I. Legal Implications of Accountability Mechanisms

Higher education is caught in the “Big Squeeze.”¹ Revenues continue to fall and expenditures for services continue to rise, putting colleges and universities under serious financial pressure. The external and internal demands for accountability in this financially stressful time are mounting, stemming from the need for: academic programs to be responsive to market demands; competitive salaries and benefits to retain the best faculty; quality programs and faculty that justify rising tuitions; assurance of integrity in the performance of duties; and compliance with professional and ethical obligations. Institutional responses to these and numerous other demands for accountability can result in a tug-of-war of how best to expend shrinking resources.

Post-Tenure Review

One such form of tug-of-war plays out in the debate over tenure. Opponents of tenure pronounce it a “scam,” the harbor of “deadwood,” protection for the “lazy,” and the cause of a “petrified forest.” The reality is that tenure is a conditional lifetime contract awarded to faculty members after a rigorous probationary period. It is difficult to earn and revocable for cause. In response to the challenges to tenure by legislators, business leaders, and citizens, and higher education’s commitment to its survival, post-tenure review has evolved over the past few decades as a response to demands for accountability.

More than twenty years ago, the National Commission on Higher Education Issues identified post-tenure faculty evaluation as one of the most pressing issues facing higher education. The Commission suggested that “nothing will undermine the tenure system more completely than it’s being regarded as a system to protect faculty members from evaluation.”

The response by the American Association of University Professors (AAUP) was this staunch opposition: “The Association believes that periodic formal institutional evaluation of each post-probationary faculty member would bring scant benefit, would incur unacceptable costs, not only in money and time but also in dampening of creativity and of collegial relationships, and would threaten academic freedom.”

Despite this initial desire to allow tenured faculty to be free from performance assessment, over the past two decades, the adoption of post-tenure review policies has risen dramatically. In 1989, less than one percent of the Association of American Universities reported having post-tenure review. In 1994, 46% of institutions responding to a national

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2 This section is adapted from Cheryl A. Cameron, Steven G. Olswang, and Edmund Kamai, “Post-Tenure Review in Higher Education,” 2002 NACUA Annual Conference.


survey of the Carnegie Foundation for the Advancement of Teaching reported having post-tenure review and 28% indicated post-tenure review was under consideration.\(^8\) In 1996, 61% of 680 public and private institutions reported having post-tenure review and 9% indicated post-tenure review was under development.\(^9\) In 1998, 46% of 192 four-year institutions participating in the Harvard University Faculty Appointment Policy Archive reported having post-tenure review systems.\(^10\) Recognizing that post-tenure review was being implemented despite its viewpoint, in 1998 the AAUP modified its stance as follows: “Post-tenure review ought to be aimed not at accountability, but at faculty development. Post-tenure review must be developed and carried out by faculty. Post-tenure review must not be a reevaluation of tenure, nor may it be used to shift the burden of proof from an institution’s administration (to show cause for dismissal) to the individual faculty member (to show cause why he or she should be retained). Post-tenure review must be conducted according to standards that protect academic freedom and the quality of education.”\(^11\) Most recently, it has been reported that 37 states have post-tenure review activity in some form.\(^12\)

The sources of mandates for post-tenure review vary across institutions. Reflecting public concern for accountability in higher education, a few states have legislated requirements for review of faculty performance.\(^13\) Accreditation agencies are another external source of post-

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\(^9\) Id.


\(^13\) Ark. Code Ann. §6-63-104(a) (2003). “The president and chancellor of each state-supported institution of higher education in Arkansas shall work with the campus faculties to develop a framework to review faculty performance, including post-tenure review. The framework should be used to develop processes and procedures at each institution to ensure a consistently high level of performance of the faculty at Arkansas’ publicly supported institutions of higher education. The effects of the review process of faculty performance should include rewarding productive faculty, redirecting faculty efforts to improve or to increase productivity, and correcting instances of substandard performance.”

S.C. Code Ann. § 59-103-30 (2002). “(A) The General Assembly has determined that the critical success factors, in priority order, for academic quality in the several institutions of higher learning in this State are as follows: (1)
In addition to these externally mandated requirements for post-tenure review, state systems of higher education and individual institutions themselves have voluntarily adopted systems of post-tenure performance review.

Mission Focus; (2) Quality of Faculty; (3) Classroom Quality; (4) Institutional Cooperation and Collaboration; (5) Administrative Efficiency; (6) Entrance Requirements; (7) Graduates’ Achievements; (8) User-friendliness of the Institution; (9) Research Funding. (B). The General Assembly has determined that whether or not an institution embodies these critical success factors can be measured by the following performance indicators as reflected under the critical success factors below: … (2) Quality of Faculty: (a) academic and other credentials of professors and instructors; (b) performance review system for faculty to include student and peer evaluations; (c) post-tenure review for tenured faculty; (d) compensation of faculty; (e) availability of faculty to students outside the classroom; (f) community and public service activities of faculty for which no extra compensation is paid.”

Tex. Educ. Code § 51.942 (2004). “(b) Each governing board of an institution of higher education shall adopt rules and procedures providing for a periodic performance evaluation process for all faculty tenured at the institution. The governing board may design its rules and procedures to fit the institution’s particular educational mission, traditions, resources, and circumstances relevant to its character, role, and scope, in addition to other relevant factors determined by the governing board in the rules adopted pursuant to this section. The governing board shall seek advice and comment from the faculty of the institution before adopting any rules pursuant to this section. The advice and comment from the faculty on the performance evaluation of tenured faculty shall be given the utmost consideration by the governing board. (c) In addition to any other provisions adopted by the governing board, the rules shall include provisions providing that: (1) each faculty member tenured at the institution be subject to a comprehensive performance evaluation process conducted no more often than once every year, but no less often than once every six years, after the date the faculty member was granted tenure or received an academic promotion at the institution; (2) the evaluation be based on the professional responsibilities of the faculty member, in teaching, research, service, patient care, and administration, and include peer review of the faculty member; (3) the process be directed toward the professional development of the faculty member; (4) the process incorporate commonly recognized academic due process rights, including notice of the manner and scope of the evaluation, the opportunity to provide documentation during the evaluation process, and, before a faculty member may be subject to disciplinary action on the basis of an evaluation conducted pursuant to this section, notice of specific charges and an opportunity for hearing on those charges; and (5) a faculty member be subject to revocation of tenure or other appropriate disciplinary action if incompetency, neglect of duty, or other good cause is determined to be present.”


