



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

Charles F. Hurley Building • 19 Staniford Street • Boston, MA 02114
Tel. (617) 626-6400 • Office Hours: 8:45 a.m. to 5:00 p.m.

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LT. GOVERNOR

SUZANNE M. BUMP
SECRETARY, LABOR AND
WORKFORCE DEVELOPMENT

**BOARD OF REVIEW
DECISION**

JOHN A. KING, ESQ.
CHAIRMAN

DONNA A. FRENI
MEMBER

SANDOR J. ZAPOLIN
MEMBER

BR-108760-XA (July 31, 2009) -- Even though the seller ultimately retained significant land assets, there was insufficient evidence to show that the seller continued to engage in meaningful, ongoing business activity after the transfer to a successor company. Under G.L. c. 151A, sec. 14(n), the unemployment account and benefit charges of the predecessor transfer to the successor.

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), which found the employer to be a successor business under G.L. c. 151A, §§ 8(d) and 14(n)(1), and thereby responsible for all of the unemployment benefit charges of its predecessor. We review, pursuant to our authority under G.L. c. 151A, §§ 12 and 41, and affirm.

On September 17, 2008, the agency initially determined that the employer was a successor organization and liable for the experience rating and account balance of its predecessor. The employer appealed that determination to the DUA hearings department. Following a hearing on the merits, a review examiner affirmed the agency's determination in a decision rendered on December 9, 2008. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case back to the review examiner to take additional evidence. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon a review of the entire record, including the decision below and the subsequent consolidated findings.

The issue on appeal is whether the employer acquired the entire business or substantially all the assets of another business, as set forth under G.L. c. 151A, § 14(n)(1).

Findings of Fact

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

1. On December 21, 2007, the instant employer purchased the following assets of a sand and gravel business in [], Massachusetts that had assigned to it the Division of Unemployment Assistance (DUA) Employer Identification number []: land; stationary gravel crushing plant; front-end loader; excavator; off-road hauling truck; diesel generator for providing electrical power to the gravel crushing plant; and a two (2) story office building with a truck scale attached.
2. As of December 21, 2007, the instant employer had a pre-existing DUA Employer Identification number [].
3. As a sand and gravel company, the predecessor's business focused on: digging loose gravel; crushing the gravel to sand; and selling the sand to construction companies.
4. The predecessor sand and gravel company went out of business when it exhausted the loose sand and gravel on its land.
5. As an aggregate company, the instant employer's business is involved in quarrying large slabs of stone by drilling and blasting methods and, therefore, purchased the predecessor's land site for quarrying.
6. Four (4) of the predecessor's five (5) employees continued their employment with the instant employer.
7. The instant employer did not purchase or assume the predecessor's: accounts receivable; accounts payable; customer list; business name; or telephone number.
8. As a condition of purchase and sale, the instant employer deeded back to the predecessor company certain property that the predecessor used for a cranberry bog; [sic] after the instant employer paid for the predecessor's land parcels to be consolidated and subdivided according to the purchase and sale agreement.
9. In a letter to the DUA dated June 16, 2008, the predecessor sand and gravel company notified the DUA that the predecessor company: sold its gravel yard to the instant employer on December 21, 2007; ceased its operations as of December 31, 2007; no longer has any employees; and does not anticipate having any employees.

10. On July 15, 2008, the instant employer submitted a completed Form 1110-A, Employer Status Report, to the DUA, stating that the employer had acquired all of the: assets; business; tools; fixtures; equipment; and furniture of the predecessor's sand and gravel business. The Form also states that the instant employer continued the operation of the predecessor's business.
11. On or about July 15, 2008, the DUA allowed the change of ownership reflected in the completed Form 1110-A.
12. On September 17, 2008, the DUA issued a written notice to the instant employer, informing the employer that it was determined to be subject to the provisions of the Massachusetts Unemployment Insurance Law as of December 20, 2007, because the employer acquired a business, or the substantial assets of a business, that was a subject employer at the time of the acquisition. The notice also informed the employer that the experience rating records of the predecessor organization had been transferred to the employer and used to determine the employer's contribution rates.
13. On September 26, 2008, the instant employer appealed the September 17, 2008, determination.
14. After December 2007, on October 9, 2008, the instant employer complied with the original purchase agreement and deeded back to the predecessor employer approximately 88 acres of land associated with the predecessor employer's cranberry bog business; whereby, the instant employer retained approximately only 185.44 acres of the original 273.44 acres purchased by the instant employer. Accordingly, the predecessor employer was able to continue its cranberry bog business; which represented approximately thirty-two percent (32%) of the total acreage owned by the predecessor employer for its combined enterprises of sand and gravel and cranberry business.
15. The Town Assessor for the location where the acreage in question is situated informed the instant employer that the assessed value of the predecessor employer's cranberry bog acreage is \$30,000.00 per acre, or \$2,640,000.00 for the 88 acres that were not retained by the instant employer.
16. The Town Assessor for the location where the acreage in question is situated informed the instant employer that the assessed value of the predecessor employer's sand and gravel acreage is between \$12,000.00 and \$15,000.00 per acre, or approximately \$2,781,600.00 for the 185.44 acres that were retained by the instant employer.
17. For the fourth (4th) quarter of 2007, the predecessor employer made unemployment contributions for gross wages of \$59,568.00 paid to six (6) employees.

