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Order of speeches for the Journal of the First Annual Conference of the National Center for the Study of Collective Bargaining in Higher Education.

Introduction

As of September 15, 1973, 211 institutions (or more than 321 Colleges) in the United States have had a Union Agent of some kind designated to represent their faculties and sometimes their non-teaching professionals. This phenomenon covers the spectrum from two-year college to university and is true in both the private and public sector. Of these 211 institutions, 25 are in the private sector and 186 are in the public sector. The agents include the National Education Association, American Federation of Teachers, American Association of University Professors, and unaffiliated groups.[1]

Why this should have occurred is the subject of an already voluminous literature.[2] It has been suggested by a variety of writers that the reasons include the ability to organize with legal protection provided by state public employment laws; the necessity of public institution faculties to compete effectively with other organized employee groups for limited governmental resources; the similar need of private sector faculties to compete with other union groups on the same campus; dissatisfaction with governance or other organizational schema on campuses; fears for personal security in an era of cut-backs in educational resources; the coming of tenure quotas;[3] and the like.

At the same time, a number of faculties have deliberately decided not to enter into bargaining, at least at the present. This collection of papers includes an examination of the reasons for such behavior at the University of Michigan by Terrence Tice. On a more general basis, Everett C. Ladd and Seymour M. Lipsett have sought to analyze both why some faculties, and which ones, have entered into bargaining and why other faculties have thus far declined to do so. Their study seems to suggest a relationship between the decision made and the status of the institution in the educational sector.[4] As they themselves note, the status of institutions is related to the presence or absence of some of the qualities which faculties have sought through unionism: a stronger voice in governance, for example.

This compendium of papers presented at the First Annual Conference of the National Center for the Study of Collective Bargaining in Higher Education held in New York City on April 12 and 13, 1973 surveys the status of bargaining as it now exists in higher education, some of the reasons for it, some of the effects already detected, some of the problems created, and some of the expected future directions bargaining will take.

Several overview papers are presented: those of Chancellor Robert Kibbee of the City University of New York, a major institution with a contract; of Dr. Sidney Hook, a distinguished philosopher who discusses the reasons for and impact of bargaining on campus as he sees it; and of Professor Donald H. Wollett who has studied collective bargaining from its inception on campus and who also, as a legal practitioner, was involved in the early growth of

[1]Elias Lieberman Higher Education Contract Library, National Center of the Study of Collective Bargaining in Higher Education, Baruch College.

[2]See *Bibliography*, No. 1 published by the National Center.

[3]See Keast, W. R., *Faculty Tenure*. Jossey-Bass, 1973.

[4]Ladd, E. and Lipsett, S. *Professors, Unions, and American Higher Education*, McGraw-Hill, 1973. Also "Unionizing the Professoriate." *Change*, 5(6): 38-44, Summer, 1973.

unions. As might be expected, Wollett's view that faculties adoption unionism might well abandon traditional governance schemes differ from those of Kibbee and Hook, and they differ among themselves.

The papers of Jerome Lefkowitz and Tracy Ferguson trace the legal foundations on which bargaining is based in both the public and private sectors. Distressing as it may be to the campus, it will not be possible to avoid completely, if at all, the "industrial model" on campus if the precedents and law relating to the formation of units are drawn from law adapted to the needs of other types of employee groups and these papers show that this is true. Later this year, in June and July, the National Labor Relations Board, in the *Syracuse*[5] and *New York University*[6] unit determinations, showed that application of the usual unit determination rules might well fragment the campus, a result justified in law but at least arguably undesirable in the type of symbiotic community found on the campus.[7] At the same time, as Ferguson shows, the regulatory agencies have found the customs and realities of the campus to be difficult to deal with under the law and precedents established: i.e., in the area of collegiality. Who are supervisors? Are chairmen always supervisors? Sometimes? The various unit determinations show the difficulty of applying the law to the campus.

The question of collegiality on campus and its implications for bargaining – as well as for unit determination – is discussed in the paper of James P. Begin. If unionism implies an employer-employee relationship as John Dunlop noted long ago,[8] is collegiality possible on campus once bargaining has come? A number of scholars such as Donald Walters of the University of Massachusetts would answer in the affirmative. Many other students of bargaining would be doubtful that a new type of bargaining model is possible, or at least, that one has emerged.

Other papers here presented view the impact of bargaining from many aspects.

Margaret P. Chandler and Connie Chiang view the impact on management rights, which is, of course, related to the question of collegiality. Israel Kugler from a union viewpoint, believes a distinction must be created between management and faculty. Robert J. Wolfson, looks at yet another bargaining problem, the relationship between productivity, university salaries and bargaining. To what extent will the economics of the campus be altered by this new institution? One difficulty of answering this question is the vast difference in payment patterns and their causation that existed before bargaining. Governmental impacts in the public area; relative wealth in the private area; rigid schedule systems v. individual bargains; differing criteria of worth and accomplishment have always existed.

Yet another economic problem caused by bargaining is examined in the

[5]83-LRRM-1373-79.

[6]83-LRRM-1549-58.

[7]See the Center *Newsletter,* Volume 1, No. 1 for a brief discussion of these decisions and their implications.

[8]Dunlop, J. T. "The Development of Labor Organization: A Theoretical Framework," in *Insights Into Labor Issues,* R. A. Lester and J. Shister, eds., (New York, 1948) p. 184.

paper of David Newton. The significant cost of bargaining and contract administration must not be disregarded in considering the impact of bargaining on the campus. It would be interesting to discover the equivalent expenditures of the union representatives. Undoubtedly, the cost is high there also. Are the returns worth such expenditure of resources which would presumably be available for other educational uses if not allocated here?

Related to collegiality is the question of tenure, tenure quotas, and the right of faculties to bargain over these rights. Many students of collective bargaining have held that the increased security and protection of individual rights achieved in contracts is at least as important as the economic gains in explaining the desire of employees to have contract protections. The papers of Woodley B. Osborne and William B. Boyd deal with the question of tenure and the bargaining process. This writer has suggested elsewhere[9] that the broadening of security sought in many bargains for the untenured may yet endanger tenure on the campus. Of course, Sidney Hook has also considered this relationship between tenure and bargaining in his paper.

Finally, bargains must be enforced. The grievance procedure discussed by this writer on the above cited article and by Thomas Mannix[10] in another forthcoming article is the usual "industrial model" procedure and it has been adopted in virtually all college contracts (as well as in some Universities where no contract exists, i.e., Stanford). A grievance procedure defines and applies what the parties have agreed upon to particular cases. The necessity for clear definitions and the implications for the campus of various agreements are discussed from two different views in the papers of Charles Bob Simpson and Milton Friedman.

One of the most perplexing academic bargaining problems is defining what shall be relegated to peer judgment and what to the bargaining process. Virtually, all college contracts eliminate "academic judgment" from the bargaining process and hence from grievance review. Yet, fundamental faculty rights are involved and judgment by faculties as by others may conceivably be "arbitrary, capricious or discriminatory." Simpson deals as a union representative with the safeguards that bargaining should create in this area and with the definitional problems. Friedman, as a distinguished arbitrator with experience in the academic area, notes the problem which the arbitrator who is the final step in the grievance process, finds in dealing with the problem of academic judgment.

While this compendium does not deal with all of the problems of bargaining nor yet look at it from all possible viewpoints, the reader will find in these thoughtful papers a good introduction to the complexities and adaptations which will be introduced to and required of the University by the advent of unionism.

MAURICE C. BENEWITZ *Director*

[9]Benewitz, M. C. "Grievance and Arbitration Procedures." To be published in November, 1973 in *Faculty Bargaining in the Seventies* by The Institute of Continuing Legal Education, Univ. of Michigan, Ann Arbor, Mich. 48104.

[10]Mannix, T. "Community College Grievance Procedures: A Review of Contract Content in 94 Colleges." To be published in *The Journal* of the College and University Personnel Association. Wash., D. C. 20036.

The Academic Mission and Collective Bargaining

by SIDNEY HOOK
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As a philosopher, I cannot claim any special competence, over and above my role as an educator, to discuss collective bargaining in American higher education, although my conception of philosophy makes it a highly appropriate theme for analysis. But I can claim to be continuing a tradition set by two of the most distinguished American philosophers of the 20th century who, despite their epistemological differences, actively cooperated in founding the American Association of University Professors. One was John Dewey, its first President; the other was Arthur O. Lovejoy, its first Executive Secretary. Their role and, until recently, that of the Association they founded in getting the principles of academic freedom and tenure publicly recognized can hardly be exaggerated. For when they began their labors, and for many years thereafter, the status of teachers in colleges and universities was little better than that of hired hands in white collars. Their conditions of work, indeed its very continuance often depended upon certain haphazard, traditional usages, and especially upon not giving idealogical offense to Board and administrators who were in effect accountable to no one. Thorstein Veblin's reference to "the higher learning" as the "hired learning" exaggerated only a little; there were much coarser public characterizations of the timidity of college professors. To Dewey and Lovejoy and the AAUP, we largely owe the vindication of the rights of college teachers as citizens.

Nonetheless, there was a profound difference between John Dewey and Arthur Lovejoy symbolized by the fact that John Dewey proudly held membership card no. 1 in the American Federation of Teachers, although to the best of my knowledge, he was never a member of its College Teachers local. So convinced was Dewey of the benefits of union membership that on repeated occasions he maintained that the burden of explanation rested on individual teachers to justify their *not* being members. Lovejoy, on the other hand, was convinced that the proper organization of college and university teachers was not a trade union but a professional association. He developed some powerful arguments in behalf of the position that the nature, affiliations and practices of a professional association of teachers should be distinct and separate from that of a trade union of teachers, even when he reluctantly admitted the possibility of joint action between them for limited objectives.

Professional Association Arguments

Lovejoy's arguments were not only powerful but persuasive. Variations upon them are still current. They were canonic doctrine in the AAUP until October 1971 when its Council decided to pursue collective bargaining as "a major

additional way of realizing its goals." Lovejoy's position was based upon a sharp contrast between industrial trade unions and professional associations as *ideal types.* He was also influenced undoubtedly by the fact that the leadership of some College Teacher Union locals, during the years when the issue first surfaced, was in the hands of the Communist Party which subsequently led to their expulsion from the parent body. But his explicit argument made no mention of it and was based on considerations which, as I have indicated, still seem plausible to many in the academy today who although quite sympathetic to the general principles of collective bargaining and trade unionism in general feel that they are out of place in institutions of higher education, particularly in view of recent developments in the governance of colleges and universities. These developments have resulted in forms of shared power, regardless of the existence of legal forms, unprecedented in the days of Lovejoy and Dewey.

The view that trade unions and the processes of collective bargaining are not appropriate to institutions of higher education is buttressed by many considerations. They cluster, however, around two main points:

(1) Historically, trade unionism and collective bargaining arose as the most effective means by which workers in the long run increased their wages and improved their conditions of work *at the cost* of their employers. This inverse relationship obtains between profits and wages even if both are increased. No matter how big the pie, it is analytically true that the larger the slice for one, the smaller it must be for the other. What is true for the factory is decidedly not true for the academy whether private or public. Despite absurd claims by young activists in colleges and universities, the latter are not profit making institutions accumulating surpluses for private distribution at the expense of the students and faculties. This seems to be true only in the private sector of higher education in the Phillipines. Institutions of higher education elsewhere and especially in the United States are normally deficit-producing. To the extent that economic conflicts indirectly go on in which faculties as a whole are interested parties, they take place in the determination of legislative priorities. Increased disbursements of tax monies for health, welfare or defense may limit educational expansion. But all this is far removed from the *adversary* or *power* relationship recognized in the normal process of collective bargaining. To be sure there is another element we must recognize as a legitimate and growing concern of trade unions, and that is the dignity of the worker which is protected among other ways by placing curbs on the right to hire and fire by those who own the instruments of production or their deputies. To the extent that ownership of property gives power over persons who must have access to this property to live, the defense of the dignity of the worker, his freedom from arbitrary dismissal, historically meant a dimunition of the power of property owners. Here, too, we have a clear adversary relation.

(2) There is a second, and more striking, difference between the industrial enterprise and the educational enterprise that transcends in significance all the features that workers and teachers have in common as wage-

earners and job holders. This is what differentiates a job from a profession. The teacher together with his peers has a *moral coresponsibility* for the character and consequence of his vocational activity and implicit commitment not only to do it well but to improve it. That is to say he accepts and does not surrender responsibility to administrative boards and superiors for the transmission and advancement of learning and understanding and the practice and improvement of teaching. That is his calling in the same way as the cultivation of health is the calling of the physician and the operation of justice the calling of the lawyer and jurist. In other words, the teacher and scholar even when he puts a price upon his services, has a special function in the way a typical worker in a market economy has not.

The typical member of the typical trade union is not interested in the use, quality, or improvement of the typical product he manufactures. That is the responsibility of the employer and manager. His primary interest is in keeping his job and getting more and more for it. If he gets more by producing shoddy as a worker, it is a matter of indifference to him, although as a citizen and a consumer, he may have some qualms. It is not inconceivable that as a worker, he should sabotage the quality of a product that might put him out of work. In one of the Alex Guiness' movies, "The Man in a White Suit," the textile workers are ready to lynch one of their coworkers who has invented a fabric that is dirt-and-wear proof, for it spells the end of their employment. And it is not likely that under present conditions, workers on the auto assembly lines would welcome the production of a car that was free of built-in planned obsolescence and guaranteed to last the life of the owner. It might mean their jobs. But an engineer, as a professional, would welcome it.

The difference here is between the principle of trade unionism and guild socialism and is recognized as such by Lovejoy. The guild has a distinctive function from which is derived the norms of proper performance and pride in their fulfillment and improvement. Every major demand of the teacher is related to, if not derived from, "the maintenance of professional standards and of the conditions without which the special function of the profession cannot, in the long run, be truly performed."*

Whatever else may be said about this distinction between a job, as worthy as it is, and a calling, it is undeniable that the remarkable transformation in the history of American higher education in the last sixty years, especially in the growth of academic freedom, the recognition of tenure, and increased economic rewards, has been achieved *not* by exercise of power, *not* by strikes or threats of strike or disruption of community life, but by appealing to the validity of professional standards of scholarship, research and teaching. Progress was made by offering the evidence that these standards require conditions of freedom, security and reward which, although far from being universal and satisfactory, still, from the perspective of the past, seemed little short of Utopian. Faculties today have more actual power in virtue of the recognition of

*Arthur Lovejoy "Professional Association or Trade Union?" *Bulletin of the AAUP*, Vol. 24, 1938, p. 413.

their professional authority than they have ever had before in American History, even if they do not always choose to exercise it or do so wisely.

It is always possible to point to institutions in which today faculties have less power than they should have or to cite incidents that violate some claims to academic freedom or to uncover cases of economic hardship. But to use these instances to contest the truth concerning the enormous professional advance in status, income and power by the American professoriate as a whole is intellectually contemptible – comparable to denying the remarkable progress of modern medicine because so many people are still far from being completely healthy.

Public School Unions

I accept Lovejoy's distinction between the professional association and the industrial trade union. Nonetheless, I do not believe that it entails the recommendations he makes, if these are interpreted as principled opposition to collective bargaining by college and university faculties. First of all, there are trade unions and trade unions, and historical developments have a way of subverting the neat logical distinctions we make between ideal types. There are professional associations of physicians which in countries that have socialized medicine engage in practices of collective bargaining quite similar to those of trade unions. Further, there are trade unions of journalists and of government officials – state, county and city – who have professional status and functions, who engage in collective bargaining with those authorized by law to negotiate with them, but do not consider themselves in an adversary relation to them comparable to what exists in industry. The same is true of pilots and officers of planes and ships. But most relevant for our argument is the existence of trade unions of teachers in public elementary and secondary schools. It is significant that Lovejoy did not express opposition to them despite the fact that they had a special professional function that required the recognition and fulfillment of educational standards in whose formulation they cooperated. Actually trade unions of teachers have done a great deal to improve the conditions under which their special professional functions are fulfilled. They have agitated not only for better school buildings and classrooms, but for academic freedom and tenure, too.

If one can have no principled objection to trade unions of teachers in elementary and secondary schools, it seems to me that he must also accept them for community and junior colleges as well. For in these days of universal access to tertiary education, community and junior colleges perform essentially the same teaching functions as the lower schools. And once we have done this, we have broken the taboo against trade union collective bargaining for higher education with respect to teaching or to those forms of teaching that are not associated with research, the advancement of learning, original discovery, new critical perspective, creative innovations that make up the life and adventure of mind.