“Standard Four also calls for faculty members to be safeguarded in their exercise of academic freedom. The protection of academic freedom does not lessen the need for performance evaluation of temporary or permanent members of the faculty to ensure, on a continuing basis, the effectiveness and quality of those individuals responsible for the academic program. This ongoing evaluation may take several forms, in accordance with the size, complexity, and mission of the institution, including, for example, annual merit salary evaluations of a significant nature, promotions, and/or tenure reviews, periodic post-tenure reviews, or reviews conducted in response to some institutional need. The requirement of this policy is that the accredited institution shall conduct a comprehensive evaluation of each faculty member in a regular and systematic manner at least once within each five-year period of service. The institution’s faculty evaluation process shall contain a provision to address concerns that may emerge between regularly scheduled evaluation activities.”


“An institution must conduct periodic evaluations of the performance of individual faculty members. The evaluation must include a statement of the criteria against which the performance of each faculty member will be
There are four generally recognized forms of faculty performance evaluation: annual reviews; promotion reviews; periodic or cyclical reviews; and triggered, selective, or episodic reviews. Annual reviews are used to assess performance, to determine recognition for such measured. The criteria must be consistent with the purpose and goals of the institution and be made known to all concerned. The institution must demonstrate that it uses the results of this evaluation for improvement of the faculty and its educational program.”

Middle States Commission on Higher Education of the Middle States Association of Colleges and Schools. Standard 10 Faculty (http://www.msache.org).

“… Articulated and equitable procedures and criteria for periodic evaluation of all faculty contribute significantly to sustaining an appropriate level of growth and excellence. Such procedures and criteria for periodic evaluation support those who, regardless of their professional titles, are responsible for the development and delivery of programs and services. Encouragement for faculty research, as well as for professional advancement and development, are characteristics of enlightened institutional policies.”


1. Elements of Post-Tenure Review Process
Each university shall design and implement a post-tenure review process for all tenured faculty members in accordance with Board approved guidelines (set forth in a document entitled “Common Elements of the Post-Tenure Review Process,” first approved by the Board in December 1996 and as may hereinafter be modified by the Board). The purpose of the post-tenure review process is to provide accountability through emphasis on sustained high quality performance and opportunities for continued faculty development, and to provide additional accountability to the university community, to the public, and to the Board. As described in greater detail in the Board approved guidelines, the post-tenure review process at each university shall include the following essential elements:

a. Annual performance evaluations for all tenured faculty members shall be conducted by unit heads and/or peer committees and incorporate student input; administrators, community representatives and recent alumni will be involved in regular academic program reviews that cover the contribution of all tenured faculty members.

b. A faculty member's performance shall be evaluated based upon written expectations agreed to between the faculty member and the unit head and by reference to performance standards developed by each academic unit.

c. A faculty member who is determined to be performing at an unsatisfactory level shall be required to participate in developing and implementing a plan designed to improve his or her performance; the plan shall include specific goals, timelines, and benchmarks that will be used to measure progress at periodic intervals.

d. Failure to achieve the goals prescribed in the performance improvement plan in a timely manner shall result in a recommendation for dismissal.

e. A faculty member who is recommended for dismissal as a result of the post-tenure review process shall have an opportunity to challenge the recommendation as prescribed in ABOR Policy 6-201L., (Conditional of Faculty Service, Hearing Procedures for Faculty).


(1) Tenured faculty members shall be evaluated periodically and systematically in accordance with guidelines developed by each institution.

(2) The purposes of post-tenure review are to:
(a) Assure continued excellence in the academy;
(b) Offer appropriate feedback and professional development opportunities to tenured faculty;
(c) Clearly link the level of remuneration to faculty performance; and
(d) Provide accountability to the institution, public, and Board.

(3) Institutions shall develop post-tenure review guidelines in accordance with the objectives and guidelines promulgated in IMD 4.002, OAR 580-021-0135(3), and OAR 580-021-0005(3)(A).
rewards as merit salary increases, or to evaluate remediation needs for probationary, non-tenure track, and tenured faculty. The annual review is a generally recognized form of faculty performance evaluation and may become part of a post-tenure review process. The period of performance considered in an annual review may be limited to a single year\textsuperscript{16} or expansive and include the cumulative record\textsuperscript{17} of the faculty member. Promotion reviews are used to promote probationary and tenured faculty, but are not generally recognized as a form of post-tenure review. Periodic or cyclical reviews are used to evaluate the performance of all tenured faculty on a specified schedule. The schedules range from no more than once per year to every several years. In some institutions the review schedule varies depending on rank.\textsuperscript{18} Periodic reviews are conducted in addition to annual merit reviews and may focus on individual faculty or be coupled with departmental or programmatic reviews. Triggered, selective, or episodic reviews are used to evaluate the performance of faculty on an as needed basis. The common trigger for such a review is two or three unsatisfactory annual reviews.\textsuperscript{19} Although this form of review may appear

