



October 1, 2021

Karin Hilgersom
President's Office
Truckee Meadows Community College
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Reno, NV 89512

URGENT

Sent via Facsimile (775-673-7297) and Electronic Mail (khilgersom@tmcc.edu)

Dear President Hilgersom:

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 by Truckee Meadows Community College's (TMCC) recent charges against Professor Lars Jensen for "insubordination" based in part on his distribution of handouts criticizing academic standards at TMCC. While critical of TMCC, Jensen's handouts and other statements are protected by the First Amendment, which bars TMCC from investigating or punishing protected expression.

I. Jensen's Potential Termination Follows Criticism of TMCC

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

Lars Jensen is a professor in the Math Department at TMCC. During a comment period at the end of a session of the Math Summit at TMCC's Professional Development Days during the 2019-20 academic year, Jensen attempted to make a verbal comment about academic standards at TMCC. Jensen was prevented from making his full comments, however, because the schedule called for a break period to begin.¹ In lieu of verbally delivering his comments, Jensen went back to his office, typed and printed out his comments, and distributed the handouts to his colleagues during the break between programming.

¹ Letter from Dean Julie Ellsworth to Lars Jensen, Sept. 24, 2020 (on file with author).

The handout accused TMCC of lowering its standards in order to boost completion rates. In relevant part excerpted here, Jensen wrote:

- Regents Mandate: Put students into a college level math class, possibly with an additional 1-3 co-req credits to fill any holes they may have in Algebra 1-2 or Geometry.
- Math Department Response to the Mandate: The department has decided that the mandate cannot be carried out without a drop in completion rates if we maintain the current academic level of Math 120. Therefore the department has decided to lower the academic level of Math 120 so students will be able to complete the course at current rates. (The department has allowed completion rates to dictate the academic level of an exit math course.)
- What is the Level of the New Math 120? In the words of the Math 120 co-req committee, "...a student completing Math 120 may be ready for Math 95." Paraphrasing, this means that "a student graduating from college may be ready for middle school math." (This is an absurd statement. The department has decided to comply with the Regent's mandate by lowering the academic level of its classes. This is in clear violation of the intent of the mandate.)
- Impact on Our Degree- and Certificate Programs: The lower academic skills of Math 120 completers will directly impact 31% of our degree- and certificate programs by lowering the math- and technical skills of graduates in these programs.
- Impact on the Community: Employers in the community pay our salaries, and subsidize students' education, through their taxes. What do they expect in return? Answer: Qualified graduates. It is well known that employers, including all the high-tech companies coming into our area, value math skills because the more math classes a student has taken, the higher salary an employer will pay. Well, employers will soon get much less than they have been paying for. TMCC is planning to do the exact opposite of what the community wants: We are going to lower the level of our exit classes and the math skills of our graduates, in the name of preserving completion rates.²

Julie Ellsworth, Dean of the Life Sciences, Allied Health and Public Safety Division, asked Jensen not to pass out his flyers directly to other Math Summit participants and to instead place one copy on the event's "parking lot" board.³ Jensen continued to distribute his handouts directly to colleagues, but he did not interrupt the summit or prevent it from proceeding.

² Lars Jensen, *On the Math Pathways – Looking Under the Hood* (handout distributed to TMCC colleagues) (as written) (on file with author).

³ Letter from Dean Julie Ellsworth to Lars Jensen, Sept. 24, 2020 (on file with author).

Beyond distributing his handout during the Math Summit, Jensen has been an outspoken critic of the TMCC administration. In February 2018, the TMCC Chapter of the Nevada Faculty Alliance, for which Jensen served as Treasurer, shared a list of faculty concerns including violations of the First Amendment rights of other faculty members and an erosion of shared governance at TMCC.⁴ Jensen also spoke at a meeting of the Board of Regents in June 2019 at which he alleged that TMCC had been using its phase-in retirement policy as a retaliatory tool against certain faculty members.⁵

After the Math Summit, Jensen received his first unsatisfactory annual review.⁶ Despite Jensen's department chair agreeing that Jensen's performance had been excellent, Dean Ellsworth overrode that rating. She cited insubordination by Jensen due to his distribution of handouts at the Math Summit, as well as a dispute over a requested change to his course syllabus.

