STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 25, 2019

IN THE MATTER OF:
Appeal Board No. 581760

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determinations (June 26, 2013 and August 23, 2013) charging (employer or transferee) additional tax contributions based on the assignment of a negative unemployment experience rating from Jonathan Beth Consultants NY LLC (transferor or JBC) effective January 1, 2012 due to a partial transfer of that organization, trade or business (including workforce).

(Appeal Board No. 581760 and)

The Department of Labor issued the initial determinations (June 26, 2013 and October 2, 2013) charging JBCPLATFORM LLC (employer or transferee) additional tax contributions based on the assignment of a negative unemployment experience rating from Jonathan Beth Consultants NY LLC (transferor or JBC) effective June 1, 2012 due to a total transfer of that organization, trade or business (including workforce).

(Appeal Board No. 581759 and 013-35378)

The employers requested a hearing objecting to the transfer of accounts.

The Administrative Law Judge held a combined hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the employers and of the Commissioner of Labor.

By combined decisions filed July 24, 2014, the Administrative Law Judge

sustained the employers' objections and overruled the initial determinations.

The Commissioner of Labor appealed the Judge's decisions to the Appeal Board. The Board considered the arguments contained in the written statements submitted on behalf of the Commissioner of Labor and of the employers.

By order filed December 21, 2018, the Board remanded the case to the Hearing Section for a further hearing. The Administrative Law Judge held a further hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the employers and the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: JBC provided personal management services to assist with new employees and to provide benefits and human resources services. BZ, who owned at least 51 percent of JBC, was the president and CEO. At least 70 percent of JBC's human resources business was derived from one major client. JBC outsourced various parts of its human resources business. JBC was not registered as a Professional Employer Organization (PEO) for unemployment insurance purposes.

On March 3, 2008, BZ electronically submitted on behalf of JBC a NYS 100 form to the Department of Labor stating that the principal activity of JBC is "recruiting agency".

In 2009, BZ started JBCStyle NY LLC (hereafter "Style") as an executive search firm specializing in recruiting retail and fashion workers. In 2011, BZ started JBCPlatform LLC (hereafter "Platform") another executive search firm specializing in recruiting workers in the hospitality and other light industries. BZ, who also owned at least 51 percent of Style and Platform, also had the official capacity as the president and CEO of each firm. All three businesses (JBC, Style, and Platform) operated in the same building throughout at least three floors. BZ was the only JBC employee at that location. JBC did not share any clients with Style or Platform.

Both Style and Platform entered into "personnel management services" contracts with JBC that authorized JBC to direct and control workers, to hire or terminate workers, to maintain employment records, to resolve worker disputes not subject to a collective bargaining agreement, to pay salaries and wages,

to comply with applicable payroll taxes, to procure and administer respective workers' compensation insurance and claims; to develop and implement policies and practices regarding personnel management services only, to comply with any applicable professional employer organization rules and regulations, and to provide human resources advice and direction. The Contract further provides that one or more workers shall be designated by JBC as on-site supervisors to facilitate management services. JBC had a "co-employment" relationship with the employees working for Style and Platform. JBC, at its own expense, covered Style's and Platform's employees for workers' compensation insurance JBC charged an extra fee for services requested by Style and Platform, including background screening, drug testing, pre-employment testing, advertising, and issuing special bonus checks. JBC reported the employees of Style and Platform to the Department of Labor for unemployment insurance purposes. JBC, Style, and Platform all shared an employee handbook that included an Internet, Email & Electronic Media Policy.

In 2011, when its major client ended its business relationship, JBC decided to dissolve its business. In 1st quarter 2012, Style reported to the Department of Labor 75 "full-time employees (recruiters)" reported by JBC in 4th quarter 2011. In 3rd quarter 2012, Platform reported to the Department of Labor its 71 out of 77 employees reported by JBC in 2nd quarter 2012. Neither Style nor Platform acquired contracts, clients, assets, or good will from JBC.

OPINION: Labor Law § 581(4)(a), provides that "Where an employer ... transfers

his or its organization, trade or business in whole or in part, the transferee shall take over and continue the employer's account ... in proportion to the payroll or employees assignable to the transferred organization, trade or business determined for the purpose of this article" by the Commissioner of Labor. Finding a legitimate legislative purpose, the Court stated that "if the statute did not inflict the burden of a negative account balance on the transferee, this liability would be debited to the State's general account and, would in effect, be charged to the State's other employers". Matter of Cat's Pajamas, Inc., 89 AD2d 1029 (3d Dept 1982).

Initially, the record demonstrates that transfers occurred of JBC's organization, trade or business to both Style and to Platform. Significantly, the transferees continued their respective executive search firm businesses in the same location with most of its same workers who were previously reported by the transferor. At the outset, the Commissioner's presumption that a

transferred occurred under Labor Law § 581(4)(a) is reasonable. See Matter of

Cat's Pajamas, Inc., 89 AD2d 1029 (3d Dept 1982).

However, the law provides an opportunity to rebut the presumption of a transfer. Specifically, Labor Law § 581(4)(c) states that "No transfer shall

be deemed to have occurred" if the transferee proves that "all of the following conditions exist:

1) the transferee has not assumed any of the transferring employer's obligations, and

2) the transferee has not acquired any of the transferring employer's good will, and

3) the transferee has not continued or resumed the business of the transferring employer either in the same establishment or elsewhere, and

4) the transferee has not employed substantially the same employees as those the transferring employer had employed in connection with the organization, trade, business, or part thereof transferred."