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\textsuperscript{16} Montana State University – Bozeman, Faculty Handbook, 711.00 Purpose of Annual Review. “Annual review assesses the faculty member’s performance over the preceding calendar year and is based upon the faculty member’s letter of hire, role statements, annual assignments, self-assessment, and the department head’s evaluation of the individual’s performance.” (http://www.montana.edu/wwwfachb/fc/).
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\textsuperscript{17} University of Washington Procedure for Salary Increases Based on Merit. “Faculty at the University of Washington shall be reviewed annually by their colleagues, according to the procedures detailed in this Section, to evaluate their merit and to arrive at a recommendation for an appropriate merit salary increase. Such reviews shall consider the faculty member’s cumulative record, including contributions to research/scholarship, teaching, and service, and their impact on the department, school/college, university, and appropriate regional, national, and international communities.” (http://www.washington.edu/faculty/facsenate/handbook/Volume2.html).
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\textsuperscript{18} Rice University Faculty Policy No. 214-03, Faculty Performance Reviews. “Professors (including department chairs) will be reviewed at least every five years and associate professors with tenure (including department chairs) will be reviewed at least every three years.” (http://professor.rice.edu/professor/University_Policies.asp).
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\textsuperscript{19} University of Washington, University Handbook, Volume Two, Part II, Section 24-55H. “At the option of the faculty member affected, and mandatorily in the event of two consecutive annual ratings of no merit (as a result of reviews under 24-55), the chair of the faculty member's department (or dean of an undepartmentalized school or college) shall, after consultation with the faculty member, appoint an ad hoc committee of department (or school/college) faculty superior (or, in the case of full professors, equal) in rank to the faculty member. This committee shall meet at its earliest convenience with the faculty member and review more fully the record and merit of that faculty member. The committee shall, upon completion of its review, report in writing the results to the faculty member and to his or her department chair (or dean in an undepartmentalized school/college) and the committee shall advise them what actions, if any, should be undertaken to enhance the contributions and improve the merit ranking of this colleague, or to rectify existing misjudgments of his/her merit and make adjustments to correct any salary inequity. The faculty member may respond in writing to this report and advice within twenty-one calendar days to the department chair (or dean) and committee (unless upon the faculty member's request and for good cause the response period is extended by the chair or dean). The committee's report and advice, the faculty member's written response (if any),
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punitive in focus, the benefit is that it is a process limited to only those small number of faculty members needing a supplemental review and improvement plan. In terms of cost, in both dollars and time, the trigger system is the most efficient and economical.

Despite its relatively short existence, post-tenure review has withstood legal challenge. Tenured faculty have unsuccessfully challenged the implementation of post-tenure review as unconstitutional retrospective changes to tenure contracts. In Johnson v. Colorado State Board of Agriculture, M. L. Johnson, a tenured professor at Colorado State University, challenged the application of a post-tenure review policy adopted in 1997. Professor Johnson received unsatisfactory reviews in 1997 and 1998 and was therefore subject to the provisions of the new policy. He contended that a five-year waiting period was required for the application of the policy. While the policy did not expressly address when reviews were to commence, it also did not suggest that a five-year waiting period was contemplated. The court concluded that the purpose of the policy, “to enhance CSU’s effectiveness as an institution of higher learning,” supported the immediate application of the policy.

In response to the claim that the new policy was retrospective, the court found that since faculty were always subject to review and discipline, implementing a regularized post-tenure review process did not impair prior tenure policies, and was not retrospective. In addition, the court held that “[t]he policy does not take away or impair vested rights, create a new obligation, impose a new duty, or attach a new disability,” and therefore survived Professor Johnson’s challenge.

In Dinegar v. University of New Haven, tenured faculty members unsuccessfully challenged the implementation of new methodologies for reviewing faculty performance on the

the response by the chair, and any agreement reached by the faculty member and the chair shall be incorporated into a written report.” (http://www.washington.edu/faculty/facsenate/handbook/Volume2.html).


21 The policy provided that “[r]eviews of all tenured faculty shall be conducted … at intervals of five years following the acquisition of tenure or if there are two unsatisfactory annual reviews within a five year period. [T]hey shall be based upon a summary of all annual reviews since the last comprehensive review or acquisition of tenure.” Id. @ 311.

22 Id. @ 312.

23 Id. @ 313.

basis of breach of contract, negligent infliction of emotional distress, intentional infliction of emotional distress, age discrimination, and gender discrimination. In granting the University’s motion for summary judgment on the claims of breach of contract, the court affirmed that the plaintiffs were “first obliged to follow the [grievance] procedures set forth within [their contract with the University].”25 In addressing the allegations of age and sex discrimination, the court also granted summary judgment on the basis of the plaintiff’s failure “to make the effort to resolve their age and sex discrimination complaints with [the Connecticut Commission on Human Rights and Opportunities] before turning to the courts.”26 In granting summary judgment on the claims of negligent infliction of emotional distress, the court did not find that the plaintiffs suffered emotional distress sufficient to make out the tort or had reasonable fears in light of the University’s conduct.27 With regard to the claims of intentional infliction of emotional distress, the court also did not find the “deliberate will to harm that is characteristic of outrageous behavior.”28

In Wiest v. State of Kansas,29 a tenured faculty member unsuccessfully challenged the termination that resulted from his failure to cooperate in the post-tenure review process. Steven Wiest was a tenured associate professor in the Department of Horticulture, Forestry, and Recreation Resources at Kansas State University. Professor Wiest demonstrated a trend of declining performance, which began in 1992, and resulted in performance ratings below the minimum acceptable level. “[I]n 1997 Wiest’s department head evaluated Wiest and gave him a performance rating of 1.53, which is below a satisfactory score of 2. That same year, Wiest’s peers assigned him an even lower rating of 1.13. The next year, the department head assigned Wiest a performance rating of 1.47 and his peers again gave him a lower rating of 1.06.”30 Professor Wiest also failed to cooperate with the proscriptive plan designed to get him back on


26 Id. @ *19.


28 Id. @ *17.


30 Id. @ 3.
track, as provided for by University policy.\textsuperscript{31} In responding to Professor Wiest’s appeal of the University’s decision to terminate his employment, the court acknowledged that “[a]s at most universities, there is an exception at K-State to the degree tenure will protect one’s job in the case of termination for cause for “professional incompetence.””\textsuperscript{32} The court found “that there was substantial competent evidence to support K-State’s decision to terminate Wiest.”\textsuperscript{33}