Jensen received his second unsatisfactory annual review on April 1, 2021. Again, Jensen's department chair rated Jensen's performance as excellent, but Flesher rated his performance as unsatisfactory.⁷ Flesher cited Jensen's "persistent and continual defiance to the dean's supervisory role." Flesher attached a report elaborating on how Jensen's purported insubordination stemmed from disputes about his annual plan, his syllabus, and his failure to complete Canvas training on time. Critically, because this was his *second* unsatisfactory review, there were grounds for Jensen's termination, as Nevada System of Higher Education (NSHE) Code creates grounds for termination for faculty who receive two such reviews in consecutive years.⁸

On June 30, 2021 Jensen received a charging letter and notice of hearing, notifying him that he was being considered for termination due to two consecutive unsatisfactory annual reviews, as well as violations of another policy prohibiting insubordination and other general catch-all provisions.⁹

II. The First Amendment Bars TMCC from Punishing Jensen for the Flyers

Jensen's distribution of flyers at the board meeting was protected by his First Amendment right to comment as a citizen on matters of public concern, and TMCC cannot use it as grounds for termination.

⁴ Nevada Faculty Alliance – TMCC Chapter, *TMCC-NFA List of Faculty Concerns* (Feb. 20, 2018) (on file with author).

⁵ Lars Jensen, *Phased In Retirement Plan Abused at TMCC* (June 9, 2019) (on file with author).

⁶ Annual Performance Evaluation for Academic Faculty, Lars Jensen (May 19, 2020) (on file with author).

⁷ Annual Performance Evaluation for Academic Faculty, Lars Jensen (April 1, 2021) (on file with author).

⁸ NSHE Code Title 2, section 5.13.2(b).

⁹ Notice of Hearing in the Matter of Discipline of Dr. Lars Jensen (June 30, 2021) (on file with author).

A. *Jensen’s public criticism of TMCC is protected expression.*

It has long been settled law that the First Amendment is binding on public colleges like TMCC.¹⁰ Accordingly, the decisions and actions of a public college or university—including the pursuit of disciplinary sanctions in response to faculty members’ protected speech—must be consistent with the First Amendment.

Faculty members at public colleges do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment,”¹¹ but instead retain a right to speak as private citizens on matters of public concern. This includes the well-established right to distribute pamphlets, one of the “most effective instruments in the dissemination of opinion.”¹²

In distributing his handouts, it was clear that Jensen was speaking as himself, not on behalf of TMCC. The “critical question” in determining whether the speech was that of an employee or private citizen is “whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”¹³ Ordinarily, faculty are employed by institutions of higher education to teach students, produce scholarship, and provide service to the institution. Colleges typically do not employ their faculty to speak at community college board meetings about the details of its retirement policies or comment on the value of the education a community is receiving.

Similarly, Jensen’s handouts address matters of public concern. The discussion of TMCC standards was framed around the fact that taxpayers within the community expect their money to go toward producing qualified graduates, and that employers place a premium on graduates with a great degree of aptitude in mathematics.

B. *TMCC Presented No Facts Showing that Jensen’s Speech was Actually Disruptive.*

To determine whether a public employee’s speech as a private citizen on a matter of public concern is protected by the First Amendment, courts must “balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁴ The public employer must demonstrate that the speech “impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes

¹⁰ *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).

¹¹ *Connick v. Myers*, 461 U.S. 138, 140 (1983).

¹² *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. Of Stratton*, 536 U.S. 150, 162 (2002) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939)).

¹³ *Lane v. Franks*, 573 U.S. 228, 240 (2014).

¹⁴ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

the performance of the speaker's duties or interferes with the regular operation of the enterprise."¹⁵ Moreover, the "desire to maintain a sedate academic environment does not justify limitations on a teacher's freedom to express [himself] on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms."¹⁶

After distributing his handout, Jensen continued teaching for the remainder of the school year without disruption among his colleagues. While it is possible that Jensen's handout may have stirred some disagreement among his colleagues, there is no evidence that the handouts created an actual disruption during or after their distribution. The allegations against Jensen stem entirely from his rejection of the request that he post his comments to one specific location. The details of the charges against him did not say that he took speaking time from anyone else or that he prevented others from proceeding with their professional development at the Math Summit. Ellsworth's argument that, by distributing his handouts after he was asked not to, Jensen created a disruption *per se* is unsubstantiated by the facts.¹⁷ Indeed, Ellsworth herself acknowledged that participants at the Math Summit had "numerous loose-leaf handouts."¹⁸ One more to add to the stack could not have created a disruption, and concerns about confusion over the sources of various papers are unfounded because each faculty member would have taken the handout from Jensen himself. This *de minimis* burden on the institution is insufficient to overcome a public employee's strong free speech interests in "handing literature to one willing to receive it."¹⁹ Therefore, Jensen's handouts are protected by the First Amendment.

It is also important to note that Jensen's own department chair rated his performance as satisfactory for both the 2019-20 and 2020-21 academic years. According to those who work most closely with him, Jensen was able to professionally execute his duties as a teacher and colleague, and none cited an inability of his colleagues to do the same based on anything relating to Jensen. It was only after he began criticizing TMCC's administration through his handout, public comments at a board meeting, and union activities that Dean Ellsworth and Dean Fleisher stepped in and overrode the assessment of Jensen's department chair with an unsatisfactory review.

C. Jensen's termination cannot be premised on a retaliatory purpose.

While a public college might lawfully decline to renew a contract for no reason at all, it cannot decline to renew a faculty member's contract for a retaliatory purpose, including for speech protected by the First Amendment.²⁰

Here, the charges against Jensen arose in the context of his public criticism. The charges are based on his receiving two consecutive unsatisfactory annual reviews. However, the first of

¹⁵ *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); see also *Nichols v. Dancer*, 657 F.3d 929, 933 (9th Cir. 2011).

¹⁶ *Rodriguez v. Maricopa Cnty. Comm. Coll. Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2009).

¹⁷ Letter from Dean Julie Ellsworth to Lars Jensen, Sept. 24, 2020 (on file with author).

¹⁸ *Id.*

¹⁹ *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939).

²⁰ *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) ("[T]he nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights") (internal citations omitted).

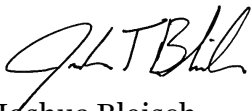
those two unsatisfactory reviews rested entirely upon Jensen’s constitutionally protected distribution of handouts at the Math Summit. If he had not received that first unsatisfactory review, there would be no grounds for his termination, regardless of the reasons for the other unsatisfactory review (the merits of which are not conceded here).²¹ Accordingly, TMCC’s decision to charge Jensen and proceed to a disciplinary hearing necessarily arises from his protected expression, and TMCC bears the “burden of proof . . . to demonstrate that it would have reached the same decision even if the [professor] had not engaged in the protected” expression.²² Because the college cited no other reasons for Jensen’s first unsatisfactory review, and because two negative reviews are required to trigger termination, it has not met that burden.

III. Conclusion

TMCC is proceeding with a termination hearing against Jensen because he received two consecutive unsatisfactory annual reviews, but one of those reviews rests on Jensen’s distribution of handouts commenting on matters of public concern. The speech that generated that unsatisfactory review is clearly protected. Accordingly, Jensen’s termination, based on receiving consecutive unsatisfactory annual reviews, would violate his First Amendment rights.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on October 15, 2021, confirming that TMCC will not pursue disciplinary sanctions in this matter.

Sincerely,



Joshua Bleisch
Faculty Legal Defense Fund Fellow

Cc: Julie Ellsworth, Dean, Life Sciences, Allied Health and Public Safety Division
Anne Flesher, Dean, Math and Physical Sciences Division
Estella Gutierrez, Vice President of Student Services and Diversity
Jeffrey Alexander, Vice President of Academic Affairs

Encl.

²¹ See NSHE Code Title 2, section 5.13.2(b).

²² *Lindsey v. Bd. of Regents of Univ. Sys. of Ga.*, 607 F.2d 672, 676 (5th Cir. 1979).

Authorization and Waiver for Release of Personal Information

I, Lars Jensen, do hereby authorize Truckee Meadows Community College (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:



10/1/2021

Date