STATE OF MICHIGAN

COURT OF APPEALS

POLICE OFFICERS ASSOCIATION OF MICHIGAN, Petitioner-Appellant,	UNPUBLISHED November 21, 1997
v	No. 194712 MERC No. C95 A-2
OTTAWA COUNTY SHERIFF, Respondent-Appellee.	

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Petitioner Police Officers Association of Michigan (POAM), the certified bargaining representative of non-supervisory deputies and correction officers of the Ottawa County Sheriff's Department, filed an unfair labor practice charge against the Ottawa County Sheriff, alleging a violation of section ten of the Public Employee Relations Act (PERA), MCL 423.201; MSA 17.455(1). POAM asserted that respondent committed an unfair labor practice by disciplining Kevin Swick, a senior corrections officer and vice-president of POAM, for speaking to the media about working conditions, in that the discipline restrained and coerced POAM and its members from engaging in protected, concerted activity under section nine of the PERA.[1] The Michigan Employment Relations Commission (MERC) adopted the administrative law judge's recommendation, following a hearing, that the charge be dismissed. MERC concluded that respondent had a substantial and legitimate business justification for applying its rules concerning authorization prior to communicating with the media and disciplining Swick. Petitioner appeals and we reverse.

I

Testimony at the hearing before the ALJ established that, following a prison escape in April of 1994, the union filed a grievance in May 1994 regarding unsafe work conditions, i.e., lack of manpower and of experienced personnel, and absence of monitoring devices, in the Ottawa County Jail (Jail) in Grand Haven.[2] On December 13, 1994, another escape occurred, this time involving two prisoners. One of the two guards working that evening was overpowered by an inmate. Within minutes of the

escape, one of the escapees killed a Grand Haven police officer. Both prisoners were apprehended within hours of the escape.

On December 15, 1994, the *Grand Rapids Press* ran several articles prompted by the escape, one of which quoted Swick and a number of others. Respondent issued a notice of charges against Swick on December 19, 1994, charging Swick with violating fifteen rules and regulations. On December 23, 1994, following a disciplinary hearing on December 21, 1994, Dale Vredeveld, Undersheriff of Ottawa County's Sheriff's Department, issued Swick a written reprimand. The reprimand stated in pertinent part:

> As a result of the [December 21, 1994] hearing it has been determined that you violated established policies of the Sheriff's Department when you gave statements to the Grand Rapids Press in a news article which appeared in the December 15, 1994, issue.
>
> Policies which you violated include the following:
>
> 1. Portions of the Law Enforcement Code of Ethics
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> 2. Section 7.9, Dissemination of Information
>
> 3.Section 8.1, Public Statements and Appearances
>
> 4. Section 10.1, Unbecoming Conduct
>
> 5. Section 12.2, News Release Police and Information Regarding a Crime Under Investigation
>
> 6. Section 12.5, Opinion - News Media
>
> 7. Rule 46, Jail Rules - General Section
>
> As a result of your violation of the above rules and policies you are hereby given this written reprimand to be placed in your personnel file as part of your record of employment.

Swick testified that he had been a senior corrections officer with petitioner for five years, employed as a corrections officer since 1984, and had been the Union vice-president for about two years. Swick testified that he wrote and signed the May 1994 grievance, as the Local representative, after many Union members complained of working conditions and equipment in the Jail. He testified that some of the portable radios, cameras and door-locking mechanisms were not working properly, that there had been a prison escape in April 1994, and that the membership's concern was that the Jail was not adequately staffed.

Regarding the December 13, 1994 prison escape, Swick testified that he was contacted at home via his union pager and told that an escape had occurred, and that one officer had been injured

and one killed. Swick contacted the hospital where the corrections officer had been taken and learned that corrections officer Cathy Shaw was the officer injured. Swick also learned that a Grand Haven public safety officer had been killed.

Swick testified that he was deluged with calls from the press. The *Grand Rapids Press* was given Swick's name by an unnamed officer of the Ottawa County Sheriff's Department, and called Swick at home on the evening of December 14. The reporter asked Swick if he was the union vice-president, and then asked him if he could ask questions regarding the escape. Swick responded that he could not represent the department in any way and could only speak as a representative of the union.

