

**POST-TENURE REVIEW
LEGAL AND POLICY ISSUES**

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I. What is tenure?

Tenure is a set of procedural protections, granted by state law, institutional regulation, or contract, that ensures that a faculty member's employment status will not be threatened because of beliefs, statements, or writings that are unpopular.

Tenure is the process by which academic freedom is protected. Academic freedom is the right to conduct one's research and to teach one's courses free of institutional or external interference. For a discussion of the interplay between academic freedom and tenure, see Steven G. Olswang and Barbara A. Lee, Faculty Freedoms and Institutional Accountability: Interactions and Conflicts (Washington, DC: ASHE-ERIC Higher Education Research Reports, 1984).

According to the AAUP's "1940 Statement of Principles on Academic Freedom and Tenure":

Academic Freedom

a. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties . . .

b. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject . . .

c. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution. (AAUP Policy Documents and Reports, 1990, p. 3).

Tenure

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age¹, or under extraordinary circumstances because of financial exigencies. (AAUP Policy Documents and Reports, 1990, p. 4).

Tenure typically guarantees a faculty member the protections of due process: notice of the charges against the faculty member, opportunity to respond to the charges, a factfinding hearing by a committee of faculty peers, opportunity to question witnesses, and a decision based only upon the evidence adduced at the hearing.

See William A. Kaplin and Barbara A. Lee, The Law of Higher Education, 3d edition (Jossey-Bass, 1995), pp. 288-295.

For a thorough analysis of academic freedom, tenure, and the compatibility of these principles with post-tenure review, see Steven G. Olswang and Jane T. Fantel. "Tenure and Periodic Performance Review: Compatible Legal and Administrative Principles," 7 Journal of College and University Law 1 (1980-81).

II. What conduct is unprotected by tenure?

As stated in the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure, tenured faculty may be dismissed for "adequate cause." "Adequate cause" is typically defined by institutional policy, contract, or state law.

The Commission on Academic Tenure recommended the following definition of "adequate cause":

1. Demonstrated incompetence or dishonesty in teaching or research,
2. Substantial and manifest neglect of duty, and
3. Personal conduct which substantially impairs the individual's fulfillment of his institutional responsibilities.

The Commission added: "The burden of proof in establishing cause

¹The federal Age Discrimination in Employment Act forbids mandatory retirement on the grounds of age.

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for dismissal rests upon the administration" (Commission on Academic Tenure in Higher Education, Faculty Tenure, Jossey-Bass, 1973, p. 21).

See Timothy B. Lovain, "Grounds for Dismissing Tenured Postsecondary Faculty for Cause," 10 Journal of College and University Law 419 (1983-84).

Procedural requirements include due process protections. See AAUP "Statement on Procedural Standards in Faculty Dismissal Proceedings," (AAUP Policy Documents and Reports, 1990, pp. 11-14). For judicial analysis of the sufficiency of procedural protections in dismissal of tenured faculty, see Potemra v. Ping, 462 F. Supp. 388 (E.D. Ohio 1978). See also King v. University of Minnesota, 774 F.2d 224 (8th Cir. 1985).

III. What is the purpose of post-tenure review?

Licata lists three potential purposes for post-tenure review:

1. to supply documentation for removal for incompetence;
2. to provide input for personnel decisions in the areas of reductions in force, merit raises, and promotions;
3. to support faculty development and improved instruction.

(Christine M. Licata, Post-Tenure Faculty Evaluation: Threat or Opportunity? Washington, DC: ASHE-ERIC Higher Education Report No. 1 (1986), p. 17).

These three purposes are very different, and can be expected to elicit differing responses from faculty members, their unions, and other professional associations.

IV. Why is post-tenure review controversial?

Post-tenure evaluation for purposes listed in numbers 2 and 3 above has met with little controversy. The participants in the Wingspread Conference on the Evaluation of Tenured Faculty² reached consensus on the following propositions:

²The Wingspread Conference, held in August, 1983, was cosponsored by the AAUP and the American Council on Education and involved college administrators (including presidents) and tenured college faculty.

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--assessments of teaching, research and service programs of departments, schools, and other academic units should be made at regular intervals

--the performance of tenured faculty members is evaluated on a continuing basis, formal and informal, by their colleagues and students, by their peers in their disciplines at other institutions, and by potential funding agencies . . .

--the performance of tenured faculty members should be and normally is regularly evaluated by their institutions for some or all of the following purposes: distribution of merit salary increases, promotion, and institutional academic awards such as sabbaticals, research support, and teaching awards. . .

--decisions made as a result of these approaches to the evaluation and improvement of faculty performance should not be used as a ground to dismiss tenured faculty. Where grounds for dismissal are believed to exist, informal resolutions of the problem should be pursued first. If these fail, then existing due process procedures can be employed.

Despite its support for post-tenure evaluation for salary and promotion purposes, the AAUP has endorsed the following statement:

. . . The Association believes that periodic formal institutional evaluation of each postprobationary 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. . . . The Association cautions particularly against allowing any general system of evaluation to be used as grounds for dismissal or other disciplinary sanctions. (Academe, November-December 1983, p. 14a).

According to Licata, the National Education Association and the American Federation of Teachers also oppose post-tenure review that is intended to provide evidence for the dismissal of tenured faculty, but they do not oppose post-tenure review whose purpose is faculty development (Licata, p. 16).

Given the substantial procedural protections provided by tenure and the limited grounds for dismissing tenured faculty members, post-tenure review will be most useful to colleges and universities if it is used for developmental purposes, and if the institution is willing to commit resources to assist faculty who may need help to improve their performance.

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v. Who designs the review procedures?

1. Post-tenure review may be conducted as part of an existing system of faculty evaluation, or it may be developed as an additional review process. Whether current methods are adapted or a new process is developed, faculty should be involved in the planning process, particularly in those institutions in which faculty will be carrying out, in whole or in part, the post-tenure review.

2. The committee charged with developing the process should specify, at a minimum:

--types of information to be submitted by the faculty member

--criteria for the evaluation

--information sources to be used (student evaluations?
information from external peers? peer observations of teaching?)
Does the institution already collect some of this information?

--development of departmental, school, or institutional criteria for assessing faculty member's contribution [e.g., is the faculty member being evaluated against some standard of individual performance (such as a "good teacher"), or will the review include assessment of how the faculty member's teaching, research, and service fit the department, school or institution's priorities?]

3. If the faculty is represented by a union, state law (for public institutions) and federal law (for private institutions) specifies whether the institution must negotiate with the union about post-tenure review. Under federal law, and under many state laws, the following obtains:

a. the administration (or board of trustees) has the "managerial prerogative" to determine that post-tenure review will occur, to establish the criteria for such review, and to determine how the results of the review will be used;

b. but the administration must negotiate with the union about the procedures to be used for the review, procedural protections for individuals who disagree with the review, and the impact of a negative review.

In practice, however, institutions may wish to consult with the union concerning some or all of the "management prerogatives;" obtaining the union's cooperation with (if not support for) the post-tenure evaluation process will contribute significantly to its effectiveness.

VI. How formal is the process?

1. Formal process (similar to reappointment, tenure or promotion decisions)

a. advantages: provides multiple data sources and multiple decision-makers; may provide better safeguards against alleged manipulation of the process or bias

b. disadvantages: time, cost, complexity, replication of other evaluations for other purposes (merit pay, sabbaticals, etc.)

A formal process may involve the development of specific measurable criteria, definitions of "good teaching" or an "appropriate level of scholarship," and forms to record the evaluator's comments. For an example of such forms, see Hollander outline of 1993, cited in References section.

2. Informal process (information submitted, conversation between faculty member and chair or dean)

a. advantages: takes less time, permits potentially healthy conversation between faculty member and colleague or administrator about individual's productivity, performance, and "fit" with department or unit's needs

b. disadvantages: vulnerable to real or alleged bias or manipulation by individual decision-maker; may not be informed by judgments of other department peers

3. Whether the process is formal or informal, documentation should be created at the time of the evaluation that, at a minimum, includes the following information:

a. date of the evaluation

b. name(s) of evaluators(s)

c. specific issues discussed with the faculty member being evaluated, including both positive and negative points discussed

d. the evidence used to support both the positive and the negative findings (evaluations of teaching, the publications or scholarship evaluated, type of institutional or professional service engaged in)

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e. if the evaluation concludes that the faculty member's performance has not been satisfactory, a written plan for improvement, including specific actions the faculty member will take, actions the department chair or dean will take, and the resources, if any, to be made available to the faculty member.

For a discussion of successful remedial actions taken to improve faculty performance, see Goodman articles, cited in References section.

4. The importance of attention to documentation and prompt response to problems identified during the post-tenure review or at other times cannot be over-emphasized. For an account of the problems faced by an institution that did not attend to documentation or to regular assessment of the performance of faculty members, see Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994), vacated and remanded, 115 S. Ct. ____ (November 14, 1994).

5. Even if an institution has clear evidence of a faculty member's alleged violation of institutional rules, evidence of other performance problems may be necessary to counter first amendment claims. For a discussion of the procedural and evidentiary issues related to dismissal of a tenured faculty member for alleged violation of the institution's code of professional ethics, see San Filippo v. Bongiovanni, 961 F. 2d 1125 (3d Cir. 1992) and 30 F.3d 424 (3d Cir. 1994).

VII. How does Post-Tenure Review Interact with Faculty Dismissal?

Assuming that post-tenure evaluation is used for developmental purposes, rather than for dismissal purposes, how will the institution coordinate these two processes?

1. Dismissal of a tenured faculty member must comport with constitutional and/or state law principles (at public institutions) and with contractual principles (at private institutions). There is also a concept, "academic custom and usage," that courts will apply when reviewing the dismissal of tenured faculty. See Greene v. Howard University, 412 F.2d 1128 (D.C. Cir. 1969). For a discussion of this concept, see Kaplin and Lee, pp. 16-18.

2. Many institutions have incorporated AAUP statements, in whole or in part, that address the procedural protections to be afforded tenured faculty in dismissal proceedings. See

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"Statement on Procedural Standards in Faculty Dismissal Proceedings" (pp. 11-14) and "Recommended Institutional Regulations on Academic Freedom and Tenure" (pp. 21-30). Whether or not the institution has promised to follow these procedures and policies, doing so will provide the candidate for dismissal with due process protections that will improve the institution's ability to defend the nearly inevitable legal challenge to the dismissal.

3. Data adduced from post-tenure review would be most likely to be used for a faculty member dismissed for incompetence. For faculty members dismissed for misconduct (e.g., sexual harassment, plagiarism, repeated violations of institutional rules, neglect of duty, or moral turpitude), evidence collected independent of the post-tenure evaluation process would very likely be used.

4. For those (probably very few) cases in which an institution wishes to dismiss a tenured faculty member solely for incompetence, the institution should first attempt to help the faculty member improve his/her performance by providing additional resources, assistance with teaching techniques, opportunity to refresh subject-matter knowledge, or other "rehabilitation." Evidence of such attempts, should they prove unsuccessful, will buttress the institution's claim that the dismissal is justified.

VIII. Suggested References

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