will not be refunded in whole or in part. [Emphasis added].

Also informative is Arizona Revised Statutes § 23-732(B), which provides in part as follows:

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

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 the Employer's voluntary payment was submitted on February 20, 2008. In order to be effective as the reason for a reduction in rate, the Employer was required to submit its voluntary payment by January 31, 2008. The Employer did not submit its voluntary payment within the time period allowed by law.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and permit finding the payment was submitted timely. Accordingly, the tax rate must remain unchanged.

THE APPEALS BOARD **AFFIRMS** the Reconsidered Determination issued on April 9, 2008.

The DETERMINATION OF UNEMPLOYMENT TAX RATE FOR 2008 issued on January 4, 2008, remains in effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1038797-001-B

In the Matter of:

XXX

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
REVERSED

THE **EMPLOYER** petitioned on April 7, 2005, for a hearing from the Reconsidered Determination issued on March 11, 2005, which affirmed the Determination of Liability for Employment or Wages issued by the Department on July 24, 2003. The Reconsidered Determination held in part that:

... the services performed by the workers as behavioral healthcare workers constitute employment effective July 22, 2001, and all forms of remuneration paid to these individuals constitute wages. The Determination includes the individuals and amounts shown on the Report of Wages Paid Each Employee form (UC-020-A) for quarters ending, September 30, 2001 through December 31, 2002. Therefore, the July 24, 2003 Determination to DTG was properly issued.

The appeal having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-724(B). We refer to the non-employing business entity as the "Corporation".

An in-person hearing was held before ROBERT T. NALL, an Administrative Law Judge, at 1140 E. Washington Street, [Suite 104], in Phoenix, Arizona, on Tuesday, October 23, 2007.

All parties were given an opportunity to present evidence on the following issues:

1. Whether the employing unit is liable for Arizona Unemployment Insurance taxes pursuant to A.R.S. § 23-613, and the Notices of Assessment.
2. Whether services performed by the individuals 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.

The following persons appeared at the hearing: four Corporation witnesses who testified, three attorneys as the Employer’s counsel, two Department witnesses who did not testify (Tr. pp. 153, 154), and the Assistant Attorney General as the Department’s counsel. At the hearing, Board Exhibits 1 through 40 and 101 through 120 were admitted into the record as evidence.

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

1. The Corporation involved in this case was incorporated as an Arizona Corporation on May 25, 2001. The Corporation acted as a referral agency by sending behavioral healthcare professionals, when requested, to various entities and agencies nationwide. (Tr. pp. 82, 83, 89-98, 121, 178; Stip. 4; Bd. Exh. 1).
2. The Corporation has certain employees who perform sales and marketing functions. The behavioral healthcare services that are the subject of this case were performed by other individuals who possess proper credentials. (Tr. pp. 77-85, 99, 114-116, 176-178, 189, 197, 205, 206).
3. The entities and agencies who requested behavioral healthcare professional services specified the tasks, location, schedule, and rate of pay. The Employer would receive an overhead mark-up, added into the contract. (Tr. pp. 98-100, 103-109, 179, 183; Exh. 106).
4. The Corporation operates in similar fashion to 12 other related corporations which are incorporated in other states, including Pennsylvania. The operation of the Corporation in Arizona is

of the same fundamental nature as the operation of the related Pennsylvania corporation named in an Internal Revenue Service (IRS) letter. The same owners and corporate officers operate the Arizona Corporation and the other corporations, using precisely the same business model and following the same practices and procedures. (Tr. pp. 42-44, 81-83, 96-98, 193; Stip. 2).

5. The Corporation, and the related corporations, consistently have treated the behavioral healthcare professionals as independent contractors for taxation purposes. The behavioral healthcare professionals were never listed as employees in reports to the federal government's IRS, and all state taxing agencies. The Corporation issued 1099 reports to all of the behavioral healthcare professionals (Tr. pp. 96, 97, 189)
6. The Corporation and the related businesses entered into written agreements with each prospective behavioral healthcare professional, which specified that the relationship was not an employment relationship. (Tr. pp. 82, 83, 92, 112-114; Bd. Exhs. 5, 11, 102A).
7. The IRS has concluded that the treatment of behavioral healthcare professionals as independent contractors, by the Corporation's related corporation in Pennsylvania, is correct for federal tax purposes. The federal tax treatment is embodied in a letter, which followed a tax audit, that the IRS would require "no change" in the practices of the Pennsylvania corporation. The IRS letter issued in 2001 was effective for tax year 1998 and remained unamended for all tax years thereafter (Tr. pp. 42, 45-49, 86, 96; Exh. 101).
8. The "no change" letter following an audit is a customary method used by the IRS to express a conclusion that the organization receiving the letter qualified for protection under Section 530 of the Revenue Act of 1978. The IRS did not issue an "SS-8" ruling, which typically would be applicable to merely one individual. (Bd. Exh. 9).
9. Certain healthcare professionals, who received work opportunities, had or operated their own business interests apart from their relationship with the Corporation (Tr. pp. 136-142, 157, 160, 168m 172; Exh. 103).

We conclude that the ruling by the IRS was applicable to all of the mental and behavioral healthcare professionals registered on the Corporation's database, because the operation of the Corporation in Arizona is of the same fundamental nature as the operation of the related Pennsylvania corporation named in the IRS letter.

Although the applicable law provides exceptions to employment status for certain industries, no provision exists to exclude behavioral healthcare workers, as a group (Tr. pp. 39, 72, 73).

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

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

1. An individual's entire service performed within or both within and without this state ...
* * *
7. An individual's service wherever performed within the United States or Canada if:
 - (a) The service is not covered under the unemployment compensation law of any other state or Canada, and
 - (b) The place from which the service is directed or controlled is in this state.
8. Notwithstanding any other provisions of this chapter, service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the federal unemployment tax act is required to be covered under this chapter.

Arizona Revised Statutes § 23-613.01(A) provides in part as follows (Exh. 112):

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. ...
[Emphasis added].

Arizona Revised Statutes § 23-614 includes definitions of “Employing unit” as follows:

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

- A. "Employing unit" means an individual or type of organization, including a partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor of any of the foregoing, or the legal representative of a deceased person, which has, or subsequent to January 1, 1936 had, one or more individuals performing services for it within this state. Effective January 1, 1962, "employing unit" shall include any federal instrumentality which is neither wholly nor partially owned by the United States and which has one or more individuals performing services for it within this state.

* * *

- D. A professional employer organization or a temporary services employer that contracts to supply a worker to perform services for a customer or client is the employer of the worker who performs the services. A customer or client who contracts with an individual or entity that is not a professional employer organization or a temporary services employer to engage a worker to perform services is the employer of the worker who performs the services. Except as provided in subsection F of this

section, an individual or entity that is not a professional employer organization or a temporary services employer, that contracts to supply a worker to perform services to a customer or client and that pays remuneration to the worker acts as the agent of the employer for purposes of payment of remuneration.

* * *

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.

* * *

C. The following services are exempt employment under this Chapter, unless there is evidence of direction, rule or control sufficient to satisfy the definition of an employee under subsection (A) of this Section, which is distinct from any evidence of

direction, rule or control related to or associated with establishing the nature or circumstances of the services considered pursuant to this subsection:

1. Services by an individual for an employing unit which are not a part or process of the organization, trade or business of the employing unit, and the individual is not treated by the employing unit in a manner generally characteristic of the treatment of employees.
 - a. Services by an individual not treated by the employing unit in a manner generally characteristic of the treatment of employees means the individual performing the services is not treated by the employing unit in substantially the same manner as employees of that employing unit.
 - b. The words "part" and "process" are not synonymous. If the individual performs services which are either a part of or process in the organization, trade or business, the conditions of this paragraph are not met and the services cannot be exempt under this paragraph. "Process" refers to those services which are directly responsible for carrying out the fundamental purpose or purposes for which the organization, trade or business exists; e.g., painting and repairing automobile bodies in an automobile body paint and repair shop. "Part" refers to any other services which are essential to the operation or maintenance of the organization, trade or business; e.g., routine cleaning of premises and maintenance of tools, equipment and building. In addition to services which are a part of or process in the organization, trade or business, there are those services which are for the purposes of the organization, trade or business but are merely ancillary or incidental and are not essential or necessary to the conduct of the organization, trade or

business; e.g., landscaping area around the automobile body paint and repair shop. [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. 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). Testimony was presented, however, that in light of the “Section 530” impact in this case, analysis under these “Common Law” tests is neither proper nor necessary (Tr. pp. 37, 38, 41).

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].

The Department has the burden of proof. In this case, the Department presented no testimony to rebut the credible testimony of the Corporation’s witnesses that the behavioral healthcare professionals were in the same class of individuals that the IRS did not treat as employees pursuant to Section 530 of the Revenue Act of 1978. We note that many of the factors upon which the original tax auditor based his conclusions, are no longer crucial. Many of his factors are not factually supported by the evidence in this case, and are contradicted by the evidence in this case. Specifically, the Corporation uses an independent contractor document with each professional. We conclude that the existence of signed “independent contractor agreements” in this case, which

consistently were followed in practice, is a major factor towards removing the relationship from employment status for taxation purposes.

More importantly, we conclude that the federal government, notably the IRS, has reviewed the business practices involved and has concluded that the workers are not employees of the Corporation's "sister corporation". We conclude the business practices are sufficiently uniform among the corporations to include the Corporation in the federal government ruling. We conclude that the services performed by individuals as healthcare professionals in this case do not constitute employment by the Corporation. Uncontradicted expert testimony established that the primary requirements for "safe harbor" status known as United States Code "Section 530 of the Revenue Act of 1978" (Tr. pp. 33-38, 54, 55), are consistent treatment, compliance with timely Form 1099 issuance to those persons designated and treated as independent contractors, and reasonable reliance upon the statutory provisions or a ruling (Tr. pp. 36, 49-51, 62-66, 68-72; Exh. 101). Arguably, pertinent provisions of Arizona's statute incorporate Federal tax principles (Tr. pp. 26, 65, 66). Based upon the uncontested evidence of a prior IRS audit investigation followed by an IRS letter to a related corporation, we conclude that the Corporation meets all of these requirements and clearly falls within the provisions of A.R.S. § 23-613.01(A)(3).

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 Corporation paid persons who, as a matter of federal law, are not considered employees. We conclude from the evidence that such remuneration to independent contractors does not constitute wages as contemplated by the applicable statutes and administrative rules. Accordingly,

THE APPEALS BOARD **REVERSES** the Reconsidered Determination issued on March 11, 2005.

1. Effective with the tax year 1998, the IRS issued a “no change” letter tacitly approving the status of the workers in question. Work performed by individuals as contracted healthcare professionals does not constitute **Employment** by the Corporation 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.
2. The remuneration paid to individual contracted healthcare professionals for the services performed does not constitute **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 Corporation **is not liable** for Arizona Unemployment Insurance taxes on wages for the quarters ending September 30, 2001 through December 31, 2002, under A.R.S. § 23-613.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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: ATTN: xxx

Acct. No: xxxxxx

(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-1069024-001-B

In the Matter of:

XXXXXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
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 Employer's authorized representative filed a request for reconsideration or appeal from the Department's letter dated October 1, 2007, which referred to the late filing of the Employer's protest to the Notice to Employer, UB-110. The letter also referred to the late filing of the Employer's application for reconsideration of the Notice of Benefit Charges, UB-602.

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

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

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

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

We have carefully reviewed the record.

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

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

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

ROBERT 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. 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:

Er: XXXXX

Acct. No: XXXXX

(x) XXXXX

(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-1069025-001-B

In the Matter of:

XXXXXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** filed a Request for Reconsideration/Appeal from the Department's letter dated June 19, 2007, which referred to the late filing of the Employer's protest to the Notice to Employer, UB-110. The letter also referred to the late filing of the Employer's application for reconsideration of the Notice of Benefit Charges, UB-602. The letter contained the following rulings and instructions:

... the Notice to Employer, UB-110, was mailed to the address of record for your firm on 11/17/2006. A protest to payment of benefits was not returned timely, therefore, your response to the Notice of Benefit Charges, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant.

This determination on the untimeliness of your response becomes final unless an appeal is filed within fifteen (15) days after the date of this letter. ...

Department Regulation R6-3-1404 requires that, if transmitted by any means other than the United States Postal Service or its successor, the date of the application shall be considered the date it is received by the Department. Your application was faxed on May 14, 2007, 31 days after the date of the Notice. Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated April 13, 2007 must be held to be final.

* * *

The Employer's petition to the Board was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD FOUND that the taking of evidence was necessary to properly adjudicate the issues under review. Accordingly, a telephone hearing was convened before ROBERT T. NALL, an Administrative Law Judge, on Tuesday, August 12, 2008. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department, pursuant to A.R.S. § 23-732(B).
2. If a timely application for redetermination was filed, whether the Notice of Benefit Charges, UC-602, became final prior to the filing by the Employer of an application for reconsideration. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.

On the scheduled date of hearing, no Employer witness appeared to testify. Counsel for the Department and a witness for the Department also appeared. Exhibits 1 through 18 were admitted into evidence. We have carefully reviewed the record.

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

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on April 13, 2007 (Bd. Exh. 7).

2. The Employer's appeal from the Benefit Charge Notice was filed by fax on May 14, 2007 (Bd. Exh. 7).
3. The Department issued its decision on the timeliness of the Employer's application on June 19, 2007, which held that because the Employer did not file an application to reconsider the benefit charge notice within 15 days, "... the Notice of Benefit Charges dated April 13, 2007 must be held to be final." (Bd. Exh. 5).
4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed to the Employer's address of record on November 17, 2006 (Bd. Exh. 5).
5. The Employer requested a review in its letter dated June 25, 2007 (Bd. Exh. 2A/2B). The Employer stated: "For whatever reason we did not receive the first letter regarding this case". The Employer did not identify which letter it contends was not received and did not specify what efforts the Employer has made to ensure its mail is received. Thus, the Employer has offered no adequate explanation for filing a late application to reconsider the Benefit Charge Notice, nor has the Employer adequately explained its failure to file a timely protest to the Notice to Employer.

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

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

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
 - b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The record reveals that a copy of the Benefit Charge Notice was sent by mail on April 13, 2007, to the Employer's last known address of record. The application to reconsider, however, was filed by fax on May 14, 2007 (Bd. Exh. 7), which is more than 15 days from the date of the Benefit Charge Notice. The Employer's application, therefore, was not filed within the statutory time.

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

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.

* * *

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

* * *

In the petition, the Employer indicated: "For whatever reason we did not receive the first letter regarding this case". The first letter was the Notice to Employer dated November 17, 2006. The Employer did not meet the statutory requirement to become an interested party to the case, because the Employer did not file a timely protest. The Employer has not expressly stated it did not receive the Notice of Benefit Charges (Bd. Exh. 7), which would be unlikely because the Employer hand-wrote its application for review on the Notice of Benefit Charges. The Employer has offered no adequate explanation for filing a late application for review (Bd. Exhs. 5, 7).

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

THE APPEALS BOARD **AFFIRMS** the Department's decision dated June 19, 2007, on the late filing of the Employer's application for review of the Notice of Benefit Charges.

The Notice of Benefit Charges dated April 13, 2007, remains in full force and effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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: XXXXX

Acct. No: XXXXX

(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-1069038-001-B

In the Matter of:

XXXXXX

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

Employer

Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
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 withdrawal request. Accordingly,

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

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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:

Er: XXXXX

Acct. No: XXXXX

(x) XXXXX

(x) ROBERT J DUNN III

(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-1069113-001-B

In the Matter of:

XXXXXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
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 withdrawal request. Accordingly,

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

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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:

Er: XXXXX

Acct. No: XXXXX

(x) XXXXX

(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-1069115-001-B

In the Matter of:

XXXXXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
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 withdrawal request. Accordingly,

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

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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:

Er: XXXXX

Acct. No: XXXXX

(x) XXXXX

(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-1069023-001-B

In the Matter of:

xxx

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Decision letter dated January 30, 2007, which referred to the Employer's late appeal from the Determination of Liability for Employment or Wages, and from the Determination of Unemployment Insurance Liability. The Department's Decision letter contained the following rulings and instructions:

On January 28, 2003, the Department received an untimely appeal ... to the Determinations of Liability for Employment or Wages and Unemployment Insurance Liability (Determinations) issued December 30, 2002 ... The Determinations and Notice further stated they would become final unless written request for reconsideration was filed within fifteen days of the date of issuance. ...

Your faxed letter of January 28, 2003 was twenty-nine days after the issuance of the Determinations and Notice. Consequently, they have become final. ... Accordingly, it is the Department's Decision that the Determinations and Notice issued ... December 30, 2002 are final. This Decision will also become final unless ... files a written petition for a formal hearing before the Department of Economic Security Appeals Board, *on the issue of timeliness only*, within 30 days of the date of this letter. ...

The Employer's petition for a formal hearing was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD conducted a telephone hearing before ROBERT T. NALL, an Administrative Law Judge, from Phoenix, Arizona, on **Friday, March 6, 2009**. The scheduled issues to be considered were:

1. Whether the Employer filed a timely request for reconsideration by the Department of the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES dated December 30, 2002, pursuant to A.R.S. § 23-724 and Arizona Administrative Code, Section R6-3-1404.
2. Whether the Employer filed a timely request for reconsideration by the Department of the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY dated December 30, 2002, pursuant to A.R.S. § 23-724 and Arizona Administrative Code, Section R6-3-1404.

At the hearing, a witness for the Employer appeared and testified, and a representative from the Tax Section of the Department appeared and testified. The Department was represented by counsel. Board Exhibits 1-25 were admitted into the record.

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

1. A DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was sent by certified mail on December 30, 2002, to the Employer's last known address of record. The Determination advised the Employer that the Determination would become final unless a written request for reconsideration was filed with the Department

within fifteen (15) days after the date of the Determination "... as provided in A,R,S, 23-724". (Bd. Exh. 8).

2. A DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY was sent by certified mail on December 30, 2002, to the Employer's last known address of record. The Determination advised the Employer that the Determination would become final unless a written request for reconsideration was filed with the Department within fifteen (15) days after the date of the Determination (Bd. Exh. 9). The same certified mail certificate was used.
3. A NOTICE OF ASSESSMENT was mailed to the Employer's address of record on December 30, 2002 (Bd. Exh. 7).
4. The Department's auditor also mailed a separate letter to the Employer's last known address of record on December 30, 2002. The auditor noted that the Department had "... executed determination letters establishing a tax account ... and assessments" for the first and second quarters of 2002. The auditor explained that he had received no reply to attempts to contact the Employer by phone, and informed the Employer: "If you receive this missive and would like to correct the record in any way please do not hesitate to contact me at the number provided." Nothing in the auditor's letter identified the determination letters by name. (Bd. Exh. 11).
5. The Employer telephoned the auditor and discussed the situation. The Employer understood the auditor's explanation that the Employer still had time to appeal, and could submit a written document.
6. Following his telephone discussion with the auditor, the Employer's managing owner wrote and signed a single-page document (Bd. Exh. 4) that he dated "JAN1.03" and he captioned:

RE: DETERMINATION OF LIABILITY FOR
EMPLOYMENT OR WAGES & DETERMIANTION
OF UNEMPLOYMENT INSURANCE LIABILITY.

7. The Employer's managing owner never mailed his letter to the Department. Instead, he personally faxed his letter to the Department on January 28, 2003. The Department's earliest receipt of his letter occurred on January 28, 2003 (Bd. Exh. 4).

8. The Department mailed an UNEMPLOYMENT TAX STATEMENT to the Employer's mailing address of record on January 24, 2003.
9. In response to the Employer's letter requesting "... reconsideration as per APPEAL RIGHTS" (Bd. Exh. 4), the Department issued, on January 30, 2007, its "... Decision that the Determinations and Notice issued ... December 30, 2002 are final". The Decision notified the Employer that the Decision would become final unless the Employer filed a written petition for a formal hearing, on the issue of timeliness only, within 30 days after the date of the letter (Bd. Exhs. 2A, 2B).
10. When the Employer filed a timely written petition for a formal hearing by mail postmarked on February 20, 2007, he utilized the same mailing address previously used by the Department to mail its Determinations to the Employer. The Employer also included a copy of the January 30, 2007 Decision (Bd. Exh. 1A-C, 1I).

Arizona Revised Statutes § 23-724 provides in part as follows:

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

* * *

- C. On an employer's written request and the submission of pertinent information to the department, the department shall, or on its own motion may, consider whether a determination, reconsidered determination or decision which has become final should be revised. ...

* * *

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.

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 de-

terminated 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].

In this case, the Employer could have filed a timely appeal within 15 days after December 30, 2002. The Employer's witness testified that he spoke with the auditor within the 15 days allowed to file a timely appeal. However, the Employer contended that neither of the adverse Determinations were received. This testimony is contradicted by the language of the appeal letter, which identifies both Determinations by their lengthy and peculiar names and also specifically refers to APPEAL RIGHTS. Testimony by the Employer's witness that he "got wind of" the adverse Determinations and assessment of taxes, then spoke with the auditor, is not sufficiently specific to overcome the inference of receipt that is obvious from his use of a precise name for both Determinations.

The Employer's witness also testified that he personally faxed the appeal letter on two occasions before January 28, 2003. However, his contention is not supported by any of the customary business records. He testified that he routinely re-used fax confirmation sheets and he made no attempt to preserve any business records to prove earlier electronic transmission of the appeal. He presented no telephone records, which likely could have confirmed a long-distance fax transmission.

Because the Employer made no effort to mail his appeal, Arizona Administrative Code, Section R6-3-1404 provides that the filing date of the appeal shall be "... the date it is received by the Department." In this case, that date is January 28, 2003 (Bd. Exh. 4). The filing date was 29 days after issuance of the Determinations and Notice. We conclude from the more credible evidence that the Employer filed the appeal late.

The Employer did not file any additional documents for consideration by the Appeals Board. The only potential explanations for the late appeal filing advanced by the Employer were that the Employer did not receive the Determinations, and that its witness faxed the appeal on unconfirmed dates prior to January 28, 2003. We conclude from the evidence that these contentions are not sufficient to overcome the presumption that the filing date of the appeal was January 28, 2003.

Arizona Revised Statutes §§ 23-724 and 23-738(B) are unambiguous, declaring that: "... the determination shall become final ..." and "If the petition

for reassessment is not filed within fifteen days the amount of the assessment shall become final ...". In the absence of a timely appeal or 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 Appeals Board to extend the appeal time.

Here, the Employer has not established a reason for the late filing of the petition for reassessment which, if accepted as true, 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 appeal from the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY and from the DETERMINATION OF LIABILITY FOR EMPLOYMENT OF WAGES was filed within the time prescribed by A.R.S. § 23-724. Similarly, no petition for reassessment of the NOTICE OF ASSESSMENT for the first and second quarters of 2002 was filed within the time prescribed by A.R.S. § 23-738(B). The Department mailed all three documents to the Employer's correct mailing address on December 30, 2002. The Employer's appeal was received on January 28, 2003, which was beyond the appeal period. A petition filed outside the statutory period may be considered timely only if the late filing is due to Department error or misinformation, postal error, or a change of address when there is no reason to notify the Department of the change.

Based upon the evidence before us, the Appeals Board concludes that the Employer filed its appeal late. 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 January 30, 2007.

The DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES, and the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY, issued on December 30, 2002, are final and binding on the Employer.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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: xxxx

Acct. No: xxxxx

(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-1069032-001-B

In the Matter of:

XXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER**, through its authorized representative, petitioned for hearing from the Department's letter dated August 25, 2006, which referred to the late filing of the Employer's protest to payment of benefits following a Notice to Employer, UB-110. The letter also referred to the late filing of the Employer's application for redetermination following the Benefit Charge Notice, UC-602. The letter contained the following rulings and instructions:

... the Notice to Employer, UB-110, was mailed to the address of record for your firm on **04/04/2006**. A protest to payment of benefits was not returned timely, therefore, your response to the Notice of Benefit Charges, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant.

This determination on the untimeliness of your response becomes final unless an appeal is filed within fifteen (15) days after the date of this letter. ...

Arizona Revised Statutes Section 23-732(B) provides that the Notice of Benefit Charges shall become final unless an application for redetermination is filed within fifteen (15) days of the date of the Notice. Department Regulation R6-3-1404 requires that the postmark date of the application be considered the date of mailing. Your application was postmarked **July 7, 2006 20 days** after the date of the Notice.

Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated **July 7, 2006** must be held to be final. ... [Emphasis added].

* * *

The Employer's petition was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **February 26, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department, pursuant to A.R.S. § 23-732(B).
2. If a timely application for redetermination was filed, whether the Notice of Benefit Charges, UC-602, became final prior to the filing by the Employer of an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.

On the scheduled date of hearing, no Employer witness appeared to testify. Counsel for the Department and a witness for the Department appeared and presented evidence. Exhibits 1 through 10 were admitted into evidence. We have carefully reviewed the record.

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

1. On July 7, 2006, the Department mailed Benefit Charge Notices to the Employer's address of record (Bd. Exh. 5A/B). The Department previously had mailed Determinations of Unemployment Insurance Liability to the Employer on March 2, 2006 (Bd. Exh. 3A/B), which the Employer has never appealed.
2. The Employer's application for redetermination from the Benefit Charge Notices was filed, according to the postmark, on July 27, 2006 (Bd. Exh. 4). The Employer dated the document March 14, 2006 (Bd. Exh. 4)
3. On August 25, 2007, the Department issued its decision on the timeliness of the Employer's application for redetermination. The Department held that because the Employer did not file its application for redetermination within 15 days, "...the Notice of Benefit Charges dated July 7, 2006 must be held final." (Bd. Exh. 6).
4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed on April 4, 2006, to the Employer's address of record (Bd. Exh. 6).
5. The Employer, through its accountants as authorized representatives, applied for redetermination in a letter dated August 29, 2006 (Bd. Exh. 8). In this letter, no reason was presented for filing a late application for redetermination or for filing a late protest.
6. The Employer did not specify what efforts the Employer had undertaken to ensure its mail is received promptly, and offered no reason for filing a late application for redetermination.

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

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with

the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
 - b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The record reveals that a copy of the Benefit Charge Notice was sent by mail on July 7, 2006, to the Employer's last known address of record. The Notice to Employer, UB-110, was mailed to the Employer's address of record on April 4, 2006.

The Employer's application for redetermination of the Benefit Charge Notice was filed on July 27, 2006, which is more than 15 days from the date of the Benefit Charge Notice. The Employer's application for redetermination, therefore, was not filed within the statutory time.

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 de-

terminated 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].

In the petition, the Employer has offered no further explanation for filing a late application for redetermination.

We conclude the Employer had reasons to notify the Department of any change in its mailing address and to ensure that important mail was handled properly, because of pending wages to be reported on a quarterly basis and because of pending charges to the Employer's experience rating account.

The Employer has offered no adequate explanation for filing a late application for redetermination of the Benefit Charge Notices, nor has the Employer adequately explained its failure to file a timely protest to the Notice to Employer. The Employer did not meet the statutory requirement to become an interested party to the case, because the Employer did not file a timely protest. The mailing of the notice to a party commenced the time period to appeal, and the party was obligated to keep a current and accurate mailing address on record with the Department.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated August 25, 2006, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notices.

The Benefit Charge Notices dated July 7, 2006, remain in full force and effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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: XXX

Acct. No: XXX-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-1069040-001-B

In the Matter of:

XXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER**, through its authorized representative, petitioned for a hearing from the Department's letter dated March 6, 2007, which referred to the Employer's late protest to the Notice to Employer, UB-110. The letter also referred to the Employer's late response to the Benefit Charge Notice, UC-602. The letter contained the following rulings and instructions:

... the Notice to Employer, UB-110, was mailed to the address of record for your firm on **September 05, 2006**. A protest to the payment of benefits was not returned timely, therefore, your response to the Benefit Charge Notice, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant.

Arizona Revised Statute Section 23-732(B) provides that the Benefit Charge Notice shall become final unless a written

request for review is filed within fifteen (15) days of the date of the Charge Notice. ... Your request for review was faxed January 30, 2007; 17 days after the date of the Charge Notice.

Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the request for review, the Benefit Charge Notice dated January 12, 2007 must be held final.

This decision on the untimeliness of your application becomes final unless a written request for review by the Unemployment Insurance Appeals Board is filed within fifteen (15) days of the date of this letter. ...

The Employer's petition was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **February 26, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department, pursuant to A.R.S. § 23-732(B).
2. If a timely application for redetermination were filed, whether the Notice of Benefit Charges, UC-602, became final prior to the filing by the Employer of an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.

On the scheduled date of hearing, no Employer witness appeared to testify. Counsel for the Department and a witness for the Department also appeared. Exhibits 1 through 11 were admitted into evidence. We have carefully reviewed the record.

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

1. On January 12, 2007, the Department mailed a Benefit Charge Notice to the Employer's address of record (Bd. Exh. 7). The Department previously had mailed, on June 5, 2006, a Determination of Unemployment Insurance Liability to the Employer (Bd. Exh. 8), which the Employer has never appealed.
2. The Employer's application for redetermination from the Benefit Charge Notice was filed by fax on January 30, 2007 (Bd. Exh. 7).
3. On March 6, 2007, the Department issued its decision on the timeliness of the Employer's application for redetermination. The Department held that because the Employer did not file its application for redetermination within 15 days, "...the Benefit Charge Notice dated January 12, 2007 must be held final." (Bd. Exh. 4).
4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed on September 5, 2006, to the Employer's address of record (Bd. Exh. 4).
5. The Employer requested a review in its undated letter faxed and mailed on March 15, 2007 (Bd. Exhs. 1-3). In his letter, the Employer's owner did not address the jurisdictional prerequisite to file a timely protest and to file a timely application for redetermination.
6. The Employer did not specify what efforts the Employer had undertaken to ensure its mail is received promptly, and offered no reason for filing a late application for redetermination.

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

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

introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
 - b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The record reveals that a copy of the Benefit Charge Notice was sent by mail on January 12, 2007, to the Employer's last known address of record. The Notice to Employer, UB-110, was mailed to the Employer's address of record on September 5, 2006.

The Employer's application for redetermination of the Benefit Charge Notice was filed on January 30, 2007, which is more than 15 days from the date of the Benefit Charge Notice. The Employer's application for redetermination, therefore, was not filed within the statutory time.

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 de-

terminated 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].

In the petition, the Employer has offered no further explanation for filing a late application for redetermination.

We conclude the Employer had reasons to notify the Department of any change in its mailing address and to ensure that important mail was handled properly, because of pending wages to be reported on a quarterly basis and because of pending charges to the Employer's experience rating account.

The Employer has offered no adequate explanation for filing a late application for redetermination of the Benefit Charge Notice, nor has the Employer adequately explained its failure to file a timely protest to the Notice to Employer. The Employer did not meet the statutory requirement to become an interested party to the case, because the Employer did not file a timely protest. The mailing of the notice to a party began the time to appeal, and the party was obligated to keep a current and accurate mailing address on record with the Department.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding that the application for redetermination was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated August 26, 2006, regarding the late filing of the Employer's application for review of the Benefit Charge Notice.

The Benefit Charge Notice dated January 12, 2007, remains in full force and effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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: XXX

Acct. No: XXX-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-1069044-001-B

In the Matter of:

XXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER**, through its authorized representative, petitioned for hearing from the Department's letter dated June 21, 2007, which referred to the late filing of the Employer's protest to payment of benefits following a Notice to Employer, UB-110. The letter also referred to the late filing of the Employer's application for redetermination following the Notice of Benefit Charges, UC-602. The letter contained the following rulings and instructions:

... the Notice to Employer, UB-110, was mailed to the address of record for your firm on **03/09/2006**. A protest to payment of benefits was not returned timely, therefore, your response to the Notice of Benefit Charges, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant.

This determination on the untimeliness of your response becomes final unless an appeal is filed within fifteen (15) days after the date of this letter. ...

Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated **April 13, 2007** must be held to be final. ... [Emphasis added].

* * *

The Employer's petition was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **February 26, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department, pursuant to A.R.S. § 23-732(B).
2. If a timely application for redetermination were filed, whether the Notice of Benefit Charges, UC-602, became final prior to the filing by the Employer of an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.

On the scheduled date of hearing, no Employer witness appeared to testify. Counsel for the Department and a witness for the Department also appeared. Exhibits 1 through 12 were admitted into evidence. We have carefully reviewed the record.

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

1. On April 13, 2007, the Department mailed a Benefit Charge Notice to the Employer's address of record (Bd. Exh. 6). On August 11, 2004, the Department previously had mailed a Determination of Unemployment Insurance Liability to the Employer (Bd. Exh. 7), which the Employer has never appealed.

2. The Employer's application for redetermination from the Benefit Charge Notice was filed by fax on May 14, 2007 (Bd. Exh. 6).
3. On June 21, 2007, the Department issued its decision on the timeliness of the Employer's application for redetermination. The Department held that because the Employer did not file its application for redetermination within 15 days, "...the Notice of Benefit Charges dated April 13, 2007 must be held to be final." (Bd. Exh. 3).
4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed on March 9, 2006, to the Employer's address of record (Bd. Exh. 3).
5. The Employer requested a review by its letter mailed to the Department and postmarked on June 26, 2007 (Bd. Exhs. 1, 2). In his letter, the Employer explained that a letter had been sent to the Employer's payroll company, which returned it several weeks later with instructions "... that it was up to me to fill it out and send back". The Employer contended that a number on the letter was called, and an unidentified rep "... tells me I have a couple of days left, to go ahead and fill it out and fax it so that they would receive it on time ...". (Bd. Exhs. 2, 10)
6. The Employer did not specify to which letter its author refers, and the Employer has not specified any date of each action. The Employer did not specify what efforts the Employer had undertaken to ensure its mail is received promptly, and offered no specific reason for filing a late application for redetermination (Bd. Exh. 2).

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

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

the rate of contributions of any employer for any calendar year ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
 - b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The record reveals that a copy of the Benefit Charge Notice was sent by mail on April 13, 2007, to the Employer's last known address of record. The Notice to Employer, UB-110, was mailed to the Employer's address of record on March 9, 2006.

The Employer's application for redetermination of the Benefit Charge Notice was filed on May 14, 2007, which is more than 15 days from the date of the Benefit Charge Notice. The Employer's application for redetermination, therefore, was not filed within the statutory time.

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].

In the petition, the Employer has offered insufficient details to constitute a further explanation for filing a late application for redetermination. If its

writer's contentions were considered to be both true and specifically applicable to the Employer's appeal, then the telephone discussion at a time when the Employer asserts it had "... two days left" must have occurred either within two days before the appeal was filed on Monday, May 14, 2007, or within two days before the time to appeal expired on April 30, 2007. The Employer did not appear at the scheduled hearing, and presented no testimony clarifying its contentions.

Under either potential analysis, the application for redetermination was unreasonably late. If the alleged telephone discussion occurred on Friday, May 10, 2007, then the application for redetermination already was late and the Employer could not have relied on misinformation from the Department's representative. If the alleged telephone conversation occurred prior to April 30, 2007, then the Employer has offered no reason for waiting an additional two weeks or more before actually filing its application for redetermination.

In addition, when the application for redetermination was filed on May 14, 2007, it contained no explanation of why it was filed late.

We conclude the Employer had reasons to notify the Department of any change in its mailing address and to ensure that important mail was handled properly, because of pending wages to be reported on a quarterly basis and because of pending charges to the Employer's experience rating account.

The Employer has offered no adequate explanation for filing a late application for redetermination of the Benefit Charge Notice, nor has the Employer adequately explained its failure to file a timely protest to the Notice to Employer. The Employer did not meet the statutory requirement to become an interested party to the case, because the Employer did not file a timely protest. The mailing of each notice to the Employer began the time to appeal, and the Employer was obligated to keep a current and accurate mailing address on record with the Department.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding that the application for redetermination was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated August 26, 2006, regarding the late filing of the Employer's application for redetermination of the Notice of Benefit Charges.

The Benefit Charge Notice dated April 13, 2007, remains in full force and effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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: XXX Acct. No: xxx-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-1069100-001-B

In the Matter of:

xxx

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER**, through its authorized representative, petitioned for hearing from the Department's letter dated July 5, 2007, which referred to the Employer's late protest to the Notice to Employer, UB-110. The letter also referred to the Employer's late response to the Benefit Charge Notice, UC-602. The letter contained the following rulings and instructions:

... the Notice to Employer, UB-110, was mailed to the address of record for your firm on **01/25/2007**. A protest to the payment of benefits was not returned timely, therefore, your response to the Benefit Charge Notice, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant. ...

Arizona Revised Statute Section 23-732(B) provides that the Benefit Charge Notice shall become final unless a written

application for redetermination is filed within fifteen (15) days of the date of the Charge Notice. ... You request for review was postmarked June 27, 2007 75 days after the date of the Notice.

Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the request for review, the Notice of Benefit Charges dated April 13, 2007 must be held to be final.

This decision on the untimeliness of your application becomes final unless a written request for review by the Unemployment Insurance Appeals Board is filed within fifteen (15) days of the date of this letter. ...

The Employer's petition was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **February 26, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department, pursuant to A.R.S. § 23-732(B).
2. If a timely application for redetermination were filed, whether the Notice of Benefit Charges, UC-602, became final prior to the filing by the Employer of an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.

On the scheduled date of hearing, no Employer witness appeared to testify. Counsel for the Department and a witness for the Department appeared. Exhibits 1 through 18B were admitted into evidence. We have carefully reviewed the record.