Tenured faculty have been unsuccessful in using the post-tenure review process as a shield to dismissal. In \textit{Barham v. University of Northern Colorado},\textsuperscript{34} Jerry Barham, a 29-year tenured faculty member, was charged with unacceptable job performance and unprofessional conduct. This charge was issued at the time he was due for his triennial evaluation. This evaluation was not completed, but rather, Professor Barham was suspended with pay while termination-for-cause proceedings were conducted. Professor Barham alleged that the completion of this triennial evaluation was a prerequisite to his dismissal. In upholding the dismissal the court acknowledged that the “procedures for faculty evaluations and dismissal operate independently under the Code.”\textsuperscript{35} The court further acknowledged that “[t]hese reviews are for the stated purpose of encouraging and documenting individual achievement and to reward contributions toward University goals. And, this section of the Code does not mandate that the evaluation process be concluded prior to the initiation of dismissal proceedings. Proceedings for

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\item \textsuperscript{31} Id. @ 5. C31.5 Chronic low achievement. Chronic failure of a tenured faculty member to perform his or her professional duties, as defined in the respective unit, shall constitute evidence of ‘professional incompetence’ and warrant consideration for ‘dismissal for cause’ under existing university polices. Each department or unit shall develop a set of guidelines describing the minimum-acceptable level of productivity for all applicable areas of responsibility for the faculty, as well as procedures to handle such cases. In keeping with regular procedures in matters of tenure (C112.1 and C112.2), eligible departmental faculty will have input into any decision on individual cases unless the faculty member requests otherwise. When a tenured faculty member’s overall performance falls below the minimum-acceptable level, as indicated by the annual evaluation, the department or unit head shall indicate so in writing to the faculty member. The department head will also indicate, in writing, a suggested course of action to improve the performance of the faculty member. In subsequent annual evaluations, the faculty member will report on activities aimed at improving performance and any evidence of improvement. The names of faculty members who fail to meet minimum standards for the year following the department head’s suggested course of action will be forwarded to the appropriate dean. If the faculty member has two successive evaluations or a total of three evaluations in any five-year period in which minimum standards are not met, then ‘dismissal for cause’ will be considered at the discretion of the appropriate dean.

\item \textsuperscript{32} Id. @ 4.

\item \textsuperscript{33} Id. @ 6.

\item \textsuperscript{34} 964 P.2d 545 (Colo. Ct. App. 1997).

\item \textsuperscript{35} Id. @ 550.
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the dismissal of an instructor can be initiated at any time.” 36 And finally, in acknowledging the institution’s obligations to its students, the court provided “[c]onversely, if, as plaintiff suggests, the triennial evaluation must always be completed prior to initiation of dismissal proceedings, students could be required to accept three years of totally incompetent instruction before any remedial action could be taken. The Code should not be interpreted so as to reach an absurd result.” 37

In *Wurth v. Oklahoma City University*, 38 Michael Wurth, a tenured professor was terminated on the ground of incompetence. In challenging this decision, he claimed that the only available procedure for terminating his contract was the evaluation/remediation method found in the Handbook. The University claimed that it could initiate an action to discharge using the “for cause” procedures in the Handbook. The court found for the University by acknowledging that “[t]ermination of employment after failing to improve unsatisfactory performance is different from being discharged for cause unrelated to performance. For performance-based adverse personal actions, evaluations and the opportunity to improve the performance are legitimate safeguards given to tenured employees. Conversely, a tenured employee may be discharged from employment for such causes as conduct involving moral turpitude or failure to maintain the level of competence necessary for tenure.” 39

Post-tenure review processes may minimize the risk of successful claims of discriminatory and retaliatory employment actions. In *Lubitz v. Wisconsin Personnel Commission*, 40 a post-tenure review of Professor Ralph Lubitz, who was known to have a health condition requiring both partial and full leaves of absence, resulted in concerns about his class cancellations, infrequent attendance at department meetings, and lack of participation with department committees. Following the implementation of a tenure-review plan, Professor Lubitz continued to miss department meetings, was unavailable to teach for several days, and failed to reschedule cancelled classes or secure coverage, which lead to a development plan that required

36 *Id.*

37 *Id.*


39 *Id.* @ 1097.

him to meet all scheduled class sessions, provide written information for all absences due to illness, hold regular office hours, attend department meetings, and meet various professional goals. Professor Lubitz’s performance issues resulted in a reduction of his merit pay points from eight to four. He claimed that the University’s negative evaluation of his performance, implementation of a development plan, and reduction of his merit points were in retaliation against him for taking FMLA leave. The court found that there was substantial evidence in the record to support the determination that the University’s actions were not in retaliation of his FMLA leave. A systematic, periodic performance review schedule or a systematic event trigger removes the discretion component replacing it with an objective factor, belying any allegation of discrimination.

Relation Between Post-Tenure Review and Retrenchment

The use of post-tenure review can provide a framework for selecting which faculty members might be eliminated in a financial exigency or other institutional contraction. In Gardiner v. Tschechtelin, all 96 faculty of a financially troubled community college were given performance reviews as part of its reorganize efforts. Seven faculty members were rated as having “poor” performance and were slated for termination; six of whom had been tenured. The tenured faculty filed suit alleging they were being terminated for cause, not financial or programmatic reasons, and were entitled to greater due process. Holding that the selection process was related to accomplishing a valid public purpose (to develop a “quality institution that is responsive to the technological and continuing education needs” of the community), the court disagreed with their characterization and upheld the termination decisions.

