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April 13, 2011

VIA U.S. MAIL AND ELECTRONIC MAIL
adam@thefire.org

Adam Kissel
Vice President of Programs
Foundation for Individual Rights in Education
601 Walnut Street, Suite 510
Philadelphia, Pennsylvania 19106

Re: *Mr. Lance Hodge, Client-Matter: AN060-001*

Dear Mr. Kissel:

My office represents the Antelope Valley Community College District (the "District") in connection with the claims of Lance Hodge that are the subject of your March 18, 2011 letter to Dr. Jackie L. Fisher, Sr. As you know, Mr. Hodge is a faculty member in the Emergency Medical Technician ("EMT") program at Antelope Valley College. Your letter supports Mr. Hodge's challenge to his performance review rating of "needs improvement" in the area of "Sensitivity to Diversity" from last year. It also challenges the District's recommendation that he prepare a one-hour class lecture on cultural diversity and the District's decision not to authorize him to present the lecture he proposed, because it was not responsive to the recommendation. Your letter contends that these actions by the District with regard to Mr. Hodge infringe his First Amendment freedom of speech rights, and violate principles of academic freedom. These contentions are unfounded.

This letter does not go line-by-line through your letter to correct its recitation of the underlying facts. Instead, it provides a general description of why the District's actions relating to Mr. Hodge did not infringe academic freedom or free speech rights.

First, as a threshold matter, Mr. Hodge filed a grievance over his "needs improvement" rating through several steps in the grievance process set forth in the collective bargaining agreement between the College and his union, and then he stopped the process. In particular, he completed step 3 of the procedure, which is presentation of his grievance to the Superintendent/President, but he did not act in a timely manner to take the grievance to the next step in compliance with the collective bargaining agreement, which is appeal to the Board of Trustees. Nor did he seek to engage in mediation under the grievance procedure. Accordingly, he never fully availed himself of the District's own procedures, and his time period in which to initiate further actions under the collective bargaining agreement has long passed.

Second, contrary to the allegations in your letter, Mr. Hodge was never subjected to any "discipline" or "sanction" in connection with the matters at issue. Instead, he received a "needs improvement" performance rating and the District issued him an assignment by which he could improve his performance in the area in question. Nowhere has the District stated that these actions should be construed as punishment. Moreover, Mr. Hodge has not articulated any way in which the "needs improvement" rating will specifically affect his future compensation, promotion, or employment conditions.

Third, principles of academic freedom, in fact, confer upon the District itself the right to make appropriate administrative decisions to further its educational mission. Indeed, the United States Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978), acknowledged that principles of academic freedom vest in institutions of higher education themselves. In the case of Mr. Hodge, the District properly exercised its discretion to remedy aspects of his teaching that deprecated cultural beliefs. This same discretion vested in the District, along with the District's management rights and its right to establish the curriculum, justifies it in determining that Mr. Hodge's proposed lecture was not responsive to the District's direction to prepare a lecture on cultural diversity.

Fourth, the District's rating of and requests to Mr. Hodge constitute viewpoint-neutral efforts to stop Mr. Hodge from generating a classroom environment that could result in student complaints of discrimination or harassment. The District is entitled to preclude Mr. Hodge from a course of conduct before it actually results in a violation of laws prohibiting discrimination or harassment on the basis of protected classifications.

Fifth, for the reasons explained in Mr. Shane Turner's letter dated November 24, 2010, Mr. Hodge does not have First Amendment free speech rights that are implicated by the "needs improvement" rating, or by the District's decisions as to his classroom lecture on diversity. Under *Pickering v. Board of Education*, 391 U.S 563 (1968), the District's decisions are justified by, among other things, a need to preclude conduct by Mr. Hodge that deprecates cultural beliefs and could prompt student complaints of discrimination and harassment or infringement of rights. Also, Mr. Hodge was carrying out his "official duties" on behalf of the District, both in his April 22, 2010 lecture observed by Dr. Karen Cowell that led to the "needs improvement" rating, and in preparing his assigned one-hour lecture on cultural diversity. As you know, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), held that a public employee cannot predicate a First Amendment retaliation claim on speech activity that was rendered pursuant to that employee's "official duties." *Id.* at 421. Your contention that *Garcetti*'s rule does not apply in an instructional setting rests on the following caveat in the majority opinion: "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to *scholarship or teaching*." *Id.* at 425 (emphasis added). But you are overstating the Court's message. The *Garcetti* Court was declining to decide, for the time being, the extent to which its "official duties" holding applies in the context of academic instruction. *See id.* The Court was not holding that the "official duties" rule would not apply. Rather, the language of the majority

opinion quoted above confirmed that the Court considered the "official duties" test to apply in *some way* in the academic context, if not in the "same way" it does for public employees generally. *See id.* The District is prepared to argue that the *Garcetti* rule concerning "official duties" should apply in the instructional setting in this particular case -- concerning an instructor's "official duties" in training students in emergency medicine.

Also, *Garcetti*'s "official duties" rule should particularly apply in a case in which District administration has affirmatively directed an instructor to provide a lecture on a particular topic, yet the instructor provides a lecture that it is non-responsive. The *Garcetti* Court emphasized that speech that is "commissioned" by the government itself should not serve as a basis for a First Amendment free speech claim by an aggrieved employee. *See* 457 U.S. at 421-22 ("Restricting speech that *owes its existence* to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has *commissioned or created.*") (emphasis added).[1]

In any event, even if *Garcetti* had no application to Mr. Hodge's contentions here, the U.S. Supreme Court's holding in *Pickering v. Board of Education* allows the District to act as it has done in order, among other things, to protect the rights of its students.

This letter does not articulate all of the District's legal grounds that support its actions as to Mr. Hodge, but the grounds cited herein amply support them. The District does not intend to change its actions, none of which are disciplinary, as to Mr. Hodge.

If you have any questions concerning this matter, please call at (310) 981-2045.

Very truly yours,

LIEBERT CASSIDY WHITMORE

David A. Urban

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cc: Mr. Shane Turner
Ms. Pilar Morin

[1] *Sheldon v. Bilbir Dhillon*, 2009 WL 4282086 (N.D.Cal. 2009), cited in your letter, is inapposite, and actually supports the District's position. The Court in *Sheldon* did decline to apply the *Garcetti* "official duties" test, but it cited other authorities, including *Pickering*, that could justify the district's action in *Sheldon*. *Id.*, *4. Also, in allowing the action to proceed past the motion to dismiss stage the Court assumed "without deciding at this stage of the proceedings that the instructional speech [of plaintiff] was within the parameters of the approved curriculum and within academic norms." *Id.*