Work performed by independent instructors at the employing unit's community center did not constitute employment, where the instructors were free to teach their courses as they wished to, the specific services were not within the usual course of the running of a community center, and the instructors were able to work elsewhere without restriction and did so.

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: Sec2-16-033

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employing unit appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), which concluded that services performed by instructors for the employing unit constituted employment pursuant to G.L. c. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On January 13, 2016, the DUA's Revenue Audit Division issued a determination finding that the services performed by the instructors constituted employment. The employing unit appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the employing unit and a representative from the Revenue Audit Division, the review examiner affirmed the agency's determination in a decision rendered on March 23, 2018.

The review examiner concluded that, although the employing unit had carried its burden with respect to G.L. c. 151A, § 2(c), it had not done so for G.L. c. 151A, §§ 2(a) and 2(b), and, thus, the services performed by the instructors constituted employment under G.L. c. 151A, § 2. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employing unit's appeal, we accepted the employing unit's application for review and afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the employing unit did not carry its burden under G.L. c. 151A, § 2, to show that the services performed by the instructors did not constitute employment, is supported by substantial and credible evidence and free from error of law.

Findings of Fact

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

1. On 1/13/2016, the Revenue Audit Department determined that there was an employer-employee relationship established between the instant employer and individuals that provided educational, recreational and cultural instruction in the year 2014.

2. The employer is a [Employer Name] providing a non profit community center providing educational, recreational and cultural programs at their facility located at [Street Address A] in [Town A], Massachusetts.

3. The instructors provide a variety of classes including Zumba, Kripalu, CPR First Aid, Gardening, Drama, Tai Chi, Dog Training, Babysitter Training, Yoga, Knitting/Crocheting, Food Preparation, Piano Lessons, Fitness Classes, Improvisation, Genealogy, Belly Dancing and Reiki and other courses.

4. The individuals provide their services outside of the [Employer Name], as well, on an independent basis and are certified and trained in their perspective [sic] interests.

5. The [Employer Name] does not provide training or instruction to the instructors.

6. The instructors generally seek out the [Employer Name] as a place that might be available to perform their services. The information about availability of space for instructors is generally found on the [Employer Name] website. The [Employer Name] does not advertise for instructors, but at times will put feelers out if a specific class is needed.

7. The [Employer Name] will advertise the various upcoming classes on posters and in pamphlets in order to obtain class participants and the instructors will also promote their courses.

8. The potential course attendees must make out a check payable to the [Employer Name].

9. The cost of the course is set by the instructor and the date and time is set by the instructor but based on the availability of the room, the minimum and maximum number of attendees is set by the instructor, but sometimes limited by the size of the room. The [Employer Name] adds 20% onto the cost of the course to cover utilities.

10. If a problem arises with a class participant, the instructor will notify the [Employer Name] and the [Employer Name] will deal with the problem.

11. Each instructor must sign a written contract drawn up by the [Employer Name] which states the name of the course to be given, the dates that the program will take place, the room where the course will be given, the

minimum and maximum number of participants, [and] the per person amount to the paid to the instructor. The agreement states in part:

If ([Employer Name]) does not receive the minimum number of participants for this program, the program and this agreement will be canceled. Consultants have been chosen because they are qualified individuals and therefore have supervising responsibilities. ([Employer name]) accepts no responsibility for students before or after a program. Consultants must stay until all students under age 18 have been picked up by a parent or authorized adult or have written permission to leave on their own. If problems occur, notify the office and we will contact the parents. It is your responsibility to leave the room in the same condition you found it. We ask that you keep attendance and store your attendance record in the office after each class.

Materials for the program are the burden of participant. As consultant you may:
*Charge a fee directly to the participant for materials necessary to the program.
* Supply the office with a materials list to be given to the participant upon registration.

It will be the responsibility of ([Employer Name]) to:
*Publicize your program.
* Register the participants for your program.
* Provide you, the consultant, with a list of participants and all necessary information.
* Cancel or reschedule your program if necessary.

12. The instructors must pass a Criminal Offender Record Information (CORI) and the [Employer Name] provides worker's compensation insurance for the instructors.

13. The instructors must personally provide their instruction and any helpers to the instructor would have to be approved by the [Employer Name].

14. The instructors are paid by an [Employer Name] check with no taxes deducted.

15. In the year 2014, the year investigated in this audit, the [Employer Name] issued Forms 1099 to each of the instructors.

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. Upon such review, the Board adopts the review examiner's findings of fact and deems 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 employing unit did not meet its burden with respect to G.L. c. 151A, §§ 2(a) and 2(b). Since the employing unit carried its burden under G.L. c. 151A, § 2, the services performed by the instructors did not constitute employment.

