



McGillivray  
Steele  
Elkin <sup>LLP</sup>

Douglas L. Steele  
dls@mnelaborlaw.com

November 10, 2020

**VIA EMAIL**

Gus Martinez  
Mission City Attorney  
1201 E. 8th Street  
Mission, TX 78572  
[gmartinez@missiontexas.us](mailto:gmartinez@missiontexas.us)

**Re: International Association of Fire Fighters Local 3609**

Dear Mr. Martinez:

I am the General Counsel for the International Association of Fire Fighters, which represents more than 320,000 fire fighters and first responders in the United States and Canada. I am writing to express my deep concern that the City of Mission and the Mission Fire Department has retaliated against IAFF Local 3609 Executive Board Member, Lieutenant Mike Silva in violation of his First Amendment rights to association and free speech, and has instituted Standard Operating Guidelines (“SOG”) that constitute an unlawful prior restraint on free speech.

On January 13, 2020 and September 24, 2020, Fire Chief Gilbert Sanchez issued two written reprimands to Lt. Silva in retaliation for his protected First Amendment associational activity and free speech. Both reprimands include false charges that can be refuted by witnesses.

Additionally, the Department recently issued revised SOGs (to be effective November 23, 2020), including the Code of Conduct and Photography and Social Policy, which include provisions that constitute an unlawful prior restraint on fire fighters’ free speech. Specifically, the Code of Conduct discourages “public criticism” of the Department and prohibits employees from “attempt[ing] to influence members of City Council, City Manager, Deputy City Manager...for the purpose of obtaining [*inter alia*,] ...benefits.” Additionally, the Photography and Social Media Policy prohibits fire fighters from taking and posting photos of incidents while off duty.

I must remind you that public employees, including fire fighters, do not relinquish their First Amendment rights by accepting government employment. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Indeed, the First Amendment protects the right of fire fighters to speak as citizens and union officials on matters of public concern. *Lane v. Franks*, 573 U.S. 228, 236-37 (2014); *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Speech on a matter of public concern includes speech on matters of “political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *Moreau v. St. Landry Par. Fire Dist. No. 3*, 808 Fed. Appx. 225,228-29 (5th Cir. 2020).

In addition, federal courts have routinely found that policies which prohibit employees from speaking to the public or media without first obtaining permission from a municipal or department are unlawful prior restraints on free speech. See, e.g., *U.S. v. NTEU*, 513 U.S. 454 (1995); *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742 (7th Cir. 1999); *Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1998); *Moore v. City of Kilgore*, 877 F.2d 364, 376 (5th Cir. 1989), *cert denied*, 493 U.S. 1003 (1990); *Int'l Ass'n of Firefighters Local 3233 v. Frenchtown Charter Twp.*, 246 F. Supp. 2d 734, 736 (E.D. Mich. 2003) (town ordinance and fire department policy was unlawful prior restraint where had effect of prohibiting department members from speaking to the media or public about department affairs).

Here, the above-referenced SOGs constitute an unlawful prior restraint because they prohibit members from engaging with elected and appointed City of Mission officials on behalf of the Local and prohibit photographs of incidents that warn the public about ongoing emergency responses and show how the Fire Department responds to and operates at emergency scenes.<sup>1</sup>

The settled law makes clear that these SOGs are unlawful prior restraints on Local 3609 members' right to speak out on behalf of the Local and on matters of public concern. Further, any disciplinary actions taken for supposed violations of these SOGs – *including written reprimands* – would constitute retaliation for engaging in protected conduct.

I urge you to take all necessary and appropriate steps to ensure that the unconstitutional actions of Department officials cease immediately, that Lt. Silva's written reprimands are rescinded and that the SOGs are rewritten to comply with the First Amendment. The IAFF will be closely monitoring this matter and will not hesitate to take legal action, if necessary. That said, I hope that this situation will be resolved quickly and amicably, without the need for further action

Sincerely,

McGILLIVARY STEELE ELKIN LLP



Douglas L. Steele  
IAFF General Counsel

cc: Dr. Armando O'Caña, Mayor  
Randy Perez, City Manager  
Jessica Ortega-Ochoa, Councilperson, Place 1

[ocana-mayor@missiontexas.us](mailto:ocana-mayor@missiontexas.us)  
[rperez@missiontexas.us](mailto:rperez@missiontexas.us)  
[jessicachoa25@yahoo.com](mailto:jessicachoa25@yahoo.com)

---

<sup>1</sup> The SOGs prohibit employees from engaging in speech at any time, even if off duty, without first obtaining permission from the Department. See, SOG 100.7.10, Code of Conduct (“Members of the department will not be allowed to contact any City Council, City Manager, Deputy City Manager on any matter involving fire operations without first advising the Fire Chief or the next in rank under the Fire Chief. Contact must be approved by the Fire Chief.”); SOG, 100.11.00, Photography and Social Media Policy (“Employees may not post, transmit, or disseminate any photographs, video, or other recordings obtained or accessible as a result of their employment with the department without the express authorization of the Fire Chief or their designee.”).

Ruben Plata, Councilperson, Place 2	<a href="mailto:ruben.plata@cardinalfinancial.com">ruben.plata@cardinalfinancial.com</a>
Norie Gonzalez Garza, Councilperson, Place 3	<a href="mailto:noriegarza@hotmail.com">noriegarza@hotmail.com</a>
Jose Alberto Vela, Councilperson, Place 4	<a href="mailto:javela5@hotmail.com">javela5@hotmail.com</a>
Harold A. Schaitberger, IAFF General President	<a href="mailto:iaffhasgp@iaff.org">iaffhasgp@iaff.org</a>
Jeff Zack, IAFF Chief of Staff	<a href="mailto:jzack@iaff.org">jzack@iaff.org</a>
Teresa Valenzuela, Executive Assistant to the IAFF General President	<a href="mailto:tvalenzuela@iaff.org">tvalenzuela@iaff.org</a>
R.L. McGhee III, IAFF 11th District Vice President	<a href="mailto:smcghee@iaff.org">smcghee@iaff.org</a>
Robert Lopez, Local 3609 President	<a href="mailto:rolopezmfd@yahoo.com">rolopezmfd@yahoo.com</a>
Lt. Mike Silva, Local 3609 Board Member	<a href="mailto:msilvamfd@yahoo.com">msilvamfd@yahoo.com</a>