Swick acknowledged making the statements attributed to him in the article[3] and testified that he did not make the statements attributed to "jail guards." Swick testified that one of the reasons he talked to the reporter as a union representative was to clarify some of the information he had gotten from the jail guards that was wrong. Regarding his comment that the number of corrections officers was reduced from three to two when the new West Olive facility opened, Swick testified that that information had appeared in previous newspaper articles about the new facility opening, its technology, etc., and that he believed that the information came from the sheriff.[4]

Regarding his comment that as many as one hundred inmates crowd the old facility and that the criminals were getting harsher, Swick testified that the membership had told him those things. Swick testified that he tried not to inject personal opinion into his statements, and that he was speaking strictly for the membership. Swick testified that the membership and Grand Haven police officers had told him that guards were forced to call the Grand Haven Police at least once a week for help with inmates causing trouble.

On cross-examination, Swick testified that he was unaware whether the union took further steps regarding the May 1994 grievance after respondent answered it on October 10, 1994, that the grievance was turned over to the POAM business agent, and that it was his understanding that the grievance was still in process. Swick testified that after October 1994 he, the union president and the union business agent, discussed the grievance and that he had been told after the December 1994 escape, he thought by the undersheriff, that it was still an ongoing grievance.

Swick testified that new guard positions were added in January 1995. He testified on further cross-examination that he was not involved in the investigation of the December 13, 1994 prison escape. Swick acknowledged that the union president had also been contacted by the press, after Swick was, and that the union president sought permission to do a TV interview, and permission was denied. Swick testified that both he and the union president declined to participate in that TV interview.

On further cross-examination, Swick was asked regarding his statement to the press that at the time of the escape, the booking officer was sixty to one hundred feet away and out of view, checking in a prisoner being lodged by the Zeeland police. Swick testified that the undersheriff told him and a group of police officers gathered at the hospital after the escape the part about the Zeeland police officer

checking in a prisoner, (and later testified on redirect) that an officer working in the facility the night of the escape had told him that the booking officer had been sixty to one hundred feet away.

Swick testified that he did not speak to the press about the type of weapon used to strike the corrections officer, and that he did know which guards had done so. Swick testified regarding his comment that Grand Haven police were called to the jail once a week, that he was told this by corrections officers at the jail and by a Grand Haven police officer who also told him that during one week he had been called to the jail seven times.

On re-direct examination, Swick was asked whether, regardless of whether the grievance was resolved or not by respondent's October 10, 1994 letter, the union remained concerned regarding the jail's staffing. Swick responded "There's always been a concern by the officers."

Swick testified that he did not at any point in time discuss with the reporter anything about the criminal investigation.

Undersheriff Dale Vredeveld, called by respondent, testified that he was paged on the evening of December 13, 1994 and arrived at the jail around 9:15 p.m. that night. Vredeveld coordinated the investigation until a detective lieutenant arrived and took over the investigation. Vredeveld testified that he gave a short news media release around 10:30 p.m. and he and several others gave an update around 2:30 a.m. A news release was prepared by the prosecutor's office and it was determined that Grand Haven would be turning the homicide over to the Michigan State Police. Vredeveld testified that they wanted to keep the community as calm as they could, and tried to squelch the potential fear and panic. He testified that the evening after the escape these were still concerns because city officials were speaking out and asking questions, and that they were very relieved that they had the four people involved in the escape in custody. Vredeveld testified that coordination among the various departments involved continued and that a significant portion of that coordination effort dealt with communications to the public. He testified that the prosecutor's office put together a homicide protocol that all the departments in the County follow regarding news releases.

Vredeveld testified that when he returned home on the evening of December 14, 1994, the union president, Mark Bennett, called him and asked whether he could do a television interview, and Vredeveld said no.

Vredeveld testified that he was familiar with staffing arrangements at the jails, and that the Department of Corrections requires one corrections officer per floor of a facility. At the time the May 1994 grievance was filed, a request for additional corrections officers was in the works, as part of the budget process, and was submitted to the County for the 1995 budget. The additional staffing was approved by the board of commissioners on October 25, 1994, to take effect in January 1995.

