



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-121929-XA (June 26, 2012) – Tutors, who were required to meet extensive reporting and performance requirements, were subject to so much direction and control by the employing unit within the meaning of G.L. c. 151A, § 2(a), as to be employees, notwithstanding the tutor's high level of skill and the fact that several of them held themselves out as independent contractors and performed tutoring services for other entities. *[Note: The District Court affirmed the Board of Review's 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 services performed by seven tutors working for the employer, as well as those of others similarly situated, constituted employment within the meaning of G.L. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

In a status determination issued on July 13, 2011, the DUA determined that the services performed by the tutors, and others similarly situated, were those of an employee, not an independent contractor, within the meaning of G.L. 151A, § 2. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, which only the employer attended, the review examiner affirmed the agency's initial determination in a decision rendered on January 3, 2012. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to allow the employer to introduce previously-referenced relevant documentation and expand upon the factual record. The employer attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the employer has met its burden to prove that the services performed by the seven named individual tutors did not constitute employment within the meaning of G.L. c. 151A, § 2.

Findings of Fact

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

1. The employer's business is an educational consulting business providing family and tutoring services.
2. The employer [sic] office is located at [address]. The employer has no staff at that location and no tutorial services are performed there. The employer handles telephone calls, e-mails, invoicing, and billing from that location.
3. The employer has seven tutors that perform services for the employer. The seven tutors providing services for the employer are [A], [B], [C], [D], [E], [F] and [G].
4. Tutors [B] and [E] work as full-time teachers. [B] works at [Name of School] in Jamaica Plain. [E] works at [Name of School] in West Roxbury.
5. [A] tutors her own clients 5 hours a month, tutors with another tutoring company 3 hours per week, contracts with the [City] Public Schools for translation 10 hours or more per month, and translates for [Private Charity] for translation [sic].
6. [C] tutors with the [City] Tutoring Company 27 hours per week and tutors for the [] Tutoring Services and [Name of organization] 2.5 hours per week.
7. [D] tutors her own clients 1 hour per week, tutors for the [Name] tutoring company 4 hours per week, and contracts with the [] Elementary School in their [sic] before and after school program between 1.5 and 5 hours per week.
8. [F] tutors his own clients in academics and piano 5 to 7 hours per week, tutors for Club [] 12 to 15 hours per week, and teaches private piano lessons with [] Piano Studio 4 to 5 hours per week.
9. [G] tutors her own clients up to 10 hours per week and contract [sic] with other tutoring companies, including [] Tutoring Services, up to 10 hours per week.
10. The tutors provide the employer with their available hours. (The tutors can also notify the employer if they are unable to drive to a specific location/area.)

11. The tutors work variable hours for the employer. [A] works 0 to 3 hours per week. [B] works 0 to 4 hours per week. [C] works 0 to 2 hours per week. [D] works 0 to 6 hours per week. [E] works 0 to 1 hour per week. [F] works 0 to 4 hours per week. [G] works 0 to 5 hours per week.
12. When the employer obtains a request from a client for tutoring services, the employer sends out an e-mail to all tutors with the information. Any tutor who is available and wants the work can accept it.
13. The tutors perform the services for the clients, high school students. The services are performed at the client home or any location that is agreeable between the tutor and the client.
14. The tutors are paid either an hourly rate or by the job. The employer determines how the tutor will be paid. The tutors are paid an hourly rate of \$25 to \$45, depending upon their level of experience and education.
15. The tutors are required to have a college degree. The tutors are not required to be licensed, i.e. Massachusetts Teacher's Certificate. (The employer has four tutors who are licensed and three tutors who are not.)
16. The employer does a background check on the tutors and checks the tutors references prior to their performing services. (The tutors cannot hire an assistant, because they have to undergo a background check.)
17. The employer would obtain a call from a parent regarding the needs of their student. The employer would then send out an e-mail to the tutors with the available work. If the tutor chose to accept the work, the tutor would then set up a meeting with the client to perform the tutoring services.
18. The client requests the number of days, hours, and times of tutoring
19. The tutors can speak directly with the clients. The employer requests that the tutors notify the employer if they should perform more hours with the client so that the employer can properly bill the client.
20. The tutor would submit an invoice to the employer with the date, the time, and the length of service provided. There is no specific form for completion to be paid. The tutor could send the information by e-mail.
21. The employer would then bill the client for the tutoring services. The employer would then provide payment to the tutor.