Employment is defined in G.L. c. 151A, § 2, which states, in relevant part, as follows:

> Service performed by an individual, . . . shall be deemed to be employment subject to this chapter . . . unless and until it is shown to the satisfaction of the commissioner that—
>
> (a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and
>
> (b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
>
> (c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

By its terms, this statute presumes that an employment relationship exists, unless the employing unit carries its burden to show "that the services at issue are performed (a) free from the control or direction of the employing enterprise; (b) outside of the usual course of business, or outside of all the places of business, of the enterprise; and (c) as part of an independently established trade, occupation, profession, or business of the worker." Athol Daily News v. Board of Review of Department of Employment and Training, 439 Mass. 171, 175 (2003). The test is conjunctive, and it is the employing unit's burden to meet all three prongs of this "ABC" test. Should the employing unit fail to meet any one of the prongs, the relationship will be deemed to be employment. Coverall North America, Inc. v. Comm'r of Division of Unemployment Assistance, 447 Mass. 852, 857 (2006).

The review examiner concluded that the employing unit carried its burden with respect to prong (c) of the ABC test. We agree with that conclusion. However, we also conclude that the employing unit met its burden with respect to prongs (a) and (b).

Prong (a) is analyzed under common law principles of master-servant relationship, including whether the worker is free from supervision "not only as to the result to be accomplished but also as to the means and methods that are to be utilized in the performance of the work." Athol Daily News, 439 Mass. at 177, *quoting* Maniscalco v. Dir. of Division of Employment Security, 327 Mass. 211, 212 (1951). "The essence of the distinction under common law has always been the right to control the details of the performance," but "the test is not so narrow as to require that a worker be entirely free from direction and control from outside forces." Athol Daily News, 439 Mass. at 177–178.

The instructors at issue in this case performed services teaching various types of classes, in numerous different fields. *See* Finding of Fact # 3. The instructors received no training from the employing unit in how to perform the services. Finding of Fact # 5. Each instructor is independently certified and has experience with the subject matter of his or her course. Finding of Fact # 4. Indeed, the findings and the testimony suggest that the instructors have considerable freedom in how they teach their classes, what they teach, and the method of instruction.

In her decision, the review examiner concluded that the employer exerted direction and control over the services performed, because the instructors have to establish that they have supervisory skills, they undergo a CORI check, they are insured for workers' compensation, and they must provide the employing unit with an attendance list of the class. However, none of these facts show that the employing unit was controlling *how* the specific services were to be done or performed in each specific room. We note that, pursuant to G.L. c. 151A, § 2, whether an employing unit pays workers' compensation premiums is not a relevant factor.[1] We are also cognizant of the Supreme Judicial Court's distinction in Athol Daily News that the focus of prong (a) is not on the relationship between the parties so much as it is on the "indices of control over the details of . . . performance." 439 Mass. at 177. Thus, conducting a CORI check or asking for an attendance list (probably so it can ensure that all course participants properly paid for the course) does not show control over the details of what the instructors were doing in the rooms in which they taught their courses. By way of example, one course was about yoga. None of the cited factors go to whether the employing unit told the yoga instructor what poses the class participants should do first, second, and so on, where they should be in the room, what they should purchase or bring to the class, or how long the participants should be doing the yoga during the class meeting time.

From the record, it appears that, once the instructors were scheduled into their rooms, they were given considerable freedom in how they gave instruction and as to what happened during the course time. In short, the means and manner of how the instructors did the services were up to them. *See* Id. at 178. Even if there were some requirements that the instructors had to fulfill or meet for their courses, they were minimal, and, again, "the test is not so narrow as to require that a worker be entirely free from direction and control from outside forces." Id. at 177–178. Therefore, the employing unit has carried its burden with respect to prong (a).

The review examiner concluded that the employing unit had not met its burden with respect to prong (b) of the ABC test. Under prong (b), the employing unit may satisfy its burden by proving *either* that the services performed are outside the usual course of the employing unit's business *or* that they are performed outside all places of the employing unit's enterprise. *See* Id. at 179. The employing unit need only establish one of the alternate components of prong (b) to carry its burden.

[1] Specifically, the statute states that the "failure to withhold federal or state income taxes or to pay workers compensation premiums" should not be considered. Although the statute talks in terms of the *failure* to pay, given the case law and our prior interpretations of this section of law, we think that the payment of federal taxes or workers' compensation premiums should also not be considered when rendering a determination under G.L. c. 151A, § 2. The point is that the focus is on the three prongs of the statute, not on other information which could be used to mislead or disguise the true nature of the relationship between the parties.

In her decision, the review examiner concluded that the employing unit had not met its burden under prong (b), because the "classes provided by the instructors are provided as part of the services or regular business of the [Employer Name], and the services are provided at the [Employer Name] at the place of business." This conclusion does not offer much in the way of analysis. However, we certainly agree with the conclusion that the instructors performed their services at the employing unit's place of business, that is, the community center in [Town A], Massachusetts. No evidence in the record is to the contrary.

