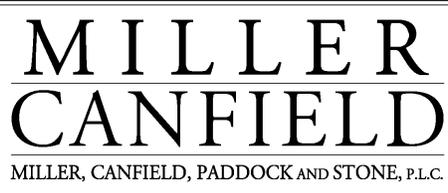


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**A STUDY OF THE LAW AND  
PRACTICE OF ACADEMIC TENURE**

**By:**

**Thomas P. Hustoles\***

\* I would like to thank my colleagues Tony Duerr and Kalyn Redlowsk for their contributions to this outline.

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## INTRODUCTION

A comprehensive review of numerous tenure policies from a wide range of colleges and universities would indicate that, undoubtedly due to the critical importance of the subject matter, policies generally cover a broad range of appropriate elements. However, it would appear that every policy reviewed is either silent on one or more elements which reasonably should be covered, or treats one or more subjects in a manner which is not appropriately protective of legitimate interests of the university administration.

Because of the broad spectrum of institutional missions and scope, it would be unrealistic and overreaching to presume that a “model” tenure policy could be crafted. Due to individual campus cultures, history, and vested interests, it would be even more unrealistic to presume that any institution would be politically able to start over and implement, after prodigious collegial consultation, a brand new policy.

Accordingly, this paper represents an effort to set forth numerous audit points through which a university administration could evaluate various selected aspects of its present tenure policy, and consider adding or revising elements in an incremental fashion over time.

The obvious bias in the following treatment is that it represents an evaluation from the perspective of examining how a tenure policy might appropriately reflect the interests of a university governing board and administration. If a faculty group were interested in conducting a parallel audit, measuring a tenure policy against the numerous tenure related policies collected in *AAUP Policy Documents & Reports* [2001 Edition; hereafter referred to as the “AAUP Red Book” or the “Red Book”] would serve a similar function. As will be noted below, AAUP policies are very well crafted, often in a manner which makes the faculty’s interests coincidental with those of the administration. As will also be noted, however, in a few cases, there are elements of some AAUP policies which are so protective of faculty interests that they arguably conflict with legitimate administrative interests.

In order to comply with your institution’s tenure policy, which is the first and basic contractual obligation an institution has with respect to its tenured faculty, you need to make sure that your academic administrators are aware of all the sources that can define your policy. These may include individual or collectively bargained contracts, appointment letters, a faculty handbook, board policy or by-laws, statutory obligations, academic senate policies, departmental policy statements, and university-wide policies.

## I. DEFINITIONS OF TENURE

Any soundly drafted policy, either in a paragraph, or cumulatively, includes a definition of tenure. A “long form” working definition of tenure, from a legal and operational standpoint, might look something like this:

“Tenure” is the employment contract between the university and a faculty member, which includes both a faculty members’ rights and responsibilities. Fundamental faculty rights incident to tenure include the right to academic freedom and the right to continuation of employment except for (a) termination for adequate cause; (b) termination due to extraordinary budgetary considerations; (c) termination due to program discontinuation; (d) termination due to medical disability; and (e) release of tenure by virtue of voluntary retirement, resignation, or abandonment. Fundamental faculty responsibilities incident to tenure include performance of assigned duties in a professionally competent manner, consistent with professional ethics, integrity, and avoidance of conflict of interest.

Most tenure policies cover the above subjects in many sections of the policy. Examples of well-drafted short definitions of tenure include:

“4.1 Definition: ‘Tenure’ is the right to continuing employment granted by the College to a faculty member upon the completion of the probationary period. Loyola College pledges that service of a regular faculty member shall not be terminated after the expiration of the probationary period except by retirement or adequate cause as specified in the Articles on dismissal, termination, or medical disability, i.e., Articles 8, 9, 10, 11.” [Loyola College] **Note:** material in brackets after a quotation will indicate the source of the quotation; material within quotations in brackets indicates explanatory references by this author.

“Tenure is the employment status awarded by a president to a faculty member who has demonstrated excellence in teaching, research, and service in accordance with criteria established by each university. The status of tenure creates a legitimate claim of entitlement to continued employment unless the tenured faculty is dismissed or released in accordance with subsections H [Post-Tenure Review], J [Dismissal or Suspension], or K [Release of Faculty for Reorganization Caused by Budgetary Reasons or Programmatic Changes].” [Arizona Board of Regents]

The basic AAUP policies defining tenure can be found in the Red Book, as follows:

*1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments* [AAUP Red Book, p. 3]

*Recommended Institutional Regulations on Academic Freedom and Tenure* [AAUP Red Book, p. 21]

Miscellaneous Related Statements [AAUP Red Book, pps. 1-130]

Professional Ethics Statements [AAUP Red Book, pps. 131-149]

The AAUP Red Book *Statement on Professional Ethics* [p. 133], *Statement on Plagiarism* [p. 137], and the portion of the *1940 Statement under the heading “Academic Freedom”* [pps. 3-4] are so well drafted, coincidental with interests of both the university administration and faculty, that they deserve to be adopted wholly or incorporated by reference in a tenure policy.

## **II. STATEMENT ON GENERAL GOVERNANCE**

A tenure policy, as much or more than any other policy on campus, reflects basic principles of shared governance. This is particularly true with regard to the process by which tenure is achieved. The *1966 Statement on Government of Colleges and Universities* [AAUP Red Book, p. 217], which was jointly formulated and adopted by the AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges, is a good starting point to examine this subject. This joint statement includes an important point that is not consistently reflected in some tenure policies:

“The governing board of an institution of higher education in the United States operates, with few exceptions, as the final institutional authority.”

The fundamental legal and governance principle that the governing board is the final decisional authority, and that academic units provide recommendations, should be consistently reflected throughout a tenure policy. Some examples include:

“Members of the University Faculty shall be elected, appointed, or promoted by the Board of Trustees or the Executive Committee upon the recommendation of the Provost, with the approval of the President.” [Duke University By-Laws, as referenced in the Faculty Handbook]

“The Board of Regents is charged by law to exercise control and supervision of each university. Any authority delegated by the Board shall

always be subject to the ultimate authority of the Board. The Board shall retain the right of periodic review and modification of all aspects of governance of the universities, and the right to enact such rules, regulations, policies and orders as it deems proper, subject to the rule making procedures set forth in the Board Policy Manual.” [Arizona Board of Regents]

Notwithstanding this fundamental principle, the notion of shared governance means that the faculty makes effective recommendations at various stages of the tenure process. Examples which articulate this include:

“The Board and the universities may adopt additional rules to govern the employment relationship. Such rules may be modified in accordance with rule making procedures, where applicable, established by the Board and/or the individual universities, which include opportunities for appropriate involvement by representatives of each university’s Faculty Senate.” [Arizona Board of Regents Policy]

“The Dean of the Faculty of Arts and Science makes recommendations to the President of the University regarding promotions and the conferring of tenure. The recommendation of the Dean is expected to be informed by the faculty at large, the department, and experts in the candidate’s field. In the Faculty of Arts and Science, tradition and faculty approved policy hold that this occurs through a multilevel process involving detailed evaluation within the department, review by the FAS Promotion and Tenure Committee consisting of elected and appointed members from the three divisions of FAS, independent external evaluations at both the department and FAS Promotion and Tenure Committee levels, and such other information as deemed appropriate by the Dean.

While there is often a remarkable degree of unanimity in the recommendations made at the various levels of review, it is not unusual for there to be divergent opinions. Disagreement may occur because of differences in perspective, differences in the weighing of strengths and weaknesses in the case, additional information not evident in preceding stages of the evaluation, and so on. In case of seriously divergent recommendations, the Dean may choose to extend the process and seek additional information, but has no obligation to do so.” [New York University]

It is critically important that a tenure policy consistently reflect that the governing board (whether on recommendation of the President or Provost or whomever) has the ultimate authority and responsibility to make the final decisions regarding tenure, and that collegial consultation prior to those final decisions is always described in terms of recommendations, and not in terms of decisional authority.

