

The transfer of some assets from one corporate entity to another did not constitute a partial successorship under G.L. c. 151A, § 14N(a), because there was not common ownership, management, or control, as defined under § 14N(k)(1) and (2). The successor's new president had been only a 15% shareholder and she had no actual authority as the predecessor's treasurer.

**Board of Review
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Issue ID: 0024 8083 82

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 partial successor business to another business organization within the meaning of G.L. c. 151A, rendering it responsible for a higher contribution rate. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On January 23, 2018, the DUA determined that the employer was a partial successor organization pursuant to G.L. c. 151A, § 14N, and, therefore, 45% of the predecessor's account balance would be transferred to the employer. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the employer and a representative from the DUA Business Transfer Unit, the review examiner affirmed the agency's initial determination in a decision rendered on July 17, 2018. We accepted the employer's application for review.

Concluding that there was a transfer of some assets as well as common ownership between the predecessor's and the employer's business organizations, the review examiner determined that the employer was a partial successor within the meaning of G.L. c. 151A, § 14N. 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 there was common ownership within the meaning of G.L. c. 151A, § 14N, is supported by substantial and credible evidence and is free from error of law, where the record shows that the employer's owner held only 15% of the predecessor's stock.

Findings of Fact

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

1. [Employer A], CPA, P.C. (EAN No. [A]), the employer in this case, is an accounting corporation. The employer was incorporated on September 13, 2017.
2. Prior to the employer's incorporation, the employees from the employer worked for [Employer B], CPA's, Inc., ([Employer B], EAN No. [B]), in [Town A], MA.
3. [Name A] owned 15% of the stock at [Employer B]. She was the corporate treasurer. The other corporate officer owned 85% of the stock. He was the president, secretary and clerk. He managed the business and made all of the management decisions.
4. [Name A] and other employees decided to leave to form their own corporation, [Employer A], CPA, P.C. They located in [Town B], MA. [Name A] is one of its stockholders. She is the corporate president.
5. On November 1, 2017, the employer purchased [Employer B]'s client list and some old furniture.
6. Before leaving, there were six employees at [Employer B]. Four employees left to work at the employer.
7. For the four quarters ending September 30, 2017, the taxable wages at the employer were 45% of the wages at [Employer B].
8. On January 23, 2018, the DUA Business Transfer Unit sent the employer Notification finding they were the recipient of a partial transfer of a business within Section 8(d), 14N and 14(n)(1) of the Law. The employer's appeal is from this determination.

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. Finding of Fact # 5 is inaccurate insofar as it indicates that the employer purchased [Employer B]'s (predecessor) entire client list. The evidence in the record shows that the employer purchased the list of only [Name A]'s (employer's owner) portion of the client base. 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 employer is a partial successor organization.

Both the DUA Business Transfer Unit and the review examiner concluded that the employer was a partial successor pursuant to G.L. c. 151A, § 14N, which provides, in relevant part, as follows:

(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. The contribution rates of the transferor and transferee shall be recalculated in accordance with subsection (c) and made effective immediately upon the date of transfer of trade or business. . . .

(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:

(1) “Common ownership of corporations” means that a stockholder or other person or business entity owned . . . over 25 percent or more of any voting securities of both the transferring employer and the transferee.

(2) “Common management or control of corporations” means a chief executive officer, chief financial officer, or any other person holding similar authority for the transferring employer, served as, or had a continuing family relationship with, a chief executive officer, chief financial officer or person holding similar authority for the transferee employer.

There is no question that the employer purchased some of the predecessor’s assets, including a portion of the predecessor’s client list and some furniture. *See* Finding of Fact # 5. It is also true that the employer’s owner had been a partial owner and officer of the predecessor’s business. *See* Finding of Fact # 3. It appears that the DUA Business Transfer Unit and the review examiner ended their inquiry here without considering that the phrase “common ownership, management, or control” under G.L. c. 151A, § 14N(a), is further defined under subsections (k)(1) and (2).

Both the predecessor business and the employer’s business organization are corporations. *See* Findings of Fact ## 1 and 2. Where both entities are corporations, G.L. c. 151A, § 14N(k)(1), dictates that common ownership exists only where a person had owned or exercised power over more than 25% of the stock in both entities. In the present case, the employer’s owner held only 15% of the predecessor’s stock, and nothing in the record indicates that she exercised power over any more. *See* Finding of Fact # 3. Therefore, the record fails to establish that there was common ownership between the predecessor and the employer’s organization.

Pursuant to G.L. c. 151A, § 14N(k)(2), “common management or control of corporations” is to be found where a chief executive officer (CEO) or chief financial officer (CFO) in the predecessor corporation served in a similar capacity for the successor corporation. Here, the findings state that the 85% stockholder of the predecessor corporation managed the business and made all of the management decisions. Finding of Fact # 3. We reasonably infer from this finding that the 85% owner was its CEO. Although not in the review examiner’s findings, the initial answers in the DUA’s fact-finding questionnaire (Exhibit 2) state that there was no person

who served in the capacity of CEO or CFO for both employers. In her testimony, the employer's owner explained that she allowed her name to be used as treasurer for purposes of filings with the Secretary of State, but in reality, it meant nothing in terms of operating the firm. *See* Exhibit 1.¹ This record simply does not include substantial evidence that the predecessor and the employer corporations shared common management or control as defined under the statute.

We, therefore, 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).

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

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 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

¹We 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).