

ALASKA DEPARTMENT OF LABOR  
AND WORKFORCE DEVELOPMENT  
EMPLOYMENT SECURITY DIVISION  
3301 EAGLE STREET #206  
ANCHORAGE, ALASKA 99503

**RECEIVED**

JAN 10 2007

APPEAL TRIBUNAL

IN THE MATTER OF: )  
)  
ANCHORAGE HOCKEY )  
OFFICIALS, INC. )  
)  
)  
Petitioner )

KIRKPATRICK LOCKHART  
PRESTON GATES ELLIS LLP

**DECISION**

**PETITIONER'S REPRESENTATIVE:**

**ATTORNEY FOR PETITIONER:**

Richard Brister, President  
Joe Barth, Treasurer  
Rosalie Nadeau, Dispatcher

Amy Limeres

Docket No. 06-TAX-004  
Account No. xxx7722

**STATEMENT OF THE CASE**

Petitioner was assessed unemployment insurance taxes for the employment of individuals for the four quarters of 2005 and the first and second quarters of 2006.

On June 22, 2006, the Employment Security Division (ESD) tax section notified Petitioner that it was responsible as an employer for wages paid certain individuals. Petitioner filed an appeal.

A hearing in the matter was conducted on December 14, 2006. Amy Limeres, counsel for Petitioner, was present. Bruce Garrison was present for the EST and testified. Richard Brister, Joe Barth, and Rosalie Nadeau testified for Petitioner.

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## FINDINGS OF FACT

Petitioner is a non-profit organization of individuals interested in promoting ice hockey and provide an organization for ice hockey officials in the Anchorage area.

In early June 2006, an individual applied to open a new claim for unemployment insurance benefits. Questioning by an ESD representative revealed the individual had income from Petitioner in three quarters of 2005. An investigation by an Employment Security Division tax auditor concluded that the individual in question performed services for Petitioner and was an employee.

The individual in question was one of a pool of approximately 120 similarly situated members of Petitioner (referees) qualified to be assigned by Petitioner to perform sports officiating for local teams, leagues, and other organizations who need such services. Petitioner has some written contracts with these organizations and some verbal agreements. Those needing sports officiating services contact Petitioner about upcoming events, which are then posted by Petitioner on its Internet website. Referee members then express an interest in officiating those events of their choosing.

One of three schedulers for Petitioner then selects qualified individuals and "dispatches" them to the event. Individuals are selected, at least in part, on the level of their certification. Certification is made through USA Hockey, a nationwide association generally governing the sport of ice hockey in the United States.

Petitioner does not have office space, conducting necessary business mainly via the Internet, and receiving mail at a post office box.

Petitioner has written agreements with referees (Exhibit 10, pages 2 and 3). Important clauses in the contract provide that referees must maintain their (USA Hockey) certification; must comply with Petitioner's "bylaws and Rules and Procedures"; that referees will be paid for their officiating by Petitioner on a monthly basis; and that Petitioner does not extend insurance coverage to referees.

Petitioner has an established fee schedule for officiating that it charges organizations, and which is based upon the number of referees utilized and the level of certification required. Petitioner collects that fee from the organization, and after deducting a charge of \$10 per event for doing the scheduling, pays the referee.

Part of the certification by USA Hockey includes insurance for liability. Petitioner provides no equipment nor pays for any expenses of the referee. There are four levels of certification. Certain contests require higher certification than

others. Certification must be renewed annually. Petitioner conducts an annual certification seminar in conjunction with USA Hockey.

There is at least one other organization in the Anchorage area dispatching referees to hockey games. Referees are free to be dispatched through this other organization. Furthermore, although Petitioner does not permit organizations to pre-select referees, organizations and referees are free to make officiating arrangements outside those offered by Petitioner.

Petitioner assesses a \$25 membership fee. Referees range in age from 12-years-old and up. Referees might be dispatched two or three times per week and may referee more than one game per dispatch. Petitioner does not know of any referee relying solely on income derived from this activity.

Petitioner does not supervise the actual officiating by a referee.

### **STATUTORY PROVISIONS**

AS 23.20.525. EMPLOYMENT DEFINED. (a) In this chapter, unless the context otherwise requires, "employment" means...

