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Workshop: Negotiations 103 CLE Credit - AAUP Faculty and Management Rights in Higher Education Collective Bargaining

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By Ernst Benjamin

Presentation at the 25th Annual Meeting of the Center for the Study of Collective Bargaining in Higher Education and the Profession on April 14, 1997.

My discussion of "faculty and management rights," like that of most previous Baruch panelists, will explore how collective bargaining affects faculty performance of duties ordinarily deemed managerial.¹ Chandler and Julius, etc. That is, I will not try to delineate specific faculty and management rights but rather will consider what rights faculty share with administration, why such "shared governance" is beneficial, and how collective bargaining affects the faculty role in academic governance.

I begin and end with a consideration of Don Wollett's assertion, at the first Baruch Conference, that "faculties cannot expect self-governance through academic senates or similar vehicles to survive--at least as institutions of significance, if they opt for collective bargaining." This assertion contains two explicit arguments: first, that faculty engage in self-government and, second, that if faculty chose to bargain they will lose self-government. This formulation prepares the way for his basic argument: that collective bargaining is preferable because it will replace a romantic attachment" to "medieval" practices with "20th Century" personnel administration.²

I do not cite this argument simply to disagree with it. I do agree with my panel colleague, Caesar Naples, who took the opportunity of the Second Conference to rebut Don Wollett's argument and speak eloquently for the merits of continued faculty participation in governance.³ And, I have long agreed with Caesar's more recent argument, along with that of Irwin Polishook and many others, that collective bargaining and shared-governance can and often do co-exist successfully.⁴ Nonetheless, Wollett's arguments bear further consideration.

Wollett's choice of the term "self-government" rather than shared-governance is instructive. It enabled him to ask how the faculty can justify a system in which they are accountable only to themselves and to ignore the actual integration of managerial activities through shared governance.⁵ By exaggerating the extent of faculty managerial authority, and indeed often conflating it with supervisory responsibility, Wollett heightened the apparent contradiction between shared-governance and collective bargaining. But, if his argument does not convince us, it or similar arguments did, as he suggested, convince the courts.

In the independent sector, where Yeshiva prevails, faculty governance and collective bargaining do not co-exist. Justice Powell's finding that faculty are managers because "their power in academic matters is absolute" is no less unequivocal than Wollett's attribution of self-governance though it is more clearly premised on managerial rather than supervisory authority.⁶ I do not object so much to the exaggeration, as to the fact that the Court's failure to explore the nature of "shared governance" led to the finding that "the faculty's professional interests . . . can not be separated from those of the institution."

The consequent required "alignment of interest" between the faculty and administration not only provides the foundation of the finding that faculty are managerial employees but is in the words of Justice Brennan "antithetical to the whole concept of academic freedom."⁷ What the majority of the Court, and Don Wollett, failed to understand is that the effective management of the university requires, indeed thrives, on a constructive tension between faculty and administration. This is why Howard Mumford Jones stated, in a classic defense of tenure in 1958, that "the code of academic freedom put forth by the American Association of University Professors (AAUP) . . . postulates an opposition between the administration of the American University and the true professional interests of the faculty members."⁸

The notion that a public enterprise might depend on the protected independent judgment of its employees, as we shall further consider below, finds little more support in state than federal court. But the issue is differently presented because, where state legislation has required the courts to respect faculty bargaining, the courts have not been able to deny, but only to circumscribe, that right by limiting the scope of bargaining. At the 1979 Conference, Jim Begin asked the interesting question whether "professionals, based on their special expertise, have a greater role in negotiations in determining policy than non-professionals."⁹ Ironically, although Don Wollett discussed a draft California code which deprived the

faculty of any managerial role, California is the one state where Begin found a code which provides explicit protection of faculty participation in managerial decision-making; though bargaining on these issues may occur only if the faculty senate defers to bargaining or the administration refuses to respect the senate.

The courts in New Jersey, Begin notes, have prohibited bargaining all matters ordinarily deemed permissive in the private sector on the theory that such bargaining would constitute an improper delegation of public power not to the faculty per se, but to a process independent of direct public control. Why a collective agreement is less subject to public control than any other contract, I leave to the imaginative reasoning of the New Jersey courts. More commonplace juridical reasoning generally finds that the issue is one of balancing the extent to which an issue is one of employment interests as against academic or public policy concerns.