### **III. GENERAL QUALITATIVE STANDARDS FOR AWARDING TENURE**

A well constructed tenure policy sets forth the general qualitative standards, from a university-wide perspective, as to the level of performance demanded of a probationary tenure track employee which merits an award of tenure. Tenure policies, depending upon the mission and tradition of the individual institution, vary widely in describing these standards. Samples include:

- “Excellence” [numerous policies]
- “High achievement and recognition in scholarship, teaching, and service” [New York University]
- “Competence” [numerous policies]
- “Academic performance and academic potential” [numerous policies]
- “Evaluations in the three performance areas that are consistent with a reasonable expectation that this candidate will, when eligible, meet the performance standards for further promotion and recognition” [numerous policies]
- “Outstanding” or “Substantial” or “Significant” or “Satisfactory as modifiers to scholarship, teaching, and service in various combinations, with outstanding the highest standard, and satisfactory the lowest [Western Michigan University]
- “Is the candidate for tenure among the strongest in her/his field, in comparison with individuals at similar points in their careers at NYU, nationally, and, if relevant, internationally?” [New York University]
- “Future promise” [numerous policies]
- “Record of successful teaching”; “Record of achievement in research”; “Record of satisfactory participation in service” [Bradley University]
- “Quality” or “Creativity” [numerous policies]

- “The highest standards”; “Northwestern aims at the superlative”; “a department or school must feel able to affirm that the candidate in question constitutes as good a permanent appointment in his or her area as we are capable of making, now or in the foreseeable future, given both the candidate’s accomplishments to date and reasonable expectations as to future accomplishments” [Northwestern University]
- “Expected to stand in competition with the foremost persons of similar rank in similar fields” [Duke University]
- “Effective” [numerous policies]
- “Record of productivity” [numerous policies]

#### **IV. CONSISTENCY OF GENERAL STANDARDS WITH DEPARTMENTAL, SCHOOL, OR OTHER CRITERIA**

In addition to general university standards, all tenure policies specify in some fashion additional criteria for meriting an award of tenure that are developed by a department, school, division, or some other academic unit. Some policies describe the development of these criteria in a short form fashion, as follows:

“Each divisional executive committee shall establish written criteria and standards it will employ in recommending the granting of tenure. These criteria and standards shall assure that the granting of tenure is based on evidence of (1) teaching excellence; (2) a record of professional creativity, such as research or other accomplishments appropriate to the discipline; and (3) service to the university, to the faculty member’s profession, or professional service to the public.” [plus a requirement that each departmental executive committee establish criteria and standards consistent with the above quoted provision]. [University of Wisconsin]

“Departments and colleges shall establish standards for retention, tenure and promotion that are no less rigorous than those described below. Each faculty member must meet the following Universitywide standards for appointment, retention, tenure, and promotion as well as the standards of her or his department and college.” [Montana State University Faculty Handbook]

Others spell out in extreme detail precisely what criteria are required at every academic level. Examples can be found in the University of Memphis policy, *see* [www.people.memphis.edu](http://www.people.memphis.edu) [a long statement of general criteria, and a long statement of

specific criteria by rank] and in the Virginia Tech Guidelines for Promotion and Tenure, *see* [www.provost.vt.edu](http://www.provost.vt.edu) [a very detailed list of the specific kinds of information about research, scholarship, and creative activity which should be included in the candidate's dossier].

Regardless of the format, the tenure policy at some point should make clear that departmental or other academic level criteria must be consistent with the university-wide general standards, or have exceptions approved by the Provost. The tenure policy should be tailored to avoid the very problematic situation where a department adopts criteria that are inconsistent with the university wide standards, or adopts criteria that are unacceptable to some higher level of review, e.g., the Provost's office.

The Duke University Faculty Handbook contains a good example of such an effort:

**“Responsibilities of the Department, Program, or School.**

All Trustee-authorized faculty hiring units (e.g., departments, programs, and schools) must have a set of formal procedures to govern their internal evaluation processes. The deans, directors, and department chairs are responsible for submitting these procedures to the provost. The provost will review the procedures and assure that they are generally acceptable and consistent with the policies described herein. Once endorsed, the deans, directors, and department chairs will be responsible for distribution of these procedures to all members of the department, program, or school and to new members of the faculty at the time of their appointment.”

**V. ADOPTION OF ADDITIONAL, NON-QUALITATIVE GENERAL STANDARDS FOR TENURE**

If the university administration is to reserve the right to base an award of tenure on factors external to the candidate, the reservation should be explicitly set forth in the tenure policy. For example:

“The current and future shape of programs in a department and beyond it in the Faculty of Arts and Science more generally may be relevant considerations.” [New York University]

“The long-term staffing needs of the department/division and the University are taken into account at each level in the review process when candidates are evaluated for tenure. Criteria to be considered may include:  
a. Enrollment patterns, b. Program changes, c. Potential for staff additions,

d. Prospective retirements and resignations, and e. Financial considerations.” [University of Memphis]

“The contract of a tenure-eligible faculty member is renewed, and tenure and promotion are granted, on the basis of excellent performance and the promise of continued excellence. The denial of, tenure or renewal, however, need not be construed as due to failure or poor performance on the faculty member’s part. Considerations such as the need for a different area of specialization or for new emphases; the lack of a continuing position; the need to shift a position or resources to another department; or the opportunity for an alternative program in teaching, research, or service may dictate that the individual not be renewed, granted tenure, or promoted.” [Arizona Board of Regents]

## **VI. SOME GENERAL DISCLAIMERS**

Some policies appropriately and expressly disclaim any possibility of “de facto” tenure, and further disclaim the authority of anyone else but the President and the Board to make tenure representations or commitments. For example:

“No faculty member shall be entitled to or acquire any interest in a tenure appointment at the University of Memphis without a recommendation for tenure by the President of the University and an affirmative award of tenure by the Board of Regents. No other person shall have any authority to make any representation concerning tenure to any faculty member. Failure to give timely notice of a non-renewal of a contract shall not result in the acquisition of a tenure appointment, but shall result in the right of the faculty member to another year of service at the University.” [University of Memphis]

“Attainment of tenure can only occur through specific notification from the president and may not result from inaction or inadvertence.” [Arizona Board of Regents]

Other policies appropriately disclaim the authority and enforceability of oral and written communications inconsistent with or in conflict with the tenure policy. For example:

“No oral or written communication made prior to or after the execution of a Notice of Appointment that is inconsistent or in conflict with the Conditions of Faculty Service or other Board of university rules shall

become a part of the conditions of employment.” [Arizona Board of Regents]

Unless otherwise bound by a collective bargaining agreement, policies might also appropriately expressly reserve the right, which would undoubtedly be exercised only after appropriate notice to and collegial consultation with the faculty, to amend the tenure policy. For example:

“The Board shall retain the right of periodic review and modification of all aspects of the governance of the universities, and the right to enact such rules, regulations, policies and orders as it deems proper, subject to the rule making procedures set forth in the Board Policy manual.” [Arizona Board of Regents]

## VII. DUE PROCESS PROTECTS TENURE

A. Public Institutions -- Tenured professors, because they have a defined “property interest” in continued employment except for certain limited reasons, are protected by federal constitutional due process principles. See below for cases setting this standard forth.

B. Private Institutions -- most, if not all, have policies embodying the principles of due process in a faculty handbook, or tenure policy.

C. Basic elements of procedural due process include, prior to termination for cause, or other deprivation of a property interest in tenure, a notice of charges, an explanation of evidence/basis for the changes, and an opportunity to be heard. AAUP policy, and many other policies, also incorporate some form of peer review judgment.

D. Basic elements of substantive due process include that decisions be made in a fair manner rather than on an arbitrary or capricious basis, and that standards not be unreasonably vague.

E. Case law in your jurisdiction clarifies other due process elements, including for example, whether due process includes a right to be represented by counsel, a right to confront and cross-examine witnesses, a right to a transcript, a right to an open hearing, etc.

