

STATE OF MICHIGAN
COURT OF APPEALS

POLICE OFFICERS ASSOCIATION OF
MICHIGAN,

UNPUBLISHED

Petitioner-Appellant,

v

No. 194712

MERC

OTTAWA COUNTY SHERIFF,

No. C95 A-2

Respondent-Appellee.

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

CAVANAGH, J. (dissenting).

I respectfully dissent.

The decisions of the MERC are reviewed on appeal pursuant to Const 1963, art 6, § 28, and MCL § 423.216(e); MSA § 17.455(16)(e). The commission's findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole. *Grandville Municipal Executive Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). The MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law. MCL § 24.306(1)(a), (f); MSA § 3.560(206)(1)(a), (f), *Grandville, supra*. The majority concludes both that the MERC made a substantial and material error of law. I disagree.

Under *Township of Redford*, 1984 MERC Lab Op 1056, 1059, an employer may limit its employees' statements to the media when there exists a substantial and legitimate business justification for doing so. The majority appears to believe that a substantial and legitimate business justification will exist only when it is established, after the fact, that the employee's statement has caused harm. I disagree with this conclusion. The fact that Swick's comments regarding the position of the guards were substantially similar to information already provided by the investigating officer does not alter the fact that Swick violated department rules in making the statements in the first place.¹ Swick was neither on duty at the time of the escape nor involved in the investigation. Moreover, the majority ignores that

Swick's statements could, in the future, affect the criminal prosecution of the escapees or the civil liability of the department.

This Court gives due deference to the expertise of the MERC. *UAW, Local 6888 v Central Michigan Univ*, 217 Mich App 136, 139; 550 NW2d 835 (1996). However, the majority accords little weight to the MERC's determination that "when crimes have been committed and an investigation is underway, a law enforcement agency has a legitimate interest in protecting the investigation and preventing conflicting stories in the press which would reflect poorly on the department and cause concern in the community with respect to its effectiveness." I concur with MERC's conclusion that these are legitimate interests of the department, and that the department was therefore justified in disciplining Swick.

I would affirm.

/s/ Mark J. Cavanagh

¹ Pursuant to § 7.9 of the department's Rules and Regulations, "Information is to be released to the news media in accordance with department procedures." Section 8.1(A) states,

Employees shall not publicly criticize or ridicule the department, its policies, and other employees by speech, writing or other expression which is defamatory, obscene, unlawful or undermines the effectiveness of the department, interferes with the maintenance of discipline, or is made with reckless disregard for the truth or falsity.

Section 12.2 provides, "Employees may release information from current investigations and reports of the department following legitimate requests upon authority of a supervisor." Furthermore, under § 12.5,

No employee, without the consent of the Sheriff shall offer or allow his opinion on department business to be utilized by the press, nor shall he/she verbally formulate department policy which has not been issued by the Sheriff. Any discussion with members of the press shall be confined only to the facts of the situation or incident.