RESOLUTION OF THE GOVERNING BODY
OF THE
THREE AFFILIATED TRIBES
OF THE
FORT BERTHOLD INDIAN RESERVATION

A Resolution Entitled "Ratifying the 2016 Social Media Policy."

WHEREAS, This Nation having accepted the Indian Reorganization Act of June 18, 1934, and the authority under said Act and having adopted a Constitution and By-laws pursuant to said Act; and

WHEREAS, Article III of the Constitution of the Three Affiliated Tribes, also known as the Mandan, Hidatsa, and Arikara Nation (or "Tribes" or "MHA Nation) provides that the Tribal Business Council is the governing body of the Tribes; and

WHEREAS, The Constitution of the Three Affiliated Tribes authorizes and empowers the Tribal Business Council to engage in activities on behalf of and in the interest of the welfare and benefit of the Tribes and of the enrolled members thereof; and

WHEREAS, Article VI, Section 5 (l) of the Constitution of the Three Affiliated Tribes provides that the Tribal Business Council has the power to adopt resolutions regulating the procedure of the Tribal Business Council and other Tribal agencies and Tribal officials on the Reservation; and

WHEREAS, Technology and the way that people communicate with one another has changed rapidly over the years. There are benefits to the technology and also some risks; and

WHEREAS, The Tribal Business Council considered the attached Social Media Policy at a Special meeting on July 13, 2016 and passed it "Subject to resolution," and

WHEREAS, A Resolution was not submitted as directed by the Tribal Business Council in 2016, and the Tribal Business Council desires to formally ratify the policy as adopted in 2016.

NOW, THEREFORE, BE IT RESOLVED, that the Tribal Business Council of the Three Affiliated Tribes hereby approves and authorizes the attached Social Media Policy, which is to be appropriately published by the Tribes' Human Resources Department, including but not limited to, being placed in the MHA Nation Personnel Policies and Procedures Handbook.

BE IT FINALLY RESOLVED, that Human Resources Department is authorized to provide training to Tribal employees, Tribal directors and supervisors on said Social Media Policy.

CERTIFICATION

I, the undersigned, as Secretary of the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation, hereby certify that the Tribal Business Council is composed of 7 members of whom 5 constitute a quorum, 7 were present at a Regular Meeting thereof duly called, noticed, convened, and held on the 26th day of November 2019; that the foregoing Resolution was duly adopted at such Meeting by the affirmative vote of 5 members, 0 members opposed, 0 members abstained, 2 members not voting, and that said Resolution has not been rescinded or amended in any way.

Chairman [X] voting. [ ] not voting.

Dated this 26th day of November 2019.

ATTEST:

Tribal Secretary, Fred W. Fox Sr.
Tribal Business Council
Three Affiliated Tribes

Tribal Chairman, Mark N. Fox
Tribal Business Council
Three Affiliated Tribes

MANDAN, HIDATSA & ARIKARA NATION
Three Affiliated Tribes * Fort Berthold Indian Reservation
404 Frontage Road * New Town, North Dakota 58763-9402

MEMORANDUM

TO: Staff

FROM: Mike Stevens, MS
Information Technology / Records Manager

DATE: Wednesday, February 22, 2017
RE: Minutes Request

No resolution has since been brought forward for approval. Included below are the requested minutes from the;

THREE AFFILIATED TRIBES
TRIBAL BUSINESS COUNCIL
SPECIAL MEETING
JULY 13th 2016 MINUTES

N. Social Media Resolution

Motion: Councilman L. Kenneth Hall moved to approve interim modifications to the Social Media Policy subject to resolution. Councilman Fred Fox seconded the motion.

Vote: 6 Ayes. 1 – Not Voting. Motion carried.
Chairman Mark N. Fox – Aye
Councilman Randy Phelan – Aye
Councilman L. Kenneth Hall – Aye
Councilman Mervin Packineau – Not Voting
Councilman Fred Fox – Aye
Councilman Frank Grady – Aye
Councilman Cory Spotted Bear – Aye

If you have any questions, please feel free to contact me at;
701-627-4781x8111 or 701-421-1968,
or my email is mstevens@mhanation.com.

