STATE OF MICHIGAN

COURT OF APPEALS

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, Charging Party-Appellee,	UNPUBLISHED November 2, 1999
v	No. 211639 MERC
FRENCHTOWN CHARTER TOWNSHIP, Respondent-Appellant.	LC No. 95-000251

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Respondent appeals as of right from an order of the Michigan Employment Relations Commission (MERC) denying respondent's motion for reconsideration of the MERC's March 23, 1998, order that denied respondent's motion for retroactive extension of time to file exceptions to the hearing referee's December 15, 1997, decision and recommended order and adopted the recommended order sanctioning respondent for unlawfully discriminating against three of its employees because of their union activities. We affirm.

This case arises from an unfair labor practice charge alleging that respondent violated § 10 of the public employment relations act (PERA), MCL 423.210; MSA 17.455(10), by discharging William Guenther, suspending Shirley Nelski for one day, and laying off Jude Defiore, all because of their union activities in conjunction with the charging party's drive to organize certain of respondent's employees. Following four days of hearings, the referee on December 15, 1997, issued a decision and recommended order finding in favor of the charging party.

By letter dated December 19, 1997, respondent's attorney requested a thirty-day extension, until February 7, 1998, for filing exceptions, averring that he would be on vacation and out of the state for a substantial portion of time. By order of December 23, 1997, the MERC granted this request. By facsimile transmission sent on or about February 3, 1998, respondent's attorney requested a second extension of time, until February 13, 1998, alleging that "the original file in this case was misplaced and

as of this date has not been located," and that "upon my return from vacation . . . I discovered the file had been lost, and a minimum of two weeks was lost searching for it, ordering transcripts and copying the Commission file." By order of February 4, 1998, the MERC granted respondent's second request.

Instead of ensuring that its exceptions and related material were physically received by the MERC by February 13, 1998, as mandated by 1979 AC, R 423.472(2), respondent's counsel *mailed* this material to the MERC on February 13. The MERC did not receive respondent's mailing until February 17, 1998, and by letter dated February 18, informed respondent's counsel that the exceptions were not timely filed. The letter advised respondent that if it wished it could move for retroactive extension, and that such a motion would "be granted only upon a showing of good cause for the late filing," citing 1979 AC, R 423.467. The letter concluded, "Absent a showing of good cause, your exceptions will be dismissed and the Commission will issue a decision and order adopting the Recommended Order of the Administrative Law Judge."

On February 19, 1998, respondent moved the MERC to grant a retroactive extension of time for the filing of exceptions and supporting brief to February 17, 1998. This motion alleged that "your petitioner worked diligently in the preparation of the Exceptions and supporting brief, and made a good faith attempt to complete the Exceptions in the period of time allotted. That, in fact, these documents were completed within the time specified and were mailed to the Commission on the appropriate date. Further, the Exceptions were served on opposing counsel on the same date . . . ." By order of March 23, 1998, the MERC denied this motion, remarking that it had "duly considered the motion for retroactive extension and, it appearing that good cause has not been shown for granting said request, IT IS ORDERED that the motion for a retroactive extension of time to file exceptions . . . is hereby denied."

In its March 30, 1998, motion for reconsideration, respondent's counsel listed reasons for his failure to timely file exceptions. For the first time, he averred that "a major and unexpected reorganization of the firm occurred as the result of the separation of one of the firm's partners and another associate attorney employed by the firm," and that "the separations resulted in a substantial and significant disruption of the firm." The MERC, by order of April 22, 1998, denied respondent's motion for reconsideration, concluding that

> more than three months have elapsed since the issuance of the Decision and Recommended Order in the instant case. That decision was issued on December 15, 1997. Thereafter, Respondent requested and was granted two extensions of time in which to file its exceptions totaling more than thirty days. Despite that fact, Respondent was unable to submit its exceptions in a timely fashion. Furthermore, Respondent made no attempt to justify the late filing in its initial motion to receive the untimely exceptions. Instead, Respondent merely reiterated the reasons for seeking the two prior extensions. It was not until March 31, 1998, that Respondent offered an explanation for the delay. Under such circumstances, we are unable to find good cause for permitting the late filing. Accordingly, the motion for reconsideration is hereby denied.

Respondent now contends that the MERC abused its discretion by denying it permission to tardily file exceptions under these facts. In order to reverse an administrative agency's decision as an abuse of discretion, this Court must find a result so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. MCL 24.306(1)(e); MSA 3.560(206)(1)(e); *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994).

The filing of exceptions to a hearing referee's decision and recommended order is governed by administrative rules. 1979 AC, R 423.466 provides as follows:

> (1) Within 20 days after service of the proposed report and recommended order, a party may file with the commission an original and 4 copies of a statement in writing, setting forth exceptions thereto or to any other part of the record or proceedings, including rulings upon motions or objections, and a brief in support thereof may be filed with the commission; at the same time copies of these documents shall be served on each party to the proceedings.
>
> (2) The exceptions shall:
>
> (a) Set forth specifically the question of procedure, fact, law, or policy to which exceptions are taken.
>
> (b) Identify that part of the administrative law judge's proposed report and recommended order to which objection is made.
>
> (c) Designate by precise citation of page the portions of the record relied on.
>
> (d) State the grounds for the exceptions and include the citation of authorities, if any, unless set forth in a supporting brief.
>
> (3) An exception to a ruling, finding, conclusion, or recommendation which is not specifically urged is waived. An exception which fails to comply with this rule may be disregarded.

