



July 27, 2017

President Diane B. Call
Office of the President
Queensborough Community College
Administration Building, A-502
222-05, 56th Avenue
Bayside, New York 11364

Sent via U.S. Mail and Electronic Mail (dcall@gcc.cuny.edu)

Dear President Call:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned about the state of free expression at Queensborough Community College (QCC) after Professor Julian Stark received a warning letter for allegedly violating the City University of New York (CUNY) Policy on Acceptable Use of Computer Resources (CUNY Policy). By issuing an official warning to a faculty member for attempting to communicate with his colleagues, QCC chills faculty dialogue. Further, by enforcing a flawed policy instead of working collaboratively with faculty to craft a more effective approach to email communications, QCC has ignored the importance of shared governance and foregone an opportunity to foster a more productive relationship with and amongst its faculty members.

FACTS

The following is our understanding of the facts; please inform us if you believe we are in error.

Prior to the 2016–17 academic year, QCC faculty conducted robust discussions at the departmental and institutional level via email distribution lists that facilitated communication with various segments of the QCC community (e.g., a “_Faculty” list, an “_Everyone” list, and a “_CommunityDialogue” list, among others). Those who did not wish to participate could “opt out” of receiving emails sent to the _CommunityDialogue list, but other lists lacked this feature.

In recent years, some faculty members have voiced concerns about email volume. Instead of simply adding an “opt-out” function to all email lists, QCC unilaterally closed access to all lists on August 24, 2016, replacing them with limited “opt-in” lists. As a result of the change, far fewer faculty now receive email communications from their peers.

As you know, faculty representatives have expressed disappointment and concern about the promulgation and impact of QCC’s new email lists. The Academic Steering Committee of the Academic Senate, the Faculty Executive Committee, and the Executive Committee of the QCC Chapter of the Professional Staff Congress have each called for the restoration of the previous email list system. On October 27, 2016, the Committee on Academic Freedom echoed this request in a letter to you, sharply criticizing the new lists as “a set of restrictions and hindrances that is totally inappropriate to a university setting and goes counter to the community ethos that existed at this College prior to 8-24-16.” In your response to Professor Stark, the author of the letter, you wrote only that “[e]fforts are on-going to facilitate communication among campus constituents.”

On March 22, 2017, the Office of Human Resources and Labor Relations sent a notification to the “Everyone” list warning QCC staff and faculty that they should “refrain from sending mass emails on an unsolicited basis.” The notification read, in relevant part:

The Queensborough Dialogue listservs (Community, Faculty, etc.) were established as a forum where all members of the College community could engage in the free exchange of ideas and open discourse, directed to the most relevant audience. The opt-in system was introduced this year to better accommodate those members of the Community who do not wish to participate, as well as to comply with *The City University of New York Policy on Acceptable Use of Computer Resources*.

The College is well-aware that some members of the college community have expressed their dissatisfaction with being asked to direct their communications to the Dialogue listservs, rather than send unsolicited mass mailings. While they are entitled to their opinion, they do not have the right to circumvent the system by disseminating emails from their own mailing lists addressed to hundreds of members of the College community without their consent, and without providing a means by which those members can remove themselves from these lists. This practice also violates *The City University of New York Policy on Acceptable Use of Computer Resources (Approved by the Board of Trustees on January 29, 2007, Cal. No. 4.D., with amendments approved on June 25, 2012, Cal No. 5.A)*. Specifically:

8. Disruptive Activities

- a. CUNY Computer Resources must not be used in a manner that could reasonably be expected to cause or does cause, directly or indirectly,

unwarranted or unsolicited interference with the activity of other users[.]

Faculty and staff should refrain from sending mass emails on an unsolicited basis.

