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CONCURRENT SESSION ONE

Should Tenure Be Abolished?

Faculty:

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Peter Ruger

**SHOULD TENURE BE
ABOLISHED?
ARE TERMS CONTRACTS AN
ALTERNATIVE? AGE
DISCRIMINATION ISSUES**

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**Presented by Stetson University
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AGE DISCRIMINATION ISSUES

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I. INTRODUCTION

The focus of this outline will be on whether tenure can be abolished and whether there are viable alternative systems for faculty employment. The legal implications of the abolition of tenure and modification of traditional faculty employment will be discussed.

The most recent motivation for scrutiny of the tenure system has been the expiration on December 31, 1993 of the ADEA exemption for mandatory retirement of tenured faculty. 29 U.S.C. 631(d). That event, and ever present financial concerns, have generated a review of the existing tenure system and other faculty employment models.

Several years ago, the National Academy of Sciences was asked to analyze "the potential consequences of the elimination of mandatory retirement in institutions of higher education." The report, issued by the National Research Council in 1991, included the following conclusions:

1. Most tenured faculty would opt to retire even if no mandatory retirement existed.
2. At research universities, a higher proportion of faculty would choose to work past 70 if mandatory retirement was eliminated.

Predictably, the Council recommended that the ADEA exemption permitting the mandatory retirement of tenured faculty be allowed to expire at the end of 1993.

II. TERMINATION OF FACULTY - LEGAL FRAMEWORK

University faculty members have a right to due process (a fair hearing) when a personnel decision at a public college or university deprives them of a property or liberty interest. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

In addition to constitutional doctrines, state law, university policies, faculty handbooks, individual agreements with a faculty member, and custom and tradition will be relevant in determining the respective rights of the college and the faculty member. While private institutions are not subject to constitutional mandates, in practice most have adopted termination procedures that afford "due process."

A. Patterns of Appointment in Higher Education

1. Tenured appointment: A tenured appointment creates a property interest and, thus, at public institutions may only be terminated after affording the faculty member due process.
2. Probationary appointment: This is a tenure track appointment. Any attempt to terminate the faculty member for cause during the term of the appointment will require the affording of due process. But a non-renewal of the appointment does not, as a matter of constitutional law, mandate a hearing. e.g. Colburn v. Trustees of Indiana University, 973 F.2d 581 (7th Cir. 1992). Many colleges and universities, public and

private, have adopted AAUP guidelines that provide the termination of an appointment will not be made for reasons abridging academic freedom. Similarly, procedural guarantees are often afforded to probationary faculty. Care should be taken to ensure that the procedural steps, particularly the timeliness of notice of non-reappointment, are carefully followed so that any claim of deprivation of contractual rights can be avoided.

3. **Term Tenure:** One could be given tenure for a long fixed term of years, such as 20 or 25 years. At the end of a fixed term, renewal or nonrenewal could occur. The length of the renewal contract could be different from the initial term. Age discrimination issues could arise if the contract term ended on what had been the normal retirement age. Perhaps the ADEA impact could be minimized by combining rigorous review prior to renewal with a standard appointment pattern of diminishing length (e.g. an initial 20 year "tenured" appointment followed by one of 10 years, then one of 5 years).
4. **Appointments For Limited Term or Term Contracts:** Appointments in this category are normally of fixed and limited duration, such as a visiting professor or a research associate on "soft" money. It is desirable to have the appointing document specify the length of the period of employment and, if administratively practicable, obtain the

written understanding of the faculty member to his or her appointment of limited duration.

A benefit of a clearly defined term contract at public institutions is that a nonrenewal creates no due process issues. However, at both private and public institutions, care should be taken to comply with procedural review and notice requirements. This normally would be a nontenure track appointment.

5. "Evergreen" or Rolling Contracts: Another variation is a contract for a fixed term with annual renewal dates that continue the contract for another year if notice of nonrenewal is not given. For example, a 5-year agreement could include annual renewal dates during each year of the agreement, with annual extensions occurring at each renewal date unless notice of nonrenewal was not given.

III. TERMINATION FOR CAUSE: DUE PROCESS REQUIREMENTS

- A. Due Process Requirements: Due process, as applied to termination proceedings, is not an inflexible concept. The objective is to develop a procedure that will prevent an arbitrary or capricious termination decision. Chung v. Park, 514 F.2d 382 (3rd Cir. 1975). Fundamentals of due process in a termination situation include: (1) clear and actual notice of the reasons for termination and sufficient detail to allow the faculty member to present evidence relating to the allegations; (2) notice of both the names of those who have made allegations and the specific nature and factual basis for those

allegations; (3) a reasonable time and opportunity to present testimony in his or her defense; and (4) a hearing before an impartial board or tribunal. E.g. King v. University of Minnesota, 774 F.2d 224 (8th Cir. 1985). Private universities, in their faculty handbooks or tenure policies, typically have created a hearing procedure not unlike that mandated at public institutions.

B. Issues in the Termination Process:

1. How Extensive Should Internal, Informal Resolution Efforts Be?
2. What is the Role and Authority of the Hearing Panel?
 - a. Composition
 - b. Jurisdiction
 - c. Procedures
 - d. Decision making authority
3. Should the President Be Involved?
4. Should the Trustees Be Involved?
5. What is the Role of Inside/Outside Counsel?

C. Cause for termination in higher education has included the following acts:

1. Use of Students as Servants. San Filippo v. Bongiovanni, 961 F.2d 1125 (3rd Cir. 1992), cert. denied, 113 S.Ct. 305 (1992).
2. Incompetence. Riggin v. Board of Trustees of Ball State University, 489 N.E.2d 616 (Ind. App. 1986).
3. Conviction of a Felony. Samaan v. Trustees of California State University, 197 Cal. Rptr. 856 (Cal. App. 1983).

4. "Conduct Detrimental to the Nursing Program" and "Inability to Cooperate With and Maintain Harmony Among the Staff." Kelly v. Kansas City Community College, 648 P.2d 225 (1982)
5. Sexual Advances, Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984).

D. Financial exigency or the discontinuance of a program are frequently recognized as valid grounds for terminating faculty appointments, including those with tenure.

Elements of due process can be applicable in this situation. In Johnson v. Board of Regents, 377 F. Supp. 227 (WD Wis. 1974), Aff'd 510 F.2d 975 (7th Cir. 1975), the Court determined that due process required the following minimum procedures in a financial exigency layoff of tenured faculty: a reasonably adequate description of the manner in which the initial decision had been reached; a reasonably adequate disclosure to each Plaintiff of the information and data on which the decision makers had relied; and providing each Plaintiff with the opportunity to respond.

The starting point for any review of the appropriateness of a termination based on financial exigency is the contract between the institution and the faculty member. The "burden of proof" is on the college or university to demonstrate that the financial distress is real and that termination of the faculty is an appropriate response. AAUP v. Bloomfield College, 346 A.2d 615, 616 (NJ 1975). In Bloomfield College the court found that in the present

case, the termination of tenured faculty members allegedly because of "financial exigency" was not bona fide, inasmuch as the financial problem was primarily one of liquidity and not one of assets, and that the action of the College administration in terminating the services of 13 faculty members was primarily a result of basic hostility to the concept of tenure, as shown in the hiring of new faculty members as well as by evidence in various internal memoranda and reports that the objective of the College administration was the abolition of tenure, and not the alleviation of financial stringency which could be accomplished through the use of obvious remedial measures other than the firing of tenured faculty members. See also Pace v. Hymas, 726 P.2d 693 (Ida. 1986), in which the University of Idaho failed to prove that financial exigency justified its termination of a tenured professor.

Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978) upheld the termination of a tenured faculty member due to financial exigency despite the absence of specific authority for termination in the faculty contract. The Krotkoff decision resorted to academic custom and usage to imply terms into the faculty contract, including the right to terminate for financial reasons.

- E. Termination of a Faculty Member With an Infectious Disease: No reported cases directly address this situation in higher education. However, surgeons with a communicable infectious disease have had their hospital privileges terminated, Estate of Behringer v. Medical Center at Princeton, 592 A.2d 1251 (N.S. 1991) and a dental student with AIDS was denied continuation in

his clinical program, John Doe v. Washington University, 780 F. Supp. 628 (E.D. Mo. 1991).

The United States Supreme Court decision of School Board of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123 (1987) established standards that would be relevant in the employment or student enrollment context. The Arline tests, fashioned to test conformance with Section 504 of the Federal Rehabilitation Act, require the following analysis:

1. First, the following four (4) factors must be analyzed to assess the threat to others:
 - a. the nature of the risk (how the disease is transmitted);
 - b. the duration of the risk (how long the carrier is infectious);
 - c. the severity of the risk (the potential harm to third parties); and
 - d. the probabilities the disease will be transmitted and will cause varying degrees of harm. Arline, 107 S.Ct. at 1131.

2. When it has been found that the individual poses a significant risk to others, part two of the Arline test is to determine whether the accommodation necessary to eliminate that risk is reasonable. Relying on Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979), the Arline decision stated that

"accommodation is not reasonable if it either poses undue financial and administrative burdens on an institution or requires a fundamental alteration in the nature of the institution's program. Arline, 107 S.Ct. at 1131, n. 17.

IV. FACULTY CONTRACT ISSUES

Contract issues can arise at both public and private institutions. The scope of the faculty member's employment agreement, particularly as it affects tenure, has been litigated frequently. Attempts by colleges and universities to abrogate or reduce tenure rights will undoubtedly expand the body of case law now extant.

- A. Recognition of Tenure as a Contract Right: Numerous cases have recognized that the award of tenure confers significant contractual rights upon the recipient. See, e.g. Kaplin, The Law of Higher Education, 2d Ed pgs. 90-99 (1985); Annot., 66 ALR 3d 1011. Cases illustrative of the significance of tenure include Bruno v. Detroit Inst. of Tech., 215 N.W.2d 745 (Mich. 1974) and State ex rel. Phillips v. Ford, 151 P.2d 171 (Mont. 1944).

In Bruno, the faculty member claimed he had attained tenure and had been wrongfully discharged. The appellate court agreed, holding that the faculty member was entitled to continuous employment until retirement. The court encouraged the defendant to restore the faculty member but, if that did not occur, the obligation to provide employment until retirement would serve as the basis for the assessment of damages, in order to "put the injured party

in as good a position as he would have had if performance had been rendered as promised." Bruno, at 747, quoting 5 Corbin on Contracts, § 992, p. 5.

When a tenured professor of history successfully resolved an attempted rape charge against him, he sought to withdraw his resignation, which had been accepted by the university's president but not, in good faith, by the State Board of Education, the tenure conferring body. The president had concealed the withdrawal from the Board. The decision, emphasizing that the professor could withdraw his resignation before that "offer" was accepted by the Board, implicitly recognized the significance and permanence of an award of tenure. State ex rel. Phillips v. Ford, 151 P.2d 171 (Mont. 1944).

- B. **Modification of the Tenure Contract:** Significant as tenure may be, its attributes, and the contract creating them, may be modified in certain circumstances. The grant of tenure did not preclude Case Western Reserve University from changing the date of mandatory retirement. The court found the changes to be valid where the right to amend was reserved in the original contract or where there was mutual consent of the parties to amend and adequate consideration was given by the university for the changed terms. Rehor v. Case Western Reserve University, 331 N.E.2d 416 (Ohio 1975). See Kaplin, supra., at 93-94, for a more extensive analysis of this case. A contrasting result was reached in Taliaferro v. Dykstra, 434 F. Supp. 705 (E.D. Va. 1977). The court held that the retirement age could not be changed unilaterally. Factual elements supporting this decision included a lack of

consultation with the faculty and a lack of understanding in the campus community ("custom and usage") that the policy was to be changed.

Absent termination for cause or for financial exigency, it is unlikely that tenure could be terminated without the consent of the faculty member and adequate consideration to support the relinquishment of that important right. See Rehor, supra.; Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938).

The presence of, or adequacy of, consideration is a significant element in tenure modification cases. Although Rehor, supra. found adequate consideration for the policy change in the acceptance of annual reappointment with a salary increase, the prevalent view reaches the opposite conclusion. E.g., Karlen v. New York Univ., 464 F. Supp. 704 (S.D.N.Y.); Drans v. Providence College, 383 A.2d 1033 (R.I. 1978); Fazekas v. Univ. of Houston, 565 S.W.2d 299 (1978).

Merely carrying out one's employment responsibilities provides insufficient consideration for a policy change that alters employment status. Sargent v. Illinois Inst. of Tech., 397 N.E.2d 443 (Ill. App. 1979). Verbal assurances, even by a Dean, are insufficient to create entitlements, such as enhanced salary, without "bargained for" consideration. Kirsner v. Univ. of Miami, 362 So.2d 449 (Fla. App. 1978). The lack of consideration was implicitly an element in the court's dicta in Rose v. Elmhurst College, 379 N.E.2d 791 (Ill. App. 1978). With respect to the relinquishment of tenure by the acceptance of annual contracts, the court observed: "We would find some

difficulty, however, in concluding that if we were to reach the issue, that 'tenure' simply means the right each year to accept employment on whatever terms the trustees establish from time to time; we're reluctant to conclude that a tenured professor could be required to give up tenure privileges as a condition for the annual renewal of his contract. At the very least a factual issue would necessarily be present to determine whether there is an unwritten 'common law' comprised of the conduct, customs and usage of the academic community in general or of Elmhurst College in particular, which would permit unilateral modification by the college trustees of a college's tenure commitment to its faculty members."

Thus, consideration is a two edged sword that should deter both faculty and colleges from unilateral or self-serving contract modifications.

V. DISABILITY DISCRIMINATION

- A. Relevant Statutes: The Americans with Disabilities Act (ADA), enacted in 1990, supplements the Rehabilitation Act of 1973 (§ 504) in prohibiting discrimination on the basis of handicap. Both statutes prohibit discrimination "against a qualified individual with a disability because of the disability..." 42 U.S.C. § 12112(a); 29 U.S.C. § 701. Discrimination "includes failure to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual. 42 U.S.C. § 12112(b)(5)(A). Employers can assert as a defense that providing the accommodation would pose an undue hardship on their operations. 42 U.S.C. § 12112(b)(5)(A).

B. **Impact on the Tenure Process:** Will the elimination of mandatory retirement plus the effects of the aging process create potential ADA and § 504 issues? If some diminution of a faculty member's acuity takes place, what is the extent of reasonable accommodation necessary? Would it be appropriate to shift a faculty member from graduate level courses to introductory ones? Can someone be put on disability leave involuntarily? These questions, and others, await determination.

VI. AGE DISCRIMINATION

A. **Relevant Statutes:** The Age Discrimination in Employment Act of 1967 (ADEA), as amended, is designed to prohibit age discrimination in employment, as its title suggests. Persons 40 years old, and older, are within the scope of this law. Age cannot be used as a basis in determining compensation, terms, conditions or privileges of employment.

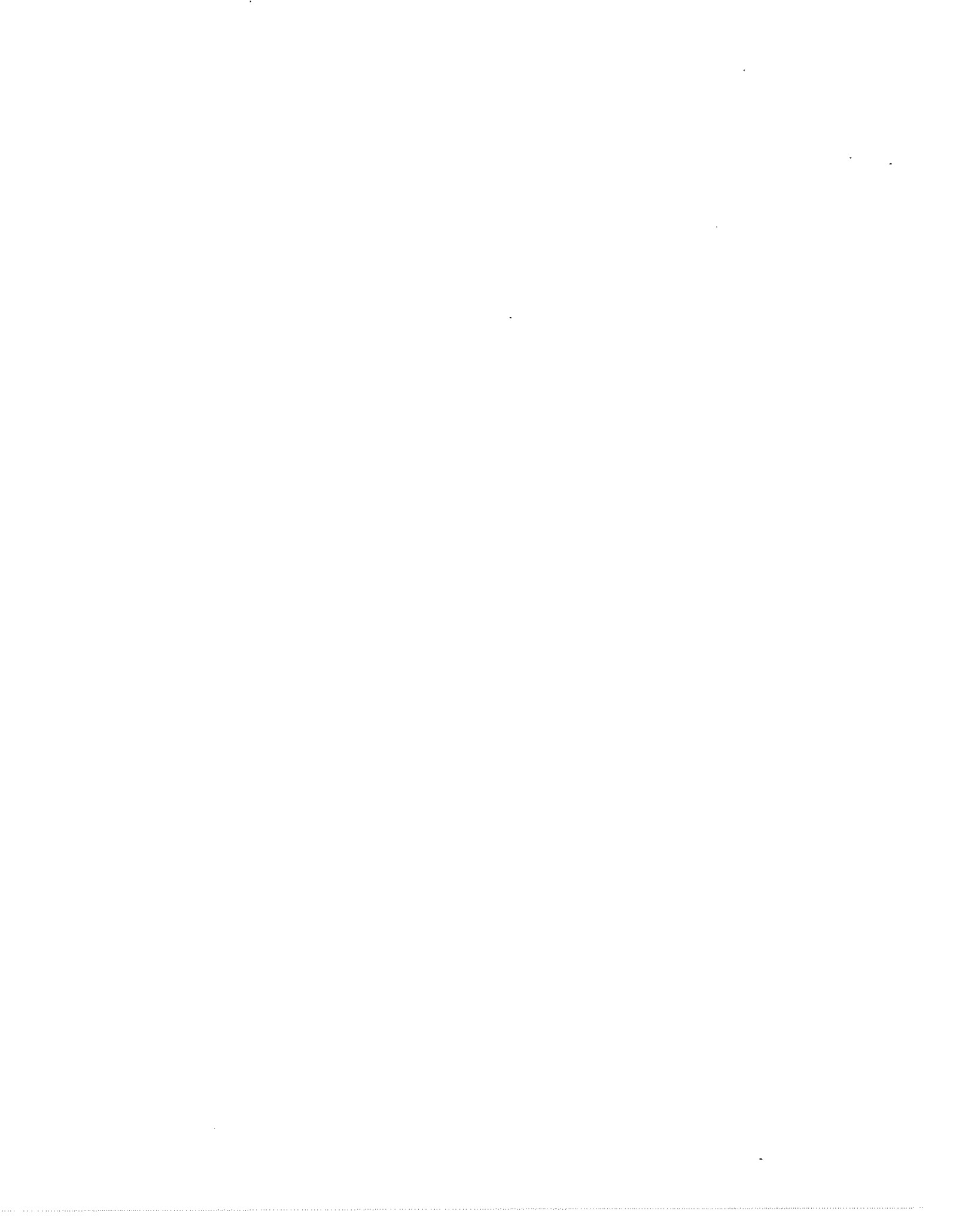
The Older Worker's Benefit Protection Act, amending ADEA, imposes restrictions on an employee's ability to waive his or her ADEA rights. The provisions for waiver are complex and, in the opinion of some commentators, excessive. The law may limit the ability of institutions of higher education to fashion flexible early retirement plans.

Once a plaintiff makes a prima facie showing, the burden shifts to the employer to demonstrate that the action was taken for reasons other than age or that age was a bona fide occupational qualification. 29 U.S.C. § 623(f)(1). If a discharge or act of discipline is involved, the action must be supported by "good cause." 29 U.S.C. § 623(f)(3).

- B. **Impact on the Tenure Process:** The uncapping of retirement will undoubtedly increase the number of higher education ADEA decisions. Tenured faculty in their 50's or 60's facing discipline or discharge may assert that the action is pretextual, designed solely to force their removal after mandatory retirement is no longer applicable. Reorganizations must be carried out carefully to avoid ADEA claims. An example of a flawed attempt to eliminate a faculty member through a reorganization is delineated in Leftwich v. Harris-Stowe College, 702 F.2d 686 (8th Cir. 1983).

It is highly improbable that institutions of higher education will be able to claim age is a BFOQ for faculty positions. Actions will have to be justified for cause or for cogent reasons other than age. If performance appraisals are used for tenured faculty, they will have to apply to all in the tenured ranks, not just those at what had been the former retirement date. Similar scrutiny for renewal of contracts will have to occur. But, unlike the ADA, there is no "reasonable accommodation" requirement so, in appropriate cases, termination will probably occur where cause or sub-standard performance exists.

The effect of uncapping remains to be fully explored. An initial debate concerning the impact of uncapping is found in O. Ruebhausen, "The Age Discrimination in Employment Act Amendments of 1986: Implementation for Tenure and Retirement," 14 J. of Coll. and Univ. Law 561 (1988) and M. Finkin, "Tenure After an Uncapped ADEA: A Different View," 15 J. of Coll. and Univ. Law 43 (1988).



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Presented at

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Why Not Abolish Tenure?

Should tenure be abolished? No, of course not. In fact, in my opinion, if tenure did not exist already in higher education, it would have to be invented!

Consider that higher education is an enterprise which has as its overall mission benefiting the common good by teaching the knowledge we have and by creating new knowledge through continuing research and the training of new researchers. True, some institutions of higher education specialize more in one than the other.

Suppose that a college or university called in a management consultant to design an organizational plan for such an endeavor. The consultant would see immediately, I think, that in order to keep a college or university in

business it must compete with others similar to it. Therefore, it would want to hire the best faculty members it could. But, suppose also that the consultant were told that while the the trustees or regents agreed on hiring the best possible, they wanted to be able to fire any faculty member whose work looked like it was beginning to deal with whatever they deemed to be "unpopular ideas."

At that point the consultant might well throw up his or her hands and tell the client that it could save a lot of money if it would just purchase an encyclopedia, pick out the topics the trustees or regents approve of, copy them, hand them out to students, test the students, and award diplomas. For, whatever such an enterprise would be called, without keeping up to date and producing new knowledge and new researchers it would not be a college or university. And without the protection afforded by tenure of new, sometimes unpopular ideas, there is little likelihood of meaningful research.

We need to remind ourselves that tenure, as recognized by the Supreme Court, is more than the right to receive a paycheck. Academic tenure, if it is to have any meaning at all, must encompass the right to pursue scholarship wherever it may lead, the freedom to inquire, to study and to evaluate without the deadening limits of orthodoxy or the corrosive atmosphere of suspicion and distrust. *Sweezy v. State of New Hampshire*, 354 U.S. 234,250 (1957).

So, the answer to the question, should tenure be

abolished is self-evident in my view. If we wish to seek new knowledge, as well as teach what we currently know, we have to follow intellectual inquiry where it leads. Otherwise, we are wasting our money.

Why Is The Tenure Question Being Asked Now?

More to the point is what has happened to cause this question to be asked now?

Perhaps we ought to take a look at how tenure apparently is being managed now at some colleges and universities by those who run it, namely, faculty members and administrators.

To enable us "to see ourselves as others see us," as Robert Burns put it, we may need look no further than two recent, notorious cases that reveal why the concept of tenure has fallen into such disrepute.

Case Number One

A tenured philosophy professor at City College of the City University of New York, Dr. Michael Levin, expressed his views about blacks, outside the classroom, in three writings: a letter to The New York Times advocating the right of storekeepers to exclude black males from their shops by locking the door and requiring customers to ring for entry; and two other writings, namely, a book review published in Quadrant, an Australian Journal, and a letter published in the American Philosophical Association Proceedings, both asserting that, on average, blacks are significantly less intelligent than whites. These outside activities caused consternation and classroom demonstrations at the college.