*See* **Weiman v. Updegraff**, 344 U.S. 183, 97 L.Ed 216, 73 S.Ct. 215 (1952) [college professors and staff members dismissed during the terms of their contracts have property interests in continued employment safeguarded by due process]; **Slochower v. Board of Education**, 350 U.S. 552, 100 L.Ed. 692, 76 S.Ct. 637 (1956) [a public college

professor dismissed from an office held under tenure provisions protected by due process] **Board of Regents v. Roth**, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972) [non-renewal of a term, tenure track contract does not give rise to a property interest in continued employment; due process does not attach unless the non-renewal is accompanied by a charge of dishonesty, immorality, or other circumstance putting a person's good name, reputation, honor, or integrity at stake so that the person is stigmatized and a liberty interest is implicated]; **Perry v. Sindermann**, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972) [a professor should be permitted to show that while no explicit tenure system existed at his institution, a "de facto" tenure system existed such that due process should attach]. Minimal pre-termination due process, as set forth by the Supreme Court in **Cleveland Board of Education v. Loudermill**, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985), requires (a) notice of charges; (b) an explanation for the basis of charges; and (c) an opportunity to respond.

For other cases which delineate the general standards of due process in a higher education context (usually in cases of tenure termination for cause or for budgetary reasons), *see* **Moon v. Midwestern State University**, 2004 WL 575953 (N.D. Texas) (February 18, 2004) [in order for tenured professor's substantive due process rights to be infringed upon during tenure termination, professor must show University acted arbitrarily and capriciously] **North Dakota State University v. United States**, 255 F.3d 599 (8<sup>th</sup> Cir. 2003) [tenured professor at state institution not only has a constitutional right to procedural due process, but also has a substantive due process right to be free from discharge for reasons that are arbitrary and capricious, or in other words, for reasons that are trivial, unrelated to the education process, or wholly unsupported by a basis in fact]; **Hulen v. Yates**, 322 F.3d 1229 (10<sup>th</sup> Cir. 2003) [Associate professor with property interest in assignment to accounting department at state university was afforded all process due to him upon transfer to management department without his mutual consent; prior to transfer, professor was able to meet with decisionmaker twice, lodged repeated written complaints, and engaged services of attorney in attempt to avoid transfer, and after transfer, professor was able to contest transfer through university's grievance process, which afforded rights to counsel, to be heard, to present evidence, to confront and cross-examine witnesses, to decision by impartial decisionmakers, and to appeal adverse decision.]; **Levitt v. University of Texas**, 759 F.2d 1224 (5<sup>th</sup> Cir. 1985), **Kowtoniuk v. Quarles**, 528 F.2d 1161 (4<sup>th</sup> Cir. 1975); **Anapol v. University of Delaware**, 412 F. Supp. 675 (D.Del. 1976); **King v. University of Minnesota**, 774 F.2d 224 (8<sup>th</sup> Cir. 1985). For a broader treatment of this topic, see Introduction to Tenure, Due Process, Just Cause, and the Discipline and Dismissal of University Employees [NACUA Paper, by Hustoles, Duerr, and Griffin; presented at the NACUA New Lawyers Workshop, 1998].

A review of the foregoing cases, particularly **Roth** and **Sindermann**, would indicate that, as a matter of law, due process generally attaches only when tenure is achieved at a public institution, since non-renewal of a probationary contract is not protected by constitutional due process. After tenure is achieved, whenever there is an attempt to terminate tenure, constitutional due process applies. It would also apply to circumstances where a probationary tenure track appointment is terminated prior to the end of a renewable term, since there is a property interest in continued employment until the end of the term. As a matter of practice, all tenure policies reviewed also included some sort of “due process” in their tenure policy as to how the tenure decision is made, and as to how non-renewal decisions are made, *i.e.*, by providing for standards of notice, information, appeals, and sometimes further providing for overall standards of “fairness” or “completeness” or “thoroughness” throughout the tenure review process. For the AAUP’s view on these matters, *see Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* [Red Book, p. 15], and *Statement on Procedural Standards in Faculty Dismissal Proceedings* [Red Book, p. 11].

As referenced in the working legal definition above, there are five basic exceptions to tenure’s contractual promise of continued employment.

## **VIII. THE FIVE EXCEPTIONS TO TENURE’S CONTRACTUAL PROMISE OF CONTINUED EMPLOYMENT**

### **A. Termination for Just Cause**

#### **1. AAUP Policy**

The *1940 Statement of Principles on Academic Freedom and Tenure* [Red Book, p. 4] provides in pertinent part:

“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 age, or under extraordinary circumstances because of financial exigencies.”  
[Emphasis supplied]

#### **2. Sample Policies**

Many policies appropriately provide for a “short form” articulation of termination for cause, containing merely a simple statement that termination of tenure shall be for “cause” or “just cause” or “reasonable cause” or “adequate cause.” These variations in the adjective preceding “cause” (or lack thereof) do not appear to have any substantive or legal distinction absent some state law statutory significance. If a short statement is

adopted, the only important consideration to keep in mind is to except or cross reference the circumstances distinguishable from cause in the sense of personal incompetence, misconduct, etc. for which tenure can be terminated. These separate circumstances include at least budgetary reasons, programmatic reasons, disability, and resignation, all of which will be treated in subsequent sections of this paper.

Other policies articulate a somewhat longer articulation of what “cause” means:

“Cause shall be restricted to physical or mental incompetence or moral conduct unbecoming the position. Academic cause shall be defined as the failure by a member of the faculty to discharge responsibly his or her fundamental obligations as a teacher, colleague, and member of the wider community of scholars.” [University of Rochester]

At the other end of the “length” spectrum, some policies choose to specify a long list of examples specifying what cause means:

“A faculty member with tenure or a faculty member on a tenure-track appointment may be terminated prior to the end of the term of appointment for adequate cause, as defined herein:

- a. Incompetence or dishonesty in teaching or research.
- b. Willful failure to perform the duties and responsibilities for which the faculty member was employed, or refusal or continued failure to comply with the policies of the Board.
- c. Conviction of a felony or a crime involving moral turpitude.
- d. Improper use of narcotics or intoxicants which substantially impairs the faculty member’s fulfillment of his/her departmental and institutional duties and responsibilities.
- e. Capricious disregard of accepted standards of professional conduct.
- f. Falsification of information on an employment application or other information concerning qualifications for a position.
- g. Failure to maintain the level of professional excellence and ability demonstrated by other members of the faculty in the department .or division of the institution.” [University of Memphis]

“Just cause shall include, but not be limited to, demonstrated incompetence or dishonesty in professional activities related to teaching, research, publication, other creative endeavors, or service to the university community; unsatisfactory performance over a specified period of time and a failure to improve that performance to a satisfactory level after being provided a reasonable opportunity to do so by the university, as neglect of or refusal to carry out properly assigned duties demonstrated through the board-approved post-tenure review process; substantial; personal conduct that substantially impairs the individual’s fulfillment of properly assigned duties and responsibilities; moral turpitude; misrepresentation in securing an appointment, promotion, or tenure at the university; or proven violation of Board or university rules and regulations (including the code of conduct or any other disciplinary rules , depending upon the gravity of the offense, its repetition, or its negative consequences upon others.” [Arizona Board of Regents]

One advantage of the longer form treatment is that if the particular act which is the basis for a tenure termination case is expressly or generically spelled out in the long list, that sometimes enhances the termination defense in an arbitration hearing or in court. If the long form list is adopted, it obviously should be qualified by “including but not limited to” and might also contain a catch-all phrase such as “and any other misconduct or impropriety of the same nature as the above examples.”