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

1. On April 13, 2007, the Department mailed a Benefit Charge Notice to the Employer's address of record (Bd. Exh. 16). The Department previously had mailed a Determination of Unemployment Insurance Liability to the Employer on March 23, 1999 (Bd. Exh. 9), which the Employer has never appealed.
2. The Employer's application for redetermination of the Benefit Charge Notice was filed by mail postmarked on June 27, 2007 (Bd. Exhs. 2, 6).
3. On July 5, 2007, the Department issued its decision on the timeliness of the Employer's application for redetermination. The Department held that because the Employer did not file its application for redetermination within 15 days, "...the Notice of Benefit Charges dated April 13, 2007 must be held to be final." (Bd. Exh. 3B).
4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed on January 25, 2007, to the Employer's address of record (Bd. Exh. 3B).
5. Through its authorized representative, the Employer requested a review in its letter dated July 12, 2007 (Bd. Exhs. 1-4). In its letter, the Employer's authorized representative explained that the UB-110 notice "... mailed on 1/25/07 was never received." The letter does not mention the late application for redetermination from the Benefit Charge Notice.
6. By a letter dated July 19, 2007, the Employer's authorized representative requested a change in mailing address to the mailing address of the Employer's authorized representative (Bd. Exh. 14).

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

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after

mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
 - b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The record reveals that a copy of the Benefit Charge Notice was sent by mail on April 13, 2007, to the Employer's last known address of record. The Notice to Employer, UB-110, was mailed to the Employer's address of record on January 25, 2007.

The Employer's application for redetermination of the Benefit Charge Notice was filed on June 27, 2007, which is more than 15 days from the date of the Benefit Charge Notice. The Employer's application for redetermination, therefore, was not filed within the statutory time.

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

* * *

- 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].

In the petition and in its prior filings, the Employer has offered no reason for filing a late application for redetermination. Instead, the Employer's authorized representative contended that it had not yet received a notice of claim filing as of June 27, 2007 (Bd. Exh. 2). According to its text, the Employer had received the Benefit Charge Notice and was aware of the \$328.80 benefit charge dated March 31, 2007 (Bd. Exh. 2). We conclude that the change of address filed on July 19, 2007, can shed no light on the reason for the Employer's late application for redetermination. The change of address request was filed after the appeal, and could not have been a reason for the late appeal.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated August 26, 2006, regarding the late filing of the Employer's application for redetermination of the Notice of Benefit Charges.

The Benefit Charge Notice dated April 13, 2007, remains in full force and effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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: xxx

Acct. No: xxx-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-1069102-001-B

In the Matter of:

XXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's letter dated August 25, 2006, which referred to the late filing of the Employer's protest to payment of benefits following a Notice to Employer, UB-110. The letter also referred to the late filing of the Employer's application for redetermination following the Notice of Benefit Charges, UC-602. The letter contained the following rulings and instructions:

... the Notice to Employer, UB-110, was mailed to the address of record for your firm on **12/21/2005**. A protest to payment of benefits was not returned timely, therefore, your response to the Notice of Benefit Charges, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant.

This determination on the untimeliness of your response becomes final unless an appeal is filed within fifteen (15) days after the date of this letter. ...

Arizona Revised Statutes Section 23-732(B) provides that the Notice of Benefit Charges shall become final unless an application for redetermination is filed within fifteen (15) days of the date of the Notice. Department Regulation R6-3-1404 requires that the postmark date of the application be considered the date of mailing. Your application was postmarked **August 2 2006 26 days** after the date of the Notice.

Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated **July 7, 2006** must be held to be final. ... [Emphasis added].

* * *

The Employer's petition was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **March 2, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department, pursuant to A.R.S. § 23-732(B).
2. If a timely application for redetermination was filed, whether the Notice of Benefit Charges, UC-602, became final prior to the filing by the Employer of an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.

On the scheduled date of hearing, no Employer witness appeared to testify. Counsel for the Department and a witness for the Department also appeared. Exhibits 1 through 15B were admitted into evidence. We have carefully reviewed the record.

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

1. On July 7, 2006, the Department mailed a Benefit Charge Notice to the Employer's address of record (Bd. Exh. 15A/B).
2. The Employer's application for redetermination from the Benefit Charge Notice was postmarked and filed on August 2, 2006. The Employer's letter was dated July 29, 2006 (Bd. Exhs.4, 5).
3. On August 25, 2006, the Department issued its decision on the timeliness of the Employer's application for redetermination, which held that because the Employer did not file an application for redetermination within 15 days, "...the Notice of Benefit Charges dated July 7, 2006 must be held final." (Bd. Exh. 3).
4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed on December 21, 2005, to the Employer's address of record (Bd. Exh. 3).
5. The Employer requested a review in its letter dated August 31, 2006 (Bd. Exh. 2). The Employer did not address the jurisdictional prerequisite to file a timely protest and to file a timely application for redetermination.
6. The Employer did not specify what efforts the Employer had undertaken to ensure its mail is received promptly, and offered no reason for filing a late application for redetermination.

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

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

the rate of contributions of any employer for any calendar year ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
 - b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The record reveals that a copy of the Benefit Charge Notice was sent by mail on July 7, 2006, to the Employer's last known address of record (Bd. Exhs. 3, 15). The Notice to Employer, UB-110, was mailed to the Employer's address of record on December 21, 2005 (Bd. Exh. 3).

The Employer's application for redetermination of the Benefit Charge Notice was postmarked and filed on August 2, 2006, which is more than 15 days from the date of the Benefit Charge Notice. The Employer's application for redetermination, therefore, was not filed within the statutory time.

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].

In the petition, the Employer offers no further explanation for filing a late application for redetermination. In the application letter dated July 29, 2006,

the Employer contended: "I have been out of the office most of the past 6 months due to surgery and other reasons."

We conclude the Employer had reasons to notify the Department of any change in its mailing address and to ensure that important mail was handled properly, because of pending wages to be reported on a quarterly basis and because of pending charges to the Employer's experience rating account.

The Employer has offered no adequate explanation for filing a late application for redetermination the Benefit Charge Notice, nor has the Employer adequately explained its failure to file a timely protest to the Notice to Employer. The first letter was the Notice to Employer dated December 2, 2005. The Employer did not meet the statutory requirement to become an interested party to the case, because the Employer did not file a timely protest. The mailing of the notice to the Employer began the time to appeal, and the Employer was obligated to keep a current and accurate mailing address on record with the Department.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding that the application for redetermination was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated August 26, 2006, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Benefit Charge Notice dated July 7, 2006, remains in full force and effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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: XXX

Acct. No: XXX-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-1069117-001-B

In the Matter of:

XXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** filed a Request for Reconsideration from the Department's letter dated May 26, 2006, which referred to the Employer's late protest to the Notice to Employer, UB-110. The letter also referred to the Employer's late response to the Notice of Benefit Charge Notice, UC-602. The letter contained the following rulings and instructions:

... the Notice to Employer, UB-110, was mailed to the address of record for your firm on **December 2, 2005**. A protest of payment of benefits was not returned within the ten (10) day period specified by A.R.S. 23-727.D.

Arizona Revised Statute Section 23-732(B) provides that the Benefit Charge Notice shall become final unless an application for redetermination is filed within fifteen (15) days of

the date of the Notice. ... Your application was postmarked May 3, 2006, 16 days after the date of the notice.

Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated April 17, 2006 must be held final.

This decision on the untimeliness of your application becomes final unless a written request for review by the Unemployment Insurance Appeals Board is filed within fifteen (15) days of the date of this letter. ...

The Employer's request for review was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **March 6, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department, pursuant to A.R.S. § 23-732(B).
2. If the application for redetermination was filed timely, whether the Notice of Benefit Charges, UC-602, became final prior to the filing by the Employer of an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.

On the scheduled date of hearing, no Employer witness appeared to testify. Counsel for the Department and a witness for the Department also appeared. Exhibits 1 through 11 were admitted into evidence. We have carefully reviewed the record.

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

1. On April 17, 2006, the Department mailed a Benefit Charge Notice to the Employer's address of record (Bd. Exh. 6).
2. The Employer's application for redetermination from the Benefit Charge Notice was postmarked and filed on May 3, 2006. The Employer's letter also was dated May 3, 2006 (Bd. Exhs. 3, 4).

3. On May 26, 2006, the Department issued its decision on the timeliness of the Employer's application for redetermination, which held that because the Employer did not file an application for redetermination within 15 days, the "... Benefit Charge Notice dated April 17, 2006 must be held final." (Bd. Exh. 2).
4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed to the Employer's address of record on December 2, 2005 (Bd. Exh. 2).
5. The Employer requested a review in its letter dated June 6, 2006 (Bd. Exh. 1A). The Employer stated: "... I submitted a protest to these charges immediately upon receipt of the original notice. ... it can be clearly seen that it has to go to Illinois and back." The Employer did not specify what efforts the Employer has made to ensure its mail is received promptly.
6. The Employer physically moved to Illinois during late May 2006 and early June 2006. He maintained an address of record in Tucson, Arizona, which was the Employer's correct mailing address during 2005 and through May 3, 2006. The Employer's letter dated May 3, 2006, was his earliest notification to the Department that he was in Illinois.
7. The Employer kept an associate in the Tucson, Arizona office as an independent contractor, and the Employer came back to Arizona briefly "every other month" between May 2006 and August 2006. Until the Employer sold his Tucson, Arizona practice in August 2006, Tucson staff was instructed to forward mail to the Employer in Illinois.

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

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

the rate of contributions of any employer for any calendar year ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
 - b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The record reveals that a copy of the Benefit Charge Notice was sent by mail on April 17, 2006, to the Employer's last known address of record (Bd. Exh. 6). The Notice to Employer, UB-110, was mailed to the Employer's address of record on December 2, 2005 (Bd. Exh. 1B).

The Employer's application for redetermination of the Benefit Charge Notice was postmarked and filed on May 3, 2006 (Bd. Exh. 7), which is more than 15 days from the date of the Benefit Charge Notice. The Employer's application for redetermination, therefore, was not filed within the statutory time.

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].

In his letter, the Employer indicated: "... I submitted a protest to these charges immediately upon receipt of the original notice." We conclude the Employer had reason to notify the Department of any change in his mailing address, because of pending wages to be reported on a quarterly basis, and because of pending charges to the Employer's experience rating account.

The Employer has offered no adequate explanation for filing a late application for redetermination of the Benefit Charge Notice, nor has the Employer adequately explained its failure to file a timely protest to the Notice to Employer. The first letter was the Notice to Employer dated December 2, 2005. The Employer did not meet the statutory requirement to become an interested party to the case, because the Employer did not file a timely protest. Nothing in the Employment Security Law specifies that the time to file an appeal could commence upon "receipt of the original notice." Rather, the mailing of the notice to the Employer began the time to appeal, and the Employer was obligated to keep a current and accurate mailing address on record with the Department.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding that the application for redetermination was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated May 26, 2006, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Benefit Charge Notice dated March 31, 2006, remains in full force and effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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: XXX Acct. No: XXX-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-1073767-001-B

In the Matter of:

XXX

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

Employer

Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER**, through counsel, petitioned for hearing from the Amended Reconsidered Determination issued by the Department on January 30, 2007, which affirmed its Determination of Liability for Employment or Wages issued by the Department on January 8, 2003. The Amended Reconsidered Determination held in part as follows:

... We held that the services performed by individuals as administrators constituted employment effective October 1, 1999; that services performed by an individual as a technician constituted employment effective February 1, 2001; and that all forms of remuneration paid to these individuals for such services constituted wages. The Determination included the individuals and amounts on the Notice of Assessment Report for the quarters ending December 31, 1999 through June 30, 2002.

Please note that you are appealing the original Reconsidered Determination that was issued on July 6, 2005; however, the Determination of Liability for Employment or Wages was dated January 8, 2003.

* * *

Our review of the employment agreement found many characteristics indicative of an employer-employee relationship. ...

* * *

Accordingly, this amended Reconsidered Determination affirms the Determination of Liability for Employment or Wages issued January 8, 2003 ...

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B). For convenience, the Employer is referred to in this decision as the "Taxpayer".

At the direction of the Appeals Board, a hearing was held on July 17, 2008, in Phoenix, Arizona, before ROBERT T. NALL, Appeals Board Administrative Law Judge, for the purpose of considering the following issues, following proper notice to all parties:

1. Whether the employing unit is liable for Arizona Unemployment Insurance Taxes under A.R.S. § 23-613, pursuant to:
 - a. the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY dated January 8, 2003; and
 - b. the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES dated January 8, 2003, for the quarters ending December 31, 1999 through June 30, 2002.
- 2A. Whether services performed by individuals as administrators constituted "employment" effective October 1, 1999; 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 or a decision of the federal government.
- 2B. Whether services performed by individuals as technician constituted "employment" effective February 1, 2001; 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 or a decision of the federal government.

The Taxpayer and counsel for the Taxpayer were present at the hearing. Two witnesses for the Department, and the Department's counsel, also appeared. At the hearing, 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 Taxpayer was incorporated in Arizona in 1997. It engaged in the business of on-site computer equipment installation and repairs (Tr. pp. 26, 46, 49). Among its officers was an administrator whose contract identified him as "a CEO". The administrator, "M.M.", was listed with the Arizona Corporation Commission as a corporate vice president who took office on May 10, 1999 (Tr. p. 14). He was tasked to handle web design for the business, he did work for clients, and he was made an officer of the business (Tr. p. 28). During 2001, the administrator used his access to the Taxpayer's bank account to take money, and he departed (Tr. pp. 28, 29, 46-51; Exh. 6D).
2. Another individual, "E.H.", started working as a leased employee of a different corporate entity throughout the year 2000 (Tr. pp. 22, 26, 52; Exhs. 10-15). The Taxpayer used the entity's services to obtain work by other individuals (Tr. p. 39). The Taxpayer ceased paying the other entity for the technician's services when his work for a particular client ended prior to January 1, 2001 (Tr. pp. 32, 40).
3. Subsequently, the Taxpayer referred "... a few extra jobs" to E.H., who performed services as a technician making computer equipment or network repairs. The Taxpayer would call her, give her the name of the client, and allow E.H. to schedule and to perform the "overflow" work (Tr. pp. 32, 33, 41, 53). The Taxpayer paid the technician for her repair services by the hour at \$20 per hour, according to her report of how much time she had spent on the repair services (Tr. pp. 14, 21, 33, 34).
4. The Taxpayer treated the technician as an independent contractor or vendor accepting business referrals, for about 90 hours during the first and second quarters of 2001 (Tr. pp. 32-36; Exh. 4F). The Taxpayer would bill the client for the technician's services and would receive payment, then would pay the technician a percentage of his then-current \$75 per hour fee (Tr. pp. 33, 34). The technician had no responsibility for the satisfactory completion of each job assigned to her, and a customer would contact the Taxpayer who would be responsible to properly complete the job (Tr. pp. 14-16).

5. The technician was free to accept or to reject an assignment from the Taxpayer (Tr. p. 37). The technician was not entitled to share in the Taxpayer's business profits, nor was she liable to suffer a loss from the Taxpayer's business. The technician did not hold herself available to the public; she did not advertise; she had no separate business cards, and she did not utilize assistants. (Tr. pp. 19, 20, 36).
6. The Taxpayer did not train the technician. The technician told the Taxpayer that she contracted with another company, and that she did "stuff" for individuals in their homes (Tr. p. 36). The Technician provided her own transportation to each job (Tr. p. 38).
7. The Taxpayer did not directly supervise the technician's work (Tr. p. 38). She was never asked to go back and "make it right". Neither the technician nor the Taxpayer possessed any professional certification (Tr. p. 43).
8. The Taxpayer gave a contract or agreement to the technician to specify the pay rate, but neither the document nor an exemplar was presented as evidence (Tr. pp. 41, 57, 58).
8. The Taxpayer did not initially consider himself as an employee, and he took no wages until 2003. The witness who testified, "C.C.", was the incorporator and the corporate president since its initiation (Tr. p. 55). During 2003, C.C. ceased operating as a "dba" trade name. After 2003, C.C. considered himself an employee of the corporation and started "... doing everything" under the business name (Tr. pp. 45, 68).

The Taxpayer contends that both the administrator, who was a corporate vice president, and the technician, who performed repair services, were independent contractors and not employees. Their employment status, and the payment of wages, remain in dispute in this case.

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

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

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

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

* * *

4. Service performed by any officer of a corporation.

* * *

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

Employee; definition; exempt employment

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

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

Wages

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

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

- A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.
 1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
 2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.
- B. "Employee" as defined in subsection (A) does not include:
 1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.
 2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit "... solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.
 - a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.

- b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
- c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

Regarding the administrator, M.M., uncontroverted evidence established that the person was a corporate officer. He was made the corporate vice president. He made sales, he collected money from clients, and he performed web design services for clients. He was entitled to 15% of the profits (Tr. pp. 28, 29). We conclude from the evidence that his services constituted employment, by operation of A.R.S. § 23-615(4). This outcome is consistent with Internal Revenue Code, §§ 3306(i) and 3121(d). We conclude any payment to him for those services constituted wages, by operation of A.R.S. § 23-622(A).

Similarly, the incorporator of the business was its corporate president who during the time period at issue performed services including on-site repair, sales, payments to vendors, and arranging for leased employees. We conclude from the evidence that the services of C.C. constituted employment, by operation of A.R.S. § 23-615(4). Further, we conclude any payment to him for those services constituted wages, by operation of A.R.S. § 23-622(A). We note that the evidence does not substantiate any amount was paid to C.C., including wages, during the time period at issue.

We separately analyze the circumstances of the technician, E.H., who prior to January 1, 2001, was employed by a separate entity and "leased" to the Taxpayer for certain services. We note that no written contract identifying the relationship of this individual with the Taxpayer was presented, but evidence of several checks from the Taxpayer in payment for her services is supported by testimony that she was paid for over 90 hours of work during the first and second quarters of 2001 (Tr. pp. 32-46; Exh. 4F).

We conclude from the evidence that the technician's services do not qualify as "exempt employment" listed in Arizona Administrative Code, Section R6-3-1723(C). We conclude from the evidence that the technician's services are not solely subject to a provision of law regulating the organization, trade of business as specified in Arizona Administrative Code, Section R6-3-1723(B)(2).

The contentions of the Taxpayer, however, bring into issue whether the services of the technician were excluded from the definition of "Employee" by qualifying as an "independent contractor" pursuant to Arizona Administrative Code, Section R6-3-1723(B)(1). Our analysis requires consideration of the statutes cited above, plus Arizona Administrative Code, Section R6-3-1723(A), and the factors specified in subsections R6-3-1723(D) and R6-3-1723(E).

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 taxpayer did not prohibit the use of assistants. However, none were used by the technician. This factor is neutral.

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 evidence indicates that the Taxpayer possessed the right to instruct or direct the work. He received the request from the client, communicated the customer's needs to the technician, billed the customer, and paid the technician by the hour at an agreed-upon rate. The Taxpayer remained responsible to the customer for satisfactory completion of the work. The Taxpayer admittedly assigned to the technician only work that he was confident she could readily complete. Thus, he controlled the complexity of the assignment. However, evidence established that the Taxpayer did not need to be physically present while the work was performed and, due to his prior assessment of the work's nature, no follow-up or warranty work was necessary. We note the Taxpayer admitted that similar methods of work assignment clearly constituted employment of the technician by the employee leasing entity. This factor shows control, and indicates an employment relationship.

c. Oral or Written Reports

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

The Taxpayer required the technician to inform him of how much time she spent on each customer assignment. Nothing indicates that her reports ever took the form of an invoice for services, which would be indicative of an independent contractor billing for vendor services. This factor shows control, and indicates an employment relationship.

d. Place of Work

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

The evidence establishes that all services by the technician were performed on client premises because "... the client's needs were immediate", and that the Taxpayer did not maintain any business premises (Exh. 6C). However, the Taxpayer communicated to the technician the address where services were to be performed. This factor shows control, and 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.

