TRENDS IN THE RELATIONSHIP BETWEEN FACULTY AND PUBLIC UNIVERSITIES: A University Lawyer’s Perspective

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Perhaps more than any other sector of our society, with the possible exception of cloistered clergy, academics fancifully imagine that they are in the world but not of it. However, what happens in that outside world greatly impacts how a modern, public university is funded and governed. Several societal and cultural developments of the past quarter century seem important:

- Increasing Judicial Deference to Academic Decision-making;
- Evaluation of the Concept of Accountability;
- First Amendment, Academic Freedom, and Evolution of the Government as Employer;
- Emergence of New Technology;

I. **Academic Decision-making and the Courts: Gulliver’s Lament**

*It is a maxim among these lawyers that whatever hath been done before may legally be done again, and, therefore, they take great care to record decisions against the common reason of mankind and these, under the name of precedents, they use to justify the most iniquitous opinions, and the judges never fail of decreeing accordingly.*

*Jonathan Swift, *Gulliver's Travels*, A Voyage to the Land of the Houyhynms*

The courts have gone to great lengths to give deference to academic decisions (perhaps because they do not fully understand the academic evaluation process) and are reluctant to substitute their judgment for the judgment of academic decision-makers. Conversely, being lawyers, they readily comprehend the significance of following established procedures as well as concepts of fair play and due process. Thus, they will reverse an academic decision in which the institution failed to follow its own rules.
Anecdotally, 15 or 20 years ago, it was difficult to win an employment law case in federal court without trial because the judges were reluctant to deny a plaintiff his or her day in court. The reasoning was that the courts of appeals would reverse anyway, especially if the record was ample, and order that the case be set for trial. Today, defendants, including institutions of higher education, are not only winning in federal court but winning without even the inconvenience of a trial. This may be attributable to a changing federal bench with a more conservative judicial philosophy. The federal courts have utilized three mechanisms which greatly increase defendants’ prospects of a favorable outcome. First, these judges are much more willing than their 1960’s and 1970’s predecessors to use summary judgment or summary dismissal of a case — that is they examine the facts, based upon sworn depositions and statements (and supporting documentation); and, if they discover that those facts are not disputed, they dismiss the case without fear of reversal since the courts of appeals seem to share a like judicial philosophy. A losing plaintiff might identify with Gulliver’s lament to the horse-like Houynynms on the English legal system. A faculty member, who had twice been denied tenure recently echoed this lament in words which the lawyers among you may find particularly amusing:

I also learned that universities count on the ability of their in-house legal counsel to drag out a lawsuit, incur extra expenses for plaintiffs, and wait out anyone who brings legal action. Indeed, university counsels throughout the United States meet regularly at annual conventions to discuss such tactics, just as literary
scholars meet to consider whether deconstruction is dead. How can a single individual confront all those institutional resources alone?¹

Of course, from a defendant college or university's viewpoint, such decisions reflect sound reasoning and judgment.

Second, the doctrine of the sovereign immunity of public universities and qualified immunity of their employees has been solidified, so that, absent the most egregious or malicious conduct, cases are dismissed. The only significant exceptions have been where Congress has explicitly passed a law that preempts that immunity. Third, some courts have ruled that a defendant, who requests dismissal of a case and is denied, is entitled to appeal the matter. Pretrial proceedings and trial are stayed pending the appeal.

In summary, while difficult to quantify, universities and their administrators appear to be the direct beneficiaries of the increasing conservatism of the courts, which, absent a clear violation of law or policy, are reluctant to overturn decisions of academic administrators.

Cases

University of Baltimore v. Iz, 716 A. 2d 1107 (Md. App. 1998). Denied tenure and promotion, professor sued the university and its officials for breach of contract and violation of civil and constitutional rights. Against the advice of her colleagues, the professor sought early tenure review, which initially was denied her. At her insistence, the university granted early review but made clear that, if she were denied tenure, she would not be reviewed a second time. The tenured faculty in her department, the dean, and the provost recommended against granting tenure while both her department chair and the college tenure and

promotion committee supported her application. After investigating her claims of discrimination, the president denied tenure. Citing earlier authority, the court asserted that "[t]he evaluation of the performance of a college professor and of his or her suitability to educational needs, goals and philosophies of a particular institution necessarily involves many subjective, non-quantifiable factors,' " the assessment of which is "best performed by those closely involved with the life of the institution, not by judges.' " Id. at 1117.