THREE AFFILIATED TATS OF THE FORT BERTHOLD RESERVATION EMPLOYEE SOCIAL MEDIA POLICY

A. **Communications Covered by this Social Media Policy**: This social media policy applies to communications made by employees of the Three Affiliated TATs of the Fort Berthold Reservation (the TAT) and all of the TAT's Departments as well as to the TAT's Business Council (collectively the "Employer"). This social media policy applies to social networking communications, media sharing, blogging and internet-based communications which includes but is not limited to: micro-blogging sites such as Twitter and WordPress; social media sites such as Facebook, MySpace and LinkedIn; media sharing such as YouTube and Flicker; all other personal blogs, message boards, websites and "chat" forums.

B. **Prohibited Communications**: When discussing the TAT, Tribal Department officers, Tribal elected officials, board members, representatives, co-workers, staff members, and employees shall refrain from:

(i) Airing strictly personal grievances or complaints solely by and on behalf of the employee himself/herself about an individual grievance that is not a matter of common concern for other employees. For example, a grievance about an employment action against one employee is a personal grievance unless such action is a management concern shared by more than one employee.

(ii) Airing personal grievances or complaints solely by and on behalf of the employee himself/herself about a matter that is not a matter of public concern. Matters of public concern include matters of political, social or other concern to the community but do not include personal complaints about internal office functions or dissatisfaction with office management, unless such statements bring to light actual or potential wrongdoing or breach of public trust on behalf of the Employer or inform the public that the Employer is not fulfilling its duty to the public;

(iii) Making statements that will disrupt the TAT's or the Tribal Department's ability to effectively and efficiently operate and fulfill its duties to the public, such as statements that will cause discord among co-workers or encourage factions among co-workers;

(iv) Making egregiously unprofessional and offensive statements or communications such as displaying sexually-oriented material; sexual or racial discrimination or harassment; harassment based on age, ethnicity, nationality, disability, race, religion, gender or sexual orientation; threats against personal safety; or extreme vulgarity;

(v) Making statements that are unlawfully slanderous and detrimental to the TAT, the Tribal Department or any elected public official of the TAT. Such statements include comments that are knowingly false or maliciously untrue and which gives a false impression about the subject to the public; or sharp, public, disparaging attacks upon the quality of the Employer's product and its business policies in a manner reasonably calculated to harm the Employer's reputation; and

(vi) Revealing the Employer's non-public, private or confidential information, for example: trade secrets, copyrighted or trademarked information, information necessary to ensure compliance with securities regulations and other laws, information about internal investigations if those investigations are designated as confidential by management, or embargoed information such as launch dates, release dates, or pending reorganizations. The discussion of sensitive, proprietary, or confidential information is strictly prohibited.

C. **Disclaimer Required**: While engaging in comments on social media or social networking relating to any discussion of the TAT's business, conduct or activities, employees must indicate that such statements reflect their own thoughts and opinions and not those of the TAT. It is required that employee's insert a disclaimer on personal social media accounts which clarifies that employees are expressing personal opinions and not the TAT's official viewpoints on any discussion addressing or representing the official position of the TAT. Further, unless specifically authorized to do so, only the TAT's Business Council may make official external communications expressing the TAT's official viewpoint and only the TAT's Business Council can make official statements communicating the TAT's official statements, messages, and viewpoints.