The Taxpayer testified that he tailored or pre-selected each of several assignments to the technician, based on his assessment of her skills. Clearly, he

expected her to perform each assignment personally, capably, and carefully. She never used an assistant or a substitute. This factor shows control, and 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 Taxpayer testified that he allowed the technician to schedule her work performance with each customer. This freedom shows an absence of control, and 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 evidence does not include any contract specifying the duration of the Taxpayer's relationship with the technician. Therefore, the Taxpayer could cease giving the technician any assignments, at any time. The technician did not possess the rights an independent contractor would expect in a contractual relationship, since she could not require advance notice that the relationship would end. This factor shows control, and indicates an employment relationship.

h. Set Hours of Work

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

The Taxpayer allowed the technician to schedule her own work. No set hours were required. This factor shows an absence of control, and 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.

The Taxpayer did not provide any training to the technician. She already demonstrated she possessed the skills and tools necessary, during her period as a leased employee. This factor shows an absence of control, and 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 Taxpayer did not require the technician's full time. Rather, he requested and paid for only 90 hours of the technician's services in a 6-month period. This manner of conducting business is equivalent to on-call, part-time work, and is neutral because the arrangement could be the same for both an employment and an independent contractor 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.

The Taxpayer did not provide any tools to the technician. She used her own tools and her own abilities. This factor shows an absence of control, and indicates independence.

l. Expense Reimbursement

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

No expense reimbursement occurred. The technician did not possess the opportunity to charge the Taxpayer for travel or incidental expenses. This factor shows an absence of control, and indicates independence.

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 technician did not advertise her services to the public, and she did not invest in business cards or business premises. She and the Taxpayer relied on referrals. She was permitted to seek assignments with other firms, including the customer to whom she was initially assigned while she was employed by an employee leasing firm. Her ability to seek work in the homes of her own

customers does not, however, indicate anything more than a lack of restriction by the Taxpayer upon her seeking other work while working only on an on-call basis for the Taxpayer. Such arrangements are common in part-time employment. The arrangement could apply equally to either a part-time employee or to an independent contractor, and is neutral.

2. Compensation

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

The technician was not paid on a job basis. She was paid by the hour, according to a report she was required to provide the Taxpayer so he could bill his client directly. The technician was not required to invoice the Taxpayer. This factor shows control, and indicates an employment relationship.

3. Realization of Profit or Loss

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

The technician was not expected to invest in the Taxpayer's business. She had no opportunity to realize a profit or a loss, and no responsibility to repair work for a dissatisfied customer. No evidence was presented that the technician had recurring or ongoing liabilities to the customer, or to the Taxpayer, for the services she performed. This factor shows control, and indicates 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.

No evidence of any early-termination penalty was presented. The Taxpayer could simply cease assigning work to the technician at any time. Completion of the job was not required. This factor shows control, and indicates an employment relationship.

5. Significant Investment.

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

facilities by the employing unit would indicate the existence of an employee relationship.

The technician was not expected or permitted to invest in the Taxpayer's business. Her expenses and investments in tools or materials were negligible. No license or certification was required. This factor is neutral.

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 technician was permitted to work for others simultaneously, including the Employer's former customer. This factor shows an absence of control, and indicates an independent contractor relationship.

Pursuant to Arizona Administrative Code, Section R6-3-1723(F), there may be other factors not specifically identified in the rule that should be considered. One such factor to consider in this case must be the Taxpayer's own assessment that the technician was actually employed by the employee leasing firm, while she performed the same type of services at his request. Her manner of performance remained that of an employee. She simply was being paid directly by the Taxpayer based on her hourly work, and derived from his collected billings to his customers. She was being paid directly at \$20 per hour, rather than the \$14 per hour plus 25% the Taxpayer previously was charged by the employee leasing firm for the same type of services (Exh. 6C). No significant reason has been presented, such as a document agreeing otherwise or the existence of vendor invoices for her services to the Taxpayer, that would differentiate the technician's previous work as an employee of the leasing firm from her more recent work performance directly for the Taxpayer.

In addition, the technician clearly believed she was employed by the Taxpayer. That was the basis for her filing of a claim for Unemployment Insurance benefits, which prompted the tax audit of the Taxpayer's circumstances, and implicitly was expressed in her interview with the tax auditor. The technician's belief in her employment by the Taxpayer is a strong factor that has not been overcome by the Taxpayer's evidence.

The arrangement, covering 90 hours of technician services that were within the normal trade of the business, was not "isolated or occasional transactions", as contended by the Taxpayer when interpreting Arizona Administrative Code, Section R6-3-1723(C)(2). Counsel's arithmetic (Exh. 6E) is contradicted by the testimony (Tr. pp. 35, 36, 51, 52, 61). The evidence necessary to sustain the presumption of "isolated or occasional transactions" was insufficient to do so.

Rather, the technician agreed to a standing arrangement to perform required services on call as requested (Exhs. 6C, 6D), and "... it will be presumed the individual is not performing isolated or occasional transactions." Arizona Administrative Code, Section R6-3-1723(C)(2)(b).

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

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

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

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

In accord with the liberal interpretation required by the Employment Security Law of Arizona, we affirm the amended Reconsidered Determination of the Department in all three respects (Exh. 7).

The technician was an employee of the Taxpayer, effective February 1, 2001. We conclude any payment to her for those services constituted wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** the amended Reconsidered Determination dated January 30, 2007.

Services performed by individuals as administrators constituted employment effective October 1, 1999.

Services performed by an individual as a technician constituted employment effective February 1, 2001.

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

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

MARILYN J. WHITE, Member

WILLIAM G. DADE, Affirming in part and Dissenting in part:

The majority of the Board (hereafter called "the majority") finds that services performed by an individual as a technician constituted employment, effective February 1, 2001. I respectfully dissent from the majority's decision with respect to services performed by EH, for the reasons that follow.

This case involves whether a computer technician (hereafter called "EH") is an independent contractor or an employee as provided by A.R.S. § 23-613.01(A)(1) and Arizona Administrative Code, Sections R6-3-1723(A) and (B)(1). The primary reason that I dissent is because I find that the majority is ignoring the plain language of A.R.S. § 23-613.01(A)(1), which provides 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 characteristics of an independent profession, trade, skill or occupation.

In addition, the majority is ignoring that practically the same language used in A.R.S. § 23-613.01(A)(1) is also used in Arizona Administrative Code, Section R6-3-1723(B), which provides as follows:

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.

EH performed services for the Taxpayer as a technician making computer equipment or network repairs. EH's services required her to possess specialized knowledge and skill. The Taxpayer would contact EH and tell her which of his customers needed computer repair services. EH would contact the customer, go to the customer's place of business, perform the repair services needed, and then EH would report the amount of time she spent servicing the customer's computer so that she could get paid. The Taxpayer would pay EH \$20 per hour for her time to make the computer repairs. The Taxpayer called EH because she possessed the skill to perform the services that the customers of the Taxpayer needed. There is unwarranted focus on whether EH was an independent contractor or an employee by an analysis of the provisions of Arizona Administrative Code, Section R6-3-1723(D)(2). I find that EH is not included as an employee under both A.R.S. § 23-613.01(A)(1) and Arizona Administrative Code, Section R6-3-1723(B)(1).

First, I agree with the majority's conclusions about (a) Authority over Individual Assistants — neutral; (f) Establishment of Work Sequence — independence; (h) Set Hours of Work — independence; (i) Training — independence; (j) Amount of Time — neutral; (k) Tools and Materials — independence; (l) Expense Reimbursement — independence. Second, I disagree with the majority's conclusions about the factors that follow.

(b) Compliance with Instructions — I find this factor shows independence. EH did not have to comply with instructions when or how she was to work. She had to comply with where to work because it was essential that she know where the customer's place of business was so that she could go service the computer. How else would she know where the services were needed? This factor shows the absurdity of ignoring the reality of business dealings. Is the Taxpayer supposed to call EH and say, "EH, I have some work for you to perform for one of my customers, but if I tell you where to go, the UI Tax Department might find that I am telling you where to go to perform the services; therefore, I'll give you a few hints where the work is, and I hope you'll find the place."

(c) Oral or Written Reports — I find this factor shows independence. The majority is using form over substance. Because EH did not submit an invoice for services but merely informed the Taxpayer of the number of hours that she took in performing the computer repair services, the majority finds an employment relationship. So, if EH submitted an invoice showing the number of hours she worked, then would the majority find this factor shows that EH is independent?

(d) Place of Work — I find that this factor shows independence. EH went to the customer's business premises because that is where the computer that needed to be repaired was located. She did not meet the Taxpayer at the business premises. The Taxpayer did go to the customer's premises to observe EH. The Taxpayer did not tell EH what to do when she arrived at the customer's business premises. Again, the majority is ignoring the realities of the situation. How else would EH know where to perform the computer services if the Taxpayer did not tell EH where the services were needed?

(e) Personal Performance — I find that this factor is neutral. EH was hired to perform the computer repair services because such work is highly specialized and the Taxpayer hired her on the basis of her professional reputation to be able to perform the job. EH worked by herself. She did not use assistants. Does this factor require a person to hire an assistant to satisfy this factor?

(g) Right to Discharge — I find that this factor is neutral. EH and the Taxpayer did not need a long term contract with the right to terminate the contract. Each time the Taxpayer called EH to perform computer services, they had a short term contract. The Taxpayer would pay EH \$20 per hour for the computer repair services that she performed.

In regard to the factors under Arizona Administrative Code, Section R6-3-1723(E), I agree with the majority's conclusions under (1) Availability to the Public — neutral, (5) Significant Investment — neutral, and (6) Simultaneous Contracts — independence. I disagree with the majority's conclusions regarding the other factors for the reasons that follow.

2 Compensation — I find this factor is neutral. What is the difference between a "report" showing EH's hours worked and an invoice for hours worked? Because of the nature of the undetermined number of hours needed to do the computer repair work. Such work is not conducive to flat fees.

3. Realization of Profit or Loss — I find this factor shows independence. Regarding the relationship of income to expenditures, EH had to make sure that her expenditures such as travel to and from the job site, meals needed, and tools needed did not exceed her hourly fee. Although EH did not have ongoing liabilities to the customer, she had ongoing responsibilities to the Taxpayer to properly perform the work or the Taxpayer would not give her any future work.

4. Obligation — I find this factor shows independence or is neutral. EH agreed to complete a specific job each time the Taxpayer called her to perform services for one of the Taxpayer's customers. For instance, each customer requiring computer repair services was a specific job.

With respect to the decision regarding the corporate officer, CC, I concur with the majority's affirmation.

For the foregoing reasons, I find that EH is an individual who performs services in a capacity characteristic of an independent skill under A.R.S. § 23-613.01(A)(1) and Arizona Administrative Code, Section R6-3-1723(B)(1).

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. 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:

Er: XXX

Acct. No: XXX-000

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XXX

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By: _____
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1076167-001-B

In the Matter of:

xxx

STATE OF ARIZONA E S A TAX UNIT
% ROBERT DUNN III
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Employer

Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for hearing from the “superseded Reconsidered Determination” letter dated June 15, 2006, which referred to the Reconsidered Determination issued on May 5, 2006. The Reconsidered Determination superseded a previous Reconsidered Determination, and affirmed the Determination of Unemployment Insurance Liability that was issued to the Employer on April 11, 2006. The Department concluded that coverage begins “10/01/2005” at the rate of “2.00” during 2005, and issued the following rulings and instructions:

You have been determined liable for Arizona Unemployment Insurance Taxes under A.R.S. § 23-613. Arizona law and rules require you to keep true and accurate records available for inspection by this Department, to submit quarterly reports of wages paid to your employees and pay taxes from the date coverage began as shown above. When an employer

becomes liable for unemployment insurance at any time during a calendar year, coverage is retroactive to the beginning of that year or the date wages were first paid in that year.

Basis for liability: GROSS PAYROLL OF AT LEAST \$1,500 IN A CALENDAR QUARTER.

The Employer's petition for hearing was timely filed. The Appeals Board has jurisdiction to consider the issues in this matter pursuant to A.R.S. § 23-724(B). The Employer is referred to hereafter as the "**Taxpayer**".

At the direction of the Appeals Board and following proper notice to all parties, a Board hearing was held on March 24, 2009, by telephone from Phoenix, Arizona, before ROBERT T. NALL, an Appeals Board Administrative Law Judge, for the purpose of considering the following issues:

1. Whether the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY dated April 11, 2006, was properly affirmed. A.R.S. §§ 23-613, 23-617.
2. Whether the Employer is a corporation for which services were performed by any officer of the corporation, constituting employment for the corporation. A.R.S. § 23-615.
3. Whether any person, including any officer of the Employer corporation, received wages during the pertinent time period in an amount sufficient to trigger liability. A.R.S. § 23-622 and Arizona Administrative Code, Section R6-3-1701 thru R6-3-1706

The Taxpayer was present at the Board hearing, but he declined to testify and he declined to present additional evidence. A witness for the Department appeared and testified, and the Department's counsel also appeared. At the hearing, Board Exhibits No. 1 through 33 were admitted into the record as evidence.

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

1. The Taxpayer was incorporated in Nevada on December 14, 2000. Its incorporators and its officers were a husband, as corporate president and secretary and 100% owner, and his wife, as corporate treasurer and director. Both officers lived in Yuma, Arizona during 2005 and 2006 (Exhs. 12, 13, 14B, 16).

2. The corporation was dissolved and was re-incorporated in Wyoming during 2007 (Bd. Exhs. 13, 14).
3. On December 29, 2005, the Taxpayer's president signed an UNEMPLOYMENT TAX AND WAGE REPORT that reported total wages paid in the calendar quarter ending December 31, 2005, were \$15,300, consisting of \$9,180 paid to the president and \$6,120 paid to the treasurer. Through its CPA, the Taxpayer reported taxable wages paid were \$13,120.00 so that total taxes due were \$262.40. (Bd. Exh. 12).
4. The Taxpayer's president also signed check #10018 for \$260.00 dated April 28, 2006, which the CPA mailed to the Arizona Department of Economic Security on May 3, 2006 (Bd. Exhs. 31, 32).
5. The Taxpayer's president signed check #10019 dated April 28, 2006, in the amount of \$513.88. That separate payment was sent with the Arizona Quarterly Withholding Tax Return dated April 28, 2006, to the Arizona Department of Revenue. The Taxpayer reported total Arizona payroll for the first quarter of 2006 was \$22,000 (Bd. Exhs. 22-25).
6. On April 11, 2006, the Arizona Department of Economic Security issued its DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY, which determined the Taxpayer was liable for Arizona Unemployment Insurance taxes under A.R.S. § 23-613. The Determination explained that coverage began October 1, 2005, and that the rate for 2005 was 2.00 percent. The basis for liability was: "GROSS PAYROLL OF AT LEAST \$1,500 IN A CALENDAR QUARTER." (Bd. Exh. 6).
7. For the Calendar quarter ending March 31, 2006, the Taxpayer reported total wages paid of \$22,000, representing \$16,000 paid to the president and \$6,000 paid to the treasurer (Bd. Exh. 11).
8. For the Calendar quarter ending June 30, 2006, the Taxpayer reported total wages paid of \$33,000, representing \$24,000 paid to the president and \$9,000 paid to the treasurer (Bd. Exh. 10).
9. On September 20, 2006, the Taxpayer's president signed an UNEMPLOYMENT INSURANCE TAX AND WAGE REPORT for the calendar quarter ending September 30, 2006. He requested suspension of the account, and commented: "BUSINESS HAS SLOWED TO A STOP. WE ONLY HAVE TWO EMPLOYEES, MYSELF AND MY WIFE, WE ARE BOTH LAID-OFF." (Bd. Exhs. 8, 9).
10. The Taxpayer also filed a request to discontinue the Unemployment Insurance Liability, and refund of all monies held, "... as we do not have any Employees ... other than myself

...and my wife ... there are no immediate plans to hire any Employees.” The letter was dated April 14, 2006 (Bd. Exh. 7).

11. In response to the Taxpayer’s request, the Department’s tax analyst issued a second “Reconsidered Determination dated June 15, 2006, which superseded a prior document by affirming the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY issued on April 11, 2006 (Bd. Exhs. 4B, 21).

The Taxpayer’s president contends that both of its owners, who also were corporate officers, should not be considered “employees” for purposes of the Employment Security Law of Arizona. The basis for his contention is his opinion that taxes should not be collected because, due to their status as owners, he believes the officers probably could not collect Unemployment Insurance benefits anyway. *See*, Arizona Administrative Code, Section R6-3-50135.05. Their employment status, and the payment of wages to them by the Taxpayer, remain disputed in this case (Bd. Exhs. 7, 9, 26).

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

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

1. An individual's entire service performed within or both within and without this state if:
 - (a) The service is localized in this state. ...
* * *
4. Service performed by any officer of a corporation.
* * *

Arizona Revised Statutes § 23-613.01(A) provides 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 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 Revised Statutes § 23-622(A) provides as follows:

Wages

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

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

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

1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.
 2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.
- B. "Employee" as defined in subsection (A) does not include:
1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.
 2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit "... solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.
 - a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.
 - b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
 - c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the

same manner as if no such designated reference had been made.

Regarding the contention that the Taxpayer corporation did not employ its owners, uncontroverted evidence established that both owners were corporate officers. Wages exceeding \$1,500 were paid to the corporate officers in all pertinent calendar quarters, commencing with the calendar quarter ending December 31, 2005 (Bd. Exh. 12). The corporate president even wrote, "WE ONLY HAVE TWO EMPLOYEES, MYSELF AND MY WIFE" (Bd. Exh. 8).

We conclude from the evidence that the services by the company president and the company treasurer constituted employment, by operation of A.R.S. § 23-615(4). This outcome is consistent with Internal Revenue Code, §§ 3306(i) and 3121(d). This outcome is required by the information within the reports of wages filed by the Taxpayer.

We conclude any payment to either officer for their services constituted wages, by operation of A.R.S. § 23-622(A).

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

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

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

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

In accord with the liberal interpretation required by the Employment Security Law of Arizona, we affirm the Reconsidered Determination of the Department (Exh. 4B). We note that, contrary to the belief of the Taxpayer's president and owner, circumstances potentially might exist that could lead to the

separation of an owner from employment by the Taxpayer, but would not disqualify that person from receiving Unemployment Insurance benefits.

Both of the corporate officers were employees of the Taxpayer, effective with the payment of wages on and after December 1, 2005. This ruling is compelled by the reports of wages filed by the Taxpayer for multiple calendar quarters, because the wages exceeded \$1,500 in each calendar quarter. We conclude that any payment to the corporate officers and owners for their services constituted wages, by operation of A.R.S. § 23-622(A). Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Reconsidered Determination dated June 15, 2006.

Services performed by individuals as corporate officers constituted employment effective December 1, 2005.

