



November 13, 2017

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*Sent via U.S. Mail and Electronic Mail (hunter3@rpi.edu)*

Dear Vice President Hunter:

FIRE is deeply disappointed to write Rensselaer Polytechnic Institute once more concerning the Institute's repeated and deliberate efforts to chill student critics of the administration. This is our third such letter this fall.

As our prior correspondence has painstakingly detailed, RPI guarantees expressive rights to its students. RPI's accreditation by the Middle States Commission on Higher Education likewise requires that the Institute demonstrate a commitment to freedom of expression. RPI is legally and morally obligated to keep the promises that it has made.

RPI has not done so. At every opportunity, RPI has interpreted vague policies to the detriment of "Save the Union" supporters' freedom of expression. Students have repeatedly been denied permission to hold peaceful demonstrations, have been denied the right to post signs in locations permitted by the Handbook, and have watched as RPI personnel have removed the few "Save the Union" signs students managed to post.

We write today because RPI's disrespect for student rights has hit a shocking new low. FIRE has learned that RPI has initiated judicial proceedings against RPI students and "Save the Union" proponents Michael Gardner and Bryan Johns. RPI has accused Gardner of "soliciting" (in other words, recruiting students to his cause), invoking a policy intended to prevent *commercial* activity. Gardner also stands accused, along with Johns, of three additional violations arising from the October 13 demonstration. RPI's summary of evidence demonstrates that RPI singled out these students for punishment on the basis that they spoke with reporters in televised interviews, and RPI argues that students should be held responsible for a *lack of evidence* that they prevented other students from demonstrating.

These proceedings are the most extreme attempt yet by RPI to penalize advocacy critical of the administration. They must end immediately.

## I. Facts

The following is our understanding of the facts. For the sake of brevity, we incorporate the facts recited in our letters of October 9 and November 8, 2017. We again ask you to inform us if you believe we have made factual errors.

Students at RPI are engaged in a long-running dispute with the university's administration and are concerned that the autonomous, student-operated Rensselaer Union is being undermined by actions of the administration.<sup>1</sup> The "Save the Union" campaign has no formal leadership.

Although RPI Assistant Vice President for Student Life and Dean of Students Travis T. Apgar denied Bryan Johns' "Application for Approval of Peaceful Demonstration," hundreds of students assembled on the afternoon of October 13, 2017.

RPI erected a fence limiting access to the demonstration site as an alternative to "a more extensive separation of our student protesters from the event," as interim Vice President for Student Life LeNorman Strong told *The Polytechnic*.<sup>2</sup> RPI viewed further separation as "not desirable."<sup>3</sup> Unidentified students moved the fence and gathered near, but not within, the site of the black-tie fundraiser being held by President Shirley Ann Jackson.<sup>4</sup> In a statement to *The Polytechnic*, Apgar cited "highly tense moments" but acknowledged that "no physical harm resulted from any of this group's actions."<sup>5</sup>

On November 8, Associate Dean of Residential Commons Michael A. Sitterley sent notices to Gardner and Johns informing them that they are to face a "Judicial Inquiry" as a result of their involvement in the October 13 demonstration. The "reported violations" include trespassing, violation of an RPI policy (specifically the "rules for Maintenance of Public Order"), and failure to comply. An "Incident Summary" prepared by RPI Director of Judicial Affairs Michael Arno describes RPI's evidence purporting to support these charges, including video

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<sup>1</sup> See generally the materials available on the "Save the Union" website. The timeline demarcates 2008 as the beginning of the dispute, due to the removal of student representatives from an RPI Board of Trustees' committee. SAVE THE UNION, THE SITUATION, <https://savetheunion.xyz/situation> (last visited Oct. 9, 2017).

<sup>2</sup> Brookelyn Parslow, *Fence installed, motivation questioned*, POLYTECHNIC (Oct. 18, 2017), [https://poly.rpi.edu/2017/10/18/fence\\_installed\\_motivation\\_questioned](https://poly.rpi.edu/2017/10/18/fence_installed_motivation_questioned).

<sup>3</sup> *Id.*

<sup>4</sup> Mark Robarge, *Hundreds urge RPI to 'Save the Union'*, TROY RECORD (Oct. 13, 2017), <http://www.troyrecord.com/general-news/20171013/hundreds-urge-rpi-to-save-the-union>.

<sup>5</sup> Sidney Kochman and Brookelyn Parslow, *Dean of Students Office begins judicial inquiries into protest participation*, POLYTECHNIC (Nov. 9, 2017), <https://poly.rpi.edu/2017/11/09/dean-of-students-office-begins-judicial-inquiries-into-protest-participation>.

surveillance by both local law enforcement and RPI security personnel. This summary is described in greater detail below.

