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A.D. No. [redacted]
No. [redacted]
B.O. [redacted]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DAVID R. KULLING,

Plaintiff-Appellant,

v

KIRK DESIGN, INC. and
MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Defendants-Appellees.
_____/

No. 89-910000 AE
2-1-90
HON. PAMELA R. HARWOOD
(P26737)

DAVID R. KULLING,
Claimant-Appellant

KIRK DESIGN, INC.
Employer-Appellee

FRANK J. KELLEY, Attorney General
for the State of Michigan
By: CATHERINE M. FLEMING (P27050)
Assistant Attorney General
Attorneys for Michigan Employment
Security Commission

_____/

OPINION

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DAVID R. KULLING,

Plaintiff-Appellant,

vs

Case No. 89-910000AE

KIRK DESIGN, INC. and
MICHIGAN EMPLOYMENT
SECURITY COMMISSION,

Defendants-Appellees.

/

OPINION

Petitioner David R. Kulling owned 100% of Kirk Design, Inc., a machine design corporation catering to the automotive industry. The corporation ceased operations on September 30, 1987. Petitioner stopped drawing a salary from the corporation on March 5, 1987 and subsequently filed for unemployment benefits on October 25, 1987.

The Michigan Employment Security Commission (MESC) initially denied Petitioner's application for benefits based on the fact that he owned more than a 50% proprietary interest in the employing unit and had only earned 18 of the requisite 20 base credit weeks to establish a benefit year, pursuant to MCLA 421.46(d). Upon a hearing for redetermination, it was the opinion of Referee Robert B. Hart, that although Petitioner did not qualify for benefits under Section 46, he did qualify under MCLA 421.46a(1). MCLA 421.46a(1) provides:

> "(1) If an individual is not able to establish a benefit year under Section 46 because of insufficient credit weeks, a benefit year may be established under this Section if the individual has at least 14 credit weeks in his or her base period, and has base period wages in excess of 20 times the state average weekly wage, applicable to the calendar year in which the individual's benefit year is established, as computed under Section 27(b)(2)."

However, MESC appealed Referee Hart's decision to the Administrative Board of Review on the basis that Section 46a(1) was intended as an exception to Section 46(a) and not as an exception to subsection (d).

The MESC Board of Review reversed Referee Hart's decision and determined Section 46(d) to be controlling in instances where the individual's credit weeks are based upon services in an employing unit in which he/she has more than a 50% proprietary interest. The Board also noted that Section 46a(1) became effective on January 2, 1983 and that Section 46(d) was enacted on July 24, 1983. Thus, the Board interpreted the legislative intent in adding subsection (d) to the Employment Security Act as to limit an individual with a substantial interest in an employing unit from collecting unemployment benefits.

The issue before this Court is whether MCLA 421.46a(1), the alternative earnings exception to 46(a), may also be applied when an individual falls within Section 46(d).

Generally, courts are to give great deference to the interpretation of an agency which has been charged with the enforcement of an Act. Wardlow v Great Lakes Express Co., 128 Mich App 54 (1983). The decision of the appeal board will be overturned only when it is contrary to law or not supported by competent, material and substantial evidence on the whole record. Saber v Capitol Reproductions, 28 Mich App 462 (1970).

It is undisputed that when Petitioner filed for unemployment benefits on October 25, 1987, he had an insufficient number of base credit weeks, pursuant to Section 46(d), thereby disqualifying him for benefits.

Subsection (d) states:

> "(d) Notwithstanding subsection (a), for services performed on or after January 2, 1983, an individual shall not be entitled to establish a benefit

> year based in whole or in part on credit weeks for service in the employ of an employing unit in which more than 50% of the proprietary interest is owned by the individual...
> Upon timely notification of the commission, a benefit year may be established for the individual, if the individual meets all of the following conditions: (1) has earned 20 credit weeks in the 52 consecutive calendar weeks preceding the week with respect to which the individual filed an application for benefits; (2) with respect to the week for which the individual is filing an application for benefits is unemployed, and meets all of the other requirements of section 28; (3) with respect to the week for which the individual is filing an application for benefits the individual is not disqualified nor subject to disqualification, except in case of a labor dispute under section 29(8), with respect to the most recent period of employment with the most recent employer with whom the individual earned a credit week..."

This provision clearly states that it applies notwithstanding subsection (a). In light of this fact and the later date of enactment of subsection (d), it is also the opinion of this Court that the legislative intent behind subsection (d) was to restrict persons with a substantial proprietary interest in an employing unit from collecting unemployment benefits. The evidence in this case supports the decision of the Appeal Board. Therefore, this Court adopts the statutory interpretation as enunciated by the MESC Board of Review.

Petitioner also raises a collateral issue as to what constitutes "wages" as referenced at page 12 of the MESC employer handbook. However, as this issue was not raised on the administrative record, it cannot be properly addressed by this Court. Taylor v US Postal Service, 163 Mich App 77 (1987).

Therefore, the decision of the MESC Board of Review denying Petitioner's application for benefits is hereby **AFFIRMED.**

Pamela R. Harwood

JUDGE PAMELA R. HARWOOD

DATED: February 1, 1990

A TRUE COPY
JAMES R. KILLEEN
CLERK