Vredeveld testified that the May 1994 grievance was not an active grievance and was not pending when the prison escape occurred in December 1994.

Vredeveld testified that he concluded, after reading the article in *The Grand Rapids Press* on December 15, 1994, that Swick had violated departmental policies and that the statements in the article went beyond internal union matters and impacted the criminal investigation. When asked what information in the article was of concern to him, Vredeveld responded:

> Well, one was some of the information that was released in particular pertaining to the weapon that was used. There had been a meeting earlier between all the investigative agencies that the weapon was not going to be released. It was made specific to us by the prosecutor's office that they did not want the type of instrument that was used in the escape to be released, and then I read it in the paper, you know, after these administrative decisions had been made.
>
> The other main issue that I took with this was—it was two, really. One was the accuracy, the truthfulness that was printed, and the third was the breach of security that was the potential here by laying out how far our guards are apart, how many guards are on duty at a time, you know. The fact of the 100 inmates that overcrowd the facility is not an accurate statement. The fact that Grand Haven City is called weekly to the facility is not an accurate statement. My research and my investigation concluded that those are inaccurate and not truthful statements.
>
> So, you know, the matter of the breach of security, and then an additional concern that I had with this article, and still have with this article, is the concern of the citizens that I talked about earlier, the potential panic, the potential reputation of our department, if you will, as to the fact that we can't maintain a facility that's safe. The implication here is that we're saying – that some are saying that it's not a safe facility and that everybody should lock their doors tight because we have all these people running around killing people.

Vredeveld testified that he had the county jail logs pulled, and that they showed that police were called to the facility only twice between the move in July 1994 and the December incident. He also testified that the county jail did not have 100 inmates after the July 1994 opening of the West Olive facility, although he did not deny that the count may have reached 100 "during the daytime" when courts sent people over.

Vredeveld then testified that petitioner had violated the Law Enforcement Code of Ethics by disobeying the department's regulations. Petitioner violated the rule on dissemination of information by not getting prior authorization to speak to the press and because official department business was released. Petitioner violated the rule on public statements and appearances by not obtaining prior approval, and publicly criticizing and ridiculing the department. Petitioner violated the rule regarding unbecoming conduct because the department was discredited. Petitioner violated the news release rule by not obtaining prior authorization and compromising security. Petitioner violated the "Opinion, News Media," rule by not obtaining prior authorization. Petitioner violated jail rule 46, pertaining to jail news

releases, because they should be passed on by someone in authority at the direction of sheriff or undersheriff.

On further cross-examination, Vredeveld was asked regarding the comments in the article attributed to "guards," whether he spoke to the reporters to determine who the "guards" were. Vredeveld testified that he had not. Vredeveld agreed that Swick was the union vice-president and that the union had a right to be concerned with manpower levels of staffing and the safety of the union members. Vredeveld also testified that he was not suggesting that the union must obtain approval from the sheriff before it speaks to the media about a concern. However, when asked whether Swick, an employee who is also an elected representative of the union, must obtain approval before speaking regarding a union concern, Vredeveld answered:

> I think I would answer that depending on the setting, depending on the circumstances that are going on at the time, depending on how it relates to the business that we have to do and how critical it is at the time of those statements being made.

Vredeveld opined that Swick was not speaking to the press as vice president of the union, and was speaking as an employee and "speaking out of school." Vredeveld admitted that he did not ask the reporters whether Swick had spoken to them in his capacity as a union representantive. Vredeveld agreed that Swick's first quote, regarding more guards, was the same issue as raised in the May 1994 grievance.

The following colloquy then occurred:

> Q Okay. Point to me, if you would, in this article where Mr. Swick has stated anywhere or in any fashion something that was a material part of a criminal investigation that was ongoing at the time. I'm a little confused as to the representations in that regard.
>
> A I believe at this point in time, we don't know that yet.
>
> Q I mean as of today.
>
> A We don't know. We haven't prosecuted this case yet. We have not – if we're going to have any ramifications from this article, the defense attorney hasn't taken his shot yet at us.
>
> Q Well, you have raised this as an issue of concern that led, in part, to discipline. What is it that you are surmising or speculating, even, is a part of Mr. Swick's comments that you believe somehow has affected the criminal investigation? I'm not talking the prosecution; I'm talking the criminal investigation.
>
> A That's all I can say, is to reiterate that I don't know. As far as what's going to come out in the trial and the prosecution, I don't know. We'll see.

Vredeveld testified on further cross-examination that at the same time Swick was speaking to the press, Vredeveld told the press, as reflected in a second article in the newspaper on December 15, 1994, that Harbin, the escapee who killed the police officer, had been in a cell with four other inmates, created a diversion, then attacked a jail guard and used the guard's keys to free his friend DeWitt, and the two fled the jail. Vredeveld also told the media that when the two escapees used a locked fire door, an alarm sounded as the door opened, but stopped when it shut behind them. Vredeveld also told the media that one other guard on duty in the booking area and two Zeeland police officers who had just brought in a prisoner responded to the commotion inside the maximum security section. Vredeveld further testified that he told the media that DeWitt did not reach the waiting car, which sped off as other police vehicles began to approach and that he made his way to Muskegon, where he took a taxi to Covert.

Vredeveld testified on further cross-examination that the capacity of the jail before July 1994 was 98 inmates, and that they were in overcrowding situations constantly. From July to December 1994 Vredeveld believed the capacity at the Jail was eighty eight to ninety prisoners.

Petitioner's counsel asked Vredeveld whether he was suggesting that because there is a grievance process, the Union is precluded from speaking to the media because it must address all matters through the grievance process. Vredeveld responded:

> A I'm suggesting that employees under crisis-type situations, whether they be Union officials or not in the Local, have a responsibility to clear their statements with the administration. That's what I'm claiming.
>
> Q And that's the policy of your department?
>
> A Yes.
>
> * * *
>
> I think there's a couple different issues here. One is the reputation of the department at the time. One is the –
>
> Q (Interposing) His statements interfered with the reputation of the department? I don't understand that.
>
> A I think they go to the reputation of the department, the discrediting of the administration at a time where cooperation is of utmost importance, the safety and security of both the inmates and the guards, the reassurance of the community that we don't have a situation where the next day or the following day we're going to have more people escape and killed.
>
> You know, I think that there comes a time in a given situation that the employees have a responsibility to, you know, be in cooperation with, not in contradiction to.

Q Do they have a responsibility or, no, a right, to be concerned with their own safety?

A Sure.

Q Okay. So to the extent that they have a right to be concerned with their own safety, they must make that subordinate to this concern you are characterizing, the public image of the department?

A There is a way to address those concerns – and those concerns were addressed and were being addressed – other than in the newspaper.

On further cross-examination, he testified:

Q What is the breach of security that you claim exists by Mr. Swick's comments?

A Well, I think that it relates to the number of guards and how they have been reduced recently from three to two, you know; laying out the number of inmates, even though falsely, that are in the facility at a time; the fact that there should be at least three guards on and he would prefer four or five. I think that all speaks to the security that is presently in place, as well as his opinion that it should be more.

Q By virtue of that information being imparted in this article as a comment of a Union representative being concerned about manpower and safety, how – I'm at a loss to understand how your security is compromised by his having related that Union concern to the public.

A It's, in my opinion, a security issue. The public at that particular time, in the incident that's going on, with all the other stuff going on and all the concerns going on – I feel that that's a security issue.

Q Well, you had an escape in April, right?

A Yes.

Q The public knew about that, right?

A Yes.

Q You didn't take any steps to add corrections officers to the shifts, correct?

A Well, we had three on at that time.

Q And then you had less, in fact, in December, correct?

A Even though we had – and that's exactly my point. If we had five on, it probably wouldn't have, you know, helped in this situation.

Q Let me see if I understand. Someone, as an employee, let's say, blows the whistle on the department for having an unsafe condition or having some internal problem and goes to the media as a whistleblower, blows the whistle –

A (Interposing) Mm-hmm.

Q -- and does that; is it your same position here that he would be precluded from having made comments to the media by raising those kinds of concerns?

A Nope. It depends on the situation and what's going on at the time.

Q I see. And how do you enumerate or identify or place on notice your employees of all of these specific kinds of crises or circumstances where they're supposed to make a decision then, as Union representatives, as to when they can or cannot exercise their rights to speak to the media?

A As it relates to this issue, I don't believe there was any question in anybody's mind on this whole side of the state that there was a crisis situation and something really bad happened here, and that there was a coordination of departments. There was a coordination of efforts going on here.

Q You are talking about after-the-fact coordination. The event was done. This man was – the escape occurred and an officer was killed in seven minutes.

A Yes.

Q The crisis, if any existed, was why did Ottawa County not have more guards, if that's what the public concern was, and what steps will be taken to resolve this in the future, correct? The crisis wasn't the criminal investigation; that was a matter of doing what you do on any day of the week on any kind of case.

A But on any given day, in any given situation, a person that is not involved in the investigation giving news releases and opinions and criticism to the department is – it wouldn't be any more acceptable then than what it is in this situation.

At the end of the cross-examination, Vredeveld was asked whether he investigated the Grand Haven police logs to see how many times they were called out to the jail, and responded "no." He did not ask his corrections officers how many times they called the Grand Haven police. Vredeveld admitted, regarding the article's stating that at times the jail had over one hundred inmates, that that could have been so.

Vredeveld testified that he did not discipline any of the other guards in the department and conceded that he gave the media considerably more information relevant to the case than Swick did.

The ALJ concluded that the charge should be dismissed on the ground that an employer may impose reasonable limitations on the right to engage in concerted activity if there are compelling reasons, and that even when employees are engaged in concerted activity, an employer may discipline for misconduct or insubordination which occurs in the course of that activity. The ALJ concluded that respondent had a substantial and legitimate business justification for the application of its rules concerning obtaining authorization before communicating with the media, distinguishing the instant case from *Township of Redford*, 1984 MERC Lab Op 1056. The ALJ further concluded that the May grievance was not active and Swick's conduct could not be regarded as an attempt to publicize a labor dispute.

The MERC adopted the ALJ's recommended order that the charge be dismissed, adopting the ALJ's finding that the employer had a substantial and legitimate business justification for the application of its rules concerning authorization prior to communicating with the media.

II

POAM argues that MERC improperly concluded that respondent did not commit an unfair labor practice by disciplining Swick, and challenges MERC's finding that respondent had a substantial and legitimate business justification for its action restricting speech. POAM argues that there was no competent evidence that Swick released confidential information related to a criminal investigation, and challenges MERC's agreement with the ALJ that respondent had a substantial and legitimate business interest in foregoing the general rule that this type of speech is protected based on its interest in preserving confidentiality and requiring that department procedures with regard to the release of information be strictly followed. Under the circumstances presented here, we agree that MERC erred.

This Court will not set aside a MERC decision if its findings are supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; MCL 423.216(e); MSA 17.455(16)(e); *Detroit Police Officers Ass'n v Detroit*, 212 Mich App 383, 388 (1995), aff'd 452 Mich 339 (1996). Substantial evidence is more than a scintilla, but substantially less than a preponderance, of the evidence. *Id.* This Court gives due deference to the expertise of MERC; however, MERC decisions contrary to law will be overturned. *UAW, Local 6888 v Central Michigan Univ*, 217 Mich App 136, 139; 550 NW2d 835 (1996). Mindful of this Court's limited role and the deference due MERC, we nevertheless must reverse because the record is devoid of substantial evidence in support of the decision.

MERC has held that the activity of speaking to the press concerning a union-management dispute constitutes protected concerted activity. *Redford, supra* at 1058, citing *City of Warren (Fire Department)*, 1980 MERC Lab Op 590. In *Redford*, a case both parties agree controls here,[5] a union officer was disciplined for making statements to the press regarding the assignment of police dispatching duties to civilians. *Id.* at 1058. The board held that the concerted activity that was

prohibited by the respondent did not involve the disclosure of confidential information or policy, and that the respondent failed to demonstrate that the application of its rules to the conduct involved was necessary for the maintenance of order and discipline in the department. *Id.* at 1059. In *Redford,* MERC concluded that a desire to keep a labor dispute out of the press did not constitute a substantial and legitimate business justification. *Redford, supra* at 1059. It also held that even where the employee's activity violates an otherwise legitimate rule of the Employer, the Employer must show a legitimate and substantial business justification for the application of its rule to restrict the exercise of PERA rights.[6] *Redford, supra* at 1058, citing *City of Detroit (Fire Department),* 1982 MERC Lab Op 1220, and *Marysville Public Schools,* 1982 MERC Lab Op 513.

When Vredeveld was asked to identify anything in the news article that was a material part of a criminal investigation that was ongoing at the time, he responded **"**I believe at this point in time, we don't know that yet." As to releasing confidential information, respondent identified only one portion of one comment in the article attributed to Swick, regarding the two guards at the time of the escape being approximately sixty to one hundred feet away, with one guard in the booking area, while the Zeeland police lodged a prisoner. However, a second article appearing next to the article in question stated virtually the same information: "One other guard on duty in the booking area and two Zeeland Police officers who had just brought in a prisoner responded to the commotion inside the maximum security section." Vredeveld testified that he gave that information to the media. That virtually the same information Swick provided the press appeared in a neighboring article after having been divulged to the media by Vredeveld significantly undercuts respondent's position that Swick revealed confidential information and impeded an ongoing criminal investigation. In fact, as conceded by Vredeveld, Vredeveld disclosed considerably more information regarding the incident.

Vredeveld's attempts to attribute to Swick the comment in the article describing the weapon used to strike a guard was also unsupported by competent evidence. The article attributes the comment to "guards," not to Swick, who is quoted directly in other portions of the article. Further, Swick testified that he did not know who made the comment to the media, and Vredeveld admitted not having spoken to other guards to determine the source of the information or to the reporters.

The article Swick was quoted in clearly centered on the issue of security at the Jail, a matter of concern to POAM. The neighboring article, in contrast, focused primarily on the details of the escape and the shooting. The article Swick was quoted in makes clear that the guard injured in the December 1994 escape, and other guards, had previously complained about levels of jail staffing and jail security, and that they had reiterated their concerns to the press in connection with the article in question as well. However, only Swick was disciplined. Swick testified, and the article supports, that he spoke to the press in his capacity as vice-president of the Union and on behalf of the membership, and not on behalf of the Sheriff's Department.

Respondent's contention that Swick made inaccurate statements to the press was not supported by competent evidence either. The only such statements identified were that the jail at times had over one-hundred inmates and that the Grand Haven police were called to the Jail at least once a week. While Vredeveld stated that the prisoner count during July through December, 1994, was "probably an

average of eighty-eight to ninety," he conceded that the article did not identify a time period, there was often overcrowding, and the inmate count before July could have exceeded one-hundred many times. As to the Grand Haven Police being called to assist at the Jail, Vredeveld admitted that he did not investigate the matter with the Grand Haven police, and had simply looked over the Jail's logs, which he thought would reflect calls made to the Grand Haven police. As noted *infra*, Swick had testified that he was told by a Grand Haven police officer, and corrections officers at the Jail, that Grand Haven police were called to the Jail once a week. Swick further testified that the Grand Haven police officer had told him that during one week, he had been called to the Jail seven times.

Respondent asserts that the ALJ correctly determined that Swick's comments could not be regarded as an attempt to publicize a labor dispute because there was no dispute at the time. POAM argues that the May 1994 grievance had not been resolved and that there was therefore a dispute pending when the December 1994 prison escape occurred and the article appeared in the newspaper. MERC concluded that it was irrelevant whether there was a grievance pending, and that the controlling issue was "whether under the circumstances of this case the Respondent had a substantial and legitimate business justification for applying the department's rules against unauthorized statements to the press." We agree, but note that it is undisputed that jail staffing and security were issues of ongoing concern to the Union.

On the record before us, we conclude that respondent did not have a substantial and legitimate business justification for disciplining Swick. Respondent did not present substantial competent evidence to show that Swick revealed confidential information, or that Swick's comments in any way impeded the ongoing criminal investigation. All respondent established is that Swick made statements claiming that jail security was deficient, that more security was needed, and that more security could have made a difference. While these statements can certainly be seen as reflecting negatively on respondent during a difficult time, the statements to the press concerned a union-management dispute and were thus concerted protected activity. *Redford, supra* at 1058, 1064. Because respondent did not show a substantial and legitimate business justification for the application of its rules to restrict the exercise of PERA rights in this instance, we reverse. *Id.* at 1058.

We note that an employer is free to apply otherwise legitimate rules such as those at issue in the instant case to its employees. Our decision is not intended to preclude an employer from promulgating rules such as those plaintiff was charged with violating, including the rule precluding employee communication with the media absent authorization. We recognize that there is a general legitimate business interest in monitoring police communications with the media. Nonetheless, when protected concerted activity is involved, the employer must show a substantial and legitimate business justification for application of such rules. *Redford, supra* at 1058, citing *City of Detroit (Fire Department)*, 1982 MERC Lab Op 1220; *Marysville Public Schools*, 1982 MERC Lab Op 513.

Here, where the employee's speech was clearly directed at the jail staffing issue and not at the specifics of the investigation, and where no confidential information was disclosed, we conclude that the while the employer can continue to have rules such as the one precluding communication with the media absent authorization, it cannot properly apply it in this case to restrict protected concerted activity.

Reversed.

/s/ Maureen Pulte Reilly
/s/ Helene N. White

[1] MCL 423.209; MSA 17.455(9) states:

> Organization of public employees; lawful purposes
>
> Sec. 9. It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

MCL 423.210; MSA 17.455(10) states in pertinent part:

> Sec. 10. (1) It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9; . . . . (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization . . . .

[2] The Ottawa County jail is at times referred to as the Grand Haven facility at the hearing.

[3] The article stated:

> [Illegible] **Questions About Jail Security**: *Injured guard Cathy Shaw had complained about working alone among dangerous inmates, according to fellow jail guards.*
>
> The Ottawa County Jail guard attacked Tuesday in an escape that led to a police officer's death had complained about working alone among dangerous inmates, said a **relative** and **fellow jail guards**.
>
> But Cathy Shaw's complaints, along with a grievance filed recently by guards, brought only promises of change from jail administrators, **guards** said Wednesday.
>
> Shaw, 32, was one of two guards assigned to watch the jail's 73 inmates at the time of the jail break, Ottawa County **sheriff's officials** said.
>
> She might as well have been working alone, **guards** said.

The other guard, a booking officer, was 60 to 100 feet away and out of view, taking in a new prisoner being lodged by the Zeeland Police Department, said senior guard Kevin **Swick**, vice president of the union that represents Ottawa County corrections officers.

Swick said he believes more guards at the jail could have "severely hampered" the escape.

"If you don't have an escape, you don't have a cop killer," he said.

Ottawa County **Undersheriff Dale Vredeveld denied union allegations** that the jail was understaffed and said additional guards would not have prevented the escape.

"We don't have five corrections officers for every inmate. That's not realistic," Vredeveld said. "It's a matter of our corrections officer being overpowered."

"Our corrections officers did not make any mistakes, it appears," Vredeveld added.

Grand Haven Police Officer Scott Flahive, 28, was shot minutes after the 8:30 p.m. escape

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when he approached a car occupied by one of the two escapees, Keith Harbin, 22, of Covert.

The second inmate, Freddie Lee DeWitt, 22, was not in the car.

Harbin was in a maximum security cell with four other inmates when he apparently lured Shaw over by stopping up a toilet, **Vredeveld** said. Shaw noticed water on the floor in the hall and opened the cell door.

Harbin struck Shaw over the head with concrete chipped from a table and loaded into a mesh laundry bag, according to **guards**.

Harbin and DeWitt dashed from one end of the maximum-security section to the other, unlocking several doors with stolen keys.

The two fled through a fire escape and climbed a 12-foot fence topped with barbed wire, **sheriff's officials** said.

Shaw suffered head injuries and was treated at North Ottawa Community Hospital. She was recovering at home on Wednesday.

A relative of Shaw, who asked not to be identified, said the guard worried that something like this would happen. "There were concerns, let me put it that way, not just from her but the whole jail staff," the **relative** said.

Swick, the union representative, said he spoke to Shaw.

"She feels responsible – for everything," he said. "That's a hard thing to have someone think."

Grand Haven **city officials** said the escape, along with another last spring, raise serious questions about security at the jail.

"At a minimum, jail procedures have to be changed or modified to ensure the safety of the people in the sheriff's department and the people in the community," said **City Councilman Dennis Swartout**. "This is a tragedy none of us ever wants to live through again."

Complaints about a shortage of guards are nothing new at the jail. The state Department of Corrections, which regulates county jails, cited the facility in March 1991 for not having enough corrections officers, according to an inspection report obtained by The Press.

The inspection, the last conducted at the jail, doesn't say how many guards the jail had or how many it needed to add.

In a written response, then-Sheriff Robert Dykstra said he added a guard, state officials said.

The Department of Corrections hasn't returned to the jail for a follow-up inspection, said Deb Wieber, DOC County Jail Services Unit Manager.

The state requires only that jails keep at least one guard per floor, but there is no required inmate-to-guard ratio, Wieber said. All Ottawa jail inmates are on one floor.

Swick said the number of guards was recently reduced, from three per shift to two, after the sheriff moved minimum-security inmates from the Grand Haven facility to a new jail in West Olive.

At times, as many as 100 inmates crowd the old facility, and the criminals are getting "harsher," **Swick** said. "You just feel like sometimes you're out there by yourself," **Swick** said of the guards. "You feel like you don't have any support."

The union filed a grievance in August, citing a shortage of guards and inadequate monitoring devices, after two inmates escaped in April.

> Ottawa **County Sheriff** Gary **Rosema** has said continuing renovations at the jail would address corrections officers' concerns.
>
> **Vredeveld refused to discuss the grievance** but said the department would review the escape.
>
> He said five additional corrections officers will begin work in January.
>
> **Swick** said he believes the jail should have at least three guards per shift. "I'd love to have at least four to five (per shift)," he said. "Everybody wants a partner."
>
> Instead, guards are forced to call the Grand Haven Police Department at least once a week for help with inmates who are fighting or causing trouble, he said. [Emphasis added.]

[4] A new facility in West Olive was opened in July 1994. At that time, the second floor of the Jail was closed, the inmates housed there were transferred to West Olive, and staffing at the Jail was reduced.

[5] The parties cited only MERC opinions to support their arguments, except as to pertinent standards of review.

[6] Michigan courts have looked to federal law for guidance in the interpretation of Michigan labor relations law. See *Rockwell v Crestwood School District Bd of Ed*, 393 Mich 616, 635-638; 227 NW2d 736 (1975). Federal decisions construing the analogous NLRA are persuasive authority in questions of the proper interpretation of PERA; but the provisions of PERA are to be construed even more liberally in favor of the employees, as compensation for the PERA prohibition against striking. *Southfield Police Officers Ass'n v City of Southfield*, 162 Mich App 729, 733; 413 NW2d 489 (1987), rev'd on other grounds 433 Mich 168 (1989).

In the instant case the POAM filed an unfair labor practice charge, asserting violations of section 10(1)(a) and (c) of PERA. Plaintiff's claim was decided under 10(1)(a), which is analogous to NLRA § 8(a)(1). *Redford, supra*, was a 10(1)(a) case. The standard applicable to alleged violations of NLRA § 8(a)(1) is:

> An independent violation of § 8(a)(1) is established by showing (1) that employees are engaged in protected activities . . . ; (2) that the employer's conduct tends to interfere with, restrain, or coerce employees in those activities . . . ; and (3) **that the employer's conduct is not justified by a legitimate and substantial business justification**. Anti-union motive is not required, but may be relevant if the employer demonstrates a legitimate and substantial business reason for the challenged action. Once the employer establishes a legitimate business reason, the NLRB has the burden to establish that the primary motive for the adverse action was to punish the employee

for protected activity. [*Retlaw Broadcasting Co v NLRB,* 53 F3d 1002, 1006 (CA 9, 1995). Citations omitted and emphasis added.]