

DECISION OF COMMISSION

In the Matter of:

Carol C. Frye
████████████████████

Frye & Associates
Virginia Beach, VA 23451

Date of Appeal
to Commission: April 29, 1987
Date of Hearing: August 25, 1987
Place: RICHMOND, VIRGINIA
Decision No.: 28602-C
Date of Mailing: October 23, 1987
Final Date to File Appeal
with Circuit Court: November 12, 1987

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This is a matter before the Commission as a result of an appeal filed by the claimant from the Decision of Appeals Examiner (UI-87-2195), mailed April 9, 1987.

APPEARANCES

Representative for Virginia Employment Commission

ISSUE

Did the claimant have sufficient earnings in covered employment during the base period of her claim so as to qualify for unemployment compensation as provided in Section 60.2-612.1 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal from the Appeals Examiner's decision which affirmed an earlier reprocessed monetary determination showing that she had no earnings in covered employment during the base period of her claim filed effective November 16, 1986.

When the claimant first filed her claim for benefits, she gave Frye & Associates of Virginia Beach, Virginia, as her last employer, indicating that she had worked between October 1, 1980 and December 31, 1985. A close examination of her initial claim form indicates that the address of the employer was the same as the claimant's address and she herself completed the Employer's Report of Separation and Wage Information, listing herself as "partner." Wages in the amount of \$8,220 during the third and fourth quarter of 1985 were then found in her base period so as to monetarily qualify her for benefits in the amount of \$164 per week for up to 12 weeks.

Later, as the result of an investigation, it was determined that Frye & Associates was a partnership running a general contracting business. A limited partner in Florida provided financial backing only, while the claimant was the only general partner in the business. Her husband and son were each employees who had no ownership interest. Between 3 and 20 other employees were carried on a part-time or seasonal basis depending upon the volume of the work. The company stopped doing business after December 31, 1985 due to an inability to obtain liability insurance.

Once the claimant's position as general partner in the business was determined, the previously reported wages were removed in a reprocessed monetary determination which is the subject of her present appeal before the Commission.

The claimant was in receipt of the "Employer's Handbook," published by the Commission, which states that partners are not considered employees of the business. The tax representative who testified at the hearing before the Commission could not cite the authority for this statement, indicating that it was simply a long-standing practice of the Commission.

OPINION

Section 60.2-612.1 of the Virginia Unemployment Compensation Act provides that an unemployed individual shall be eligible to receive benefits only if the Commission finds that he has, in the highest two quarters of earnings within his base period, been paid wages in employment for employers in an amount sufficient to qualify for benefits as found in the "benefit table" appearing in Section 60.2-602 of the Act.

Section 60.2-602 of the Act provides the "benefit table" showing that in order to meet the minimum qualifying amounts for unemployment compensation, an individual must have earned at least \$2,900 in the two highest quarters of his base period.

In the present case, the Commission has been able to determine where the "long-standing practice" of not treating partners as employees originated. On August 31, 1938, the Attorney General of Virginia issued an opinion on that subject which reads in part:

"In reply I wish to state that where an employer is organized as a partnership, the bona fide partners shall, with respect to such enterprise, be treated as employers rather than employees and bona fide partners are not to be considered as employees under the Virginia Unemployment Compensation Act. Neither is the compensation received by such partners subject to the unemployment compensation tax provided for by said statute."

This opinion has never been overruled or amended and is in line with the law in other jurisdictions. Generally, the remuneration received by partners is not considered wages, but rather a distribution of profits. This is the same reasoning applied by the Commission previously in cases involving fishing boats operated under the so called "Hampton Share Plan" where each crew member is entitled to a portion of the profit from a particular fishing expedition. If the expedition loses money, the individual crew members are responsible for making up the loss. In such a situation, the Commission held: "Clearly, this relationship is more of a joint venture with risks, as well as profits, shared by the venturers." See, In the matter of Virginia Pride Associates, Decision L-48, September 10, 1980. (Underscoring supplied)

In the case at hand, as the only general partner in the business, the claimant assumed liability in the event that the partnership lost money. Her husband, her son, and the other construction workers incurred no such liability and were thus properly classified as employees. The fact that the claimant may have looked upon her remuneration as a "salary" or that it may have been paid in a set amount over a regular period of time does not change its nature. In the event that the profits from the partnership were insufficient to cover those payments, any creditors could have gone against her personally to seek satisfaction of the debts.

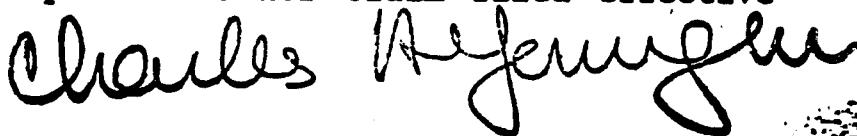
If the Commission were to find that a "partnership" was actually a sham arrangement made in an effort to disguise an employer-employee relationship, then there would be no difficulty in establishing liability for unemployment taxes. In the present case, however, it is apparent that the claimant was a bona fide partner by virtue of the manner in which the employer's separation report on her claim was filled out. By having the report sent to her own address and filling it out herself, the claimant actually showed that she was acting in the capacity of an employer. According to the previously cited Attorney General's Opinion, this means that she could not be an employee of the partnership and any

remuneration she may have received from it represented profits rather than wages. Because of this, her monetary determination was correctly reprocessed to show no wages during the base period of her claim filed effective November 16, 1986. (Underscoring supplied)

DECISION

The Decision of Appeals Examiner is hereby affirmed.

It is held that the claimant had no earnings in covered employment during the base period of her claim filed effective November 16, 1986.



Charles A. Young, III
Special Examiner

Note: Aff'd by Circuit Court of the City of Virginia Beach, CL87-2602 (October 6, 1989).