

The purchase of certain landscaping equipment from a company that had two other lines of business and continued to perform one of them after the sale did not constitute the transfer of an entire business under G.L. c. 151A, § 14(n)(1). Because the seller kept its real estate interest in its warehouse and other assets connected to its other lines of business, this was not a transfer of substantially all of the assets under the same provision. Given the absence of any evidence suggesting common ownership, management, or control at the time of transfer, this was also not a partial business transfer under § 14N.

**Board of Review
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Issue ID: 0022 8973 28

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), which concluded that the employer is a successor business organization within the meaning of G.L. c. 151A, rendering it responsible for a higher recalculated contribution rate. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On May 19, 2017, the agency determined that the employer was a successor organization pursuant to G.L. c. 151A, §§ 14(n)(1), and 14N, and, therefore, subject to the experience rating account, benefit charges, and contribution rate of its predecessor. The employer appealed that determination to the DUA hearings department. Following a hearing on the merits attended by the employer, the review examiner affirmed the agency's determination in a decision rendered on April 24, 2018. We accepted the employer's application for review.

Concluding that the employer acquired substantially all of the assets of the predecessor business at the time of the transfer, the review examiner determined that there was a successorship pursuant to G.L. c. 151A, § 14(n)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that, when the employer acquired certain assets from another company to begin his own landscaping business, he acquired substantially all of the other company's assets within the meaning of G.L. c. 151A, § 14(n)(1), is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. The alleged successor employer, [Name A] (the Employer), is a limited liability company with an address of [Post Office address A], Massachusetts. The employer applied for an employer identification number with the Department of Unemployment Assistance (the Department). The Department assigned the Employer the employer identification number [XXXXXXXXXX].
2. [Name B] Landscaping and Irrigation ([Name B]) was a Massachusetts corporation with a principal address of [Post Office address A], Massachusetts.
3. [Name B]'s employer identification number with the Department was [YYYYYYYYYY].
4. Prior to April 3, 2015 [sic] employed four (4) employees.
5. Prior to April 3, 2015, [Name B] stored equipment and supplies in a warehouse owned by [Name B].
6. On April 3, 2015, the Employer and [Name B] entered into the Business Proposal (the Agreement).
7. The Agreement provided that [Name B] transfer the "customer list", transfer "vehicles, trailers, [w]alker mowers, and other sundry equipment", allow the Employer "use of the [Name B] Landscaping warehouse", "utilities", "cell phone and internet services", and *"Above all, you will carry the [Name B] Landscaping name with dignity and professionalism."*
8. The Agreement transferred the lawn maintenance equipment to the Employer and [[Name B]] sold the equipment the Employer chose not to take.
9. The price for the transfers and allowances set forth in the Agreement was \$42,995.00.
10. [Name B] ceased landscaping and maintenance operations after entering into the Agreement with the Employer.
11. After entering into the Agreement, the Employer began employing all four of the employees previously working for [Name B].
12. After entering into the Agreement, the Employer took over [Name B]'s phone number and mailing address.
13. After entering into the Agreement, the Employer used equipment purchased from [Name B] to operate the business.

14. After entering into the Agreement, the Employer used [Name B]’s warehouse to store machinery.
15. After entering into the Agreement, [Name B] continued to operate an irrigation business for one year.
16. After entering into the Agreement, the Employer did not operate an irrigation business until [Name B] closed after one year.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner’s ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner’s findings of fact except as follows. We reject as unsupported the portions of Findings of Fact ## 1 and 2 that refer to the employer as a limited liability company and “[Name B],” as a corporation, because all of the evidence in the record indicates that both businesses were run as sole proprietorships. Finding of Fact # 4 omits the identity of the entity employing the four individuals. Since the employer was not in business until April 3, 2015, we assume the review examiner was referring to [Name B]. We further note that the finding is inaccurate, as both parties agreed that [Name B] had employed eight, not four, employees prior to April, 2015.¹ Accordingly, to the extent Finding of Fact # 11 refers to the employer employing “all four” of [Name B]’s former employees, it is misleading. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner’s legal conclusion that the transfer of assets constituted the transfer of a business under G.L. c. 151A, § 14(n)(1).

The review examiner rendered his decision under G.L. c. 151A, § 14(n), which provides, in relevant part, as follows:

- (1) If the entire organization, trade or business of an employer, or substantially all the assets thereof, are transferred to another employer . . . and the transferee continues such organization, trade or business, the transferee shall be considered a successor
- (2) The successor shall take over and continue the employer’s account, including its plus or minus balance and all other aspects of its experience under this chapter.
...

The findings show that on April 3, 2015, pursuant to a written agreement, the employer acquired \$42,995.00 worth of equipment from [Name B] Landscaping and Irrigation (predecessor). *See* Findings of Fact ## 2, 6, 7, and 9. We must decide whether this transaction constituted the

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

transfer of either the predecessor's entire business or substantially all of the assets of the predecessor's business. We conclude that it was neither.