22. The equipment necessary to perform the position would be a vehicle, paper, pencil, calculator, and SAT preparation book. The employer does not provide any of the equipment and does not provide any reimbursement for the use of the vehicle.
23. If a tutor is unable to report as scheduled they could either contact the employer or contact the client directly. There are no ramifications from the employer if a tutor does not report for an assignment.
24. The tutors do not receive any training from the employer in the performance of the position. The employer does not provide the curriculum to be taught, or any instruction as to how to teach it.
25. The tutors performing services for the employer are all either full-time teachers or full-time tutors with their own clients. The tutors are not required to provide the employer with any minimum commitment as to the hours worked. The tutors can refuse work or stop performing services at anytime without ramifications.
26. The tutors are not required to attend any regular meetings with the employer. The tutors are not required to wear a uniform. The tutors are not provided with business cards.
27. Prior to the summer of 2011, the employer provided the tutors with an employer [sic] handbook, addressing such issues as being matched with a client, filling out a "Tutoring Report" within 24 hours of the session, changing, canceling, or rescheduling appointments, what to do if the session runs over, duration of commitment to the employer, pay structure, documentation of tutoring service, communication between the tutor and the employer, guardian presence, inappropriate conduct, infrequent solicitation, independent contracting, references, dress code, client absentee or late cancellation, quality control, and changes in policy. As of the summer 2011, the employer was no longer distributing or utilizing those handbooks.
28. The employer has the tutors sign a "Non-Compete Agreement." That agreement indicated in part that; [T]he Tutor/Contractor may not assist (the employer) clients in contracting outside tutors, educational companies, or any services that compete with (the employer)." "After expiration or termination of this agreement the Tutor/Contractor agrees not to contract with or solicit any present or former clients of (the employer) eternally." "Competition also means, while contracting, the [sic] (the employer) and/or while within the period of this agreement in this contract, the Tutor/Contractor may not work for, contract for, or receive any [money] from (the employer) clients or their relatives or guardians." "If a Tutor/Contractor terminates this agreement with a formal letter and ceases to contract with (the employer), the Tutor/Contractor may not contract with or solicit any present or former clients of (the employer) eternally."

29. The tutors sign and complete a “1099 Contractor Agreement” before being permitted to perform services for the employer.
30. The tutors fill out a Form 1099. The tutors are paid the last day of the month for the services provided. The tutors are paid by check with no taxes deducted. The employer does not provide Worker’s Compensation Insurance for the tutors.
31. After the third quarter of 2009, the employer had made payment to the tutors in the amount of \$1,500 or more in some calendar quarters. (The employer did not have any payroll information available and was uncertain as to the exact calendar quarters where payment was made to the tutors in the amount of \$1,500 or more.)

Ruling of the Board

The Board adopts the review examiner’s consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

Employment is defined under 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.

Under G.L. c. 151A, § 2, the employing unit must 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 Div. of Employment & 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 employer fail to meet any one of the prongs, the relationship will be deemed to be employment. Coverall North America, Inc. v. Comm’r of Div. of Unemployment Assistance, 447 Mass. 852, 857 (2006).

Prong (a) - Direction and Control

With respect to prong (a), we consider whether services performed by an individual are 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.” Griswold v. Dir. of Department of Employment Security, 315 Mass. 371, 372 (1944). However, the inquiry under prong (a) is “not so narrow as to require that a worker be entirely free from direction and control from outside sources.” Athol Daily News, at 178 (2003). The employing unit must prove, however, “...the absence of control and direction over the worker ‘both under his contract for the performance of service and in fact.’” Boston Bicycle Couriers, Inc. v. Deputy Dir. of Department of Employment and Training, 56 Mass. App. Ct. 473, 484 (2002).

