Demands for Accountability: The Implications of Review, Reorganization, and Retrenchment on Faculty Appointments

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Headlines

• Financial Outlook 2004: The Big Squeeze
• Despite Rebound, States’ Budgets are Still Reeling
• State Spending on Colleges Drops for the First Time in 11 Years
Parallel Headlines

- McKeon Proposes Legislation to Control Tuition Increases

- Bush's Next Target? The president may use the renewal of the Higher Education Act as an opportunity to attack colleges for high costs and dropout rates

- Higher Expectations: Second in a Series of Essays on the Future of Higher Education
Post-Tenure Review
Really? I thought it was Publish or Paris.
"That's Dr. Cray conducting research."
Mandates for Post-Tenure Review

- State Legislative Requirement
- State System Requirement
- Collective Bargaining Agreement
- Accreditation Requirement
Models of Post-Tenure Review

- **FORMATIVE** focuses on development and growth of faculty and institution
- **SUMMATIVE** results in personnel action or consequences
  - Rewards for meritorious performance
    - Salary increases
    - Development opportunities
  - Sanctions for unsatisfactory performance
    - Salary implications
    - Adjustments to assignments
    - Reprimand
Forms of Faculty Evaluation

- Annual Reviews
  - Pre- and Post-Tenure review
  - Merit salary determinations
  - Progress toward promotion
  - Ranges from single year assessment to comprehensive assessment
  - Determination of programmatic/departmental budget allocations
  - Administrative review and/or peer review
Forms of Faculty Evaluation

- Promotion Reviews
  - Pre- and Post-Tenure review
  - Not generally recognized as a form of Post-Tenure review
Forms of Faculty Evaluation

- Periodic or Cyclical Post-Tenure Reviews
  - Specified schedule of review
  - Ranges from annual to seven years
  - Schedule may vary by rank
  - Does not substitute for annual reviews
  - May focus on individual faculty or be coupled with departmental or programmatic review
- Peer review
- Costly in faculty time
Forms of Faculty Evaluation

- Triggered, Selective, or Episodic Post-Tenure Reviews
  - On an as needed basis
  - Triggered by unsatisfactory annual reviews or program review
  - Triggered by voluntary participation
  - Peer review
  - Least costly as used only when needed
Legal Issues in Post-Tenure Review

- A system of Post-Tenure Review can minimize risk of age discrimination.
- Implementation of a Post-Tenure Review system does not impair vested rights or create new obligations.
- Faculty evaluation and dismissal for cause are distinguishable.
- Post-Tenure Review can provide a framework for selecting faculty members to be eliminated in a financial exigency or other institutional contraction.
Practical Considerations in Post-Tenure Review

- Cost-Benefit Analysis
- Joint Administration and Faculty Involvement
- Contract Negotiations
- Clarity of Purpose
- Commitment to Tenure and Academic Freedom
- Establishment of Performance Standards and Measures
- Training, Training, Training
Post Tenure Review

Senior Faculty Follies

Misunderstanding a voice mail from the dean, Professor Fogelfroe organizes his college’s first Post-Tenure Revue.
Reorganization & Retrenchment
RELAX, I'M JUST CUTTING A LITTLE OFF THE TOP.
A place not far down the road...

"YUP, SHE USED TO BE A BEAUT! BUT WE DIDN'T GET 'ROUND TO CHANGIN' THE OIL, SKIPPED TUNE-UPS, LET THE TIRES GO BALD, STOLE PARTS TO FIX THE LAWNMOWER ..."
Retrenchment Strategies

- Program Reduction
- Program Elimination
- Declaration of Financial Exigency
- Merger, Affiliation or Consolidation
- Institutional Closure
Fundamental Issues

- Level of budgetary reduction
- Academic considerations
- Institutional combinations and merger
- Available time to resolve problem
- Implications for faculty
- Implications for students
Retrenchment Processes Should Be Guided By

- Employment/Enrollment Contract
  - Institutional Policy
  - Collective Bargaining Agreement
- Constitutional & Statutory Law
- Case Law
- Custom & Practice
  - AAUP
Employment Arrangements