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

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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: xxx

Acct. No: xxx-000

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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-1084320-001-B

In the Matter of:

xxx

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER**, through its authorized representative, petitioned for hearing from the Decision letter dated August 8, 2008, which referred to the Employer's late appeal filed August 25, 2006, following a Determination of Liability for Employment or Wages (Determination) and Notice of Assessments (Assessment) issued on July 28, 2006. The Decision letter contained the following rulings and instructions:

... the Determinations stated that the decision would become final unless a written request for reconsideration was filed within fifteen (15) days of the determination date pursuant to Arizona Revised Statutes (ARS) § 23-724(A). ...

The documents were mailed to the address of record. Although you did not retrieve them from the Post Office in

a timely manner, they were still served on your company as of July 28, 2006. ...

Your request for Redetermination was faxed to the Department on August 25, 2006, which is 11 days past the deadline for the appeal to be considered timely. ...

Accordingly, it is the Department's Decision that the Determination of Liability for Unemployment Insurance and the Notice of Assessment issued July 28, 2006, are final. ...

The Employer's petition for a hearing was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened before ROBERT T. NALL, an Administrative Law Judge, on **March 2, 2009**. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reconsideration of the Determination of Liability for Employment or Wages, pursuant to A.R.S. § 23-724.
1. Whether the Employer filed a timely request for reconsideration of the Notice of Assessments, pursuant to A.R.S. § 23-724 and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of hearing, an Employer witness appeared to testify. Counsel for the Employer also appeared. Counsel for the Department and a witness for the Department also appeared. Exhibits 1 through 8 were admitted into evidence without objection. We have carefully reviewed the record.

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

1. On July 28, 2006, the Department mailed a DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES and two NOTICES OF ASSESSMENT to the Employer's address of record. The Department utilized certified mail (Bd. Exhs. 3A, 3B, 3F, 4).
2. The Employer's request for reconsideration was filed by fax on August 25, 2006. The Employer's appeal letter was dated August 24, 2006 (Bd. Exhs. 5A, 5B).

3. On August 8, 2008, the Department issued its decision on the timeliness of the Employer's request for reconsideration, which held that the Employer did not file a request for reconsideration within 15 days, "...the Determination of Liability for Unemployment Insurance and the Notice of Assessment issued July 28, 2006, are final." The Department mailed its decision to the Employer's mailing address of record, and utilized certified mail (Bd. Exh. 6A, 6B).
4. The Employer, through counsel, timely requested a review in a letter dated and faxed to the Department on September 5, 2008 (Bd. Exh. 7A, 7B).

Arizona Revised Statutes § 23-724(A), provides in pertinent part:

23-724. Liability determinations; review; finality

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

* * *

E. A refusal to grant relief under subsection C of this section may not be appealed unless within fifteen days the employer appeals the refusal to the appeals board. Notwithstanding any other provision of law and pursuant to such an appeal, the appeals board may initiate hearings to obtain information and issue a decision as to whether the relief requested in subsection C of this section should be granted. Thereafter, the appeals board shall issue a decision in the matter. The decision may not be appealed with respect to the employing unit unless petition

for review and request for review are filed within the time and in the manner provided in section 23-672. [Emphasis added].

The record reveals that a copy of the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES was sent by mail on July 28, 2006, to the Employer's last known address of record (Bd. Exhs. 3A, 4). The NOTICES OF ASSESSMENT for the third and fourth quarters of 2004 and for the year of 2005, also were mailed on July 28, 2006 to the Employer's address of record (Bd. Exhs. 3B, 3F, 4).

The Employer's request for reconsideration was faxed and filed on August 25, 2006, which is more than 15 days from the date of the Benefit Charge Notice. Therefore, the Employer's request for reconsideration dated August 24, 2006, was not filed within the statutory time (Exh. 5). In its request for reconsideration, the Employer offered no excuse for filing a late appeal and referred to a "... final determination ... made a couple of weeks ago." (Exh. 5A).

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].

In the petition, the Employer offered no further explanation for filing a late application for review. Rather, the Employer, through counsel, contended: "The essence of the petition is reasonableness." Counsel contended the certified mail letter to the Employer was returned "unclaimed" and, thus, was not initially received by the Employer. Counsel acknowledges the Employer "... finally did get a copy of the July 28, 2006 letter and responded promptly, but the Section now claims his response was 11 days past the 15 day deadline for an appeal." (Bd. Exh. 7A).

Counsel contends that Arizona Rule of Civil Procedure, Rule 6(e), constitutes a general rule that should be applied to add an additional five days for completion of mailing. However, an administrative rule specifies that the document shall be considered as served on the addressee on the date it is mailed to the addressee's last known address. Contrary to counsel's contention, the only allowable basis for considering a late-filed appeal to be timely must be listed in Arizona Administrative Code, Section R6-3-1404. The other general provisions cited by counsel are not applicable to the calculation of time periods, due to the specific rule that directly controls completion of service. *See, Freelance Interpreting Services, Inc. v. State of Arizona, Department of Economic Security*, 212 Ariz. 457, 133 P.3d 1163 (App. 2006).

The Employer, through counsel, does not contend in the petition that any of the "... three reasons late submissions shall be considered timely ..." applies to the facts of this case (Bd. Exh. 7B). The Department's determination and notice of assessment were mailed to the Employer's correct address of record. Conceivably, an error by the United States Postal Service might have occurred that caused the certified letter to be returned to sender. We conclude that insufficient evidence was presented to exclude some other action as responsible for the delay, including actions attributable to the intended recipient. The Employer presented no clarifying evidence that would tend to attribute the Employer's delay to the United States Postal Service. The evidence establishes that the Employer actually received copies of the July 28, 2006 determinations.

The Employer, through counsel, contends further that the time period between the late request for reconsideration, and the Department's decision that the request for reconsideration was late, far exceeds the few days by which the request for reconsideration was filed late. However, no statute or rule supports the "fairness" argument made by counsel, in order to make the late-filed request for reconsideration timely. A statute expressly made the adverse actions final, in the absence of a request for reconsideration filed within fifteen days after the adverse actions were mailed to the Employer's address of record.

The Arizona Court of Appeals addressed similar arguments in *Freelance Interpreting Services, Inc. v. State of Arizona, Department of Economic Security*, 212 Ariz. 457, 133 P.3d 1163, (App. 2006). The Court held:

Furthermore, we find no good cause exception to the filing deadline imposed by A.R.S. § 23-724 or the associated regulations. As we stated in *Banta*, the statute is unambiguous and must be enforced according to its terms. 130 Ariz. at 474, 636 P.2d at 1256.

The regulation also fails to support a good cause exception. Under A.A.C. R6-3-1404(B), the Department could accept untimely appeals and requests for reconsideration only if caused by Department error, postal service delay, or delay due to an address change at a time when the individual would have no reason to notify the Department regarding the change. In *Roman v. Arizona Department of Economic Security*, we applied the regulation and held that an unemployed person whose attorney failed to file a petition for review with the ADES Appeal Tribunal within the fifteen-day period could not obtain relief. 130 Ariz. 581, 582-84, 637 P.2d 1084, 1085-87 (App. 1981). In construing A.A.C. R6-3-1404(B), we found that it expressed due process guarantees and did not find it to be a good cause exception. *Id.* at 583-85, 637 P.2d at 1085-86. No

violation of the regulation was shown and we denied relief. *Id.*

Similarly, in *Wallis v. Arizona Department of Economic Security*, we held that "[w]e must assume that the legislature meant what it said, and therefore [we] hold that where the statutory prerequisites for finality to a [Department] deputy's determination are established, that decision becomes 'final,' unless a timely appeal is perfected." 126 Ariz. 582, 585, 617 P.2d 534, 537 (App. 1980). Section 23-724(A) meets this standard because it states that the determination becomes final unless a written request for reconsideration is filed within fifteen days. Therefore, the evidence supports the finding that Freelance's request was untimely and the January 26 Determinations became final.

The Court in *Freelance, supra*, also saw no reason to engraft Rule of Civil Procedure, rule 6(e), onto A.R.S. § 23-724. The Court pointed out the absence of express language otherwise. The Court specifically held and captioned a segment of its decision as follows: "Rule 6(3) Does Not Apply to A.R.S. § 23-724(A)".

During the hearing, counsel for the Department pointed out that, even if five days were added to account for postal delivery pursuant to the civil rule, the Employer's request for reconsideration still was filed several days late.

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

THE APPEALS BOARD **AFFIRMS** the Department's decision letter dated August 8, 2008, regarding the late filing of the Employer's application for review of the Notice of Benefit Charges.

The Determination of Liability for Employment or Wages issued on July 28, 2006, and the Notices of Assessments, issued on July 28, 2006, remain in full force and effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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:

Er: xxx

Acct. No: xxx

(x) xxx

Counsel

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By: _____
For The Appeals Board

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1087635-001-B

In the Matter of:

XXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER**, through its authorized representative, petitioned for a hearing from the Department's letter dated September 15, 2008, which referred to the Employer's late application for redetermination filed June 29, 2007, following a Determination of Liability for Employment or Wages and a Notice of Assessment issued on April 25, 2007. The Decision letter contained the following rulings and instructions:

... The Determination further stated it would become final unless a written request for reconsideration was filed within fifteen (15) days after the issuance date, April 25, 2007. ...

The 15 day appeal period for both the Determination and Assessment expired on May 10, 2007. Your letter requesting an appeal was filed on June 29, 2007, which is

50 days past the deadline for the appeal to be considered timely. ...

Accordingly, it is the Department's Decision that the Determination of Liability for Unemployment Insurance and the Notice of Assessment issued April 25, 2007 for the period January 1, 2005 through December 31, 2005 is final and binding ... because no request for reconsideration was filed within the prescribed statutory period. ...

The Employer's petition was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **March 2, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reconsideration of the Determination of Liability for Employment or Wages, pursuant to A.R.S. § 23-724.
2. Whether the Employer filed a timely request for reconsideration of the Notice of Assessments, pursuant to A.R.S. § 23-724.

Also: Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of hearing, one Employer witness appeared to testify. Counsel for the Department and a witness for the Department appeared and presented evidence. Exhibits 1 through 8F were admitted into evidence. We have carefully reviewed the record.

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

1. The Department mailed its NOTICE OF ASSESSMENT to the Employer's address of record on April 25, 2007 (Bd. Exh. 3C/D). The Department also mailed a DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES to the Employer on April 25, 2007 (Bd. Exh. 3A/B).
2. The Employer's request for reconsideration of the Determination and Assessment was filed, according to the postmark, on June 29, 2007 (Bd. Exh. 4A-C). The Employer dated the document June 29, 2007.

3. On September 15, 2007, the Department issued its decision on the timeliness of the Employer's request for reconsideration. The Department held that because the Employer did not file its request for reconsideration within 15 days, "...the Determination of Liability for Employment or Wages and the Notice of Assessment issued April 25, 2007 for the period January 1, 2005 through December 31, 2005 is final and binding ..." (Bd. Exh. 5A-C).
4. The Employer, through its accountant as its authorized representative, filed a petition for hearing by a letter dated October 6, 2008 (Bd. Exh. 7). In this letter, no further reason was presented for filing a late request for reconsideration.
5. The Employer, through its accountant, offered the following in explanation for filing a late request for reconsideration (Bd. Exh. 4A):

... We are not in agreement with his report and would like an opportunity to appeal his audit findings. I understand under normal circumstances there is a 15 day window in which to request an appeal and at this time we are beyond that period. ... The information was not returned until after our third request on April 27, 2007. We were in the process of moving our physical location to Gilbert effective May 1 ... [The auditor] also provided us with the audit report and unfortunately due to the move, the report was set aside. However, after reviewing the audit report at a later time ... I immediately began trying to reach [the auditor] ...
6. The delay in filing a request for reconsideration occurred because the Notice of Assessment, which was received on April 27, 2007, was misplaced by the Employer's accountant during a move of the accountant's offices. On June 11, 2007, the Employer's president faxed a bill dated June 5, 2007, to the accountant. This prompted the accountant's inquiries. The Employer's business offices, and its mailing address, remained unchanged.

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

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon

the employer for all purposes. A redetermination or denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year ... [Emphasis added].

Arizona Revised Statutes § 23-738, provides in part as follows:

Delinquency assessments; interest and penalties; petition for reassessment

* * *

- 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 section 23-745 shall attach.

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
 - b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The record reveals that copies of the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES and the NOTICE OF ASSESSMENT were sent by mail on April 25, 2007, to the Employer's last known address of record. Copies were received by the Employer or its accountant as of April 27, 2007.

The Employer's request for reconsideration was filed on June 29, 2007, which is more than 15 days from the date of the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES and the NOTICE OF ASSESSMENT. The Employer's request for reconsideration, therefore, was not filed within the statutory time.

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

* * *

- 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].

We conclude the Employer's delay is attributable to its internal handling of the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES and the NOTICE OF ASSESSMENT, which had been received within the period a timely appeal could have been filed. The Employer had reasons to notify the Department of any change in its mailing address and to ensure that important mail or documents received was handled properly, because of pending wages to be reported on a quarterly basis and because of pending charges to the Employer's experience rating account.

The Employer has offered no adequate explanation for filing a late request for reconsideration of the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES and the NOTICE OF ASSESSMENT.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the request for reconsideration was timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated September 15, 2008, regarding the late filing of the Employer's request for reconsideration of the DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES and the NOTICE OF ASSESSMENT.

The DETERMINATION OF LIABILITY FOR EMPLOYMENT OR WAGES and the NOTICE OF ASSESSMENT dated April 25, 2007, remain in full force and effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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: XXX

Acct. No: XXX-001

(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-1092914-001-B

In the Matter of:

XXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER**, through its authorized representative, petitioned for hearing from the Department's Reconsidered Determination letter dated October 31, 2008, which referred to the Employer's late request for reconsideration of the Department's Determination and Demand for Payment of Predecessor Debt issued July 18, 2007. The Reconsidered Determination letter contained the following rulings and instructions:

Department records reveal that the Determination was sent July 18, 2007, to the employer's last known address of record ... The 15 day appeal period for the Determination expired on August 2, 2007. Your letter requesting reconsideration was filed on October 6, 2008, which is over a year past the deadline for the appeal to be considered timely. ...

Accordingly, it is the Department's decision that the Determination and Demand for Payment of Predecessor Debt is final and binding ... because a request for reconsideration was not submitted within the specified statutory period. ...

The Employer's petition was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **March 6, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issue:

Whether the Employer filed a timely request for redetermination by the Department, or appeal, pursuant to A.R.S. § 23-733 and A.R.S. § 23-724.

See: Arizona Administrative Code, Sections R6-3-1713(E) and R6-3-1404

On the scheduled date of hearing, two Employer witnesses appeared to testify. A Vietnamese interpreter participated throughout the hearing. Counsel for the Department and a witness for the Department appeared and presented evidence. Exhibits 1 through 12 were admitted into evidence. We have carefully reviewed the record.

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

1. On July 18, 2007, the Department mailed a "DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT" to the Employer's address of record (Bd. Exh. 3). The Department previously had mailed a Determination of Unemployment Insurance Liability to the Employer on May 25, 2006 (Bd. Exh. 2D), which the Employer has never appealed.
2. On October 6, 2008, the Employer's appeal from the Determination was filed by fax (Bd. Exh. 4). The Employer dated the document, which also is called a "written request for reconsideration", on October 6, 2008 (Bd. Exh. 4)
3. The Department issued its "Reconsidered Determination" on the timeliness of the Employer's request for reconsideration on October 31, 2008. The Department held that because the Employer did not file its request for reconsideration within the specified statutory period of 15 days after the Department's

adverse action was mailed to the Employer, "... the Determination and Demand for Payment of Predecessor Debt is final and binding ..." on the Employer (Bd. Exh. 5A/B).

4. The Employer filed a petition for a hearing dated November 9, 2008 (Bd. Exh. 6A), and mailed it in an envelope postmarked November 10, 2008 (Bd. Exh. 6B). In this letter, no reason was presented for filing a late request for reconsideration. Instead, the Employer requested a formal hearing "... on the issue of the Predecessor Debt."
5. The Employer received the "DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT" within the time allowed for appeal. However, the Employer presented it to the prior owner of the business it had purchased and demanded that he pay the debt. The Employer renewed its efforts to have the prior owner make arrangements to pay the debt, following the Department's Reconsidered Determination, and was successful in convincing him to pay the debt. The Employer had delayed filing an appeal because its owners expected the prior owner to pay the debt directly to the Department, which did not happen.

Arizona Revised Statutes § 23-724, provides in pertinent part:

Liability determinations; review; finality

- A. When the department makes a determination, which determination shall be made either on the motion of the department or on application of an employing unit, ... the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.
- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice of the reconsidered determination is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written

petition for hearing or review. The department may for good cause extend the period within which the written petition is to be submitted. If the reconsidered determination is appealed to the appeals board and the decision by the appeals board is that the employing unit is liable, the employing unit shall submit all required contribution and wage reports to the department within forty-five days after the decision by the appeals board.

C. On an employer's written request and the submission of pertinent information to the department, the department shall, or on its own motion may, consider whether a determination, reconsidered determination or decision which has become final should be revised. Revision shall be granted if either:

1. There has been a substantial and material change in the facts on which the determination, reconsidered determination or decision relied.
2. There has been a change in the law or interpretation of the law which warrants a revised determination, reconsidered determination or decision.

* * *

E. A refusal to grant relief under subsection C of this section may not be appealed unless within fifteen days the employer appeals the refusal to the appeals board. Notwithstanding any other provision of law and pursuant to such an appeal, the appeals board may initiate hearings to obtain information and issue a decision as to whether the relief requested in subsection C of this section should be granted. Thereafter, the appeals board shall issue a decision in the matter. The decision may not be appealed with respect to the employing unit unless petition for review and request for review are filed within the time and in the manner provided in section 23-672.

F. The determination of the department or decision of the appeals board, together with the record, shall be admissible in any subsequent judicial proceeding involving liability for contributions. A determination or decision that an employing unit is liable that has become final shall be conclusive and binding on the employing unit and shall not be

reconsidered in proceedings brought before the department or a hearing officer.

* * *

Arizona Revised Statutes § 23-733, provides in pertinent part:

Transfer of employer experience rating accounts to successor employer; liability of successor

A. When any employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of section 23-613, prior to such acquisition, and continues such organization, trade or business, the account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination.

* * *

D. Any individual or organization, including the types of organizations described in section 23-614, whether or not an employing unit, which in any manner acquires the organization, trade or business, or substantially all of the assets thereof, shall be liable, in an amount not to exceed the reasonable value, as determined by the department, of the organization, trade, business or assets acquired, for any contributions, interest and penalties due or accrued and unpaid by such predecessor employer, except that the department may waive the successor's liability for such unpaid amounts if a determination that the predecessor was subject to this chapter had not been made as provided in section 23-724 prior to the date of acquisition, and such liability on the part of the successor would be against equity and good conscience.

