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Campus Labor Law Issues Today

John B. Wolf

Editor's Note: The issue of Academic Freedom remains critical on our nation's campuses. The issue raised frequently transcends traditional collective bargaining concerns and involves constitutional law and First Amendment protections. In June of this year, John Wolf presented this paper at the annual conference of the National Association of College and University Attorneys. The emphasis of this presentation is on public rather than private sector case law. We believe that it is of significance and have reprinted it below. The views represented in this paper are those of Mr. Wolf and not necessarily those of Rutgers University or NCSCBHEP. This Newsletter is an edited version. For the full text, contact Mr. Wolf.

I. INTRODUCTION

Collective bargaining in higher education requires college and university attorneys to recognize, first, that fundamental concepts of academia may be regarded by the law differently in a collective bargaining context than in a non-bargaining context and, second, that traditional relationships between institutions and their faculty are not the same in a collective bargaining context as they were prior to collective bargaining. Even if traditional relationships have not been supplanted by labor-management relationships, they are seen in a new light and may not be as vibrant as in the past.

This paper is limited to three basic areas of higher education — academic freedom, collegiality and tenure — and how collective bargaining impacts on them. It does not address the many areas of labor relations that seemed to the author to have no special significance in the higher education context (for example, agency shop fees, duty of fair representation, grievance and interest arbitration, strikes and unit determination). There are some forty states, plus the District of Columbia, with public employee bargaining statutes. Some states have more than one statute. Not all of these states, however, have statutes covering faculty members in higher education. Each statutory scheme is different in substance and procedure. Further, state constitutional provisions may impact on collective bargaining of faculty members. This outline is not intended to summarize the collective bargaining rights of faculty members nationwide nor does it purport to describe thoroughly any state's approach to the topics covered herein. Rather, this material is intended to give college and university attorneys a feel for the challenges and problems collective bargaining has brought to academia.

The discussion of **ACADEMIC FREEDOM** in Section II is not limited to the collective bargaining context. Rather, the discussion attempts to set forth the many facets of academic freedom in an effort to contrast these with the treatment of academic freedom in a labor relations context. Similarly, the discussion of **COLLEGIALITY** in Section III contrasts traditional notions of collegiality with its significance in the labor relations field. The final section on **TENURE** is divided into two parts, JOB SECURITY and ACADEMIC JUDGMENTS. The part on JOB SECURITY deals primarily with the negotiability of criteria and procedures for promotion or tenure. The part on ACADEMIC JUDGMENTS attempts to illustrate the problems that arise in collective bargaining relationships where collective bargaining agents and individual faculty members challenge particular tenure or promotion decisions.

II. ACADEMIC FREEDOM

A. WHAT IS IT?

When one examines the cases in which academic freedom has arisen, it is apparent that the concept means different things to different people. The traditional statement of what we generally regard as academic freedom is found in the AAUP's "1940 Statement of Principles and 1970 Interpretive Comments." The AAUP's "Statement of the Association's Council: Freedom and Responsibility" also addresses academic freedom issues.

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B. ACADEMIC FREEDOM AND THE UNITED STATES CONSTITUTION

Though not mentioned in the Constitution, academic freedom has been said to be a special noncern of the First Amendment. See, e.g., Sweezy v. New Hampshire, 354 U.S. 234 (1957) (state cannot inquire into content of professor's lectures or political associations).

With respect to academic freedom the Court in Sweezy said:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. 354 U.S. at 250.

However, the most frequently quoted passage from Sweezy in judical discussions of academic freedom is from Justice Frankfurter's concurring opinion. In his concurrence, Justice Frankfurter quoted from a statement of faculty members at South African universities:

> ...It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. 354 U.S. at 263.

See, also, Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589 (1967) (state statute which forbade continued employment of "subversive" teachers unconstitutionally chilled exercise of First Amendment rights). The majority, citing Sweezy, called attention to academic freedom as follows:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 385 U.S. at 603.