It was these aspects of higher education that were of primary concern to Lovejoy as they are to so many scholars today who feel they are threatened by

the introduction of collective bargaining. It is this which constitutes the *distinctive* academic mission of the college and university, its chief glory and real calling. The economic aspect of the scholar's life is important and once he acquires family responsibilities he cannot live the life of genteel poverty, which Ernst Renan declared should be his lot, without imposing hardships and unjustices on his dependents, unknown when scholars were priestly celibates. But any person who chooses the life of scholarship whether creative or critical because of its economic rewards has made a foolish choice. A desire, sometimes conscious, more often not, for intellectual fame or ambitions, "that last infirmity of noble minds," probably exerts a greater influence than money but does not explain why it expresses itself as a call for scholarship. But whatever the motivations that account for the choice of the scholarly vocation, there is a social need for the professionally trained scholar, for pioneers on the frontiers of knowledge, for disinterested, independent and above all, *free* minds, prepared to follow and publish the truth as they see it, regardless of its consequences on vested material or emotional interest. Civilization is transmitted by teaching; but it originates and evolves by intellectual discovery, those small and large mutations in ideas, about which we know little except that they flourish best when society provides room and leisure for them. To a large extent in our century, the faculties, the climate and leisure have been provided by institutions of higher education.

In asking, then, what is the bearing of collective bargaining on the academic mission we are not assessing the question from a selfish professional vantage point or pleading a narrow parochial cause. We are asking a question of profound concern to the whole community.

How shall we answer it? Before doing so, let us take a realistic look at the situation revealed by recent discussions in universities and by the illuminating statistical surveys by Lipset and others. They reveal that the strongest support for collective bargaining comes from community colleges and from the lower ranks in four-year colleges; the strongest opposition comes from professors in academically prestigious universities. Even the most committed partisans of collective bargaining admit that there is a widespread apprehension among those in senior academic rank that academic standards are threatened by the recognition of bargaining agents for the entire faculty. Nonetheless, "Nearly three-fifths of all academics in the 1969 Carnegie survey give general endorsement to the principle of collective bargaining" (Lipset).

Wave of the Future

At the same time, there is every likelihood that collective bargaining is the wave of the academic future. There are various grounds for the prediction, welcome it or not. First, the number of persons in the lower or junior ranks outnumber those in the senior ranks. Second, present financial stringencies and the halt in institutional expansion have made teachers tenure conscious, all the more so because the tenure system itself has come under attack from students, legislators and some administrators. Third, in most elections so far, one or another outside organization has been selected as the collective bar-

gaining agent. Even in the few cases where faculties have voted for no collective bargaining, it is admitted that because of the periodicity of elections, the ample resources of those in favor of some kind of trade unionism in contrast to the limited resources of those opposed, any move towards academic retrenchment or any unpopular administrative decision is likely to cause the faculty to reverse itself. Fourth, some of the economic gains won by collective bargaining for teachers in lower echelon institutions have been so impressive that they are sure to carry great weight among members of all institutions. When news gets around that full professors at the two-year community colleges by *automatic* increases can earn $31,275, it may produce a bandwagon effect. Finally, scholars are not fighters, and on this issue not even activists or participants. In centers of academic research and scholarship, the proportion of abstentions, of those who do not even take the trouble to vote, is much higher than in centers mainly of teaching. At one institution in the former category, one-third of the faculty cast no vote. The enthusiasm and dedication all seem to be on one side.

I conclude from these and related considerations that intelligent choice today is not between acceptance or rejection of the principle of collective bargaining but between the different forms of collective bargaining. Since contracts are written, as distinct from most labor contracts, not for the entire industry but for each university or university system, we must ask: under what form of collective bargaining can ***the academic mission*** best be preserved and strengthened?

I am not an expert on collective bargaining and on the writing of contracts, but having spent more than fifty years in the academy, most of them in a position of administrative authority, and seen a mediocre university achieve distinction in many fields and observed threats to that distinction, I submit reflections on my experience as relevant evidence on what nourishes and what subverts the academic mission.

Collective Bargaining and Excellence

First of all, collective bargaining must not make difficult the achievement of excellence in institutions in which the advancement of knowledge and understanding is central. Such excellence cannot be achieved without educational leadership and some degree of delegated power. The fact that the power is delegated makes it responsible, ultimately subject to control by the relevant educational constituency. But there must be some provision within the limits of control for the exercise of initiative, for decision which is not arbitrary but still discretionary after the discussion and pooled reflection that should normally precede action is over. This is particularly important in building up departments or in trying to develop eminence where it has been lacking. Because of an illegitimate transference of political categories to the realm of mind, the very words "elite" and "elitism", and expressions like "intellectual discrimination" have become suspect. The very essence of the life of mind consists in intellectual discrimination. Democracy in an extended sense is an ethical concept, and involves an equality of respect and concern in rele-

vant respect for all members of the academic community. It does not entail a leveling down or uniformity of expectation and result, or an equality of rewards – whether material or psychic. In my experience mediocrity has a tendency to resent, if not conspire against, excellence. Academic rank should reflect excellence. No great departments, no great universities have been built where the lower intellectual ranks defined in terms of experience and objective scholarly achievement, have the same weight and authority in determining who should be invited into the higher ranks as the peers of the latter. Where everyone automatically goes to the top, provided only that he doesn't break a law, the whole notion of excellence and quality becomes a farce.

It is difficult to make this point without laying oneself open to distortion and caricature even in the absence of a will to misunderstand. With respect to the *academic* mission, although authority should be shared, it cannot be equal. Some provision should be made to permit educational leadership at some point, at least for a limited time, somewhat of the same degree of freedom that we give a conductor of an orchestra or a coach of a team. Ultimately, the justification for the inequality and discretionary power is the production of great music, the creator of a great team, the publication of a great book, the discovery of great ideas and intellectual breakthroughs. It may be that with universal access to higher education this academic mission may have to be relegated to special institutes, where teaching is only incidental or does not exist, or to only a few elite universities. For many reasons this would be a pity, and before long, similar problems would arise there, too, concerning how the *academic* mission can best be furthered.

Recent developments make it necessary to safeguard the academic mission from some other tendencies. I refer to the growing dangers of politicalization of university life not only in the manifest espousal of political positions on foreign policy or domestic issues unrelated to the academic mission but to the introduction of categories of evaluation irrelevant to scholarly promise or performance. Appointments and promotions should in no way be determined by vague and ambiguous classifications like "liberal" or "conservative," "left" or "right" but whether a person's thinking is profound or shallow, original or derivative, scholarly or unscholarly. Universities should be extremely chary in entering into negotiations with any organization that has a political commitment. In the event that it has been selected by majority vote, its proposals should be carefully scanned to detect possible political bias. Further, where students or their representatives are brought in at any point they should have, on *academic* matters, voice but no vote, powers of consultation and advice, not of decision. In general, reliance upon decisions of individuals outside the academy on purely academic matters should, as far as possible, be avoided. And against those who are under the belief that the ultimate and staunchest bastion of defence of academic freedom are the courts, I would register an emphatic protest. Most jurists who have discussed the educational issues seem unfamiliar with the logic and ethics of the academic mission. At crucial points they seem unable to differentiate between the first amendment rights of teachers as citizens, and the rights and obligations of teachers and scholars as members of an academic community subject to standards of professional

ethics. A citizen may freely plagiarize from what is in the public domain or advise students to cheat or disrupt classes of his colleagues with complete impunity under the protection of the Bill of Rights. As a member of a faculty, however, such actions would constitute *prima facie* evidence of a conduct unbecoming a scholar and teacher and subject to punishment, where due process is observed and guilt established, for violation of professional ethics.

This brings me to the most crucial and dangerous challenge to the academic mission in educational life today. This is the attempt to use the mechanisms of due process which legitimately protect scholars and teachers from abuses of academic freedom as a means of establishing permanent tenure where issues of academic freedom are not involved after the probationary period has lasped. I speak as one committed to the principle of tenure once it has been won, and quite aware of its difficulties and problems on the ground that the support it gives to academic freedom, is worth its high cost. Where this principle is recognized, especially when institutions of higher education cannot rely on continuous expansion, the academic mission requires that it be possible to recruit the best and most promising scholars and teachers available to upgrade its quality and standards in the continuous pursuit of excellence. This is extremely difficult, if not impossible, if the distinction between tenured and untenured faculty is undermined. No reasonable case can be made for the claim that the acquisition of a teaching or scholarly post carries with it the presumption of instant tenure. Nonetheless, proposals are being made, partly motivated by the desire of conflicting groups for an enlarged constituency among faculties, that in effect will give instant tenure to those appointed to teach by imposing the same or similar conditions for dropping them as hold in the case of colleagues who have won permanent tenure.

This will be the natural consequence of the demands made by some proposed collective bargaining contracts which specify that when a teacher or scholar is hired he or she receive a written statement of the conditions which will govern the grant or withholding of permanent tenure upon the lapse of his or her probationary period. Presumably, if the conditions are satisfactorily fulfilled, there will be normal expectation of tenure; and if there are grounds for the judgment that satisfactory service has not been given these will be explicitly indicated. In addition, this is coupled with the demand that the candidate have complete access to his departmental or personnel file so that he can be informed of the materials and data on which the judgment is reached and the right to invoke the grievance procedure with a guarantee of full academic due process if he wishes to challenge the justice of the decision.

These seemingly innocent requests may spell disaster to the academic mission. Tenure, as a principle which protects full-time faculty members after a probationary period from dismissal without adequate cause, must be defended but it cannot successfully be defended unless it is given after careful assessment of academic quality. For it not only involves mortgaging the resources of an institution to the tune of a half million dollars or more for each grant of tenure on the average, but subjects *in* advance for thirty years or more a large number of students to the pedagogical mercies of those upon whom tenure is bestowed as well as limiting the future freedom of action of the university

to renew and expand its faculty. From the point of view of the academic mission, merely satisfactory service may not be good enough. Failure to win promotion is not equivalent to dismissal for incompetence. At the time the probationary period is up, some other young scholar may be available who is much better, who is a specialist capable of filling a gaping curricular need, or who has brilliant pedagogical gifts from which students can profit enormously. Popularity with students is neither a necessary nor sufficient condition of scholarly promise, something that can most reasonably be determined by scholars already established in the field. It will never be honestly determined if the contract specified that those who have failed to win tenure have the right of access to confidential personnel files that contain the judgments of scholarly evaluation on the basis of which the decision to grant or not to grant tenure is made.

For who will write frank and honest letters about anyone knowing that the subject whose career may be blasted in consequence will be privy to them? As it is, in academic matters we tend to be too kind rather than too truthful. It is possible to love someone, or be friendly to him, who happens to know unflattering truths about us. But it is extremely difficult to love him or be friendly if he not merely knows but publicly *proclaims* these truths. It is safe to predict that honest evaluation will end where files are open.

There are other reasons why the freedom of the academic community to renew and improve itself should not be hedged in by provisions that within a few years may result in a faculty that is completely tenured. All contracts that would have this effect should be rejected. For if this were the upshot of any collective bargaining agreement how would it be possible, without additional resources, to add a new department? Or if some institution were to innovate by recruiting teachers qualified to give instruction in several disciplines, how could this be achieved? All partisans of collective bargaining insist that they would never dream of attempting to influence the content or direction of curricular studies. And they actually may not intend to do so. But some provisions, if enforced, may in fact have this effect.

Grievance Procedures

Finally, a word about grievance procedures at any level. Anyone familiar with the few cases in which attempts have been made by full academic due process to enforce standards of professional ethics knows what a tremendous burden of time, energy and loss of teaching services they entail. In some places it has even involved risks to the personal safety of those members of the faculty who serve as jurors. It usually embroils not only faculties but arouses students to attempt to impose their point of view while cases are under adjudication. Without sacrificing any principles of equity, procedures should be simplified. Where issues of academic freedom are not centrally involved but of educational policy institutions should insist that whatever the appeal procedure, the last word should be spoken by the faculty as a whole or its representatives. Where agreements are made to submit any educational issue to binding arbitration, recourse to arbitrators whose experience has been limited to settling industrial disputes should be avoided, and only distinguished educators with-

out *party pris* should be brought in, who are well informed about the *special* educational needs of the institution.

It is time to bring these considerations to a close lest we get lost in a sea of detail. If one takes the long view, it is undeniable that institutions of higher education have more independence and autonomy with respect to their mission – the advancement of knowledge and understanding – than at any time in the past. By and large faculties enjoy more security and better conditions. And above all, they enjoy a greater shared authority. The crucial question is whether they can retain the gains won, extend them to places and areas where they are still absent, and still fulfill their academic mission by reliance upon the collegial processes of the past or by resort to collective bargaining. My answer to the question cannot be univocal. Nor is it equivocal. Under ideal conditions, I would place my faith on the processes of rational collegiality. But conditions are not ideal. Some form of collective bargaining seems historically inescapable even if not ideally desirable. That is why I believe we must opt for that form of collective bargaining that will least affect the achievement of our academic mission.

A Chancellor Views Bargaining in Retrospect and Prospect

by ROBERT J. KIBBEE
Chancellor, City University of New York

I have been asked to talk to you today about my perceptions on collective bargaining in the university. If the title of this homily were changed slightly to — "What do you think of collective bargaining?" — I would be tempted, only half-facetiously, to respond with the classic counter-question, "compared to what?"

In the hierarchy of activities chancellors are expected to engage in, I would rate participation in collective bargaining somewhat below meetings of the council of presidents, plenary sessions of the faculty senate and answering the daily mail. On the other hand, I would rate it somewhat higher than legislative budget sessions, dealing with the federal office of civil rights, student confrontations, and luncheon speeches.

However, we are not here to discuss what brings me pleasure and what gives me pain. Neither does it seem profitable to debate whether or not collective bargaining is good or bad for higher education. Contract agreements of some sort are already in force at 10 percent of the nation's colleges and the numbers will grow rapidly over the next few years. Unionization of faculties is here to stay — at least during our professional lives, and no productive effort can be expended conjuring up fantasies about what might have been.

What I have to dispense today is not wisdom but experience which may or may not be helpful. Since even my experience is limited and the nature of C.U.N.Y.'s experience is probably not typical, a few historical notes are required to put my observations in a proper context.

Employees of the City University of New York are covered by 37 different bargaining agreements with unions representing separate employee groups — various crafts and trades, civil service employees and similar classifications. Some of these agreements go back many years and in my remarks, I shall be referring only to bargaining agreements with what is referred to within this university as the instructional staff — a term that includes all professional personnel — faculty, counselors, librarians, registrars, business managers, laboratory technicians, and a group of administrators called higher education officers.

The first formal contract with legally recognized bargaining agents for the instructional staff was signed on October 3, 1969, after approximately eight months of collective bargaining. Prior to that time, the Board of Higher Education had negotiated informally with a representative faculty organization known as the Legislative Conference.

The New York State Legislature, in 1967, enacted the Public Employees Fair Employment Act, commonly referred to as the Taylor Law, which set forth procedures for union representation by public employees and, among other things, spelled out procedures for bargaining, mediation and fact-finding

as well as those matters on which public employers were required to bargain. The Public Employment Relations Board stipulated that the instructional staff at the City University consisted of two units. One unit encompassed the full-time tenurable faculty and the full-time supportive and administrative staff who held comparable ranks. The second unit consisted of full-time non-tenurable faculty – in our case the full-time lecturer, administrative and supportive staff of comparable rank, and all part-time instructional staff. Elections were held separately in each unit with the same two bargaining agents contesting in both instances. The election resulted in one union, the Legislative Conference representing the tenurable faculty group, and another, The United Federation of College Teachers, representing the lecturers and part-time staff. Separate but quite comparable agreements were reached with each union for a three-year period ending August 31, 1972.

In preparation for negotiations for a new contract, The United Federation of College Teachers filed a petition with PERB requesting that there be a single bargaining unit at C.U.N.Y. rather than the two previously established. The University in responding, suggested three units covering full-time teaching faculty, part-time teaching faculty, and non-teaching professional personnel. While the petition was being argued before PERB, the two existing unions agreed to merge into a single union to be known as the Professional Staff Congress. Bargaining between the PSC and the Board of Higher Education began in June, 1972.

My own twenty month tenure as Chancellor has spanned the final year of operations under the first contract and the negotiations for a new contract which have not yet been concluded. I do not believe there would be any useful purpose in discussing either the previous contract or the specific issues involved in the present negotiations. Many of them are peculiar to C.U.N.Y. and in any case generalizing from the particular is a hazardous business.

Rather, I would like to talk briefly about some overriding considerations which, sooner or later, have to be faced by every academic institution that is engaged in or will be engaged in collective bargaining. I do not have answers for you, but I believe that the questions themselves are worth your contemplation.

Let me begin by discussing the importance of defining a proper bargaining unit. My concern is not about the relative bargaining advantages that accrue to one side or the other from a particular unit definition, but rather about the difficulties certain definitions might create for the bargaining process itself.

Over the years, there have evolved certain principles about the governance of universities and colleges. These are not graven images, but foci for decision-making which have been agreed upon as making sense. Within these governance patterns, students, faculty, trustees, and administrators have been assigned primary roles or participatory roles that presumably reflect their respective interest, expertise, available time, and legal responsibilities.

The injection of a group whose rights and responsibilities are defined in a legally sanctioned contract clearly adds another dimension to the governance structure and, in effect, reassigns, both authority and responsibility. The assumption of the existing governance concepts is that definable groups

within the institution have a set of common operational interests and the particular expertise to foster sound operational decisions. Where the bargaining agent represents a group, the members of which all have essentially the same operational interests, the likelihood of internal conflict is reduced and serious distortion of the process of governance can be minimized. However, when the membership of the union cuts across operational lines both the process of governance and the bargaining process itself can be seriously disrupted.

