

STATE OF MICHIGAN
COURT OF APPEALS

KIRBY GRILL MANAGEMENT, INC.,
Plaintiff-Appellant,

UNPUBLISHED
July 28, 1995

v

No. 166288
LC NO. 92 077049-AE

MICHIGAN EMPLOYMENT SECURITY
COMMISSION,

Defendant-Appellee.

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DECISION AND OPINION

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Before: Sawyer, P.J., and Griffin and Neff, JJ.

PER CURIAM.

Plaintiff employer appeals as of right from a decision of the Michigan Employment Security Commission (MESC) that plaintiff's challenge to the MESC's determination of successorship was untimely and that plaintiff had failed to establish "good cause" to reopen the proceedings. We reverse and remand for proceedings consistent with this opinion.

I

On May 11, 1990, plaintiff prepared and submitted a "Registration Report to Determine Liability" (MESC Form 1009) to the MESC. Plaintiff certified that it had acquired 100 percent of the assets of a predecessor employer known as Kings Manor, Inc.

On June 22, 1990, the MESC mailed a "Notice of Successorship" to plaintiff which provided that plaintiff was determined to be the legal successor to Kings Manor. According to the notice, plaintiff was considered the legal successor because it had purchased more than 75 percent of the assets of Kings Manor. The notice also clearly indicated that the determination of successorship would become final unless a written application for review and redetermination was received by the MESC within thirty days of the date of mailing.

Plaintiff did not timely appeal but did file a request for redetermination in September 1990. On October 5, 1990, the MESC denied plaintiff's request for redetermination or reconsideration because plaintiff had failed to establish "good cause" for its untimely protest. Plaintiff subsequently appealed the MESC's determination that no good cause existed and requested a hearing before a referee. In addition, plaintiff also submitted a revised registration report to defendant indicating that plaintiff had only acquired fifteen percent of the assets of Kings Manor rather than the 100 percent that it had originally indicated.

At the hearing before a referee, plaintiff conceded that the June 22, 1990, notice of successorship was sent to plaintiff's correct address and that plaintiff received the notice. Nevertheless, plaintiff argued that the revised registration report it submitted to the MESC constituted good cause to reopen the case. The MESC referee refused to reconsider the prior determination after concluding that plaintiff had failed to establish good cause for its untimely protest:

Having carefully reviewed the testimony presented in this matter and the material contained in the file, the referee is compelled to find that the employer has not established good cause for the late protest to the 6-22-90 determination of successorship. That determination was properly mailed to the employer at a correct address, and the employer acknowledges receipt of the document. Yet the protest was not mailed until 9-5-90 and received by the commission on 9-14-90. The referee can only conclude that the document was within the Kirby Grill Management organization, and that the employer through its own fault simply did not recognize the significance of this document to file a timely protest.

The referee finds [plaintiff's] arguments on the merits of the successorship matter intriguing and perhaps persuasive, but the referee simply lacks jurisdiction to get to the base issue because the employer has not established good cause for the late protest.

The referee's finding of lack of good cause was subsequently affirmed by the Michigan Employment Security Board of Review and the circuit court.

II

Both parties concede that this issue is controlled by MCL 421.32a(2); MSA 17.534(1)(2). The statute provides:

The commission may, for good cause, including any administrative clerical error, reconsider a prior determination or redetermination after the 30-day period has expired and thereafter issue a redetermination affirming, modifying, or reversing the prior determination or redetermination, or transfer the matter to a referee for a hearing. [Emphasis added.]

In arguing that the MESC and the trial court incorrectly applied the "good cause" standard set forth in the statute, plaintiff focuses upon Administrative Rule 1986 AACCS, R 421.270:

(1) In determining whether good cause exists under sections 32a, 33, and 34 of the act, after the 30-day protest or appeal period has expired, for reconsideration of any prior determination or redetermination or for reopening and review, good cause shall include, but shall not be limited to, any of the following situations:

(a) When an interested party has newly discovered material facts which, through no fault of the party, were not available to the party at the time of the determination, redetermination, order, or decision; however, a request for reconsideration of a determination or redetermination or for reopening of a decision or order made after the expiration of the statutory 30-day period solely for the purpose of evading or avoiding such statutory period is not deemed to be made for good cause.