### 3. Representative Cases Finding Just Cause

By simple use of the phrase “just” or “adequate” cause, the policy implicitly adopts by reference the countless judicial and arbitral decisions interpreting that phrase. For some representative court decisions defining just cause in the context of higher education, where just cause for termination was found to exist, *see* **Board of Regents v. Roth**, 408 U.S. 564 (1972) [violation of a standard providing for continued employment “during efficiency and good behavior” as specified in Wisconsin statute]; **Dougherty v. Walker**, 349 F.Supp. 629 (W.D. Mo. 1972) [unauthorized occupation of a university facility; interference with normal and regular activities giving doubt as to future usefulness]; **Chung v. Park**, 377 F.Supp. 524 (M.D. Pa. 1974) [intransigence with respect to dealings with superiors and incompetence]; **Kowtoniuk v. Quarles**, 528 F.2d 1161 (4th Cir.1975) [a series of instances of “unprofessional conduct” such as failing to serve on department committees, failing to work cooperatively with members of the department, and evicting a colleague from a class which the colleague had been assigned to teach]; **Barsycz v. Board of Trustees**, 400 F.Supp. 675 (N.D. Ill. 1975) [misrepresentation of or failure to inform regarding true academic credentials]; **Prebble v. Broderick**, 535 F.2d 605 (10th Cir. 1976) [neglect of duty in failure to teach on eight

scheduled days in one semester]; **Smith v. Kent State University**, 696 F.2d 476 (6th Cir. 1983) [persistently flouting the authority of the department head and refusing to meet scheduled classes]; **Samaan v. Trustees of California State University**, 197 Cal.Rptr. 856 (Cal.App. 3 Dist. 1983) [conviction of grand theft relative to submitting false claims for Medi-Cal reimbursement, unrelated to work done for the university]; **Korf v. Ball State University**, 726 F.2d 1222 (7th Cir. 1984) [improper advances towards and gifts to male students]; **Levitt v. Moore**, 590 F.Supp. 902 (W.D. Tex. 1984) [improper sexual advances toward female students in a class]; **Riggin v. Board of Trustees of Ball State University**, 489 N.E.2d 616 (Ind. App. 1 Dist. 1986) [professional incompetence based upon evidence that the professor was not prepared, used irrelevant material, had not updated his material, spent class time on irrelevant matters, was uncooperative, failed to adequately participate in department affairs, had not engaged in scholarship, and his students could not meet qualifications for advanced work]; **Agarwal v. Regents of the University of Minnesota**, 788 F.2d 504 (8th Cir. 1986) [plagiarism and incompetence].

#### 4. Representative Cases Finding that Just Cause Did Not Exist

“Just cause” means incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duties. However, evidence that a particular duty was not completely performed by a teacher on a certain occasion, or evidence of an occasional neglect of some duty of performance, does not, in itself, ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination of a tenured teacher. Incompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection, but instead must be measured against the standard required of others performing the same or similar duties. **Sanders v. Board of Education**, 263 N.W. 2d 241 (Neb. 1978).

A Wisconsin statute provided for tenure “during efficiency and good behavior.” Urging students not to take northern Wisconsin teaching jobs and voicing opposition to a graduate program because graduate students were permitted to take courses offered as part of a bachelor’s program did not qualify as inefficiency or bad behavior. **State v. McPhee**, 94 N.W.2d 711 (Wis. 1959).

A single sexual advance to a student made without a threat of retaliation did not support the disciplinary charge of unprofessional conduct based on a “series and pattern” of sexual harassment. **Brown v. California State Personnel Board**, 213 Cal.Rptr. 53 (Cal. App. 3 Dist. 1985). Comments by a faculty member and academic dean to a student about his sexual desire and liaisons with both men and women, although arguably unprofessional, did not create an abusive educational environment because there was no

discrimination because of the plaintiff's sex. **Gallant v. Board of Trustees of California State University**, 997 F. Supp. 1231 (N.D. Cal. 1998).

The failure of a tenured professor at a private university to teach a class until an incident with a disruptive student was resolved did not per se constitute "neglect of professional responsibilities" as referred to in the faculty handbook. "Neglect" implies an assessment as to whether the professor's actions were within the range of acceptable conduct. **McConnell v. Howard University**, 818 F.2d 58 (D.C. Cir. 1987).

## 5. Cases Involving Insubordination

College and university cases sustaining discharge for insubordination or similar neglect of duty include **Chung v. Park**, 377 F.Supp. 524 (M.D. Pa. 1974) [intransigence with respect to dealing with superiors at Mansfield State College and incompetence constituted cause for discharge]; **Kowtoniuk v. Quarles**, 528 F.2d 1161 (4th Cir. 1975) [failure to serve on departmental committees at Virginia State College and to work cooperatively with members of the department]; **Shaw v. Board of Trustees of the Frederick Community College**, 549 F.2d 929 (4th Cir. 1976) [failure to take part in mandatory college functions]; **Stastny v. Board of Trustees**, 647 P.2d 496 (1982) [professor's action in ignoring a warning and absenting himself from duty at Central Washington University after the denial of his request for a brief leave of absence constituted insubordination]; **Kelly v. Kansas City Community College**, 648 P.2d 225 (1982) [evidence established conduct detrimental to the nursing program and inability to cooperate with and maintain harmony among the staff]; **Smith v. Kent State University**, 696 F.2d 476 (6th Cir. 1983) [conduct which persistently flouted the authority of the department head and refusal to meet scheduled classes constituted cause for dismissal]; **Josberger v. University of Tennessee**, 706 S.W.3d 300 (Tenn.App. 1985) [dismissal appropriate where plaintiff failed or refused to carry out the assigned task of developing two graduate courses]; **Robinson v. Boyer**, 825 F.2d 64 (5th Cir. 1987) [security officer of Mississippi State Valley University terminated for refusal to comply with orders of superior]; **Nyberg v. University of Alaska**, 954 P.2d 1376 (Alaska 1998) [Supreme Court of Alaska held that termination of employee was not justified because supervisor's oral directives that employee discuss workplace problems were not both reasonable and sufficiently clear to enable employee to understand what was required by her employer]; **University of Guam v. Guam Civil Service Commission**, 2002 WL 500905 (Guam Terr.) (April 3, 2002) [striking a student, failing to report for fitness to work exam, failing to report to work].

## 6. Cases Involving Disruptive Conduct

Numerous cases decided in the college and university context support discipline up to and including discharge for disruptive conduct. These include several of the cases cited above in the discussion regarding insubordination and **Harden v. Adams**, 841 F.2d 1091 (11th Cir. 1988) [professor at Troy State properly terminated for actions including conduct which caused disruption and disharmony among faculty]; **de Llano v. Berglund**, 282 F.3d 1031 (8<sup>th</sup> Cir. 2002) [authoring a series of derogatory letters about University faculty members to local newspaper, school newspaper, Chancellor, and University President] **Klein v. President and Fellows of Harvard College**, 517 N.E. 167 (Ma. App. 1987) [director of department of health policy and management terminated for just cause due to strained and acrimonious relationship with faculty and reference to a faculty member in words of “vehement disparagement”]; **Rinehimer v. Lucerne City Community College**, 539 A.2d 1298 (Pa. 1988) [discharge appropriate where employee disagreed with college policymakers and disrupted its administrative operation]; and **Kosik v. Cloud County Community College**, 827 Pa.2d 59 (Ka. 1992) [conduct supported discharge where director of library was subject of complaints about his relationship with students and faculty resulting from strict enforcement of rules and abusive behavior].

## 7. Cases Involving the Alleged Exercise of First Amendment Rights

The Supreme Court of the United States decided a case which buttresses an employer’s rights to discharge an employee for disloyal, disruptive speech and conduct. In **Waters v. Churchill**, 511 U.S. 661, 128 L.Ed.2d 686, 114 S.Ct. 1878 (1994), the Court considered a claim by a discharged public hospital nurse that her First Amendment rights had been violated. She had criticized the hospital’s cross training policy, and later complained to another nurse about the hospital’s staffing policies and supervision. The 7th Circuit Court of Appeals had found that when a public employer fires an employee for engaging in speech which is later found to be protected under the First Amendment as a “matter of public concern,” then the employer is liable for violating the employee’s free speech rights regardless of what the employer knew about the speech at the time of the termination.