That same day, after receiving the Office of Human Resources and Labor Relations' letter, Professor Stark sent an email to his peers criticizing the new email lists and their promulgation. Because the lists' creation was approved "without the full consultation of the faculty," Professor Stark argued that it "represents a unilateral decision taken by the few that caused much 'unwarranted or unsolicited interference with the activity of other users,'" and thus violated the same CUNY Policy cited by the Office of Human Resources and Labor Relations. After pointing out that the now-defunct "_CommunityDialogue" list allowed users to opt out of receiving emails, Professor Stark further noted that the administrative warning followed "an important faculty conversation about publication in 'predatory journals.'" This timing suggested to Professor Stark that "the true motivation for the new email policy, to splinter the faculty to prevent discussions on substantive matters of governance and policy, is now clearly in view."

The next day, March 23, Professor Stark received a memorandum from Dean of Human Resources and Labor Relations Liza Larios warning him against sending any further "mass emails on an unsolicited basis." A copy of the memorandum was placed in Professor Stark's personal personnel file. Per QCC's Personnel Policies and Procedures, Larios' warning is now "available to all those involved in the personnel review process for reappointments, tenure and promotion."¹ Accordingly, it appears to have been intended to convey a threat of potential discipline for sending similar emails in the future.

ANALYSIS

A. CUNY Policy's Application against Professor Stark

QCC's application of the CUNY Policy against Professor Stark's email was in error. Professor Stark's response to the Office of Human Resources and Labor Relations' email could not reasonably have been expected to "directly or indirectly" cause "unwarranted or unsolicited interference" with the "activity" of other CUNY Computer Resources users.

The receipt of Professor Stark's single email cannot constitute actionable "interference" with the use of CUNY Computer Resources. Those users who received the email—no matter their number—were under no obligation to read it. For those recipients who disagreed with its content or did not wish to receive it in the first place, the time it would take to delete it and any subsequent correspondence would have been negligible. *See Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 711 (9th Cir. 2009) (observing that recipients offended by

¹ Faculty Handbook, *Personnel Policies and Procedures*, QUEENSBOROUGH COMMUNITY COLLEGE, <http://www.qcc.cuny.edu/governance/faculty/handbook/personnel-policies-and-procedures.html>.

a professor's emails "should engage him in debate or hit the 'delete' button when they receive his emails. They may not invoke the power of the government to shut him up.") Professor Stark's email did not restrict or impede the online "activity" of other users in any meaningful or cognizable way.

We further note that Larios did not attempt to argue or otherwise demonstrate that Professor Stark's email was "unsolicited" by its recipients; rather, she appears to have simply assumed as much. Nor did Larios' warning explain if or how, in the alternative, any of its recipients found Professor Stark's email to be "unwarranted." This shortcut in Larios' reasoning assigns unwarranted blame to Professor Stark and further exacerbates the effect of the already flawed language of the CUNY Policy.

By enforcing an unacceptably broad policy against Professor Stark's criticism of the administration's decision making, Larios' warning chills faculty and student expression at QCC—an unfortunate and unacceptable outcome. QCC must immediately rescind the warning issued to Professor Stark and remove it from his personnel file.

B. CUNY Policy

The CUNY Policy is constitutionally suspect on its face.

It has long been settled law that the First Amendment is binding on public institutions like QCC. *See Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" (internal citation omitted).

Because it provides users with insufficient notice as to what usage might run afoul of its directive, the CUNY Policy is impermissibly vague. A regulation is unconstitutionally vague when it does not "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Per the CUNY Policy's broad terms, QCC students and faculty are left to guess as to whether an email sent to their peers might constitute "unwarranted interference" with another's use of the internet—even if such "interference" was "indirect," and no matter how unreasonable their peers' conception of "interference" may be.

Further, the CUNY Policy's vague, subjective prohibitions condition the right of users to use QCC email resources upon the subjective reaction of their peers to their expression—again, without regard to how unreasonable any such reaction may be.

This is an unacceptable result, as "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

Even assuming for the sake of argument that QCC's email lists constitute "limited or nonpublic forums . . . state actors may not suppress speech because of its point of view."