(b) When the commission has additional or corrected information.

(c) When an administrative clerical error has been discovered in connection with a determination, redetermination, order, or decision.

(2) If, before the start of an initial hearing by a referee, the commission receives new, additional, or corrected information or discovers an administrative clerical error in the claim, the matter may, in the discretion of the commission, be returned to the commission for reconsideration and redetermination.

Plaintiff relies on subsection (b) of R 421.270(1) for its argument that good cause exists to reopen the case because the revised registration report it submitted constitutes "corrected information" under subsection (b).

III

Under the statute, the commission is authorized to reconsider or redetermine prior successorship determination for any "good cause" shown. MCL 421.32a(2); MSA 17.534(1)(2); Dow Chemical Co v Curtis, 431 Mich 471, 482; 430 NW2d 645 (1988). The focus below was on whether the employer could show "good cause" for failing to timely file its protest. However, we do not read the statute to limit the commission's discretion to reconsider a determination to situations in which the employer has a valid reason to excuse its tardiness, finding that reading of the statute overly technical and bureaucratic. Rather, we find the statutory language, as support by the language of AACCS, R 421.270, to provide the commission with the discretion to review the merits of plaintiff's claim that additional or corrected information would support a redetermination.¹ That is, the additional or corrected information can provide the necessary good cause to reconsider the successorship determination and, hence, the all-important rate determination. Otherwise, plaintiff-employer could be saddled with a rate which is prohibitively and undeservedly high, a result we do not believe the Legislature intended.

Therefore, we reverse and remand to the MESC for a determination of whether good cause exists under R 421.270(1)(b), and, if so, whether that good cause is sufficient to compel reconsideration of the successorship determination. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Janet T. Neff

¹ We note that the opinion of the referee concedes that on the merits, the issue is "intriguing and perhaps persuasive"

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GRIFFIN, J. (dissenting).

I respectfully dissent. I agree with the circuit court that the decision of the MESC is supported by competent, material, and substantial evidence and is not contrary to law. Const 1963, art 6, § 28, MCL 421.38(1); MSA 17.5401(1).

Under MCL 421.32a(2); MSA 17.534(110), redetermination is authorized for any "good cause" shown. Dow Chemical Co v Curtis, 431 Mich 471, 482; 430 NW2d 645 (1988). Here, the term "good cause" is not defined by the statute or other case law. However, an agency's long-standing construction of a statute and its implementing rules are entitled to great weight. Murphy v Michigan, 418 Mich 341, 348; 343 NW2d 177 (1984); Lindsay Anderson Sagar Trust v Dep't of Treasury, 204 Mich App 128, 130; 514 NW2d 514 (1994), lv den 447 Mich 905 (1994).

After giving due deference to the MESC's construction of the statute and its administrative rules, I would affirm. Taken in context, my reading of R 421.270(1) refutes plaintiff's assertion that an employer's fault is irrelevant to a determination of good cause under MCL 421.32a(2); MSA 17.534(1)(2). On its face, subsection (b) is silent regarding plaintiff's contention that the untimely receipt of corrected information by the commission constitutes good cause irrespective of the reasons behind the delay. Rather, good cause exists under subsection (b) when the commission "has" additional or corrected information. In my view, plaintiff's attempt to carve out such an exception ignores the plain language of the rule.

Further, plaintiff's construction of subsection (b) would lead to an absurd result. Under subsection (a), newly discovered material facts constitute good cause only if they were unavailable to the party through no fault of its own. It would be incongruous to conclude that a party should benefit more from its negligence in submitting corrected information than a party who has newly discovered evidence but was negligent in its discovery.

I would affirm.

/s/ Richard Allen Griffin