The Supreme Court vacated that opinion, and remanded the case for further hearings on what the motivation of the employer was. If the employer’s motivation was the nurse’s earlier, general criticism of cross-training policies, then the discharge would violate the First Amendment. But if the motivation was the employer’s reasonable belief after a reasonable investigation that the nurse had engaged in a conversation with a colleague that criticized her supervisor and discouraged the transfer of that colleague, then the discharge would not violate the First Amendment since such criticism was

potentially disruptive to the efficient operation of the hospital, and as such, was unprotected speech.

In an opinion authored by Justice O'Connor which announced the judgment of the Court and was joined by three other justices, the Court reviewed and endorsed in part three of its most important prior decisions balancing an employee's free speech rights against the right of a public employer to efficiently provide public services. The Waters Court summarized **Connick v. Myers**, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983) to hold "that the First Amendment protects a government employee's speech if it on a matter of public concern and the employee's interest in expressing herself on this matter is not outweighed by any injury the speech could cause to the government's interest, as an employer, in promoting the efficiency of the public services it performs through its employees." Although the landmark decisions of **Mt. Healthy City Bd. of Ed. v. Doyle**, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977) and **Pickering v. Board of Ed. of Township High School Dist.**, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968) were cited, this Opinion disagreed with the proposition (advanced by Justice Scalia) that they should be read to hold that an employer's mere "good faith" conclusion that motivation for the discharge was not retaliation for speech on a matter of public concern is enough to preclude further judicial inquiry.

Rather, the O'Connor Opinion sets forth the following test which for now is the guiding standard for judging whether EU's investigation and disciplinary decision in this matter is appropriate:

"...Thus, if an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, [the First Amendment requires that the manager proceed with the care that a reasonable manager would use before making an employment decision of the sort involved in the particular case.] In situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion, many different courses of action will necessarily be reasonable, and only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable."

In a very significant guideline to employers, Justice O'Connor expressly rejected the Court of Appeals approach to the investigation of these cases, which would have required the employer to follow evidentiary rules of court, and stated:

“...The Court of Appeals’ approach gives insufficient weight to this interest [the government employer’s interest in achieving its goals as effectively and efficiently as possible], since it would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules in court, whereas employment decisions are frequently and properly based on hearsay, past similar conduct, personal knowledge of people’s credibility, and other factors that the judicial process ignores.”

Of interest is that the U.S. Supreme Court used the Waters case as the basis to send back to the U.S. Court of Appeals for the Second Circuit the case of Jeffries v. Harleston, 21 F.3d 1238, cert. granted and judgment vacated by 115 S.Ct. 502 (1994).

That case involved Professor Jeffries’ claim that his out of classroom remarks disparaging Jews were the basis for his removal as chair of his department at CUNY. The Supreme Court told the Second Circuit to reexamine its decision, upholding the trial court’s ruling that Professor Jeffries’ First Amendment rights were violated by CUNY’s action, in light of the Waters decision. On remand, the Second Circuit held that CUNY did not violate Professor Jeffries’ First Amendment rights by reducing his term as department chair because of his controversial speech, since CUNY was motivated by a reasonable prediction of disruption to university operations. 52 F.3d 9 (2<sup>nd</sup> Cir. 1995).

In addition to the above cited cases, there have literally been scores of prior judicial decisions interpreting this difficult balancing test between protected matters of public concern vs. the public employer’s interest in achieving its goals efficiently and effectively. For the purposes of illustration by example, pertinent cases in the education arena where the plaintiff’s free speech claims were rejected or qualified include Dougherty v. Walker, 349 F.Supp. 629 (W.D. Mo. 1972) [protest at the University of Missouri may not be carried out in a way that disrupts the educational mission]; Watts v. Board of Curators, University of Missouri, 363 F.Supp. 883 (W.D. Mo. 1973) [statements directed towards persons with whom an employee is working and which would effect harmony among co-workers or the maintenance of discipline by an immediate superior are not protected speech]; Peacock v. Board of Regents of the Universities and State Colleges of Arizona, 380 F.Supp. 1081 (D. Ariz. 1974) [verbalization of aggressive conduct is not protected speech — a university has a right to expect a professor to follow instructions and work harmoniously and cooperatively with other members of the faculty]; Shaw v. Board of Trustees of the Frederick Community College, 549 F.2d 929 (4th Cir. 1976) [violation of policy manual not justified by motivation to protest tenure change]; Harris v. Arizona Board of Regents, 528 F.Supp. 987 (1981) [expressions of opposition to the candidacy of another person to fill a vacancy are not protected speech since this is an internal matter, not a matter of

public concern]; **Stastny v. Board of Trustees**, 647 P.2d 496 (Wash.App. 1982) [professor must meet job related requirements — action consisting of a persistent course of willful defiance in refusing to obey a reasonable direct or implied order given by authorities constituted unprotected insubordination]; **Smith v. Kent State University**, 696 F.2d 476 (6th Cir. 1983) [petitioning for the removal of the department head which interfered with the administration of the department was not protected speech]; **Franklin v. Stanford University**, 218 Cal. Rptr. 228 (Cal.App. 6 Dist. 1985) [speech which called for a strike to shut down some of university’s activities and interference with a police dispersal order was not protected speech or conduct]; **Robinson v. Boyer**, 825 F.2d 64 (5th Cir. 1987) [security officer’s discharge for repeated refusal to comply with superior’s orders and recommendations regarding the role of security on campus not retaliation for expression of first amendment rights]; **Colburn v. Trustees of Indiana University**, 739 F.Supp. 1268 (1990) [methods used by a department committee in making personnel decisions are a private, personal matter, not free speech]; **Barnhill v. Board of Regents**, 479 N.W.2d 917 (Wi. 1992) [employee speech unprotected where employee allowed a newspaper reporter to examine survey questions regarding a matter in litigation — the public employer may justify a discharge by showing that the employee speech will have a substantial and detrimental impact on the employer’s long term operations]; **de Llano, supra** [certain statements in letters were not a matter of public concern, and those that were, were not a substantial factor in termination decision].

## **B. Termination Due to Extraordinary Budgetary Reasons**

The *1940 Statement* [Red Book, p. 4], as noted above, allows for continuous tenure, “except” for “under extraordinary circumstances because of financial exigencies ....” On the same page, the policy provides that “termination of a continuous appointment because of financial exigency should be demonstrably bona fide.” This language in and of itself is not on its face particularly unsettling, and many institutions have adopted it as part of their tenure policy.

However, in the first significant reduction-in-force case prosecuted by an AAUP chapter, **AAUP v. Bloomfield College**, 129 N.J. Super. 249, 322 A.2d 846 (1974), *aff’d*, 126 N.J. Super. 442, 346 A.2d 615 (1975), the trial judge adopted the position urged by the AAUP that tenure should prevail unless the “survival of the college is imperiled,” and commented on methods by which the college could cure its deficit, including the potential sale of its valuable property in the form of a golf course, and concluded that there was no “bona fide” financial exigency. Although the appellate court rejected the trial court’s evaluation of the golf course property sale, it found that the college had not established a bona fide relationship between the condition of financial urgency (which it found to be a better definition of exigency than the “survival of the college” standard), and affirmed the trial court’s conclusion that thirteen professors should not be dismissed.

For other cases interpreting this “survival of the college standard” in the context of judicial consideration of AAUP policies, *see* **Scheuer v. Creighton University**, 199 Neb. 618, 260 N.W.2d 595 (1977); **Krotkoff v. Goucher College**, 585 F.2d 675 (4th Cir. 1978); **Browzin v. Catholic University of America**, 527 F.2d 843 (D.C. Cir. 1975); **Linn v. Andover-Newton Technological School**, 638 F.Supp. 1114 (1986).

The AAUP’s 1976 Recommended Institutional Regulations on Academic Freedom and Tenure (“RIR”), currently in force [Red Book, pps. 21-30] provide in RIR 4(c)(1) that:

“Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur under extraordinary circumstances because of a demonstrably bona fide financial exigency, i.e., *an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means.*” [Emphasis supplied].