Rodriguez, 605 F.3d at 710. Because the CUNY Policy is violated if a single recipient believes that an email “indirectly interfered” with his or her usage of QCC email or internet resources, users must consider whether the viewpoints they express over email will provide grounds for complaint. As a result, users will rationally decide to self-censor, fearful of receiving warning letters like the one placed in Professor Stark’s personnel file. The First Amendment does not tolerate such a chill on speech, and forcing users to self-censor in this way is at odds with the spirit and letter of First Amendment jurisprudence. *See United States v. Williams*, 553 U.S. 285, 292 (2008) (“[T]he threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas.”); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (“Such unwarranted inhibition . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice. . . .”).

We remind you that “[b]road prophylactic rules in the area of free expression are suspect.” *NAACP v. Button*, 371 U.S. 415, 438 (1963). We urge you and CUNY to revise this policy immediately to make clear to users that only speech unprotected by the First Amendment or speech that materially interferes with the operation of QCC internet resources will constitute a violation. To that end, we offer the following policy language for your consideration:

Abuse of computer facilities and resources is prohibited, namely:

- (a) unauthorized access or transfer of an electronic file or files;
- (b) unauthorized use of another individual’s identification or password;
- (c) use of computing facilities and resources to materially interfere with the work of another student, faculty member, or College Official;
- (d) sending a large volume of unsolicited emails with the intent to severely impair the functionality of the College’s computer network;
- (e) repeated use of the College network to send unsolicited emails with the primary purpose of proposing a commercial transaction;
- (f) use of computing facilities and resources to share copyrighted materials in knowing violation of state or federal law;
- (g) use of computing facilities and resources to transmit unlawful obscenity; or
- (h) use of computing facilities and resources to campaign for public office, or to perform official duties on behalf of an election campaign, or in any other manner that reasonably suggests the College itself is participating in political activity, campaigning, or fundraising, or attempting to influence legislation. Merely sharing or discussing personal political beliefs through the College’s computing facilities and resources is not a violation of this subsection.

These restrictions specifically delineate user responsibilities in a way that respects both the university’s interest in maintaining the integrity of its computer resources and complying with its legal obligations, while also recognizing the importance of freedom of expression and facilitating robust online faculty and student dialogue. FIRE would be pleased to work

with you and your colleagues towards the adoption of this policy at QCC and across the CUNY system.

C. Policy Revisions and Faculty Collaboration

As discussed above, FIRE is aware of the contentious history of the new email lists. We are likewise familiar with both your administration's justifications for implementing the new approach and the concerns of those faculty members frustrated with the previous system. Given these continuing tensions, we suggest that a collaborative dialogue with concerned faculty members on both "sides" of the email list issue would be productive.

If a straightforward "opt-out" functionality were to be introduced to the previously existing listserv, the concerns of both proponents and critics of the old list system would appear likely to be ameliorated. Faculty who wished to easily reach peers who wished to be readily available would be able to do so. Accordingly, faculty who did not wish to be contacted by peers would be able to quickly and easily indicate as much. However, given the importance of intra-faculty dialogue—for programmatic, collegial, governing, and academic matters—the default configuration would assume a faculty member's participation in the larger discussion, unless he or she took deliberate (and simple) action to "opt out."

FIRE is also aware that CUNY is considering broader changes to its policies governing student and faculty speech. As you know, campuses nationwide have struggled with this crucial issue in recent years. In an effort to protect student and faculty speech and assist institutions that wish to do so, FIRE has launched a campaign to encourage colleges and universities to adopt formal policies modeled on the University of Chicago Statement on Free Expression.

That statement's powerful articulation of the importance of campus free speech identifies the principles that should guide institutions committed to the search for truth and to greater understanding through free and open deliberation and debate. As the Chicago Statement observes:

In a word, the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose. Indeed, fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission.

We would be very pleased to work with you and your colleagues to address not just the CUNY Policy on Acceptable Use of Computer Resources, but also institutional policies addressing freedom of expression at QCC more generally.

Thank you for your attention to our concerns. We look forward to hearing from you, and we request a response to this letter by August 24, 2017.

Sincerely,

A handwritten signature in black ink, appearing to read 'Will Creeley', with a long, sweeping underline that extends to the right.

Will Creeley
Senior Vice President of Legal and Public Advocacy

cc:

Liza Larios, Dean of Human Resources and Labor Relations
Professor Julian Stark