E. The amount of liability of a successor employer for any contribution, interest and penalties due or accrued and unpaid by his predecessor employer shall be a lien against the property or assets so acquired which shall be prior to all other liens except prior recorded realty mortgages, but the lien shall not be

valid as against one who acquires from the successor any interest in the property or assets in good faith, for value, and without notice of the lien. ... The remedy provided by this section shall be in addition to all other existing remedies against the predecessor employer or his successor, and the lien against the successor may be foreclosed as in other civil actions.

Arizona Administrative Code, Section R6-3-1713(E), provides in pertinent part:

Business transfers

* * *

E. Liability for predecessor's debt

1. Notwithstanding subsections (A) and (B) above, when an individual or employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets of an employer as defined in A.R.S. § 23-613, the successor shall be equally liable along with the predecessor for the contributions, interest and penalties due or accrued and unpaid by the predecessor as provided in A.R.S. § 23-733(D).
2. When the Department determines an individual or employing unit is equally liable for the unpaid contributions, interest and penalties of another as provided in A.R.S. § 23-733(D), the determination shall be subject to the same provisions as determinations made in accordance with A.R.S. § 23-724. ...

* * *

4. Waiver of the successor's liability for the predecessor's debt as provided in A.R.S. § 23-733(D) shall not be granted when any ownership interest of the predecessor's business is found present in the ownership of the successor or when there is a reasonable basis for the successor to believe that there may be amounts due or accrued and unpaid by the predecessor employer.

* * *

The record reveals that a copy of the DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT was sent by mail on July 18, 2007, to the Employer's last known address of record.

The Employer's request for reconsideration of the DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT was filed on October 6, 2008, which is more than 15 days from the date of the Determination. The Employer's request for reconsideration, therefore, was not filed within the statutory time.

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].

In the petition, the Employer has offered no further explanation for filing a late request for reconsideration. The Employer testified that the delay was attributable to his expectation that the previous owner would pay the debt, after he called the previous owner when he received the demand for payment of the predecessor debt during July 2007. The Employer testified that he wrote a letter to the Department after a collector called him about the debt, which remained unpaid as of October 3, 2008. The Employer acknowledged that his earliest appeal to the Department was dated October 6, 2008 (Bd. Exh. 4).

We conclude the Employer's expectation that the previous owner would pay the predecessor debt is not a reason recognized by law to adjust the predecessor debt amount, or to extend the time allowed to file a request for reconsideration.

The Employer has offered no adequate explanation for filing a late request for reconsideration. The mailing of the Determination to the Employer commenced the time period to appeal.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding that the request for reconsideration was timely filed. Accordingly,

THE APPEALS BOARD AFFIRMS the Department's Reconsidered Determination dated October 31, 2008, regarding the late filing of the Employer's request for reconsideration of the DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT.

The DETERMINATION AND DEMAND FOR PAYMENT OF PREDECESSOR DEBT dated July 18, 2007, remains in full force and effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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: XXX Acct. No: XXX-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-1110383-001-B

In the Matter of:

XXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 340-8447 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on April 1, 2009, which held that "... the Benefit Charge Notice dated 01-16-2009 must be held to be final" because the Employer's application for redetermination was filed late. The Determination also held that the Employer's response to the Benefit Charge Notice cannot be accepted as a timely protest. The Determination held:

On 10-07-2008 the Notice to Employer, UB-110 was mailed to the address of record for your firm. A protest to payment of benefits was not filed timely, therefore, your response to the Benefit Charge Notice, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant. ...

Your application was postmarked/telefaxed 03-09-2009, 52 days after the date of the notice. Since your

application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated 01-16-2009 must be held to be final. ...

The Employer's petition was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled an in-person hearing, which was convened on **May 8, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
2. Whether the Notice of Benefit Charges, UC-602, became final during the interim period before the Employer filed an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.

See: A.R.S. §§ 23-732(B) and 23-727(D), and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, one Employer witness appeared by telephone to testify. Counsel for the Department and a witness for the Department appeared. Exhibits 1 through 8F were admitted into evidence. We have carefully reviewed the record.

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

1. On January 16, 2009, the Department mailed a Benefit Charge Notice to the Employer's address of record (Bd. Exh. 1).
2. The Employer's application for redetermination from the Benefit Charge Notice was filed by mail postmarked on March 9, 2009. The Employer's application letter was dated March 8, 2009. The Employer included no reason for filing a late application (Bd. Exhs. 3, 4).
3. On April 1, 2009, the Department issued its decision on the timeliness of the Employer's "letter about charges to your account for benefits paid". The Department held that, because the Employer did not file its application within 15 days "... and

because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated 01-16-2009 must be held to be final.” (Bd. Exh. 5).

4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed on October 7, 2008, to the Employer’s address of record (Bd. Exh. 5).
5. On April 4, 2009, the Employer requested a review. In its letter, the Employer contended the UB-110 notice was never received. The Employer’s letter discusses the procedural history of a completely different case involving a different former employee. The Employer’s letter does not mention the late application for redetermination of the Benefit Charge Notice. (Bd. Exhs. 6, 7).
6. The mailing address used by the Department was correct.

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

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

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

- B. Petition for hearing or review
 1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed

within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:

- a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
- b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The record reveals that a copy of the Benefit Charge Notice was sent by mail on January 16, 2009, to the Employer's last known address of record. The Employer's witness confirmed that the mailing address used by the Department was correct. The Employer's witness did not testify to any reason for filing a late application for redetermination. The Notice to Employer, UB-110, was mailed on October 27, 2008, to the Employer's address of record.

The Employer's application for redetermination of the Benefit Charge Notice was filed on March 9, 2009, which is more than 15 days from the date of the Benefit Charge Notice. The Employer's application, therefore, was not filed within the statutory time.

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

* * *

- 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].

In the petition, in testimony, and in its prior filings, the Employer has offered no reason for filing a late application for redetermination. Instead, the Employer has contended that work remains available for the former employee and that the Employer had not yet received a Notice to Employer that the Claimant has filed a claim for Unemployment Insurance (UI) benefits. However, the Employer had received the Benefit Charge Notice dated January 16, 2009, and was aware of the \$156.20 charge (Bd. Exh. 1).

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

THE APPEALS BOARD **AFFIRMS** the Department's decision dated April 1, 2009, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Benefit Charge Notice dated January 16, 2009, remains in full force and effect.

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. 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: XXX

Acct. No: XXX

(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-1111276-001-B

In the Matter of:

xxx

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for hearing from the Determination letter issued on January 8, 2009, which held: "... the Notice of Benefit Charges dated 10/12/08, must be held to be final", because the Employer's application for redetermination was filed late. The Determination also held that the Employer's response to the Notice of Benefit Charges cannot be accepted as a timely protest to payments paid to this claimant. The Determination held as follows:

A subsequent review of our records has determined that the Notice to Employer, UB-110, was mailed to the address of record for your firm on 6/10/08. A protest to payment of benefits was not returned timely, therefore, your response to the Notice of Benefit Charges, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant. ...

Your application was postmarked 12/15/08, 66 days after the date of the Notice. Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated 10/12/08 must be held to be final. ...

The Employer's letter dated January 19, 2009, has been broadly construed as a petition for hearing. It was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled an in-person hearing, which was convened on **June 19, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
 2. Whether the Notice of Benefit Charges, UC-602, became final during the interim period before the Employer filed an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.
- See:* A.R.S. §§ 23-732(B) and 23-727(D), and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of hearing, no Employer witness appeared to testify. Counsel for the Department and a witness for the Department appeared. Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

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

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on October 10, 2008 (Bd. Exh. 2).
2. The Employer's application for redetermination of the Benefit Charge Notice was filed by mail postmarked on December 15, 2008. The Employer's appeal letter was dated December 15, 2008. The Employer included no reason for filing a late appeal (Bd. Exhs. 3A-3C).
3. On January 8, 2009, the Department issued its decision on the timeliness of the Employer's "response to the Notice of Benefit

Charges, UC-602 ...". The Department held that, because the Employer did not file its application within 15 days "... and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated 10/12/08 must be held to be final." (Bd. Exh. 4).

4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed to the Employer's address of record on June 10, 2008 (Bd. Exh. 4).
5. On January 19, 2009, the Employer requested review. In its letter, the Employer contended the "letter sent on 6/10/08 had not been received." The Employer's letter discusses the nature of the separation from employment of a particular claimant. The Employer's letter does not mention the late appeal from the Benefit Charge Notice. (Bd. Exh. 5A).
6. The NOTICE OF TELEPHONE APPEALS BOARD HEARING was not returned as undelivered. This implies that the mailing address used by the Department was correct for the Employer, as it matched the Department's letter that was received by the Employer (Bd. Exhs. 5B, 6).

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

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

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

- B. Petition for hearing or review
 1. Any interested party to a reconsidered determination or a denial of application for

reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:

- a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
- b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The Notice to Employer that a claimant had filed an initial claim for Unemployment Insurance benefits, UB-110, was mailed to the Employer's address of record on June 10, 2008. The record reveals that a copy of the Benefit Charge Notice, UC-602, was sent by mail on October 10, 2008, to the Employer's last known address of record.

The Employer's application for redetermination of the Benefit Charge Notice was filed on December 15, 2008, which is more than 15 days from the date of the Benefit Charge Notice. The Employer's application, therefore, was not filed within the statutory time.

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

* * *

- 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 ex-

planation 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].

In the petition and in its prior filings, the Employer has offered no reason for filing a late application for redetermination of the Benefit Charge Notice. Instead, the Employer has contended that it had not yet received a different document, a Notice to Employer that the Claimant has filed a claim for Unemployment Insurance (UI) benefits. However, the Employer had received the Benefit Charge Notice dated October 10, 2008, and the Employer returned to the Department a copy of the Benefit Charge Notice (Bd. Exhs. 3A-3B).

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

THE APPEALS BOARD AFFIRMS the Department's decision dated January 8, 2009, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Employer did not file an application for redetermination of the Benefit Charge Notice within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated October 10, 2008, remains in full force and effect.

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) 347-6343.

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, 1951 W. Camelback Rd, Suite 465, in Phoenix, Arizona 85015. 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) 347-7343.
-

A copy of the foregoing was mailed on
to:

(x) Er: xxx Acct. No: xxx

(x) Er's 2nd address:

xxx

(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-1111287-001-B

In the Matter of:

XXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on March 30, 2009, which held that "... the Notice of Benefit Charges dated 1/16/09 must be held to be final", because the Employer's application for redetermination was filed late. The Department's letter also held that the Employer's response to the Notice of Benefit Charges cannot be accepted as a timely protest to payments paid to this claimant. The Department's letter held as follows:

A subsequent review of our records has determined that the Notice to Employer, UB-110, was mailed to the address of record for your firm on 6/13/07 protest to payment of benefits was not returned timely, therefore, your response to the Notice of Benefit Charges, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant. ...

Your application was postmarked 18 days after the date of the Notice. Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated 1/16/09 must be held to be final. ...

The Employer's letter faxed on April 1, 2009 and received April 6, 2009, has been broadly construed as a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled an in-person hearing, which was convened on **June 19, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
 2. Whether the Notice of Benefit Charges, UC-602, became final during the interim period before the Employer filed an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.
- See:* A.R.S. §§ 23-732(B) and 23-727(D), and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of hearing, no Employer witness appeared to testify. Counsel for the Department and a witness for the Department appeared. Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

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

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on January 16, 2009 (Bd. Exh. 2).
2. The Employer's application for redetermination of the Benefit Charge Notice was filed by fax on February 3, 2009, according to the fax header and the receipt stamp. The Employer's appeal letter was written on the Benefit Charge Notice. The Employer included no reason for filing a late application (Bd. Exh. 3).
3. On March 30, 2009, the Department issued its decision on the timeliness of the Employer's application for redetermination.

The Department held that, because the Employer did not file its application within 15 days, "... and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated 1/162/09 must be held to be final." (Bd. Exh. 4).

4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed to the Employer's address of record on June 13, 2007 (Bd. Exh. 4).
5. On April 1, 2009, the Employer petitioned for a hearing. In its notations written on the March 30, 2009 letter, an unidentified person on behalf of the Employer contended that: "I faxed this to your office back in Jan." The Employer's letter offers no further explanation for the late application for redetermination following the Benefit Charge Notice (Bd. Exh. 5A).
6. The NOTICE OF TELEPHONE APPEALS BOARD HEARING was not returned as undelivered. This implies that the mailing address used by the Department was correct for the Employer, as it matched the Department's letter that was received by the Employer (Bd. Exhs. 5A, 6).

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

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

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

- B. Petition for hearing or review
 1. Any interested party to a reconsidered determination or a denial of application for

reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:

- a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
- b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The Notice to Employer that a claimant had filed an initial claim for Unemployment Insurance benefits, UB-110, was mailed to the Employer's address of record on June 13, 2007. The record reveals that a copy of the Benefit Charge Notice, UC-602, was sent by mail on January 16, 2009, to the Employer's last known address of record (Bd. Exhs. 1, 4).

The Employer's application to reconsider the Benefit Charge Notice was filed on February 3, 2009, which is more than 15 days from the date of the Benefit Charge Notice. The Employer's application, therefore, was not filed within the statutory time.

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

* * *

- 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 ex-

planation 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].

In the petition and in its prior filings, the Employer has offered no reason for filing a late application for redetermination of the Benefit Charge Notice. Instead, the Employer has contended that it "... did not get original copies of file" (Bd. Exh. 3). However, the Employer had received the Benefit Charge Notice dated January 16, 2009, as demonstrated by the Employer's handwritten notes returning to the Department a copy of the Benefit Charge Notice (Bd. Exhs. 3).

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

THE APPEALS BOARD AFFIRMS the Department's decision dated January 8, 2009, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Employer did not file an application for redetermination of the Benefit Charge Notice within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated January 16, 2009, remains in full force and effect.

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) 347-6343.

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, 1951 W Camelback Rd, Suite #465, Phoenix, Arizona 85015. 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) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: XXX Acct. No: XXX

(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-1112928-001-B

In the Matter of:

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE EMPLOYER petitioned for a hearing from the Department's decision letter issued on March 30, 2009, which held: "... the Notice of Benefit Charges dated 1/16/09 must be held to be final" because the Employer's application for redetermination was filed late. The Department's decision letter also held that the Employer did not file a timely protest to the Notice to Employer, UB-110. The Department's decision letter held as follows:

... the Notice to Employer, UB-110 was mailed to the address of record for your firm on 9/12/08. A protest to payment of benefits was not returned timely, therefore, your response to the Notice of Benefit Charges, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant. ...

Your application was postmarked 18 days after the date of the Notice. Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated 1/16/09 must be held to be final. ...

On April 1, 2009, the Employer requested a review. It has been construed as a request for a hearing. It was timely filed. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled an in-person hearing, which was convened on **June 19, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
 2. Whether the Notice of Benefit Charges, UC-602, became final during the interim period before the Employer filed an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.
- See:* A.R.S. §§ 23-732(B) and 23-727(D), and Arizona Administrative Code, Section R6-3-1404.

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

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

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on January 16, 2009 (Bd. Exh. 2).
2. The Employer's application for redetermination of the Benefit Charge Notice was filed by fax on February 3, 2009. The Employer's application was hand-written and typed on the Benefit Charge Notice document. The Employer included no reason for filing a late application (Bd. Exh. 3).
3. On March 30, 2009, the Department issued its decision on the timeliness of the Employer's "response to the Notice of Benefit

Charges, UC-602 ...". The Department held that, because the Employer did not file its application for redetermination within 15 days "... and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated 1/16/09 must be held to be final." (Bd. Exh. 4).

4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed to the Employer's address of record on September 12, 2008 (Bd. Exh. 4).
5. On April 1, 2009, the Employer requested review. The Employer's letter does not specifically mention the late appeal from the Benefit Charge Notice. (Bd. Exh. 5).
6. The Employer's office manager faxed a document (Bd. Exh. 3) to the Department on February 3, 2009. He did not retain a transmission report that notified him of a problem with the Employer's attempt to fax the Employer's response to the Notice of Benefit Charges on February 2, 2009. January 31, 2009, was not a business day for the Employer because it was a Saturday. The Employer realized that the application for redetermination was due to be filed on February 2, 2009.

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

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

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
 - b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The Notice to Employer that a claimant had filed an initial claim for Unemployment Insurance benefits, UB-110, was mailed to the Employer's address of record on September 12, 2008. The record reveals that a copy of the Benefit Charge Notice, UC-602, was sent by mail on January 16, 2009, to the Employer's last known address of record.

The Employer's application for redetermination of the Benefit Charge Notice was filed as a single-page facsimile transmission on Tuesday, February 3, 2009, at 11:37, as established by the fax header and by the Department's receipt stamp (Bd. Exh. 3). February 3, 2009, is more than 15 days from the date of the Benefit Charge Notice. The Employer's application for redetermination, therefore, was not filed within the statutory time.

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].

In the petition and in its prior filings, the Employer has offered conflicting explanations for filing a late application for redetermination of the Benefit

Charge Notice. The Employer wrote that its application "... was also sent via facsimile on January 31, 2009", and that date was not a business day for the Employer. The document itself shows a transmission and receipt date of February 3, 2009 (Bd. Exhs. 3, 5). The testimony establishes the Employer's witness realized on February 2, 2009, that his attempts to fax the document were unsuccessful, so the Employer's witness personally faxed it again on February 3, 2009. We note the Employer could have achieved a timely filing by mailing the document with a postmark of February 2, 2009, or earlier.

Because the evidence established the Employer did not file a timely application for redetermination, the issue of whether the Employer filed a timely protest is secondary and need not be decided in this case (Bd. Exhs. 5, 7A, 7B).

The Employer has not established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD AFFIRMS the Department's decision dated March 30, 2009, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Employer did not file an application for redetermination of the Benefit Charge Notice within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated January 16, 2009, remains in full force and effect.

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) 347-6343.

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, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. 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) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: xxx Acct. No: xxx

(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-1114741-001-B

In the Matter of:

xxx

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE EMPLOYER petitioned for a hearing from the Department's decision letter issued on March 30, 2009, which held: "... the Notice of Benefit Charges dated 1/16/09 must be held to be final" because the Employer's application for redetermination was filed late. The Department's decision letter also held that the Employer did not file a timely protest to the Notice to Employer, UB-110. The Department's decision letter held as follows:

... the Notice to Employer, UB-110 was mailed to the address of record for your firm on 9/4/08. A protest to payment of benefits was not returned timely, therefore, your response to the Notice of Benefit Charges, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant. ...

Your application was postmarked 18 days after the date of the Notice. Since your application was not filed within

fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated 1/16/09, must be held to be final. ...

On April 3, 2009, the Employer requested a review. It has been liberally construed as a timely request for a hearing. The Appeals Board has jurisdiction to consider the timeliness issue pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled a telephone hearing, which was convened on **June 19, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
2. Whether the Notice of Benefit Charges, UC-602, became final during the interim period before the Employer filed an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.

See: A.R.S. §§ 23-732(B) and 23-727(D), and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of hearing, no witnesses appeared on behalf of the Employer. Counsel for the Department appeared, and a witness for the Department testified. Board Exhibits 1 through 10 were admitted into evidence. We have carefully reviewed the record.

