OFFICE OF THE COUNTY ATTORNEY

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MEMORANDUM

TO: James L. Stowe, Director
Office of Human Rights

FROM: Edward B. Lattner
Chief, Division of Human Resources & Appeals

DATE: February 1, 2010

RE: [redacted] **complaint; LEOBR limitations upon investigation of police officers; First Amendment limitations upon § 27-22**

SUMMARY

You have asked for advice regarding how to proceed with [redacted]'s complaint alleging "hate/violence" against officers in the Montgomery County Police Department. There are two issues. First, does the LEOBR (Law Enforcement Officers' Bill Of Rights) preclude the Office of Human Rights from investigating [redacted]'s claim that law enforcement officers violated the County's Human Rights Law? Second, are there any First Amendment limitations upon County Code § 27-22 ("Discrimination through intimidation"), the provision of the County's Human Rights Law most likely implicated by the complaint?

The Office of Human Rights (HR or Office) can proceed with [redacted]'s complaint against Montgomery County Police Officers to the extent it alleges that they damaged his property or injured him because of his national origin.

ANALYSIS

1. The LEOBR Does Not Preclude HRC From Investigation A Discrimination Complaint Against A Law Enforcement Officer.

The LEOBR (Law Enforcement Officers' Bill Of Rights) does not preclude HR from accepting and investigating [redacted]'s complaint against individual police officers. At best, the law on this issue is unsettled.

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The LEOBR is a state law that provides the exclusive mechanism under which a law enforcement agency can investigate and discipline one of its officers. Although, at one point, the Maryland Court of Special Appeals ruled that the LEOBR precluded the State Human Relations Commission from investigating claims of police brutality, *Prince George's County, Maryland v. State of Maryland Commission on Human Relations*, 40 Md. App. 473, 392 A.2d 105 (1978), Maryland's highest court, the Court of Appeals, vacated that decision, noting that "this action leaves open the issues decided in the opinion of the Court of Special Appeals." *State of Maryland Commission on Human Relations v. Prince George's County, Maryland*, 285 Md. 205, 207, 401 A.2d 661, 662 (1979). *See also Baltimore City Police Dep't v. Andrew*, 318 Md. 3, 9 n.2, 566 A.2d 755, 758 n.2 (1989) ("we vacated the Court of Special Appeals' judgment . . . pointedly observing that "this action leaves open the issues decided in the opinion of the Court of Special Appeals' ").

HR can proceed with its investigation of the County police officers. HR is not a law enforcement agency as defined under the LEOBR. Neither does HR have the authority to impose discipline upon County employees. In light of the Court of Appeals express vacateur of the intermediate appellate court's decision described above, HR can go forward with the [redacted] Complaint.[1]

2. Section 27-22 Violates The First Amendment To The Extent It Proscribes Speech Or Expressive Conduct Based Upon Its Content, But § 27-22 May Constitutionally Proscribe Non-Expressive Conduct Based Upon Discriminatory Motives.

County Code § 27-22 states: "A person must not: willfully and maliciously destroy, injure, or deface another person's real or personal property, or willfully and maliciously injure another person, with the intent to intimidate or attempt to intimidate any person because of race, religion, national origin, disability, sexual orientation, or gender identity."

A. Summary

Section 27-22 cannot constitutionally be read to generally proscribe speech or expressive conduct with the intent to intimidate someone because of their race, religion, national origin, disability, sexual orientation, or gender identify. Such a content-based ban violates the First Amendment. Rather, § 27-22 must read as prohibiting non-expressive conduct (property damage personal injury) with the intent to intimidate someone because of their race, religion, national origin, disability, sexual orientation, or gender identify.

[1] Any issue regarding the ability of the police department to discipline an officer based upon information obtained by HR outside the strictures of the LEOBR would be resolved in the context of a show cause hearing brought by the accused officer under the LEOBR.

B. "Fighting words" and "true threats" are not protected expressive speech.

While content-based restrictions on speech and expressive conduct are presumptively invalid, the protections offered by the First Amendment are not absolute; the government may constitutionally regulate certain categories of expression. These categories include obscenity, defamation, and two closely related categories at issue here—"fighting words" and "true threats."

Fighting words are those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. The fighting words doctrine has generally been limited to face-to-face interactions.

If fighting words are a provocation, then a true threat is a serious expression of intent to harm. The essence of a true threat is that, upon hearing it, a reasonable person believes that the listener perceives that he will be subjected to physical violence. *State v. Deloreto*, 265 Conn. 145, 162, 827 A.2d 671, 684 (2003).

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Virginia v. Black, 538 U.S. 343, 359-60 (2003)

C. But the government cannot proscribe "fighting words" and "true threats" based upon their content.

While these categories of speech can be regulated because of their constitutionally proscribable content, they are not without any constitutional protection. In other words, they may not be made vehicles for content discrimination unrelated to their distinctively proscribable content. "Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing **only** libel critical of the government." *R.A.V. v. St. Paul*, 505 U.S. 377, 383-84 (1992) (emphasis in original). Similarly, because the government could not ban fighting words based on their content, it could not ban fighting words based upon hostility, or favoritism, towards the underlying message expressed by the speaker. *Id.* at 386.

Thus, in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), the Supreme Court held that a local ordinance that banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" was unconstitutional because it discriminated on the basis of content by targeting only those individuals who "provoke violence" on a basis specified in the law (race, religion, etc.). The ordinance prohibited fighting words based upon their content, in this case, bias motivated hatred. The ordinance did not cover the use of fighting words to provoke violence in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership or homosexuality. *Id.* at 391. "[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey." *Id.* at 393.[2]

The Supreme Court later upheld a state ban on cross burning with the intent to intimidate someone. The law at issue in *Virginia v. Black*, 538 U.S. 343 (2003) made it a felony "for any person . . . , with the intent of intimidating any person or group . . ., to burn . . . a cross on the property of another, a highway or other public place."

> Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward one of the specified disfavored topics. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's political affiliation, union membership, or homosexuality.

Id. at 362 (internal citations or quotations omitted). In fact, the record demonstrated that cross burners did not limit intimidating conduct to racial or religious minorities, but also burned crosses to intimidate unions members and others.[3]

Thus, even if County Code § 27-22 could be read to generally prohibit a person from attempting to intimidate any person based upon race, gender, etc., and further assuming that intimidation is limited to "fighting words" and "true threats," it would still be unconstitutional under *R.A.V.* because the County could not proscribe such speech or expressive conduct based upon its content (i.e., hostility based upon race, gender, etc.).

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[2] A year later, the Supreme Court upheld a state statute that enhanced a criminal defendant's sentence if he intentionally selected his victim based upon the victim's race. The statute was directed at non-expressive conduct (aggravated battery in this case). *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

[3] The Court did conclude that a provision in the law stating that cross burning in public view was prima facie evidence of an intent to intimidate was facially unconstitutional under the First Amendment.

CONCLUSION

Section 27-22 would pass constitutional muster if it was patterned after the statute upheld by the Court in *Virginia v. Black*. Such a statute would proscribe "fighting words" and "true threats" that intimidate anyone, regardless of their content. Our present law is more like the law struck down in *R.A.V. v. St. Paul*. Please let me know if you would like some assistance with that.

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