C. ACADEMIC FREEDOM AND STATE CONSTITUTIONS

Kahn v. Superior Court (Davies), 188 Cal.App.3d 752, 233 Cal.Rptr. 662 (Cal.App. 6 Dist. 1987) (in case alleging defamation and tortious interference with advantageous business relationship, California's constitutional right of privacy protected member of peer review committee from being deposed and disclosing his vote and comments made during committee's deliberations where there was no compelling public need for disclosure).

Stanford University v. Superior Court (Dong), 119 Cal.App.3d 516, 174 Cal.Rptr. 160 (Cal.App. 1 Dist. 1981) (in case alleging, inter alia, defamation, California's constitutional right of privacy protected from disclosure defendant-colleague's personnel file, communications involving defendant-colleague, and communications involving committee investigations of plaintiff where there was no compelling need for disclosure; plaintiff's personnel file was discoverable subject to redaction of letters of reference).

See, also, Missoulian v. Board of Regents of Higher Education, 675 P.2d 962 (Mont. 1984) (after balancing Montana constitutional right to privacy against constitutional and statutory right to know, Court held that performance evaluations of university presidents which were obtained upon promise of confidentiality were not subject to disclosure).

D. THE ACADEMIC FREEDOM PRIVILEGE IN FEDERAL DISCRIMINATION CASES

The approach to the academic freedom privilege issue in the federal courts is not uniform. EEOC v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985), cert. denied, 476 US 1163 (1986) (affirmed a District Court order enforcing a subpoena that required the production of confidential peer review materials and remanded the case to the District Court for the purpose of considering the issue of redaction). 850 F.2d 969 (3d Cir. 1988) (The University's petition for rehearing en banc was denied on August 11, 1988. The University's Petition for a Writ on Certiorari is pending before the Supreme Court).

EEOC v. University of Notre Dame du Lac, 715 F.2d 331 (7th Cir. 1983) (qualified academic freedom privilege recognized protecting academic institutions against disclosure of names and identities of peer review participants).

In re Dinnan, 661 F.2d 426 (5th Cir. 1981), cert. denied, sub nom. Dinnan v. Blauberg, 457 US 1106 (1982) (academic freedom privilege rejected where member of Promotion Review Committee refused to

disclose vote on plaintiff's application).

Gray v. Board of Higher Education of the City of New York, 692 F.2d 901 (2d Cir. 1982) (recognizes First Amendment basis of academic freedom and adopts AAUP's test of balancing need for confidentiality of peer review votes and deliberations against need of civil rights plaintiff for disclosure; plaintiff's need for disclosure prevailed).

Currently pending in two different courts is a dispute between the EEOC and the University of Pennsylvania involving EEOC access to confidential peer review materials. Pursuant to its investigation of charges of sex and national origin discrimination arising out of the University's failure to tenure the charging party, the EEOC issued a subpoena duces tecum seeking confidential peer review materials. The University commenced suit in the United States District Court for the District of Columbia seeking to quash the subpoena. The parties presently are engaged in discovery in this action. The Trustees of the University of Pennsylvania v. Equal Employment Opportunity Commission, Civil Action No. 87-1199. Approximately six weeks after the University commenced suit in the District of Columbia, the EEOC filed an action in the United States District Court for the Eastern District of Pennsylvania to enforce its subpoena. The University moved to dismiss the action. The Court denied the University's motion to dismiss and enforced the EEOC subpoena. The Third Circuit stayed the order enforcing the subpoena and the matter presently is on appeal before that court. Oral argument was held in March 1988. Equal Employment Opportunity Commission v. University of Pennsylvania, No. 87-1547.

See "A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments," 67 Academe 27 (1981); see, also, "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," AAUP Policy Documents and Reports, Washington, D.C. (1984), p. 14-20.

E. THE ACADEMIC FREEDOM PRIVILEGE IN STATE COURTS

The law is not well developed in the state courts. The following state cases have addressed the academic freedom privilege.