Where, as Begin noted, the Michigan courts found that any issue which is "minimally a condition of employment," is mandatorily negotiable, the Minnesota Courts subsequently determined that only narrowly construed terms and conditions of employment are mandatory. The Michigan Court required negotiation of a teaching evaluation form, despite its prior approval by an academic senate as well as the administration, because the form could affect personnel decisions. The Minnesota Court found on the other hand, that only the procedural steps but not the standards for such decisions were mandatorily negotiable since the standards shaped public policy.¹⁰ Other states fall in between. None of these save New Jersey, to my knowledge, forbids bargaining on matters related to academic policy and, of course, all permit bargaining on the employment impact of academic decisions.

When faculty bargain matters of academic policy, bargaining is rarely over substance but almost always limited to establishing and assuring the procedures for faculty participation and respect for faculty judgment in other venues. For example, the academic policies of concern to the Yeshiva Court, including program, curricula, admissions, grading, instructional format, and graduation standards, as well as specific faculty status decisions, are rarely if ever, bargained. The faculty role in such matters is however, as Barbara Lee has documented, frequently presupposed or ensured in collective agreements.¹¹ Accordingly, limits on the scope of bargaining are only material to the extent that they prevent, as in New Jersey, or hinder, as in Minnesota, the faculty agent from negotiating guarantees of faculty participation through shared governance structures.

The threat to the faculty role in shared governance rarely proceeds from bargaining, but rather from the denial of the opportunity to bargain or limitations on the scope of bargaining which prevent the faculty from protecting participation in governance. Despite the Court's professed respect for shared authority in the Yeshiva decision, Justice O'Connor writing for the majority in the Knight case observed that though

there is a strong, if not universal or uniform, tradition of faculty participation in school governance, and there are numerous policy arguments to support such participation. . . . this court has never recognized a constitutional right of faculty to participate in policy-making in academic institutions.¹²

Similarly, I am not aware of any state court which, in limiting the scope of faculty bargaining over managerial or public policy, has found protections for the traditional faculty role in such matters.

Consequently, despite the judicially created conflict between faculty bargaining and faculty governance, the legal right to bargain is the principle source of the faculty's collective power, in many public colleges and universities, to ensure continued and effective participation in shared governance. This participation is increasingly threatened by the application to universities of the autocratic management practices Don Wollett identifies with the "20th Century of personnel administration." Many seek to complete these developments which have led Justice Brennan to observe that "education has become a 'big business'" and that "the task of running the university enterprise has been transferred from the faculty to an autonomous administration which faces the same pressures to cut costs and increase efficiencies that impact any large industrial organization."¹³

The effective governance of universities requires a creative counterpoint between the faculty's emphasis on professional academic priorities and the administration's representation of financial limitations and the comprehensive mission of the institution. Historically, the faculty achieved

their influence by virtue of their market power in periods of university expansion and sustained this influence through practices created and institutionalized at such times. But only a small proportion of faculty at a small proportion of research universities, those most highly regarded as measured by the ability to command the highest price, achieve and maintain their authority based on their individual market power.¹⁴

In the absence of collective bargaining, the collective academic priorities of most faculties and their institutions lack foundation in market power or in law. Absent such a foundation, the academic and public policy matters the courts profess to protect depend increasingly on the decisions of institutional managers who are necessarily more responsive to considerations of cost, politics and administrative control than faculty. This is not to say that administrators are indifferent to academic priorities, anymore than to say that faculty are indifferent to cost or community needs, but clearly the emphasis and order of priorities vary.

