Since the employer acquired substantially all of the predecessor's assets and continued its business, Board held the employer was a successor under G.L. c. 151A, § 14(n)(1). Although the employer had stopped its former Massachusetts operations in 2017, there is no evidence that it obtained DUA permission under G.L. c. 151A, § 11, to cease being subject to the Massachusetts unemployment statute, and, in fact, the employer reported payroll within 2 years of its last wage report. Thus, it remained an active employer and was properly assigned its existing contribution rate pursuant to G.L. c. 151A, § 14(n)(4)(1).

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0055 2856 10

Introduction and Procedural History of this Appeal

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

On September 24, 2020, the DUA determined that the employer was a successor organization pursuant to G.L. c. 151A, §§ 14(n)(1), and liable for an unemployment tax contribution rate of 14.37%. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the employer, the review examiner affirmed the agency's initial determination in a decision rendered on February 24, 2021. We accepted the employer's application for review.

Concluding that, at the time of transfer, there was no common ownership, management, or control, and that all major assets of the predecessor business were transferred, the review determined that there was a successorship pursuant to G.L. c. 151A, § 14(n)(1), and declined to disturb the assigned unemployment tax contribution rate. 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 issues before the Board are: (1) whether the review examiner's decision, which concluded that the employer's July 1, 2020, purchase of assets constituted a transfer of business and rendered it a successor within the meaning of G.L. c. 151A, § 14(n)(1); and (2) whether the DUA properly revived the employer's existing contribution rate for 2020 pursuant to G.L. c. 151A, § 14(n)(4), are supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The employer is a Home Care Provider for Seniors.

2. [Employer A] purchased [Employer B] on July 1, 2020.

3. The two parties executed a purchase and sale agreement.

4. All employees were transferred to the purchaser.

5. The address of the business was purchased.

6. All major assets were acquired.

7. There is no common ownership between the companies.

8. At the time of purchase, [Employer B] had an experience transfer rate of 2.15%.

9. At the time of purchase, [Employer A] had an experience transfer rate of 14.370%.

10. On September 24, 2020, DUA sent the employer a notification of its UI contribution rate of 14.370%.

11. The employer appealed the September 24, 2020, notice.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's legal conclusion that, on July 1, 2020, there was a successorship pursuant to G.L. c. 151A, § 14(n)(1), and we further conclude that the DUA properly assigned to the employer the contribution rate applicable to it for the 2020 calendar year pursuant to G.L. c. 151A, § 14(n)(4).

The relevant section of law is G.L. c. 151A, § 14(n), which provides, in pertinent 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 for the purpose of this section . . .
>
> (2) The successor shall take over and continue the employer's account . . .
>
> (4) For the calendar year in which a transfer occurs which results in a transfer of an employer's account, the contribution rates of the transferring employer and successor shall be determined as follows:

> 1. Any transferring employer or successor which had a contribution rate applicable to it for that calendar year shall continue with such contribution rate.
>
> 2. If a successor had no contribution rate applicable to it for that calendar year, and only one transferring employer is involved, the contribution rate of the successor shall be same as that of the transferring employer. . . .

On appeal, the employer is not disputing that there was a business transfer on July 1, 2020. The findings of fact provide that on July 1, 2020, the employer purchased all major assets, including the business address, and acquired the employees of [Employer B] (predecessor). There was no common ownership between the entities. *See* Findings of Fact ## 2 and 4–7. Moreover, the record indicates that the employer continued the predecessor's business of providing home care services for seniors. *See* Finding of Fact # 1; *see also* Exhibits 5 and 6. In light of this evidence, we agree with the review examiner that the there was a transfer of the entire organization, trade or business within the meaning of G.L. c. 151A, § 14(n)(1), and that the employer became a successor employer.

The employer has appealed because it asserts that the DUA failed to properly assign it the predecessor's 2.15% unemployment tax contribution rate (contribution rate) at the time of transfer. In the DUA's September 24, 2020, determination, it assigned a 14.37% contribution rate. *See* Exhibit 2. Thus, the employer asks the Board to decide whether it was assigned the proper contribution rate pursuant to G.L. c. 151A, § 14(n)(4).

In support of its appeal, the employer argues that the employer formerly ran a Massachusetts business, but it ceased operating in Massachusetts in 2017, and it filed a withdrawal notice with the Massachusetts Secretary of State Corporations Division on January 10, 2018. The employer asserts that, although the CEO continued to live in Massachusetts, his focus was the company's base of operations at its headquarters in California, a company with different functions, and none of those California-based employees worked in Massachusetts. The employer further alleges that when the Massachusetts business shut down in 2017, its contribution rate was 1.98%, then inexplicably rose to 7.27% in 2018, to 10.7% in 2019, and to 14.37% in 2020. It argues that DUA had no jurisdiction to impose increasing contribution rates on this out-of-state entity. Instead, the employer asks the Board to assign the predecessor's 2.15% contribution rate.