Dixon v. Rutgers, 110 N.J. 432, 541 A.2d 1046 (1988) (declined to create a qulaified academic freedom privilege to protect the confidentiality of academic peer review materials from discovery in the context of an anti-discrimination suit. However, the Court did set forth threshold requirements that a plaintiff must meet in order to discover confidential peer review materials: first, that the discrimination charge is valid and, second, that the material sought is relevant. If disclosure is to be compelled, trial courts are to take measures to minimize the intrusion into confidentiality, including the issuance of protective orders. The Court also set forth a procedure to be followed in redacting names and other identifying features of confidential materials).

Cockrell v. Middlebury College, 536 A.2d 547 (Vt. 1987) (premature to determine whether qualified privilege ought to apply to protect confidential peer review material from disclosure).

Desimone v. Skidmore College, 517 NYS 2d 881 (Co. Ct. 1987) (in breach of contract case, peer review committee member not required to answer questions concerning committee's deliberations).

Smith v. State of North Dakota, 389 N.W.2d 808 (N.D. 1986) (in nonrenewal case alleging breach of contract, trial court did not abuse its discretion in issuing protective order prohibiting depositions of members of Standing Committee on Faculty Rights because proposed depositions would have "chilling effect" on committee's ability to advise president).

F. WHOSE FREEDOM IS IT?

Individual faculty members invoke academic freedom to support their ability to speak, teach, research and publish as they wish and, when engaged in peer review evaluations, to avoid disclosing votes, deliberations and evaluations. Institutions invoke academic freedom to avoid having to disclose confidential peer review materials and other personnel documents to civil rights and discrimination plaintiffs (and investigatory agencies). Institutions also rely upon notions of academic freedom when defending academic judgments in cases brought by faculty members who allege improper discipline, nonrenewal or termination and who may have invoked academic freedom in support of their claims. Accordingly, there exists potential conflict or tension between an individual's academic freedom and an institution's academic freedom where a personnel action has been taken based upon speech, conduct or the performance of the faculty member which he/she believes is protected by academic freedom. This conflict has been addressed in the following recent First Amendment cases.

Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986). Midland College reacted to student complaints of a faculty member's persistent use of profanity in the classroom, first, by warning him and, then, by terminating his employment. The court found that the instructor's speech was not protected by the First Amendment because it did not address matters of public concern.

Weinstein v. University of Illinois, 628 F.Supp. 862 (N.D. Ill. 1986), affirmed 811 F.2d 1091 (7th Cir. 1987). Upon expiration of a probationary period, plaintiff was not granted tenure. He alleged that his First Amendment right to academic freedom had been violated. Specifically, he claimed, first, that a colleague had misappropriated data that he had collected, and second, that termination of his employment interrupted the progress of his scholarly activity, thereby interfering with his academic freedom. The misappropriation claim was rejected on the basis of the University's copyright policy. The

second academic freedom theory was rejected because plaintiff's termination was not based upon the content of his speech or activity.

Carley v. Arizona Board of Regents, 153 Ariz. 461, 737 P.2d 1099 (Ariz. App. 1987). When plaintiff's teaching contract was not renewed, he claimed that his teaching methods were protected by academic freedom and the First Amendment. He claimed that use of critical student evaluations challenged his academic freedom and could not be used as the primary basis for failing to renew his contract. The court distinguished between teaching methods and the content of a faculty member's speech. It concluded that the institution did not violate plaintiff's academic freedom by not renewing his contract on account of his ineffective teaching.

Lovelace v. Southeastern Massachusetts University, 793 F.2d 419 (1st Cir. 1986) (plaintiff claimed academic freedom and First Amendment violations when his contract was not renewed because he refused to change his grading standards and policies; the court held that faculty member's grading policies were not constitutionally protected).

Riggin v. Board of Trustees of Ball State University, 489 N.E.2d 616 (Ind. App. 1 Dist. 1986). Trans. denied, 499 N.E.2d 243 (Ind. 1986). Plaintiff's employment was terminated because of failure to cover course material, expenditure of excessive amounts of class time on non-pertinent matters, and failure to carry out responsibilities. The court said:

> The cases hold that school and University administrators have a right to control curriculum, course content and methods of instruction, and that a teacher has no right to override the wishes and judgments of his superiors and fellow faculty members in that regard... Academic freedom is not a license for uncontrolled expressions at variance with established curriculum content. Academic freedom does not encompass matters inherently destructive of the proper functions of the institution... 489 N.E.2d at 629-630 (citations omitted).