As to whether the services performed were within the usual course of the employing unit's business, we disagree with the review examiner. An important consideration as to what the usual course of business is for an employing unit is what the employing unit characterizes as its business. *See* Id. at 178–179. Here, the employing unit describes itself as a "non-profit community center enriching the lives of area residents through educational, recreational, and cultural programs for all ages." Exhibit # 1, p. 1; Finding of Fact # 2. Specifically, the employing unit provides a space for various programs and courses to take place. It does not run the courses, nor does it get involved in the details of what the course should cover. Here, the services at issue are instruction in a wide variety of topics, from Zumba and yoga, to First Aid, knitting, and belly dancing. Finding of Fact # 3; Exhibit # 2. Each of these services are not generally in the usual course of running a community center. For example, the employing unit does not need a belly dancer in order to run the community center in the same way it would need an executive director or maintenance person to run the business and take care of the building itself.

During the hearing, the DUA's representative argued that the services provided by the instructors were within the scope of the employing unit's business, because the services are critical to the essential goals of the employing unit. Without the instructors, the DUA argued, the employing unit would not exist and would not be able to educate or provide educational and cultural activities. We are unpersuaded. It is important that the analysis under prong (b), and indeed under all three prongs of the ABC test, be specific, rather than general. As noted above, the services are very specific in this case. Our focus is on those services, not on the general goals of the employing unit, which are not necessarily dependent on any one course or instructor. Work in the general course of business of a community center might include maintaining the building itself, obtaining grants or other money to support the community center, filing documents relating to the various courses and whether participants have paid for those courses, or arranging the location of the various courses within the building itself. Specific services, such as instructing in Zumba, dog training, yoga, babysitter training, and genealogy classes are not pivotal or integral to running a community center.

Therefore, we conclude that the employing unit has carried its burden with respect to prong (b), because the specific services performed are not within the employer's usual course of business.

As to prong (c), the test "asks whether the worker is 'customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.'" Id. at 179. To determine whether the employing unit has carried its burden under prong (c), we "consider whether the services in question could be viewed as an independent trade or business because the worker is capable of performing the services [for] anyone wishing to avail themselves of the services or, conversely, whether the nature of the

business compels the worker to depend on a single employer for the continuation of the services." Coverall, 447 Mass. at 858.

The analysis in this case is relatively straightforward. The employing unit did not restrict the instructors from performing services for any business or entity. In fact, the review examiner specifically found that the instructors "provide their services outside of the [Employer Name], as well, on an independent basis." Finding of Fact # 4. In other words, they held themselves out to the public as individuals able to provide a certain services to whomever wished to engage them. *See* Boston Bicycle Couriers, Inc. v. Deputy Dir. of Department of Employment and Training, 56 Mass. App. Ct. 473, 480 (2002). Moreover, given the rather modest amounts of money the instructors were making, and given that they could, and did, perform their services elsewhere, they were not compelled to rely on the community center to continue their work as instructors in their various fields. *See* Exhibit # 69 (showing payment amounts). These factors indicate that the employing unit carried its burden with respect to prong (c).

We, therefore, conclude as a matter of law that the review examiner's decision, which concluded that the services performed by the instructors constituted employment, is not free from error of law, because the review examiner's findings of fact, in conjunction with the full record of testimony and documentary evidence, show that the employing unit has met its burden with respect to each prong of G.L. c. 151A, § 2.

The review examiner's decision is reversed. The services performed by the instructors were not employment, and the employing unit is not required to make contributions based on those services.[2]

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 27, 2018

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 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.

SF/rh

[2] The legal authority (apparently from the IRS) submitted by the DUA in its response to the Board's acceptance of the employing unit's application for review does not persuade us to alter our conclusion here. The first ruling, in which an employment relationship was found, concerned part-time instructors at a college campus. Per the submission by the DUA, the instructors had to comply with college rules and regulations and had to meet with a college representative for course planning purposes. The college set the class schedules and furnished materials (such as computers and other equipment) to the instructors. The facts of the case before us are clearly distinguishable. The second ruling, in which an employment relationship was also found, concerned an instructor who taught an art class for three hours per week. In finding an employment relationship, the IRS noted that the college "exercised control over the curriculum, the facility, and the scheduling of classes, and the college consulted with the worker regarding the performance of the teaching services." Those factors are not present here in sufficient quantity or importance such that we could conclude that an employment relationship existed. We note that not every instance of an instructor teaching a course leads to the conclusion that the instructor is an employee. The specific facts of the case, including where the services are being performed and for what type of entity, are critical.