1979 AC, R 423.472(2) states:

> (2) When LMA, PERA, or any of these rules requires the filing of a motion, brief, exception, or other document in any proceeding, the document shall be received by the commission, administrative law judge, or other agent designated to receive the document before the close of business of the last day of the time limit, if any, for the filing or extension of time that has been granted.

Finally, 1979 AC, R 423.467(3) provides:

(3) A request for extension of time in which to file exceptions or briefs or both shall be in writing and filed with the commission before expiration of the required time for filing, except for good cause shown, and, at the same time, copies thereof shall be served on each of the other parties.

Examining the facts in light of these principles, we do not believe that the MERC abused its discretion by denying respondent's motion for retroactive extension of time to file late exceptions. Respondent relies primarily upon *Saginaw v Saginaw Fire Fighters Ass'n*, 1983 MERC Lab Op 1102. In that case, the hearing referee issued his decision and recommended order on July 22, 1983, and the charging party's request for extension of time to file exceptions was granted until August 23, 1983. The MERC subsequently received the exceptions and supporting brief, with the proof of service indicating that they had been mailed on August 23. In its motion to set aside the MERC's final order of August 24, 1983, the charging party alleged that it had understood exceptions to be timely filed if they were *mailed* on the date due, and also maintained that the law offices of its representative experienced a secretarial shortage on August 19, 1983, when the exceptions could otherwise have been prepared. The MERC found that these facts established cause for permitting the late filing, noting also that the respondent was not prejudiced by allowance of the exceptions.

In the case at bar, the MERC distinguished *Saginaw* on the following bases, with which we concur. First, unlike the charging party in *Saginaw*, respondent in the case at bar had been granted not one, but two extensions of time to file exceptions, and still missed the deadline. Second, in its February 19, 1998, motion for retroactive extension of time for filing exceptions, respondent's counsel failed to adduce any new ground for his failure to file the exceptions with the MERC not later than February 13, 1998. As the MERC notes, "Respondent made no attempt to justify the late filing in its initial motion to receive the untimely exceptions. Instead, Respondent merely reiterated the reasons for seeking the two prior extensions. It was not until March 31, 1998, that Respondent offered an explanation for the delay." We further note that respondent's attorney claimed to represent respondent in labor law matters and must therefore be assumed to know that exceptions must be *received by* the MERC by the close of business on the last day of the period granted for filing them, not simply *mailed* on that date. Therefore, even though there is no indication in the record that the charging party would be prejudiced by the tardy filing of respondent's exceptions, the MERC's refusal to allow respondent to do so cannot properly be characterized as an abuse of discretion.[1]

Respondent next argues that the hearing referee erred as a matter of law by applying the "small plant doctrine" to this case. This Court may review questions of law regardless of the MERC's factual findings. *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 175; 445 NW2d 98 (1989).

In awarding the charging party relief with respect to William Guenther and Shirley Nelski, the hearing referee relied in part upon the small plant doctrine. "The essence of the small plant doctrine 'rests on the view that an employer at a small facility is likely to notice union activities at the plant because of the closer working environment between management and labor.'" *NLRB v Health Care Logistics, Inc*, 784 F2d 232, 236 (CA 6, 1986), quoting from *Alumbaugh Coal Corp v NLRB*, 635 F2d 1380, 1384 (CA 8, 1980). However, the "small size of the facility . . . does not give rise to a *presumption* of knowledge that an employer must rebut to prevent establishment of the [opposing

party's] prima facie case. Rather, the doctrine permits an inference of employer knowledge only if the [opposing party] establishes by other evidence, direct or circumstantial, that an employer had reason to notice the union activities in the facility." *Health Care Logistics*, *supra* at 236.

We do not believe that the hearing referee erred as a matter of law by applying the small plant doctrine to the present facts. Contrary to respondent's allegation, the referee did not rely exclusively on this doctrine to establish a prima facie case of discrimination based upon anti-union animus by respondent. The referee was entitled to make an inference of employer knowledge of union activity because – in addition to the small plant doctrine – he established by other evidence, direct or circumstantial, that respondent had reason to be aware of the union organizational drive. There was no error.

Because of respondent's failure to timely file exceptions to the hearing referee's decision and recommended order, its remaining allegations of error, which are factually oriented, have not been preserved for appellate review. See *Attorney General v Public Service Comm,* 174 Mich App 161, 164; 435 NW2d 752 (1988); *Attorney General v Public Service Comm No 1*, 136 Mich App 52, 55-56; 355 NW2d 640 (1984); *Robertson v Detroit*, 92 Mich App 377, 379-380; 284 NW2d 808 (1979); *Robertson v Local Division 26, Amalgamated Transit Union*, 91 Mich App 429, 431-433; 283 NW2d 766 (1979).

Affirmed.

/s/ William B. Murphy
/s/ Kurtis T. Wilder

[1] The dissent applies the doctrine of substantial compliance, utilized by this Court exclusively in worker's compensation cases, and concludes that the MERC abused its discretion in dismissing respondent's appeal for a minor procedural infraction. We believe that in denying respondent's motion for reconsideration the MERC implicitly considered essentially the same factors that are explicitly analyzed under the doctrine of substantial compliance. Our decision to affirm the MERC's order similarly recognizes those factors. Specifically, though the length of the delay beyond the ultimate deadline for respondent's exceptions was minimal, it was a twice extended deadline with which respondent failed to comply. Moreover, the reason for the delay referenced by the dissent was in fact considered and relied on by the MERC in granting the second extension. The worker's compensation doctrine of substantial compliance, if applied, would not alter our conclusion that the MERC committed no abuse of discretion.