State Board for Community Colleges and Occupational Education v. Olsen, 687 P.2d 429 (Colo. 1984). The court, citing Keyishian, determined that although a teacher in a public educational institution may have "...constitutionally protected First Amendment interest in choosing a particular pedagogical method for presenting the idea-content of a course..." the court held that a faculty advisor to a student newspaper did not have a constitutionally protected interest in the newspaper's publication as an instructional instrument.

Institutions also rely upon academic freedom to determine and implement educational policy without having to engage in collective negotiations. This is discussed in Section II. G. below. Note that while Sweezy and Keyishian involved First Amendment rights of individual faculty members, the passage from Sweezy most often quoted appears to address not the individual's, but the institution's academic freedom. In the collective bargaining context, this is an important distinction.

G. ACADEMIC FREEDOM AND COLLECTIVE BARGAINING

The rights of institutions which are discussed in the above, and other First Amendment cases remain intact in the collective bargaining context. Moreover, notwithstanding the strong tradition of shared institutional governance in higher education (see Section III. B. below), to the extent academic freedom refers to matters that bear predominantly on issues of educational policy, institutions may not be compelled to submit these matters to collective negotiations.

In Rutgers University, 9 NJPER 661 (par. 14286 PERC 1983), the collectively negotiated agreement between the faculty union and the University incorporated by reference the AAUP's "Statement on Professional Ethics" (see Section III. A. below) as well as the following language in University Regulations under the heading "Academic Freedom":

> Since the very nature of a university and its value to society depend upon the free pursuit and dissemination of knowledge and free artistic expression, every member of the faculty of this University is expected, in the classroom and studio, in research and professional publication, freely to discuss subjects with which he is competent to deal, to pursue inquiry therein, and to present and endeavor to maintain his opinion and conclusions relevant thereto. In expressing those ideas which seem to him justified by the facts, he is expected to maintain standards of sound scholarship and competent teaching.

A grievance arose concerning the Rutgers University Press' failure to publish a faculty member's report. The faculty member's exclusive representative for collective negotiations argued that the University had delegated to the faculty the power to exercise and enforce academic freedom, that the contract provided for binding arbitration of grievances involving academic freedom, and that the scope of negotiations at the University should be broader than at other public educational institutions. The University argued that principles of academic freedom are at the heart of educational policy and were, therefore, not negotiable or arbitrable. The Commission held that guarantees of academic freedom predominantly implicated matters of fundamental educational policy which could not be submitted to collective negotiations or to arbitration.

The AAUP's position is that collective bargaining is an effective instrument for protecting

academic freedom and that local chapters should seek to obtain through collective negotiations "explicit guarantees of academic freedom". "Statement on Collective Bargaining (1984)", AAUP Policy Documents and Reports, Washington, D.C. (1984), p. 125-126.

H. OTHER CONTEXTS IN WHICH ACADEMIC FREEDOM ISSUES MAY ARISE

1. Defamation

Baker v. Lafayette College, 532 A.2d 399 (Pa. 1987) (department chair's evaluations of faculty member whose contract was not renewed were opinion and, therefore, were not defamatory).

Bellivau v. Rerick, 504 A.2d 1360 (R.I. 1986) (department chair's evaluation of faculty member who was not promoted was opinion and, therefore, was not defamatory; further, even if statement and evaluation was one of fact, it was protected by a qualified privilege because chair had a duty to comment frankly on professor's performance).

2. Wrongful Discharge Litigation

Sola v. Lafayette College, 804 F.2d 40 (3d Cir. 1986) (Court rejected plaintiff's claim that tenure quota violated public policy by threatening principles of academic freedom).