Even in industry the notion that undivided management is more effective is subject to increasing question. In a review of recent management studies, Roger Alcaly finds numerous empirical studies to support the proposition that replacing unilateral management and job insecurity with employee participation in decision-making and job security improves the performance of their firms.¹⁵ In universities, the need for the faculty's professional judgment should be evident in Justice Powell's summary of the faculty's managerial responsibilities:

"They decide what courses will be offered, when they will be scheduled and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained and graduated."¹⁶

If one recognizes that these are, in fact, decisions in which faculty and administrators share, one may reasonably argue about the appropriate relative weight to give to administrative and faculty judgment with respect to each issue. But those who believe that we would do well to shift the balance substantially toward administrative management should reflect on the structural imperatives that would lead to further substitution of economic and political for academic priorities in curricula, admissions, grading, and faculty appointments.¹⁷

Advocates of managerial administration who assure us that they will safeguard academic priorities despite the political and economic constraints are similar to advocates for alternatives to tenure who assure us they will protect academic freedom. Indeed, one need not be a conspiracy theorist to note that the PEW Foundation has promoted and funded both efforts. On the one hand, it is in the PEW funded Policy Perspectives that we find the proposal that: "Changes in how the faculty regard themselves and their institutions lie at the heart of the restructuring process. What faculty are being asked to do is return--in effect, to give back--a portion of their ability to define their own tasks and performance standards."¹⁸ On the other, the PEW funded AAHE New Pathways project seeks to organize the academic assault on tenure.¹⁹ To complete the linkage the President of AAHE recently resigned to become the higher education officer for PEW.

The linkage is not conspiratorial but practical. Tenure is the legal foundation of individual faculty rights. Without tenure, faculty will lack the autonomy to exercise professional judgment without fear of retaliation. Those who seek to impose their agendas on higher education through managerial domination need to eliminate tenure and are prepared to do so-- even at the cost of offering "higher salaries, more frequent sabbaticals, more desirable workloads, or some other valued trade-off."²⁰ Remember when the opponents of faculty bargaining opined that faculty unions might trade off tenure?--Unions didn't, anymore than they bargained away governance, so now AAHE proposes to buy off faculty one at a time in the name of "diversity."

Recent events in Minnesota perfectly illustrate the interconnection between tenure and governance, on the one hand, and governance and bargaining on the other. The Minnesota Regents set out to modify tenure. They set aside a compromise tenure reform proposal reluctantly put forward by the faculty senate and unilaterally proposed an alternative drafted with the assistance of a leader of the AAHE "New Pathways" project. This proposal not only sought to circumscribe tenure by increasing the oversight of tenured faculty and easing the procedures and standards for discipline and discharge. To facilitate "re-engineering" it also removed the faculty senate from significant involvement in program reorganization and required that

the faculty maintain "a proper attitude of industry and cooperation with others within and without the university community."²¹

When the faculty senate, and even statements by the nationally prominent faculty, proved an insufficient obstacle to the Trustee's proposed actions the faculty petitioned for collective bargaining. Only when the Trustees retreated and signaled that they would adopt drop their more egregious proposals and the aptly named "Regent's Professors" withdrew their support, did the impetus to bargain diminish to the extent that the bargaining proponents lost by less than one percent of votes cast. The serious threat of collective bargaining successfully protected both shared governance and tenure where the nationally prominent faculty could not.


The University of Minnesota is the sort of leading research university in which academic values have heretofore been defended, as Seymour Lipset noted, by the market power of such leading faculty.²² But public research universities have lost the support required to maintain their market position. One indicator of the declining market power of faculty in public research universities is the diminished salaries for compared to private research universities: in 1975-76 nominal average salaries for full professors were \$24,150 in public universities and \$26,540 in private universities, by 1995-96 the respective averages were \$69,750 to \$88,050 and the proportion had declined from 91% to 79%.²³ Although public sector academic management seeks to protect its most prestigious individual faculty members by increasing internal differentiation, most public research university faculty are losing economic ground and individual influence.

Consequently, we have reached a situation in which the attack on faculty tenure and authority, particularly in the public sector where the fiscal squeeze generates recurrent public demands to subordinate academic to economic priorities, has provoked the faculty of a leading public research university to think the unthinkable. In these circumstances, it is not not only not true, as Don Wollett proclaimed, that collective bargaining displaces faculty governance, but it is likely that only collective bargaining can preserve effective faculty governance in the public universities. The market may protect those few faculty, and students, who find a place in the small number of elite private research universities (and selective liberal arts colleges). Collective bargaining has become the essential legal and political foundation for faculty participation in shared governance in publically supported universities. Collective bargaining is, therefore, the last, best defense of the academic priorities that determine the quality of education for the vast majority of students in the face of the perpetual fiscal crisis which continues to erode the quality of publically assured educational opportunity.

