

IOWA DEPARTMENT OF INSPECTIONS AND  
APPEALS  
DIVISION OF ADMINISTRATIVE HEARINGS  
Wallace State Office Building  
DES MOINES IOWA 50319

**Appeal Number: 13IWD011**

**Respondent (1)**

**DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**This Decision Shall Become Final, as of the date of mailing stated below unless:**

**DIETCH CONSTRUCTION  
DAVID DIETCH, OWNER**

1. Either party files a WRITTEN application for a rehearing WITHIN TWENTY (20) DAYS AFTER the date below. The written application must state the specific reasons for the rehearing and the relief sought. If the request for a rehearing is denied or if the rehearing decision is not satisfactory, either party may petition the District Court WITHIN THIRTY (30) DAYS of either action;  
OR

**IOWA WORKFORCE DEVELOPMENT  
AL LEWIS, FIELD AUDITOR  
1000 EAST GRAND AVENUE  
DES MOINES, IA 50319**

2. Either party may petition the District Court WITHIN THIRTY (30) DAYS after the date below.

YOU DO HAVE THE RIGHT TO HIRE A LAWYER at your own expense to represent you in these proceedings.

JOSEPH WALSH, IWD  
JOSEPH BERVID, IWD  
CARIE O'BRIEN, IWD  
NICHOLAS OLIVENCIA, IWD  
RYAN DOSTAL, IWD

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(Administrative Law Judge)

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July 10, 2013

(Decision Dated & Mailed)

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**STATEMENT OF THE CASE**

Dietch Construction filed an appeal of two decisions issued by Iowa Workforce Development (the Department), both dated December 6, 2012. In one decision, the Department determined that an employer-employee relationship existed between the business and individuals performing services for the business from 2007 through September 30, 2012. In the other decision, the Department found the business liable for unemployment insurance contributions effective October 1, 2007.

The case was transmitted from Workforce Development to the Department of Inspections and Appeals on April 10, 2013 to schedule a contested case hearing. A Notice of Hearing was mailed to all parties on April 18, 2013. On June 6, 2013, a telephone hearing was held before Administrative Law Judge Laura Lockard. The Department was represented by investigator Ryan Dostal, who presented testimony. Field auditor Al Lewis also testified for the Department. The Appellant was represented by Jackie Dietch, who presented testimony. The Department submitted Exhibits A and B, which were admitted into the record as evidence.

## **ISSUE**

Whether the Department correctly determined that an employer/employee relationship existed between Dietch Construction and the individuals performing services for the business between 2007 and 2012.

## **FINDINGS OF FACT**

In June, 2012, the Department's Misclassification Unit received an anonymous tip regarding Dietch Construction. The individual who made the report referenced a Craigslist ad posted by Dietch Construction looking for workers to do residential house framing. The ad indicated that the business would provide tools and a lift and that workers would only need to provide their own tool belt and car. The ad indicated that workers would be expected to work every day. (Dostal testimony; Exh. A26).

In response to the tip, the Department initiated an investigation into Dietch Construction's classification of its workers. David Dietch, the owner of Dietch Construction, completed a Questionnaire for Determining Status of Worker that the Department provided. In the questionnaire, Dietch indicated that he has the right to direct and control the manner in which the services are performed by workers and that the worker's services are supervised and reviewed by him on the job site. (Dostal testimony; Exh. B3-B7).

The Department ultimately determined that an employer-employee relationship existed between Dietch Constructions and the individuals performing services for the business. The Department issued two decisions dated December 6, 2012. One decision informed Dietch Construction of the Department's decision that it was an employer for purposes of unemployment insurance contributions. This decision also calculated the past-due contributions for the business, \$2,917.24, as well as interest and penalty amounts, which were \$1,103.11 and \$463.95 respectively. In the second decision, the Department found Dietch Construction liable for unemployment insurance contributions effective October 1, 2007. (Exh. A8-A10).

At hearing, the representative for Dietch Construction acknowledged that it had incorrectly classified its workers as independent contractors rather than employees and indicated that it was not challenging this part of the Department's decision. Rather, Dietch Construction disputes the assessment of interest and penalty for the time period at issue.

Jackie Dietch testified at hearing that the business treated its workers as independent contractors and not as employees based on advice it had received from an accountant many years ago. In the appeal letter, David Dietch made the same assertion and indicated that after the CPA who gave him that advice passed away, his wife continued to do the 1099s just as the accountant had. Dietch asserted in the letter that his current CPA has never questioned this way of doing business. (J. Dietch testimony; Exh. B1).

Al Lewis, the Department's filed auditor, testified at hearing that the Department calculated interest and penalties beginning in 2007, the year in which Dietch became an employer according to the Department's investigation. Lewis testified that an employer has to formally request a waiver of penalty and interest. (Lewis testimony).

### **REASONING AND CONCLUSIONS OF LAW**

Iowa law provides that any employer who fails to timely pay any contribution required by the Iowa Employment Security Law shall pay to Department interest at the rate of one percent per month from the date upon which the contribution should have been paid. In addition, any employer who fails to file a report of wages paid to each of the employers' employees for any period is required to pay a penalty. The penalty rate is determined by the number of days the report is delinquent and the total penalty amount is computed with the total wages in the period for which the report was due. In addition to penalty and interest, there is a separate assessment – equal to fifty percent of the amount of the contribution – for an employer who the Department finds has willfully failed to pay any contribution required by the law with the intent to defraud the Department.<sup>1</sup>

The Department may cancel interest or penalties if it is shown to the Department's satisfaction that failure to pay a required contribution or file a required report was not the result of negligence, fraud, or intentional disregard of the law or the Department's rules.<sup>2</sup> The Department's regulations provide that interest and penalty shall not accrue in those cases "where the [D]epartment finds that, as a matter of equity and good conscience, the employer should not be required to pay interest."<sup>3</sup> The Department's regulations require that the employer make a written request for waiver of the interest and penalty. The Department will consider, in determining whether to grant the waiver, whether the party acted in the manner that a reasonably prudent individual would have acted under the same or similar circumstances, whether the party received timely notice of the need to act, whether there was administrative error by the Department, whether there were factors outside the control of the party which prevented a timely action, the efforts made by the party to seek an extension of time by promptly notifying the Department, the party's physical inability to take timely action, the length of time the action was untimely, and whether any other interested party has been prejudiced by the untimely action.<sup>4</sup>

Dietch Construction has not challenged the Department's decision that its workers were employees beginning in October, 2007, nor has it challenged the Department's calculation of the penalty and interest that are due. Rather, Dietch Construction argues that it should not have to pay penalty and interest due to the fact that it relied in good faith on erroneous information provided by an accountant. The Department's regulations set up a process through which Dietch Construction may request waiver of the penalty and interest assessed. Dietch Construction has not yet availed itself of this

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1 Iowa Code § 96.14(1)-(2) (2013).

2 Iowa Code § 96.14(2)(g) (2013).

3 871 Iowa Administrative Code (IAC) 23.60(4).

4 871 IAC 23.63.

process, but is free to do so at any time. Under these circumstances, the Department's decisions are affirmed.

**DECISION**

The Department's December 6, 2012 decisions are affirmed. The Department shall take any action necessary to implement this decision.