

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

Appeal Number: 13IWD010

Respondent (2)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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

MARY A. CALLAHAN-ELLIOTT

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
CHARLES RUMMERY, FIELD AUDITOR
IOWA WORK FORCE DEVELOPMENT
680 MAIN STREET 2ND FLOOR
DUBUQUE IA 52001-6818**

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.

TERESA K. HILLARY, IWD
JOSEPH BERVID, IWD
NICHOLAS OLIVENCIA, IWD
CARIE O'BRIEN, IWD
PATRICIA LUEDTK, WORKER

(Administrative Law Judge)

August 13, 2013

(Decision Dated & Mailed)

STATEMENT OF THE CASE

Mary A. Callahan-Elliott filed an appeal of a decision issued by Iowa Workforce Development (the Department) dated January 28, 2013. In that decision, the Department determined that an employer-employee relationship existed between Mary A. Callahan-Elliott (d/b/a Seventh Heaven Elder Group Home) and Patricia Luedtk and other workers performing services for the business. Ms. Callahan-Elliott filed a timely appeal.

The case was transmitted from Workforce Development to the Department of Inspections and Appeals on March 28, 2013 to schedule a contested case hearing. A Notice of Hearing was mailed to the parties on April 4, 2013 setting the hearing for May 29, 2013. The matter was continued. On July 17, 2013, a telephone hearing was held before Administrative Law Judge John M. Priester. The Department was represented by field auditor Charles Rummery, who presented testimony. Attorney Donald Moonen represented Ms. Callahan-Elliott. Appellant Mary A. Callahan-Elliott was present and provided testimony. Kelly Grant was present and testified for Ms. Callahan-Elliott. The Department submitted Exhibit A (pp. 1-56), which was admitted into the record as evidence. Exhibit #2 was admitted on behalf of Ms. Callahan-Elliott.

ISSUE

Whether the Department correctly determined that an employer-employee relationship existed between Mary Callahan-Elliott and the workers performing services at Seventh Heaven Elder Group Home.

FINDINGS OF FACT

Ms. Callahan-Elliott owns and operates an elder group home in Dubuque. The home, Seventh Heaven, is located in her home. Initially Ms. Callahan-Elliott was the sole worker. Eventually Ms. Callahan-Elliott determined that she would need to hire others so that she could have some time off.

When Ms. Callahan-Elliott hired new workers she would have them fill out a "Contractor Applicant" form. The contractors were to perform Certified Nursing Assistance (CNA) duties at Seventh Heaven. When a former worker applied for unemployment benefits the Department conducted an investigation to determine whether the worker was misclassified as an independent contractor instead of an employee.

The Department determined that an employee-employer relationship exists between Ms. Callahan-Elliott and the workers. This determination was based upon the finding that the forms provided show a continuous working relationship between Ms. Callahan-Elliott and the independent contractors. Another finding was that the employer paid the independent contractors hourly wages for services performed at the facility. The Department found that the employer provides the equipment and supplies to the independent contractors for them to perform their services.

Additionally, the independent contractors bear no financial risk of loss while working at the facility. The employer oversees the independent contractors' activities by requiring them to turn in timecards and help resolve tenant complaints. The tenants pay the employer directly for the use of the Seventh Heaven facility. The employer advertises Seventh Heaven's facility and services through the local newspaper.

The Department did not find any information showing the independent contractors operating their own businesses or any advertising showing their services were offered to the general public. The employer indicated an independent contractor relationship because the independent contractors managed their own hours.

To summarize, the Department found an employee-employer relationship existed between Ms. Callahan-Elliott. The basis of the determination was:

The employer maintained her right to direct and control the services performed by the independent contractors. The employer provided the details and means for the independent contractors to do their services. No information was provided by the parties showing the independent contractors operated their own businesses.

Ms. Callahan-Elliott filed a timely appeal of this determination. In the hearing Ms. Callahan-Elliott testified that she and her attorney went to a scheduled meeting with the Department, but no one would meet with them to talk about the case. Ms. Callahan-Elliott found this very frustrating. In the hearing Mr. Rummery testified that his wife had just been diagnosed with skin cancer and his grandmother had just passed away. Because of these two issues he was not in the office on the date of the scheduled appointment.

Ms. Callahan-Elliott explained that her Elder Group home is licensed for three tenants. The tenants live in the three bedroom house and Ms. Callahan-Elliott lives in the basement. Initially in 2001 when she opened the group home Ms. Callahan-Elliott was the sole worker. In 2002 another worker was added so that Ms. Callahan-Elliott could have some time off. Then over the years the group home has contracted with 3 or 4 certified nursing assistants to assist.