Ultimately, the college: (1) created "shadow" classes for the professor's students to transfer into; (2) subjected him to review by an ad hoc presidential advisory committee which threatened his tenure; and (3) failed to discipline students who disrupted his classes and threatened him in violation of college rules.

Levin sued the college alleging it violated his First and Fourteenth Amendment rights. After a number of hearings the federal appellate court held that: (1) since there was no evidence that the professor's expressions outside the classroom harmed his students or the educational process, the creation of shadow classes violated his free speech rights and warranted injunctive relief; (2) the threat of discipline, including loss of tenure and job implicit in the creation of the ad hoc presidential advisory committee to inquire into his racially denigrating writings outside the classroom as possibly being conduct unbecoming a member of the faculty, created a chilling effect on the professor's First Amendment rights, and warranted a declaration of the violation but no injunctive relief; and (3) because the college failed to respond to other disruptions at the college just as it failed to respond to these disruptions of the professor's classes, there was no violation of his Fourteenth Amendment equal protection rights. Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y.1991); 966 F.2d 85 (2nd Cir. 1992)

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Case Number Two

A tenured professor, Dr. Leonard Jeffries, was removed from his post as chairman of the black studies department at City College of the City University of New York about two years ago. He remained as a tenured professor. Recently, after several court hearings, Judge Kenneth Conboy of the Federal District Court in Manhattan ruled that Jeffries' removal from the chairmanship violated his constitutional rights. A jury awarded Dr. Jeffries \$400,000 in damages, though that sum has been reduced by ten percent by the court. Judge Conboy also ordered Dr. Jeffries reinstated to his chairmanship.

The judge acknowledged that the university had full legal authority to remove a chairman on legitimate grounds, such as, that his job performance was unsatisfactory, or that his activities hurt the black studies department. But in this instance, the judge said, university administrators were "dishonest about their motivations."

The judge stated that while university administrators alleged that their removal of Dr. Jeffries from the chairman's position was for administrative incompetence, the real motivation was a speech Dr. Jeffries made in July 1991 at the Empire State Black Arts and Cultural Festival in Albany blaming "rich jews" for the slave trade and Jews and Italians for a "conspiracy, planned and plotted and programmed out of Hollywood" to cause "the destruction of black people."

Dr. Jeffries also allegedly taught that the races are divided into white "ice people" and black "sun people," the whites being cruel and aggressive and the blacks being naturally creative, cooperative and intuitive.

Judge Conboy reportedly said in his decision that the Constitution does not forbid a university from disciplining a professor for engaging in a "systematic pattern of racist, anti-Semitic, sexist or homophobic remarks during class," or for teaching "patently absurd and wholly fallacious theories in class."

The judge said that "there appears to have been some indication of rather serious improprieties on the part of Professor Jeffries upon which the CUNY administrators could have constitutionally acted." One example given was the accusation that Dr. Jeffries threatened to "kill" a Harvard Crimson reporter who interviewed him. Instead, the judge said, "the university inexplicably, and perhaps cowardly, chose to ignore these improprieties, and only acted against the plaintiff when the public outrage over the July 20, 1991, speech in effect forced its hand."

"The university cannot escape the astonishing picture it painted for the jury: high public and academic officials swearing under oath that they had removed the professor for tardiness in arriving at class and sending in his grades and for asserting brutish behavior which had been either ignored or condoned by the university," said Judge Conboy. Dr. Jeffries routinely had been reappointed chair for many years.

In effect, the judge found that college faculty and administrators had done superficial, rather than appropriate, periodic evaluations of Dr. Jeffries as chairman of his department, and as a tenured professor. It was upon these evaluations that he could have been constitutionally disciplined, instead of relying on a single off-campus speech that aroused much negative publicity to punish Dr. Jeffries unconstitutionally.

See R. Bernstein, "Judge Reinstates Jeffries as Head of Black Studies for City College" in The New York Times, August 5, 1993, p.1. See also: Jeffries v. Harleston, 820 F.Supp. 736 (S.D.N.Y. 1993); 820 F.Supp. 739 (S.D.N.Y. 1993); 820 F.Supp. 741 (S.D.N.Y.1993).

Implications of These Cases

Both of these cases were heard by Judge Kenneth Conboy, a Manhattan federal district court judge. In very direct words he emphatically said that those who manage the tenure process, i.e., faculty members and administrators, should be more responsible and accountable.

In both cases, for instance, the college administration apparently did not explain to students that generally a professor's views expressed outside the classroom are not grounds for discipline. Nor did it provide guidance about appropriate ways for students and others to express their opinions about the professors' views and have an airing of ideas.

In the Levin case, the college apparently did not follow

its own rules regarding the handling of classroom disruptions.

In the Jeffries case, neither the college administrators nor the faculty appear to have conducted adequate evaluations of his performance either as a professor or as a chairperson over the years.

