

# The Local Government LIABILITY BEAT



PRESENTED BY LOCAL GOVERNMENT RISK MANAGEMENT SERVICES INC - A SERVICE ORGANIZATION OF THE ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA AND THE GEORGIA MUNICIPAL ASSOCIATION RISK MANAGEMENT PROGRAMS

## UNITED STATES COURT OF APPEALS FOR FOURTH CIRCUIT FINDS POLICE DEPARTMENT SOCIAL MEDIA POLICY UNCONSTITUTIONAL AND PUNISHMENT OF TWO OFFICERS UNDER THAT POLICY TO BE UNCONSTITUTIONAL

By Jack Ryan, Attorney, Legal and Liability Risk Management Institute

In *Liverman v. City of Petersburg* [Virginia] the United States Court of Appeals for the Fourth Circuit reviewed the discipline of two officers from the City of Petersburg Police Department that was based on posts they had made on Facebook. In it's review the court overturned the discipline and concluded that the police department's policy was "overbroad" because it prohibited too much, and therefore infringed on the officers' First Amendment rights.

The policy provisions the court took issue with are outlined as follows (actual policy language bold print):

The preface to the revised policy prohibits in sweeping terms the dissemination of any information:

**"that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees."**

The central provision of the policy, which we will refer to as the Negative Comments Provision, states:

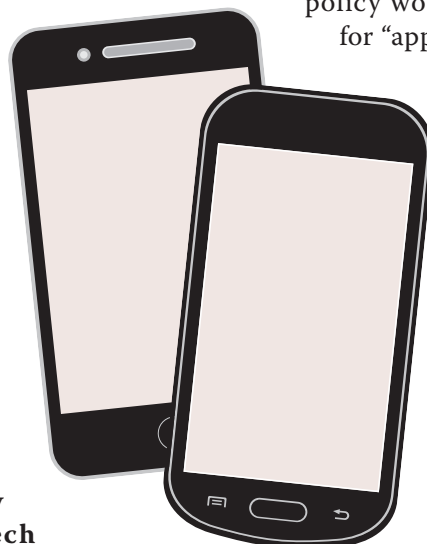
**"Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment free speech**

**clause, in accordance with established case law."**

Another provision, which we label the Public Concern Provision, specifies:

**Officers may comment on issues of general or public concern (as opposed to personal grievances) so long as the comments do not disrupt the workforce, interfere with important working relationships or efficient work flow, or undermine public confidence in the officer. The instances must be judged on a case-by-case basis.**

The court also noted that the policy strongly discouraged officers from posting information about off-duty activities and provided that violations of the policy would be forwarded to the chief of police for "appropriate disciplinary action."



The court detailed the messages that were posted by the involved officers and the disciplinary proceedings as follows:

**Liverman:** 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 today's world of instant gratification and political correctness we have rookies in specialty units, working as field training officers and even as instructors. Becoming a master of your trade is essential, not only does your life depend on it but more importantly the lives of others. Leadership is first learning, knowing and then doing.

More than thirty people "liked" or commented on this post. Richards, also off-duty at the time, commented as follows:

**Richards:** Well said bro, I agree 110%... Not to mention you are seeing more and more younger Officers being promoted in a Supervisor/ or roll. 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 experienced Officers. 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 waiting to happen. And you know who will be 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 roll to begin with. Im with ya bro....smh\*

Later that day, Liverman responded to Richards with a comment of his own:

**Liverman:** 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.

Richards then replied:

**Richardson:** Your 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

Among those who liked or commented on the Facebook postings, most were current or former Department officers.

### **Discipline:**

Two sergeants, Liverman's and Richards's supervisors, learned of the exchange and notified

Chief Dixon of the issue. Dixon determined that the statements violated the Department's social networking policy and instructed the sergeants to discipline the officers. In the disciplinary action forms, the Department stated that Liverman's follow-up comment and both of Richards's comments **violated the Negative Comments Provision**. They each received an oral reprimand and six months' probation, but were advised that such discipline **would not affect their eligibility for promotion**. Both the City Manager and Human Resources Director signed the personnel action forms indicating their probationary status.

**Several weeks later, however, Chief Dixon altered the qualifications for promotion. The new protocol expressly excluded any officers on probation from participating in the promotion process.** Accordingly, when Liverman and Richards applied for open sergeant positions, the Department notified them that they were ineligible to sit for the promotional exam.

### **Retaliation**

On October 1, 2013, the two officers sent a letter informing the City that they **intended to challenge the disciplinary actions. Shortly thereafter, Liverman and Richards were the subject of several complaints and investigations within the Department. Based on the findings, Chief Dixon decided to fire Liverman, but Liverman resigned before receiving notice of his termination.**

The officers then filed a lawsuit that made three basic claims. First, the social networking policy violated the officers' rights to free speech. Second, the officers challenged the discipline they received through application of this policy. Finally, the officers challenged their subsequent discipline as being the result of retaliation, as it came on the heels of their notification to the chief about challenging their initial discipline under the social networking policy.

In its review of the facts here, the Fourth Circuit began with a review of the cases and rules regarding free speech and public employees, recognizing that a public employee can be restricted in their speech in many circumstances. The court asserted:

The legal framework governing public employee speech claims is well known. **Public employees may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public**

**interest.”** *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). Underlying this principle is the recognition that “public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers.” *City of San Diego v. Roe*, 543 U.S. 77, 82, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004) (per curiam). **Nonetheless, a citizen who accepts public employment “must accept certain limitations on his or her freedom.”** *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). **Government employers enjoy considerable discretion to manage their operations, and the First Amendment “does not require a public office to be run as a roundtable for employee complaints over internal office affairs.”** *Connick v. Myers*, 461 U.S. 138, 149, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

Thus, there are several steps that a court will apply in deciding whether an officer, or any public employee’s speech is protected by the First Amendment:

- **Is the speech about a matter that would be of public concern?** Note, speech that is purely personal is not protected and any review will end if the court determines that the speech is purely personal
- **If the court has determined that the speech is a matter of public concern, the court will turn to a balancing of the employee’s interest as a citizen in commenting on the matter of public concern**

**versus the interests of the law enforcement agency (or any governmental entity) “in promoting the efficiency of the public services it performs through its employees.”**

- **Note: Speech that is found to be disruptive to the law enforcement operation may be subject to restriction even if it is a matter of public concern.**

The court noted that the government or law enforcement agency’s burden is higher when the policy serves as a “prior restraint” on speech rather than isolated after the fact disciplinary actions. In such cases the agency must demonstrate that the harms to be suffered in the agency’s operations are real and not just speculation.

In applying the principles to the officers’ social media postings, the court began by finding that the officers’ posts concerning a lack of experience among trainers and supervisors was a “matter of public concern.” The court then noted:

The threshold question in this case is whether the Department’s policy regulates officers’ rights to speak on matters of public concern. There can be no doubt that it does: the restraint is a virtual blanket prohibition on all speech critical of the government employer. The explicit terms of the Negative Comments Provision prevent plaintiffs and any other officer from making unfavorable comments on the operations and policies of the Department, arguably the “paradigmatic” matter of public concern.

Having found that the policy prohibited officers from speaking on matters of public concern, the court then moved to the second question as to whether the officers interest in exercising their First Amendment rights as citizens outweighed the law enforcement agency’s need for efficient operations. **The Court took significant issue with the language from the policy that sought to “prohibit the dissemination of any information on social media ‘that would tend to discredit or reflect unfavorably upon the [Department.]’”**

The court noted:

We do not, of course, discount the capacity of social media to amplify expressions of rancor and vitriol, with all its potential disruption of workplace relationships that *Connick* condemned. But social networking sites like Facebook have also emerged as a hub for sharing information and opinions with one’s larger community. And the speech prohibited by the policy might affect the public interest



in any number of ways, including whether the Department is enforcing the law in an effective and diligent manner, or whether it is doing so in a way that is just and evenhanded to all concerned. The Department's law enforcement policies could well become a matter of constructive public debate and dialogue between law enforcement officers and those whose safety they are sworn to protect. After all, "[g]overnment employees are often in the best position to know what ails the agencies for which they work." [citations omitted].

Having found that the Police Department's policy impacted speech on matters of public concern and that that the policy placed a heavy burden on the employee's expressive conduct, the court then shifted to the next question, specifically, whether the Police Department "established 'real, not merely conjectural harms' to its operations."

The court then looked at the department's concerns and whether they justified such a policy.

Chief Dixon's primary contention is that divisive social media use undermines the Department's interests in maintaining camaraderie among patrol officers and building community trust . . . Here, however, the Department fails to satisfy its burden of demonstrating actual disruption to its mission. Apart from generalized allegations of budding "divisiveness" and claims that some "patrol officers sought [shift] transfers," J.A. 502, Chief Dixon presented no evidence of any material disruption arising from plaintiffs' – or any other officer's – comments on social media. We do not deny that officers' social media use might present some potential for division within the ranks, particularly given the broad audience on Facebook. But the speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restrictions on officers' freedom to debate matters of public concern . . .

Defendants' fallback argument is that, even if the Negative Comments Provision itself is overbroad, the Public Concern Provision significantly narrows the reach of the social networking policy. This second provision, which permits comments on "issues of general or public concern . . . so long as the comments do not disrupt the workforce," J.A. 162, is ostensibly more aligned with the case-by-case analysis of *Connick* and *Pickering*. But the milder language in a single provision does not salvage the unacceptable overbreadth of the social networking policy taken as a whole. Indeed, the Public Concern Provision does not purport to nullify or otherwise supersede the blanket censorship endorsed by the Negative

Comments Provision. If the Department wishes to pursue a narrower social media policy, then it can craft a regulation that does not have the chilling effects on speech that the Supreme Court deplored. We cannot, however, allow the current policy to survive as a management and disciplinary mechanism.

It should be clear that the court was not troubled by the provision it refers to as the "public concerns provision" in the way it was by the "negative comments provision" which it determined was overbroad and unconstitutional.

Having determined that the policy was unconstitutional the court then turned to the disciplinary actions related to the officers in this case.

First, the court found that the officers were speaking on a matter of public concern rather than a matter that was personal in nature. The court noted that others joining the discussion on Facebook served as evidence that inexperienced instructors or supervisor within the police department was a matter of public concern.

Second, the court looked at balancing the public interest of inexperienced trainers and supervisors versus the disruption to the Police Department by a public airing of this issue. The court then found that Chief Dixon failed to establish that the officers' "social media comments would meaningfully impair the efficiency of the workplace."

Due to the fact that the department could not establish that the comments would meaningfully impair the efficiency of the department, the court concluded that the discipline given to the officers was unconstitutional.

Finally, the court found that the law was clearly established and therefore Chief Dixon was not entitled to qualified immunity.

## Summary

### Policy

The Petersburg Police Department Policy was Unconstitutional due to the Negative Comments Provision that states:

Negative 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 court determined this provision was overbroad and would restrict speech/expression that was protected by the First Amendment.

## Discipline of These Officers

The discipline given to these officers was unconstitutional because they were:

- **Speaking on a Matter of Public Concern AND**
- **The Chief did not establish that the comments would Meaningfully Impair the Efficiency of the Police Department.**

## HUMAN RESOURCES LIABILITY IN LOCAL GOVERNMENT

*By John McIntyre, East Georgia Field Representative, LGRMS*

One of the most often neglected areas of liability within our local governments is that of the Human Resources department or the Human Resources functions within local governments. The areas that receive the most attention as well as most of the headlines are law enforcement, public works, and the other public safety areas. Liability losses and claims, however, in the daily running of the departments within local government, are on the rise. The most familiar claims are harassment, discrimination, wrongful discipline and/or termination, and workers' compensation issues. Times have changed and local governments are now being scrutinized in other areas—many of which management and supervisors, as well as employees, are unaware even exist. The key to running a competent and legal Human Resources department is to ensure that all areas of local government are in compliance as well as are current in all its policies and procedures. A simple mistake can lead to thousands or even millions of dollars of liability.

In order to assist local governments in ensuring that they are fully compliant, LGRMS is in the process of reworking and updating its Human Resources section of the member survey guide as well as the full, comprehensive Human Resources Guide. These new guides were rolled out in early 2017 and can be administered by your LGRMS field representative. The purpose of these guides is to make sure that you know what you are required to have, what you are required to have available for your employees, and what you are required to post for employees to have access, as well as all the policies and processes that you need to have to protect your local government from potential employment liability. LGRMS has many of the standard policy samples on the LGRMS website, [www.lgrms.com](http://www.lgrms.com), and can be accessed by you on our website, or your field representative can help you with these. Again we are in the process of updating this section of our website to ensure it has the current sample policies.

## Bottom Line

Agencies should review Social Networking Policies and any policy limiting employee speech/expression to determine if there are provisions within the policy that would prohibit protected speech that would not impact agency operations.

Make sure that all your Human Resources policies, procedures, processes, and federal/state labor postings are current and that you have all the ones you need to lessen the liability to non-compliance. If anyone is interested in having these guides completed for your local government human resources area, contact your field representative.

### FIVE ESSENTIALS FOR SUCCESSFUL SAFETY PROGRAMS

*Extract from McDowell Incentives Inc. 2007*

#### Commitment from the Top

Many a program has failed without the boss' energy behind it 100%.

#### Employee Awareness and Engagement

Awareness means repetition of an idea or thought (up to 20 times for long term recall). Remember, 93% of accidents are caused by lack of attention.

#### Training

Employees must be taught the correct behaviors from the start and trained to be proactive in spotting dangers.

#### Accountability

Ownership of both the behavior and its consequences. (Note: Measurability should be built into the program.)

#### Recognition

Behavior reinforcement should be a constant rather than a periodic act. (Statistics show that the closer to the event of the desired behavior an employee is recognized, the more likely he/she is to repeat it.)



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*This Month:*

**RULINGS ON SOCIAL MEDIA POLICIES**  
**HUMAN RESOURCES LIABILITY**