The process for an employer to cease being subject to the Massachusetts unemployment statute is set forth under G.L. 151A, § 11, which provides as follows:

> No employer shall cease to be subject to this chapter except upon a finding by the commissioner, after having made such investigation as he may deem necessary, that such employer has not on any day after the first day of the then last completed calendar year employed one or more individuals in employment subject to this chapter, whereupon such employer shall cease to be subject hereto as of January first of the year in which such finding is made.

Accordingly, even if the employer stopped performing its former business in Massachusetts in 2017 or withdrew its registration as a corporation with the Massachusetts Secretary of State, this

statutory provision requires an affirmative DUA determination that the employer has stopped employing individuals subject to G.L. c. 151A. The record indicates that this was never done.

During the hearing, a representative from the DUA Business Transfer Unit noted that the employer last filed a payroll report with the DUA in the 3rd quarter of 2018, before filing again in the 2nd quarter of 2020, after the transfer. In fact, the employer's counsel acknowledged that in 2018, there was a $15,000 payroll listed for the employer's CEO, though he asserted that this was a mistake.[1] The record also indicates that DUA mailed numerous contribution rate notices to the employer but received no response.[2]

Whether or not the DUA properly increased the employer's contribution rate between 2017 and 2020 to 14.37% pursuant to G.L. c. 151A, § 14, or whether the employer's failure to respond to DUA notices had anything to do with this, is not before us. We simply consider whether, pursuant to G.L. c. 151A, § 14(n)(4)(1), the DUA properly continued to assign to the employer its existing contribution rate applicable for the 2020 calendar year, or whether, pursuant to G.L. c. 151A, § 14(n)(4)(2), the employer had no contribution rate applicable to it for the 2020 calendar year, and the DUA should have assigned the rate of the transferring employer.

During the hearing, the representative from the DUA Business Transfer Unit explained that the employer had to be closed for more than two years, or eight quarters, to get a new rate, and that when the employer filed its payroll report in the 2nd quarter of 2020, the old rate was revived because it had only been closed for seven quarters. This "revival rule" is based upon the U.S. Department of Labor (DOL) definitions for active and inactive employers, which state, in relevant part as follows:[3]

> "Active Employer" is defined as "An 'employer' . . . who has met a specific threshold or condition of liability contained in the state's unemployment compensation law, is currently registered and required to file contribution and wage reports (CWR's), and (except for new employers establishing liability within the 581 report quarter) has reported wages during one or more of the eight consecutive calendar quarters immediately preceding the ETA 581 report quarter."
>
> "Inactive Employer" is defined as "an employer who does not qualify for termination of coverage by reason of no longer meeting the state's definition of 'Employer' but: (a) has notified the agency it is no longer paying wages and has been granted permission to suspend filing of quarterly reports, or (b) has been administratively granted permission to suspend filing quarterly reports by reason of no longer paying wages, or (c) has not reported wages for any of the eight

[1] While not explicitly incorporated into the review examiner's findings, this testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

[2] When asked by the review examiner, the employer's CEO testified that he could not definitively speak to whether they received all of the notices, noting that some of the notices did not have the suite number for the California office building where they were mailed. Implicit in this testimony is that the employer had received at least some of the DUA's notices. This testimony is also part of the unchallenged evidence in the record.

[3] *See* DOL Employment and Training Administration ETA UI Report Handbook No. 401 (7/2017), section II-3, E, p. II-3-97.

> consecutive calendar quarters immediately preceding the ETA 581 report quarter. For these employers the effective date for inactivation shall be the last day of the eight no wage quarter (or the first day of the ninth quarter depending on state specific inactivation procedures). . . ."

Thus, it appears that for those employers who do not obtain express DUA authorization to cease being subject to the Massachusetts unemployment statute pursuant to G.L. c. 151A, § 11, DUA will deem an employer to be inactive under (c), above.

Here, there is no indication that, when it stopped operating in 2017, the employer sought or obtained a DUA determination under G.L. c. 151A, § 11, to cease being subject to the Massachusetts unemployment statute. The record also indicates that the employer remained active by filing its 2020 wage report within seven quarters of its last wage report. Under these circumstances, the DUA properly revived the employer's existing contribution rate for 2020 following the business transfer pursuant to G.L. c. 151A, § 14(n)(4)(1).

We, therefore, conclude as a matter of law that the employer was a successor employer pursuant to G.L. c. 151A, § 14(n)(1). We further conclude that for the 2020 calendar year in which the transfer occurred, the contribution rate of the employer continued to be the contribution rate applicable to it for that calendar year pursuant to G.L. c. 151A, § 14(n)(4)(1).

The review examiner's decision is affirmed.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 21, 2021

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT 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