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

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on January 16, 2009 (Bd. Exh. 1).
2. The Employer's application for redetermination of the Benefit Charge Notice was filed by fax on February 3, 2009. The Employer's application was dated February 3, 2009. The Employer included no reason for filing a late application (Bd. Exhs. 2A, 2B).
3. On March 30, 2009, the Department issued its decision on the timeliness of the Employer's "response to the Notice of Benefit Charges, UC-602 ...". The Department held that, because the Employer did not file its application for redetermination within 15 days "... and because you have not established a good and

sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated 1/16/09 must be held to be final.” (Bd. Exh. 3).

4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed to the Employer’s address of record on July 11, 2008 (Bd. Exh. 3).
5. On April 3, 2009, the Employer requested review regarding two former employees. The Employer included a copy of the July 11, 2008 Notice to Employer UB-110 regarding one of its workers, with a protest dated July 17, 2008 (Bd. Exhs. 5A, 5B). The Employer also included a copy of the September 4, 2008 Notice to Employer UB-110 regarding another of its workers, with a protest dated September 12, 2008 (Bd. Exhs. 10D, 10E). These former workers were among dozens listed on the Benefit Charge Notice issued on January 16, 2009 (Bd. Exhs. 1, 7).
6. In its letter, the Employer contended that it filed a protest to the UB-110 notice within 4 business days. The Employer did not offer any explanation for filing a late application for redetermination on February 3, 2009. The Employer’s letter does not specifically mention any explanation for the late application for reconsideration of the Benefit Charge Notice. (Bd. Exh. 4B).

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

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

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
 - b. The rate of contributions (A.R.S. § 23-732); ...

* * *

Notices to Employer that a claimant had filed an initial claim for Unemployment Insurance benefits, UB-110, were mailed to the Employer's address of record on July 11, 2008 and September 4, 2008. The record reveals that a copy of the Benefit Charge Notice, UC-602, was sent by mail on January 16, 2009, to the Employer's last known address of record.

The Employer's application for redetermination of the Benefit Charge Notice was filed by fax on February 3, 2009 (Bd. Exhs. 2, 8). That date is more than 15 days from the date of the Benefit Charge Notice. The Employer's application for redetermination, therefore, was not filed within the statutory time.

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

* * *

- 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 be-

cause 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].

In the petition, the Employer offered no explanation for filing a late application for redetermination of the Benefit Charge Notice. Instead, the Employer only discussed whether it filed timely protests regarding two out of dozens of employees who were listed in the Benefit Charge Notice. Because the evidence established the Employer did not file a timely application for redetermination, the issue of whether the Employer filed timely protests is secondary and need not be decided in this case.

The Employer has not established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD AFFIRMS the Department's decision dated March 30, 2009, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Employer did not file an application for redetermination of the Benefit Charge Notice within the 15-day time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated January 16, 2009, remains in full force and effect.

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) 347-6343.

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, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. 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) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: xxx Acct. No: xxx

(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-1114751-001-B

In the Matter of:

XXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE EMPLOYER petitioned for a hearing from the Department's decision letter issued on March 30, 2009, which held: "... the Notice of Benefit Charges dated 01/16/2009 must be held to be final" because the Employer's application for redetermination was filed late. The Department's decision letter also held that the Employer did not file a timely protest to the Notice to Employer, UB-110. The Department's decision letter held as follows:

... the Notice to Employer, UB-110, was mailed to the address of record for your firm on 9/08/08. A protest to payment of benefits was not returned timely, therefore, your response to the Notice of Benefit Charges, UC-602, cannot be accepted as a timely protest to benefits paid to this claimant. ...

Your application was postmarked 24 days after the date of the Notice. Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated 1/16/09, must be held to be final. ...

On April 8, 2009, the Employer requested a review. It has been liberally construed as a timely request for a hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled an in-person hearing, which was convened on **June 19, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
2. Whether the Notice of Benefit Charges, UC-602, became final during the interim period before the Employer filed an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.

See: A.R.S. §§ 23-732(B) and 23-727(D), and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of hearing, two Employer witnesses appeared to testify. Counsel for the Department and a witness for the Department appeared. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

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

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on January 16, 2009 (Bd. Exh. 1).
2. The Employer's application for redetermination of the Benefit Charge Notice was filed by fax on February 17, 2009. The Employer's application was hand-written on the Benefit Charge Notice document. The Employer included, as its reason for filing a late application, "JUST RECEIVED THIS NOTIFICATION AT HOME ADDRESS 2/8/2009." (Bd. Exh. 2).
3. On March 30, 2009, the Department issued its decision on the timeliness of the Employer's application for redetermination of

the Benefit Charge Notice. The Department held that, because the Employer did not file its application for redetermination within 15 days "... and because you have not established a good and sufficient reason for the delay in submitting the application, the Notice of Benefit Charges dated 1/16/09, must be held to be final." (Bd. Exh. 3).

4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed to the Employer's address of record on September 8, 2008 (Bd. Exh. 3).
5. On April 8, 2009, the Employer requested review. In its letter, the Employer contended that it filed its response "... a few days after the due date because the claim was sent to our home address, not the business – and I was having a baby – and did not check the mail for 2 weeks." On the back of the envelope containing its request for hearing, the Employer specified a different address for the first time (Bd. Exhs. 5A, 5C).
6. The Employer's personal chef business is operated by a husband and wife. In February 2008, a retail shop was opened on Bell Road but the Employer continued to receive documents from the Department at its former private residence address on Aster Drive because the Employer did not notify the Department of a change in address.
7. Due to the wife's childbirth and hospitalization for 4 days, the owners did not check incoming mail at the residence until the Saturday before it faxed an application for redetermination. A second fax transmission also occurred because the Department's workers said they had not received anything.

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

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

the rate of contributions of any employer for any calendar year ... [Emphasis added].

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
 - b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The Notice to Employer that a claimant had filed an initial claim for Unemployment Insurance benefits, UB-110, was mailed to the Employer's address of record on November 5, 2008. The record reveals that a copy of the Benefit Charge Notice, UC-602, was sent by mail on January 16, 2009, to the Employer's last known address of record.

The Employer's application for redetermination of the Benefit Charge Notice was filed by mail postmarked on February 17, 2009 (Bd. Exh. 2). This date is more than 15 days from the date of the Benefit Charge Notice. The Employer's application for redetermination, therefore, was not filed within the statutory time.

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 de-

terminated 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].

In the petition and by testimony, the Employer explained it filed a late application for redetermination of the Benefit Charge Notice because its incoming mail was not checked at its address of record for several days. We conclude the reasons for late filing amount to a suggestion that good cause or other reasons should be considered. 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 conclude the same reasoning applies to an analysis of the 15-day deadline specified in A.R.S. § 23-732(B), because the statutory provisions are nearly identical. We note that the same considerations for extending the deadline apply to both statutes, and are specified in Arizona Administrative Code, Section R6-3-1404(B).

Because the evidence established the Employer did not file a timely application for reconsideration, the issue of whether the Employer filed a timely protest is secondary and need not be decided in this case.

The Employer has not established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated March 30, 2009, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Employer did not file an application for redetermination of the Benefit Charge Notice within the 15-day time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated January 16, 2009, remains in full force and effect.

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) 347-6343.

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, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. 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) 347-6343.
-

A copy of the foregoing was mailed on
to:

(x) Er: XXX

Acct. No: XXX

(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-1114762-001-B

In the Matter of:

XXX

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

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE EMPLOYER petitioned for a hearing from the Department's decision letter issued on April 6, 2009, which held: "... the Notice of Benefit Charges dated 01/16/2009 must be held to be final" because the Employer's application for redetermination was filed late. The Department's decision letter also held that the Employer did not file a timely protest to the Notice to Employer, UB-110. The Department's decision letter held as follows:

... On 11/5/2008 a Notice to Employer, UB-110, was mailed to the address of record for your firm. A protest to payment of benefits was not returned timely therefore, your response to the Benefit Charge Notice cannot be accepted as a timely protest to benefits paid to this claimant. ...

Your application was postmarked/telefaxed 2/17/2009, 33 days after the date of the notice. Since your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated 01/16/2009 must be held to be final. ...

On April 15, 2009, the Employer requested a review. It has been liberally construed as a timely request for a hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled an in-person hearing, which was convened on **June 19, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination by the Department.
2. Whether the Notice of Benefit Charges, UC-602, became final during the interim period before the Employer filed an application for redetermination. Also, whether the documents filed by the Employer can be considered a timely protest to benefits paid to this claimant.

See: A.R.S. §§ 23-732(B) and 23-727(D), and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of hearing, two Employer witnesses appeared to testify. Counsel for the Department and a witness for the Department appeared. Board Exhibits 1 through 6 were admitted into evidence. We have carefully reviewed the record.

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

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on January 16, 2009 (Bd. Exh. 1).
2. The Employer's application for redetermination of the Benefit Charge Notice was filed by mail on February 17, 2009. The Employer's application was hand-written on the Benefit Charge Notice document. The Employer included no reason for filing a late application (Bd. Exhs. 2A, 2B).
3. On April 6, 2009, the Department issued its decision on the timeliness of the Employer's "response to the Benefit Charge Notice ...". The Department held that, because the Employer did

not file its application for redetermination within 15 days "... and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated 01/16/2009 must be held to be final." (Bd. Exh. 3).

4. The Department also concluded that a protest to payment of benefits was not returned timely following the Notice to Employer, UB-110, that was mailed to the Employer's address of record on November 5, 2008 (Bd. Exh. 3).
5. On April 15, 2009, the Employer requested review. In its letter, the Employer contended that it never received a UB-110 notice. The Employer explained its application for redetermination was filed on February 17, 2009, "... when I noticed the claim was paid on our quarterly report." The Employer's letter does not specifically mention any explanation for the late application for redetermination of the Benefit Charge Notice. (Bd. Exhs. 4A, 5).
6. The Employer's president processes all Unemployment Insurance claim correspondence. The Employer's witness knew she was late filing an application for redetermination, after having taken a while to go through the various line items on the Benefit Charge Notice.

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

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

Arizona Administrative Code, Section R6-3-1506(B), provides in pertinent part:

B. Petition for hearing or review

1. Any interested party to a reconsidered determination or a denial of application for reconsidered determination or a petition for reassessment may petition the Appeals Board for review. The petition shall be in writing and shall be signed by the appellant or the authorized agent. The petition shall be filed within 15 calendar days after the mailing of the reconsidered determination or denial thereof involving one of the following issues:
 - a. Benefits paid and chargeable to the account (A.R.S. § 23-732);
 - b. The rate of contributions (A.R.S. § 23-732); ...

* * *

The Notice to Employer that a claimant had filed an initial claim for Unemployment Insurance benefits, UB-110, was mailed to the Employer's address of record on November 5, 2008. The record reveals that a copy of the Benefit Charge Notice, UC-602, was sent by mail on January 16, 2009, to the Employer's last known address of record.

The Employer's application for redetermination of the Benefit Charge Notice was filed by mail postmarked on February 17, 2009 (Bd. Exh. 2A, 2B). That date is more than 15 days from the date of the Benefit Charge Notice. The Employer's application for redetermination, therefore, was not filed within the statutory time.

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 ab-

sence 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].

In the petition and by testimony, the Employer explained it filed a late application for redetermination of the Benefit Charge Notice because several former workers were included on the Benefit Charge Notice. The Employer took

additional time analyzing the records of each worker, then decided charges for one of the 14 workers should be recalculated. The testimony established that the Employer's witness realized the application for redetermination would be late, before it was filed.

Because the evidence established the Employer did not file a timely application for redetermination, the issue of whether the Employer filed a timely protest is secondary and need not be decided in this case.

The Employer has not established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD AFFIRMS the Department's decision dated April 6, 2009, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Employer did not file an application for redetermination of the Benefit Charge Notice within the 15-day time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated January 16, 2009, remains in full force and effect.

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) 347-6343.

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, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. 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) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: XXX Acct. No: XXX

(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-1119436-001-B

In the Matter of:

XXX

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

Employer

Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE EMPLOYER petitioned for a hearing from the Department's Reconsidered Determination letter issued on May 19, 2009, which affirmed the Determination of Unemployment Insurance Liability issued August 14, 2007. The Department's Reconsidered Determination letter held as follows:

... the only issue remaining is whether ... experience rating account was properly transferred to the existing experience rating account of [the Employer].

... In light of all of the foregoing, we must conclude that [the Employer] acquired and continued the trade or business ... and that the transfer of ... experience rating account to the existing experience rating account of [the Employer] was proper.

The petition for hearing having been timely filed, the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724(B) and 23-733(B).

THE APPEALS BOARD scheduled an in-person hearing, which was convened on **July 17, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the transfer of the experience rating account of the former entity "AIP" to the Employer was proper.
2. Whether the Determination of Unemployment Insurance Liability issued August 14, 2007, was properly affirmed.
3. Whether the transaction between the Employer and the former entity "AIP" was restricted to the purchase of a list of clients, or was a more extensive transaction giving rise to a successor business situation, as defined by A.R.S. § 23-733.

See: A.R.S. §§ 23-733, 23-733.01, and 23-727(D), and Arizona Administrative Code, Section R6-3-1506.

On the scheduled date of hearing, one Employer witness appeared to testify. Counsel for the Department and a witness for the Department appeared. Board Exhibits 1 through 9 were admitted into evidence. We have carefully reviewed the record.

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

1. On August 1, 2006, the Employer agreed to purchase from a Seller "... the following assets: the entire book of business (insurance accounts), phone and fax numbers, web site and or web addresses, covenants not to compete and not to solicit, and certain representations and warranties." The purchase was consummated on August 1, 2006, under the terms of a written PURCHASE AGREEMENT. All terms of the PURCHASE AGREEMENT were followed completely (Bd. Exh. 2).
2. On March 21, 2007, the Seller filed a REPORT OF CHANGES that reported "All of the Arizona business was transferred to [the Employer] as of 8-1-06" (Bd. Exh. 1). A CERTIFICATE OF DISSOLUTION for the Seller was issued by the Arizona Corporation Commission effective March 4, 2008 (Bd. Exh. 6B).
3. The Department mailed a DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY to the Employer's address of record on August 14, 2007 (Bd. Exhs. 3, 8I).

4. On May 19, 2009, the Department issued its Reconsidered Determination affirming the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY. The Department's rationale for ruling that the Employer succeeded to or acquired the organization, trade or business, or substantially all of the assets thereof, included an absence of evidence that the Seller continued to operate. Further rationale noted the covenant not to compete whereby the Seller agreed that it would not engage in the insurance business within Maricopa County, Arizona, from the purchase effective date of August 1, 2006 through July 31, 2008 "... except as an employee or independent contractor for ..." the Employer. The Department also concluded the acquisition involved more than just "... a list of clients" (Bd. Exh. 7).
5. The Employer is an insurance agency selling personal and commercial products, which requires professional licenses. The Employer continued to operate the acquired business immediately upon the acquisition. No employees of the Seller were hired by the Employer, although one of the Seller's owners was authorized to "hang her license" as a subcontractor to the Employer.

Arizona Revised Statutes § 23-733, provides in pertinent part:

Transfer of employer experience rating accounts to successor employer; liability of successor

- A. When any employing unit in any manner succeeds to or acquires the organization, trade or business, or substantially all of the assets thereof, excepting any assets retained by such employer incident to the liquidation of his obligations, whether or not such acquiring employing unit was an employer within the meaning of section 23-613, prior to such acquisition, and continues such organization, trade or business, the account of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate determination.
- B. ... The predecessor and successor employers shall be promptly notified of the determination made upon the application which shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the parties files with the department a written request for reconsideration. When timely request for reconsideration

is filed, a reconsidered determination shall be made. The reconsidered determination shall become final fifteen days after written notice thereof is served personally or by certified mail addressed to the last known address of each employing unit involved, unless within such time one of the employing units involved files with the department a written petition for hearing. When timely petition for hearing is filed, the parties shall be afforded an opportunity for hearing and thereafter furnished with a decision. The decision shall become final unless a petition for review is filed as provided in section 23-672.

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

* * *

- D. Any individual or organization, including the types of organizations described in section 23-614, whether or not an employing unit, which in any manner acquires the organization, trade or business, or substantially all of the assets thereof, shall be liable, in an amount not to exceed the reasonable value, as determined by the department, of the organization, trade, business or assets acquired, for any contributions, interest and penalties due or accrued and unpaid by such predecessor employer, except that the department may waive the successor's liability for such unpaid amounts if a determination that the predecessor was subject to this chapter had not been made as provided in section 23-724 prior to the date of acquisition, and such liability on the part of the successor would be against equity and good conscience. [Emphasis added].

* * *

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

- C. Report of changes. Each employer as defined in A.R.S. § 23-613 shall promptly notify the Department in writing of any change in its business operations. Changes include: the acquisition or disposal of all or any part of the business operations or assets; a change in business name or address; bankruptcy or receivership; or any other change pertaining to the operation or ownership of the

business operations. The notification shall include the date of change, and the name, address, and telephone number of the person, firm, corporation or official placed in charge of the organization, trade or assets of the business.

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

A. General

1. The manner in which an organization, trade or business is acquired or succeeded to is not determinative of successor status. business may be acquired or succeeded to "in any manner" which includes, but is not limited to, acquisition by purchase, lease, repossession, bankruptcy proceedings, default, or through the transfer of a third party.
2. An "organization, trade or business" as used in A.R.S. §§ 23-613 and 23-733(A) through (D) is acquired if the factors of an employer's organization, trade or business succeeded to are sufficient to constitute an entire existing operating business unit as distinguished from the acquisition of merely dry assets from which a new business may be built. The question of whether an organization, trade or business is acquired is determined from all the factors of the particular case. Among the factors to be considered are:
 - a. The place of business
 - b. The trade name
 - c. The staff of employees
 - d. The customers
 - e. The goodwill
 - f. The inventory
 - g. The accounts receivable/accounts payable
 - h. The tools and fixtures
 - i. Other assets.
3. For the purpose of determining successorship status under A.R.S. §§ 23-613(A)(3) and 23-733(A) or (B), an individual or employing unit who in any manner

acquires or succeeds to all or a part of an organization, trade or business from an employer as defined in A.R.S. § 23-613 shall be deemed the successor employer provided the organization, trade or business is continued. Continuation of the organization, trade or business shall be presumed if the normal business activity was not interrupted for more than 30 days before or after the date of transfer. ...

B. Special provisions

1. An individual or employing unit shall be determined a successor under the provisions of A.R.S. § 23-733(A) and receive the experience rating account of the predecessor when the organization, trade or business acquired or succeeded to constitutes all of the predecessor's employment generating enterprise upon which the experience rating account was primarily established without regard to those factors retained by the predecessor which represent:
 - a. Exempt employment; or
 - b. Employment necessary for the liquidation of the trade or business; or
 - c. Employment arising from the activities establishing another trade or business; or
 - d. Employment as a result of an organization, trade or business succeeded to or acquired within two calendar days of the date of transfer of the enterprise upon which the experience rating account is based.