Notes:

1. Margaret Chandler (with Connie Chiang, "Management Rights Issues in Collective Bargaining in Higher Education," *Proceedings, First Annual Conference, 1973*, National Center for the Study of Collective Bargaining in Higher Education, pp. 58-66) did explore the propensity of most higher education contracts to include management rights clauses of varying strength and outline some of the areas in which faculty sought to participate in managerial decisions. With Dan Julius, she further assessed these issues in subsequent conferences as well. ("By Whose Right? Management Rights and Governance in the Unionized Institution," *Proceedings . . .*, 1985, NCSCBHE, pp. 89-117; and "Rights Issues: A Scramble for Power," *Proceedings . . .*, 1980, pp. 58-64). A more recent analysis has been prepared by Gary Rhoades, "Managed Professionals: Unionized Faculty and Restructuring Academic Labor," unpublished MS, 1996. [Back to text.](#)
2. Donald H. Wollett, "Historical Development of Collective Bargaining and Current Extent," *Proceedings, . . .*, 1973, pp. 29, 37, 40. [Back to text.](#)
3. Caesar Naples, "Collegiality and Collective Bargaining: They Belong Together," *Proceedings . . .*, 1973, pp. 51-55. [Back to text.](#)
4. Caesar Naples, "Governance: Senates and Unions," and Irwin H. Polishook, "The debate Over faculty Unions and Governance," *Proceedings . . .*, 1989, pp. 10-27. [Back to text.](#)
5. Wollett, *op. cit.*, p. 33. [Back to text.](#)
6. NLRB v. Yeshiva University, 444 U.S. 672 (1980), 103 LRRM 2533. [Back to text.](#)
7. *Ibid.*, 2537. [Back to text.](#)

8. Howard Mumford Jones, "The American Concept of Academic Freedom," in *Academic Freedom and Tenure*, ed. by Louis Joughin, the University of Wisconsin Press, 1969, p. 240. [Back to text.](#)
9. James P. Begin, "Scope of Bargaining: Implications for Traditional Faculty Governance" *Proceedings* . . ., April 1979, p. 51. [Back to text.](#)
10. *Ibid.*, p. 54; University Education Association v. Regents of the University of Minnesota, 353 NW2d 534, 122LLRM 2569 (Minn., 1984). [Back to text.](#)
11. Barbara A. Lee, "Contractually Protected Senates at Four-Year Colleges," *Proceedings* . . ., April, 1981, pp. 56-61. [Back to text.](#)
12. Minnesota Board of Community Colleges v. Leon W. Knight, 465 U.S.271 (1984), 1115 LRRM 2785. [Back to text.](#)
13. Yeshiva, 103 LRRM 2538. [Back to text.](#)
14. Seymour Martin Lipset, "The Academic As Political Man or Women," *Proceedings* . . ., April, 1989, pp. 7-8. [Back to text.](#)
15. Roger E. Alcaly, "Reinventing the Corporation," *New York Review of Books*, Vol. XLIV, No. 6 (April 10, 1997), pp. 38-45. [Back to text.](#)
16. Yeshiva, 103 LRRM 2532. [Back to text.](#)
17. I have described the consequences of increasing managerial control at other Baruch presentations and will not repeat them here. See: "Unionization and Academic Excellence," *Proceedings* . . ., 1985, pp. 23-27; and "A Faculty Response to the Fiscal Crisis: From Defense to Offense," in *Higher Education Under Fire*, ed. by Michael Berube and Cary Nelson, Routledge, 1995, pp. 52-72. [Back to text.](#)
18. *Policy Perspectives*, PEW Higher Education Research Program, February 1993, Vol. 4, No. 4; p. 9A. [Back to text.](#)
19. "New Pathways: Faculty Careers and Employment in the 21st Century," American Association for Higher Education," March, 1997. [Back to text.](#)
20. *Ibid.*, p. 5. [Back to text.](#)
21. "Minnesota Board of Regents Policy on Faculty Tenure," Section 10.2, Draft of September 5, 1996. [Back to text.](#)
22. Lipset, *op. cit.* [Back to text.](#)
23. *AAUP Reports On the Economic Status of the Profession* for 1975-76 and 1995-96. [Back to text.](#)

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