In Bignall v. North Idaho College, the court was squarely faced with the question of whether junior, non-tenured faculty were properly retained over tenured faculty. Annette Bignall, a full-time instructor who was de facto tenured, was notified by the college of the non-renewal of her appointment as a result of a financial shortfall. She alleged, among other things, that she was discriminated against because the college did not use proper procedures in selecting

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42 Id. @ 289.
43 538 F. 2d 243 (9th Cir. 1975).
her for non-retention and that “the college retained less senior faculty.”\textsuperscript{44} The court found, however, that the college had formulated guidelines to be applied to the entire fifty-person faculty, which took into account performance evaluations and the overall needs of the college. The evidence the court identified as supporting Ms. Bignall’s non-retention included: “He [the President of the College] and various administrators, including the two heads of the two departments in which Ms. Bignall taught, all testified that she was the least well qualified academically; that because she directed her instruction to the most gifted among her students, she alienated the less bright so that students regularly transferred out of her class or tried to avoid her courses.”\textsuperscript{45} The court found the College’s non-retention of Ms. Bignall to be non-discriminatory and valid. Therefore, individualized performance evaluations, such as post-tenure reviews, may justify the selection of non-tenured over tenured faculty for retention during reorganization and retrenchment.

Reorganization and Retrenchment

Another tug-of-war at play is the dilemma of budget reduction decisions in the face of inadequate financial resources. Employment decisions are often inevitable and range from a hands-off strategy with regard to faculty employment, to freezing faculty hires, to faculty non-renewals and terminations. An extensive discussion of reorganization and retrenchment in higher education is attached to these materials.\textsuperscript{46}

Scientific Integrity

Many institutions of higher education are regulated by federal and state laws intended to ensure the integrity of their operations. Institutional and individual compliance is essential. Higher education is not alone in its financial struggles and there appears to be generally decreasing tolerance for abuse of institutional policies and federal and state regulations.\textsuperscript{47}

\textsuperscript{44} Id. @ 250.

\textsuperscript{45} Id.


\textsuperscript{47} The Office of Research Integrity reports that the number of allegations in the last two years is up by about 10 – 13 percent over the preceding years. ORI Annual Report 2002, (http://ori.dhhs.gov/html/publications/02annreport.asp).
Administrators should be alert to the potential that financial stresses and increased demands for productivity and accountability will result in intentional or unintentional untoward practices. Institutions must be prepared to assist faculty to engage in responsible academic, scholarly, and service activities. There could be no greater harm to higher education than to have the public trust in the work performed by academic scholars shattered by dishonesty and self-motive. Institutions of higher education need to be prepared to vigilantly respond to allegations of non-compliance or misconduct.

Higher education and the federal government are partners in the research process. While the federal government has ultimate oversight authority for Federally funded research, the research institution bears primary responsibility for the prevention and detection of research misconduct.\textsuperscript{48} It is imperative that institutions take seriously the assurances they give to any funding agencies and take the necessary steps to ensure compliance. Institutions face potential refund obligations when they fail to comply with federal requirements.\textsuperscript{49} Such pay back obligations could have debilitating effects on institutions facing overall budget reductions necessitating already difficult personnel decisions. The effects of non-compliance to institutional eligibility and reputation may also hinder future funding, student enrollment, and faculty recruitment efforts.

The individual effects of a finding of non-compliance or misconduct in science can be devastating to a faculty member’s employment opportunities. Yet, such actions may be necessary to preserve the integrity of the institution. The U.S. Naval Academy recently reported the demotion from associate to assistant professor, removal of tenure, and reduction in salary of a history professor after an investigation found he had plagiarized a published book. It was reported that the faculty member is being treated like a newly hired professor under probationary status for future employment.\textsuperscript{50} Misconduct is a generally recognized cause for termination,

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\item Office of Science and Technology Policy, Executive Office of the President, Federal Policy on Research Misconduct, 65 FR 76260. See also, Public Health Service, 42 CFR Part 50, Subpart A and National Science Foundation, 45 CFR Part 689.
\item Office of Research Integrity, “Violation of Voluntary Exclusion Agreement Extends Exclusion Period.” Newsletter, 12 (1) (December 2003).
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which will be upheld when accompanied by the necessary due process.\(^{51}\) In contrast, due process requirements do not extend to prospective or speculative employment interests (e.g., renewal of appointments, emeritus appointment, service as a principal investigator on a research grant, and selection for professional service on advisory boards).\(^{52}\)

**Conflicts of Interest and Commitment**

Other accountability policies and regulations are designed to ensure that the primary commitment of the faculty member is to institutional responsibilities and is not deterred by conflicts of interests. They are also intended to ensure that institutional resources are used for the fulfillment of institutional duties and not for the private benefit of the faculty member. Potential diversions from institutional responsibility include outside work or consulting and other financial interests in outside entities. Federal agencies such as the National Institutes of Health and the National Science Foundation require institutions to have in place procedures requiring faculty disclosure of significant financial interests in entities that may benefit from federally funded research.\(^{53}\) The National Institutes of Health has recently announced that it will disqualify, from the peer review process, scientists with financial interests in the research of more than $10,000.\(^{54}\)

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\(^{51}\) *Agarwal v. Regents of the University of Minnesota*, 788 F. 2d 504 (8th Cir. 1986) (The court concluded that the termination of a tenured faculty member on the basis of a lack of moral integrity, plagiarism, incompetence, and unprofessional conduct was supported by substantial evidence and complied with procedural due process requirements); *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1137 (3rd Cir. 1992) (In vacating the district court’s order granting partial summary judgment on Dr. San Filippo’s void for vagueness claim, the court found that “[i]t is not unfair or unforeseeable for a tenured professor to be expected to behave decently toward students and coworkers, to comply with a superior’s directive, and to be truthful and forthcoming in dealing with payroll, federal research funds or applications for academic positions. Such behavior is required for the purpose of maintaining sound scholarship and competent teaching. The academic community can reasonably conclude that otherwise the educational atmosphere is likely to become so tainted and disturbed that it would become impossible to ‘maintain standards of sound scholarship and competent teaching.’”). *See also*, Steven G. Olswang and Barbara A. Lee, “Scientific Misconduct: Institutional Procedures and Due Process Considerations.” 11 J.C.& U.L. 51 (1984).


Limitations on outside work may be legislatively mandated or implemented through institutional policy. Such limitations may restrict the nature of outside work (e.g., limits on management positions, participation in ongoing operations, or equity interests) or the amount of time dedicated to the work (e.g., one day per seven day week). Restrictions on outside work by faculty have been upheld when the limitation is consistent with legislative or institutional mandates.\textsuperscript{55} It is not uncommon for external agencies to monitor, through public records requests, the outside professional work of faculty employed by state institutions of higher education. It is also not uncommon for ethics complaints to be filed with regulatory bodies when there is the perception that the outside work of a faculty member exceeds the limits of state law, inappropriately utilizes state resources for private gain, or competitively disadvantages another entity. The results of such complaints can lead to external agency action against offending individuals and institutional adverse employment actions when there are findings of intentional and egregious violations. Institutions should implement mechanisms for enforcing regulations and policies intended to minimize conflicts of interest and uphold institutional accountability.

Summary

Institutions of higher education are in the unique position of needing to uphold the public trust as they seek to advance and disseminate knowledge through the use of a largely autonomous workforce of faculty employees. The culture of academe is to entrust faculty with academic freedom for the pursuit of its mission and goals. This trust, however, is not a limitation to the legitimate and necessary response to demands for accountability.

\textsuperscript{55} Marks v. New York University, 61 F. Supp. 2d 81 (S.D.N.Y. 1999) (NYU’s motion for summary judgment was granted on plaintiff’s breach of contract claim based on her termination for working full-time at a competing university); Mueller v. Regents of the University of Minnesota, 855 F.2d 555 (8th Cir. 1988) (Professor Clarence Mueller, a tenured faculty member and director of the Office of Recreational Sports, was terminated for misuse of the University’s personnel, name, and resources in the conduct of his outside personal business. Summary judgment by the district court against Mueller in his suit challenging his termination was affirmed.); Nicholas v. Pennsylvania State University, 227 F. 3d 133 (3rd Cir. 2000) (The termination of a tenured medical professor for failure to discontinue his outside work and maintain a full-time presence at the University was upheld); Graf v. West Virginia University, 429 S.E.2d 496 (W. Va. 1992) (The moonlighting of a tenured medical school faculty member could not be restricted when it complied with published institutional regulations.); see also, Steven G. Olswang and Barbara A. Lee, “Faculty Freedoms and Institutional Accountability: Interactions and Conflicts,” ASHE-ERIC Higher Education Research Report No. 5 (1984).
II. Mergers, Acquisitions, and Closures: Implications for Faculty and Students

Reductions in force, layoffs, mergers, acquisitions, and bankruptcies are not limited to the corporate community. Over the past decade, institutions of higher education—both public and private—have faced the unpleasant task of reducing or eliminating academic programs, reducing or eliminating faculty and staff positions, or merging with another institution in order to stave off closure. Although the human resource issues that these problems raise are difficult, issues related to the rights of faculty—and in particular, tenured faculty—may create legal liability for one or more institutions involved in reorganizations or reductions.

Mergers and Reorganizations

In some cases, a college’s board of trustees may determine that retrenchment or program elimination are insufficient to protect the college from eventual closure. At that point, the trustees may decide to approve the merger of that college with a college that is financially stronger, or may even agree to the acquisition of a college by another, usually larger, institution.

An example of a merger is the decision by Mundelein College to merge with nearby Loyola University (Chicago) in 1991. An example of an acquisition is the decision of the trustees of Mount Vernon College to agree to an acquisition of the college’s property and other assets by George Washington University (District of Columbia) in 1999. Both actions resulted in litigation by faculty who asserted that their tenure rights survived the merger (Mundelein) or acquisition (Mount Vernon College).

The primary legal theory used to challenge faculty dismissals in cases of merger or acquisition is contract law. In most states, the faculty handbook is viewed as a binding contract unless that document specifically disclaims any intent to contractual status. And because most faculty handbooks are either silent or ambiguous with respect to mergers, acquisitions, or even


retrenchment, difficult problems of contract interpretation may occur when an institution merges into another or is acquired by another. (Total closure of the institution would presumably terminate any contractual rights a faculty member might have.)

The AAUP has developed a policy statement on faculty rights in the case of institutional mergers or acquisitions. The portion devoted to merger or acquisition reads:

When, in the context of financial exigency, one institution merges with another, or purchases its assets, the negotiations leading to merger or purchase should include every effort to recognize the terms of appointment of all faculty members involved. When a faculty member who has held tenure can be offered only a term appointment following a merger or purchase, the faculty member should have the alternative of resigning and receiving at least a year of severance salary.\(^58\)

If the college has incorporated the AAUP statement quoted above into its faculty handbook or other policy document, then its requirements may have contractual significance unless the document or handbook expressly states that it is not intended to be a contract. Even if the statement is not expressly incorporated into the handbook or document, language that provides a role for faculty in institutional changes that affect their status may be interpreted by a court as requiring the college to involve faculty in the planning process. The guidelines quoted above also recommend that faculty be fully involved in planning for the merger or acquisition.

In *Gray v. Mundelein College*,\(^59\) the court was asked to address the obligations to tenured faculty at Mundelein College when it entered an affiliation agreement with Loyola University. Mundelein was facing severe financial difficulties, and entered an agreement with Loyola in which Loyola acquired Mundelein’s assets and assumed some of Mundelein’s financial obligations. The agreement provided that Mundelein would remain in existence as a separate college governed and administered by Loyola. Loyola offered 26 of Mundelein’s tenured faculty positions with tenure; it offered another eleven tenured faculty five year appointments without tenure, and it offered three tenured faculty two years of salary as severance. Three of the faculty who were not offered tenured positions sued both institutions, claiming that their contract rights had been breached.


