

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1006207-001-B

In the Matter of:

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

Department

DECISION
AFFIRMED

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

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

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

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

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

The following persons appeared at the hearing:

ROBERT DUNN	Department counsel
VIVIAN NAST	Department witness

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

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

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

1. A Benefit Charge Notice for the calendar quarter ending September 30, 2005, was mailed to the Employer's last known address of record on October 7, 2005. The Notice advised the Employer that the Notice would become final unless a request for review was filed within 15 days of the mailing date as provided in A.R.S. § 23-732(B). (Although the Notice refers to a request for review, the designation in the statute is an "application for redetermination") (Tr. pp. 5, 6; Bd. Exh. 1A).
2. In September of 1999, the Employer provided its mailing address to the Department. No change in that address was made until January 2006, when the Employer advised the Department that the suite number was not correct (Bd. Exhs. 4, 11).
3. On November 4, 2005, as indicated by the Department's date stamp, the Employer filed, by fax, a request for review (Bd. Exh. 8).
4. On February 16, 2006, the Department issued a decision advising the Employer that the Benefit Charge Notice issued October 7, 2005, for the calendar quarter ending September 30, 2005, was final and binding because the application for redetermination was not filed within the required statutory period (Bd. Exh. 14).

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

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

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

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

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

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

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

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

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

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

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

* * *

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

* * *

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

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

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

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

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

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

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

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

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

DATED:

APPEALS BOARD

HUGO M. FRANCO, Chairman

WILLIAM G. DADE, Member

MARILYN J. WHITE, Member

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

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

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

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

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

 2. Parties may be represented in the following manner:

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

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

(x) Er: XXXXXX XXXX XXXXXXXXXXXX , Acct. No: XXXXXXXX-XXX
XXX

(x) ROBERT DUNN,
Assistant Attorney General, CFP/CLA
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(x) JOHN B. NORRIS, Chief of Tax
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By: _____
For The Appeals Board