

**FACULTY DISMISSALS
DURING FINANCIAL EXIGENCY**

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16TH ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 12-14, 1995

Among the many methods employed by colleges and universities to deal with financial exigency, a reduction in the number of faculty is regarded as the most serious. Whether it is called retrenchment, cutbacks, or reduction in force, the mere thought of eliminating faculty positions, especially tenured faculty, will cause most administrators' hearts to skip a beat. Unfortunately, there are times when the situation requires this course of action, and the administrator must act in the best interest of the institution while maintaining consideration and respect for the individuals involved and their respective rights.

These rights also create conflict between the various factions involved in a financial exigency situation; best illustrated by the different definitions of financial exigency. The American Association of University Professors (AAUP) has developed one, different institutions, that have seen fit to include a definition in their faculty contracts or handbooks, have different interpretations, and courts of differing jurisdictions have not always agreed upon a definition. The following two definitions demonstrate the dichotomy that has developed in this area.

The American Association of University Professors defines financial exigency as "an imminent financial crisis which threatens the survival of the institution as a whole and cannot be alleviated by less drastic means."¹ In contrast is the definition found in the University of Idaho's Faculty Handbook. The handbook defined financial exigency as a:

demonstrably bona fide imminent financial crisis which threatens the viability of an agency, institution, office or department as a whole, or one or more of its programs, or other distinct units, and which cannot be adequately alleviated by means other than a reduction in the employment force.²

¹ 1976 *Recommended Institutional Regulations on Academic Freedom and Tenure*, §4(c)(1), 17 AAUP Policy Documents and Reports (1977).

² *Pace v. Hymas*, 111 Idaho 581, 583, 726 P.2d 693, 695 (1986).

This dichotomy of interpretation is often assumed to be an operation of the usual confrontations between administrators and faculty. However, it is not that clear cut. Without a doubt, many administrators remain faculty members and may still align themselves as faculty. In contrast the dean of a department, while still very much a faculty member, may prefer the administrative definition that gives her department more flexibility should the need arise to dismiss faculty from her department. A third component of this split also exists in the form of a governing board that could provide the final authority in the matter depending upon its power. In many instances, the governing board creates the policies and the contracts that the institutions under its control must follow, especially in the large state systems with a central board.

Minimum Legal Requirements

This is the critical area for both administrators and faculty members. Knowing the legal requirements can decrease the likelihood of litigation for the institution and spare it from unnecessary liability. Such knowledge will also help tenured faculty members exercise their rights more effectively should the situation arise. Before discussing actual requisites, an analysis of the court cases addressing the constitutional versus contractual approach, in relation to the public or private classification of the institution, will establish an important foundation.

For a public college or university, the court may apply a constitutional analysis, a contractual analysis, or both, depending upon the issues the court must address. A prime example of a court applying only a constitutional analysis to a public institution is *Johnson v. Board of Regents*. In *Johnson* the University of Wisconsin terminated several tenured faculty members on the ground of financial exigency. The professors as plaintiffs based their cause of action only on constitutional grounds stating that the university had denied them minimum

procedural due process requirements under the Fourteenth Amendment of the federal constitution. Thus, the pleadings of the faculty members limited the type of analysis the Johnson court could apply. The only question was whether the procedures the University of Wisconsin followed in terminating the professors met constitutional requirements, which the court held it did.

The *Hartman v. Merged Area VI Community College* case illustrates a court addressing only a contractual issue. The college dismissed Professor William Hartman due to financial exigency resulting from a decrease in enrollment. The professor contended that the college did not have the authority under the employment contract to terminate his position due to financial difficulties. Here the court did not interpret by implication, as other courts have done, the right of the college to dismiss due to financial exigency. Instead the court applied strict contractual analysis. The employment contract in question was actually a state statute which provided that the Board could dismiss a teacher "for incompetency, inattention to duty, partiality, or *any good cause*." The Board argued that financial exigency fit under the definition of "any good cause." The court rejected this argument citing that the other reasons found in that statute were personal attributes of the teacher and that another statute existed under which the Board could have exercised its dismissal for financial reasons. Although this case involved a public institution, the court addressed a contractual issue found in a state statute.

There are two excellent examples of courts having to apply both contractual and constitutional analysis to the issues brought before it. In *Pace v. Hymas* the plaintiff-professor alleged that the university was not experiencing a financial exigency, and that she had been denied substantive due process. For the first issue, the court looked at the faculty handbook as the employment contract and held that its defining financial exigency as a "demonstrably bona fide, imminent financial crisis" required that the university prove the

existence of the financial exigency, which the court held it had failed to do. The second issue of substantive due process is a constitutional matter which required the plaintiff to prove that the university's decision to terminate her was arbitrary, capricious, or without rational basis.

In the second case, *Christensen v. Terrell*, the rules of procedural due process at issue were also contractual in nature as they were a part of the Washington State University Faculty Handbook. Although the handbook set out additional requirements to those minimum procedural due process requirements of the Constitution, the court held that an agency's failure to follow its own procedural rules is not automatically a procedural due process violation. The court said that "the real question is whether the procedures that *were* employed satisfied federal constitutional requirements." In effect the court's use of the constitutional approach usurped the contract that the parties had entered. The professor allowed the court to rule this way by not also basing the violation on a breach of contract claim. Such an approach may have required the court to apply the stricter terms of the contract.³

The primary requirements of a financial exigency relate to the phrase "demonstrably *bona fide*" which courts have applied to professors' employment contracts, both as expressed terms and as implied terms. The courts have interpreted this phrase to involve as many as four requirements.

The first legal requirement concerns whether the claimed financial exigency actually exists. The courts have recognized a duty upon the university or college to prove the genuineness of the financial difficulties if the faculty member questions its existence. In *Pace*

³ The court cited the following cases in which a state agency did not follow its own procedural rules but the procedure was upheld as meeting minimum federal standards: *Danielson v. Seattle*, 742 P.2d 717 (1987); *Williams v. Seattle*, 607 F. Supp. 714 (W.D. Wash. 1985); *Levitt v. University of Texas*, 759 F.2d 1224 (5th Cir. 1985); *Ritter v. Board of Commissioners*, 96 Wash. 2d 503, 637 P.2d 940 (1981); and *Smith v. Greene*, 86 Wash. 2d 363, 545 P.2d 550 (1976).

court, the handbook defined financial exigency as "a *demonstrably bona fide*, imminent financial crisis" which the court interpreted as requiring the defendant institution to prove the existence of the financial crisis before the faculty members had any burden of proof.

In *Krotkoff*, the court also applied this requirement of proving the validity of the institution's financial exigency after implying the right to terminate based upon financial exigency into the employment contract. The court integrated AAUP documents into the employment contract, which not only gave Goucher College the implied right to terminate tenured faculty based on financial exigency, but also required Goucher College to prove the existence of the financial exigency first. And since Goucher College is a private institution, and the institution involved in *Pace*, the University of Idaho, is public, this criteria of the institution proving the existence of the financial crisis applies to both classifications.

The case of *American Association of University Professors v. Bloomfield College* shows how a court held a private institution in violation of the second legal requirement. In *Bloomfield*, the court held that the college had failed to meet its burden of proving the existence of a bona fide financial crisis. However, the court phrased the key issue as "whether that financial exigency was the *bona fide* cause for the decision to terminate." Not only must the institution prove that financial exigency exists, it must also show that the dismissals were a rational reaction to the financial exigency. Evidence brought before the judge at the lower court demonstrated a disdain by the president of Bloomfield College for the concept of tenure. Not only did the college dismiss several tenured professors, but those tenured professors retained had their tenure status removed by the college. The lower court judge saw the claim of financial exigency as a cover-up for a plan to eliminate tenure from the campus. While the appellate court did not go into detail about why the college did not meet its burden of proof, it held that there was sufficient evidence to support the trial courts finding that financial exigency was not the bona fide reason for the terminations.

This third criterion, which requires the institution to use a uniform set of guidelines to determine who to dismiss, can cause some confusion. A dismissed professor who believes the institution did not follow a uniform set of guidelines in deciding to dismiss her would claim the decision was arbitrary, capricious, and not rational. The confusion exists because two bases exist under which faculty could make this claim. The first is based on the employment contract itself. The court in *Krotkoff* found the words "demonstrably *bona fide*" either as expressed or implied language and based the requirement upon that phrase. The court stated that as a matter of contract, the professor was "entitled to insist that the college use reasonable standards in selecting which faculty appointments to terminate." However, the court in *Bloomfield* did not refer to such a requirement. While the court did refer to the phrase "demonstrably *bona fide*" as requiring a certain amount of proof from the college, the court did not completely define the phrase. The court may not have addressed the guidelines used by Bloomfield College because the college failed to prove that the reason for the faculty terminations was the financial exigency. Yet courts continue to cite the *Bloomfield* case as authority for requiring the institution to show it used a uniform set of procedures in deciding what positions to dismiss.

The second approach to this requirement is from a constitutional perspective based on a substantive due process claim. In the *Pace* case, the professor claimed that the institution's decision to terminate her violated her due process rights. As a claim in constitutional law, the court held that in order for the professor to prevail on this claim, "she must prove that the decision to discharge her was arbitrary, capricious, or without a rational basis." The *Pace* court cited the *Bignall* case and quoted its language concerning the university's burden of proving the existence of the financial exigency, but did not continue the quotation concerning the uniform set of guidelines. In fact, the court did not follow previous holdings that required the university to prove that the decision was not arbitrary, capricious, or without a rational

basis by demonstrating its adoption and use of a uniform set of guidelines.

It is critical for faculty members to understand how the basis for their claim can affect a trial. For this requirement, if the dismissed faculty member bases the claim on contract principles, the issue is whether the institution used a uniform set of procedures in deciding whom to dismiss, provided the terms of the contract can be interpreted to include such a requirement. If the basis is constitutional as a violation of substantive due process, the issue changes to whether the decision by the institution was arbitrary, capricious, or without a rational basis, with the burden of proof shifting to the faculty member. A faculty member from a private institution will always base her claim on the employment contract. However, the professor of a public institution can analyze his situation and decide if one claim is better than another, usually opting to use both by pleading in the alternative.

The fourth aspect of the "demonstrably bona fide" requirement involves the phrase "suitable, alternative employment." In *Browzin*, the court interpreted the employment contract to include this requirement. The parties stipulated to the inclusion of the 1968 Recommended Institutional Regulations on Academic Freedom and Tenure as written by the AAUP. This regulation only required the institution to find the dismissed professor suitable alternative employment if the dismissal was based upon an abandonment of a program or department of instruction. Financial exigency was not classified as an event that would trigger this requirement. In order to find the university had such a duty, the court reclassified the basis for the dismissal, stating that the university had abandoned the program of instruction in Soil Mechanics and Hydrology as a direct result of the financial exigency. Thus, the dismissal of faculty due to the abandonment of a program of instruction requires the university to make reasonable efforts to find the affected faculty suitable, alternative employment. However, the court held that the professor failed to establish that the university did not make every reasonable effort to find him suitable alternative employment. It is

important to note that while the *Browzin* court implied that the burden of proof as to this issue should have been the institutions, the court held that the professor's failure to object to his having the initial burden of proof precluded him from raising the issue on appeal.

In the *Krotkoff* case, the court inferred this condition of suitable alternative employment as a part of the employment contract, based in part on the *Browzin* decision. However, the court went on to hold that the college had not breached its duty as to the suitable, alternative employment requirement. The court said that the professor's constraints of tenure, rank, and pay restricted the college's efforts to accommodate. The professor not only demanded the same tenure, rank, and pay in the alternative position, but she claimed a right to training to meet the qualifications of the opening that met her demands. The court held unequivocally that unless a contract exists explicitly granting such rights, "tenure does not entitle a professor to training for appointment in another discipline."

However, not all courts have extended this fourth requirement of suitable alternative employment. In *Refai v. Central Washington University* the university laid off several tenured and non-tenured professors due to a declared state of financial exigency including the plaintiff, who had attained tenure. Among other claims, Refai argued that the university had an affirmative duty to find him alternative employment within the university. Even though the court had to go beyond the scope of the faculty handbook to define financial exigency, the court would not extend the terms of the handbook for this requirement. The handbook limited the university's duty to find alternative employment to situations where the layoff is required by staffing adjustments or program needs. Because financial exigency was not enumerated as a reason for the university to undertake such a duty, the court held that no such duty existed.

The next topic involves the classification between tenured and non-tenured and addresses the issue of whether an institution can dismiss a tenured professor and retain a non-

tenured professor in the same department. In *Brenna v. Southern Colorado State College* the college terminated 32 full-time faculty due to a bona fide financial exigency, including the plaintiff, who was a tenured professor. The professor claimed that the college violated his rights by deciding to retain a non-tenured professor in the same department over him. The court held that this was not a violation, as the method used by the college to select those dismissed was reasonable. The rationale for the decision was that the college had lost its accreditation in the plaintiff's field of expertise and that the nontenured professor gave the department increased flexibility in creating teaching assignments. Thus, as long as the institution can show that its method of choosing faculty for dismissal was reasonable, the fact one professor is kept over another, even nontenured over tenured, does not seem to matter.