Both Style and Platform failed to meet prongs three and four under the four-pronged test to rebut the presumption of a transfer, i.e. that the transferees continued their business and employed most of the transferor's workers. See Matter of Hancock Lumber LLC, DBA Mallery Lumber, 56 AD3d 844 (3d Dept 2008); Matter of Felix Associates Inc., 53 AD3d 893 (3d Dept 2008); and Matter of Cat's Pajamas, Inc., 89 AD2d 1029 (3d Dept 1982).

Although the transferees contend that JBC was not in the executive search firm business, the law does not require such mandate. Also, even though there may not have been a physical transfer or a purchase of assets, a transfer of employees from one entity to another may readily suffice a finding of a transfer. As the Court noted, the Appeal Board is properly authorized to "give the words 'transfer', 'transferor' and 'transferee' a liberal construction to carry out the intent and the purposes of the law with respect to experience rating." Matter of Mark Hotel Corp., Operating Hotel Riverside Plaza, 9 AD2d 412 (3d Dept 1959). In Mark Hotel, the Court further stated that the method of transfer is insignificant where the transferor ceased operation and where the

owner simultaneously owned another business and continued the business without interruption. Also, the law does not require a written agreement between the transferee and transferor or of an exchange of money. See Matter of Employee Relations Associates Inc., DBA Extra Help, 142 AD2d 813 (3d Dept 1988); and Matter of Carrazza Buick Inc., 20 AD2d 613 (3d Dept 1963). And even if the transferor is no longer in business, the Court has upheld a transfer where the transferor is defunct. See Matter of Employee Relations Associates Inc., DBA Extra Help, 142 AD2d 813 (3d Dept 1988).

Moreover, effective January 1, 2006, the legislature specifically excluded from consideration the opportunity to rebut under § 581(4)(c) when a certain

transfer occurs with at least 10% common control among the transferor and transferee. Labor Law § 581(7)(a)(1) states the following:

If an employer transfers its organization, trade or business, or a portion thereof, to another employer and, at the time of the transfer, there is at least ten percent common ownership, management or control of the two employers [transferor and transferee], then the unemployment experience attributable to the [transferor] shall be transferred to the [transferee].

In addition to the provisions of this subdivision, the transfer provisions of paragraphs (a), (b) and (d) of subdivision four of this section shall apply to such transfers. For purposes of this subdivision "organization, trade or business" shall include the employer's workforce. (Emphasis added.)

Although Labor Law § 581(4)(a), (b) and (d) were made applicable to Labor Law

§ 581(7), the legislature intentionally excluded the application of the

rebuttable presumption under subsection (c). Such legislative intent is to prevent, in part, an employer from transferring or acquiring another business to obtain a lower experience rate. See Unemployment Insurance Program Letter No. 30-04 (http://www.ows.doleta.gov/dmstree/uipl/uipl2k4/uipl_3004.htm). Here, regardless of any purpose to obtain a lower rate, BZ's 51 percent ownership in each of the three entities involved is more than 10 percent common ownership or control at the time of the transfer. Accordingly, Labor Law § 581(7) precludes the transferees from taking advantage of Labor Law §

581(4)(c) to rebut the presumption of a transfer found under Labor Law §

581(4)(a).

Although the transferees contend that JBC made unemployment contributions under the registration numbers of Style and Platform, JBC was admittedly not a registered PEO and, therefore, the Commissioner's refusal to recognize JBC's efforts and actions to act as a co-employer is not unreasonable. The Board distinguishes Matter of Management Data Communications Corp., 86 AD2d 936 (3d Dept 1982) where the purported transferors merely outsourced data processing needs to the purported transferee, as compared to this case where JBC's employees were transferred to Style and Platform. The Board further distinguishes Matter of Control Building Services Inc., 136 AD2d 825 (3d Dept 1988) where the Court upheld the denial of Control's contention of a transfer of Allied's "organization, trade or business" based on a lack of nexus between Allied and Control other than their industry-wide union contract to provide the same services to a third-party, as compared to this case where BZ had a majority controlling interest in all three involved entities and where they all operated out the of the same building.

Under all these circumstances, the record amply supports the Department of Labor's determination to charge the transferees, Style and Platform, additional tax contributions based on the assignment of a negative unemployment experience rating based on transfers of JBC's organization, trade or business.

DECISION: The combined decisions of the Administrative Law Judge are reversed.

The initial determinations, charging additional tax contributions based on the assignment of a negative unemployment experience rating from Jonathan Beth Consultants NY LLC effective January 1, 2012 due to a partial transfer of that organization, trade or business (including workforce), are sustained.

(Appeal Board No. 581760 and)

The initial determinations, charging JBCPLATFORM LLC additional tax contributions based on the assignment of a negative unemployment experience rating from Jonathan Beth Consultants NY LLC effective June 1, 2012 due to a total transfer of that organization, trade or business (including workforce), are sustained.

(Appeal Board No. 581759 and 013-35378)

The employers' objections are overruled.

The employers are liable with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER