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Panel: Shared Governance and Collective Bargaining: The Line Between "Protecting Shared Governance Through Collective Bargaining: Models Used by AAUP Chapters"

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Protecting Shared Governance Through Collective Bargaining: Models Used by AAUP Chapters¹

Michael Mauer²

Understanding Redbook Policies and their Connection to Collective Bargaining

For over five decades following its founding in 1915, the American Association of University Professors (AAUP) carried out its mission outside of the realm of collective bargaining. The organization formulated policy on a constantly evolving range of issues of concern to higher education, and worked to have those policies adopted by individual institutions and state public higher education systems. The mechanisms employed were a combination of: encouraging faculty to use their participation in shared governance to work towards policy adoption; interacting directly—including in the initial formulation of policy pronouncements and in joint endorsements—with organizations representing the interests of administrators and trustees; and carrying out visible “enforcement” activities (primarily investigations leading to censure and sanction.)

Beginning in the late 1960’s, the means by which AAUP policy was effectuated at the campus and system levels was expanded as faculty in large numbers began to acquire collective bargaining rights. At first, unionization was carried out under the auspices of the American Federation of Teachers and the National Education Association. After a good deal of internal deliberation, though, the AAUP abandoned its historical opposition to faculty bargaining and began organizing aggressively on both public and private sector campuses. Today, some 80 AAUP collective bargaining agreements serve to advance the interests of tenure-track and non-tenure-track faculty, both full-time and part-time, and of graduate student employees and academic professionals of various types. The institutions with active unionized chapters range from two-year schools to research universities.

AAUP’s turn to collective bargaining grew out of a more expansive view of unionization than is typical for American labor unions. The mission of the AAUP incorporates financial matters, as it does the purpose of unions generally: “to promote the economic well-being of faculty and other academic professionals.” But lying at the heart of AAUP’s 1973 formal endorsement of faculty collective bargaining was the belief that collective bargaining could be an

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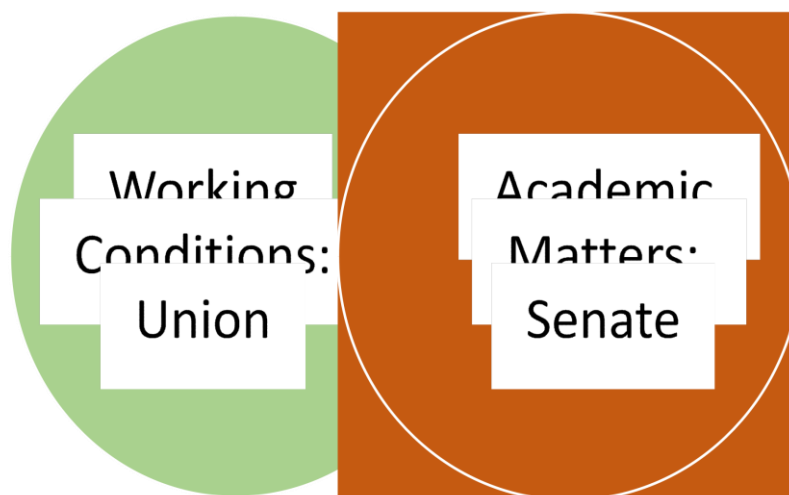
effective means of achieving the AAUP's other objectives, most notably "to protect academic freedom and to establish and strengthen institutions of faculty governance."

The key practical question arises, then, of how faculty can most effectively utilize collective bargaining in tandem with shared governance to translate AAUP policies into binding provisions of campus life. Some of the Redbook's (American Association of University Professors, 2015) content is more readily adaptable to contract language than other parts. This is because some AAUP pronouncements address the broad principles that should determine how institutions of higher education should conduct themselves. Other AAUP documents, though, (such as the Recommended Institutional Regulations on Academic Freedom and Tenure) are more easily translatable into binding contractual documents, since they are more direct in setting forth specific procedures that ought to be in place on each campus.

Dividing the Faculty Voice

The fundamental starting point is determining the division of responsibility between the senate and the union. Only once it is clear which body is responsible for which matters can union negotiators turn to the question of how to bargain helpful provisions into a collective bargaining agreement, and can senate leaders direct governance efforts to deal with such matters.

