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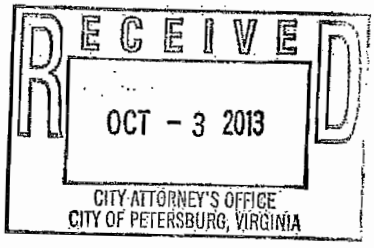
[* **] United States Bankruptcy Court for the Eastern District of Virginia
[* **] United States District Courts for the Eastern and Western Districts of Virginia

CONFIDENTIAL – FOR SETTLEMENT AND NOTICE PURPOSES AND FOIA REQUESTS

October 1, 2013



Mayor Brian Moore
135 N. Union Street
Petersburg, Virginia 23803

Mr. Brian Telfair, Esq.
City Attorney
135 N. Union Street
Petersburg, Virginia 23803

Dear Mr. Moore and Mr. Telfair:

This firm represents Petersburg City Police Officers Vance Richards and Herbert Liverman in connection with various employment and discipline disputes with the City and City personnel. This letter is intended (1) to provide you notice of Officer Richards's and Liverman's potential claims against the City of Petersburg pursuant to Virginia Code § 15.2-209, (2) to request information under the Virginia Freedom of Information Act, and (3) to provide you an opportunity to resolve the matter prior to litigation, thereby avoiding excessive defense fees, adverse publicity, and a substantial jury verdict or jury verdicts.

Officer Liverman is an eighteen year veteran of the Petersburg Police Bureau. Officer Liverman has served as an instructor at the regional police academy, and even as the coordinator of Applied Patrol Tactics, a.k.a. "hell week," at the academy. In March 2011, he was solicited to revise various training techniques and hands-on scenarios at the academy. Officer Richards is also veteran police officer with twenty-one years of law enforcement experience, including four years with the Petersburg Police Bureau. He too has been an academy instructor for approximately ten years. He has trained with the New York Police Department Special Victims Unit, and has served as a detective in sex crimes and child abuse, and is currently a CIT Officer.

Needless to say, both of these officers have great experience in the proper training and conduct of police officers, especially in the most crucial issues of the practical application of classroom lessons to real-life scenarios.

In June 2013, Officer Liverman learned that a lead instructor at the regional police academy was soliciting relatively inexperienced officers to become certified as instructor for the academy. Based on Officer Liverman's experience and specialized knowledge, he was concerned about this, and he reasonably believed that this was yet another instance of a growing trend that could harm the public and could endanger the lives, safety, and property of officers and citizens. In response, he posted on Facebook the following message on June 17, 2013 as an expression of that opinion formed as a **citizen** with particular expertise in the subject:

> "Sitting here reading posts referencing rookie cops becoming instructors. Give me a freaking break, over 15 years of data collected by the FBI in reference to assaults on officers and officer deaths shows that on average it takes at least 5 years for an officer to acquire the necessary skill set to know the job and perhaps even longer to acquire the knowledge to teach other officers. But in todays [sic] world of instant gratification and political correctness we have rookies in specialty units, working as field training officers's [sic] and even as instructors. Becoming a master of your trade is essential, not [sic] only does your life depend on it but more importantly the lives of others. Leadership is first learning, knowing and then doing."

This comment was "liked" by at least thirty-two people and received many comments, including one which stated, "I agree, petg [sic] made me an FTO in less than a year, no [sic] way was I ready[.]" Not that it needed to be, but the comment was supported by authoritative sources.[1]

In response to Officer Liverman's post, on June 17, 2013 Officer Richards wrote:

> "Well said bro, I agree 110%... Not to mention you are seeing more and more younger Officers [sic] being promoted in a Supervisor/ or [sic] roll [sic]. It's disgusting and makes me sick to my stomach DAILY. LEO Supervisors should be promoted by experience... And what comes with experience are "experiences" that "they" can pass around to the Rookies and younger less experience Officers [sic]. Perfect example, and you know who I'm talking about..... How can ANYONE look up, or give respect to a SGT in Patrol with ONLY 1 1/2yrs experience in the street? Or less as a matter of fact. It's a Law Suit [sic] waiting to happen. And you know who will responsible for that Law Suit [sic]? A Police Vet [sic], who knew tried [sic] telling and warn the admin for promoting the young Rookie who was too inexperienced for that roll [sic] to begin with. Im [sic] with ya bro....smh".

[1] See Federal Bureau of Investigations, U.S Dept. of Justice, *Violent Encounters: A Study of Felonious Assaults on Our Nation's Law Enforcement Officers* 159 (Aug. 2006) ("The amount of street time needed in an agency to lose the rookie status varies from agency to agency. Many officers expressed that this generally occurs after spending 5 years on patrol and becoming comfortable with their position in the law enforcement profession. ").

Officer Liverman subsequently commented on June 17, 2013:

> "There used to be a time when you had to earn a promotion or a spot in a specialty unit...but now it seems as though anything goes and beyond officer safety and questions of liability, these positions have been "devalued"...and when something has no value, well it is worthless."

Officer Richards subsequently commented on June 17, 2013:

> "Your [sic] right..... The next 4yrs can't get here fast enough... From what I've been seeing I don't think I can last though. You know the old 'but true' saying is.... Your Agency is only as good as it's Leader(s)... It's hard to 'lead by example' when there isn't one....smh"

No leadership

Officer Richards and Liverman were subsequently disciplined for this exchange, and they were notified of their discipline on or about July 8, 2013. That discipline is continuing, as described below. The "Narrative of Event/Actions" on the Disciplinary Action Report Form, signed on July 8, 2013, states, "During a 'Facebook' exchange with Officers Vance Richards and Evan Jones, Liverman made the comment, 'There used to be a time when you had to earn a promotion or a spot in a specialty unit... but now it seems as though anything goes and beyond officer safety and questions of liability, these positions have been 'devalued'... and when something has no value, well it is worthless." Officer Richards's "Narrative of Event/Actions," signed on July 8, 2013, states, "During a 'Facebook' exchange with Officers' [sic] Herbert Liverman and Evan Jones, Richards made the comment, 'Perfect example, and you know who I'm talking about....How can ANYONE look up,or [sic] give respect to a SGT in Patrol with ONLY 1 1/2yrs experience in the street? Or less as a matter of fact. It's a Law Suit waiting to happen. And you know who will responsible for that Law Suit? A Police Vet, who knew tried telling and warn the admin for promoting the young Rookie who was too inexperienced for that role to begin with. I'm with ya bro.....' In addition, 'It's hard to 'lead by example' when there isn't one...'"

7/8 Notice of Disciplinary action

Petersburg identified the policy violation for each of these to be General Order 400-23 Social Networking-IV Procedures #4: "Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the publics [sic] perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law." This General Order was issued April 15, 2013.

400-23 4/15/13

The discipline administered to each officer was an oral reprimand and a return to probation for six months, apparently (per letters dated August 13, 2013 from Major Charlene L. Hinton) beginning June 17, 2013. Because of the return to probation, both Richards and Liverman were notified by letters dated August 13, 3013 that they were ineligible to participate in the testing for the position of Sergeant in the most recent promotion pool, which was announced on July 25, 2013, pursuant to General Order 100-14, § III(f), adopted on July 26, 2013.

7/25 Notice to promotional process

Officers Liverman and Richards believe that this is only the most recent example of a long line of discriminatory or preferential treatment in the Bureau, and we will be gathering the evidence in support of that belief and will take appropriate remedial action.

As to this incident in particular, several irregularities are apparent. First, General Order 100-14, under which Officers Liverman and Richards were denied participation in the promotion process, was promulgated on July 26, 2013, one day after the promotional opportunity was published and about ten days after Liverman and Richards were notified of their discipline. General Order 100-14 replaced the longstanding General Order 1-12, under which Officer Liverman and Richard would be permitted to participate in the promotion process despite the discipline. This ex post facto alteration to the definition of those who are qualified for promotion constitutes a deprivation of Liverman's and Richards's due process rights under the Fourteenth Amendment.

Second, we cannot locate in the Petersburg Police Bureau Code of Conduct or General Orders any authority permitting the Bureau to place Richards and Liverman back on probation for their alleged violations. In the absence of authority to punish Richards and Liverman in this way, this constitutes a deprivation of due process and an infringement of their First Amendment Rights. Moreover, despite at least Liverman's desire to grieve his discipline he was informed that he was not permitted to do so since it was an oral reprimand. This, too, was a denial of his due process rights.

Third, and perhaps most importantly, with respect to the underlying alleged misconduct (i.e., the Facebook posts), any discipline violates Richards's and Liverman's First Amendment rights, as they were commenting as citizens on matter of public concern. As the Supreme Court has said, "[A] citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." Garcetti v. Ceballos, 547 U.S. 410, 419 (2006). "[P]ublic employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." Id. at 417.

This First Amendment right is fundamental in the American system, because "[speech] concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). The First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. Garcetti v. Ceballos, 547 U.S. 410, 419 (2006). Public employees like Liverman and Richards are "the members of a community most likely to have informed and definite opinions" about a wide range of matters related, directly or indirectly, to their employment. Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2500 (2011) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968)). This right of free speech is not limited to political issues, but covers all matters of public concern. Connick v. Myers, 461 U.S. 138, 147 (U.S. 1983)

Speech involves a matter of public concern when it involves an issue of social, political or other interest to a community, when viewed in context. Kirby v. City of Elizabeth City, 388 F. 3d 440, 446 (4th Cir. 2004). This is determined by the content, form, and context of the statement, as revealed by the whole record. Connick v. Myers, 461 U.S. 138, 147-48 (1983). The determination rests on whether the public or community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a private matter between employee and employer. Edwards v. City of Goldsboro, 178 F.3d 231, 247 (4th Cir. 1999).

Liverman's initial post clearly related to matters of public concern. Liverman is commenting on other posts he saw, expressing concern as a particularly well-educated citizen with specialized knowledge on a practice that he believed impacted public safety and the safety of public officers. He specifically grounds his opinion on data collected and previously published by the FBI. The numerous "likes" and comments demonstrates that the public was or was likely to be concerned with the particular expression. Nothing in this post appears to be raising a personal grievance. Moreover General Order 400-23, Sec. IV(5) specifically identifies matters affecting issues of "public safety" as being matters of public concern.

This initial post shapes the entire content and meaning of the discussion that follows, even though the discussion delves into details rather than covering pure generalities. Richards agrees that the concern is valid and expresses concern that the promotion of inexperienced officers may lead to a lawsuit, and that the inexperienced supervising officers will not be able to set the example necessary for subordinate officers to follow. Liverman points out that specialty units will not be as effective in their tasks where the members lack sufficient experience. For these comments, they were disciplined. Notably, under Connick, Stroman, and Cambell v. Galloway, 483 F.3d 258 (4th Cir. 2007), it is clear that even if one part of the correspondence touches on a matter of public concern, the whole correspondence is protected.

Once it is clear that speech on a matter of public concern is implicated, the Court considers whether the public body had sufficient interests to justify the adverse employment action under the Pickering balancing test. Richards's and Liverman's interest in addressing a matter of public concern and the public's interest in hearing the opinions of well-informed law enforcement officers on matters affecting public safety and security clearly outweigh Bureau's interests under the circumstances. There is no reason to believe that these isolated, off-duty comments on Facebook critiquing practices practices of promoting inexperienced officers in an unidentified department or departments impaired the maintenance of discipline by supervisors, damaged close personal relationships crucial to police operations, impeded the performance of the public employee's duties, interfered with the operation of the institution, conflicted with the responsibilities of the employee with the institution, or abused the authority and public accountability that the employee's role entailed.

It is likewise clear that the Bureau is not entitled to qualified privilege. The defense is not available in an official-capacity suit brought against a government entity or a government officer as that entity's agent. Kentucky v. Graham, 473 U.S. 159, 165-67 (1985). Moreover, the Fourth Circuit has made clear since at least 2000 that making decisions relating to promotion on the basis of protected comments violates the First Amendment. Suarez Corp. Indus. v. McGraw, 202

F.3d 676, 686 (4th Cir. 2000). Furthermore, it is clear from the language of the discipline report and the underlying policy that the Bureau did not engage in a Pickering balancing test. Those reports articulate false and misleading bright line standard under which Richards and Liverman were disciplined: "Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the publics [sic] perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law." This bright-line rule is fundamentally at odds with Supreme Court case law rejecting "a general standard against which all such statements may be judged." Connick v. Myers, 461 U.S. 138, 154 (1983) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968)). Because the policy adopted just two months before and the disciplinary report themselves articulate a clearly erroneous basis for evaluating the First Amendment conduct of Richards and Liverman, the agents of the public body and the public body itself will not convincingly be able to claim that they are entitled to qualified immunity for a good faith but erroneous application of established law.

Moreover, General Order 400-23, Social Networking (dated April 15, 2013), itself and the discipline of Richards and Liverman pursuant to the policy constitutes a violation of the First Amendment by chilling the speech of Petersburg Police Bureau employees. A public employer is prohibited from threatening to discharge or discipline a public employee in an effort to chill that employee's speech rights under the First Amendment. Ridpath v. Board of Governors, 447 F.3d 292, 319 (2006).

General Order 400-23 states that its purpose is to "clearly identify prohibited activities by the Petersburg Bureau of Police employees on social networking and other web sites, both on and off-duty." It claims to prohibit "activities by employees on such web sites such as MySpace, Facebook, Twitter and other social sites that may bring discredit to the Petersburg Bureau of Police and any other City of Petersburg Department." The General Order overreaches, prohibiting activities protected under the First Amendment. It announces, "Employees shall not post, transmit, reproduce, and/or disseminate information (text, pictures, video, audio, etc.) to the internet or any other forum (public or private) that would tend to discredit or reflect unfavorably upon the Petersburg Bureau of Police or any other City of Petersburg Department or its employees." Section IV(4), under which Richards and Liverman were disciplined, falsely advises the police officers that "[n]egative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law." This provision of the Order is not only wrong but also clearly inappropriate. It is not the place of the Chief of Police or his Designee to advise employees as to their legal rights under the First Amendment in an Order threatening the employees with discipline for communicating with the public.[2] Similarly, Section IV(5) erroneously describes the Pickering balancing test. Whereas Pickering weighs competing interests on a case-by-case basis, Section IV(5) indicates that officers may never make comments on matters of public concern that "disrupt the workplace, interfere with important working relationships or efficient work flow, or undermine public confidence in the officer." The implicit threat of discipline in the General Order is made explicit in its final sentence: "Additional [sic], social networking violations deemed to be in violation of

[2] Cf. Virginia Code § 54.1-3904: **"Penalty for practicing without authority.** Any person who practices law without being authorized or licensed shall be guilty of a Class 1 misdemeanor."

the Policy 100-1, Rules of Conduct will be forwarded to Chief of Police or designee for appropriate disciplinary action." When this policy is viewed in light of discipline administered against Richards and Liverman, placing them on probationary status where their future employment is in jeopardy, it is clear that their employment was threatened for their valid exercise of their First Amendment rights.

This overreaching and chilling effect in General Order 400-23 is further exacerbated by the plainly unconstitutional Executive Order #13-09 adopted September 25, 2013, which would require every statement about the police department published by an employee of the department, whether as a citizen or as an employee, to be censored by the Chief of Police. These actions bring to mind the words of Article I (Declaration of Rights), Sec. 12 of the Virginia Constitution: "A DECLARATION OF RIGHTS made by the good people of Virginia in the exercise of their sovereign powers, which rights do pertain to them and their posterity, as the basis and foundation of government[:] . . . That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments."

The timeline of these events suggests an even more sinister possibility—namely that the Bureau is purposefully manipulating the pool of candidates for the promotions. Richards and Liverman were disciplined under a questionable application of the Social Networking policy and placed on probation, without any legal basis that we can find in early to mid July. The promotion opportunity was announced on July 25, 2013, and a policy published on July 26, 2013 excluding Richards and Liverman from the promotion opportunity on the basis of their probation. This course of events lacks the appearance of propriety. If it is found, as it is suspected, that someone in the Bureau at the policy-making level had an axe to grind against Liverman or Richards or both, or evidence of favoritism towards some individual or individuals in the promotion pool, this evidence of bias will be admissible in Court as motive. Moreover, the fact that two Caucasian officers in a predominantly African American bureau were denied an opportunity to participate in a promotion process for which they were clearly qualified on the basis of a questionable disciplinary action obviously suggests racial employment discrimination. The scope of discovery, as you can imagine, will be broad in this case.