The problem for the union leadership becomes extremely difficult when in seeking highly desirable concessions for one group within its membership it begins to encroach upon the operational prerogatives of other members of the union. Similarly, it becomes impossible for the union to concede the advantage it had been seeking for one part of its membership to achieve agreement on matters important to other members. In a bargaining situation when the union membership consists of disparate groups with quite different functional responsibilities the negotiators become immobilized.

My advice on this matter is of a kind that you may not be able to do much about but I assure you it is worth a serious effort. In defining the unit to be covered by a contract I would urge you to try to establish one that coincides with non-union, operational and governance responsibilities and one where the members have, in general, the same basic professional interests. Specifically restrict faculty unions to teaching faculty even if it means separate unions for supportive personnel, lower and middle-level management and part-time employees. It may seem administratively cumbersome but the bargaining should be more productive and less acrimonious.

There are several corollaries to this general observation which should be kept in mind as an aid to understanding what is going on and what is likely to happen in the future.

First, there is a tendency for institutional administrators to reach generalizations about the extent to which union negotiators really represent the feelings of a faculty even though the union was chosen in a free election. This feeling seems to be strongest among those who only recently moved to the other side of the desk and on those issues which seem most distant from salaries and fringe benefits. My perception is that this kind of thinking is a siren's call and should not form a basis for institutional strategy in dealing with union negotiators. Clearly individual faculty members differ on a given issue and support some bargaining positions more strongly than others but the dynamics of unions and bargaining do not allow members to pick and choose what they will support. The fundamental issues are almost always economic and the faculty almost to the man or woman will subjugate their concerns about peripheral matters to ensure a strong position on the basic issues.

You should also be aware that once formed a union itself becomes an institution with all that is implied by the term. As such it develops a basic life drive, centers of power and influence, a political structure and a number of individuals who either seek to maintain the power they have within the organization or to achieve power held by others. This is neither sinister nor evil but a part of the dynamics of all organizations. It cannot be ignored, however, in the bargaining process. The relative security of union leadership is an advan-

tage to everyone in a bargaining situation. Where there is friction or uncertainty compromises become more difficult and without compromises there are no agreements.

Let us move now to another area which has been scarcely recognized in the consideration of the unionization of university professional staffs. I refer to the role of students in the collective bargaining process.

In the October issue of the Journal of Higher Education, Mr. Alan Shark, chairman of the University Student Senate at the City University of New York, wrote about "a student's collective thoughts on bargaining." Lest anyone who may have read the article think that Mr. Shark is a disruptive radical and should not be taken seriously, let me disabuse you of the thought. Alan Shark is a very able student leader, deeply interested in CUNY and its future who has worked as diligently and as effectively in soliciting legislative support for CUNY as anyone at the university.

In his article he raises questions that recur from time to time in the minds of frustrated consumers. The ultimate users are never consulted about agreements reached that in the end affect them most of all. Although this is so the problem is generally too difficult to deal with in large part because consumers are too widely dispersed, too poorly organized and generally undisciplined. Except for occasional half-hearted efforts to control wages or boycott goods, very little has been done to insert the views of the consumer into the collective bargaining picture. The case of students is quite different and could very well become the area in which effective consumer participation is seriously attempted.

First of all, where most union contracts are "industry wide" or "craft-wide" agreements over a fairly broad geographic area, virtually all agreements between institutions and their professional staffs are quite parochial. Students as a group are considerably more sophisticated and articulate than comparable consumer groups and by tradition and practice they always have at least a rudimentary organizational structure. The possibility of organizing students to effectively pressure a place at the bargaining table is certainly more real than it is for the normal consumer.

There are some very serious problems, the solutions to which I have not yet visualized. The very nature of a collective bargaining contract is that it is a set of promises or agreements to which each side commits itself. Because they are highly disciplined and have legal status the agreements can be enforced. Although one can conceive of many things that administrators and faculty can promise students it is difficult to conceive of what students can promise in return. It is equally difficult to understand what penalty can effectively be imposed for failure to live up to agreements made.

Yet, because the position of the student as consumer is so different from more traditional models I am convinced that some form of their participation in collective bargaining negotiations will develop before too long and it will spread rapidly.

My final observation on collective bargaining deals with the atmosphere that surrounds both the process and the results. It may be that the imposition of a formalized, and in a sense an adversary posture, on relationships that

were looser and more collegial is depressing to everyone no matter what their occupation. It strikes me as particularly startling in the university perhaps because the employer-employee relationship between an institution and its faculty has been recognized only in its most legalistic sense. Administrators have always been viewed with some wariness by the faculty for symbolic reasons at least, while it is the rare administrator who has not bemoaned the absence of realism and understanding of the faculty. But on the whole administrators and faculty have treated each other as equal participants in a common task who from time to time are called upon to support and defend each other and do. It is not difficult for this concept to become tarnished in the midst of vigorous negotiations on important issues. The problem is complicated by several circumstances that deserve consideration.

I have already commented on the institutionalization of the union and the survival instincts of both the organization and its leadership. During negotiations it is incumbent upon the union to convince the faculty of both the rightness of its cause and the vigor of its representation. Since faculty unions are young and have not developed a vocabulary of their own there is a tendency for the leadership to borrow both words and tactics from industrial unionism. Charges of refusal to bargain in good faith, union-busting, callousness, indifference to faculty needs, put together with rhetorical flourishes begin to fill the air. Charges and counter-charges become common currency on the campus and slowly but surely real animosities begin to develop. Thus the negotiating scenario itself becomes a vehicle for changing the campus atmosphere.

We must also realize that the activity of the institution continues even as collective bargaining is going on. Most of this activity is not affected by the negotiations nor is it likely to be. However, the same people are involved and therein lies the rub. Irritations and animosities are not easily compartmentalized. What develops out of the negotiating struggle is a generalized view of the administration by the faculty and vice versa. Those working together on a curriculum problem may easily become conscious over time, particularly when the atmosphere at the bargaining table is hostile, that they have described each other's attitudes in less than glowing terms. Doubts about each other begin to develop and the result can hardly be beneficial to the educational effort.

It is important to remember that sooner or later negotiations will end and that a contract will be signed. Not only will everyone concerned have to live with that contract but they must continue to work together cooperatively on matters not covered by the contract. The realization places heavy responsibilities on the administration but it is a responsibility we must accept and which we must recognize as a most important test of leadership. To me it means that we must have a firm hold on our tempers and a clear vision of our responsibility. We cannot indulge ourselves in cheap rhetoric nor can we succumb to the temptation of fighting fire with fire. The principal responsibility of maintaining an atmosphere of cordiality both at the bargaining table and on the campus is ours. Our statements should be temperate and factual and our attitudes both firm and friendly. We cannot afford the luxury of vituperation or righteous

indignation. Too much is at stake that transcends the brief period of negotiations or even the final contract.

I must admit that for those who are seeking some sure-fire way of dealing with the unionization of our professional staff what has been said may not be very helpful. I assume, however, that the nuts and bolts of negotiating will be dealt with elsewhere in the conference by those who are closer to it than I am. All I can urge on you is a set of attitudes with which to approach the problem which I hope will help in bargaining but which, more importantly, will help to preserve an atmosphere on your campus that people can live in comfortably after the dust has settled.

The educational enterprise functions adequately only within the context of a reasonable measure of trust and respect among those who participate — faculty, students, administrators and trustees — how to maintain that in the face of conflict or adversity is the true measure of administrative leadership.

Unionism's Place in Faculty Life

by DAVID SELDEN
President, American Federation of Teachers

In 1964 when I came to the AFT National Office as Assistant to President Charlie Cogen, one of the problems that we addressed ourselves to was the problem of AFT prestige. The NEA, our chief rival, had for many years been running a campaign against the union more or less on the basis that you couldn't be both professional and a union member. While this propaganda was aimed mainly at elementary and secondary school teachers, it could have applied even more to college teachers.

As a matter of fact, we had very few college members in the AFT, and those we did have were people who had joined over the years for ideological reasons. They wanted to be associated with the American labor movement and the only way they could give any legitimacy to that association was by joining the American Federation of Teachers. By far, the largest group of college people in the AFT were in Local 189, which sought to organize education directors of unions, primarily.

One of the ways I sought to improve the prestige of the AFT was by publishing a professional journal with a distinguished advisory council. I found, after considerable searching for distinguished AFT people, that we did have maybe a dozen or so people who had been heard of outside of their own immediate localities, so I diligently searched out all of them and put them on the advisory board. They agreed to be exploited in this way with the understanding that they would never be called on to advise.

