



July 24, 2008

Chief David Dicks
Flint Police Department
210 East Fifth Street
Flint, MI 48502

Re: Unconstitutional discipline of Sgt. Rick Hetherington and Lt. David Winch for speaking to the media concerning matters of public concern

Dear Chief Dicks:

We write on behalf of Sergeant Rick Hetherington and Lieutenant David Winch whose constitutional rights to speak to the media about the Flint Police Department on matters of public concern have been violated. We ask that you repeal your unconstitutional rule completely banning officers from speaking to the media. We also ask that you rescind the discipline that you imposed on Sgt. Hetherington and Lt. Winch for exercising their constitutional rights.

RECENT PUBLIC CONTROVERSY CONCERNING APPOINTMENTS IN THE CITY OF FLINT POLICE DEPARTEMENT

You are well aware that the recent appointment of you and your father, Richard Dicks, as a team to lead the City of Flint Police Department has become a matter of public controversy in the City of Flint. This controversy is not only fuelled by the “father and son” aspect of the appointments but also by (1) the fact you were promoted from the entry rank of police officer to the highest rank in the department, (2) the fact that you were previously terminated from the department for drunken driving, (3) the questionable legitimacy of these appointments under the Flint City Ordinance, and (4) the ongoing FBI investigation involving your father’s relationship with Career Alliance. In addition, the promotion of Dave Forystek, a Sergeant, to Deputy Chief, became a matter of public concern because he bypassed many very qualified officers in the higher rank of Lieutenant and Captain.

As a result of the controversial nature of these appointments, the news media sought comment from reputable leaders in the Flint City Police Department. The opinions of Sergeant Rick Hetherington and Lieutenant David Winch were requested because they both serve as president of the unions representing their respective ranks. In spite of the fact these two officers were exercising their right to speak on matters of public concern, our investigation has revealed the following facts establishing that both were punished for exercising that right.

SERGEANT RICK HETHERINGTON

While off duty Sergeant Hetherington was contacted by the Flint Journal and asked his opinion about these appointments and his quote below was printed:

**AMERICAN CIVIL
LIBERTIES UNION
OF MICHIGAN
FLINT BRANCH**

P.O. BOX 1001
FLINT, MI 48501

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www.aclumich.org

"Basically (the Flint Police Department is) a laughingstock and appointments like these don't add much more to it," said Sgt. Rick Hetherington, president of the sergeants union."

We have documents that unequivocally establish you suspended Sergeant Hetherington two days without pay because he exercised his right to express this opinion to the media.

LIEUTENANT DAVID WINCH

The Flint Journal contacted Lieutenant David Winch and asked his opinion on the propriety of the appointment of David Forystek to Deputy Chief. On June 7, 2008, the Flint Journal quoted Lieutenant Winch in the following context:

Lt. David Winch, president of the lieutenants' and captains' bargaining unit, said he is checking to see if the contract was violated when Forystek was promoted Monday.

"We're checking into our options," Winch said, adding filing a grievance could be a possibility."

We have documents that unequivocally establish you disciplined Lieutenant Winch on June 11, 2008, by ordering Lieutenant Whaley to verbally warn Lt. Winch for making this statement.

We also have documentation establishing that when others involved in your investigation of these officers questioned whether your intent to take disciplinary action against these officers was appropriate under existing personnel rules, you issued the following directive as Flint Police Department policy to be used for interpreting those rules:

No member of the department shall speak to or release any information regarding the department and/or its employees to the news media. This shall be in accordance with the Flint Police Department's Rules and Regulations #5/002.2-1 Responsibility for the Release of Information.

PUBLIC EMPLOYEES' RIGHTS TO SPEAK ON MATTERS OF PUBLIC CONCERN

We have also been informed that during a recent radio program interview of you concerning this disciplinary action and your rule forbidding police department personnel from speaking to the media, you defended your right to forbid employees for speaking out on matters of public concern by stating there are Supreme Court decisions saying public employees have to "keep their mouths shut." Your characterization of the Supreme Court's stance on this issue callously disregards the decisions upholding first amendment rights of the employees you supervise.

First Amendment Rights of Public Employees

It has long been settled that by accepting employment with the government, public employees do not "relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." United States v. National

Treasury Employees Union [NTEU], 513 U.S. 454, 465 (1995) (quoting Pickering v. Board of Education, 391 U.S. 563, 568 (1968); accord Connick v. Myers, 461 U.S. 138, 142 (1983). Typically, the Court has considered the scope and extent of public employees' First Amendment rights in the context of discipline of an individual employee following some statement by the employee. See generally Pickering, 391 U.S. 563 (holding unconstitutional the dismissal of teacher for publishing comments critical of school board).

In NTEU, the Supreme Court extended the tests developed in Pickering and its progeny to a prior restraint—a law prohibiting federal employees from accepting any compensation for making speeches or writing articles. In doing so, the Court set forth standards that have resulted in determinations that the type of restraint of public employees that your rule forbidding Flint police department personnel from speaking to the media, unconstitutionally “chills potential speech before it happens”.

In an ACLU case we recently litigated on behalf of firefighters employed by the Frenchtown Township Fire Department, U.S. District Judge Marianne Battani found a rule almost identical to the rule you have imposed on the City of Flint Police Department was unconstitutional. International Association Of Firefighters Local 3233 v. Frenchtown Charter Township, 246 F.Supp.2d 734 (E.D. Mich. 2003) (See opinion attached). In the Frenchtown case the township adopted an ordinance encompassing a media ban similar to your memo. It provided:

The Fire Chief, or his/her designee, shall be the only authorized person who may release facts regarding fire department matters, fires or other emergencies to the news media. All other personnel shall refer all media inquiries to the Chief or the designee.

Judge Battani held this ordinance was an unjustified prior restraint in violation of firefighters' First Amendment rights to comment on matters of public concern. Your rule forbidding employees to speak to the media will suffer the same fate if we are forced to pursue this case on behalf of Sergeant Hetherington and Lieutenant Winch.

Under the circumstances, we are requesting that you agree to the following within 10 days from the receipt of this letter:

1. Remove all the discipline issued to Sergeant Hetherington and Lieutenant Winch.
2. Reinstate the two (2) days of seniority Sergeant Hetherington lost as a result of his unconstitutional suspension.
3. Reimburse the pay Sergeant Hetherington lost as a result of his unconstitutional suspension.

4. Provide Sergeant Hetherington and Lieutenant Winch adequate compensation for the distress and inconvenience they have suffered as a result of your unconstitutional acts.
5. Rescind your unconstitutional rule prohibiting police department personnel from releasing any information regarding the department and/or its employees to the news media.

If we do not receive a response acquiescing in the relief requested in this letter by August 4, 2008, we will have no alternative but to pursue appropriate relief on their behalf in United States District Court. Please direct all responses to my office address listed below.

Sincerely,

Gregory T. Gibbs
Chair
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Cc: Trachelle Young, Flint City Attorney

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