D. **Permitted Communications**: This policy shall not be interpreted or applied so as to interfere with employee's rights to comment on matters of public concern nor to interfere with an employee's First Amendment rights. Accordingly, this policy shall not be interpreted or applied to prohibit any speech or comments:

(i) Regarding matters of "public concern" that are of political or social interest to the community, unless such comments are made pursuant to the employee's job duties; or

(ii) Regarding the Employer's policies, the Employer's performance, or the Employer's treatment of its employees if such statements: bring to light actual or potential wrongdoing on behalf of the Employer; bring to light actual or potential breach of public trust on behalf of the Employer; or inform the public that the Employer is not fulfilling its duty to the public.

E. **Cautionary Note**: Please use caution when making online statements because online comments reflect upon the TAT, the individual employee, and the employee's co-workers. Before posting, please consider how such statement impacts others, and how the posting portrays you as a professional and portrays the TAT.

F. **Effective Date**: This social media policy is effective [insert date], 2016.

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MEMORANDUM

CONFIDENTIAL COMMUNICATION

TO: Three Affiliated Tribes of the Fort Berthold Reservation Tribal Council

FROM: Fredericks Peebles & Morgan LLP

DATE: May 10, 2016

RE: Social Media Use Restrictions

This memorandum analyzes whether the Three Affiliated Tribes of the Fort Berthold Reservation (the "TAT") may restrict social media use of its private citizens and government employees. This memorandum first summarizes the law relevant to government restrictions of private citizens' social media use and discusses the ability of government employers to limit government employees' use of social media.

ANALYSIS

Social media postings are considered a form of speech. *E.g.*, *Mattingly v. Milligan*, Case No. 4:11-CV-00215 JLH, 2011 WL 5184283 (E.D. Ark. Nov. 1, 2011). Like other speech issues, determining whether social media use is protected free speech depends on whether the social media activity is conducted in the individual's capacity as a private citizen or as part of the individual's job duties as a public employee.[1]

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[1] *Compare Citywide Sewer & Drain Service, Corp. v. Carusone*, No. 0018160/2005 (N.Y. App. Div. Sept. 18, 2006) (finding statements by employee who worked a summer job for employer, and subsequently made comments on his blog under the title "Citywide Really is Shittywide," were statements of opinion protected by the First Amendment), *with In re Tenure Hearing of Jennifer O'Brien*, No. A-2452-11T4, 2013 N.J. Super. Unpub. LEXIS 28 (App. Div. Jan. 11, 2013) (appeals court upheld firing of tenured school teacher who allegedly wrote derogatory remarks about her students on Facebook; finding the First Amendment does not protect her posts because even if the teacher's comments were on a matter of public concern, "her right to express those comments was outweighed by the district's interest in the efficient operation of its schools").

Not only does the First Amendment protect freedom of speech, it also protects "the right to be free from retaliation by a public official for the exercise of that right." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000). The usual rule is that governmental bodies may not prescribe the form or content of individual expression. *Cohen v. California*, 403 U.S. 15, 24 (1971). The First Amendment protects a recipient and the sender of direct personal correspondence from unjustified governmental interference with the communication. *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974).

However, it is well established "that the government may impose certain restraints on its employees' speech and take action against them that would be unconstitutional if applied to the general public." *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 560 (4th Cir. 2011). So, courts use different analyses to determine whether a restriction is unlawful depending on whether the communicator is a private citizen or government employee.

This memorandum will: (I) set-forth laws which apply to private citizen speech; (II) set-forth laws which apply to government employee speech; (III) review laws that apply to private sector employee speech; and (IV) make recommendations regarding the TAT's inquiry on restricting use of social media based on the legal analyses in (I), (II) and (III).

I. Restriction of Social Media Use of Private Citizens

Generally, content-based restrictions on speech are impermissible under the First Amendment right of free speech.[2] When a regulation is based on the content of speech, governmental action is scrutinized to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko* v. *Maryland*, 340 U.S. 268, 282 (1951); *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980). The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibitions of public discussion of an entire topic. *Consol. Edison Co.*, 447 U.S. at 536.

The First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Id.* The Supreme Court's justification of this rule is that allowing "a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Id.* Where a government restricts the speech of a private person, the action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. *See Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976).