It's easy—deceptively so—to state in very broad strokes what the allocation of responsibilities is. It's always the case that some topics of concern to faculty are solely in the union's bailiwick and others under the jurisdiction of the senate. So, for example, it may be the case that salaries and benefits are completely within the purview of the union contract, while more purely academic matters, like course offerings, are handled exclusively by the senate.



But the typical arrangement would have the darker area of overlap be the largest, with each faculty body having some responsibility. So, for example, the faculty functioning through their

governance mechanisms might determine standards for promotion and tenure, while the faculty in their union capacity might establish the procedural aspects of the process, including applicable time frames and the functioning of appeal mechanisms.

What determines what lies where in this Venn diagram is partly up to the parties, but not entirely so. For starters, the legal environment in which negotiations take place is a significant determining factor. Those legal strictures vary significantly among public sector jurisdictions, and between the public and private sectors. Understanding the particulars is key to beginning to understand what the range of possible shared responsibilities might be between the senate and the union.

So the first question is to what extent the applicable bargaining law may limit the union's ability to bargain over professional topics. Specific aspects of matters concerning tenure and shared governance, for example, may be specified in state law or in implementing regulations, and thus beyond the reach of negotiations. But even if the particulars of such items may be, at the outset, off the collective bargaining table, creative negotiators have still found it possible to devise ways of building union protections into the faculty—administration relationship. (More on such strategies below.)

In general, the greater the extent to which issues at the bargaining table address professional concerns, as opposed to pure “bread and butter” matters, the greater the probable overlap between the functions of the faculty union and the senate. Precisely because there is so often considerable overlap—indeed, lack of clarity as to which body has “jurisdiction” over a particular issue—the greatest success occurs on campuses where the union and the senate have found a way to be in sync regarding how to handle matters of professional concern. As a matter of “offense”, if the two see eye-to-eye they can maximize the faculty’s ability to exert primacy in this decision making. As a matter of “defense”, a union’s position at the bargaining table will be weakened if resistance to its proposals comes not only from the administration but also from the faculty as “organized” through governance mechanisms. And the senate’s effectiveness will be hampered if the administration is given the opportunity to reject a senate’s urgings on the ground that “the union contract wouldn’t permit this.”

It behooves the union and the senate, then, to be active partners (and not just during the period of time when the union is at the bargaining table.)

- During the life of a collective bargaining agreement, the two faculty bodies should work hand in hand. This can be accomplished both on an individual level—by having union activists seek positions on the senate—and on an organizational level—such as having a “union report” as a standing item on the senate’s business meeting agenda, and providing the senate an equivalent forum at union meetings. A prerequisite for this is educating colleagues that an individual’s involvement in both governance and union

activities does not constitute a conflict of interest. Rather, it is an illustration that the responsibilities of a faculty member encompass a variety of professional tasks.

- In the run up to bargaining, as the union acquires information and formulates its bargaining agenda, an active dialog with senate leaders should be taking place. And draft union proposals should be reviewed by knowledgeable senate activists, to ensure that the draftsmanship accurately reflects the joint goals on issues of joint concern.
- During the bargaining process, the senate and the union should seek opportunities to make it clear to the administration that their goals are congruent. So the senate might adopt a resolution supporting the union's position at the bargaining table (or opposing the administration's position), or a senate leader might be invited by the union to speak at the table, in order to make clear the senate's position on proposals under discussion.

Relationship Between Collective Bargaining Agreements and Governance Documents

Negotiated contractual protections never stand alone. There are virtually always other applicable non-collectively bargained institutional rules that address policy matters, and thus consideration must be given to how to integrate the two. This certainly is the case with the topic of governance, since, by AAUP's lights, a healthy institution requires mutually dependent and complementary governance and collective bargaining activities.

Some argue that the contractual approach of dealing specifically with Redbook topics solely in the collective bargaining agreement has the advantage of being as direct as is possible, with no ambiguity about the reach of the contract. But other considerations, including how the lines of authority between the union and the senate are most logically drawn, impel a more nuanced approach.

One approach to dealing with these topics is simply to enshrine in the collective bargaining agreement existing institutional constitutions or bylaws, or a faculty or university senate's own rules or practices. This can be accomplished very comprehensively:

Article 2 The University Mission and Educational Philosophy. The AAUP-FA and the Administration...by the incorporation of the University Statutes into this Agreement...
(St. John's University)

Article 3. Term of Agreement. Further, this agreement, along with its companion document, the Faculty Handbook, will constitute the Master Agreement between FAC and the University and will supersede any previous regulations, faculty contracts, previous practices or policies.
(University of Scranton)

This approach provides indisputably strong protections. If this is the model used, however, then the degree of enforcement through the contract's grievance / arbitration mechanisms becomes key, of which more below.

Another related approach cedes authority over academic matters generally to the existing governance structure, but establishes contractual oversight or protection of these processes in some manner. So, for example, a collective bargaining agreement may specify that governance changes may not be made without the approval of the union:

Article 1 Recognition, 1.07. This Agreement and University Governance. During the term of this Agreement, the Administration will not alter the organizational structure and responsibilities of the University Senate of the Faculty Councils within the bargaining unit without the consent of the AAUP-FA.

(St. John's University)

To similar effect, some contract language permits governance bodies to change their functioning as they wish, including the scope of what matters they deal with, provided that doing so does not alter any terms of the contract.

Article 3. Faculty Statutes and Faculty Process Series, 3.3. Amendments to FS or FPS. During the term of this Agreement, no amendments to the FS or FPS or any University practice which would void, alter or in any way modify any provision of this Agreement will be enacted or effectuated without the consent of the AAUP.

(Hofstra University)

Article XIX Governance, 19.1.D. The parties to this Agreement recognize that the presently constituted organizations within the University, i.e., the Departments, the Faculty Senate, the full Faculty in session, which are composed, in whole or in part, of the faculty and may exercise all the rights and powers, and prerogatives that they have heretofore possessed, provided that the actions thereof may not directly or indirectly repeal, rescind, or otherwise modify the terms and conditions of this Agreement.

(Delaware State University)

Article 4: General Relationship Between the AAUP and the University, 4.3. Other Organizational Structures. The presently constituted organizations within the University, i.e. the University Senate or any other similar body composed in whole or in part of the faculty, will continue to function at the University, provided that the actions thereof may not directly or indirectly repeal, rescind, or otherwise modify the terms and conditions of this Agreement.

(Hofstra University)

Less effective are collective bargaining agreements that simply acknowledge the existence of other policies, without limiting them or providing any enforcement mechanism.

Article 27 Governance of the University, 27.2.6. The parties to this Agreement recognize the Faculty Senate and Student Senate, and the by-laws which govern their relationship with the University.

(University of Cincinnati)

Article VI – Governance, Section 6.1. The parties recognize and accept the By-Laws of the Lincoln University Faculty, as amended (“Faculty By-Laws”), and as such Faculty By-Laws may be further amended by the faculty and approved by the Trustees from time to time, as the legal instrument defining the role of the faculty in the governance of the University.

(Lincoln University)

Models for Incorporating Redbook policy

As discussed above, there’s a broad spectrum of topics of concern to faculty, with most being addressed in part in each of the available forums. Sometimes the breakdown is that procedural matters are covered by the collective bargaining agreement and substantive academic matters by senate rules. But often the mix is less clearly delineated, and thus careful thought has to be given to how best to tackle particular items of professional concern to faculty.

As a result of the abundance of “grey areas”, policy matters are dealt with in collective bargaining agreements in a number of different ways, some more direct than others. To appreciate the degree of protection, one must factor in both the extent to which the contract itself contains provisions that comport with Redbook policies, and the extent to which the contract supplements institutional policies found elsewhere.

In the case of academic freedom and governance in particular, explicit citations to the foundational AAUP Statements are often found in collective bargaining agreements. (This is the case in both AAUP chapter collective bargaining agreements and in those negotiated by other unions.)

It is highly advantageous for collective bargaining agreements to specifically cite AAUP policy statements for a number of reasons. These include that doing so incorporates by reference “case law” as it has been developed by the AAUP over the years, for example in censure and sanction cases. Specific references to our policies also permits the argument that the content of derivative AAUP policies, including any that are formulated over the life of the contract by AAUP at the national level, can be read into the contract.

This is one example of an explicit contractual citation to AAUP policy:

Article 2 The University Mission and Educational Philosophy, 2.02 b. (i) The parties hereby incorporate into this Agreement Part V of the 1966 Statement insofar as it is

applicable to the University and to the extent set forth below...

(St. John's University)

Less ideally, numerous collective bargaining agreements adopt verbiage that quite directly mirrors AAUP's. This is done without explicitly referencing the applicable AAUP policy.

Article 3. Shared Governance ,Section 1. The parties agree that it is desirable that the faculty have primary authority over choice of method of instruction; subject matter to be taught; academic standards for admitting students, and standards of student competence in a discipline. The University affirms that in these areas the power of supervision, review, and final decision lodged in the Board of Trustees of the University of Oregon will depart from the faculty judgment on these matters only in rare instances and for compelling reasons communicated to the faculty.

(University of Oregon, combined TT / NTT unit)

And somewhat less helpful still are contracts that deal with such policy matters by simply generally endorsing the general concept of shared governance. For example:

Article 10 Governance, Section 1. Board of Trustees. ...the parties agree that it is mutually desirable that the collegial system of shared academic governance be maintained and strengthened so that faculty will have a mechanism and procedures, independent of collective bargaining, for appropriate participation in the governance of the University.

(University of Akron, combined TT / NTT unit)

Issues Pertaining to Incorporation of Contingent Faculty

Increasingly, collective bargaining agreements address the role of contingent faculty in governance. Sometimes this takes the form of statements simply mandating a general role for NTT faculty in academic decision making:

Article XVII. Contract Units, Section 1.c. In addition to teaching assigned classes, employment as a Faculty member includes participation in curricular planning; attendance and participation in organizational and hiring committee meetings; attendance and participation in Faculty Senate meetings...

Section 1.d. Faculty members are also responsible for serving on at least one, but not more than two, school-wide committees per semester. Such committees include...the Faculty Senate...

(San Francisco Art Institute, combined TT / NTT unit)

Article 3. Shared Governance, Section 2. The parties agree that the faculty of each department or unit should have the opportunity to participate in the system of shared governance of that department or unit, according to policies initially developed and recommended by the faculty in accordance with Article 4 of this Agreement.

Article 4. Internal Governance Policies, Section 3. Policies for internal governance must include provisions...for the appropriate and equitable participation of both faculty in the Tenure Track and Tenured Professor classification and Career NTTF in governance and development of departmental or unit policies.

(University of Oregon, combined TT / NTT unit)

Sometimes the formulation used is a general exhortation for inclusiveness, tempered by a statement of deferral to the wishes of the governance bodies:

Article 7 Faculty Governance, 3. The parties recognize that the participation of all faculty in the institutional life of the University strengthens the institution, and therefore departments, schools and colleges shall be encouraged to incorporate part-time faculty colleagues into governance. However, bargaining unit members shall be eligible to be members of and participate, by voting or otherwise, in college, school or department meetings and governance only if, and so far as, authorized by the By-laws and other applicable guidelines of those colleges, schools or departments.

(University of Vermont, NTT unit)

Collective bargaining agreements deal substantively with the role of NTT faculty in a wide range of academic matters within the purview of governance bodies: professional development, content of job duties, promotion decisions, and so on. The specific ways in which these matters are dealt with varies greatly, and few general rules apply. But one common approach is the exclusion of contingent faculty from peer review processes. So, for example:

Article VI, Section 2. Governance, In those academic units or regional campuses that include FTNTT Faculty members in academic or regional campus governance, those FTNTT Faculty members shall not participate in any personnel decision regarding tenure-track faculty members, including but not limited to appointment, reappointment, tenure, [or] promotion...

(Rider University, combined TT / NTT bargaining unit)

That said, occasionally there are at least partial exceptions to such exclusion:

Article 29, Reappointment and Promotion of College Lecturers and Instructors, F.4, The tenured faculty of the academic unit shall constitute the NTT Evaluation Committee. If there are fewer than three tenured members in the academic unit...additional members may be non-tenured tenure-track faculty within the academic unit or Senior non-tenure track faculty within the academic unit...

(University of Akron, combined TT / NTT bargaining unit)

Finally, it is of note that the different circumstances of part-time / contingent faculty (who generally do not have a service component calculated into their workload) can be accommodated

contractually. This can be done either by providing a financial stipend or release time for governance participation:

Article 12, Department Committees, 3. The lecturer(s) who serves on a Committee will be paid \$250.00 per semester. Payment will be made with the final paycheck of the semester (Suffolk University, NTT bargaining unit)

Article 9, Teaching Loads, Assignments and Equivalencies, Section 7. Release Time for Faculty Senate President and FUSFAI President, The Chair of the Faculty Senate, the Senate's annual designee to all Tenure and Peer Review Committees, and the President of the Union or his/her designee shall accrue release time equivalency credit at the rate of one quarter (1/4th) of a Contract Unit (CU) of release time per semester served. (San Francisco Art Institute, combined TT / NTT bargaining unit)

Enforcement considerations

Ideally, a faculty collective bargaining agreement preserves full grievance and arbitration rights to challenge any actions that abridge whatever contractually-protected rights are enshrined in the collective bargaining agreement. And ideally, some would argue, this ability to challenge alleged contract breaches extends to matters of professional concern that are addressed in the contract.