The CNAs who work at the group home arrange for coverage between themselves. Ms. Callahan-Elliott does not have a work schedule. The CNAs provide a list of times they worked and Ms. Callahan-Elliott pays them accordingly.

While most of the CNAs only work at the group home, there is a precedent where CNAs contracted with other clients to care for them in addition to their work at the elder group home.

Ms. Callahan-Elliott does not direct the CNAs or the contracted nurse on what to do with the clients. Ms. Callahan-Elliott believes that the CNAs, as licensed professionals, know what to do to care for the clients. The CNAs set their own hours and work between themselves to switch to make sure that the clients are covered.

Kelly Grant testified for Ms. Callahan-Elliott. Ms. Grant testified that as a CNA with the group home she understands that she is an independent contractor. There are no policies to follow at the group home. The CNAs take care of the clients and then turn in their hour summaries. There are no "time cards" like in other employment situations.

REASONING AND CONCLUSIONS OF LAW

For purposes of unemployment compensation, an "employer" is defined as an employing unit that, in any calendar quarter in the current or preceding calendar year, paid wages of \$1,500 or more, or employed at least one individual for some portion of a day in each of twenty different calendar weeks during the current or preceding calendar year.¹ "Employment" is defined as service performed for wages or under any contract of hire, written or oral, express or implied.² When an employer claims that any employment is not employment under the Iowa Employment Security Law, the burden is on the employer to prove the exemption claimed.³ The Department's regulations do not appear to contemplate an employee challenging a finding that an employer-

1 Iowa Code § 96.19(16)(a) (2011).

2 Iowa Code § 96.19(18)(a) (2011).

3 871 Iowa Administrative Code (IAC) 22.7(3), 23.55(2).

employee relationship existed, but the clear import of the regulations is to place the burden on the party arguing against an employment relationship to prove an exemption.

In the unemployment compensation context, it is well-settled that “the right to control the manner and means of performance is the principal test in determining whether a worker is an employee or independent contractor.”⁴

The relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. An employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.⁵

The Department’s regulations set out in some detail the factors to be considered in determining whether a worker is an employee or an independent contractor.⁶ Factors that support the existence of an employer-employee relationship include:

- Right to discharge an employee without being held liable for damages for breach of contract;
- Furnishing of tools, equipment, material, and a place to work;
- Continuous performance of work for the employer;
- Payment of a fixed wage on a weekly or hourly basis.

Factors that support an independent contractor relationship include:

- Performance of a specific job at a fixed price;
- Following a distinct trade, occupation, business, or profession in which an individual offers services to the public to be performed without the control of those seeking the benefit of his or her training or experience;
- Unreimbursed expenses and fixed, ongoing costs regardless of whether work is currently being performed;
- Significant investment in real or personal property that is used in performing services for someone else;
- Right to employ assistants with the exclusive right to supervise their activity and completely delegate the work.⁷

The regulations also provide that if, upon examination of the facts of a case, an employer-employee relationship exists, the designation or description by the parties of

⁴ *Gaffney v. Department of Employment Services*, 540 N.W.2d 430, 434 (Iowa 1995).

⁵ 871 IAC 23.19(1).

⁶ See generally 871 IAC 23.19.

⁷ 871 IAC 23.19.

their relationship as anything other than an employer and employee is immaterial.⁸

While there are factors in this case that fall on both sides of the employee/independent contractor line, the weight of the evidence supports the conclusion that Ms. Luedtk was an independent contractor and not an employee.

The most persuasive evidence of an employee-employer relationship is the continuous nature of the work and the payment on a fixed wage on an hourly basis. However, the undersigned finds that the evidence shows that Ms. Callahan-Elliott does not control the work that is performed in the elderly group home. The CNAs work together to fill the shifts and they work together to make sure that the clients are cared for. The CNAs can and do work for other clients other than the clients of the elderly group home.

The undersigned finds that the preponderance of the evidence establishes that an independent contractor relationship exists between the workers at the Seventh Heaven Elderly Group home.

Under these circumstances, the Department's determination that Ms. Luedtk was an employee of Seventh Heaven Elderly Group Home is found to be incorrect and shall be reversed.

DECISION

The Department's decision dated January 28, 2013 is reversed. The Department shall take any action necessary to implement this decision.

jmp