The trial and appellate courts adopted the view that Mundelein’s faculty handbook was contractually binding on that college, despite the affiliation agreement it had entered with Loyola. The handbook listed four reasons for termination of tenured faculty: 1) financial exigency, 2) program discontinuance, 3) health, or 4) cause. There was no provision for the termination of tenured faculty in the event of a merger or affiliation. The trial court ruled that because the Board of Trustees had never declared the existence of financial exigency, the termination of the tenured faculty was unlawful. Furthermore, ruled the trial court, because the college still had valuable assets, a bona fide financial exigency did not exist. It ruled that Mundelein had breached the plaintiffs’ contract, and ordered damages to be paid to the two who had been given severance. The third, who had accepted a five-year contract, was denied damages because the trial court viewed her acceptance of the contract as a waiver of tenure.

On appeal, the college argued that academic custom and usage should control the outcome of the case, and that AAUP policies and guidelines provide that tenure does not survive an affiliation or merger unless the parties have specifically agreed that it would. The court did not rule on whether tenure survives affiliation or merger; a custom and usage analysis is only necessary, said the court, when a court must interpret uncertain or ambiguous contract terms. In this situation, the court believed that the terms of the faculty handbook were clear. “Mundelein could have taken whatever course was necessary to remedy its financial difficulties without continued obligation to tenured faculty if it had followed the procedures set out in its manual.”60

The court affirmed the rulings for the terminated plaintiffs, and reversed the trial court’s ruling against the plaintiff who had accepted a five-year contract, ruling that this act was not a waiver of tenure, but an appropriate attempt to mitigate damages. Furthermore, said the court, if Loyola had intended to terminate the plaintiff’s tenure claim against Mundelein by offering her a five-year contract, it could have included that provision in the terms of the contract. The Illinois Supreme Court denied review.

This case is particularly interesting because the court ruled that a merger had not occurred because Mundelein still existed as a corporate entity. Therefore, said the court, Mundelein, not Loyola, was liable for the damages awarded to the plaintiffs. The case is also interesting because of the defendant college’s attempt to use expert testimony regarding “academic custom and usage” with respect to whether tenure at an institution survives that institution’s merger into or

60 695 N.E.2d at 1387.
acquisition by another institution. In addition to ruling that it was not appropriate to look to academic custom and usage when the contractual terms were clear, the court added that there was no evidence that the plaintiff faculty were aware of “academic custom and usage” in the context of affiliations or mergers, nor that the faculty handbook would not apply to their tenure rights when such an affiliation was effected. Given the result in Mundelein, it appears that a college may need to cease its corporate existence in order to extinguish faculty tenure rights unless faculty handbooks or other policy documents expressly provide for the possibility of merger or acquisition, and describe the faculty’s rights (or lack of rights) under those circumstances.

When George Washington University (GWU) entered an affiliation agreement with the trustees of Mount Vernon College (MVC), the affiliation document provided that GWU could exercise its right to cause MVC to close if MVC’s operating deficit for the 1997-98 academic year was $1 million or greater. A joint faculty/administration committee comprised of representatives from both institutions developed a plan during the 1997-98 academic year for the “Mount Vernon College Campus of the George Washington University.” The plan recommended cessation of MVC’s regular operations as of the end of the 1998-99 academic year, a teachout of students, a transition which included admission of MVC students to GWU, notice of termination to MVC faculty, including tenured faculty, and continued employment of MVC faculty through June 30, 1999. The proposal provided that MVC faculty be permitted to apply for vacancies at GWU. The MVC Board of Trustees declared financial exigency in December of 1997. After an audit of MVC’s financial condition, GWU exercised its right to cause MVC to close as of June 30, 1999.

While GWU characterized the action as the closure of MVC, some of its faculty characterized it as an affiliation, which would have meant that MVC contractual obligations to its faculty would continue. Twelve faculty members (9 with tenure and 3 untenured faculty) sued MVC and GWU for breach of contract and related claims.61 Also at issue was whether the faculty were entitled to be involved in planning for the affiliation/merger, for the faculty handbook contained language that provided a consultative role for the faculty in the case of program retrenchment, elimination or reorganization. The trial court rejected the defendants’

summary judgment motion, refusing to dismiss the claims against MVC. The case was settled in 2001.\textsuperscript{62}

If faculty handbooks, collective bargaining agreements, or other institutional policy documents specify a faculty role in determining how program reductions or closures, or the criteria for selecting faculty, will be accomplished, then excluding faculty from this process will invite breach-of-contract claims. But in some instances, despite the fact that handbooks and policy documents did not specify a faculty role in the process, breach-of-contract claims have been brought. For example, when Mercer University closed its Atlanta College of Arts and Sciences, the faculty asserted that excluding them from participating in the closure decision breached their contract because in the academic community the term "bona fide discontinuance of a program," used in the faculty handbook, meant that faculty must be involved in the decision.\textsuperscript{63}

For additional information on faculty status issues involving mergers and affiliations, see Donna R. Euben, “Faculty Issues in Tough Times,” 11\textsuperscript{th} Annual Legal Issues in Higher Education Conference, The University of Vermont, October 16, 2001.

**Student Challenges to Retrenchment Decisions**\textsuperscript{64}

Faculty and staff are not the only individuals whose careers may be negatively affected when a college retrenches, closes a program, or closes entirely. Students may be left with incomplete academic programs, or the institution may lose its accreditation before closing, which may make it impossible for students to transfer to other institutions, to attend graduate school, or to sit for licensing examinations. Faculty and administrators need to carefully consider the needs and welfare of students when making decisions involving retrenchments or reorganizations of academic programs.


\textsuperscript{64} This section is adapted from William A. Kaplin and Barbara A. Lee, *The Law of Higher Education*, 4\textsuperscript{th} ed. (San Francisco: Jossey-Bass Publishers, Inc., forthcoming).
Courts have used a variety of contractual and quasi-contractual theories to analyze students’ challenges to program closures. For the most part, students have been unsuccessful in these challenges. For example, in *Aase v. State*, the state decided to close a branch of the University of South Dakota and transform it into a prison. The state’s supreme court defined the contractual relationship between students and the university as existing from semester to semester, and ruled that the students could not challenge the regents’ decision to close the institution.