- Term
- At Will
- Conditional Continuous
- Tenure
Tenure

- Protects academic freedom and economic security
- Conditional lifetime employment
- Defined by institutional policy/contract
- **Grounds for termination**
  - **Cause**
    - Incompetence
    - Immorality (including sexual harassment)
    - Neglect of duty
    - Insubordination
    - Conviction of a felony
    - Physical or mental incompetence
    - Other defined violation of employment contract or collective bargaining agreement
  - **Non-Cause**
    - Financial exigency
    - Program elimination
    - Program reduction
Other Forms of Separation

- Retirement
- Resignation
- Buy outs
Program Reduction

- Elimination of courses, majors, degree tracks
- Allows reallocation and reduction of expenditures within a program while preserving the essential aspects of a course of study
- Usually requires non-renewal or termination of faculty to save resources
- Legally upheld if:
  - Compliance with policies and agreements
  - Not arbitrary or capricious
  - No retaliation for exercising academic freedom
  - No violation of anti-discrimination laws
- Not AAUP endorsed
Program Elimination

- Discontinuance of an entire course of study, major, department, or school within an institution when:
  - Budget shortfalls that may or may not rise to financial exigency, and/or
  - Academic program is no longer viable or central to educational mission

- Legally upheld if:
  - Compliance with policies and agreements
  - Not arbitrary or capricious

- AAUP acknowledged
“Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur as a result of bona fide formal discontinuance of a program or department of instruction.”
Financial Exigency

- Institution-wide declaration of a financial emergency that requires immediate action to reduce expenditures

- Legally upheld if:
  - Bona fide
  - Fairness of selection criteria
  - Compliance with policies and agreements

- AAUP acknowledged
  - “Less drastic means”
AAUP Definition

“An imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means.”
Due Process Rights

- Private institutions – controlled by contract
- Public institutions – contract augmented by 14th Amendment guarantees
  - Retrenchment decision:
    - Written statement of the basis for termination decision
    - Written statement of the manner decision was made
    - Disclosure of the information used to make decision
    - Opportunity to respond
    - Notice period as long as possible
    - Post-termination process permitted
Mergers and Reorganizations

Issues for Faculty and Administrators
Sources of Faculty Rights

- Faculty handbook
- Institutional policy documents
- Collective bargaining agreement
- Past practice
AAUP Policy Statement regarding mergers or acquisitions addresses continuation of faculty appointments or at least one year of severance.
• **Gray v. Mundelein College**
  
  - Faculty handbook language providing permissible reasons for termination of tenured faculty
  
  - Academic custom and usage
  
  - Faculty tenure rights had not been extinguished because Mundelein retained as corporate entity and did not follow its own rules of declaring financial exigency
Heppel v. George Washington University and Mt. Vernon College

- Closure, affiliation, or merger?
- Faculty role in planning for affiliation
- Faculty rights to jobs at acquiring university
Student Rights in Program Closures

- Contract claims
  - Student handbook
  - Other policy documents

- Duration of contract
  - One semester
  - Academic year
  - Until program is completed
• Implied in fact contract to protect students’ interests (*Behrend v. Ohio*)

• Quasi contract theory (*Beukas v. Fairleigh Dickinson University*)—duty of good faith to protect students’ interests
Fraud and other tort theories (Craig v. Forest Institute of Professional Psychology), particularly when institutional publications promise accreditation, placement, eligibility for licensure, etc. and those promises are false or become impossible.
Implications for Academic Administrators

- Planning process is critical
  - Who is involved (check handbooks, etc.)
  - What is the role of the faculty in:
    - Declaration of financial exigency
    - Determination of which programs to reduce or eliminate
    - Assessment of which faculty should be retained
    - Opportunities for transfer, retraining
What is the role of students?

- Involvement in planning process?
- Student advisory committee to planners?
- Assessment of options for students re: transfer to other institutions or other majors
Prior to the Planning Process

- Review all written documents to ascertain whether there are potential contractual obligations to faculty, staff, or students
- Seek advice from experts on issues that have arisen in other institutions faced with these problems
- Ensure that all institutional policies (e.g., post tenure review) have been followed
Lessons Learned

- Develop institutional policy consistent with educational mission
- Follow institutional policy and law
- Be as generous as possible with notice
"President Smith, I think we've found a way to get us over our financial pinch!"
"Due to budgetary constraints, questions are allowed only in 200-level and above courses."
"When they hired me, I thought 24/7 was the course number and 'midnight to two' was a typo."
“Due to budgetary realignments, we’re asking that you take your sabbatical in 20-minute segments.”
Scientific Integrity
More Headlines

- Northwestern U. Pays Fine for Animal-Research Violations
- Naval Academy Demotes Professor Accused of Plagiarism
Scholarly Integrity: How do we promote it?

- **Education and training**
  - Science of research
  - Responsible conduct of research

- **Peer Review**
  - Promotion and merit review
  - Research proposals
  - Manuscripts and abstracts

- **Policies and Procedures**
  - Conflict of interest
  - Standards of conduct
  - Responding to allegations of scholarly misconduct
Lapses in Scholarly Integrity

- Failure to comply with regulations applicable to research
  - Human subjects
  - Animal subjects
- Research or scientific misconduct
  - Fabrication
  - Falsification
  - Plagiarism
  - Departures from accepted practices
  - Intentional misrepresentation of credentials
  - Abuse of confidentiality
- Criminal acts
Research Misconduct

- Fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.
  - Fabrication is making up data or results and recording or reporting them.
  - Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.
  - Plagiarism is the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit.
  - Research misconduct does not include honest error or differences of opinion.
Responding to Allegations of Scholarly Misconduct

- Allegation
- Inquiry
- Investigation
- Internal and external review of findings and recommendations
- Closure, remediation, or adjudication
Institutional and Individual Accountability: The Costs

- Tangible
  - Education
  - Oversight
  - Investigation
  - Payback
- Intangible
  - Public trust
  - Reputation
  - Productivity
Conflicts of Interest and Commitment
Three-Way Balance of Interest
NIH Calls for Removal of Some Peer Reviewers to Avoid Conflicts of Interest

Medical-Research Ethics Under the Microscope: Schools try to plot the fine line between commercial links and conflicts of interest

Selling Out: A Textbook Example. Insiders say kickbacks and payoffs have tainted both the industry and the professors who profit

Professor Punished for Consulting
Mandated and Enforceable Limitations

- Outside professional work
- Use of institutional resources
- Use of University position for private gain
- Email/Internet
- Patents, inventions, copyrights
University has a triggered system of post-tenure review, which provides for review in the event of two consecutive annual ratings of no merit. Faculty triggered for review are identified through an analysis of faculty salary database. Based on this analysis, Department Chair, new to his position, was notified that Professor should receive a post-tenure review. Professor, a senior faculty member with over thirty years of service to the University, received the lowest merit rating ever given to a faculty member by the Department faculty.
Professor is also known to be a difficult person to get along with and looks for every opportunity to disagree with the administration and his colleagues.

When notified that his low merit ratings have triggered a post-tenure review he declared that the policy did not apply to him. It was adopted long after he was tenured.

Upon reflection, Professor also believes that his selection for review was discriminatory. He is the oldest faculty member in his department and the only one identified for post-tenure review.

Professor refuses to provide information to or meet with the review committee.

What should the Department Chair do? How do you advise the Chair?
Hypothetical 2

- The financial outlook for University continues to be problematic. The state allocation of resources is dwindling, student demand for popular career-based programs is soaring, and the need for reallocation of resources is rising.

- A decision is made to reduce the course offerings in Department consistent with enrollment trends. The enrollment reductions are to be paralleled with employment reductions of three faculty members.

- The Department is composed of five tenured faculty members, two probationary faculty members, and three annual faculty appointees.
The faculty members identified for termination include:

- An annual appointee who is given written notice of his non-renewal
- A probationary faculty member who was favorably reviewed by her colleagues for promotion and tenure
- A tenured faculty member of 20 years who teaches four of the ten courses eliminated from the curriculum

What issues are involved in these employment decisions?