

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION
and
MILWAUKEE COUNTY

Case 773
No. 71184
MA-15099

Appearances:

Ryan S. MacGillis, Attorney, MacGillis Wiemer, LLC, 11040 West Bluemound Road, Suite 100, Wauwatosa, Wisconsin 53226, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Roy Williams, Milwaukee County Corporation Counsel, 901 North 9th Street, Suite 303, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

Pursuant to the terms of a collective bargaining agreement (CBA) between Milwaukee County and the Milwaukee Deputy Sheriffs' Association (the Union), the parties selected the undersigned from a panel of arbitrators provided by the Wisconsin Employment Relations Commission to hear and resolve a dispute between them. The dispute involves whether the County had just cause to suspend the Grievant, Deputy Stephen Mills, for five days without pay for allegedly interfering with Fox 6 media's efforts to gather information from a criminal defendant in a Milwaukee County Courthouse hallway and staircase following a pre-trial proceeding. An arbitration hearing was held on January 25, 2012, at the Milwaukee County Courthouse in Milwaukee, Wisconsin. No court reporter was present to record the proceeding. The parties filed written briefs, the last of which was received on February 9, 2012. However, the undersigned Arbitrator encountered technical difficulties accessing a key exhibit produced at the hearing, namely, a video recording of the events leading to the discipline. These technical difficulties were resolved in January, 2013

STIPULATED ISSUES

The parties stipulated in writing to two issues: “Was there just cause to suspend Deputy Mills for 5 days without pay? If not, what is the appropriate remedy?”

FACTS

Overview of Grievant’s Employment with the County

At the time this matter was heard, the Grievant had been an employee of the Milwaukee County Deputy Sheriff’s Department for approximately ten years. His service has included membership on the SWAT team, which required specialized training, and the Target Enforcement Unit, which focused on violent crime issues in Milwaukee County parks. The Grievant and other deputies received Letters of Commendation, dated May 2, 2008, for “their bravery in the face of armed subjects, and for their calm, clear, and tactically sound decision-making in a joint arrest operation...” Prior to the incident at issue herein, the Grievant had received a written reprimand for insubordination.

For over two years (including the April 8th incident in question), the Grievant has been assigned to the Sheriff’s Office Detention Bureau – Courts Division, and more specifically, to a SWAT 700 squad in the courthouse. As a “runner” on that squad, his responsibilities include providing courthouse security, responding to calls for service, transporting prisoners to and from courtrooms, assisting courtroom bailiffs, and performing escorts. According to the Grievant, many such escorts involve the presence of the media in the courthouse. He is aware that the media needs permission from a judge to be present in a Milwaukee County Courthouse courtroom, but that no such permission is necessary for the media to be present in public areas of the courthouse, such as hallways and stairwells. Based on his experience in the courthouse, the Grievant perceives the media as usually very respectful of those sought to be interviewed and willing to back off to some extent if requests to interview are denied.

Events Leading to Five-Day Suspension

During the morning of April 8, 2012, James Gardetto, a criminal defendant charged with theft-false representation, was walking toward Judge Fiorenza’s courtroom, Room 629, to attend a pre-trial hearing. Mr. Gardetto has an extensive criminal history, including multiple crimes and incarcerations.¹ News reporter Joshua Quinn and a cameraman from Fox 6 News (hereinafter, the media) wished to interview and film Mr. Gardetto and thus approached him with questions, as Mr. Gardetto made his way to the courtroom. Mr. Quinn, who also was using a small, hand-held camera, had been investigating Mr. Gardetto for years. To avoid being interviewed or filmed, Mr. Gardetto swiped at Quinn’s camera, breaking its cover and scratching Quinn’s finger.

¹ A Wisconsin Criminal History of Mr. Gardetto, introduced at hearing as a Joint Exhibit, contains 26 pages.

The media had obtained permission from Judge Fiorenza to film Mr. Gardetto's hearing; however, because Mr. Gardetto did not wish to be filmed, he was reluctant to enter the courtroom while they were present in it. Deputy Landry, the courtroom bailiff, informed Mr. Gardetto that the media had the right to be present and to film him, that he must sit in the gallery of the courtroom like other defendants until his case was called, and that he must remove the hood of his coat from his head. Eventually, Mr. Gardetto complied.

The incident at issue took place following Mr. Gardetto's hearing. He was afraid and reluctant to leave the courtroom, because the media had positioned themselves in the courthouse hallway outside the door to the courtroom vestibule,² in order to film and attempt to interview him as he made his way out. Deputy Landry informed the agitated Mr. Gardetto that she could not prevent the media from filming him; however, she called the 6th floor bullpen for an escort. In response, Deputy Harrington came to Judge Fiorenza's courtroom to discuss the situation with Mr. Gardetto, who informed him that the media were harassing him (i.e. following him around and trying to take pictures of him), and that they were violating a restraining order that Mr. Gardetto said he had obtained. In response, Deputy Harrington did not make any effort to verify whether Mr. Gardetto indeed had obtained a restraining order; rather, he called for an additional deputy to assist him. Deputy Mills heard this request over his radio and then was summoned to assist Deputy Harrington. Prior to Mills' arrival on the scene, Deputy Harrington entered the hallway and advised Reporter Quinn that he needed to be 100 feet away or he would be in violation of a restraining order. When Reporter Quinn responded by asking for a copy of the restraining order, Deputy Harrington replied that he did not have a copy of it. Reporter Quinn responded that Fox 6 was not aware that there was a restraining order against the station, and that he'd be happy to look at the paperwork.

During this exchange between Deputy Harrington and Reporter Quinn, Deputy Mills arrived on the scene to provide assistance and heard the latter part of the discussion referencing a restraining order. He and Deputy Harrington then walked through an open door into the courtroom vestibule and through the second set of vestibule doors into the courtroom gallery. Deputies Mills and Harrington began to discuss the situation, while the media remained in the hallway. Deputy Mills then walked back into the vestibule to close the door leading to the hallway, and returned to the courtroom. Mr. Gardetto, according to Deputy Mills, looked agitated and panicky. In addition, Mr. Gardetto was shaking and not articulating his thoughts very coherently.

Deputies Mills and Harrington and Mr. Gardetto then moved to the courtroom vestibule to discuss the situation further. Deputy Mills did not ask for Mr. Gardetto's identification, because Deputy Mills recognized him from when Mr. Gardetto had been incarcerated in the Milwaukee County jail in the past.³ Deputy Mills also remembered Mr. Gardetto as having

² The vestibule is the area in between the hallway and the courtroom. One set of double doors separates the vestibule from the hallway, and another set of double doors separates the vestibule from the courtroom.

³ Deputy Mills recalls Mr. Gardetto having been incarcerated in segregation unit 4D, a highly restrictive unit used in large part to house inmates accused of rules infractions. By contrast, Lieutenant Holton testified that a computer

exhibited aberrant behavior while incarcerated⁴ and perceived him to be an emotionally disturbed person. However, neither Deputy Harrington nor Deputy Mills was aware that Mr. Gardetto had taken a swipe at Reporter Quinn's camera prior to Mr. Gardetto's hearing. When Deputy Mills questioned Mr. Gardetto, the latter advised that he had a restraining order against Fox 6, and that he just wanted to leave. Deputy Mills then asked to see a copy of the restraining order and inquired which judge had issued it and from where in the courthouse Mr. Gardetto had obtained it. Because Mr. Gardetto had no copy of the restraining order and, despite having allegedly obtained it the previous day, could not recall the issuing judge or even the floor of the courthouse from which he had acquired it, Deputy Mills (correctly) did not believe Mr. Gardetto had such an order. Furthermore, the Sheriff's Office does not have any written policy regarding restraining orders or their verification; such matters are left to the discretion of the deputies. Accordingly, Deputy Mills did not attempt to verify the restraining order.

Despite his correct belief that no restraining order existed, Deputy Mills devised a plan whereby he and Deputy Harrington would accompany Mr. Gardetto out of the courtroom vestibule to a staircase located down the hallway that led out of the building. Deputy Mills suggested this plan because Mr. Gardetto was agitated, because the latter seemed to be getting out of control, and because Deputy Mills perceived Mr. Gardetto's potential volatility as presenting a safety risk to himself and others. Deputy Mills thus sought, as he testified during the hearing, to "get [Mr. Gardetto] off of the floor and give him an avenue to get himself out of the situation before it escalated into something worse."

The Fox 6 film introduced as a joint exhibit includes footage of the implementation of this plan. It shows Deputy Mills open the door from the courtroom vestibule to the hallway, turn right, and begin to walk down the hallway towards the staircase door, located approximately 20 feet down the hallway on the right. Following approximately 2 to 3 feet behind Deputy Mills through the vestibule doorway and down the hallway is Deputy Harrington. The latter, in turn, is followed by Mr. Gardetto, who exits the vestibule doorway just after Deputy Harrington and proceeds to walk down the hallway in the same direction, but to Deputy Harrington's right, in between Deputy Harrington and the wall of the hallway. Deputies Mills and Harrington are positioned somewhat in between the media and Mr. Gardetto as they all proceed down the hallway; however, the media is slightly ahead of all three and walking backwards in the same direction as the other three as they film them. As he walks down the hallway, Mr. Gardetto has his hood up and uses his left hand to cover his face. In addition, while walking down the hallway in between the two deputies and the hallway wall, Mr. Gardetto accelerates first past Deputy Harrington and then just past Deputy Mills by the

search of Mr. Gardetto's stays in the Milwaukee County jail showed that Mr. Gardetto was not housed in Unit 4D. Nonetheless, he did not dispute that Mr. Gardetto had been incarcerated in the Milwaukee County jail. I find Deputy Mills' testimony that he recognized Mr. Gardetto from his previous incarcerations to be credible, irrespective of the unit(s) in which Mr. Gardetto was housed.

⁴ For example, at the time of the incidents underlying this grievance, Deputy Mills recalled Mr. Gardetto as having spoken to on-duty deputies over the intercom in a Kermit-the-Frog voice.

time he reaches the staircase door. At that point, Mr. Gardetto opens the staircase door and walks through it, followed by Deputies Harrington and Mills, respectively. Deputy Mills then closes the staircase door before the media can enter, makes sure that the door latches before taking his hand off of the knob,⁵ and walks to the other side of the stair landing. As Deputy Mills closes the door, moreover, the cameraman queries, “Am I not all... Sir, am I not allowed to use the public stairs?” After Deputy Mills walks to the opposite side of the stair landing, the cameraman opens the staircase door, walks to the staircase, and films it. As the film footage shows, Mr. Gardetto is not to be seen on the staircase; he has already descended it prior to the cameraman filming it. In the meantime, Deputy Mills, followed by Deputy Harrington, walks past the cameraman on the stair landing in the opposite direction, open the staircase door, and goes back into the hallway.

WORK AND CIVIL SERVICE RULES ALLEGEDLY VIOLATED

The County alleges that the Grievant violated the following work and civil service rules:

MILWAUKEE COUNTY SHERIFF’S OFFICE RULES AND REGULATIONS:

202.15 Knowledge of Duties, Rules and Regulations

Members shall be accountable for their knowledge of, performance of, and familiarization with all duties, policies, procedures, rules and regulations of the Milwaukee County Sheriff’s Office and the Milwaukee County Civil Service system. Members shall immediately inform their supervisor if unfamiliar with any duty to which they have been assigned.

202.20 Efficiency and Competence

Members shall adequately perform the duties of their assigned position. In addition, sworn members shall adequately perform reasonable aspects of police work. “Adequately perform” shall mean performance consistent with the ability of equivalently trained members.

MILWAUKEE COUNTY CIVIL SERVICE RULE VII, SECTION 4(1):

- (l) Refusing or failing to comply with departmental work rules, policies or procedures.
- (u) Substandard or careless job performance.

⁵ That Deputy Mills made sure that the door latched before taking his hand off of the doorknob goes to his state of mind and cannot be inferred from the film footage alone. However, I conclude that Deputy Mills made sure that the door had latched before removing his hand from the doorknob because he testified as much.

ANALYSIS

Because the CBA does not define “just cause”, I shall identify and apply an appropriate construction of the standard.

I. APPROPRIATE CONSTRUCTION OF “JUST CAUSE”

The stipulated issues noted above accord with the construction of “just cause” set forth in Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 948 (Alan Miles Ruben ed., 6th ed. 2003):

There are two “proof” issues in the arbitration of discipline and discharge cases. The first involves proof of wrongdoing; the second, assuming that guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, concerns the question of whether the punishment assessed by management should be upheld or modified. . . .

II. APPLICATION OF JUST-CAUSE STANDARD

The Grievant’s wrongdoing, as alleged by the County of Milwaukee’s Notice of Suspension, was as follows:

Dep. Mills did not properly follow up with Gardetto’s claim that he had a restraining order out against Reporter Quinn, even though he both [sic] felt that Gardetto was giving them false information. Dep. Mills should have further questioned Gardetto as to why he gave him false information, and should’ve conducted a field interview with the subject. Instead, Dep. Mills escorted Gardetto off the 6th floor of the Courthouse at his own request. Both Deputies flanked Gardetto, which allowed him to be “protected” from the media being able to question him....

In addition, the Notice references Reporter Quinn’s allegation during an Internal Affairs interview that “once Gardetto and the two deputies had entered the stairway, Reporter Quinn believed that one of the deputies held the door closed with his hand, which blocked the public stairway for the cameraman to enter.” The express allegations of 1) the deputies flanking Mr. Gardetto to protect him from the media, and 2) Deputy Mills holding the stairway door with his hand to block the media’s access to it, imply a violation of the media’s First Amendment rights.⁶

⁶ The County’s Brief more expressly alleges that “Sheriff Clarke imposed a 5-day suspension on both deputies because he believed they interfered with one of the primary tenets of the United States Constitution – the freedom of the press.” More specifically, the County’s brief asserts that Deputies Mills’ and Harrington’s conduct of “escort[ing] Mr. Gardetto to the stairwell and allow[ing] him to leave without giving the media even an opportunity to have contact with him . . . infringe[d] on the freedom of the press” and that such infringement “sets up the Office of the Sheriff and Milwaukee County for lawsuits.” (County Br. 2).

As discussed below, I conclude that A) the County's position that the Grievant erred by not questioning Gardetto further and not conducting a field interview with him is invalid; B) the deputies' efforts, as described above, to protect the Grievant from the media and facilitate his exit did infringe on the media's First Amendment Rights; and C) the Grievant's five-day, unpaid suspension should be reduced to a three-day, unpaid suspension.

A. Allegedly Inadequate Questioning and Absence of Field Interview

Insufficient evidence supports the County's position that Deputy Mills' questioning of Mr. Gardetto was inadequate and that he should have conducted a field interview. The County's own witness who conducted the Internal Affairs investigation, Lieutenant Holton, admitted that there is no written policy regarding conducting field interviews, and that the point at which a field interview can come to a close is left to the discretion of each deputy. He further testified that the purpose of a field interview includes determining the identity of the subject, whether a crime was committed, why a person is at a given location, and why (in the case of Mr. Gardetto) a subject is agitated. Similarly, Deputy Mills testified that the requirements of a field interview taught by the Academy are to ascertain 1) who the person is; 2) what he/she is doing there; and 3) whether anything rises to the level of probable cause that a crime has been committed. In this case, Deputy Mills already knew Gardetto's identity from his past incarceration and aberrant behavior in the Milwaukee County jail. He also had learned from his consultations with Deputy Harrington and Mr. Gardetto that the latter was present in the courthouse for a hearing, that he was highly agitated by the prospect of being filmed by the media, and that he wanted to go home without being filmed. Neither the media nor any law enforcement personnel informed Deputy Mills of the altercation between the media and Mr. Gardetto that had occurred prior to the hearing, nor is it clear from the evidence presented that Mr. Gardetto committed a crime during that altercation. In any event, Deputy Mills had no indication that a crime had been committed. Accordingly, I find that the County's conclusion that Deputy Mills did not conduct a proper field interview is invalid, even when measured against the criteria for a field interview proposed by the County's own witness.

I am similarly unpersuaded that Deputy Mills should have checked on the status of the restraining order that Mr. Gardetto claimed he had obtained. As noted, there was no written policy regarding restraining orders or their verification, as such matters are left to the discretion of the deputies. Here, Deputy Mills did not believe such an order existed, because Mr. Gardetto had no copy of the restraining order and, despite having allegedly obtained it the previous day, could not recall the issuing judge or even the floor of the courthouse from which he had acquired it. In addition, Deputy Mills was familiar with Mr. Gardetto's dubious credibility from his past incarcerations. Lastly, because Mr. Gardetto was highly agitated and expressing his desire repeatedly to go home, his imminent departure would have had the benefit of preventing possible disruption in a venue (the Milwaukee County Courthouse) where disturbance would be especially detrimental. I find these considerations to constitute a sound basis for Deputy Mills to conclude that no restraining order existed, to exercise his discretion not to spend additional time verifying the existence of such an order, and to allow

Mr. Gardetto to leave the building. I am also unconvinced by Lieutenant Holton's testimony that additional questioning of Mr. Gardetto and the media, as well as verification of the restraining order, would have had any additional benefit. Deputy Mills correctly concluded that the restraining order in fact did not exist and the value of verifying as much is purely speculative. In light of the foregoing considerations, the absence of additional questioning and the decision not to verify the restraining order smack of *post-hoc* and unsupported fly specking to augment what I view as the grist of the alleged wrongdoing here – Deputy Mills' interference with the media's First Amendment rights.

B. Infringement on Media's First Amendment Rights

Assessing whether Deputy Mills' conduct violated the First Amendment requires me to determine 1) whether the media's activity was a protected right under the First Amendment; and 2) whether Deputy Mills' conduct violated that right.

1. Whether News Gathering Is a Protected Right

This case involves not an allegedly unconstitutional, governmental regulation of the media's right of expression, but rather an alleged interference by a governmental employee with the media's ability to gather information to enable that expression. I thus must determine whether such information gathering falls within the ambit of the First Amendment's protections. A deputy's adequate performance of job duties, as required by the Milwaukee County Sheriff's Office and Civil Service rules cited above, presupposes the discharge of those duties in a manner consistent with the United States Constitution.

The United States Supreme Court recognized news gathering as a qualified First Amendment right over four decades ago:

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.

Branzburg v. Hayes, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656 - 2657 (U.S. Cal. 1972). Recently, a New Jersey Court again recognized and further expounded on this right:

It is firmly established that the First Amendment's aegis extends further than the text's proscription on laws "abridging the freedom of speech, or of the press," and encompasses a range of conduct related to the gathering and dissemination of information. As the Supreme Court has observed, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." First Nat'l Bank v. Bellotti, 435 U.S. 765, 783, 98 S.Ct. 1407 [1419], 55 L.Ed.2d 707 [722] (1978); *see also* Stanley v.

Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243 [1247], 22 L.Ed.2d 542 [549] (1969) (“It is ... well established that the Constitution protects the right to receive information and ideas.”). An important corollary to this interest in protecting the stock of public information is that “[t]here is an undoubted right to gather news ‘from any source by means within the law.’ ” Houchins v. KQED, Inc., 438 U.S. 1, 11, 98 S.Ct. 2588 [2594], 57 L.Ed.2d 553 [562] (1978) (quoting Branzburg v. Hayes, 408 U.S. 665, 681–82, 92 S.Ct. 2646 [2657], 33 L.Ed.2d 626 [639] (1972)).

Ramos v. Flowers, 429 N.J. Super. 13, 29-30, 56 A.3d 869, 879 (N.J. Super. A.D., 2012). Nevertheless, “[t]he right to speak and publish does not carry with it the unrestrained right to gather information.” Zemel v. Rusk, 381 U.S. 1, 16-17, 85 S.Ct. 1271, 1281 (U.S. Conn. 1965).

The facts of this case implicate some of the restrictions on the First Amendment right to gather news but not others. Such restrictions, for example, include “reasonable time, place, and manner restrictions” . . . *Id.*, 429 N.J. Super. at 32, 56 A.3d at 881; *see also* Glik v. Cunniffe, 655 F.3d 78, 84 (C.A.1 (Mass.), 2011). Here however, the media were permitted to be present in the Milwaukee County Courthouse courtroom and to question individuals in public areas of the courthouse outside of the courtroom. Thus, time, place, and manner restrictions are not defenses on which the Grievant can rely. However, restrictions on news gathering also include the media’s obligation not to “unreasonably interfere[] with police and emergency functions.” Connell v. Town of Hudson, 733 F.Supp. 465, 471 (D.N.H., 1990). *See also* Barry P. McDonald, “*The First Amendment and The Free Flow Of Information: Towards A Realistic Right To Gather Information in the Information Age*”, 65 Ohio St. L.J. 249, 307 -308 (2004) (observing that “police conduct *unreasonably* interfering with the media’s access to or ability to record events in the public domain, [has] been held to violate the First Amendment.”) (emphasis added). Thus, I must determine whether Deputy Mills’ interaction with the media unreasonably interfered with their right and efforts to film and interview Mr. Garetto.

2. Whether Deputy Mills Unreasonably Interfered with the Media

To determine whether Deputy Mills’ conduct rose to the level of unreasonable interference, I address whether his conduct indeed interfered with the media’s news gathering right, and, if so, whether such interference was reasonable.

a. Whether There Was Interference with News Gathering

The video footage suggests that Deputies Harrington and Mills interfered with the media’s efforts to gather news. Deputy Harrington, not Deputy Mills, inaccurately advised the media of the existence of a restraining order. However, Deputy Mills’ silent acquiescence in this false statement (even though he ultimately concluded that the restraining order did not exist) suggests at least moderate complicity in the initial effort to restrict the media. As

Deputies Harrington and Mills accompanied Mr. Gardetto from the courtroom vestibule to the staircase doorway, the media was able to, and did, film Mr. Gardetto (and the two deputies). However, the deputies positioned themselves in a manner to suggest that they were shielding Mr. Gardetto. When Mr. Gardetto and the two deputies subsequently reached the staircase doorway, Mr. Gardetto was allowed to exit it first, followed by Deputy Harrington and Deputy Mills. The latter, according to his own testimony, held the doorknob until after he heard the door latch. By the time the media felt that they could, and in fact did, enter the staircase doorway and walk to the stairs, Mr. Gardetto was no longer in sight. From these facts, I conclude that Deputy Mills did interfere with the media's right to both film and attempt to interview Mr. Gardetto.

b. Whether Deputy Mills' Interference Was Reasonable

Deputy Mills' argument that his conduct was reasonably justified to prevent the situation from escalating into potentially unsafe disruption is colorable but ultimately unconvincing. He was legitimately concerned with Mr. Gardetto's agitation and the unpredictability that attends such an emotional state. Moreover, although Deputy Mills was unaware of the altercation between Mr. Gardetto and the media that had occurred prior to the hearing, that incident confirms the reasonableness of Deputy Mills' perception regarding Mr. Gardetto's propensity to act out. However, Deputy Mills also was aware of the media's right to be present, and he believed based on experience that generally, the media is respectful of those sought to be interviewed. More importantly, the media during the incident at issue was not "interfere[ing] with police and emergency functions" Connell v. Town of Hudson, 733 F.Supp. 465, 471 (D.N.H., 1990), but rather was simply seeking to film and interview Mr. Gardetto in an area where the general public was entitled to be present about a matter of public concern:

The press has a duty and a right to cover crime news and criminal investigations, including a right of access to matters to which the public generally may have access, but it has no right to statements from the agents of the government, and no right to information not open to the public.

16B *C.J.S. Constitutional Law* § 849, "Gathering of news" (database updated Dec. 2012). Furthermore, by the time Deputy Mills and Deputy Harrington escorted Mr. Gardetto to the staircase, Mr. Gardetto was upset and frightened, rather than angry and threatening. Thus, the two deputies could have counseled Mr. Gardetto that they would be nearby in the event that the media became overly aggressive. They could have been present, moreover, without assuming a shielding position and certainly without closing the door to the staircase in the media's faces to allow Mr. Gardetto to escape down the stairwell. This less obstructive approach would not have unreasonably interfered with the media's efforts to film and interview Mr. Gardetto but would have provided a safety assurance in the event a conflict ensued. While Deputy Mills' effort to "get [Mr. Gardetto] off of the floor and give him an avenue to get himself out of the situation before it escalated into something worse" is laudable purely from the standpoint of public safety, he should have, but failed to, balance this important objective with the

significant obligation to carry out his duties in a manner that did not infringe upon the media's First Amendment rights. His interference with the media's news gathering rights was not reasonable.

C. Whether the Grievant's Five-Day Suspension Should Be Upheld

Because I find that the Grievant acted in a manner that infringed on the media's First Amendment rights, I conclude that the County had just cause to impose discipline; however, I also find that the five-day suspension should be reduced, because some of the alleged grounds on which it was based, namely, the inadequate field interview and failure to verify the restraining order, are not persuasive. In addition, Deputy Mills' employment record includes notable achievements, and he has never been suspended. His only instance of past discipline was a written reprimand.

On the other hand, I also must consider the significance of the constitutional right – freedom of the press – that Deputy Mills' conduct infringed. As our founding fathers and the United States Supreme Court have recognized, freedom of the press is one of our most established and cherished constitutional rights:

In 1799, James Madison made the point in quoting (and adopting) John Marshall's answer to Talleyrand's complaints about American newspapers, American State Papers, 2 Foreign Relations 196 (U.S.Cong.1832):

Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press.

Connell v. Town of Hudson, 733 F.Supp. 465, 470 (D.N.H., 1990). *See also* Bridges v. State of Cal., 314 U.S. 252, 260, 62 S.Ct. 190, 192 (U.S. 1941) (observing that “free speech and fair trials are two of the most cherished policies of our civilization”); Malloy v. Hogan, 378 U.S. 1, 5, 84 S.Ct. 1489, 1492 (U.S.Conn. 1964) (referring to “the freedoms of speech, press, religion, assembly, association, and petition for redress of grievances” as “cherished rights of mind and spirit”); 1 Rodney A. Smolla & Melville Nimmer, “*On Freedom of Speech*” § 1:1 (3d ed. 1996) (recognizing that the First Amendment's guarantees of freedom of speech, press, religion, assembly, and petition are among “the most cherished” fundamental rights of Americans.) Given the elevated status – indeed the primacy – of the infringed constitutional right herein, but taking into account the mitigating factors discussed above, I find it appropriate to reduce Deputy Mills' unpaid suspension from five to three days.

AWARD

For all of the foregoing reasons, I find that just cause does not support a five-day, unpaid suspension but does support a three-day, unpaid suspension. Accordingly, the County must reduce Deputy Mills' five-day, unpaid suspension to a three-day, unpaid suspension. Moreover, the County must reimburse the Grievant for all pay and benefits covering the two days that he was wrongfully suspended.

Dated at Madison, Wisconsin, this 26th day of February, 2013.

John C. Carlson, Jr. /s/

John C. Carlson, Jr., Arbitrator