As for whether the entire business was transferred, the findings indicate that the employer was taking over the landscaping portion of the predecessor's business. The employer's new company continued to use the name "[Name B] Landscaping." See Finding of Fact # 7.² It acquired lawn maintenance equipment and the predecessor ceased performing landscaping and maintenance services after the employer bought that equipment. See Findings of Fact ## 8 and 10. Furthermore, the employer subsequently used that equipment, customer list, warehouse facility, telephone number, and several former employees to operate its new landscaping business.

In determining whether an entire organization, trade, or business was transferred under G.L. c. 151A, § 14(n)(1), however, the Appeals Court directs us to look for evidence that the predecessor continued to engage in ongoing business activity after the sale. In National School Bus Service, Inc. v. Comm'r of Department of Employment and Training, the Appeals Court concluded there had been a transfer of the entire business from a transportation company joint venture, because it merely operated as "an empty shell" after transferring its assets to another bus service. 49 Mass. App. Ct. 445, 453 (2000). In contrast, the Appeals Court in L&CP Corporation v. Dir. of Division of Employment Security, ruled that an employer was not a successor because it purchased only the laminated products division of another company's larger corporation, and the predecessor continued to conduct its other diversified business activities after the sale. 28 Mass. App. Ct. 961, 961–962 (1990) (rescript opinion).

Here, the record shows that landscaping was only a portion of the predecessor's business. It had also provided irrigation and construction services, and, following the transfer of assets to the employer, the predecessor continued to operate its irrigation business. See Finding of Fact # 15.³ As in the L&CP Corporation case, this evidence of ongoing business activity means that the predecessor did not transfer the entire organization, trade, or business to the employer.

In the present appeal, the record also indicates that the predecessor did not transfer substantially all of its assets to the employer. Finding of Fact # 8 provides that the employer chose not to acquire all of the predecessor's equipment. In a written statement to the DUA, the predecessor stated that he retained about 75% of all of his equipment, including vehicles, trailers, construction equipment, and hand tools, all of his construction and irrigation business accounts, and his ownership of the warehouse. See Exhibit # 7. Ideally, the employer would provide us with the value of the assets that had not been transferred so that we could simply calculate the portion that the employer acquired. However, from the evidence in the existing record, we can reasonably infer that a substantial portion of the predecessor's business assets were not transferred. Aside from the value of the equipment and accounts for two other lines of business, the value of the predecessor's real estate interest in the warehouse alone likely exceeded the \$42,995.00, which the employer paid for the landscaping equipment.

² Exhibit 2, the employer statement to the DUA, states that the employer opened a new company, "[Name A] d/b/a [Name B] Landscaping." This is also part of the unchallenged evidence in the record.

³ Although not in the findings, the employer testified that the predecessor had ceased performing its construction services prior to April, 2015.

We, therefore, conclude as a matter of law that the transaction on April 3, 2015, did not constitute a business transfer within the meaning of G.L. c. 151A, § 14(n)(1).

We further conclude that this partial transfer of assets did not constitute a successorship pursuant to G.L. c. 151A, § 14N. G.L. c. 151A, § 14N provides, in relevant part:

(a) If an employer transfers its trade or business, or a portion thereof, to another employer . . . and, at the time of the transfer, there is substantially common ownership, management or control of the transferor and transferee, then the account of the transferor shall be transferred to the transferee. . . .

(k) As used in this section the following words shall . . . have the following meanings:

“Common ownership, management or control”, at the time of transaction, the following:

(6) “Common ownership, management or control of sole proprietorships”, the sole proprietor, or a family member of the sole proprietor, of the transferring employer served as the sole proprietor of the transferee, or was a family member of the sole proprietor of the transferring employer.

The record reflects that both the predecessor and the employer in this case were sole proprietors. When the employer acquired the landscaping assets, he took over the day-to-day operations of the predecessor’s landscaping business,⁴ and nothing in the record suggests that there is any family relationship between the employer and the predecessor. Thus, there is no evidence of common ownership, management or control within the meaning of G.L. c. 151A, § 14N(k). We, therefore, further conclude as a matter of law that the transaction between the predecessor and the employer did not constitute a partial successorship under G.L. c. 151A, § 14N(a).

⁴ We read paragraph 10 in the Business Proposal Agreement, Exhibit # 3, to be an offer to help with business decisions during the ownership transition and nothing more. This is based upon the employer’s testimony that he had never owned a business before, and that the predecessor, his former employer, had been a good mentor.

The review examiner's decision is reversed. The employer is not a successor organization and it is not subject to the assignment of the predecessor's account balance, benefit charges, or contribution rate.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 29, 2018



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh