

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
GENERAL DIVISION

PENNEX ALUMINUM COMPANY, LLC,		CASE NO. 12CV-12544
		JUDGE SHEERAN
Appellant,		
vs.		
DIRECTOR, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES,		
Appellee.		

**DECISION AND JUDGMENT ENTRY REVERSING DECISION OF OHIO
UNEMPLOYMENT COMPENSATION REVIEW COMMISSION**

NOTICE OF FINAL APPEALABLE ORDER

SHEERAN, J.

This case is an administrative appeal brought by Pennex Aluminum Company, LLC, pursuant to R.C. 4141.26(D)(2). Pennex has appealed a Decision in which the Ohio Unemployment Compensation Review Commission found that Pennex was the successor-in-interest to GEI of Columbiana, Inc., for the purpose of determining Pennex’s unemployment-compensation contribution rate as an Ohio employer. The record that the Commission has certified to the Court reflects the following facts, which are not in dispute.

Facts

Pennex Aluminum Company, LLC, which is headquartered in Wellsville, Pennsylvania, is a supplier of custom aluminum extrusions, fabrication services, and aluminum billets.¹ Pennex

¹ Affidavit of Rick Merluzzi, Jan. 27, 2012 (Merluzzi Affid.) ¶3, 5; ODJFS Exhibit (Ex.) 6.

re-melts scrap aluminum, casts the melted aluminum into bars called “billets,” and then, through the process of extrusion, uses the aluminum billets to produce shaped objects.² Extrusion is the process of shaping metal by forcing it through a die.³ Pennex then adds value to the extruded aluminum objects by creating finished fabricated products for its customers.⁴

Prior to 2010, Pennex operated two aluminum extrusion plants, one in Wellsville, Pennsylvania and the other in York, Pennsylvania.⁵ In 2010, Pennex determined that it needed to acquire a third aluminum extrusion plant in order to expand its capabilities.⁶

On November 1, 2010, pursuant to an “Asset Purchase Agreement” executed on August 31, 2010, Pennex purchased a third aluminum extrusion plant, located in Leetonia, Ohio, from the plant’s joint owners, GEI of Columbiana, Inc. (GEI Columbiana) and GEI Corporation of Ohio (GEI Ohio).⁷ Pennex purchased only the production assets related to the Leetonia plant.⁸

Pennex did not purchase GEI Columbiana’s or GEI Ohio’s business.⁹ Pennex did not purchase another aluminum extrusion plant jointly owned by GEI Columbiana and GEI Ohio, which was located in Youngstown, Ohio.¹⁰ GEI Columbiana and GEI Ohio retained and continued to operate the Youngstown plant.¹¹ Pennex did not purchase GEI Columbiana’s or GEI Ohio’s accounts receivable, their existing contracts with their customers, their work in progress, or their inventory, other than the existing aluminum billets at the aluminum extrusion plant in Leetonia, Ohio.¹² The work in progress and the finished goods inventory that were in

² Merluzzi Affid. ¶5.

³ Merluzzi Affid. ¶5.

⁴ Merluzzi Affid. ¶5.

⁵ Transcript (T.) 19; Merluzzi Affid. ¶6; ODJFS Ex. 6.

⁶ Merluzzi Affid. ¶6.

⁷ T. 8-9, 19-21; Merluzzi Affid. ¶11; ODJFS Ex. 5.

⁸ Merluzzi Affid. ¶12.

⁹ Merluzzi Affid. ¶12.

¹⁰ Merluzzi Affid. ¶9, 13.

¹¹ T. 20-21; Merluzzi Affid. ¶13; ODJFS Ex. 6.

¹² T. 10, 21; Merluzzi Affid. ¶13.

the Leetonia plant at the time of the asset purchase were removed from the Leetonia plant by GEI Columbiana and GEI Ohio.¹³

In Section 2.2 of the Asset Purchase Agreement, there is a complete list of the items that Pennex did not purchase from GEI Columbiana and GEI Ohio:

2.2. Excluded Assets. The following assets of Seller *** are not part of the sale and purchase contemplated hereunder, are excluded from the Assets and shall remain the property of Seller after the Closing:

- (a) all cash in an amount exceeding the aggregate amount of cash equivalents and short-term investments;
- (b) all Inventory, other than Billet;
- (c) all work in progress;
- (d) all Accounts Receivable;
- (e) all minute books, stock Records and corporate seals;
- (f) the shares of capital stock of Seller held in treasury;
- (g) all insurance policies and rights thereunder (except to the extent specified in Section 2.1(g) and (h)), and all prepaid insurance;
- (h) the Seller Contracts listed in Part 2.2(h);
- (i) all personnel Records and other Records that Seller is required by law to retain in its possession;
- (j) all claims for refund of Taxes and other governmental charges of whatever nature;
- (k) all rights in connection with and assets of the Employee Plans;
- (l) all rights of Seller under this Agreement, the Bill of Sale, and the Assignment and Assumption Agreement; and
- (m) the right to use of the corporate names "GEI of Columbiana, Inc." and "GEI Corporation of Ohio" for the sole purpose of winding down the Seller's business.¹⁴

¹³ Merluzzi Affid. ¶15.

¹⁴ ODJFS Ex. 5.

When Pennex purchased the aluminum extrusion plant in Leetonia, Ohio, all twenty-two of the plant employees, who worked for GEI Columbiana and GEI Ohio, were terminated from their employment.¹⁵ Pennex thereafter offered to re-hire those employees to work for Pennex at the Leetonia plant.¹⁶

When Pennex purchased the aluminum extrusion plant in Leetonia, Ohio, Pennex shut the plant down for a period of time for cleaning and reorganization, and then re-opened the plant and began operations.¹⁷ Twenty of the twenty-two former plant employees of GEI Columbiana and GEI Ohio returned to work for Pennex at the Leetonia plant.¹⁸

Procedural History

In a Determination issued on July 2, 2011, the Ohio Department of Job and Family Services (ODJFS) notified Pennex that ODJFS had determined that Pennex was the successor-in-interest to GEI Columbiana effective November 1, 2010 and that, as an Ohio employer and as the successor-in-interest to GEI Columbiana, Pennex was required to assume the resources and liabilities of GEI Columbiana's unemployment-compensation account, with a contribution rate of 4.3% for 2010 and a contribution rate of 8.8% for 2011.¹⁹ Pennex applied to the Director of ODJFS for reconsideration of that Determination.²⁰

In a Director's Reconsidered Decision issued on April 10, 2012, the Director affirmed the initial Determination.²¹ Pennex appealed the Director's Reconsidered Decision to the Ohio Unemployment Compensation Review Commission.

¹⁵ Merluzzi Affid. ¶14.

¹⁶ Merluzzi Affid. ¶14.

¹⁷ Merluzzi Affid. ¶15.

¹⁸ ODJFS Ex. 7.

¹⁹ T. 7; ODJFS Ex. 1.

²⁰ T. 7; ODJFS Ex. 2.

²¹ T. 7-8; ODJFS Ex. 3.

On July 27, 2012, the Commission, acting through a Hearing Officer, conducted a telephone hearing on Pennex’s appeal.²² ODJFS presented the testimony of its employee Catharina Bester.²³ Pennex presented the testimony of its President and CEO, Rick Merluzzi.²⁴ Several exhibits were admitted into evidence.

In a Decision issued on September 6, 2012, the Commission affirmed the Director’s Reconsidered Decision, having concluded that Pennex was the successor-in-interest to GEI Columbiana for the purpose of determining Pennex’s unemployment-compensation contribution rate as an Ohio employer. Pennex has appealed that Decision to this Court pursuant to R.C. 4141.26(D)(2).

Analysis

Revised Code 4141.26(D)(2), which governed the proceedings below and which governs this appeal, provides:

§ 4141.26. Notice of contribution rate; *** application for reconsideration; review commission; appeals

(D) The rate determined pursuant to this section and section 4141.25 of the Revised Code shall become binding upon the employer unless:

(2) Within thirty days after the mailing of notice of the employer's rate *** to the employer's last known address[,] *** the employer files an application with the director for reconsideration of the director's determination of such rate setting forth reasons for such request. The director shall promptly examine the application for reconsideration and shall notify the employer of the director's reconsidered decision, which shall become final unless, within thirty days after the mailing of such notice by certified mail, return receipt requested, the employer files an application for review of such decision with the unemployment compensation review commission. The commission shall promptly examine the

²² T. 1-26.

²³ T. 6-17.

²⁴ T. 18-22.

application for review of the director's decision and shall grant such employer an opportunity for a fair hearing. ***

The employer and the director shall be promptly notified of the commission's decision, which shall become final unless, within thirty days after the mailing of notice of it to the employer's last known address by certified mail, *** an appeal is taken by the employer or the director to the court of common pleas of Franklin county. ***

***** The court may affirm the determination or order complained of in the appeal if it finds, upon consideration of the entire record, that the determination or order is supported by reliable, probative, and substantial evidence and is in accordance with law.** In the absence of such a finding, it may reverse, vacate, or modify the determination or order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. (Emphasis added.)

Pennex asserts that the Commission erred in determining that Pennex was the successor-in-interest to GEI Columbiana and therefore obligated to assume the unemployment-compensation contribution rate of GEI Columbiana. Appellee, the Director of ODJFS, contends that the Commission did not err in its determination. For the following reasons, the Court concludes that the Commission did, in fact, err in its determination.

Pursuant to R.C. Chapter 4141, Ohio employers are obligated to make contributions into Ohio's Unemployment Compensation Fund. *Miracle Home Health Care, LLC v. Ohio Dept. of Job and Family Servs.*, 10th Dist. No. 12AP-318, 2012-Ohio-5669, ¶21. The Ohio Department of Job and Family Services (ODFJS) maintains a separate account for each employer's contributions, and determines the rate at which an employer makes contributions into that account. *Kate Corp. v. Ohio Unemp. Comp. Review Comm.*, 10th Dist. No. 03AP-315, 2003-Ohio-5668, ¶3.

Revised Code 4141.24(F) provides:

***** If an employer transfers all of its trade or business to another employer *****, the acquiring employer *** shall be the successor in interest to the transferring employer and shall assume the resources and liabilities of such

transferring employer's account, and continue the payment of all contributions *** due under this chapter.

If an employer *** acquires substantially all, or a clearly segregable and identifiable portion of an employer's trade or business, then upon the director's approval of a properly completed application for successorship, the employer *** acquiring the trade or business, or portion thereof, shall be the successor in interest. (Emphasis added.)

Ohio Adm. Code 4141-17-04 provides:

4141-17-04. Automatic successorship.

(A) The transferee shall become a successor in interest by operation of law where:

(1) There is a transfer of **all of the transferor's trade or business located in the state of Ohio**; and

(2) At the time of the transfer the transferor is liable under Chapter 4141. of the Revised Code. (Emphasis added.)

Ohio Adm. Code 4141-17-01(A) defines "trade or business" as "**all** real, personal and intangible property integral to the operation of the trade or business, and may include the employer's workforce as applicable." (Emphasis added.)

Pursuant to R.C. 4141.24(F), *supra*, there are three methods by which an employer may become a successor-in-interest to another employer. *All Star Personnel, Inc. v. Ohio Unemp. Comp. Review Comm.*, 10th Dist. No. 05AP-522, 2006-Ohio-1302, ¶15. The second and third methods, described by the second sentence of R.C. 4141.24(F), require that both the predecessor employer and the acquiring employer submit an application for such status to the Director of ODJFS. *Id.* Because neither GEI Columbiana nor Pennex made such an application, the second and third methods do not apply in this case.

The Tenth Appellate District has held:

*** The first method of acquiring successor-in-interest status is by operation of law, and is described in the first sentence of R.C. 4141.24(F). Pursuant to this

first method, successor-in-interest status arises automatically **upon the transfer of the entire business of the predecessor**. *All Star Personnel*, 2006-Ohio-1302, ¶16. (Emphasis added.)

Dating back to 1955, the Supreme Court of Ohio has equated the transfer of 100 percent of a business's assets to the transfer of a business under R.C. 4141.24(F). *Kate Corp.*, *supra*, 2003-Ohio-5668, ¶10, citing *Apex Smelting Co. v. Cornell*, 164 Ohio St. 369, 371-372 (1955) and *In re Lord Baltimore Press, Inc.*, 4 Ohio St. 2d 68, 72 (1965).

Based upon the undisputed facts of this case, Pennex did not acquire successor-in-interest status by operation of law, because GEI Columbiana did not transfer all of its trade or business located in Ohio to Pennex. To the contrary, Pennex did not acquire the aluminum extrusion plant in Youngstown, Ohio from GEI Columbiana, nor did Pennex acquire GEI Columbiana's accounts receivable, its existing contracts with its customers, its work in progress, or its inventory, other than the existing aluminum billets at the aluminum extrusion plant in Leetonia, Ohio. The Commission therefore erred in its determination that Pennex was the successor-in-interest to GEI Columbiana.

“[A]n unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language.” *Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 118 Ohio St. 3d 400, 2008-Ohio-2618, ¶10. Applying the plain meaning of R.C. 4141.24(F) to the undisputed facts of this case, there is but one conclusion, and that conclusion is that Pennex is not the successor-in-interest to GEI Columbiana for purposes of determining Pennex's unemployment-compensation contribution rate as an Ohio employer.

Upon consideration of the entire record certified by the Commission, the Court finds that the Commission's September 6, 2012 Decision is not supported by reliable, probative, and

substantial evidence and is not in accordance with law. The Commission's Decision is therefore
REVERSED.

This is a final, appealable Order. Costs to Appellee. Pursuant to Civ. R. 58, the Franklin
County Clerk of Courts shall serve notice of this judgment and its date of entry upon all parties.

Copies to:

SAMUEL N. LILLARD, ESQ. (0040571), ANTHONY D. DICK, ESQ. (0084913), Counsel for
Appellant

PATRIA V. HOSKINS, AAG (0034661), Counsel for Appellee

Franklin County Court of Common Pleas

Date: 04-23-2014
Case Title: PENNEX ALUMINUM COMPANY LLC -VS- OHIO STATE DEPT
JOB FAMILY SERVICES DIRE
Case Number: 12CV012544
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, reading "Patrick E. Sheeran", is written over a circular embossed seal. The seal is partially obscured by the signature and has a textured, dotted appearance.

/s/ Judge Patrick E. Sheeran

Court Disposition

Case Number: 12CV012544

Case Style: PENNEX ALUMINUM COMPANY LLC -VS- OHIO
STATE DEPT JOB FAMILY SERVICES DIRE

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes