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Liberties Union

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Fund of Michigan

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June 4, 2010

Robert J. Erspamer, Director
Ironwood Department of Public Safety
123 West McLeod Ave.
Ironwood, MI 49938
ipsd@cityofironwood.org

VIA FIRST CLASS MAIL AND EMAIL

Scott Erickson, City Manager
City of Ironwood
213 S. Marquette St.
Ironwood, MI 49938
ericksons@cityofironwood.org

Re: Free Speech Rights of Ken Jacobson

Dear Mr. Erspamer and Mr. Erickson:

We write on behalf of the American Civil Liberties of Michigan to express our deep concern that you are violating the free speech rights of Ken Jacobson, a firefighter for the City of Ironwood for almost three decades. You have threatened to discipline, or even fire, Mr. Jacobson for merely writing letters to the editor about a variety of municipal concerns. Even though Mr. Jacobson is a public employee, he has a well established constitutional right to criticize government officials on matters of public concern. Accordingly, for the reasons set forth below, we request that you retract your warning of disciplinary action and respect his First Amendment rights.

FACTS

As we understand it, Mr. Jacobson wrote four letters to the editors of local Ironwood news organizations during a two-month period this winter, between December 27, 2009, and February 27, 2010. (See text of letters, Exhibit A). Three of the letters appeared on the websites of superiorchronicle.com or ironwoodinfo.com and one appeared in the print edition of the *Daily Globe*. He wrote these letters on his own time and did not represent himself as a city firefighter.

Three of the letters concerned snow-removal efforts by the city. The first two letters suggested that poor snow plowing in Ironwood, especially in contrast to neighboring Hurley, might hurt business in Ironwood, and questioned the city manager's efforts to address the problem. In the third letter Mr. Jacobson thanked the city workers for their plowing efforts and said that he hoped "management" appreciated them next time they considered "the apparent union busting tactics that were attempted during the most recent contract talks." (Exhibit A, Jan. 23 letter).

The final letter criticized the author of an article in the *Daily Globe* for suggesting that moving a 911 dispatch center would somehow jeopardize public safety. This final letter does not directly mention or criticize city officials. (Exhibit A, Feb. 27 letter).

On March 9, 2010, you sent Mr. Jacobson a memorandum warning that his letters constituted “public criticism” of you, in your capacities as Director of Public Safety and City Manager, respectively; that you consider such public criticism to be insubordination; and that you will not “tolerate[]” future “public criticism.” (See memo, Exhibit B). Your memo informs Mr. Jacobson that he will be subject to discipline, including possible termination, in the absence of “immediate and sustained improvement in [his] behavior.” Mr. Jacobson and we, as his attorneys, understand the memorandum to mean that any further letter to the editor by him complaining about any aspect of city government is likely to lead to his termination.

FREE SPEECH RIGHTS OF PUBLIC EMPLOYEES

Government employees do not lose their constitutional rights when they accept their positions, although concededly those rights must be balanced against the realities of the employment context. In *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), the Supreme Court analyzed a claim that a public employee suffered a deprivation of her First Amendment rights by her employer when she was disciplined for sending a letter to the editor. The court explained that in such cases, it seeks “a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Id.*; see *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). In other words, courts must decide (1) whether the speech in question addresses a matter of “public concern,” and if so, “whether the interest of the employee (and perhaps the public) in speaking on the matter outweighs the employer’s interest in enhancing public services through the restriction.” *Firefighters Local 3233 v. Frenchtown Charter Twp.*, 246 F. Supp. 2d 734, 737 (E.D. Mich. 2003).

Mr. Jacobson’s letters addressed subjects of “public concern.” Mr. Jacobson touched on snow removal and road safety; the performance of city government; union negotiations; and public safety generally. Speech is on a subject of public concern if it may be “fairly considered as relating to any matter of political, social, or other concern to the community.” *Connick v. Myers*, 461 U.S. 138, 146 (1983). Clearly, the subjects addressed by Mr. Jacobson are covered by that broad description; indeed, a wealth of case law clearly establishes that point. As a general proposition, “[c]ases from the various circuits confirm that the performance of public works and agencies . . . is of public importance.” *Frenchtown*, 246 F. Supp. 2d at 738 (citations omitted). More specifically,

- traffic safety and snow removal are matters of public concern, *Lee v. Nicholl*, 197 F. 3d 1291, 1295 (10th Cir. 1999) (employee fired for “insubordinate behavior” after writing seven internal memoranda regarding “traffic safety and snow removal at a particular intersection” was “undoubtedly” addressing “subjects with which the public has a general concern”);
- a municipal government’s failure to discharge its duties is a matter of public concern, *David v. City of Denver*, 101 F.3d 1344, 1355 (10th Cir. 1996); and

- labor disputes are matters of public concern. *Bartnicki v. Vopper*, 532 U.S. 514, 533-34 (2001), cited in *Frenchtown*, 246 F. Supp. 2d at 737.¹

In addition to establishing that the specific subjects addressed by Mr. Jacobson were subjects of “public concern,” it is also important to consider the “content, form, and context” of the statement. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). In none of his letters did Mr. Jacobson identify himself as a volunteer firefighter, nor did he even suggest that he was in any way connected with the City. In none of his letters did Mr. Jacobson identify any city employees by name. In none of his letters was Mr. Jacobson rude or offensive. In other words, he did not in any way transform the subjects of public concern into something inappropriately personal. Finally, all of Mr. Jacobson’s letters were reproduced in a public forum, and while there is no requirement that someone speak publicly, to the media, in order to be deemed to be speaking on a matter of public concern, it is certainly the case that directing comments to the media is itself a strong indication that a subject is one of public concern. See *Considine v. Board of Cty Comm’rs*, 910 F.2d 695, 700 (10th Cir. 1990).

Turning now to the second step of the Supreme Court’s *Pickering* test, the question is whether the speaker’s and the public’s interests in speech on matters of public concern outweigh the employer’s interest in promoting the efficiency of its provision of public services. *Frenchtown*, 246 F. Supp. 2d at 737, 740 n.2; see *Brandenburg v. Housing Authority of Irvine*, 253 F.3d 891, 897-98 (6th Cir. 2001). Ironwood has proffered no adequate justification. The memo asserts only that Mr. Jacobson’s “behavior has a negative impact on the City of Ironwood, its management and its employees.” This sort of vague assertion isn’t enough. Ironwood has offered nothing to indicate that Mr. Jacobson’s letters “impair[ed] discipline by superiors, ha[d] a detrimental impact on close working relationships, undermine[d] a legitimate goal or mission of the employer, impede[d] the performance of the speaker’s duties, or impair[ed] harmony among co-workers.” *Myers*, 934 F.2d at 730. And that sort of impact is required.

¹ See also *Montgomery v. Mississippi*, 498 F. Supp. 2d 892 (S.D. Miss. 2007) (context, form, and content of Mississippi fire captain’s letter to the editor prior to upcoming city elections, in response to letter claiming that incumbent mayor had appreciated city employees by giving them pay raises, indicated that letter was written in captain’s capacity as a citizen and that his speech was on a matter of public concern); *Griggs v. Board of Fire Comrs.*, 430 N.E.2d 188 (Ill. App. 1981) (firefighter’s statements to a newspaper reporter critical of the deputy chief and regarding funding of the fire department were protected); *Castleberry v. Langford*, 428 F. Supp. 676, 683 (N.D. Tex. 1977) (holding that firefighter’s remarks, critical of city officials and printed in local newspaper, were protected by First Amendment); *Marr v. Ft. Smith*, 501 S.W.2d 777, 779 (Ark. 1973) (firefighter’s expressed dissatisfaction, during television interview, with a city ordinance was protected speech); *Belshaw v. Berkeley*, 54 Ca. Rptr. 727 (1966) (firefighter’s letter to newspaper regarding pay disparity between police and firefighters was constitutionally protected speech; firefighter could not be disciplined under personnel rules requiring employees to refrain from adverse criticism of superiors; court noted that letter was not offensive, defamatory, or obscene and it did not urge or suggest violent or unlawful conduct).

Bear in mind, too, that the negative impact on government efficiency must relate to the proper function of the employer, and must be in connection with the function of the particular employee. In other words, the question here is not whether some minor unpleasant feelings are engendered in the City government by Mr. Jacobson's protected speech, but rather whether the fire department's firefighting abilities themselves are compromised. *See Gilbrook v. Westminster*, 177 F.3d 839, 869 (9th Cir. 1999). Here, there is an absolute absence of evidence that the firefighting capacity of Ironwood was affected in the slightest by Mr. Jacobson's letters, the subjects of which had nothing whatsoever to do with the fire department. Despite the higher standard to which fire departments are often held—because of the unique necessity in fire departments and other similar “quasi-military departments” to maintain an *esprit de corps*—the facts in this case reveal the limits of such arguments; the special nature of a fire department simply has no bearing on a consideration of Mr. Jacobson's circumstances. *Cf. Muller v. Conlisk*, 429 F.2d 901, 904 (7th Cir. 1970) (police officer, despite “quasi-military” status, had First Amendment protection for speech derogatory to the police department).

In other words, not only has there been no showing of any particular harm resulting from Mr. Jacobson's letters to the newspapers, but it seems extremely unlikely that the type of harm contemplated by First Amendment law could ever result from these letters or letters like them.

It is evident that if the City of Ironwood disciplined Mr. Jacobson for any or all of his letters to the editor, the discipline would run afoul of the First Amendment. But here, the problem posed is even graver: Ironwood, while not actually disciplining Mr. Jacobson, has threatened to do so should he not immediately desist from making any public criticisms. This threat constitutes a prior restraint on Mr. Jacobson's speech—as well as on the speech of any other similarly situated Ironwood employee. The chill that this type of threat casts on speech that has not yet been uttered is viewed by the Supreme Court with even greater disfavor than after-the-fact discipline: when a law acts as “[a] wholesale deterrent to a broad category of expression,” the stakes are even higher than in a case of individual after-the-fact discipline. *United States v. National Treasury Employees Union*, 513 U.S. 454, 467 (1995). The Court therefore imposes an even stricter burden on employers: “The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government.” *NTEU*, 513 U.S. at 468. Or, as the *Frenchtown* court put it, the court must

weigh[] against the state the combined interest of *all* employees whose speech is restricted by the rule *plus* all members of the public who would have an interest in hearing the restricted speech, . . . and the government must show that the speech being restricted *necessarily* would have impacted the *actual* operation of the government. . . [T]he government “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”

246 F. Supp. 2d at 740 (citation omitted). Certainly, this is a burden that Ironwood cannot satisfy.

**REQUEST TO RESCIND THREAT OF DISCIPLINE FOR
EXERCISING FREE SPEECH RIGHTS**

Seven years ago, the ACLU of Michigan won a similar free speech case against Frenchtown Township on behalf of the Frenchtown firefighters union. Firefighters Local 3233 v. Frenchtown Charter Twp., 246 F. Supp. 2d 734, 737 (E.D. Mich. 2003). Instead of engaging in protracted and expensive federal litigation in the Ken Jacobson matter, we desire to settle the issue amicably. Accordingly, we urge the City of Ironwood to rescind the March 9 memo and state clearly to Mr. Jacobson that he need fear no discipline for exercising his constitutional right to express himself on matters of public concern, irrespective of whether his expression is critical of the City of Ironwood or particular employees.

Thank you for your prompt attention to this matter.

Very truly yours,



Sarah C. Zearfoss, Cooperating Attorney
Michael J. Steinberg, Legal Director
American Civil Liberties Union of Michigan
2966 Woodward Avenue
Detroit, Michigan 48103
(313) 578-6814
msteinberg@aclumich.org

cc: Ironwood Mayor and City Commission Members (via email only)

Unplowed Streets Hurt Downtown Businesses (December 27, 2009)

I was disappointed this morning, Saturday, 12-26-09 (yes the day AFTER Christmas) while driving through the downtown of Ironwood vs Hurley. The downtown streets in Ironwood were narrow and covered with snow and the parking spaces in front of downtown businesses were accessible only by those with 4 wheel drive.

What a difference as soon as I crossed the bridge into Hurley! The streets were plowed as clean as possible and the downtown businesses had street parking accessible by any type of vehicle. My first thought on seeing these two different situations was "which town looks like it's open for business?" "Which town is welcoming in appearance?" If I was a stranger driving through these adjoining towns, I wouldn't waste my time trying to plow through a foot or more of frozen slush to attempt to shop at a downtown Ironwood business when I could drive west a few blocks to a town that clearly invites me to stop and shop.

If I was a downtown business owner in Ironwood, paying the exorbitant taxes and fees which they do, I'd be very vocally angry that my city, which I support with my aforementioned taxes and fees, was doing so little to help me out here! Hurley always has seemed to be able to keep the downtown streets clear of snow, and they usually finish BEFORE people are out and about. Good for them! They should be proud of the job they do. What is our city manager doing about this recurring fiasco?

Ken Jacobson
Ironwood, Michigan

Paralysis by Analysis (December 30, 2009)

So, if I understand the Chronicle report correctly, after numerous complaints about the lousy street conditions on Saturday the 26th, the manager's response was that the crews do a good job. No one is criticizing the crews' performance. They, as usual, do an outstanding job under trying conditions.

The complaint should be lodged against management for not being on top of the situation. As for the lack of workers, as usual we see the results of "paralysis by analysis". One can study this stuff until the cows come home, but this isn't an engineering problem that needs to be viewed from different angles. We need leadership in this city. If the manager is incapable of ever making a timely decision, as seems to usually be the case, the commissioners need to. Workshops are lovely but sometimes a person needs to make a decision. Come on guys, let the crew plow the damned streets! How difficult a decision is that?

Ken Jacobson
Ironwood, Michigan

EXHIBIT A

Appreciates Improvement In Plowing Efforts (January 23, 2010)

I must give credit where credit is due, and since my last letter commenting on the mess downtown on the day after Christmas the snow removal in the downtown Ironwood area has been exceptional! The streets and sidewalks are mostly clear of snow and one can easily find parking and walk safely without having to climb over a pile of snow. The notable exception being the lot parking lot across from Tacconelli's where the snow was plowed INTO the lot from the sidewalk. I've lived downtown for 14 years and they haven't done that before. It's still there. The city workers work long hard hours at a difficult job, we're lucky to have them. I hope management appreciates their efforts, especially the next time they think to try the apparent union busting tactics that were attempted during the most recent contract talks.

Ken Jacobson
Ironwood, MI

911 Committee Members Take Their Jobs Seriously (February 27, 2010)

While reading the Globe article about the 911 dispatch moving from Negaunee to Iron County Michigan, I was very disappointed in the opinion presented as fact that the safety of Gogebic County police officers and citizens will be in jeopardy when the switch in dispatch centers occurs. This is only conjecture and this person's opinion, without the facts to back it up.

Not only that, but clearly the vast majority of the county representatives on the 911 committee, including three of the five police agencies located in the county, have repeatedly voted to support this move.

How dare he imply that they or anyone on the 911 committee would support an action that would put anyone's life in danger?

In my opinion that sort of reckless implication is what is really irresponsible and it should be retracted.

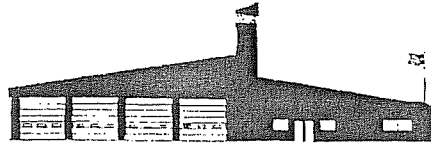
I've toured both dispatch centers in question. They both are capable of handling Gogebic County's dispatching needs.

I question why anyone would want our hard-working, tax-strapped citizens to pay considerably more for a similar service.

Ken Jacobson
Ironwood, MI

The City of
IRONWOOD
Department of Public Safety

123 West McLeod Avenue Ironwood, Michigan 49938
PHONE: 906-932-1234



Robert Erspamer
Director of Public Safety

Date: 3/9/2010

To: Ken Jacobson, Volunteer Fire Department Assistant Chief
From: Robert Erspamer, Director of Public Safety
Scott Erickson, City Manager
Subject: Written Warning, Unprofessional Conduct-Insubordination

Well over a year ago we met to discuss several items and issues, one of which was a continued pattern of insubordination on your part.


Recently, you have written several letters to the local newspaper and local Internet newspaper. One of the letters openly criticizes the City Manager and the other criticizes the Director of Public Safety.

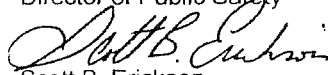
As a paid volunteer firefighter, you are an agent of the City and this behavior is considered insubordination. Your behavior has a negative impact on the City of Ironwood, its management and its employees.

Both of us are willing to meet with you to discuss your opinions, thoughts or ideas in private; however, public criticism will no longer be tolerated.

Please be advised that if immediate and sustained improvement in your behavior is not realized, you will be subject to further disciplinary action, up to and including termination from your position as an Ironwood Volunteer Fire Department member.

If you have any questions, feel free to contact either of us.

Sincerely,

Robert J. Erspamer
Director of Public Safety


Scott B. Erickson
City Manager

Cc: Robert Tervonen, Volunteer Fire Chief

EXHIBIT B