That's how things were in 1964. There was no college local of the American Federation of Teachers which was a majority local – junior college, community college, four-year college or university. There was no college local that had collective bargaining rights.

I don't know when the first collective bargaining agent was recognized on the college level, but it probably was not before 1966. Now, it is only seven years later, and the coming way of academic life even at the college level is collective bargaining. We are way beyond prestige building by scrounging around for advisory board members.

Many people have a great many misgivings about the advent of collective bargaining at the college level, just as there were many people who had misgivings about the beginning of collective bargaining at the elementary and secondary school levels. I remember that the National Education Association refused to use the term "collective bargaining," preferring to develop an entirely new vocabulary which was designed to give some of the substance of collective bargaining without the reputation. Collective Bargaining was called "professional negotiations" and there was a great deal of discussion about the role of the superintendent. Some writers even developed a model for tri-partite negotiations, with the administration being the third party. All of that's gone by the board, of course, and many of the things that the American Federation

of Teachers began saying in the early 60's have been established as accepted fact. This process is now happening at the college level. Some organizations and faculty members are still trying to have the benefits of collective bargaining with none of the pain.

I was asked to talk about the effect of collective bargaining on faculty life. I did teach for Rutgers in the labor program over a period of years, but that's about the closest I ever got to college teaching. Dr. Kugler, who is here today, is an old friend of mine, and some time around 1953 we spent a lot of time organizing the Community College of Applied Arts and Science in Brooklyn. I learned a lot of things at that point, but I hope you'll pardon me if there are certain lapses in my first-hand information. Furthermore, my contact with college collective bargaining is all from the teachers' side.

"Faculty life;" the term strikes a bell in my memory. A dear friend who died more than 10 years ago – a very wonderful man named Eli Trachtenberg – was a teacher in NYC. Eli developed a concept of faculty life as applied to a junior high school. His idea was that the faculty should meet together at least once a month, without too specified an agenda and without too much reliance on Roberts' Rules of Order and without the principal, to discuss school problems. He welcomed everybody into those meetings at Jr. High School 136 in Manhattan – union members and nonmembers. Perhaps because he was a skilled conductor of discussions; he really did develop some faculty life in that school. Of course, there had been very little faculty life before that time. There had been faculty meetings called by the principal to deal with items on an agenda; ditto sheets were distributed and the principal would read them to the faculty. That, of course, is not faculty life.

In my inquiries among college people to try to find out what faculty life is, I found that the reaction to my questions ranged from blank stares to outright indignation. Most people in college today feel there is very little contact among the staff that could be termed faculty life in the sense that Trachtenberg was able to work out in a very different, but still applicable, situation.

We have Faculty Senates, but these are formal bodies very often include deans and other administrators. In many areas there is a conflict between administration and teachers; professors, and instructors. The conflict doesn't stem directly from Marxist pressures. It is more a sociological conflict; a matter of interest and orientation. The administration *does* tend to be what we might call "upward-oriented." The president is employed by the board of trustees, and while he may be tough enough to withstand some of the more outrageous demands that are made by the board (or the Board of Higher Education), still, he knows where his contract comes from. The deans and the other administrative officers are part of the management team. They, too, tend to be upward-oriented. If there is anything more important than the job at hand, it's the next one they're trying to get.

I'm not a sociologist, but there is a sociology of administration that calls for a certain amount of class identification. The teachers, for the most part, may be interested in their next grant, if you want to be cynical. Or they're interested in being successful in the results of their classes. Student success is what gives them their chief reward – although money helps, too. Neverthe-

less, you can't pay a person enough to be confronted with a feeling of failure day after day or year after year. It's a question of psychic survival.

So, there are identifiable class interests in governmental agencies, colleges included.

Let me say a word about collegiality – I don't know whether that is a hard "g" or a soft "g"; maybe it's soft for some people and hard for others.

Well, anyway, in addition to the structural source of conflict that exists between faculty and administration, another enemy of collegiality – faculty life – is "alienation." We have had a tremendous expansion in the college enterprise. We are still expanding at the junior college level. There are some states, such as the one I live in, Virginia, where the junior college has just been discovered. The system is expanding in these states, particularly in many states which did not have adequate college services. As colleges of all types have grown, it has become just too hard to know people. To have a feeling of collegiality one must have some confidence in the others involved. How can you have confidence in people that you never see from one year's end to the next, or even in people in your department that you have only a nodding acquaintance with at best? It's a problem of size that has not been solved at the college level. The expansion of colleges during the sixties has not been assimulated.

Another source of alienation among college people is the accent on research which emerged during the fifties and sixties. Research is a solitary occupation. It takes people out of the main stream of faculty life. As everyone knows, it has been a bonanza for people who like to do research, but now it seems that probably has to come to an end. The trend is the other way, but its effect on the ability of people to communicate with each other was negative. It alienated faculty members from each other.

Finally, conflict between administration and faculty is a fact of life on most campuses. I do not think that everything that college teachers want to do is right for either them or the college, but we must discover more ways for genuine responsibility to be assumed by faculty members. There should be an effort to work out more departmental responsibility. I know that in CUNY, the tradition of departmental responsibility is stronger than it is in most universities. There should be more interdepartmental contact, as well as contact within departments, and certainly the bargaining agent could provide one means of bringing this about. Of course, it is difficult to do that while trying to get a contract in the first place.

Another observation which has occurred to me is that in many colleges there is no center where people can meet away from the sidearm chairs and the chalk dust of the classroom, and away from the make-shift quarters that many people have to get along with in lieu of offices. We need places where faculty members can meet in some dignity to think about – plan – some of the solutions to the problems which concern them. A private institution can, perhaps, be a little more daring along these lines than a public one, but there is no reason why, if the Board of Trustees or the bargaining agent wishes to set up one faculty center or one with branches, it can't be done.

I don't view the mission of the union as one of creating conflict. As the Union matures, it takes on greater responsibility. It assumes (I hate to use

this word, but I will) greater accountability for the success of the institution for which its members work. But a good Union – and I think ours is a good Union – must have a three-fold purpose. In the first place it has to be concerned with the welfare of its constituency. There is no evading that, and nobody should get mad if the Union tries to get higher salaries, better fringe benefits, and better working conditions for professors and instructors. Secondly, the Union must be concerned with the quality of the institution, the quality of instruction, the quality of education. In times of financial austerity, as we now find ourselves primarily as a result of the policies of the national administration, it is difficult to improve the quality of instruction. You can't hold the whip over teachers to make them teach faster. It just doesn't work like that. The quality of instruction depends primarily on the amount of investment the public is willing to put into the institution. Finally, the third quality that I would like to see a union sponsor is concern for the quality of life – a concern for the condition of society. Without that, the rest of it is sterile. I do not want to see an American Medical Association in education. I would like to see an organization that is responsible as a whole. We should welcome the participation of representatives of society in most of our processes wherever it is appropriate.

I do not think that faculty life in an American higher education institution, even the most Ivy League, ever resembles that we see pictured in the novels of C. P. Snow, and I hope we never achieve such stuffiness. But in some institutions there seems to be more collegiality than in others. At least, if we have as a goal the development of more mutual regard and interdependence, in due course we will come much closer to true collegiality than we have today.

Historical Development of Faculty Collective Bargaining and Current Extent

by DONALD H. WOLLETT
Professor of Law, University of California at Davis

It is the fashion to begin these conferences with a speech that has a panoramic title. I am stuck with the title – it was imposed upon me. However, I have assumed license to give it the content which I deem to be of prime relevance and materiality – as I examine the two-day conference curriculum.

I note that the following matters are on the agenda that lies ahead: productivity, management rights, collegiality, faculty responsibilities, unit determinations, bargainability of tenure, the relationship between binding grievance arbitration and the finality of academic judgments in determining tenure and related questions, the structure of management, and (a subject which fascinates me) – "*Creation* of a Distinction Between Management and Faculty."

First, I shall pay my respects to the title. I shall then touch on some of these subjects in an analytical and provocative way. My objective is to create a spirited dialogue, even at the risk of being obnoxious.

As to the former, the watershed event in terms of structured collective bargaining – United States style – with appropriate bargaining units, designated organizational representatives with the status of exclusivity, a defined constituency, an identifiable and authoritative management team, and an enforceable written collective agreement to be implemented by binding grievance arbitration – was the bargaining that transpired at the City University of New York which led to the consummation of the collective bargaining agreement dated September 15, 1969 – scarcely three and one-half years ago. In sum, the history of collective bargaining in higher education is short, although the signs of its development were evident before 1969. The symptoms were described in 1967 by the Report of the Task Force, entitled "Faculty Participation in Academic Governance," sponsored by the American Association for Higher Education.