RIR 4(c)(3) prohibits tenured faculty from being terminated when non-tenured are retained except “where a serious distortion of the academic program would otherwise result.” RIR 4(c)(4) requires the institution, with faculty participation, to make “every effort” to place a faculty member in another suitable position within the institution before termination of financial exigency. RIR 4(c)(5) provides for at least one year’s notice, and RIR 4(c)(6) basically provides for a three-year recall period.

In situations essentially involving due process challenges, courts interpreting institutional policies which did not incorporate by reference AAUP policy on this topic consistently upheld a much wider discretion in the institutional governing board to determine layoffs for financial or budgetary reasons than would be present if AAUP policy had been contractually binding. See, e.g., **Levitt v. Board of Trustees of Nebraska State College**, 376 F.Supp. 945 (D. Neb. 1974); **Johnson v. Board of Regents**, 377 F.Supp. 227 (W.D. Wisc. 1974); **Bignall v. North Idaho College**, 538 F.2d 243 (9th Cir. 1976); **Klein v. Board of Higher Education of the City of New York**, 434 F.Supp. 1113 (S.D. N.Y. 1977); **Jiminez v. Almodovar**, 650 F.2d 363 (1st Cir. 1981).

From all of the foregoing, this is one area where AAUP policy is clearly more protective of faculty interests than administrative interests. If an institution decides to adopt AAUP policy in this area, it should do so knowing that many institutions reserve the right to terminate for extraordinary budgetary reasons that would fall short of the “survival of the institution” standard expressed in the explicating AAUP regulations. Even use of the term “fiscal exigency” in your tenure policy, given its origin and history

as an AAUP policy term, at least arguably adopts by reference the ancillary regulations defining the term.

Examples of reservation of the right to terminate for extraordinary budget reasons short of the “survival of the institution” standard include:

“Layoff may take place in the following circumstances: (a) When Western deems it prudent and appropriate to curtail, modify or eliminate programs, services, offerings or courses of instruction....” [Collective Bargaining Agreement between Western Michigan University and AAUP chapter]

“... the Board may layoff or terminate a tenured faculty member, or layoff or terminate a probationary faculty member prior to the end of his or her appointment, in the event of a financial emergency...” “...the chancellor of each institution or designee may layoff a member of the academic staff holding an indefinite appointment, or may layoff a member of the academic staff holding either a fixed term or probationary appointment prior to the end of the appointment period, when such action is deemed necessary due to budget or program decision requiring program discontinuance, curtailment, modification, or redirection” [Wisconsin System Administrative Rules]

The tenure policy should provide appropriate process for termination in this context, consisting of at least notice to the faculty member that termination is required for budgetary reasons, collegial participation in procedural matters, and appropriate notice. For some representative cases defining the scope of what is required at public institutions as a matter of law, see the cases cited earlier in this section starting with Levitt, as well as Brenna v. Southern Colorado State College, 589 F.2d 475 (10<sup>th</sup> Cir. 1978) and Texas Faculty Ass’n v. University of Texas at Dallas, 946 F.2d 379 (5th Cir. 1991).

For a more detailed analysis of this the reduction-in-force aspects vis-a-vis tenure, *see Practical Considerations for Effecting Legally Defensible Reductions in Force* [a NACUA paper by this author presented at the Chicago annual conference and the Savannah CLE in 1995]; and *Academic Program Closures* [a 1991 NACUA compendium edited by Ms. Corinne A. Houpt].

### **C. Termination Due to Program Discontinuance**

AAUP Policy on termination of appointments due to discontinuance of programs or departments not mandated by financial exigency appears in the Red Book as RIR 4(d), p. 24. This RIR includes a stipulation that such discontinuance will be “based essentially upon educational considerations, as determined primarily by the faculty as a whole or an

appropriate committee thereof.” It also provides that educational considerations do not include “cyclical or temporary variations in enrollment. They must reflect long range judgment that the educational mission of the institution as a whole will be enhanced by the discontinuance.”

This is another clear area where AAUP Policy is divergent from the discretion reserved by many governing boards, and the same advice as given in the preceding section pertains. If your institution chooses to adopt AAUP policy in this area, it should do so at least knowing that the policy includes regulations including stipulations that determinations in this area will be made “primarily by the faculty.”

An example of a policy on program discontinuance drafted more from the perspective of protecting administrative interests follows:

“Release of tenured faculty members, or release of non-tenured faculty members prior the end of the appointment period may occur when determined to be necessary due to budgetary or programmatic considerations requiring program discontinuance, curtailment, modification, or redirection” [Arizona Board of Regents Policy; *see also*, the Western Michigan University and University of Wisconsin System policies quoted in the preceding Section].

The Arizona, WMU, and Wisconsin System policies, while including broad reservation of rights, contain detailed procedures for appropriate collegial consultation, and procedural protections. The remarks regarding due process in the preceding section also apply to terminations of tenure for programmatic reasons.

#### **D. Termination Due to Medical Disability**

A sample policy regarding termination due to medical disability appears in the collective bargaining agreement between Western Michigan University and its AAUP Chapter, as follows:

“28. §6 TERMINATION FOR DISABILITY. A faculty member may be terminated by Western whenever he/she is unable for a period of two consecutive academic years, by reason of a health disability, to perform satisfactorily, with or without reasonable accommodation, the essential functions of the position for which they were employed or the essential functions of a vacant position for which they are qualified and eligible pursuant to the terms of the collective bargaining agreement. During this two-year period, Western will consider reassignment and retraining before making a decision to terminate the employee.

28. §6.1 Before a faculty member can be so terminated, he/she must be notified of the action proposed, supplied with a general summary of the evidence of the disability, and offered an opportunity to consult with the administrative officer who proposed to terminate for such a reason. A copy of such notification and general summary shall be sent to the Chapter at that time.

28. §6.2 If, after such consultation, the disability is disputed by the faculty member, he/she shall be given an opportunity to respond fully with all relevant evidence concerning the issue of disability. The faculty member shall have the option of assistance by another faculty member and/or by legal counsel.

28. §6.3 Following consultation and response, and consideration of any first health care provider opinions supplied by the bargaining unit member, if a dispute exists as to whether the bargaining unit member is disabled, Western may require, at the expense of Western, that the bargaining unit member obtain the opinion of a second health care provider, designated or approved by Western.

28. §6.4 In any case where the second opinion so obtained differs from the first opinion originally offered by the bargaining unit member in support of his/her position that he/she is not disabled, then Western may require, at the expense of Western, that the bargaining unit member obtain the opinion of a third health care provider jointly approved by Western and the Chapter. The opinion of the third health care provider shall state whether or not the bargaining unit member is disabled under the standard outlined above, and the opinion shall be final and binding on Western, the Chapter, and the bargaining unit member, and shall not be subject to the grievance procedure.”

Concerns regarding the impact of the Americans with Disabilities Act should be addressed in your policy on this topic, as well as due process concerns as previously discussed.

#### **E. Termination Due to Voluntary Relinquishment or Retirement**

An individual is obviously free to terminate or release tenure rights voluntarily. The two most obvious examples are voluntary resignation or retirement. Much has been written on tenure and the uncapping of the retirement age that is beyond the scope of this treatment. However, in evaluating your policy, there are some AAUP policies which are helpful to review, including one on *Faculty Tenure and the End of Mandatory Retirement*

[Red Book, p. 102] and a *Statement of Principles on Academic Retirement and Insurance Plans* [Red Book, p. 275].

A tenure policy should at least somewhere provide that tenure is held except for retirement and resignation. The definition of tenure section would be an appropriate place. One example of a simple consideration of these matters follows:

**“Expiration of Tenure.**

Tenure status shall expire upon retirement of the faculty member. Tenure status shall also expire upon the event of permanent physical or mental disability of a faculty member, as established by appropriate medical authority, to continue to perform assigned duties.