3. "Whistleblowing" Litigation

Hamer v. Brown, 831 F.2d 1398 (8th Cir. 1987) (while faculty member's cooperation with committee investigating improprieties at institution was protected by First Amendment, it was not motivating factor in termination of his contract).

4. Common Law or Statutory Rights of Access to Files

Pennsylvania State University v. Department of Labor and Industry, 536 A.2d 852 (Pa. Cmwlth. 1988) (peer review evaluations were "performance evaluations" rather than "letters of reference", and were, therefore, available for inspection by employee under state statute permitting employees access to their personnel files).

5. Duty of Employer in Collective Bargaining Relationship to Provide Information to Union

The employer's duty to supply information requested by a union in the public sector follows private sector precedent. See, e.g., Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, 527 A.2d 1097 (Pa. Cmwlth. 1987) (public employer has statutory obligation to provide union with information pertaining to grievant's evaluation, grievances of non-unit employees and work schedules to enable it to determine whether to pursue grievance). The duty to furnish information requires that an employer furnish relevant information both during contract negotiations and during the term of the agreement.

Information may be protected from disclosure if it is confidential; see, New Jersey Department of Higher Education, 13 NJPER 254 (par. 18104 H. Ex.), aff'd 13 NJPER 504 (par. 18187 PERC 1987) (unfair practice complaint dismissed where Department of Higher Education refused to provide union with correspondence between the Chancellor of Higher Education and Salary Adjustment Committee where union had been orally informed of the substance of the correspondence).

But, see, California State University, 9 NJPER pa. 18051 (CA. PERB 2/9/87) (University violated duty to meet and confer in good faith by refusing to provide faculty union with copy of comparative wage survey in unredacted form).

See, also, Illinois Educational Labor Relations Board v. Homer Community Consolidated School District No. 208, 160 Ill.App.3d 730, 112 Ill.Dec. 802, 514 N.E.2d 465 (Ill.App. 4 Dist. 1987) (in discovery dispute in case alleging refusal to bargain in good faith, court relies on EEOC v. Notre Dame, supra, and adopts qualified privilege as to disclosure of documents and information from closed bargaining strategy sessions).

See, also, Temple University, 18 PPER 293 (par. 18102 H. Ex. 1987) (no unfair practice committed where University failed to provide promotion and tenure files which were sought by union in preparation for a grievance where parties had contractual provision requiring University to release information "in exceptional circumstances"; issue of contractual violation was for arbitrator).

III. COLLEGIALITY

A. OBLIGATION OF THE PROFESSORIATE

The AAUP's Statement on Professional Ethics sets forth a faculty member's responsibility as a colleague. See, "Statement on Professional Ethics (1966)", AAUP Policy Documents and Reports, Washington, D.C. (1984), p. 134.

The courts have acknowledged the ethical obligations of the professoriate as set forth in the AAUP's "Statement on Professional Ethics", Korf v. Ball State University, 726 F.2d 1222, 1227 (7th Cir. 1984), and have held that a faculty member's ability to work effectively with colleagues and administrators is an appropriate criterion in faculty evaluations. Gottlieb v. Tulane, 809 F.2d 278, 283 (5th Cir. 1987); Zahorik v. Cornell University, 729 F.2d 85, 92-93 (2d Cir. 1984); EEOC v. Notre Dame, supra, 715 F.2d at 336; Clark v. Whiting, 607 F.2d 634, 639 (4th Cir. 1979); Lewis v. Chicago State College, 299 F.Supp. 1357, 1359 (N.D. Ill. 1969).

B. INSTITUTIONAL GOVERNANCE

1. Traditional View

The AAUP's "Joint Statement on Government of Colleges and Universities" sets forth, in some detail, the role of the faculty in institutional governance. See, "Joint Statement on Government of Colleges and Universities (1966)", AAUP Policy Documents and Reports, Washington, D.C. (1984), p. 105-110.

The Supreme Court recognized in NLRB v. Yeshiva University, 444 U.S. 672 (1980) that shared governance and collegial decision-making characterized many universities. In another case, the court has declined to grant constitutional status to faculty participation in institutional governance. See Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984) ("meet and confer" provision of Minnesota Public Employment Labor Relations Act did not unconstitutionally deny First Amendment rights to faculty members who were not members of exclusive representative). The court stated:

> Even assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting, they do not require government to allow teachers employed by it to participate in institutional policymaking. Faculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution. 465 U.S. at 288.

2. Collective Bargaining

Collegiality in the collective bargaining context refers to the practice or system of delegating to faculty employees certain functions generally performed by management. Middlesex County College Board of Trustees, 4 NJPER 47 (par. 4023 PERC, 1977); Rutgers, The State University, 2 NJPER 13 (PERC, 1976). This practice is not protected by the First Amendment (see Knight, supra).

However, see Vermont State Colleges Faculty Federation v. Vermont State Colleges, 138 Vt. 451, 418 A.2d 34 (1980) (contract proposal on "Faculty Governance" was subject of bargaining where proposal sought to give faculty a voice, but not a vote, in academic policy decisions). But, see In re Faculty Association of Adirondack Community College and Adirondack Community College, 16 NYPERB 4557 (H.Off. 1983) (contract proposal entitled "Faculty Organization and Governance" that permitted bargaining unit representatives to make recommendations in areas of educational policy, employee selection and promotion was a managerial prerogative because employer determines policy and who recommends policy).

See, also, New Jersey Institute of Technology, 9 NJPER 51 (par. 14025 PERC 1982) (grievance concerning disbanding of department chairperson search committee composed of faculty members held not arbitrable because employer not required to negotiate over proposal that personnel recommendations come from a certain body); New Jersey Institute of Technology, 7 NJPER 461 (par. 12203 PERC 1981) (grievance challenging appointment of special committee by President to review candidates for promotion was not arbitrable because employer cannot be restricted in who it chooses to review qualifications of candidates for promotion).

The AAUP's position is that local chapters should seek, through collective negotiations, to maintain and enhance faculty participation in institutional governance. "Statement on Collective Bargaining (1984)", AAUP Policy Documents and Reports, Washington, D.C. (1984), p. 125-126.

Contract proposals which have sought to affirm the mutual responsibility of faculty and administration for the quality of education have been held to be non-negotiable. In re Onondaga Community College Federation of Teachers, AFT, Local 1845 and Onondaga Community College, 11 NYPERB par. 3045 (1978); In re Orange County Community College Faculty Association and Orange County Community College and County of Orange, 9 NYPERB par. 3068 (1976).

An argument in opposition to faculty participation in management decisions was made in Edinboro University, 18 PPER 623 (par. 18225 Pa.LRB 1987) by a faculty member who alleged he was not promoted because he refrained from engaging in union activity. He alleged that the University committed an unfair labor practice where it encouraged union membership and the union controlled the college-wide promotion committee. He alleged that promotion decisions should not be made with faculy participation, but should be made exclusively by the institution. The complaint was dismissed because there was no allegation that union members were promoted while non-union members were not and also because the dissenting faculty member identified no protected activity under the state labor statute. The Board noted that it was consistent with the collegial atmosphere of a university for the institution to delegate to faculty members the authority to make promotion decisions.

A good discussion of collegiality in the context of collective bargaining appears in In the Matter of Board of Higher Education of the City of New York and Professional Staff Congress/CUNY, 7 NYPERB 3042 (par. 3028 1974). The New York PERB determined that a contract proposal prohibiting students from participating in academic committees concerned with faculty reappointment, promotion and tenure was not negotiable. The Professional Staff Congress argued that the traditional role of faculty in evaluating their peers was necessary to the stability and academic soundness of the college. The Board distinguished between the roles of faculty members as employees and as policy makers:

> The right of the faculty to negotiate over terms and conditions of employment does not enlarge or

> contract the traditional prerogatives of collegiality; neither does it subsume them. These prerogaties may continue to be exercised through the traditional channels of academic committees and faculty senates and may be altered in the same manner as was available prior to the Taylor Law. We note with approval the observation that, "faculty must continue to manage, even if that is an anomaly. They will, in a sense, be on both sides of the bargaining table. We would qualify this observation, however; faculty may be on both sides of the table, but not the union." 7 NYPERB at 3045-3046 (footnote omitted).