Gardner has also been charged, in a separate proceeding, with “operating a business” because he distributed a letter in support of the “Save the Union” campaign, which RPI characterizes as impermissible “solicitation.” These charges remain pending.

## **II. RPI’s Continuing Conduct Demonstrates a Lack of a Commitment to Freedom of Expression**

By pursuing disciplinary charges against students who support the “Save the Union” campaign, RPI further betrays its commitment to freedom of expression, interpreting vague policies in order to penalize the most vocal critics of RPI’s administration.

### **A. Charges for “Operating a Business” in Soliciting Student Support for the “Save the Union” Campaign**

On the evening of October 2, several supporters of the “Save the Union” campaign distributed a letter addressed to freshmen students,<sup>6</sup> placing the letter under the doors of the Burdett Avenue Residence Hall (“BARH”). One of the students, Michael Gardner, was subsequently summoned to meet with Cynthia Smith, an assistant dean of students at RPI, who conducted a Judicial Inquiry<sup>7</sup> on November 3. As of today, Gardner has not been informed of what consequences, if any, he will or may face as a result of these charges.

RPI’s “Operating a Business” policy<sup>8</sup> reads, in full:

Residents are not permitted to use any Rensselaer facilities or services for business or personal profit activities. This includes, but is not limited to buildings, telephone system, and computer network, hardware, or software, etc.

Only members of recognized student organizations, with permission from Residence Life, may conduct fundraising activities in the residence halls. Fundraising activities may not include door-to-door solicitation. No outside organization or person may solicit in residence halls or apartments.

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<sup>6</sup> Letter to freshmen students at Rensselaer Polytechnic Institute (Oct. 2, 2017), *available at* <https://savetheunion.xyz/assets/FreshmenLetter.pdf>.

<sup>7</sup> A “Judicial Inquiry” is “part of the fact finding phase of” RPI’s “judicial process,” a coercive process requiring that a student appear before an RPI administrator and answer any questions posed to them, after which the administrator may assign a penalty. 2014 – 2016 Rensselaer Handbook of Student Rights & Responsibilities, Rev. Oct. 2015, at 10–11, available at <http://www.rpi.edu/dept/doso/resources/main/2014-2016StudentHandbookrevOctober2015.pdf> (“Handbook”).

<sup>8</sup> *Operating a Business*, Rensselaer Polytechnic Institute Student Living & Learning (last modified Jan. 14, 2012), <http://reslife.rpi.edu/update.do?artcenterkey=160>.

It is abundantly clear that this policy purports to bar students from engaging in commercial activity at RPI. The policy clarifies, in the second paragraph, that students may seek permission to engage in “fundraising activities” so long as they do not go door-to-door, but that non-students will not be granted permission to engage in these activities.

The letter distributed in support of the “Save the Union” campaign is not a commercial or fundraising effort. Rather, the letter describes the “power struggle” with the RPI administration and exhorts students to “join the fight to save our student-run Union before this beloved cornerstone of student life is lost forever.” It does not ask students to raise or contribute funds, to patronize any of the services offered within the non-profit Union, or to do anything more than express their support for the campaign.

During the Judicial Inquiry proceeding with Gardner, Dean Smith suggested that the policy’s failure to define “solicit,” as it is used in the final sentence of the policy, extends the policy’s reach to encompass the distribution of non-commercial flyers in support of the “Save the Union” campaign. Yet even if this sentence could be read in isolation and construed to encompass non-commercial activity, it purports only to bar an “outside organization or person” from that activity.

RPI’s use of this policy<sup>9</sup> to subject Gardner to a judicial proceeding is troubling, and certainly cannot be squared with RPI’s purported commitment to its students’ freedom of expression. Rather, the act of attempting to utilize clearly inapplicable policies to critics of the RPI administration evinces an intent to dissuade vocal criticism of the Institute. Accordingly, any charges arising out of the distribution of written material in support of the “Save the Union” campaign must be abandoned.<sup>10</sup>

## **B. Charges Arising from the October 13 Demonstration**

RPI has also brought charges against Gardner, as well as Bryan Johns, as a result of their participation in the peaceful demonstration on October 13, 2017. These charges<sup>11</sup> are likewise contrary to a demonstrable commitment to freedom of expression.

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<sup>9</sup> Perhaps more troubling, Dean Smith also suggested to Gardner that there may be *unwritten* policies at RPI barring the distribution of written materials in the dorms.