In *Behrend v. Ohio*, students challenged Ohio University’s decision to close its School of Architecture because of enrollment declines and financial losses. The university had planned to close the program gradually, which would have allowed current students to complete their degrees, but the accrediting agency for architecture, having learned of the planned closure, withdrew the school’s accreditation, leaving the students with the choice of continuing their studies at a school that was not accredited, or transferring to another college with an accredited architecture program. The court used an implied-in-fact contractual analysis to find that the university, although it had the authority to make academic decisions concerning program viability, could also be held liable for those decisions if students were harmed. The court awarded money damages to the students.

In *Beukas v. Board of Trustees of Fairleigh Dickinson University*, students challenged a private university’s decision to close its dental school when the state withdrew its subsidy and the program suffered a sizable deficit. Although the university offered the students assistance with transfers to other dental schools in the state and offered to pay for any difference in tuition rates, several students sued the university, claiming that the school’s deficit did not make it impossible for the university to continue operating the school. The court used a quasi-contract theory to examine the university’s decisions, and created a duty of good faith on the part of the university that flowed from this quasi-contractual relationship. The appellate court affirmed, but

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65 400 N.W. 2d 269 (S.D. 1987).


primarily on the basis that the university’s course catalog included a disclaimer that reserved the university’s rights to change or eliminate programs or schools.

Students enrolled in programs that are terminated or changed prior to the students’ graduation have found some state courts to be receptive to their claims that promotional materials, catalogs, and policy statements are contractually binding on the institution. An illustrative case is *Craig v. Forest Institute of Professional Psychology*, in which four students filed state law breach of contract and fraud claims against Forest. Forest, whose main campus was located in Wheeling, Illinois, opened a satellite campus in Huntsville, Alabama and offered a doctoral degree program in psychology. Although the Huntsville campus was not accredited by the American Psychological Association (APA), a regional accrediting association, or the state, Forest’s written materials allegedly implied that its graduates were eligible to sit for licensing examinations and to be licensed in Alabama. The Alabama Board of Examiners would not allow Forest graduates to sit for a licensing examination because its regulations provided that only graduates of accredited institutions were eligible to take the examination.

The Alabama campus proved to be a financial drain on Forest, and it closed the campus before the students had completed their doctorates. Because the college was not accredited, the students were unable to transfer credits earned at Forest to other doctoral programs.

The students’ claims were based on the college’s alleged promises that they could obtain a doctorate at the Huntsville campus and be eligible for licensure in Alabama. The trial court granted summary judgment to the college, but the appellate court reversed. Disagreeing with an earlier ruling by the South Dakota Supreme Court in an earlier case, *Aase v. State*, the court ruled that “it is not clear that Forest fulfilled all of its contractual obligations to the students merely by providing them with instruction for which they had paid tuition on a semester-by-semester basis.” The scope of the contract could not be determined without a trial, said the court; although Forest had pointed to language in one publication that reserved its right to modify or discontinue programs, the court stated that this language was not “dispositive” and

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70400 N.W. 2d 269 (S.D. 1987).
7113 So. 2d at 973.
that all relevant documents needed to be considered. The court also ruled that a trial was necessary on the plaintiffs’ fraud claims.

An earlier case from Montana has been cited in subsequent state court proceedings in support of the contractual nature of the student-institution relationship. Although *Peretti v. State of Montana* was later reversed on other grounds, a federal trial court determined that language in the literature published by the Missoula Technical Center describing the course requirements of the aviation technology program was contractually binding on the state. The program extended over six quarters, and courses were not transferable to any other institution. Fifteen students who enrolled in the program in the fall of 1976 were told in 1977 that the program was going to be eliminated because of legislative budget cuts, and they would not be able to finish their training. They sued, asserting that the written materials describing the program constituted a contract, and that the Board of Higher Education’s decision to close the program prior to their completing it constituted a deprivation of due process.

The trial court first determined whether contract law was appropriate for analyzing the student-institution relationship. It determined that it was:

Since a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; custom and usages can also become specific terms by implication. This contract has been upheld against attacks based upon lack of consideration, the statute of frauds, and lack of mutuality of obligation.\(^{73}\)

The trial court ruled that an implied contract existed between the state and the students because the state had contracted to provide six quarters of education, and should have known that the students would expect to be enrolled for the full six quarters. This was particularly true, said the trial court, because the students could not transfer the credits already earned to another institution. The court ruled that “there was an implied contract that if the plaintiffs enrolled in the aviation technology course, they would be given an opportunity to complete the training period of six quarters and receive a diploma evidencing such completion.”\(^{74}\)


\(^{73}\) 464 F. Supp. at 786.

\(^{74}\) 464 F. Supp. 787.
breached the contract by terminating the program and preventing the students from finishing. This contract breach, said the court, denied the plaintiffs due process. On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed on sovereign immunity grounds, but did not reach the merits.\(^7\)

When a college is considering the reorganization, reduction, or elimination of one or more programs, the impact of that decision on the students should be a central element of the planning process. As was evident in several of the cases reviewed for this paper, students may be harmed not only by the need to transfer to another institution to finish their education, but may also be harmed if the college from which they wish to transfer has lost its accreditation, which may mean that their credits will not be accepted by other institutions. The Beukas case provides a good example of an institution that worked cooperatively with the accrediting organization to ensure that it would remain accredited until the date of closure of the dental school, thereby allowing students to retain the value of the courses they had completed through the transfer process.

**Summary**

This review of litigation surrounding issues of accountability, retrenchment, merger, acquisition and closure demonstrates that the planning process for such acts is very important. For example, a well-designed and –executed post-tenure review program is an important component of an effective defense to subsequent challenges to layoffs or terminations of tenured faculty during a retrenchment or other institutional reorganization. Clear, unambiguous written policies, careful adherence to these policies, thorough planning prior to program closures, and a strategy for minimizing the harm to faculty and/or students are critical to successful defense of whatever legal claims may follow these very difficult choices that institutions may have to make.

\(^7\) **Montana v. Peretti**, 661 F.2d 756 (9th Cir. 1981).