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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


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I do not cite this argument simply to disagree with it.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-government 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." 7

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."2 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."2 Interestingly, 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 though 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 tenure, 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 faulty 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 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 protection 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 publicly assured educational opportunity.

Notes:
7. Ibid., 2537. Back to text.


10. Ibid., p. 54; University Education Association v. Regents of the University of Minnesota, 353 NW2nd 534, 122LRRM 2569 (Minn., 1984). Back to text.


20. Ibid., p. 5. Back to text.


22. Lipset, op. cit. Back to text.