Here, the TAT's efforts to restrict social media use of its private citizens would be unlawful if the TAT seeks to enact regulations prohibiting any negative comments about the TAT on Facebook. Such a regulation would be viewed as a restriction on expression because of

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[2] The First Amendment of the United States Constitution extends to Indian Tribes through the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302 (a)(1), which states in pertinent part:

No Indian Tribe in exercising powers of self-government shall . . . make or enforce any law . . . abridging the freedom of speech.

its message or content. Courts would also likely interpret such a regulation as a prohibition of speech based upon public officials' disapproval of the speaker's views. This is the type of restriction that the First Amendment prohibits. Thus, a regulation restricting private citizens' negative comments of the TAT on social media would be impermissible under the First Amendment.

II. Restriction of Social Media Use of Government Employees

Although the TAT cannot regulate all private citizens' use of social media, it can regulate the social media use of government employees. Because the TAT is a government, laws that apply to government employee speech will apply to the TAT's social media regulations. A government employer's policy regarding its employee's speech is analyzed within the framework of the First Amendment. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Ed. of Township High School Dist. 2005 Will Cty*, 391 U.S. 563 (1960).

A government employee enjoys First Amendment protections when he is speaking as a private citizen on *a matter of public concern.* A government employer can limit the speech of a government employee if: (1) the employee is not speaking as a private citizen on a matter of public concern; (2) the employee's speech hinders the employer's ability to operate efficiently and effectively; or (3) if the employee's speech is made pursuant to his job duties. *See, e.g., Garcetti*, 547 U.S. at 417-19.

For a government employee to assert that an employer violated her First Amendment right to free speech, the employee must first show that the speech was the kind of speech protected by the First Amendment.[3] *Ricciuti v. Gyzenis*, No. 3:09-cv-826 (MRK), 2011 WL 6816542 at *4 (D. Conn. Dec. 28, 2011). A public employee's speech is protected if it is speech about a matter of public concern, such as matters about political, social, or community concerns. *Connick*, 461 U.S. at 145-48; *Riccuiti*, 2011 WL 6816542 at *5-6. If a government employee's speech is not regarding a matter of public concern, it is not protected by the First Amendment and the government employer can restrict such speech. *Garcetti*, 547 U.S. at 418.

Statements about how a government employer spends tax dollars, funding policies of a government entity, a government employer's policies regarding its employee's political activity, an employer's racially discriminatory policy or conduct, or questioning whether a government entity is discharging its duties to the public or breaching the public trust, are all matters of public

[3] If an employee is speaking pursuant to his job duties, he is not speaking as a private citizen and the employee speech is likely not protected by the First Amendment. *See, e.g., Garcetti*, 547 U.S. at 421. Employee speech that is made pursuant to his job duties is "commissioned" by the employer. *See, e.g., Riccuiti*, 2011 WL 6816542 at *6. Co-workers speaking with one another about their employer is not speech pursuant to job duties and is likely protected by the First Amendment. *See, e.g., Riccuiti*, 2011 WL 6816542 (discussing *Weintraub v. Board of Education*, 593 F.3d 196 (2d Cir. 2010). If a Tribal employee is tasked with posting statements on Facebook or media publicity is part of his job duty, then the postings on Facebook are not protected by the First Amendment; otherwise, Facebook postings are unlikely to be categorized as an employee's speech made pursuant to job duties.

concern. *Garcetti*, 547 U.S. at 417 (citing *Pickering*, 391 U.S. at 566); *Connick*, 461 U.S. at 145-48; *Riccuiti*, 2011 WL 6816542 at *5-6.