<sup>10</sup> This includes the charge premised on RPI’s “Visitor Policy,” as there is no evidence that the student was *not* “hosted by a resident living in the same hall.” RPI promises that students enjoy the right against self-incrimination, meaning that they are not obliged to answer questions which might tend to incriminate them. Handbook at 11. If this right is meaningful, RPI must bear the burden of proffering evidence that a policy has been violated, and cannot demand that a student answer whether or not a particular fact is true, or rely on a student’s silence as evidence that an element of an offense can be evidenced. The lack of evidence that the student was not “hosted” is insufficient to meet the preponderance of the evidence burden required by RPI’s judicial system. Handbook at 10.

<sup>11</sup> The charges include Trespassing, Violation of a Published Rensselaer / Student Government Policy or Regulation, and Failure to Comply. None of the documents setting forth the “reported Grounds for Disciplinary Action violations” identify any specific conduct giving rise to any of these charges, depriving the students of the requisite notice “of the nature of the charges against him or her” provided under the Student Bill of Rights. Handbook at 7. Without being provided with the factual basis for each charge, students cannot adequately

An “Incident Summary,” prepared by RPI Director of Judicial Affairs Michael Arno and provided to Gardner, cites a “peaceful demonstration” during which unidentified persons “moved a barrier and entered a restricted area of campus.” At that point, “professional staff was instructed to identify demonstration participants,” efforts later supplemented by “[v]ideo . . . provided by [RPI] Public Safety and Troy Police.”

This effort, combined with RPI’s review of media reports, apparently identified 11 students who participated in the demonstration. RPI has elected to charge two: Gardner and Johns. The evidence against Gardner is that he is seen in photographs using a bullhorn. The evidence against Johns is that he submitted the (denied) application to hold the demonstration and was seen in pictures of the demonstration distributed online. The “Incident Summary” also asserts that Gardner was “identified as a protest leader on Channel 10 news” and that Johns “is featured on Channel 6 news promoting the protest.”

This last claim is not true. Neither news report characterizes the student as a “protest leader.” The Channel 6 report identifies Johns as an “RPI student” who discusses the controversy involving the Union.<sup>12</sup> Johns does not even *mention* the protest, let alone “promote” it. Likewise, the News 10 report quotes one sentence from Gardner (“It’s disappointing that we can’t have a say in what we’re going to do” at RPI), but does not, as RPI says it does, identify him as a “protest leader.”<sup>13</sup> Additionally, our review of dozens of videos and photographs of the demonstration indicates that at least *six* people spoke using the bullhorn, in addition to Gardner.

RPI’s summary then accuses the students of failing to act, recounting a *lack* of evidence<sup>14</sup> that the two students “displayed actions to prevent the demonstrators from entering” the area, encouraged them to leave, or provided RPI with alternative dates to hold the demonstration.<sup>15</sup> RPI’s policies do not require students to undertake any of these actions. Rather, RPI’s own policies place these burdens squarely and exclusively on RPI’s Dean of Students and *forbids* RPI students from deciding whether other demonstrators are in compliance with RPI policy.

marshal evidence, witnesses, or arguments in advance of the hearing. For example, students cannot defend themselves against a charge of “Failure to Comply” if they are not informed, in advance, of the policy or direction they are alleged to have breached.

<sup>12</sup> Emily DeFeciani, *RPI students protest over control of Student Union*, WRGB (Oct. 13, 2017), <http://cbs6albany.com/news/local/rpi-students-protest-over-control-of-student-union>.

<sup>13</sup> Andrew Banas, *RPI students hold demonstration to protect student union*, NEWS10 ABC (Oct. 13, 2017), <http://news10.com/2017/10/13/rpi-students-hold-demonstration-to-protect-student-union>.

<sup>14</sup> Specifically, the summary states: “There is not [*sic*] information provided that indicates Johns and Gardner displayed actions to prevent the demonstrators from entering the restricted area of campus or to encourage demonstrators to leave the restricted area of campus. In addition, there is no information presented that indicates Johns or Gardner, presented alternative dates to hold the demonstration / protest.”

<sup>15</sup> It is unclear what responsibility RPI believes Johns had to provide them with alternative dates for the demonstration. Leaving aside that RPI’s conduct in flatly denying his application breached the Institute’s express commitment to freedom of assembly, RPI was in a better position than Johns to propose alternative dates and times for the demonstration. It did not do so.

Punishing students because of a lack of evidence that they took affirmative action, particularly action they were not required to take, is plainly inconsistent with any semblance of due process.

RPI's "Rules for Maintenance of Public Order,"<sup>16</sup> under which RPI has charged these two students, provides, in relevant part, and with emphasis added:

At *any* demonstration, meeting, or other occasion, **judgment as to whether the regulations are being observed shall be made at the scene by the Dean of Students** or designee. The Dean of Students or designee may, before making a judgment, consult with appropriate individuals at the scene who are not involved in the demonstration, meeting, or other occasion.

