



September 9, 2011

**BY EMAIL**

City Council Members  
City of Dover  
P.O. Box 475  
Dover, DE 19903

Re: Proposed Social Media Policy for Dover Employees

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
of DELAWARE  
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NORMAN M MONHAIT  
PRESIDENT

KATHLEEN M MacRAE  
EXECUTIVE DIRECTOR

RICHARD H MORSE  
LEGAL DIRECTOR

Dear Council Members:

I write with regard to item no. 8 on the Legislative, Finance and Administrative Copmmittee agenda for September 12, 2011, Implementation of Social Media Policy. As described in the press and on the City of Dover website, the policy would violate the First Amendment of the United States Constitution by prohibiting city personnel from engaging in constitutionally protected speech. Specifically, the policy states that, without regard to whether the activity occurs in the workplace or uses City of Dover equipment or technology, all Dover personnel other than Dover Police Department employees are prohibited from using the internet and social media to make certain types of statements. For example, the proposed policy states that employees may not use the internet to disparage co-workers, supervisors, members of the public with whom they interact as a result of their employment, or affiliated agencies, and may not use the use the internet to direct negative comments towards or about any individual or group based on race, religion, gender, etc.

No matter how distasteful or repulsive that speech may be, the Constitution's guarantee of free speech means the City of Dover may not prohibit it. In this country, the government does not get to choose whether speech is acceptable, even when government officials fear harm that might be caused by the speech. As the Supreme Court has said, "fear of serious injury cannot alone justify suppression of free speech and assembly." *United States v. National Treasury Employees Union*, 513 U.S. 454, 476 (1995)(quoting *Whitney v. California*, 274 U.S. 357, 376, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Justice Brandeis concurring)).

Americans do not lose their right to free speech when they become government employees. At the federal court of appeals has ruled, "Public employers cannot silence their employees simply because they disapprove of the content of their speech." *Baldassare v. State of N.J.*, 250 F.3d 188, 194 (3d Cir. 2001) citing *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). Likewise, the Third Circuit ruled that the "state cannot lawfully discharge an employee for reasons that infringe upon that employee's constitutionally protected interest in freedom of speech." *Feldman v. Phila. Hous. Auth.*, 43 F.3d 823, 829 (3d Cir. 1994).

The strength of government employees' free speech rights has been made crystal clear by United States Supreme Court decision in *United States v. National Treasury Employees Union*. In that case, the Court ruled unconstitutional a federal statute limiting the ability of federal employees to speak publicly on matters having nothing to do with their jobs because "deferring to the Government's speculation about the pernicious effects of thousands of articles and speeches yet to be written or delivered would encroach unacceptably on the First Amendment's protections." At 476.

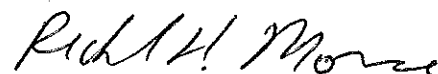
In *National Treasury Employees Union*, Congress had passed a law barring federal employees from receiving payment for making speeches or writing articles on matters of interest to the employees, whether or not those matters had a relationship to their official duties. Obviously, that law had a less direct effect on limiting speech than the proposed Dover policy barring use of the internet for disfavored speech would have. Nevertheless, the Supreme Court ruled the law unconstitutional, recognizing that "the large-scale disincentive to Government employees' expression [and the] significant burden on the public's right to read and hear what the employees would otherwise have written and said." At 470, citing *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-757, 96 S.Ct. 1817, 1822-1823, 48 L.Ed.2d 346 (1976).

*National Treasury Employees Union* dealt primarily with speech that did not relate to matters of public concern, but the free speech right of public employees extends to matters of public concern, as well. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987).

The Dover government's duty to comply with the Constitution is certainly reason enough for Council to reject the proposed policy. But there is a second reason as well. The city will be exposed to damages claims by employees if the policy is adopted and then enforced against an employee. Public employees have the right to assert claims under 28 U.S.C. § 1983 against their employers for violations of their constitutional rights. An employee disciplined or fired because of what he or she has said may assert free speech and due process claims against the employer – in this case the City of Dover – and receive a damages award.

I urge you to reject the proposed policy.

Sincerely yours,



Richard H. Morse

Cc: Nicholas A. Rodriguez, Esq.