Linkey v. Medical College of Ohio, 65 N.E. 2d (Ohio, 1997). Professor's appointment ran from July 1 to June 30 of each year and, by both policy and practice, was considered automatically renewed unless the college gave 90 days written notice of intent not to renew. The college gave notice on May 24 that the appointment would be extended until August 22, at which time it would end. The Ohio Court of Claims found that the medical college breached the terms of its contract with the professor and ordered that a trial be scheduled to determine what his damages were.

II. Evolution of the Concept of Accountability

The law governing the relationship between a faculty member and the institution is unchanged. Nevertheless, there is a shift, a slow but certain accretion of the historical relationship between institutions of higher education and their faculties. Two developments over the past twenty years are notable — emergence of non-tenure track faculty and the societal/legislative/regental notion of accountability and its incarnation in the form of post-tenure review.

A. A Note on Due Process

Historically, the relationship between the faculty member and the institution has been governed by contract and/or by federal (and/or state) statutory or constitutional law. In the case of private institutions, the primary relationship is contractual although private institutions may be bound by federal laws, such as Title VII,
circumscribing the ability of the institution to impact faculty rights. Conversely, public institutions may be governed by contract, but the protections conferred by the United States Constitution or by the constitutions and laws of the various states are often more critical in defining the relationship of faculty and their employing institutions.

The Fourteenth Amendment provides, in pertinent part, that a State may not "deprive any person of life, liberty, or property, without due process of law . . . ." In a public university setting, the law is well-established that the granting of tenure also concerns a property interest protected by the Fourteenth Amendment. Also, faculty members have rights called liberty interests, which refer to the right or freedom to engage in significant areas of human activity, among the most important of which are employment and the enjoyment of a good reputation. An individual may not be deprived of a vested property interest or of a liberty interest without being afforded a trilogy of due process rights: notice, opportunity to be heard, and an impartial decisionmaker.

The courts have not changed the way they analyze due process cases; and, faculty with vested rights, post tenure review notwithstanding, may not have those rights taken away without due process.

B. Emergence of Non-Tenure Track Faculty: "I come to bury Caesar, not to praise him . . . ."

Although, over the past two decades, the percentage of faculty holding tenure has held constant, universities have begun to make extensive use of part-time faculty. The Chronicle of Higher Education counts at least 40 institutions nationwide
that have adopted the contract system over the tenure system (Bennington, Bradford, and Hampshire Colleges, Florida Gulf Coast University, and the Arizona International campus of the University of Arizona, and Westark College, which is phasing out tenure) and notes that George Mason University “has hired lots of full-time, non-tenured instructors lately – 230 of its 749 full-time faculty members are on fixed contracts.”

Whether this is because of changing demographics, budgetary considerations or some other reason is unclear. As an attorney, it is interesting to compare the increasing number of law firms that have created alternatives to partnership-track positions. Such shifting from long-term tenured/partnership level commitments to part-time, essentially “at-will” employment for some employees lends greater flexibility, not only in an institution’s ability to respond to market needs but also in its ability to eliminate such personnel without legal cost or consequence. The American Council on Education\(^3\) notes the following statistics:

- Nearly half (47%) of 403 institutions responding to its 1996 “Campus Trends” survey made extensive use of part-time faculty, extensive use meaning such faculty taught more than one-fourth of the institution’s courses;
- Nearly 25% of all institutions have full-time faculty positions that are not on tenure track;
- At four-year institutions, non-tenured positions comprise about 15% of the faculty.


The American Association of University Professors\textsuperscript{4} observes:

- While the same proportion (52\%) of faculty held tenure in 1995 as in 1975, the proportion of full-time professors working on contracts climbed from 19\% to 28\% during the same time period;

- During the 1975-1995 time period, the proportion of faculty on tenure track fell from 29\% to 20\%.

\textit{Policy Guidelines for Institutions:}

- Articulate and publish clear, written policies governing the employment of non-tenure track faculty, including recruitment, academic qualifications, job duties, pay scales, and termination processes. If employment is to be "at will," say so in your policies.

- Retain the right and the flexibility in written policies, handbooks, and faculty appointment letters to determine distribution of faculty assignments.

- Encourage tenured and tenure track faculty to include their non-tenure track counterparts in the life and culture of the department and of the institution.

- Offer non-tenure track faculty career counseling as a way of assisting their transition out of the institution.

- Realize that both the instructional needs of the institution and the professional interests of faculty change; therefore, develop policies aimed at helping faculty retool. The development of the field of medical ethics a few years ago is a good example.

\textit{Policy Guidelines for Administrators}

- Recognize that non-tenure track faculty retain many of the constitutional and civil rights enjoyed by other faculty – including First Amendment rights as well as freedom from discrimination because of race, religion, color, national origin, sex, age or disability – and familiarize yourselves with such rights.

• Know the contents of the faculty handbook and other policies of the institution. Exclusive reliance upon the knowledge of legal counsel is not sufficient.

• Dealing with faculty, understand and represent that you are not the appointing authority, which ultimately may be the president or the governing board.

• Remind the faculty member that employment is governed by the faculty handbook, institution policy, and/or the governing board's rules and regulations.

• Avoid statements that may be construed as promissory, for example, "as long as you do a good job, your employment will continue"; "as long as you teach well and publish, your contract will be renewed"; or "getting tenure will be a 'rubber stamp.' " Although the courts are not likely to grant tenure to someone to whom such promises are made, such assertions are fodder for argument and ensuing litigation which is costly to the institution and embarrassing to the administrator.

C. Post Tenure Review: The Texas Experience

Post tenure review has been feared by many as synonymous with the abolition of tenure and the demise of academic freedom. At one level, post-tenure review represents a desire on the part of legislators and governing boards for greater accountability, a trend which finds parallel in other institutions in our society. In 1997, the Texas legislature passed a law requiring the evaluation of tenured faculty (See Attachment). In committee hearings, state senators raised concerns about accountability, articulated complaints their offices had received about faculty perceived to be unproductive, and questioned the various university chancellors as to the number firings of tenured faculty over the past twenty years. The response statewide was that there had been only a handful of dismissals. Perhaps more importantly, the chancellors
noted that the true benefit of post-tenure review would not be termination but development of non performing faculty members. The chancellors stressed the importance of academic freedom in protecting faculty who engage in unpopular ideas, thus preserving the intellectual enterprise.

Each higher education governing board in the state was required to adopt a policy for evaluating all faculty within an institution, which policy was to be developed with the advice and comment of the faculty. Required components of such a policy include:

Evaluation

- Periodic evaluation (not less than one nor more than every six years);
- Peer evaluation in teaching, research, service, patient care and administration;
- Focus on professional development of the faculty member being evaluated;

Process

- Notice of the manner and scope of evaluation and opportunity for input;
- Incorporation of commonly recognized due process rights if discipline results;
- Faculty right to request non-binding alternative dispute resolution.

Many Texas universities already had periodic evaluation, usually annual, of tenured faculty. The American Association of University Professors (AAUP) expresses concern that “at its most benign, [post tenure review] formalizes and
systematizes longstanding practices”; that the “additional layer of review will either become routinized and potentially redundant or will have more serious consequences, whether intended or otherwise”; and that “neither outcome is desirable.” As with the legislators’ concerns, the perception may be as important as the reality, and the prudent university administrator will address both perception and reality. The impact of the legislation remains to be judged. One possible outcome of the legislation as applied, which likely was not contemplated by the legislature, is that faculty who were being evaluated annually may now be evaluated every few years.

The concept of peer evaluation in teaching, research, and service (plus patient care in the case of medical and health care institutions), of course, maintains the traditional criteria by which faculty are judged as well as the historical safeguard of faculty input. The focus on professional development of faculty members is novel although the legislature did not provide a particularized funding mechanism. The orientation of the legislation appears to be remedial rather than strictly disciplinary. The process provides three procedural layers of protection for faculty. First, they must be given notice of the instrument by which they will be evaluated and essentially given the opportunity to negotiate with the university the manner and scope of evaluation. Second, they are entitled to provide input into the evaluation itself. Third, the law requires a remediation plan for non-performing faculty, essentially requiring the university to document non-performance before harsher discipline is imposed. Fourth,

existing due process protections remain in place but are supplemented by providing recourse to alternative dispute resolution.

In practice, at least within some institutions within the Texas State University System, each department faculty is developing its own local review policies. That the evaluation may lead to discipline or dismissal in some cases seems clear; however, this does not differ from a university’s prerogatives under the existing evaluation system. Is this legislation a trumpet call to effect a rash of dismissals? Such is not apparent on the face of the legislation, and, as the legislative testimony demonstrated, dismissals of tenured faculty under the current system are rare.

Although the first cases dealing specifically with post tenure review have not yet made their way to the courts, it seems unlikely that they will raise any novel legal issues.

Cases

**Brine v. The Iowa Board of Regents** (8th Cir. 96-994). A tenured associate professor of dental hygiene alleged that she and two other female professors had been retaliated against for speaking out about the closing of their department. They claimed that by assigning them to other duties and giving them small pay raises the university, in effect, demoted them. They further claimed that the closing of a predominantly female department constituted sex discrimination.

**The Johns Hopkins University v. Ritter** (MD Court of Special Appeals, 1996). A department chair in the college of medicine recruited two highly accomplished professors to accept faculty appointments, assuring and reassuring them that, although they would have to submit to the tenure review process, the process was a “rubber stamp.” In reliance, the professors resigned tenured appointments at prestigious universities, sold their homes, accepted the Johns Hopkins offers, and moved. The chair took a leave of absence during their first few months on the job; and, their relationship with their faculty colleagues deteriorated, resulting in denial of
tenure. They sued in state court, and won a jury verdict for breach of contract from which the university appealed. The professors argued on appeal that the chair’s oral conversations with them as well as academic practice when faculty of their stature are recruited is such that tenure was promised as well as the means of achieving it – the “rubber stamped” review process. Although finding the facts were as stated by the professors, the appeals court found that the department chair had no authority to waive or alter the tenure process as contained in the university handbook.

Policy Guidelines for Administrators

- **Be politically astute:** Legislators and regents want accountability; faculty want their traditional rights respected. It is not helpful to the university administrator for regents or legislators to speak of “deadwood” and firing tenured professors who are “driving through their careers on autopilot,” but such statements are sometimes made. The prudent administrator desensitizes such comments and reassures faculty that periodic evaluation will not be used as a subterfuge to undermine vested tenure rights or impair academic freedom.

- **Encourage faculty participation:** Faculty should be kept informed and a mechanism created whereby they can participate in the development of policy and provide meaningful input.

- **Avoid redundancy:** The review should be implemented so as to be consistent with and not redundant of existing evaluation and termination procedures. Thus, the procedure should not derogate from existing “for cause” termination procedures or be used to impose harsher burdens on faculty.

- **Be positive:** The focus of any post-tenure review program should be positive and remedial, not negative and punitive. Unsatisfactory performance must be documented and a written plan for improvement within a specified time period developed with the faculty member.

- **Provide due process:** Notice, opportunity to be heard, and an impartial decision-maker should be given, including:
  - notice to the faculty member of the evaluation criteria (the Texas law provides for faculty input into such criteria);
a statement by the institution of any perceived performance or employment-related deficiency;

an opportunity for the faculty member to respond to the evaluation and to provide input of his or her own;

a remediation plan, which is the product of faculty/institutional negotiation, if possible, and a specified time period for re-evaluation;

notice from the institution as to the general consequences of failure to meet the terms of the remediation plan.

Retain flexibility: A routine performance evaluation normally would not occasion "for cause" termination; however, care should be taken in drafting such policies so as to authorize "for cause" termination proceedings in the event the evaluation discloses serious and unremediable performance or conduct (for example, conduct, which pose a danger to the health or safety of others or impairs academic programs).

III. First Amendment, Academic Freedom, and Evolution of the Government Employer

The First Amendment - - "Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The AAUP's 1940 Statement of Principles - - "The teacher is entitled to full freedom in research in the publication of the results...to freedom in the classroom in discussing [the subject, and when speaking or writing as a citizen, to freedom] from institutional censorship or discipline."

A. General Principals

Two considerations govern the extent to which a public college or university can regulate speech - -whether the forum in which the speech takes place is a public or non-public forum and whether or not the regulation which restricts or limits the speech is content-based or content-neutral. Whether a public employee may be
disciplined or fired for expressing an opinion depends upon the subject matter of the communication and the forum or place where the opinion is expressed. The following principles apply.

• Freedom of speech is not a absolute right, and the courts balance the rights of the speaker (and listener) and the interests of the government, for example, and interest in promoting efficient delivery of educational services.

• Speech in a public forum, such as public park or campus free speech area, is entitled to the highest level of protection and may not be restricted or limited unless the government has a compelling reason and alternative channels of communication are open to the speaker.

• Where speech is restricted or limited because the government disagrees with the message, i.e., content-based restrictions, the government must demonstrate both that it has a compelling reason for the restriction and that alternative channels of communication are open to the speaker.

• Where the speech is obscene, defamatory, false or misleading, or likely to incite violence, it may be more easily limited or banned altogether.

Cases

Rankin v. McPherson, 483 U.S. 378 (1987): After hearing of the 1981 assassination attempt on the President of the United States, a data-entry employee in a county constable’s office expressed the sentiment that “if they go for him again, I hope they get him.” She was fired. The U.S. Supreme Court balanced the interests of the parties and found her discharge improper.

Connick v. Meyers, 461 U.S. 138 (1983): An assistant district attorney raised concern, in a questionnaire to colleagues about alleged wrongdoing or breach of public trust the way the district attorney was running the office. The Supreme Court upheld the firing, reasoning that the government as employer should have wide discretion in the management of its personnel and internal affairs.
Waters v. Churchill, 511 U.S. 661 (1994): A nurse was fired because of statements she made to a co-worker during a break. The statements were critical to the hospitals training policies for nurses. The Supreme Court upheld the firing, noting that "the government as employer has far broader powers than does the government as sovereign.

Jefferies v. Harleston, 21 F.3d 1238 (2nd Cir.1994), vacated and remanded, 155 S. Ct. ______ (November, 1994): A department chair, giving a speech off campus, criticized the racial and ethnic bases he perceived in the public school curriculum. His term as chair was not renewed. In a two sentence order, the Supreme Court directed that the case be reconsidered in light of Waters v. Churchill.

Policy Implications

The following nearly-failsafe three-step test should be applied before employee speech is punished:

- Would the speech be protected if uttered by someone who is not a public employee?
- Is the speaker voicing a purely personal, employee grievance?
- Does the university have a convincing reason to suppress the speech?

IV. Emergence of New Technology

A few years ago, when queried about the changes he had seen in fifty years as a lawyer, and El Paso judge cryptically answered, "paperweights!" He elaborated that when he started practice during the Great Depression, and for years afterward, legal documents were typed on a manual typewriter and copies made with carbon paper. Since the copies were impressed on onionskin paper, and buildings cooled by fans, paperweights were essential to preventing law office chaos. Lawyers purchased, gave, received, and took great pride in their paperweight collections, recalled the judge. Observing a dramatic change in the infrastructure of campuses from 1990 to 1996, the
American Association of State Colleges and Universities notes that the average number of desktop computers owned by public four-year colleges increased from 611 to 1,358.\(^6\)

The issues are varied and complex and are dealt with in greater detail in other sessions. From a university lawyer's and administrator's perspective, at least three "big picture" issues emerge:

\( A. \quad \text{Constitutional and State Law Issues} \)

The extent to which a public university can regulate and access the online activity of students, faculty and staff using university computer resources, of course, raises First and Fourth Amendment issues (respectively, freedom of speech and right to be free from unconstitutional searches and seizures). However, difficult state law issues may lurk as well. In Texas, the state constitution prohibits state agencies from making a gift of state resources. For example, using a state telephone to make a personal long distance telephone call is prohibited and can, not only subject an offender to civil and criminal liability but also expose a public official to censure by the state auditor's office and discipline by his or her university. The extent to which use of the university's computer hardware or access, from off campus, to the university's internet lines remain questions with which the universities are grappling.

\( B. \quad \text{Commercial Issues} \)

Many institutions of higher education historically have not been concerned with asserting or enforcing any rights of ownership they might have in faculty work

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products. United States copyright law holds that ownership of a work resides with the author, except a work made for hire, which is a work prepared by an employee in fulfillment of some requirement or commission of the employer. Arguably, a course syllabus falls within this definition. When such a work had limited commercial value, no conflict surfaced between the institution and the faculty member. However, an institution engaged in distance learning squarely faces not only the issue of who owns the intellectual property but also its corollary issue—who has the right to control course content. For example, does the faculty member have "academic freedom" to determine content of a course that is being developed to meet a specific market, i.e., a local oil refinery has contracted with the college of business to offer on-line courses in management of an oil refinery? Who is entitled to the profits if the course finds a national market? If the faculty member leaves the university, does he or she have the right to take and use the course syllabus elsewhere?

C. Paradigm Shifts

Demographic, budgetary and cultural trends seem to be impacting the development and increased use of distance learning. The AAUP notes that distance learning is becoming "increasingly admired by governors, legislators, institutional administrators, and critics and reformers of higher education," who view it as a cost effective way of delivering educational services "to a wider, more varied audience than
ever before."

In his June 1995 speech to the National Association of College and University Attorneys in San Antonio, former California State University Chancellor Barry Munitz articulated his worst nightmare as a telephone call from the governor, advising him that the president of AT&T and other communication industry leaders were in the governor's office with a proposal to offer educational services electronically to the people of the state. The governor pointedly inquires of the chancellor, "What's the university's best offer?"

On the other side of the equation, people want this type of learning, "the kind of relationship with a college that they had with their bank, their supermarket, and their gas company . . . terrific service . . . convenience . . . quality control." The phenomenal growth of for-profit universities gives testimony to this. Perhaps the best example is the University of Phoenix, which has grown from mustard seed in 1978 to over 40,000 students. The very definition of what a university is, what it does, and its concurrent relationship with its faculty should not be reserved for discussion by the next generation. This dialogue should take place now. The paradigms of the past are valuable and should not be blithely discarded; neither should they be so rigidly adhered to as to impede progress.

Policy Guidelines

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8 Ibid., p. 32.
• After consulting with legal counsel and if institution policy permits, administrators should advise all members of their departments:

• To be familiar with any applicable institution policies dealing with freedom of speech, privacy, proper uses of institution equipment, including computer and electronic equipment;

• That institution property is to be used solely for institution business and that personal or nonbusiness use could subject the employee to discipline or discharge (and in some cases, prosecution by civil authorities);

• That the institution reserves the right to monitor and access online communications for any legitimate business reasons;

• That passwords or access codes may be overridden by the institution for legitimate business reasons and that all such passwords and codes should be disclosed to the institution to facilitate this limited access (placing passwords and codes in a sealed envelope and entrusting a non-policymaking system administrator with custody may allay some privacy concerns);

• The institution should have policies governing ownership of distance learning courses in place prior to offering such courses.

• Know what your institution’s copyright policies are and whether the institution historically has asserted its copyright interests.

• Before venturing into distance learning, in consultation with legal counsel and faculty, create a policy which clearly defines the property rights of the university, faculty property rights, right to control course content, and matters relating to workload and compensation of the faculty member.

• Because the distance learning market is potentially national, a contract with the faculty member should be considered, specifying not only ownership of the work product but also limitations on use of that product in the event the faculty member leaves the institution.

Cases
Loving v. Boren, 133 F.3d 771 (10th Cir. 1998). After hearing complaints from a local legislator and the director of a center promoting a family oriented internet, the University of Oklahoma revised its newsgroup access policy to stop carrying 100 newsgroups the university found carried sexually objectionable material. Professor Loving sued the university claiming that his First Amendment rights had been violated; however, prior to trial, the University revised its newsgroup access policy, setting up two servers—one which restricted access and one which allowed unrestricted access but which required persons using it to certify that they were over eighteen years of age and were seeking access "for academic and research purposes." The court rejected the argument that the university had created a public forum and that the state had the right to preserve property under its control for the use to which it was lawfully dedicated.

United States v. Machado, No. SACR 96-142-AHS (S.D. Cal.) February 1998. Student sent a "hate e-mail" message on a university computer and the university network to 59 Asian students, threatening to make it his life's work to hunt them down and kill them and signing the message, "Asian Hater." He was convicted under federal civil rights law.
References


____________________________________________, Subcommittee on Distance Learning of Committee R on Government Relations, "Distance Learning," November 1997.

Texas Education Code

§ 51.942. Performance Evaluation of Tenured Faculty

(a) In this section:

(1) "Governing board" has the meaning assigned by Section 61.003.

(2) "Institution of higher education" means a general academic teaching institution, medical and dental unit, or other agency of higher education, as those terms are defined by Section 61.003.

(3) "Neglect of duty" means continuing or repeated substantial neglect of professional responsibilities.

(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 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.

(d) A faculty member subject to termination on the basis of an evaluation conducted pursuant to this section must be given the opportunity for referral of the matter to a nonbinding alternative dispute resolution process as described in Chapter 154, Civil Practice and Remedies Code. If both parties agree, another type of alternative dispute resolution method may be elected. The governing board must give specific reasons in writing for any decision to terminate a faculty member on the basis of an evaluation conducted pursuant to this section.

(e) A governing board may not waive the evaluation process for any faculty member granted tenure at an institution.

(f) A governing board may not award tenure to an administrator in any way that varies from the institution's general policy on the award of tenure.

(g) Each governing board shall file a copy of the rules adopted pursuant to this section, and any amendments to such rules, with the coordinating board on or before September 1 of each year.


Historical and Statutory Notes

1997 Legislation
Section 2 of Acts 1997, 75th Leg., ch. 1017 provides:
"The rules adopted by a governing board of an institution of higher education pursuant to the provisions of this Act shall provide for the performance evaluation of tenured faculty not later than January 1, 2004, of each faculty member tenured at the institution as of the effective date of this Act."