Responsibility for exercising such judgment shall rest **solely** with the Dean of Students or designee. It must be emphasized that judgment as to **whether the regulations are being observed shall not be exercised by demonstrators**, those demonstrated against, or spectators in contradiction to the expressed judgment of the Dean of Students or designee, except at the risk of such individuals.

**If the Dean of Students** or designee **at the scene** of any demonstration, meeting, or other gathering determines that one or more of the regulations are being breached, **he or she will request the participants to modify their conduct so as to comply with the regulations, indicating briefly and informally the nature of the breach of regulations and the requested corrective action.** All participants and spectators shall comply immediately, fully and cooperatively with the requests of the Dean of Students or designee.

RPI's "Incident Summary" does not recount any administrators or officials providing any directions or orders at the scene of the demonstration. Myriad RPI administrators were present at or near the scene of the demonstration. They had at their disposal a public address system, as well as a phalanx of police officers and security officials idling nearby. If there was a violation of any policy, it was the responsibility of RPI administrators—not the charged students—to identify it and give participants an opportunity to modify their conduct. For unknown reasons, RPI opted not to do so.

Further, the policy expressly and pointedly denies student demonstrators any authority to determine whether the conduct of demonstrators is permissible. RPI cannot now fault students for failing to make a determination that the Institute forbids them to make. RPI's failure to abide by its own policy prohibits it from now enforcing that same policy against its student critics.<sup>17</sup>

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<sup>16</sup> Handbook at 28–30.

<sup>17</sup> For similar reasons, the charge of "Trespassing" must also be rescinded. That charge is premised on the third regulation promulgated under RPI's "Grounds for Disciplinary Action," which provides that a trespassing charge is proper where there is an "unauthorized entry" or "refusal to leave . . . when ordered to do so by any person

Perhaps more critically, RPI's erection of a fence across a substantial portion of its campus is at odds with RPI's Student Bill of Rights, which forbids the Institute from using "denial of access to facilities . . . by the Institute . . . as a means of censorship or suppression" of students' lawful activities, including assembly.<sup>18</sup> Yet Vice President for Student Life LeNorman Strong expressly explained that the fence's construction was intended to separate demonstrators from RPI's black-tie fundraiser and served as an alternative to "a more extensive separation of our student protesters from the event."<sup>19</sup> While we are cognizant of RPI's need to preserve the safety and security of its campus, it cannot do so at the expense of its students' right to assemble at meaningful times and locations.

Finally, it bears emphasizing that RPI's selection of Gardner and Johns for disciplinary charges, at the exclusion of others, bears no apparent relationship to any particular *conduct* they took during the demonstration. Rather, RPI has selected these two students based on their choice to *speak* during the demonstration and to media. It is concerning that vocalizing dissent is what serves as the basis to punish particular students.

### III. Conclusion

RPI's charges against Gardner and Johns arise directly from the Institute's pre-ordained refusal to grant students permission to engage in meaningful, peaceful demonstrations. At every opportunity, RPI has demonstrated that it will use its vague policies as a vehicle to suppress students' criticism in advance of visits by prospective students or donors. When students have sought to hold demonstrations, RPI has claimed a lack of resources to enable such demonstrations—resources RPI was able to summon when students proceeded with their demonstrations.

RPI's commitment to freedom of expression may be best tested when it is the administration that is the subject of criticism or derision. That is precisely when administrators should be most reluctant to exercise their authority. In maintaining policies that grant administrators nearly unlimited authority, and in exercising that authority against critics of the Institute, RPI is failing to demonstrate a meaningful commitment to freedom of expression.

We request a response to this letter by November 21, 2017. Absent abandonment of the charges against "Save the Union" advocates and an express commitment to addressing RPI's

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having jurisdiction over [the property]." Handbook at 9. Because RPI cannot, by the terms of its own policies, close portions of its open campus in order to frustrate students' ability to express themselves, there can be no "unauthorized entry." Further, and again, RPI administrators did not order students to leave the area they had entered.

<sup>18</sup> Handbook at 6.

<sup>19</sup> Parslow, *supra* note 2.

institutional barriers to students' freedom of expression, FIRE intends to lodge a formal complaint with the Middle States Commission on Higher Education.

Sincerely,



Adam Steinbaugh  
Senior Program Officer, Individual Rights Defense Program  
Foundation for Individual Rights in Education

cc:

Michael Arno, Director of Judicial Affairs  
Cynthia Smith, Assistant Dean of Students  
Michael A. Sitterley, Associate Dean, Residential Commons  
Kris Nolan, Assistant Dean

Encl.