Though this decision pre-dates NLRB v. Yeshiva University, 444 U.S. 672 (1980), this statement of the dual role of faculty (i.e., as employees and as policy makers) remains operative in the public sector.

Note, however, the action pending at the University of Pittsburgh (a public institution). In 1984, a Petition for Representation was filed by the faculty. The faculty and the University entered into a lengthy stipulation of facts concerning faculty participation in institutional governance. The parties agreed, further, that the faculty at the University shared in its governance in a fashion comparable to those faculties found to be managerial under the principles of Yeshiva, supra. The issue submitted to the Pennsylvania Labor Relations Board was whether such sharing in the University's governance conferred managerial status upon the faculty so as to exclude them from coverage under Pennsylvania's Public Employee Relations Act. A hearing examiner concluded that the tenured, tenure-stream and full-time nontenure-stream faculty were managerial employees, but that full-time and part-time librarians, and nontenure-stream part-time faculty were not managerial employees. University of Pittsburgh, 18 PPER 216 (par. 18077 H. Ex. 1987). An appeal is expected upon completion of the election process involving those employees found to be entitled to coverage under the Act.

IV. TENURE

A. JOB SECURITY

Academic tenure is the ultimate in job security. In the labor relations context, there are many difficult issues surrounding tenure. For example, are the scope and prerogatives of tenure proper subjects of collective negotiations? Are tenure quotas negotiable? Are issues of who is to acquire tenure, why one acquires tenure and how one acquires tenure proper subjects of collective negotiations? The following cases are relevant to these issues.

Kansas Board of Regents v. Pittsburgh State University Chapter of Kansas-National Education Association, 233 Kan. 801, 667 P.2d 306 (1983) (length of probationary period is mandatorily negotiable; criteria, procedures and methods for identifying candidates for promotion are mandatorily negotiable, but determination that promotion is in order is management prerogative); compare State of New Jersey (Stockton State College), 2 NJPER 147 (PERC 1976) (length of probationary period is akin to tenure ratio in its educational implications and, therefore, is not a mandatory subject for negotiations).

Association of New Jersey State College Faculties, Inc. v. Dungan, 64 N.J. 338, 316 A.2d 425 (1974) (tenure guidelines concerning proportion of tenured faculty members and criteria for the awarding of tenure were not mandatorily negotiable).

New Jersey Institute of Technology, 9 NJPER 33 (par. 14016 PERC 1982), affirmed Appellate Division, unpublished opinion April 12, 1984 (granting tenure or multiple-year contracts to faculty where necessary to recruit them was not mandatorily negotiable).

University Education Association v. Regents of the University of Minnesota, 353 N.W.2d 534 (Minn. 1984) (selection of substantive criteria for tenure or promotion are matters of inherent managerial policy because they are intertwined with educational policies and objectives of university); compare Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 446 A.2d 347 (1982) (policy statement establishing criteria for promotion and tenure was proper subject for collective bargaining); see, also, Aplington Community School District v. Iowa Public Employment Relations Board, 392 N.W.2d 495 (Iowa 1986) (criteria for teacher evaluations are mandatory subjects of bargaining). See Rutgers, The State University, 9 NJPER 276 (par. 14127 PERC 1983) (proposals concerning job security, RIF's and re-employment of coadjutant faculty would restrict matching qualifications of individual instructor to course and would interfere with assignments and were, therefore, not negotiable).

Rutgers, The State University, 2 NJPER 13 (PERC, 1976) (while tenure quotas and limits are not negotiable, scope of tenure — whether tenure is university-wide or less than university-wide — is negotiable).