**Relinquishment of Tenure**

A faculty member shall relinquish or waive the right to tenure upon resignation from the institution, or upon willful failure to report for service at the designated date of the beginning of any academic term, which shall be deemed to a resignation unless, in the opinion of the President, the faculty member has shown good cause for such failure. Tenure shall not be relinquished during periods of approved leaves of absences, or during periods of service in administrative positions at the institution.” [Memphis State University]

**F. Practical Pointer**

Never confuse the concepts of performance deficiency (e.g., conduct issues leading to potential discipline or dismissal for cause) with legitimate reasons for termination unrelated to performance (e.g., termination for budgetary or programmatic reasons).

**IX. PEER REVIEW CONFIDENTIALITY**

A. Tension regarding public university open record statutes.

B. In **EEOC v. University of Pennsylvania**, 493 U.S. 182 (1990), the U.S. Supreme Court supported the EEOC’s position in its holding that neither the common law privilege nor the First Amendment right of academic freedom protects peer review materials from disclosure.

**X. DISTINGUISH BETWEEN TERMINATION OF A TENURED APPOINTMENT, NON-RENEWAL OF A PROBATIONARY APPOINTMENT, AND TERMINATION OF A PROBATIONARY APPOINTMENT PRIOR TO THE END OF ITS TERM**

Due process does not apply to non-renewal of a term appointment, part-time, or adjunct faculty at the expiration of the term commitment to such faculty. Due process may apply to discipline or dismissal of such faculty prior to the expiration of the term commitment. Again, it is critical to strictly follow any written policies regarding discipline or dismissal for performance problems. Because of fairness concerns related to the circumstance that a large percentage of instruction can be delivered by such faculty, and to the circumstance that such faculty sometimes are “reappointed” for many years, many institutions are developing better-defined policies regarding the evaluation and retention of such faculty.

Some policies do not take care when using the word “termination” to clearly distinguish between the very different circumstances (and procedural rights which attach) represented by the termination of a tenured appointment, the non-renewal of a probationary tenure-track appointment, and the termination of a probationary appointment during its term. One example of a policy which painstakingly makes the distinction between termination and non-renewal of a probationary tenure track appointment is contained in the contract between Western Michigan University and AAUP Chapter, which reads as follows:

“17. §11.2 *Non-Renewal of Continuing Probationary Tenure-Track Appointments.* The circumstances under which a continuing probationary tenure-track appointment may be non-renewed at the expiration of any year-to-year term of such appointment are: (a) unsatisfactory performance in professional competence at the time of a first year review, if required by Western; or unsatisfactory performance in professional competence and/or professional recognition at the time of the second year or subsequent review; or (b) failure to make satisfactory progress toward tenure in the period between two or more reviews by not remedying noted serious deficiencies, so that meeting professional standards for tenure awarded by ~ the end of the probationary appointment is not likely. Where such an appointment is not renewed in these circumstances, then written notice of non-renewal (or *pro rata* pay in lieu of notice) shall be given by the provost according to the following schedule:

17. §11.3 *Termination of Continuing Probationary Tenure-Track Appointments.* The circumstances under which a continuing probationary

tenure-track appointment may be terminated at any time during its course are: (a) failure to achieve the terminal degree in a timely manner as stipulated by the terms of the appointment, provided, however, that at the discretion of the provost, the stipulated period may be extended for good cause due to extenuating circumstances beyond the control of the faculty member; (b) dismissal for cause; (c) disability, Article 28, Accommodation for Disability; (d) layoff; or (3) resignation. Except for terminal notice due to layoff, which is governed by the notice provisions of Article 25, Layoff and Recall, termination for any of these reasons shall be effective as of the date Western's final decision is given to the faculty member."

## **XI. DISTINGUISH TENURED APPOINTMENTS FROM NON-TENURED APPOINTMENTS**

Tenure track faculty members are characterized by a series of probationary term appointments, which can be terminated prior to the achievement of tenure after various term intervals. Due process does not apply to non-renewal of a tenure track appointment as a matter of law. Due process, as a matter of policy, may apply to non-renewals. Due process generally does apply to the dismissal or discipline for cause of a tenure track faculty member because of performance problems, prior to the expiration of any probationary term.

As noted above, due process, as a matter of law or policy, generally applies prior to any termination or discipline of tenured faculty for performance related problems. In addition to complying with due process standards (summarized above), the tenure policy and any other policies in any handbook or other writing regarding discipline or dismissal for performance problems must be scrupulously followed.

Because of the often radically different procedural and job security rights which attach to a tenured appointment, it is very important that a policy clearly distinguish tenured appointments from non-tenured appointments. Many faculty handbooks are written in a way that does not make clear that certain policies only apply to tenured appointments, and vice-versa.

One example of a careful distinction is contained in the University of New Mexico Faculty Handbook. Tenure-track faculty titles are explicitly separated from non-tenure track faculty titles, and the employment status of each appointment is carefully distinguished.

## **XII. PROVISION FOR “RETREAT RIGHTS”**

Many policies appropriately reserve the option for certain administrators, who had tenure at the institution before they were administrators, or who were awarded tenure as part of their initial hire as an administrator, to return to the faculty on the conclusion of their administrative appointment. Since this can be a politically sensitive subject, this subject is better treated by way of pre-determined policy, rather than being faced with an ad hoc decision of what or how to do it. One example:

“Faculty who are appointed to administrative positions do not have tenured status with respect to those positions, the salary of the position, the term (AY/FY) of contract, or any other provisions or perquisites of that administrative position. In the event any of the foregoing individuals have tenured status in an academic position, and are removed or resign from an administrative position, but wish to remain employed at the institution, they will be employed under the same conditions and contractual terms as other tenured faculty.” [Montana State University Regents Policy]

### **“Retreat Rights from Administrative Appointments**

A tenurable faculty member who is given an administrative appointment retains her or his academic title, and if tenure, the right to return to her or his faculty position.” [Montana State University Faculty Handbook]

## **XIII. STOPPING THE TENURE CLOCK**

Rather than dealing with the subject on a case-by-case basis, which can lead to potential arguments of discriminatory or unfair treatment, many policies cover the subject of “stopping the tenure clock.” One example of a well drafted provision is contained in the *Faculty Policies and Procedures* document in force at the University of Wisconsin-Madison, Chapter 7.04, subparagraph H, which can be found at [www.wisc.edu](http://www.wisc.edu).

## **XIV. MARSHALLING ALL SOURCES OF THE TENURE POLICY**

In an early section of the tenure policy, if there are other governing elements to tenure at your institution, they should all be marshaled and referenced in the policy. Other sources could include board by-laws, or a collective bargaining agreement. The tenure policy should specify that all sources of the tenure policy be incorporated by reference in a faculty member’s initial appointment letter, so as to provide appropriate notice to the faculty member and remove any argument that the faculty member was unaware of some governing aspect.

## **XV. STATEMENT ON COLLEGIALITY**

Given that tenure can be a lifetime appointment, and that professional relations with one's colleagues are a legitimate factor upon which employment decisions are sometimes made, a university could consider a separate statement on collegiality in its tenure policy. An example of a well-articulated statement would be:

“In appraising a candidate's collegiality, department members should keep in mind that the successful candidate for tenure will assume what may be an appointment of 30 years or more in the department. Collegiality should not be confused with sociability or likability. Collegiality is a professional, not personal, criterion relating to the performance of a faculty member's duties within a department. The requirement that a candidate demonstrate collegiality does not license tenured faculty to expect conformity to their views. Concerns relevant to collegiality include the following: Are the candidate's professional abilities and relationships with colleagues compatible with the departmental mission and with its long term-goals? Has the candidate exhibited an ability and willingness to engage in shared academic and administrative tasks that a departmental group must often perform and to participate with some measure of reason and knowledge in discussions germane to departmental policies and programs? Does the candidate maintain high standards of professional integrity?”