In our view, the employing unit has not met its burden under prong (a). The findings establish that the employer does not allow the tutors to hire assistants, that the employer billed the clients for services provided by its tutors, and that the employer, not the clients, paid the tutors for their services. The findings also establish that the employer provided its tutors with a “Tutor Handbook,” specifically outlining various aspects of the tutors’ performance of services. Although the review examiner found that the employer was no longer distributing or utilizing the Tutor Handbooks as of the summer of 2011, it is evident from the record that many of the policies and procedures set forth in this handbook are still practiced by the employer. As discussed in the handbook, the review examiner found that the employer determines the amount that the tutors will be paid, setting the hourly rate based upon the tutor’s level of experience and education. The employer’s undisputed testimony also indicates that the employer still practices certain terms delineated in the handbook, including the employer’s procedure for matching its clients with the tutors, that the tutors are paid at the end of the month, and that the tutors should call the employer if they are running late or unable to make their tutoring session.¹ For these reasons, we conclude that the employer has substantial “direction and control” over the tutors’ performance of services.

Finally, we note that the review examiner found that the employer has all of its tutors sign a non-compete agreement. In the non-compete agreement, the tutors agree to use their best efforts to “comply with all policies as outlined in the Tutor Handbook.” Therefore, even though the employer no longer distributes or utilizes the Tutor Handbooks, because the non-compete agreement contains this language, which all of the tutors sign, the tutors are actually still contractually bound by the terms and conditions of the Tutor Handbook as they are incorporated by reference into the non-compete agreement.

Prong (b) – Outside the course or place of the employer’s business

In order for the employing unit to meet its burden under prong (b), the employing unit need only prove that the services provided are *either* outside the usual course of the employer’s business *or*, that such services were performed outside of the employer’s place of business. Athol at 179.

¹ See Remand Exhibit # 6. We supplement the findings of fact, as necessary, with the unchallenged evidence in the record. See Bleich v. Maimonides Sch., 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Dep’t of Employment & Training, 64 Mass. App. Ct. 370, 371 (2005).

The employer meets the “either/or” test for prong (b). The review examiner found that the employer’s only office is located in her home in [], Massachusetts, and that the tutors do not perform any services there. The tutors perform their services at the clients’ homes or at a location mutually agreed upon by the individual tutor and client. Therefore, the employer has proven that the services performed by the tutors are outside of all the employer’s places of business.

Prong (c) – Capable of carrying on an independent business of the same type

The SJC requires the following approach to evaluating part (c). In order to assess whether a service could be viewed as an independent trade or business, we must consider whether “the worker is capable of performing the service to 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...” Athol, 439 Mass. at 181. The Athol test does not require a worker to be actually conducting work for others, only that he be capable of doing work for others.

The review examiner found that the tutors work very limited hours for this employer and therefore the tutors’ time commitments to this employer were not so great as to preclude them from providing such services for others. In fact, the findings establish that the tutors actually work in a similar capacity for others. Of the employer’s current seven tutors, two of the tutors are full-time teachers and the remaining five perform tutoring services for their own clients and/or with another tutoring agency. Moreover, the non-compete agreement only limits the tutors from soliciting and interfering with the employer’s current and former clients, thereby still enabling the tutors to perform tutoring services for others that are not associated with this employer. Therefore, the employer has met its burden under prong (c).

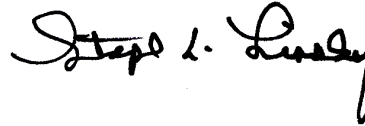
However, since it is the employer’s burden to meet all three prongs of the “ABC” test and the employer failed to meet prong (a), we therefore conclude, as a matter of law, that the services provided by the seven named tutors, and the services of others similarly situated, were employment within the meaning of G.L. c. 151A, § 2.

The review examiner's decision is affirmed. The services performed by the seven named tutors constitute employment, and therefore, the employer is required to report the compensation for their services to the DUA and to make unemployment tax contributions.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - June 26, 2012



Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT-