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General Guidelines on Employer Responsibilities with Respect to Union-Related Activities

February 18, 2007

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1. Prohibited and Permitted Employer Activities - Generally

First Amendment claims are, by their very nature, fact specific and, therefore, do not lend themselves easily to simple categorization; however, I believe the following general guidelines are reflected by the Court decisions from various jurisdictions across the Country relating to First Amendment protections for union-related activities:

- a. Union-related activities are not, by themselves, First Amendment protected activities. The activity must touch on a matter of public concern. Nevertheless, Board members and Chief Staff must use caution in addressing any union-related activity, as it will be closely scrutinized by the Courts;
- b. Being a member of a union, or engaging in union-related activities, never gives an employee the right to engage in inappropriate conduct. Numerous Courts have upheld a Fire Department's compelling need to maintain effective and efficient operations, with some going so far as to state that the quasi-military character of the fire department, with respect to the need for discipline, is a legitimate factor in favor of the fire department. The Courts are inconsistent on this issue. As a result, Chief Staff should be careful to make sure any corrective or disciplinary action against an individual that touches upon union-related activities can be amply justified under the Fire Department's rules, policies and procedures.
- c. The most common place where Fire Departments get into trouble is unguarded comments by Board members or Chief Staff that are subsequently used against them when an adverse employment action is taken against an individual. Board members and Chief Staff must be very careful not to let themselves engage in "bantering" or other unguarded union-related comments with anyone. Negative comments to or about individuals regarding union-related activities should not be permitted under any

circumstances. Comments made in jest will never be seen as funny when retold to a jury or judge 6 months or a year later.

- d. Neither the Board members nor Chief Staff should make any comments to the union with respect to its political activities, or the political activities by its members. The case law from other jurisdictions show this area is fraught with peril. While union activities may not, in themselves, be matters of public concern, the Courts almost unanimously hold that political activities are matters of public concern. When the union activity is linked with a political activity, the Courts have little trouble finding the actions to be matters of public concern. Give the sensitivity of this area of the law, such a concern should be address by an Issue Committee/Political Action Committee member who is not directly employed or related to the Fire Department, if possible.
- e. The Fire Department can only impose a non-solicitation rule against the union if it has uniformly enforced such a rule with respect to all other types of solicitations. Chief Staff must carefully and thoroughly analyze what has been the actual past practice on this issue. If solicitations for other organizations and activities have been permitted, even on just an occasional basis, then the Fire Department must allow the union to engage in similar solicitation activities. Moreover, if a non-solicitation policy has not been observed in practice, the policy should be revised to reflect the Fire Department's actual practice.
- f. If should, of course, go without saying that no adverse employment action should be taken against an employee for engaging in union-related activities, whether organizational or ongoing. If the union-related activities adversely affect the Fire Department's ability to effectively and efficiently perform its operations, then Chief Staff should confer with legal counsel to develop a strategy for addressing the activities.
- g. Dress can be a difficult issue. In general, the Fire Department cannot prohibit union-related pins or other accessories, unless it can demonstrate that such accessories would adversely affect the Fire Department's operations. Chief Staff should consult with legal counsel before taking action on union accessory issues.
- h. Board members and Chief Staff should not engage in actions that could infer Fire Department recognition of the union. While in theory a general discussion between a Board member and a union member or representative will not raise recognition concerns, these types of interactions are always fraught with danger, because they inevitably lead to a "he said she said" scenario. Moreover, individual Board members have no authority to make any representation or take any position on behalf of the Fire Department's governing body, absent an express delegation of authority. To avoid inadvertently making unauthorized representations to union members or representatives, or being placed in a "he said she said" scenario, we recommend that Board members avoid individual interactions with Fire Department employees on union issues. With respect to Chief Staff, there is nothing inherently wrong with their inviting the union to keep Chief Staff generally advised as to union activities, as long as Chief Staff makes it clear that such a request is purely voluntary, and in no manner constitutes a recognition of the union or its members on any level. Similarly, Chief Staff should be careful not to engage in activities that would give tacit recognition to

the union, such as inviting the union president or other union representative to participate in assessment centers for new hires, training etc.

An employee's status in the union (or outside the union) cannot be a consideration in Chief Staff's decision to include or exclude an employee from such activities.

2. General Principles on Union Interaction.

Although the NLRA and Peace Act do not apply to political subdivisions of the State, I believe some of the general principles developed under the NLRA and Peace Act through Court decisions provide useful guidance:

- a. The Fire Department cannot prohibit employees from distributing union literature in nonworking areas during nonworking time unless the Fire Department can show the ban is necessary to maintain discipline and production.
- b. A Fire Department policy denying access to off-duty employees is valid only if (1) it limits access only with respect to interior and working areas; (2) it is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the fire station interior for any purpose.
- c. The Fire Department cannot deny off-duty employees access to outside nonworking areas (e.g. parking lots) unless justified by business reasons.
- d. The Fire Department cannot interrogate union supporters about the Fire Department's concerns with unionization if the questioning is coercive under the "totality of the circumstances."
- e. The Fire Department cannot hold gripe sessions in order to remedy employee grievances, concurrently with unionization activities, if the Fire Department never held such gripe sessions before.
- f. A dress code restricting the wearing of union pins is only valid if special circumstances are present: (1) the Fire Department maintains policy that employee wear only authorized uniforms; (2) the Fire Department enforces the policy in a consistent and non-discriminatory fashion; and (3) employees restricted by the policy have contact with the public, and wearing the insignia may reasonably interfere with the Fire Department's public image.
- g. The Fire Department cannot prohibit off-duty employees from wearing union symbols on their uniforms.
- h. The Fire Department cannot implement new rules limiting organizational activities, such as suddenly restrict posting of union propaganda or suddenly restricting the ability of employees to promote union organization during off-duty hours.
- i. The Fire Department can restrict the right to use company bulletin boards but cannot discriminatorily prohibit the posting of union materials.

- j. The Fire Department can restrict employee decorations on Fire Department property (e.g. employee lockers, employee carts) only if it restricts all decorations, not just union symbols, stickers, pins, etc.

- k. The Fire Department may prohibit employee solicitation (i.e. where the communication is expected to occasion a spontaneous response or initiate reciprocal conversation) during working time, but prohibitions on employee solicitation during non-working time, even in work areas, is presumed unlawful absent an overriding Fire Department interest.

- l. E-mail classified as solicitation is treated in the same manner as other forms of solicitation – it can be prohibited during working time, but cannot be prohibited during non-working time, even in work areas.