Quite commonly Redbook-related topics are addressed in the collective bargaining agreement but the contract explicitly limits the degree to which such disputes can be dealt with by the grievance / arbitration procedure. Some contracts, for example, provide that though these topics are covered by the contract, they do not have the same status as other provisions in the agreement. So there may be an explicit statement that contract language dealing with academic freedom or governance is hortatory only, and entirely unenforceable through the contract's grievance procedure. Another version of limitations on enforcement is found in collective bargaining agreements that provide that specified contractual provisions may properly be the subject of a grievance, but are not arbitrable.

Commonly, though, contracts fashion a different middle ground on enforcement rights. This can take the form of a general exclusion of certain "matters involving academic judgment" or some such from the grievance / arbitration procedure, while permitting the challenge of "arbitrary or capricious" actions, or claims of discrimination, for example. Or contracts can restrict the remedial authority of an arbitrator. With such language, an award may not be capable of fully addressing any allegation of an infringement of academic freedom or other rights, even if a contract violation of such matters is found.

As one example of this middle ground on enforcement rights:

Article 2 The University Mission and Educational Philosophy, 2.02 b. (ii) The parties agree that all rights, powers and authority of the Administration which have not been abridged or

modified by the Agreement are retained by the Administration. The existence and right to exercise such powers and authority shall not be subject to the grievance-arbitration procedures set forth in this Agreement, but any claim of arbitrary, unreasonable or discriminatory exercise of such powers and authority relating to the terms and conditions of employment of the faculty shall be subject to such grievance-arbitration procedures.
(St. John's University)

To similar effect, a contract may limit the arbitrator's jurisdiction to allegations of procedural violations:

Article 12, Grievance Procedure, Section 9.3. The arbitrator shall not render an opinion as to whether a bargaining unit member should or should not be appointed, reappointed, terminated, laid off, or be granted tenure or promotion, but shall be limited in his/her jurisdiction on these matters to determining whether the contractual procedures have been satisfied / followed.

(Western Michigan University)

Quite commonly, however, a topic related to governance is addressed in the collective bargaining agreement, but disputes cannot be processed at all through the grievance / arbitration procedure:

Article 7, Faculty Governance, Section 3... departments, schools and colleges shall be encouraged to incorporate part-time faculty colleagues into governance...Neither a bargaining unit member nor the Union may file a grievance over the membership, participation and/or voting eligibility specifications set by a department, college, or school. Section 4. Neither a bargaining unit member nor the Union may file a grievance over the membership, participation and/or voting eligibility specifications set by the Faculty Senate.

(University of Vermont, part-time faculty unit)

Relatedly, collective bargaining agreements may preserve grievance and arbitration rights to challenge final decisions that abridge governance processes or substantive rights contained in the contract:

Article 10, Governance Section 5. With respect to 2, the BGSU-FA may utilize the Grievance and Arbitration Procedures Article in this Agreement to contest only the Board of Trustees' approval of: (1) an action by the Faculty Senate which violates this agreement; or (2) the removal of any of the roles of the Faculty Senate as set forth in Section 2.1, supra. [note: Section 2 is "Faculty Participation in University Governance]
(Bowling Green State University)

It is important to note that even in the absence of full grievability and/or arbitrability rights, there may be an alternative forum enshrined in the collective bargaining agreement for airing

professional concerns. So, for example, the contract may establish and defer to other bodies to resolve appeals concerning promotion or tenure:

Article 18, Promotion Policy and Procedures, 18.Section 6.10, Appeals: A faculty member has the right to appeal recommendations by the DPC [Department Promotion Committee], the chair, the dean, and the provost...Appeals to the DPC shall be in accordance with policies that shall be developed by the departments in accordance with Article 23, Faculty Participation in Department Governance. [see parallel provision in Article 17 regarding tenure decisions]

(Western Michigan University)

References

American Association of University Professors. (2015). *Policy Documents and Reports* (11th ed). Baltimore: Johns Hopkins University Press.