As far as extent is concerned, Joe Garbarino tells us that as of last summer there were 39 collective bargaining systems in the state of New York alone, even if CUNY and SUNY are counted as only two units, with 32 units in Michigan, and that there were 33 new units established from June, 1971, to June, 1972. Professors Ladd and Lipset state:

> *As of September, 1972, . . . the National Education Association, (NEA), represented over 50,000 professors and non-teaching professionals at 76 four-year colleges and universities and 119 two-year schools. The college division of the AFL-CIO affiliate, the American Federation of Teachers (AFT), had won rights to represent 24,000 academics at 76 institutions (33 four-year and 43 two-year). And the traditional faculty professional association, the American Association of University Professors (AAUP), had plunged, albeit with more than a little reluctance, into the world of collec-*

tive bargaining, serving as agent for more than 4,000 professors at 16 universities and four-year colleges and at one community college.

By mid-November 1972, the number of faculty and other professional personnel covered by union contracts approached 80,000, up from just 10,000 in 1968. And a continuing stream of collective bargaining elections seemed assured. In the late summer and early fall of 1972 alone, faculty at the University of Hawaii, Temple, Lincoln University, Hofstra, Somerset County College (N.J.), and Roger Williams College (R.I.) joined the ranks of those under contract.

The defeat of collective bargaining in 1972 at Michigan State University (and at Fordham and Manhattan) may slow down this growth, as Garbarino suggests, but Ladd's and Lipset's phrase "rapid growth of professional unionism" may prove to be more accurate than Garbarino's more quotable metaphor, "creeping unionism."

Be that as it may, the point is that the current extent of faculty collective bargaining is widespread and growing.

Self-Governance and Collective Bargaining: Can they co-exist?

My thesis is that they cannot, that the issue is cleanly drawn, that the choice is clear (if understood), and 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.

In coming to grips with this issue, I would like to refer to the report of March 15 of this year made by the Assembly Advisory Council on Public Employee Relations to the Speaker of the California State Assembly – a five-man committee upon which I was privileged to serve. After four days of public hearings, the receipt of extensive oral testimony, as well as many written statements from persons and organizations who were not able to appear at the hearings, and extensive review of existing pertinent federal and state laws (as well as those in several foreign countries), the experience under those laws, current legislative trends, and after several executive sessions during which the report moved through an agonizing series of drafts and redrafts, we reached a fundamental conclusion:

Although recognizing that there are important differences between the public and the private sectors, the Advisory Council has concluded that there are equally important similarities. *It has not hesitated, therefore, to recommend that certain practices and procedures under the National Labor Relations Act, which have been tested for almost 40 years, be incorporated in a proposed new statute covering employer-employee relations in the government service in this State. . . .*

The superficial implications of this conclusion are reflected in the fact that we propose a straight-forward collective bargaining law which borrows heav-

ily from the private sector and includes only a minimal number of adaptations to the idiosyncracies of public employment, with total rejection of the proposition that "education is different."

> *We are convinced . . . that there is nothing intrinsic in the teaching profession in institutions of higher learning that absolutely rules out collective bargaining as the alternative to present methods of faculty governance. Reasonable men can and do differ over the advisability of substituting collective bargaining for existing arrangements, and we express no opinion on that question. We do conclude, however, that the faculties of state colleges and universities should have the same rights and protections as other public employees in the State to decide for themselves whether they wish to organize and to engage in collective bargaining with their employers. (at p. 39)*

Specifically, we recommend that supervisory employees be excluded from the rights and obligations of the collective bargaining system. This conclusion is based upon the proposition that collective bargaining is an adversarial, not a collegial, system and that its effective and meaningful operation requires strong employee organizations balanced by strong management teams. Because employee organizations, under our recommendations, are given broadly-based rights of collective bargaining, including in most instances the right to strike, we believe that public management, including the management of institutions of higher education, should have the right to insist that all persons who fit our proposed definition of supervisor be a part of the management team.

Our definition is functional, making job titles irrelevant and job descriptions of slight probative value; the question in each case is what the employee who allegedly is a supervisor *in fact* does. If he has a substantial responsibility on behalf of management regularly to participate in the performance of all or most of the following functions – employ, promote, transfer, suspend, discharge, or adjudicate grievances, if in connection therewith, the exercise of such responsibility is not merely of a routine nature, but requires the exercise of independent judgment, he is a part of management. This would have the effect, in the self-governance structures which characterize some institutions of higher education, of excluding department heads and deans; more dramatically, it would remove from the employee's side of the bargaining table any member of the faculty who participates on a *regular* (as distinguished from an *episodic*) basis in recruiting decisions, promotions, merit increases, tenure or nonrenewal. Thus, many members of the "establishment" faculty may find themselves on the management side of the table if the self-governance structure survives collective bargaining; clearly this would be true of senate committees which function as personnel committees, such as the Budget Committee of the campus Senate divisions in the University of California system.

Furthermore, we take direct aim at senates by making it an unfair practice for an employer to dominate or interfere with the formation or administration of any employee organization or to contribute financial or other support to it.

Thus, if the senate is supported by institutional funds, or has supervisory employees playing key roles in the formulation and implementation of policy, or has members who are indirectly subsidized by being given released time from teaching or research activities in order to perform senate functions, the university or college is guilty of an unfair practice.

An employee organization is defined by us as one which exists in whole or in part for the purpose of dealing with employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment. In sum, a university would have to terminate all forms of support, direct or indirect, and all forms of effective interference with the operation of academic or faculty senates or; *alternatively*, senates would have to get out of the business of handling grievances, of making decisions in respect to recruitment, merit increases, the award or denial of tenure, advancement up the tenure ladder through promotions, and other functions which relate to compensation, work load, or the terms and conditions of the working environment, in respect to which they purport to represent the faculty vis-a-vis management.

We take aim on one other matter which is pertinent in traditional self-governance systems. At the University of California, for example, only members of the tenure faculty are members of the Faculty Senate, its committees, and representative bodies. So-called non-teaching professionals are not part of the governance structure. Our committee regards this distinction as being sufficiently artificial so that the administrative agency responsible for implementing our proposed statute would not be foreclosed by law from including in collective bargaining units both groups under circumstances where the functional interrelationship between the two classifications overrides the fact that the standards for acquiring a rung on the tenure ladder have not been met. Thus, it would be possible under our proposal for non-teaching professionals (who often in fact do more teaching than the members of the teaching faculty) to be included in the same unit with the "elite" faculty.

We also provide that, if a collective bargaining representative is selected and a collective agreement is negotiated which includes an agency shop provision, any faculty member, including those who enjoy tenure status, may be non-renewed, discharged, or placed on terminal appointment if he fails either to join the organization or to pay to it a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization.

Finally, with respect to the disposition of grievances, we recommend that the parties are free to define the term as broadly or as narrowly as they desire in their negotiations. We reject any distinction imposed by law in respect to grievances that involve so-called academic judgments as distinguished from other judgments; we provide that the parties may define a grievance as involving any question concerning the interpretation or application of the collective agreement or any established employer policy or practice which the parties have agreed should be considered a grievance. Furthermore, we explicitly recommend that the parties be authorized to submit such disputes to binding arbitration by an impartial outsider, again without making any distinction in respect of questions involving academic judgment as distinguished

from those which do not. In sum, we found no persuasive reason why the parties should not be empowered to authorize arbitrators to make decisions in respect to such matters as tenure, promotions, or the award of merit increases – either in response to a hearing on the merits or in prescribing a remedy for some procedural aberration.

Since three of the five members of this committee are faculty employees of the University of California, and the chairman has been very active in the affairs and operations of the Academic Senate, including a stint as chairman of the Senate division at the University of California at Los Angeles, there has been some surprise expressed at our conclusions. Here it is important that the Report not be misunderstood. The thrust of the position is not that the faculty *should* opt for collective bargaining as distinguished from self-governance (although that is my personal preference). Our point is that the faculty should have this *choice;* our further point is that the choice, since it should be made intelligently, should be grounded on an informed understanding of its implications – the basic one being that collective bargaining is an adversarial system which carries with it the consequences and implications we have specified. Collective bargaining amounts to a turning away from collegiality and self-governance and a moving toward an adversarial system which recognizes that the central fact of life in the academy is that there are those who manage and those who are managed, that there are employers and employees, that conflicts arise from these relationships, and that in a collective bargaining system they are resolved by a process predicated upon the proposition that people whose interests conflict are, at least in respect of those conflicts, adversaries.