B. ACADEMIC JUDGMENTS

Some of the most difficult questions in labor relations involve challenges to promotion or tenure decisions in higher education. Typically, those challenging promotion or tenure decisions will allege that evaluation procedures were not followed, that incorrect criteria were applied (or that correct criteria were misapplied) or that the decision was made arbitrarily or in bad faith. Those defending promotion or tenure decisions typically assert that the challenger merely disagrees with the academic judgment made and that the right to make an may not be delegated or bargained away.

When challenged, those who make academic

judgments may become indignant, impatient and defensive, in part, because they are called upon to defend their judgments not before their colleagues but before lay tribunals in adversarial, rather than collegial, settings. The following is just a sampling of cases that bear on the making of academic judgments.

Regents of the University of Minnesota, supra (objective and fair application of tenure or promotion criteria to specific individuals are negotiable terms and conditions of employment; accordingly, tenure and promotion procedural process is negotiable).

Lewandoski v. Vermont State College, 457 A.2d 1384 (Vt. 1983) (college president had significant leeway in interpretation of tenure criteria and his judgment will not be disturbed unless arbitrary).

Board of Trustees of Junior College District No. 508, Cook County v. Cook County College Teachers' Union, Local 1600, 87 Ill.App.3d 246, 42 Ill.Dec. 317, 408 N.E.2d 1026 (Ill.App. 1 Dist. 1980) (dispute involving determination of qualifications of faculty members concerns nondelegable responsibility of Board and, therefore, is not arbitrable); compare Board of Trustees of Community Colleges District 508 v. Cook County College Teachers' Union, Local 1600 (Degerstrom), 139 Ill.App.3d 617, 94 Ill.Dec. 79, 487 N.E.2d 956 (Ill.App. 1 Dist. 1985) (dispute involving determination of qualifications of faculty member was arbitrable because issue to be decided by arbitrator was not grievant's qualifications, but whether Board's decision was made for another purpose under the guise of making a qualification decision); see, also, New Jersey Institute of Technology, 9 NJPER 215 (par. 14101 PERC 1983) (grievance challenging denial of tenure was arbitrable on issues of whether denial was, in fact, for academic reasons and, if denial was based on non-academic reasons, whether reasons were arbitrary and capricious).

University of Hawaii Professional Assembly v. University of Hawaii, 66 Haw. 207, 659 P.2d 717 (1983) (University may establish criteria for tenure; but arbitrator may substitute his judgment for that of University where he finds that judgment is arbitrary or that University did not apply criteria).

University of Hawaii Professional Assembly, ex rel. Daeufer v. University of Hawaii, 66 Haw. 214, 659 P.2d 720 (1983) (arbitrator may grant tenure or promotion if it is found that University official's decision is arbitrary or capricious; however, arbitrator's award of tenure vacated because, although University officials found to have acted arbitrarily, record did not reflect whether University President — who had ultimate authority to grant tenure on behalf of Board of Regents — merely "rubberstamped" arbitrary recommendations below or whether President arrived at independent and impartial decision).

University of Hawaii v. University of Hawaii Professional Assembly, ex rel. Wiederholt, 66 Haw. 228, 659 P.2d 729 (1983) (arbitrator may not order that special tenure review committee be constituted to determine whether to tenure grievant).

Snitow v. Rutgers, 103 N.J. 116, 510 A.2d 1118 (1986) (Court, noting academic freedom concerns and statutory requirement that collectively negotiated grievance procedure be used, held that it was improper for lower court to appoint ad hoc committee in place of peer group to make tenure recommendation after grievance committee found one peer biased).

University of Hawaii v. University of Hawaii Professional Assembly, ex rel. Watanabe, 66 Haw. 232, 659 P.2d 732 (1983) (arbitrator's award of promotion vacated where arbitrator ignored criteria in faculty handbook that candidate have Ph.D.).

Eyre v. Big Bend Community College, 36 Wash.App. 154, 672 P.2d 1270 (1983) (arbitrator permitted to reinstate faculty member where evaluation procedure is violated and where tenure committee's negative recommendation was not supported by substantial, probative evidence).

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