An employee's personal grievance about dissatisfaction with conditions at work or complaining about office morale is not employee speech regarding a matter of public concern. *See, e.g., Connick*, 462 U.S. at 146; *Riccuiti*, 2011 WL 6816542 at *4. However, even if employee speech is *motivated* by a personal grievance, it can be speech that addresses a matter of public concern. *Riccuiti*, 2011 WL 6816542 at *5. Courts look closely at "content, form, and context" of employee speech to evaluate whether it is addressing a matter of public concern. *Connick*, 461 U.S. at 147-48; *Riccuiti*, 2011 WL 6816542 at *5 (citing *Sousa v. Roque*, 578 F.3d 164, 175 (2d Cir. 2009)). For example, if an employee's statement about a supervisor would convey to the public that the employee is upset with the status quo, or is part of a dispute with his supervisor, the statement is likely a personal grievance. *See Connick*, 461 U.S. at 148. However, if an employee's statement about a supervisor brings to light actual or potential wrongdoing or breach of public trust on behalf of the government employer, it may be a matter of public concern. *See id.* Employee speech suggesting more effective office practices is likely protected speech. *See Riccuiti*, 2011 WL 6816542.

But, even where a public employee's speech is regarding a matter of public concern, it may still be restricted if it disrupts the government employer's ability to effectively and efficiently operate or to fulfill its duties to the public. *Garcetti*, 547 U.S. at 418; *Connick*, 462 U.S. at 150-51. Such disruption occurs, for example, if the speech causes disruption at the office, causes discord among co-workers, or encourages employees to resist management's decisions and policies. *See Connick*, 462 U.S. at 151-53. Thus, if employee postings on Facebook cause tension or discord among co-workers, encourage employees to resist management decisions, or generally disrupt the TAT's or Tribal Department's daily operation or its ability to deliver services to tribal members, such postings may be limited.

Applying the parameters of protected government employee speech, the TAT's social media policy must be tailored to allow for protected speech regarding matters of public concern, but can prohibit speech that is merely airing personal grievances. The TAT's social media policy may also limit speech that will cause discord among employees and generally prevent the TAT or its Departments' ability to operate and fulfill its obligations to the tribal members.

III. Private Employer Social Media Policies

Because the TAT is a government employer, the laws regarding private employee speech, such as the National Labor Relations Act of 1935 ("NLRA")[4], which protects private workers' rights to unionize, would not apply to the TAT's social media policy. *See, e.g., Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 270 (6th Cir. 1990). However, it is helpful to briefly review guidelines for lawful private-sector social media policies through the lens of the NLRA.

The National Labor Relations Board (the "NLRB") is the administrative review board tasked with determining whether a private employer's actions have violated the NLRA and has

[4] Pub. L. 74-198, 49 Stat. 452 (1935), codified at 29 U.S.C. §§ 151-169.

issued three memoranda[5] summarizing cases it had decided regarding employer's social media policies and employee social media activity. These three memoranda are useful guides for social media policies that the NLRB considers unlawful. This section summarizes the NLRB's application of the NLRA to: (a) employee's Facebook posts; (b) employee complaints about employers; and (c) an employer's social media policy.

(a) Employee Facebook Posts

Recent NLRB decisions indicate that private employee's Facebook posts criticizing employer's conduct or co-workers conduct can constitute "concerted activity" protected by the NLRA, so long as the criticism is shared by more than one employee. For example, in *Karl Knauz*, an individual employee posted chastising comments on Facebook about his employer's choice of catering services at a work event. *Karl Knauz Motors Inc.*, Case No. 13-CA-46452, pp.3-4 (2011). Two employees had previously voiced concern about the planned catering services. *Id.* at p.6. The Court held that the Facebook comments were "concerted activity" protected by the NLRA. *Id.* at p.8. Similarly, in *Bay Sys. Technologies, LLC*, 357 NLRB No. 28 (2011), the NLRB found that a private company violated the NLRA by discouraging employees from engaging in Facebook postings and other "concerted activity" where employees were complaining that the employer had not issued paychecks on time. *Id.* at *2-3. Because the Facebook complaints were shared by more than one employee, the posts were considered concerted activity.