(10) service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that

(A) the individual has been and will continue to be free from control and direction in connection with the performance of the service, both under the individual's contract for the performance of service and in fact;

(B) the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

### **CONCLUSION**

SERVICE

"Service" exists when an individual performs some sort of compensated labor for another. King Cab, Inc., v. State of Alaska, Super. Ct. 4FA-89-1746 Civil, February 1, 1990; other cites omitted.

Petitioner contracted with organizers to provide crews to officiate events. Petitioner realized a gain from dispatching crews to events. The Appeal Tribunal concludes individuals acting as referees performed a service for Petitioner.

#### EMPLOYMENT

Once having established that service has been performed, that service constitutes employment, for unemployment insurance purposes, until the Petitioner shows to the satisfaction of the department that the "ABC" provisions are conjunctively met for the particular services being provided. ESC v. Wilson, 461 P.2d 644 (Alaska 1969); Clayton v. State, 598 P.2d 84 (Alaska 1979).

#### Element A

Element A requires a showing that the person's actions are and will be free from control and from the right to control. This is to be measured against that level of supervision which the nature of the work requires. Rahier Trucking v. United States, 344 F.2d 644 (1969).

The conduct of game officiating may not supervised by Petitioner, but Petitioner does expect referees to conform to a standard of officiating imposed by another organization, USA Hockey. Petitioner collects fees and disburses a share to the referee. This method of handling money is further evidence of control. The Appeal Tribunal considers these aspects sufficient control, or the right to control, to hold Petitioner has failed the test under element A.

#### Element B

Element B is satisfied only if the service is shown to have been performed either outside the usual course of business for which the service is performed or is performed outside of all the places of business of the enterprise for which the services were performed. "'All of the places of business' as described by the statute refers to all those places where an enterprise conducts any business related activity." Commissioner Dec. 77T-10, April 28, 1978; affirmed Donald A. Jeffus, d/b/a Jeffus Aircraft v. ESD, Super. Ct., 4FA-78-1034 Civil, December 8, 1978.

Petitioner is either merely in the business of dispatching referees or in the business of officiating sporting events. In the latter case it accomplishes this by referring referees to actually perform the officiating function. We believe that dispatching referees and the services those referees then perform are both integral parts of one business; therefore, the usual course of Petitioner's business is sports officiating. Furthermore, the places of business for Petitioner must extend to include the venue locations where a sporting event and officiating actually takes place. The Appeal Tribunal concludes neither the usual course of business of Petitioner nor the place of business can be distinguished from the officiating the referees perform, and, therefore, element B has not been met.

#### Element C

Element C requires that an individual be shown to be customarily involved in an independently established trade, occupation, or profession. This is typically a separate establishment where the contractor offers services to the public and performs services under his own name or a trade name which affects his own good will rather than that of the person for whom the services are performed.

Referees are free to contract directly with organizations or be dispatched through other dispatching services. These are not full-time businesses for referees, but the Appeal Tribunal concludes the evidence is sufficient proof of an independently established business to sustain element C.

#### **SUMMARY**

As all three parts of the ABC test must be met in the conjunctive, and Petitioner has met only one of the parts; this Appeal Tribunal, therefore, holds that referees performed services for Petitioner as employees.

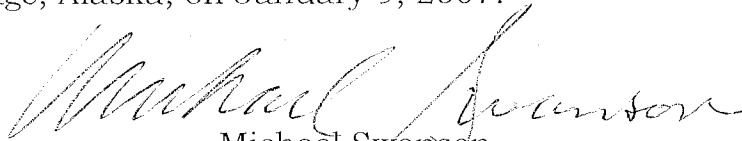
#### **DECISION**

The letter of coverage and notice of assessment issued June 22, 2006 is **SUSTAINED**. Services provided to Petitioner by referees are covered under AS 23.20.525, and therefore, Petitioner is held liable for contributions, interest, and penalties as assessed by the Employment Security Division.

**APPEAL RIGHTS**

This decision is final unless an appeal is filed to the Commissioner of Labor within **15 days** of the date of the decision. The appeal period may be extended only if the appeal is delayed by circumstances beyond the party's control. A statement of appeal rights and procedures is enclosed.

Dated and Mailed in Anchorage, Alaska, on January 9, 2007.

A handwritten signature in cursive script that reads "Michael Swanson".

Michael Swanson,  
Hearing Officer