Collegiality can best be evaluated at the departmental level. Concerns respecting collegiality should be shared with the candidate as soon as they arise; they should certainly be addressed in the yearly review and the third year review. Faculty members should recognize that their judgment of a candidate's collegiality will carry weight with the Promotion and Tenure Committee.” [Auburn University]

## **XVI. DURATION OF THE PROBATIONARY PERIOD AND THE TENURED APPOINTMENT**

If an institution allows for prior credit towards the probationary period before tenure can be awarded, this policy should be spelled out in the tenure policy.

Some commentators have suggested as a way of dealing with the impact of the uncapping of mandatory retirement, or with post-tenure review concerns, that institutions consider alternatives to the traditionally unlimited period of lifetime tenure. The concept of a very long tenure term (such as 30 or 35 years) as a way to address the elimination of mandatory retirement gives rise to concerns that it will be viewed as a subterfuge to avoid the purposes of the Age Discrimination in Employment Act provisions prohibiting mandatory retirement.

## **XVII. CONSIDERATION OF NON-TRADITIONAL ALTERNATIVES**

*Facing Change: Building the Faculty of the Future*, a thoughtful 1999 report co-sponsored by AASCU, AACC, ACE, AGB, and the state systems of California (California State University), Florida, New York, Maryland, Minnesota, Pennsylvania, and West Virginia, contains several recommendations for re-examining traditional tenure policies. For example:

“Recent literature has explored new patterns of employment, including simple renewable term contracts, continuing contracts with a guaranteed severance period upon termination, rolling contracts similar to those given to athletic coaches, and voluntary nontenured status accompanied by higher salary (trading the tenure “policy value”), as well as fixed term tenure followed by a series of term contracts.” (p. 11).

“Locus of tenure is a variable that institutions may wish to rethink in light of efforts to increase flexibility. At many institutions, tenure is located in the academic department or equivalent unit - a concept which protects the integrity of specific academic programs but which can result in inflexibility for both faculty members and the institution. Institutions should establish locus of tenure upon hiring any tenure-track professor. There is a wide variation in practice, and varied loci of tenure within a single institution may be desirable. For example, tenure may be placed in more broadly defined service areas that may include more than a single curricular area or department. Institutions may benefit from faculty development opportunities made available to faculty whose programs face reduction. Retraining in related areas may recharge faculty member and inspire program development in new areas ...” (p. 12).

The report contains an excellent bibliography and reference to sample policies. It can be accessed at [www.aascu.org](http://www.aascu.org).

## **XVIII. POST TENURE REVIEW PROVISIONS**

If a post tenure review provision is adopted, it obviously should be incorporated into the tenure policy. For a very good analysis and summary of various kinds of post tenure review systems, *see Facing Change: Building the Faculty of the Future*, pps. 40-41.

**XIX. PRIMARY CAUSES OF INSTITUTIONAL OR PERSONAL LIABILITY OR FACULTY UNREST RELATED TO ADDRESSING PERFORMANCE PROBLEMS OF TENURED FACULTY**

- A. An institution's failure to scrupulously follow its own written policies.
- B. Arbitrary or capricious treatment or treatment that is legitimately perceived as unfair.
- C. Unlawful discriminatory treatment of individuals in categories protected by state law, federal law, or university policy.

**XX. THE MINIMAL STANDARDS FOR FAIR PRACTICE IN ADDRESSING PERCEIVED PERFORMANCE DEFICIENCIES**

- A. Informal notice of the deficiency.
- B. Informal opportunity to correct the perceived deficiency.
- C. Formal notice of deficiency.
- D. Formal notice of suggested plan for correcting the deficiency.
- E. Important note: Some conduct need not be addressed by progressive notice or discipline, including plagiarism, egregious sexual harassment, felonies related to the workplace, etc. Some circumstances can justify immediate discipline or discharge, after notice, an explanation of the basis for the action, and an opportunity for the faculty member to be heard.
- F. Give fair warning, where applicable, of intended consequences for failure to address performance deficiency.
- G. Scrupulously follow your policies and practices, including due process where applicable, in establishing the deficiency and taking action because of the deficiency.
- H. Before formal action is taken, an objective finding of the deficiency should be documented.

**XXI. CONCLUSION**

A tenure policy is intertwined with an institution's history, culture, mission, and collegial relationship with its faculty. However, from a legal perspective, it is at its core

an employment contract between the university and a faculty member. Accordingly, and particularly in such critical areas as retention of ultimate decisional authority, termination for cause, and separation due to financial or programmatic reasons, legal consequences flow from the manner in which that contract is drafted. The above considerations are intended to aid legal counsel and other university administrators in at least evaluating the extent to which a particular policy addresses legitimate interests of the university in these areas.

**APPENDIX:  
FOR FURTHER READING**

The American Association of University Professors, **POLICY DOCUMENTS AND REPORTS** (Ninth Edition, 2001)

“Facing Change: Building the Faculty of the Future” (1999) [Joint Report co-sponsored by AASCU, AACC, ACE, AGB, and the state systems of Florida, New York, Maryland, Minnesota, Pennsylvania and West Virginia, and the California State University system]

“Good Practice in Tenure Evaluation: Advice for Department Chairs, Senior Faculty and Academic Administrators”, Ann H. Franke [Joint Report from ACE, AAUP, and United Educators Insurance]

“Tenure: Current Perspectives and Challenges,” Donna R. Euben, General Counsel, AAUP [Vermont Conference Outline, October 2002]

*Recent National Association of College and University Attorneys [NACUA] Conference Outlines:*

“Introduction to Tenure, Due Process, Just Cause, and the Discipline and Dismissal of University Employees,” Thomas P. Hustoles and Charles A. Duerr (October 1998)

“Faculty/Tenure Issues,” Steven G. Olswang (October 1998)

“Some Considerations When Preparing a Tenure Denial Case for Trial,” John J. Pelrano (November 1999)

“Preparing for and Presenting at a Promotion or Tenure Denial Arbitration: Some Practice Advice,” Thomas P. Hustoles and Kevin M. McCarthy (November 1999)

“Auditing a Tenure Policy from the Perspective of the University Administration,” Thomas P. Hustoles (June 2000)

“Administration of Tenure Policies,” Martha Hartle Munsch and Joshua David Verdi (June 2000)

“Governance, Tenure and Promotion, and Faculty Employment Policies -- Some Basic Advice for Drafting, Interpretation, and Application,” Thomas P. Hustoles (October 2001)

“College and University Faculty: Academic Freedom and Tenure,” Steven G. Olswang (October 2001)

“The ABC’s of Training for Academic Administrators,” Ann H. Franke (October 2001)

“Tenure Policies and Process: Who Gets Tenure; Dealing with Those Who Don’t,” Lori E. Fox (March 2002)

“Effectively Lawyering Faculty Disciplinary Proceedings,” Susan Smith (March 2002)

“Tenure Evaluation Policies and Processes: Advancing Institutional Interests While Creating the Appearance and Fact of Fairness,” Felix J. Springer and Kenneth W. Gage (March 2002)

“Getting Off on the Right Foot: The Beginning of the Tenure Process,” Jeffery L. Graves (March 2002)

“Faculty Misconduct, Discipline, and Dismissal,” Ann H. Franke (March 2002)

***Articles:***

Gilmore, “Student Ratings as a Factor in Faculty Employment Decisions and Periodic Review,” 10 *Journal of College and University Law* [JCUL] 557 (1983-1984)

Lovain, “Grounds for Dismissing Postsecondary Faculty for Cause,” 10 *JCUL* 419 (1983-1984)

Lee, “Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII,” 9 *JCUL* 279 (1982-1983)

Brown and Kurland, “Academic Tenure and Academic Freedom,” 53 *Law and Contemporary Problems*, Number 3 (1990)

Fishman, "Tenure and its Discontents: The Worst Form of Employment Relationship Save All of the Others," 21 Pace Law Review 159 (2000)

Hustoles and Duerr, "Dealing With Employee Misconduct On and Off Duty: A Practical Framework," College and University Personnel Association Journal, Winter 1994 Vol. 45, No. 4.

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