See W.P. Metzger. "Professional and Legal Limits to Academic Freedom." The Journal of College and University Law, Vol 20, No. 1, Summer 1993, p. 1.

Improving the Management of Tenure

1. A sea change has occurred in public attitudes, with the insistence that academics either be more accountable or funding support will wane further. A profession that refuses to police itself soon will be policed by others. Administrators and faculty who share governance of academic matters such as tenure and academic freedom must reform any lax tenure decision practices and restore rigor to them.

2. Since the mission of the college or university drives decisions about hiring and tenure, the mission must be clearly stated and fully understood. Faculty job descriptions and the criteria for making hiring decisions are critical matters.

Reminder: The Americans With Disabilities Act requires that job descriptions set forth which are essential and which are non-essential job functions. Therefore, to forestall lawsuits concerning hiring, promoting, and terminating individuals with disabilities, colleges and

universities should review all job descriptions of all personnel to assure that each description differentiates essential from non-essential job functions. By doing so, employment decisions affecting persons with disabilities can be better made, and, hopefully, legal challenges to those decisions reduced.

3. Regular evaluations now are essential both before tenure and after tenure. Remember that as of January 1, 1994 tenured professors, like all other college and university personnel, can be terminated only for just cause. The exemption granted to higher education under the Age Discrimination in Employment Act, which permitted the mandatory retirement of tenured faculty, ran out December 31, 1993. See attached P. Hollander, "Point of View: Evaluating Tenured Professors," The Chronicle of Higher Education, Vo. 38, No. 41, June 17, 1992, P. A 44.

4. Provide the required due process. Colleges and universities that follow all their own rules and procedures will go a long way in preventing lawsuits because courts tend to decline to interfere in scholarly decisions made within an institution's own rule-making authority.

5. Acquaint faculty members and administrators with the legal issues involved in tenure decisions by having legal counsel give regular seminars.

6. Take every opportunity to explain to the public what the job of a faculty member entails and why tenure and academic freedom are valued doctrines. Demonstrate how

academia handles protected but distasteful speech, e.g., by immediately providing a forum for the exchange of ideas without resorting to violence.

7. Make a real effort to counter a public image of academics as inefficient on the one hand and arrogant on the other!

See R.L. Quinones. "The Need to Improve the Formation of the Modern Academic Employment Contract." Employee Responsibilities and Rights Journal, Vol. 4, No. 2, 1991, p. 137.

F73:ST294

Point of View

By Patricia A. Hollander

DECEMBER 31, 1993, will mark the end of mandatory retirement of tenured faculty members. Under the Age Discrimination in Employment Act, after that date colleges and universities will be permitted to terminate tenured faculty members only for just cause. It will no longer be possible to rely on mandatory-retirement rules as a convenient solution to the problem of unsatisfactory performance by tenured professors.

Beginning January 1, 1994, colleges will be able to terminate tenured faculty members only if they can show that the individuals no longer meet appropriate standards, such as competence in teaching, research, and service. In addition to incompetence, examples of just cause for termination of tenured faculty members, as determined by a number of court cases, include the following:

- Neglect of duty, such as refusing to follow the curriculum, refusing to teach scheduled classes, or refusing to develop assigned courses.
- Insubordination, including refusing to serve on faculty committees or absenting oneself from work even if a leave of absence has been denied.
- Unprofessional conduct, such as evicting a colleague from a class that the colleague was assigned to teach or misrepresenting one's academic credentials.
- Sexual misconduct, including making sexual advances in a classroom, laboratory, or similar setting.

Some people mistakenly believe that a tenure contract is an employment contract for life—everlasting job security. It is not. Rather, a tenure contract is a conditional continuing contract. That is, it continues without having to be formally renewed year after year but only so long as the individual meets the conditions of the contract, including satisfactory performance of duties. Tenure does not protect faculty members from being terminated for "cause," such as incompetence; it protects them from being terminated for reasons related to academic freedom, such as teaching or doing research on unpopular topics.

We all know particular tenured faculty members who even after age 80 will gleefully run younger colleagues around the academic track, hardly pausing for breath and leaving limp and gasping bodies in their wake. We also know faculty members who will not be that vigorous. The task is to separate one group from the other. Before the end of mandatory retirement, colleges should set up periodic performance reviews to provide routine, consistent, honest evaluations of all faculty members' teaching and research.

Honesty is of central importance in these evaluations. Although some institutions may already have *pro forma* evaluation systems, they do not help if a troublesome faculty member eventually becomes the subject



Evaluating Tenured Professors

Without mandatory retirement, colleges need new procedures

of a termination proceeding and can pull out past evaluations that have rated him or her highly—or at least have never indicated any significant problems. An honest evaluation might note that a professor was not prepared for class, had not updated his or her material, spent class time on irrelevant matters, or had not adequately prepared students for more advanced work. It might say that the faculty member was uncooperative, had failed to participate adequately in departmental affairs, or had not engaged in research or scholarly activities. Such honest reviews might spur many inadequate faculty members to improve their performance; even if they did not, they would provide a clear record upon which colleagues and administrators could act.