Ethnic, Demographics

Pursuant to our obligations to conduct a reasonable investigation into the factual basis of our client's potential claims prior to suit, we demand the following be produced to us:

1. All personnel records for Officers Richards and Liverman (see attached authorizations).
2. Records identifying all individuals who participated in the two-hour written examination for Police Sergeant on or about August 29, 2013.
3. For each individual who participated in the two-hour written examination for Police Sergeant on or about August 29, 2013, and pursuant to Virginia Code § 2.2-3705.8, all contracts between a public body and the individual, and all records of the position(s), official salary(ies) or rate(s) of pay of the individual since the start of their employment, and records since January 1, 2012 of the allowances or reimbursements for expenses paid to the individual.

4. For each individual who participated in the two-hour written examination for Police Sergeant on or about August 29, 2013, records showing the scored results of such examination.
5. All complaints concerning the conduct of any individual who participated in the two-hour written examination for Police Sergeant on or about August 29, 2013.
6. All drafts of what became General Order 400-23, General Order 100-14, and Executive Order #13-09, and all communications related to such drafts.
7. All emails by and between Patricia A. Clement, and naejd2@comcast.net or Sherwood Young from December 1, 2010 to January 31, 2011.
8. Records identifying every individual denied participation in the in the two-hour written examination for Police Sergeant on or about August 29, 2013 based on General Order 100-14.
9. All emails from or to Patricia A. Clement in February or March 2011 referencing Officer Liverman.
10. All emails dated April 26, 2011 from Carl Moore referencing Officer Liverman, and all replies to or forwards of such emails.
11. All complaints as to the conduct of any other officers filed by Officer Liverman or Officer Richards since January 2011.

Please remember that even if you decide to withhold all or part of the records requested, you have an obligation to identify the volume and subject matter of the withheld records, the specific Code section authorizing the withholding, and to release after redactions as much of the records as is not subject to being withheld. We further request that you estimate the costs of such production in advance, it the amount exceeds $200.

Also, be aware that in the event Richards or Liverman are further disciplined or if either suffer adverse employment action, we believe that we may have a good faith basis to conclude that such action was in retaliation for this notice of their claims, which is an exercise of their First Amendment right to petition the government for redress of grievances. Moreover, please also be aware that it is well-established that Virginia recognizes a common law tort claim of wrongful discharge in violation of established public policy against an individual who was not the plaintiff's actual employer but who was the actor in violation of public policy and who participated in the wrongful firing of the plaintiff, such as a supervisor or manager. VanBuren v. Grubb, 284 Va. 584, 593 (2012). The public policy of Virginia, embodied in Article I (Declaration of Rights), Sec. 12 of the Virginia Constitution, prohibits retaliatory terminations based on public employees' comment on matters of public concern. Therefore, if Richards or Liverman are terminated, we will be exploring the personal liability of every individual who participated in the termination.

Notice of retaliation

In short, Officers Richards and Liverman have claims or may have claims against the City and various City personnel for inter alia negligence, violation of Constitutional due process, equal protection, and First Amendment rights under § 1983 and 1988, and violation of Title VII for both an adverse employment actions and hostile work environment, arising from (1) the enactment of the General Order 400-23 on or about April 15, 2013, (2) the continuing discipline of Richards and Liverman for their June 17, 2013 Facebook messages effective on or about June 17, 2013 but announced to them on or about July 8, 2013, (3) the enactment of General Order

100-14 on or about July 26, 2013, under which they were disqualified from participating in the promotion process, (4) the application of General Order 100-14 against them, which they were notified about on or about August 13, 2013 by letter from Charlene L. Hinton, and (5) the enactment of Executive Order #13-09 on or about September 25, 2013.

This litigation will likely be time consuming, expensive, and embarrassing for the City of Petersburg. A prompt, pre-filing resolution of this matter is in the interest of all of the parties. While our clients have not at this time provided specific settlement authority to us, they may be willing to entertain reasonable settlement offers or an offer to sit down with the City to attempt to mediate a resolution related to this matter.

Please confirm receipt of this letter by email or mail.

Very truly yours,

Thomas H. Roberts, Esq.

THR/atb

Enclosures