* * *

C. Transfer of entire business

1. When the Department determines that an individual or employing unit is a successor and shall inherit the experience rating account of the predecessor as provided in A.R.S. § 23-733(A), the determination shall be subject to the same provisions as determinations made in accordance with A.R.S. § 23-724.
2. When the experience rating account is transferred to the successor, the successor's account shall be charged with benefits determined chargeable as a result of the employment in the organization, trade or business acquired, and the successor's

contribution rate shall be determined in accordance with A.R.S. § 23-733(C) for the calendar year beginning on the date of acquisition.

* * *

E. Liability for predecessor's debt

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

* * *

The evidence in this case establishes that the Employer acquired the Seller's entire trade, business and assets. The Purchase Agreement also specified that covenants not to compete prohibited the Seller from continuing to operate in the insurance business industry. The Seller's phone numbers, web site, and existing clients were acquired by the Employer on August 1, 2006. The evidence establishes that the Employer acquired and immediately continued to operate the trade or business of the Seller. The Employer has not established any fact which, if accepted as true, would prevent or would render improper the transfer to it of the Seller's experience rating account. The Employer did not present evidence sufficient to overcome the presumption of successor status, pursuant to Arizona Administrative Code, Section R6-3-1713(A)(3).

As the Department noted in its Reconsidered Determination, no taxes, penalties or interest were due and unpaid by the Seller (Exhs. 7A, 8B). Accordingly, the transfer of the Seller's experience rating account to the existing experience rating account of the Employer was required by law, and was proper.

THE APPEALS BOARD AFFIRMS the Department's Reconsidered Dtermination decision dated May 19, 2009, regarding the successor status of the Employer.

The Employer acquired the organization, trade or business of the Seller.

The transfer of the Seller's experience rating account to the Employer, as a successor employer that inherited the Seller's experience rating account, was proper.

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) 347-6343.

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, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. 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) 347-6343.
-

A copy of the foregoing was mailed on
to:

(x) Er: XXX

Acct. No: XXX

(x) KEVIN R SMITH
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-1121880-001-B

In the Matter of:

XXXX
XXXX
XXXX

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

Employer

Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE EMPLOYER petitioned for a hearing from the Department's decision letter issued on May 15, 2009, which held that "... the Determination issued December 16, 2008 is final" because the Employer's letter requesting reconsideration was filed late. The Department's decision letter held as follows:

... The 15-day appeal period for the Determination expired on December 31, 2008. Your letter requesting an appeal was filed on March 3, 2009, which is 62 days beyond the deadline for the appeal to be considered timely.

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

Following notification to the parties, a telephone hearing was conducted before ROBERT T. NALL, an Administrative Law Judge in Phoenix, Arizona, on Wednesday, August 26, 2009. At that time, all parties were given an opportunity to present evidence on the following issue(s):

1. Whether the Employer filed a timely appeal from the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY.
2. Whether the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY, UC-016-c, became final during the interim period before the Employer filed an appeal.

See: A.R.S. § 23-724, and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of hearing, an Employer witness appeared to testify. Counsel for the Department and a witness for the Department appeared. Two observers were present. Board Exhibits 1 through 8 were admitted into evidence. We have carefully reviewed the record.

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

1. The Department mailed a DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY to the Employer's address of record on December 16, 2008 (Bd. Exh. 2). The mailed document was not returned to the Department by the postal service, as not delivered.
2. The Employer's request for reconsideration of the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY was filed by fax on March 3, 2009, but was dated February 25, 2009. The Employer noted that it was filing a late appeal, and explained that it had received during January 2009 "... notification in the mail from DES for all four quarters, sent on 12/31/08" (Bd. Exhs. 3A, 3B).
3. On May 15, 2009, the Department issued its decision on the timeliness of the Employer's request for reconsideration of a liability determination. The Department held that, because the Employer did not file its request for reconsideration within 15 days after the date of issuance, "... the Determination issued December 16, 2008 is final." (Bd. Exh. 5).
4. According to the postmark, the Employer's authorized representative petitioned for a formal hearing on June 6, 2009. In its letter, the Employer contended that it did not receive "the

letter” until December 31, 2008. The Employer opined that the use of three different Employer experience rating account numbers was confusing. The Employer’s letter does not specifically mention any explanation for the delay after December 31, 2008, before filing its written request for reconsideration (Bd. Exhs. 6A, 6B).

5. The Employer was using a payroll processing service during December 2008. When documentation was received from the Department during December 2008, the Employer contacted the payroll service and “turned it over to them” in hopes the payroll service would respond appropriately. The Employer’s store manager received documentation from the Department in the store’s mail, then he forwarded it to the company’s president. The company president received the documentation on December 31, 2008, but he referred to four blank payroll reports in his letter to the Department (Bd. Exh. 3B). Although the store manager may have received the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY, it was not forwarded to the company’s president.

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

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

Arizona Revised Statutes § 23-724, provides in pertinent part:

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

an employing unit constitute employment as defined in section 23-615 that is not exempt under section 23-617 or that remuneration for services constitutes wages as defined in section 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration.

- B. When a request for reconsideration is filed as prescribed in subsection A of this section, a reconsidered determination shall be made. The reconsidered determination shall become final with respect to the employing unit thirty days after written notice of the reconsidered determination is served personally, by electronic transmission or by mail addressed to the last known address of the employing unit, unless within such time the employing unit files with the appeals board a written petition for hearing or review. ...

* * *

- F. The determination of the department or decision of the appeals board, together with the record, shall be admissible in any subsequent judicial proceeding involving liability for contributions. A determination or decision that an employing unit is liable that has become final shall be conclusive and binding on the employing unit and shall not be reconsidered in proceedings brought before the department or a hearing officer.

* * *

The DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY was mailed to the Employer's address of record on December 16, 2008. The Employer's written request for reconsideration was filed by fax on March 3, 2009. That date is more than 15 days from the date of the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY. The Employer's request for reconsideration, therefore, was not filed within the statutory time.

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

* * *

- 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].

In the petition and by testimony, the Employer consistently acknowledged that it "... received the letter on ... December 31, 2008." (Bd. Exh. 6A). For the first time during testimony, the Employer indicated that the documentation it received was not "... the letter", but actually what the Employer received was "... notification in the mail from DES for all four quarters, sent on 12/31/08."

Arizona courts have long recognized a strong presumption that a letter properly addressed, stamped and mailed will be delivered to the addressee. *State v. Mays*, 96 Ariz. 366, 395 P.2d 719 (1964). The testimony by a party that the

party did not receive a letter mailed to that party is not binding on the trier of fact, *Oney v. Barnes*, 5 Ariz. App. 460, 428 P.2d 124 (1967). We conclude the Employer has not overcome this presumption of delivery and the presumption of service set forth in Arizona Administrative Code, Section R6-3-1404(C). In particular, the petition for hearing clearly acknowledges having received a single letter from the Department, rather than referring to four blank forms. The Employer's witness also acknowledged that the store manager may have received the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY at the Employer's mailing address of record.

Further, the Employer's delay by additional weeks after receiving documentation from the Department is attributable to the Employer's internal procedures. The Employer's delay was not due to error or misinformation by the Department or by the United States Postal Service, and was not due to a change in the Employer's mailing address. The Employer has not established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the request for reconsideration to have been timely filed. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's decision dated May 15, 2009, regarding the late filing of the Employer's written request for reconsideration of the DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY.

The Employer did not file a request for reconsideration within the 15-day time period allowed, pursuant to Arizona Revised Statutes § 23-724(A).

The DETERMINATION OF UNEMPLOYMENT INSURANCE LIABILITY dated December 16, 2008, 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) 347-6343.

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, 1951 W. Camelback Road, Suite 465, Phoenix, Arizona 85015. 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) 347-6343.

A copy of the foregoing was mailed on
to:

(x) Er: XXXX Acct. No: XXXXX

(x) KEVIN SMITH
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-1138096-001-B

In the Matter of:

XXXXX
XXXXX
XXXXX

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

Employer

Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on April 22, 2008, which held that "...the Determination of Liability for Employment or Wages issued to [the Employer] January 8, 2008 is final..." because neither a request for review nor a request for an extension of time to file the request for review was filed within the statutory period.

The Department's letter held as follows:

The Department's records reveal that our Determination issued January 8, 2008 was sent by certified mail to your last known address of record...and was not returned by the U.S. Postal Service. Your letter postmarked February 15, 2008 reflects that same address. A request for review of that Determination had to be filed by **January 23, 2008** in order for it to be timely. Neither a request for review nor

a request for an extension of time to file the request for review was filed within the statutory period. ...

The Employer's response letter, postmarked on May 15, 2008, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-724(B).

THE APPEALS BOARD scheduled an in-person hearing, which was convened on **November 10, 2009**, before ROBERT T. NALL, an Administrative Law Judge. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely request for reconsideration or appeal following the Determination of Liability for Employment or Wages.
2. Whether the Determination of Liability for Employment or Wages became final during the interim period before the Employer filed a request for reconsideration.
3. Whether the Notice of Assessment for the quarters ending March 31, 2006 through December 31, 2006, became final during the interim period before the Employer filed a request for reconsideration.

See: A.R.S. § 23-734 and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, no Employer witness appeared to testify. Counsel for the Department and a witness for the Department appeared. Exhibits 1 through 7 were admitted into evidence. We have carefully reviewed the record.

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

1. The Department mailed a Determination of Liability for Employment or Wages to the Employer's address of record on January 8, 2008 (Bd. Exh. 1).
2. The Employer's request for reconsideration of the determination was postmarked on February 15, 2008 (Bd. Exh. 2C). The Employer included no reason for filing a late request (Bd. Exh. 2A).
3. On April 22, 2008, the Department issued its decision on the timeliness of the Employer's request for reconsideration (Exhs. 3A, 3B). The Department held that, because the Employer did

not file its application within 15 days, "...it is the Department's Decision that the Determination of Liability for Employment or Wages issued to [the Employer] January 8, 2008 is final" (Bd. Exh. 3B).

4. On May 15, 2008, the Employer petitioned for a hearing. The Employer asserted that a fifteen-day appeal deadline is "an unreasonable and unrealistic timeframe" (Bd. Exh. 4A). The Employer does not explain why the Employer did not appeal within the statutory period.

Arizona Revised Statutes, Section 23-724, provides in pertinent part:

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

* * *

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

* * *

- 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.

(emphasis added)

* * *

In the petition and in its prior filings, the Employer has offered no reason for filing a late request for reconsideration of the Determination of Liability for Employment or Wages. Instead, the Employer has contended that the statutory period “is an unreasonable and unrealistic timeframe for an employer to respond” (Bd. Exh. 4A). The Employer does not elaborate and does not explain why it could not have complied. The Determination clearly states the 15-day time limitation for filing an appeal. The Employer has not offered a reason for its late filing beyond its conclusion that the time limit is “unrealistic” and “unreasonable”.

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

THE APPEALS BOARD AFFIRMS the Department’s decision dated April 22, 2008, regarding the late filing of the Employer’s application for reconsideration of the Determination of Liability for Employment or Wages.

The Employer did not file an application for reconsideration of the Determination within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Determination of Liability for Employment or Wages dated January 8, 2008, 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) 347-6343.

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 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) 347-6343.
-

A copy of the foregoing was mailed on
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(x) Er: XXXX

Acct. No: XXXX

(x) KEVIN SMITH
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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-1150610-001-B

In the Matter of:

XXXXX
XXXXX
XXXXX

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

Employer

Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on October 2, 2009, which stated that "...the Benefit Charge Notice dated July 10, 2009 must be held to be final" because the Employer's application for redetermination was not filed within 15 days of the date of the Notice and the Employer did not establish a "good and sufficient reason for the delay in submitting the application" for redetermination.

The Employer's response letter, faxed on October 16, 2009, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled an in-person hearing, which was convened on **December 2, 2009**, before Appeals Board Administrative Law Judge S. Rabin. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination following the Benefit Charge Notice.
2. Whether the Benefit Charge Notice became final during the interim period before the Employer filed an application for redetermination.

See: A.R.S. § 23-732 and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, one Employer representative/witness testified. Counsel for the Department and a witness for the Department appeared and testified. Exhibits 11 through 15 were admitted into evidence. We have carefully reviewed the record.

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

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on July 10, 2009 (Bd. Exh. 11A).
2. The Employer's application for redetermination was faxed on July 31, 2009 (Bd. Exh. 12). The Employer included no reason for filing a late request (Bd. Exh. 12).
3. On October 2, 2009, the Department issued its decision on the timeliness of the Employer's request for redetermination (Bd. Exh. 13). The Department held that, "[s]ince your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated July 10, 2009 must be held to be final" (Bd. Exh. 13).
4. On October 16, 2009, the Employer petitioned for a hearing (Bd. Exh. 14). The Employer asserted that "[i]t was our understanding that the 15 days were 15 working days...not calendar days" (Bd. Exh. 14).

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

* * *

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or

denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year.
(emphasis added)

* * *

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

* * *

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.
(emphasis added)

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.

* * *

In the Employer's appeal letter, as well as in the testimony of its witness, the Employer explained that the late filing of its application for redetermination of the Benefit Charge Notice was due to the Employer's mistaken belief that the Employer had 15 working days, rather than 15 calendar days, to file its application for redetermination. The Benefit Charge Notice clearly stated the 15-day time limitation for filing an appeal. The Notice explained that "[t]he charges shown will become conclusive and binding, pursuant to A.R.S. § 23-732 (B), unless a written request for review is filed within 15 days of the mailing date..." (Bd. Exh. 11A).

Arizona Revised Statutes § 23-732 requires that an application for redetermination be filed "within fifteen days after mailing". The Employer filed its application for redetermination 21 days after the mailing date on the Notice. Pursuant to Arizona Administrative Code, Section R6-3-1404, the only acceptable reasons for filing a late application for redetermination are Department error or misinformation, delay or other action of the United States Postal Service or its successor, or delay in submission because the Employer changed its mailing address at a time when there would have been no reason to notify the Department of the address change.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD AFFIRMS the Department's decision dated October 2, 2009, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Employer did not file an application for redetermination of the Benefit Charge Notice within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated July 10, 2009, 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) 347-6343.

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, 1951 W Camelback Rd, Suite #465, Phoenix, Arizona 85015. 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) 347-6343.
-

A copy of the foregoing was mailed on
to:

(x) Er: XXXXX

Acct. No: XXXXX

(x) KEVIN SMITH
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-1150611-001-B

In the Matter of:

XXXXX
XXXXX
XXXXX

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

Employer

Department

IMPORTANTE---DECISIÓN DE LA JUNTA DE APELACIONES

Esta es la decisión de la Junta de Apelaciones sobre sus beneficios de seguro de desempleo. Este aviso contiene información importante sobre su derecho de recibir beneficios de seguro de desempleo. Si usted no está de acuerdo con la decisión, sólo tiene 30 días para apelar desde la fecha de la decisión. Nos puede llamar al (602) 347-6344 y le traduciremos este aviso al español.

DECISION
AFFIRMED

THE **EMPLOYER** petitioned for a hearing from the Department's letter issued on October 2, 2009, which stated that "...the Benefit Charge Notice dated July 10, 2009 must be held to be final" because the Employer's application for redetermination was not filed within 15 days of the date of the Notice and the Employer did not establish a "good and sufficient reason for the delay in submitting the application" for redetermination.

The Employer's response letter, faxed on October 16, 2009, was a timely petition for hearing. The Appeals Board has jurisdiction to consider the timeliness issue in this matter pursuant to A.R.S. § 23-732(B).

THE APPEALS BOARD scheduled an in-person hearing, which was convened on **December 2, 2009**, before Appeals Board Administrative Law Judge S. Rabin. At that time, all parties were given an opportunity to present evidence on the following issues:

1. Whether the Employer filed a timely application for redetermination following the Benefit Charge Notice.
2. Whether the Benefit Charge Notice became final during the interim period before the Employer filed an application for redetermination.

See: A.R.S. § 23-732 and Arizona Administrative Code, Section R6-3-1404.

On the scheduled date of the hearing, one Employer representative/witness testified. Counsel for the Department and a witness for the Department appeared and testified. Exhibits 1 through 5 were admitted into evidence. We have carefully reviewed the record.

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

1. The Department mailed a Benefit Charge Notice to the Employer's address of record on July 10, 2009 (Bd. Exh. 1A).
2. The Employer's application for redetermination was faxed on July 31, 2009 (Bd. Exh. 2). The Employer included no reason for filing a late request (Bd. Exh. 2).
3. On October 2, 2009, the Department issued its decision on the timeliness of the Employer's request for redetermination (Bd. Exh. 3). The Department held that, "[s]ince your application was not filed within fifteen (15) days and because you have not established a good and sufficient reason for the delay in submitting the application, the Benefit Charge Notice dated July 10, 2009 must be held to be final" (Bd. Exh. 3).
4. On October 16, 2009, the Employer petitioned for a hearing (Bd. Exh. 4). The Employer asserted that "[i]t was our understanding that the 15 days were 15 working days...not calendar days" (Bd. Exh. 4).

Arizona Revised Statutes, Section 23-732, provides in pertinent part:

* * *

- B. The department may give quarterly notification to employers of benefits paid and chargeable to their accounts or of the status of such accounts, and such notification, in the absence of an application for redetermination filed within fifteen days after mailing, shall become conclusive and binding upon the employer for all purposes. A redetermination or

denial of an application by the department shall become final unless within fifteen days after mailing or delivery thereof an appeal is filed with the appeals board. The redeterminations may be introduced in any subsequent administrative or judicial proceedings involving the determination of the rate of contributions of any employer for any calendar year.
(emphasis added)

* * *

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

* * *

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.
(emphasis added)

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.

* * *

In the Employer's appeal letter, as well as in the testimony of its witness, the Employer explained that the late filing of its application for redetermination of the Benefit Charge Notice was due to the Employer's mistaken belief that the Employer had 15 working days, rather than 15 calendar days, to file its application for redetermination. The Benefit Charge Notice clearly stated the 15-day time limitation for filing an appeal. The Notice explained that "[t]he charges shown will become conclusive and binding, pursuant to A.R.S. § 23-732 (B), unless a written request for review is filed within 15 days of the mailing date..." (Bd. Exh. 1A).

Arizona Revised Statutes § 23-732 requires that an application for redetermination be filed "within fifteen days after mailing". The Employer filed its application for redetermination 21 days after the mailing date on the Notice. Pursuant to Arizona Administrative Code, Section R6-3-1404, the only acceptable reasons for filing a late application for redetermination are Department error or misinformation, delay or other action of the United States Postal Service or its successor, or delay in submission because the Employer changed its mailing address at a time when there would have been no reason to notify the Department of the address change.

The Employer has not alleged and established any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code, Section R6-3-1404(B) and would permit finding the application for redetermination timely filed. Accordingly,

THE APPEALS BOARD AFFIRMS the Department's decision dated October 2, 2009, regarding the late filing of the Employer's application for redetermination of the Benefit Charge Notice.

The Employer did not file an application for redetermination of the Benefit Charge Notice within the time period allowed, pursuant to Arizona Revised Statutes § 23-732(B).

The Benefit Charge Notice dated July 10, 2009, 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) 347-6343.

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

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2. Parties may be represented in the following manner:

An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.
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) 347-6343.

—

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to:

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By: _____
For The Appeals Board