STATE OF MICHIGAN

COURT OF APPEALS

SUSAN VAN DER WAARD,

Charging Party-Appellee,

v

CHELSEA BUS DRIVERS ASSOCIATION,

Respondent-Appellant.

UNPUBLISHED
January 7, 1997

No. 190579
MERC No. CU 92 A-6

Before: Taylor, P.J., and Gribbs and R. D. Gotham,* JJ.

PER CURIAM.

Respondent Bus Drivers Association appeals as of right from an order of the Michigan Employment Relations Commission (MERC) which assessed damages against respondent arising out of respondent's unfair labor practice against charging party, Susan van der Waard. We affirm.

Generally, appellate review of a MERC decision is limited. *Detroit Police Officers Ass'n v Detroit*, 212 Mich App 383, 388; 538 NW2d 37 (1995), affirmed 452 Mich 339; ___ NW2d ___ (1996). This Court will not disturb a MERC decision if its findings are supported by competent, material, and substantial evidence on the whole record. *Id*. Substantial evidence is more than a scintilla but substantially less than a preponderance. *Id*. However, this Court may set aside a MERC decision if, although supported by substantial evidence, it is based upon a substantial and material error of law. *Id*.

Respondent challenges certain elements of damages assessed against it on the basis that the hearing referee erred when she denied respondent's request to review a confidential settlement agreement. Respondent asserts that this denial impeded its ability to cross-examine a witness who testified against it.

MERC decisions are no different than other decisions that this Court reviews regarding evidentiary matters; evidentiary issues are reviewed for abuse of discretion. See, e.g., *Lake Michigan*

* Circuit judge, sitting on the Court of Appeals by assignment.

Federation of Teachers v Lake Michigan College, 60 Mich App 747, 755-756; 231 NW2d 538 (1975).

We are not persuaded by respondent's argument that it could not cross-examine Beauchamp regarding van der Waard's settlement agreement with her employer because the hearing referee denied respondent's request to examine the settlement agreement at the time of the hearing. Respondent argues:

> The Appellant [respondent] felt severally [sic] handicapped by the denial [to examine the settlement agreement at the hearing] and determined that further examination of the witness under the handicap imposed by the ALJ would be both impractical and superficial, since we would not be able to cross-examine with respect to matters contained therein.

Respondent cites the best evidence rule, MRE 1002, in support of its argument. However, that rule has nothing to do with the alleged problem about which respondent complains. In fact, the best evidence rule actually supports what the hearing referee did in that she did not rely on anyone's testimony to determine the amount of damages which the employer had paid to van der Waard in settlement, but instead determined this amount from a review of the settlement agreement itself.

More important, however, there simply is no connection between the specific items of damages about which respondent complains and the inability to cross-examine Beauchamp about the confidential settlement agreement. Accordingly, it is not necessary for us to determine whether the hearing referee abused her discretion in denying respondent's request to examine the settlement agreement prior to cross-examining Beauchamp. Assuming error, it was harmless because it had no effect on the result. *People v Morton*, 213 Mich App 331, 335; 539 NW2d 771 (1995). According to the record, respondent's substantive complaint relates to "the inclusion of back pay for bus runs other than van der Waard's regular run, medical expenses, and attorney fees in the total" amount of damages. However, the prejudice respondent claims, is not a result of being hindered in cross-examining Beauchamp due to not being allowed to examine the settlement agreement. As the commission observed, "those calculations stand independent of the settlement agreement with the Employer." Moreover, respondent waived its opportunities to challenge these calculations, which opportunities existed independent of whether respondent was allowed to examine the settlement agreement. We agree with the hearing referee's comment that:

> Respondent union had the opportunity to cross-examine charging party [van der Waard] and her former attorney [Beauchamp] at the hearing held on December 2, 1995, but did not challenge the calculations of charging party with respect to medical costs, lost hours of work, bus runs, and hourly rates, nor did it submit any calculations of its own at that time or at any time in these lengthy proceedings.

We also agree with the Commission's finding that:

> Respondent was afforded ample opportunity to respond after receiving a copy of the settlement agreement and IRS documents. If respondent felt that additional time was necessary, then it should have requested an extension of time from the Administrative Law Judge. Respondent neither requested additional time to review the settlement agreement nor asked that the hearing be reopened.

Under the circumstances, the hearing referee's decision, which the commission upheld, to deny respondent's request to examine the settlement agreement at the time of the hearing was at most harmless error. Therefore, respondent is not entitled to any relief.

Affirmed.

/s/ Clifford W. Taylor
/s/ Roman S. Gribbs
/s/ Roy D. Gotham