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May 8, 2012  
By first class mail and e-mail

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**Re: D.C. Fire and Emergency Medical Services charges against  
Lt. Robert Alvarado, cases U-12-073 and U-12-077**

Dear Mr. Turner:

The American Civil Liberties Union of the Nation's Capital has become aware of the charges pending against Lt. Robert Alvarado of the D.C. Fire and Emergency Medical Services Department based on events that took place on January 4, 2012. We have seen the charging papers and we have watched the Fox 5 television news broadcast that forms the factual basis for the charges.

We write because we were astonished to see that one of the charges against Lt. Alvarado was based on his alleged violation of an FEMS order that was, in substance, declared unconstitutional and struck down twenty years ago in litigation brought by the ACLU (together with a private law firm) on behalf of the Fire Fighters Association and five members of the Department. *Fire Fighters Association, District of Columbia v. Barry*, 742 F. Supp. 1182 (D.D.C 1990).

That case involved DCFD "Memorandum 38," which provided that "neither officers or [*sic*] members of the Department are permitted to give interviews while on duty without prior written permission from The Public Affairs Officer." *Id.* at 1187 n.9. The court found that regulation to be an unconstitutional prior restraint on firefighters' freedom of speech and prohibited the Department "from enforcing [the] regulation in the future." *Id.* at 1198.

We presume that Memorandum 38 was removed from the Order Book in 1990. But in Memorandum 113, Series 2005, the Department re-adopted essentially the same

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unconstitutional prior restraint, in violation of the permanent injunction issued in the 1990 case. As quoted in Charge No. 3 against Lt. Alvarado, Memorandum 113 provides:

All personnel desiring to speak with or who are contacted by the media regarding policies, procedures and standards of the Department shall contact the Director of the Public Information Office, or their [*sic*] representative, for authorization prior to conducting interviews.

It was not Chief Ellerbe who issued Memorandum 113, Series 2005, but he and his legal counsel are certainly responsible for knowing the existence of permanent injunctions issued against the Department by the courts. The attempt to punish Lt. Alvarado for violating Memorandum 113 is prohibited by the decision and order in the *Fire Fighters v. Barry* case. Charge 3 must therefore be dismissed.

Additionally, it seems quite clear that some of the other charges brought against Lt. Alvarado have no merit and apparently were added in order to increase the potential discipline that can be imposed upon him. For example, Charge No. 1, Specification No. 1, alleges that Lt. Alvarado violated the Department's *Patient Bill of Rights* because a Fox 5 news crew filmed the Department's response to a request for medical care that occurred on the public street in front of Engine 10. But anyone watching the news broadcast can see that the Fox 5 crew was already on the sidewalk, filming, when the patient in question drove up and called out of his vehicle's window for help. Neither Lt. Alvarado nor anyone else — including Fire Chief Ellerbe, had he been present — had any power to tell Fox News to turn off its cameras. News crews have a First Amendment right to film events that take place in public places. If the Department's *Patient Bill of Rights* is construed to require members to physically interfere with a news crew, it is plainly unconstitutional. If the *Patient Bill of Rights* is construed to require members to withhold emergency medical care whenever a news crew (or anyone else) is photographing or witnessing the event on a public street or sidewalk, it is absurd and will result in the unnecessary deaths of D.C. residents and visitors. Charge No. 1, Specification No. 1, must also be dropped.

We also wish to comment on Charge No. 4, Specification No. 1, which seems to be at the heart of the allegations against Lt. Alvarado. That charge alleges that during his interview with Fox 5 News, he “accused the Fire Chief of being a liar.” In fact, Lt. Alvarado did not say that the Fire Chief was a “liar.” As can be heard in the broadcast, and as shown on the accompanying transcript on the Fox 5 website, what he said was, “It’s a complete outright lie that we are issued outerwear. We are not issued outerwear.” See <http://www.myfoxdc.com/dpp/news/dc/veteran-dc-firefighter-speaks-out-on-clothing-logo-mandate-010412>. That was an accurate statement, and significantly, the charge itself notes that it is made “[w]ithout regard to veracity,” reflecting an implicit recognition that Lt. Alvarado spoke the truth. Indeed, the Fox 5 broadcast provides clear evidence that the Fire Chief, who is a public servant, was seeking to mislead the public

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on this topic. When asked by a Fox news reporter about “winter wear,” the Chief asserted that the Department provides “outerwear” for members, and dismissively claimed that what some firefighters were complaining about was only the need to buy new “sweatshirts and t-shirts.” *Id.* Both of those statements were untrue, as the Fire Chief surely knew. The Chief’s subsequent explanation (also included in the same news report) that when he said “outerwear” he meant turnout gear only emphasizes the point; it was entirely clear that the reporter’s question was about “winter wear” — which is what some firefighters were complaining about — and not about technical firefighting gear. While Lt. Alvarado might have used a different word to characterize the Fire Chief’s statement (*e.g.*, that it was false, untrue, or misleading), it is the Chief who owes the citizens of D.C. and the members of his Department an apology, and his effort to punish Lt. Alvarado for committing truth should be rejected.

Finally, we are also aware — and we assume the members of Lt. Alvarado’s trial board will be well aware — of the fact that the Fire Chief recently demoted Richard Sterne from Battalion Fire Chief to Captain because BFC Sterne, acting as an adjudicator, imposed lesser discipline on two members for a certain incident than the Fire Chief thought was appropriate. The Fire Chief’s action sends a clear message to Department members who act as adjudicators (such as members of trial boards) that if they exercise independent judgment they may be subject to very serious retaliation. It would be difficult to exaggerate the pernicious effect that such a message is likely to have on trial board members, whose own careers are subject to the Fire Chief’s whim. If the demotion of BFC Sterne remains in effect, it is hard to imagine how any trial board in the Fire and Emergency Medical Services Department can provide due process to a member in a case in which the Fire Chief is personally interested. Because Lt. Alvarado’s case is undoubtedly a case in which the Fire Chief is personally interested, we do not believe an FEMS trial board can properly proceed in his case. Perhaps his case can be transferred to a Police Department trial board, whose members would not be sitting under Chief Ellerbe’s Damoclean sword.

Sincerely yours,



Arthur B. Spitzer

cc: Ariel Waldman, Esq.  
Hon. Phil Mendelson