18. For the first (1st) quarter of 2008, and thereafter, the predecessor employer made zero (\$0.00) unemployment contributions for gross wages of \$0.00 paid to zero (0) employees.
19. The instant employer purchased 273.44 acres from the predecessor employer for the sale price of \$3,115,000.00, with the condition that the instant employer would re-convey to the predecessor employer approximately 88 acres of cranberry bog land for little or no consideration; after the instant employer had the 88 acres in question subdivided and recorded. Accordingly, the instant employer paid, in effect, \$3,115,000.00 for only 185.44 acres, or sixty-eight percent (68%), of the original 273.44 acres; of which, thirty-two percent (32%) was deeded back to the predecessor employer.

Ruling of the Board

The Board adopts the DUA review examiner's consolidated findings of fact, with the exception of the references to the predecessor's "cranberry bog business" under Findings of Fact #8 and #14, which we do not adopt for the reasons specified below. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law.

The review examiner issued his decision pursuant to section 14(n) of G.L. c. 151A. The relevant portion of § 14(n) provides as follows:

- (1) If the entire organization, trade or business of an employer, or substantially all the assets thereof, are transferred to another employer ..., 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....

In National School Bus Service, Inc. v. Commissioner of the Dept. of Employment & Training, 49 Mass.App.Ct. 445 (2000), and L & CP Corp. v. Director of the Div. of Employment Security, 28 Mass.App.Ct. 961 (1990)(rescript opinion), the Massachusetts Appeals Court addressed the transfer of a business under G.L. c. 151A, § 14(n). These cases provide useful guidance in the present matter.

In L & CP, although the buyer purchased the entire laminated and coated products operation from the seller, the buyer was not a successor under G.L. c. 151A, § 14(n)(1), because that operation was only one of the seller's many business activities. Id. at 962. Evidence of other business activities was presented and contained in the record. In contrast, the court in National School Bus upheld the buyer's successor status, because the buyer had acquired the business of operating the school system's bus transportation services without offering evidence of any meaningful, ongoing business activity by the seller. National School Bus, 49 Mass.App.Ct. at 450-452.

The appellant/successor in this appeal argues that the predecessor continued to operate its sand and gravel business after the 2007 transfer. In support, it offered copies of the predecessor corporation's on-going annual reports to the Secretary of State. Additionally, it offered four invoices showing the sale of stone, gravel, or fill to the predecessor during 2008, which the successor's witness testified "could be" indicative of the predecessor engaging in the sand and gravel business, though he did not know that for a fact.¹

In contrast, the weight of the evidence showed that upon its sale to the successor in 2007, the predecessor ceased operating its sand and gravel business. Initial written statements from the predecessor and successor to the DUA had represented that the predecessor sold its operations to the successor and ceased its operations. Additionally, the successor hired four out of the five predecessor employees; the latter notified DUA that it did not intend to hire any more; and DUA did not subsequently receive any reported wages from the predecessor company.

Moreover, nothing in the record shows that the predecessor engaged in any other meaningful, on-going business activity after the transfer. The successor successfully demonstrated that the transfer included deeding back a parcel of land containing cranberry bogs, and that this parcel was worth more per acre than the land it planned to use as a quarry. However, the record reflects that the successor failed to prove that the predecessor actively engaged in the business of growing or selling cranberries. Accordingly, we reject the portions of Findings # 8 and #14 that refer to the predecessor using the land for a cranberry bog business.

In light of the successor's failure to establish any meaningful sand and gravel or cranberry business activity by the predecessor following the sale, we find that the predecessor's entire business was transferred. We, therefore, conclude as a matter of law that the appellant is a successor employing unit, under G.L. c. 151A, § 14(n)(1).

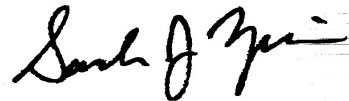
¹ This testimony, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and contained in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Director, DET, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is affirmed. The predecessor's unemployment account and benefit charges are transferred to the appellant successor employer



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - July 31, 2009



Sandor J. Zapolin
Member

Member Donna A. Freni did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 12, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – August 31, 2009