(b) Employee Complaints About Employers and Supervisors

Private employees can complain about or criticize employers, employer conduct, and employer policies and such speech can be protected by the NLRA if the speech: (1) is about terms and conditions of employment[6]; (2) if it invites support, mutual aid, or protection from other employees[7]; or (3) if it is a complaint shared by employees[8]. An employee can also complain about an employer's hiring practice, supervisory style, supervisor's attitude, supervisor's performance, and supervisor's disciplinary action if it is part of a continuing discussion with other employees about the same or similar, shared concerns. *E.g.*, Memo II.

However, individual employee complaints about employers are not protected speech under the NLRA. *E.g.*, Memo II, pp. 31-35; Memo I at "Employee's Facebook Postings About Manager Were Individual Gripes, Not Concerted Activity." That is, if the complaint is personal or impacts just one employee, it is not protected speech. Further, employee comments can be unprotected where they are sharp, public, disparaging attacks upon the quality of the company's product and its business policies in a manner reasonably calculated to harm the company's

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[5] Memorandum, OM 11-74: *Report of General Counsel Concerning Social Media Cases*, Anne Purcell, Assoc. Gen. Counsel, Nat'l Labor Rel. Bd., to All Reg'l Dir., Officers-in-Charge, and Resident Officers ("Memo I")(Aug. 18, 2011), *available at*: https://www.nlrb.gov/search/simple/all/social%20media%20cases; Memorandum, OM 11-74: *Report of General Counsel Concerning Social Media Cases*, Anne Purcell, Assoc. Gen. Counsel, Nat'l Labor Rel. Bd., to All Reg'l Dir., Officers-in-Charge, and Resident Officers ("Memo II") (Jan. 24, 2012); Memorandum, OM 12-59: *Report of the Acting General Counsel Concerning Social Media Cases*, Anne Purcell, Assoc. Gen. Counsel, Nat'l Labor Rel. Bd., to All Reg'l Dir., Officers-in-Charge, and Resident Officers ("Memo III")(May 30, 2012).

[6] *See Five Star*, 522 F.3d at 50.

[7] *See Hispanics United of Buffalo, Inc.*, Case No. 3-CA-2782, p. 7 (2011).

[8] *See* Memo I.

reputation and reduce its income. *Nat'l Labor Rel. Bd. v. Intern. Broth. Of Elec. Workers, Local No. 1229*, 346 U.S. 476, 471 (1953).

(c) Employer's Social Media Policy

Recent NLRB decisions indicate that a private employer's social media policy that is too broad or limiting can violate the NLRA, *even where employees are not unionized and even where there is no actual adverse employer action.* That is, merely establishing or maintaining an overly-broad social media policy can violate the NLRA. For example, in *Lafayette*, an employer had an employee conduct manual that stated: "making false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees" was unacceptable employee conduct. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1988). The NLRB found this general employee conduct policy violated the NLRA because it was overbroad and would prevent an employee from exercising their right to concerted actions protected by the NLRA. *Id.*

Thus, where possible, the TAT's social media policy should include specific limitations on employee speech, define potentially ambiguous terms, and give specific examples of speech that is considered prohibited.

IV. Recommendation

Since the TAT is a government, it can limit employee speech that is not regarding a matter of public concern, that disrupts the efficient operation of the office, and employee speech made pursuant to job duties. While public employees can make comments on matters of public concern, personal grievances or statements of dissatisfaction are not protected. Thus, the TAT's social media policy should differentiate between postings about matters of public concern, which is protected speech, and postings that are not matters of public concern. While the NLRA does not apply to the TAT, the TAT's proposed social media policy could implement some of the NLRA recommendations as guidelines for a clearer social media policy.

Further, the TAT's management should be trained on what constitutes protected speech and what disciplinary actions may be taken pursuant to the social media policy. Attached to this memorandum is a Social Media Policy that the TAT Business Council can review and pass if it so desires.