Ethical Considerations

Although ethical and legal issues sometimes appear to be mutually exclusive, no profession has made ethics such an integral part of its administration than the legal profession. However, despite such efforts certain operations of the current laws and policies have created the potential for two contradictions that academe must address to prevent injury from the normal operation of law. The first concerns the role of faculty in developing a financial exigency policy and in determining which faculty to terminate. The cases have been very consistent in holding that faculty have no right in the decision making process involving which positions to dismiss to alleviate financial exigency. This is based on a division between management and labor, or the administration and the faculty respectively. However, this appears to contradict the United States Supreme Court decision of *National Labor Relations Board v. Yeshiva University*.

The operation of the financial exigency cases and *Yeshiva* places faculty in the role of employee when the institution faces financial exigency and in the role of management all

other times. This excludes the faculty from the role of management at a time faculty should definitely be involved.

The second area of concern is addressing affirmative action achievements when dismissing tenured faculty under financial exigency. In developing guidelines for dismissals, it would be tempting to base it on length of time served. However, the consequences of such a policy would likely result in the dismissal of a disproportionate number of minorities. Therefore, it is important to remember that the courts have upheld the dismissal of tenured over non-tenured and those tenured faculty with less seniority being retained over those with greater seniority. The courts have also upheld procedures that rank non-tenured and tenured professors together as a part of the established criteria for deciding which positions to dismiss. This not only provides the institution with an opportunity to maintain affirmative action successes, it should also help in preventing the retainment of faculty based solely on minority status, a problem of the other extreme.

It is evident that attempting to address these two ethical concerns together might create additional backlash. Involving faculty in the decision process could cause infighting between tenured and non-tenured members in deciding whom to terminate without any consideration given to affirmative action concerns. The practical guidelines that follow should provide the administrator and faculty member with some ideas in addressing these ethical issues, in addition to the legal issues.

Practical Guidelines in Developing a Financial Exigency Policy

1. Analyze the current policies and contracts making note of the following:
 - a. Is financial exigency specifically defined? If so, which definition is used?
 - b. How many documents make up the entire policy, i.e., employment contracts, faculty handbooks, bylaws, or state laws? Are any AAUP guidelines

specifically incorporated as a part of the policy?

- c. Who decides that a financial exigency exists?
- d. Does a specific set of guidelines exist on how to determine which positions to dismiss?

2. Develop a new policy, if necessary, around the following suggestions:

- a. Write the entire policy in a single document without referring to other documents, if possible.
- b. Define terms that are not readily definable by a court, such as financial exigency, in the policy. Leave nothing to judicial fiat.
- c. Provide as specific as possible, without creating too great of a burden, those elements that would create a state of financial exigency. Issues to discuss here include budget operations, cash flow management, asset management, the selling of capital, and use of indentured property.
- e. State which steps or the number of steps that must be taken to try to alleviate the financial exigency before faculty dismissals will become an option. Such steps include freezes on raises, hiring freezes, staff reductions, deferring maintenance, and administration reductions. To effectively address the affirmative action concern, the dismissal of non-tenured faculty should not occur as a prior step.
- f. Illustrate in detail the guidelines and criteria that the institution will use in assessing which faculty will be dismissed because of financial exigency. The actual criteria should include both objective and subjective standards. Glenn E. Tagatz and K. Thomas Nelson in *Financial Exigency, EEOC Compliance, and Professional Seniority* provide a demonstration on creating a mathematical model to better assess which faculty to retain other than a tenure versus

nontenure distinction.

3. Involve members of the faculty in the development of the policy.

This addresses the legal paradox of courts holding that faculty have no right as employees to be a part of the decision making process when it comes to financial exigency dismissals and the contrary holding that faculty are management and therefore, unable to organize as a labor union.

The only limitation for a private institution in following the above guidelines would involve the effect of any current policy or procedure. To what extent such current policies prevent an institution from following the above guidelines will depend directly upon the institution and its ability to make changes. To the contrary, the regulations of a board of regents or the operation of a state law could prevent a public institution from enacting these guidelines through preemption. These are problems that each institution would have to address as the number of different problems developing is infinite.

Conclusion

Academe has well recognized over the years that legal constraints do exist that can limit how a college or university operates. Fortunately in this area of financial exigency, the legal limitations are not so severe that an institution is unable to prepare for them. Combining the guidelines given with a committee of administrators and faculty and guidance by legal counsel, a financial exigency policy should emerge that satisfies both legal and ethical standards.

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