Evaluation should not affect adversely most tenured professors. In fact, once they become accustomed to it and less annoyed by the routine of it, many faculty members may come to enjoy the opportunity to display

tional institutions, colleges and universities already have developed evaluation processes for administrators, staff members, and non-tenured faculty members. Are administrators and professors ready for the additional work of honestly and objectively evaluating tenured faculty members to determine whether their performance meets appropriate standards? Some say this is an impossible task. In fact, it is and always has been an entirely possible task, although, rightly, a difficult one.

Evaluating teaching usually is said to be particularly difficult. Most people agree that research can be evaluated, since committees do it for tenure and promotion decisions, but many universities have avoided evaluating teaching, sometimes on the grounds that such evaluations would be more subjective. The criteria and methodology used to evaluate teaching should be agreed upon in advance, of course, but appropriate methods do exist. Some departments employ criteria such as updated course descriptions and syllabi, use of current textbooks and assigned readings, and active signs of advising, including encouraging students to participate in national professional meetings. Methods for evaluating faculty members often involve classroom visits by colleagues, reviews of written handouts, and screening of student evaluations.

SOME PEOPLE SAY that faculty members are not willing to participate in evaluations of peers that may result in terminations, but this is largely a canard. For if the faculty refuses to join in, who will do the evaluations? Administrators alone? Surely not. I have no doubt that many faculty members are as interested in assuring that their colleagues perform up to standard as are administrators, students, and parents.

After all, evaluation of professors is nothing new; non-tenured faculty members have always had their overall performance scrutinized when they are up for tenure. Institutions already use performance reviews to decide merit salary increases and promotions from associate to full professor. What is new is that an evaluation system that routinely focused on non-tenured faculty members now must be adjusted and enlarged to include serious attention to the continuing performance of tenured professors.

Many institutions already have used faculty panels to conduct proceedings that led to the dismissal of tenured professors. During a session at a recent conference at Stetson University on law and higher education, about half of the audience of 50 to 60 people raised

their hands when asked if their institution had terminated a tenured professor for cause. In the past, however, such proceedings probably have been used only in extreme cases, such as when an individual clearly was unfit to continue because of lingering illness or explicitly unacceptable conduct.

In the future, colleges and universities must establish procedures that lead to evaluations that are honest and careful enough to persuade faculty members whose performance is flagging to retire without the need for a full-blown faculty hearing. Undoubtedly, some colleges and universities already have reviewed and modified their

Less than two years remain until mandatory retirement for tenured professors ends.

WHAT MUST BE DONE? Basic documents, including faculty contracts, faculty handbooks, and governing-board policies, must be gathered and reviewed. Basic questions must be answered: What is the job description for each faculty position? What are the qualifications for that position? What are the criteria for promotions, salary increases, and terminations? What evidence is acceptable to demonstrate that the standards have been met? Who shall participate in setting evaluation standards and procedures? Who shall participate in doing evaluations? What due-process procedures shall apply?

In setting standards and procedures for tenured faculty members, care must be taken not to end up with two sets, one for non-tenured faculty members and the other for tenured professors; having two different standards might open an institution to challenge on the grounds of age discrimination.

Colleges also must consider whether they need to provide new monetary or other inducements to encourage faculty members to retire. Numerous institutions provide for buyouts of faculty contracts, using various formulas based on actuarial projections of longevity. Some also provide benefits such as office space or secretarial support, access to libraries, medical benefits, and counseling about post-retirement employment opportunities. Colleges could also encourage aging professors to share a faculty slot with a colleague or to work part time.

If ever a situation cries out for legal advice, this is it. Administrators and faculty senates should enlist legal counsel in all aspects of the process of setting standards and procedures, including drawing up job descriptions and designing mechanisms that provide appropriate due process when terminations are contemplated. Obtaining sound legal advice and consulting with faculty leaders may help colleges avoid or limit litigation.

Should litigation occur in spite of the care taken, a careful process for designing and carrying out faculty evaluations will help a college or university demonstrate to a court that its procedures give adequate notice of shortcomings in performance and guarantee fair treatment before any decision to terminate a faculty member is made. When they are hired, all faculty members should be given full explanations of the standards and procedures that an institution will use to evaluate them throughout their careers. This should help to reassure professors that their rights, as well as their responsibilities, have been given due attention.

The entire academic community has an interest in urging faculty members to summon the courage to act against colleagues who are not performing adequately. Although better evaluation procedures may help colleges avoid a lot of messy cases, inevitably some will arise, and faculty members must live up to their obligations to students and the rest of academe to remove faculty members who are not doing their jobs.

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