Why are the two systems incompatible?

The teacher who is active in a system of self-governance may spend much of his time performing managerial functions. He may serve on a departmental or divisional recruiting committee, a merit increase committee, or a promotional or tenure committee. He may also be a part of the senate structure where his managerial responsibilities are so great that he is given released time from the classroom. How is he to be categorized in a system of collective bargaining – as a part of management or as a part of the employed work force?

Where the decisions reached in higher education are *managerial* in the sense that they direct and control (and sometimes terminate) the on-the-job life of other persons, the question of who makes them is simply irrelevant in a collective bargaining structure. Collective bargaining is a system of representative government, predicated upon the principle of majoritarianism, which operates essentially as a check on the performance of managerial functions, regardless of *who* makes those decisions.

It has been argued that a system of self-governance should be strengthened in the collective bargaining process by guaranteeing its status and authority contractually so that its power no longer rests on the willingness of the governing board to share authority but derives from an enforceable legal instrument; it has also been argued that such an agreement should further strengthen the

self-governance mechanisms by providing that decisions reached pursuant thereto by faculty should be definitive. This argument is not persuasive unless one makes the doubtful assumption that decisions made by faculty vis-a-vis other faculty are inherently more equitable, less likely to be characterized by unfairness, and more likely to upgrade the quality of the institution than decisions made by persons who are a part of the formal administrative hierarchy. Furthermore, it seems unreal for the faculty to suppose that it can justify a system of authority without responsibility, where the faculty "establishment" is accountable only to itself, while administrators must answer to aggrieved faculty members, to students, and to alumni or taxpayers.

If the faculty desires to participate fully in the collective bargaining process and to accept the premises upon which that process are based, it should be prepared to remove itself from the performance of managerial functions which are time-consuming and economically unrewarding, leaving such decisions to the administration, subject to challenge by their organizational representative in the collective bargaining system.

Nevertheless, despite what appears to me to be the overwhelming force of the argument to the contrary, there continue to be those who do not see self-governance and collective bargaining as mutually exclusive, their basic thesis being that collective bargaining can be used either to strengthen the self-governance system or to create it, in either case converting its "shared" authority derived by delegation from a governing board into "guaranteed" authority derived by contract from an enforceable agreement.

I have already indicated my skepticism (indeed, my rejection) of this argument. Let me be more specific.

In the first place, there are statutory constraints frequently imposed upon collective bargaining systems by law. Thus, the state of Oregon limits the scope of mandatory bargaining to salaries, grievance procedures, extra compensation, and related economic policies. The Nevada law makes it permissible but does not require an employer to agree to any proposal which interferes with the employer's right to direct the employees, to determine qualifications, standards for work, nature and content of examinations; hiring, promoting, transferring, assigning, and retaining employees in positions; suspending demoting, discharging, or taking other disciplinary action against employees for proper cause; relieving an employee from duty because of lack of work or other legitimate reasons; maintaining the efficiency of operations; and determining the methods, means and personnel by which operations are to be conducted. Hawaii makes agreements in respect of such matters illegal.

Even the National Labor Relations Act, which in the main has been liberally construed by the National Labor Relations Board in cases involving scope of bargaining questions, has been interpreted to contain a domain of managerial prerogative into which employee organizations can make incursions only if they have the muscle to do so. In this regard one should note the footnote in the NLRB's decision in the *Adelphi* case where the Board stated:

> *The delegation by the University to such elected groups of a combination of functions, some of which are, in the typical industrial situation, normally*

more clearly separated as managerial on the one hand and as representative of employee interests on the other, could raise questions both as to the validity and continued viability of such structures under our Act, particularly if an exclusive bargaining agent is designated. We have not been asked to pass on these lurking issues and, in any event, would not do so in the context of a representation proceeding.

The point to note here is that the scope of subject matters which the NLRB regards as legitimately within the ambit of bilateral concern varies depending upon whether the system is a shared authority system where ultimate power continues to reside in the managing board or whether it is a collective bargaining system which redistributes power, taking a share of it from the governing board and placing it in the hands of the employee representative.

It should be remembered that both in the *Adelphi* case and in the *C. W. Post* case, the NLRB had before it the question of whether faculty members of higher education institutions who perform "quasi-managerial" functions by virtue of their participation in faculty senates and other decision-making bodies are supervisors and thus excludable from the bargaining unit as well as the other protections of the National Labor Relations Act. The holding that the faculty members involved in the two cases were not supervisors within the meaning of the NLRA was clearly predicated on the proposition that the authority they exercised rested on collective discussion and consensus, that the concept of collegiality, wherein power and authority are vested in a body composed of one's peers or colleagues, does not square with the traditional authority structures with which the NLRA was designed to cope.

The Board stated the central dilemma in these terms:

The statutory concept of "supervisor" grows out of the fact that in those organizations authority is normally delegated from the top of the organizational pyramid in bits and pieces to individual managers and supervisors who in turn direct the work of the larger number of employees at the base of the pyramid.

Because authority vested in one's peers, acting as a group, simply would not conform to the pattern for which the supervisory exclusion of our Act was designed, a genuine system of collegiality would tend to confound us. Indeed the more basic concepts of the organization and representation of employees in one group to deal with a "management" or authoritarian group would be equally hard to square with a true system of collegiality.

The Board rested its decisions, as I read the cases, on the point that the ultimate authority in a self-governance system does not rest with the peer group but rather with the governing board. Although the facts in a given case may indicate, as they did in those cases, that much respect was paid by the trustees to the recommendations of the collegial body, it was clear that the trustees reserved the ultimate authority for themselves. In sum, the Board of Trustees had simply formalized a procedure for soliciting and receiving the *advice* of the faculty, and the faculty, by agreement with the trustees had

seen fit to spend its time and to channel its collective advice through the vehicles at issue.

But the question remains as to whether the NLRB would have reached the same conclusion, or will reach the same conclusion, if it is faced with a true collective bargaining system in which the authority of faculty to perform managerial functions is delegated without reservation.

There are also the realistic constraints imposed by considerations of relative bargaining power as between governing boards and faculty organizations. It is one thing for a governing board to "share" authority which it may, in a given case, "recall." It is quite another thing to give up authority by agreeing in an enforceable legal instrument that power will reside elsewhere or that its exercise will be curtailed to the extent prescribed by the agreement. The fact of the matter is that faculties in higher education have yet to demonstrate the degree of bargaining power which is necessary in order to impel or compel governing boards to include provisions in collective bargaining agreements that relate to such matters as admissions policy, curriculum, grading standards, academic freedom, election of department chairmen and deans, recruiting, merit increases, promotions, and tenure. Clark Kerr has stated that a strike may be defined as the concerted interruption of a service which the community regards as valuable. If this is valid, a faculty strike is not possible by definition.

This is obviously an overstatement. Some institutions of higher education perform functions, such as the operation of a teaching hospital, the interruption of which would generate significant pressure on the institutional managers. In research-oriented institutions, substantial economic loss might be caused by the elimination of the "overhead" take from research grants. If a strike protracted to the point where the academic careers of a large segment of students were threatened, the managerial decision-makers might feel pressure from the community; however, it should be noted that long strikes are anathema to employee organizations whose members cannot long tolerate significant loss of income. Other sanctions are possible, such as forms of academic sabotage, *e.g.*, refusal of faculty to serve on committees or to seek research grants, censure or "blacklisting," or an effort to persuade "trade associations" such as the American Association of Law Schools to threaten the withdrawal of accreditation if specified work standards are not met. Thus, it is not accurate to say that faculty organizations are without bargaining power; however, it does seem accurate to state that the strike or the credible threat of a strike is not likely to be effective in moving management to relinquish its "prerogatives."

There are also constituency constraints on efforts to broaden the role of the faculty senate or some other instrumentality of self-governance through the collective bargaining process. The question can be posed illustratively as follows: Should the faculty, in its aspirations to self-governance, involve itself in decisions relating to recruiting, promotions, granting tenure, and awarding merit increases? If the answer to this question is yes, then the faculty must also be prepared to assume a heavy burden of responsibility in meting out discipline to its members.

This question goes directly to the matter of so-called "peer" evaluation. Peer evaluation is grounded on the premise that the members of a higher education faculty constitute a profession; and that they should, as a part of their obligation of professional self-regulation, evaluate each other for the purpose of ascertaining who survives and prospers in the academy.

The pros and cons of peer evaluation are not pertinent to this question. Whether peer evaluation is a form of ritual cannabalism pursuant to which "superior" peers evaluate "inferior" peers or whether it is a *sine qua non* of "professionalism" a la doctors and lawyers is beside the point. The point is that the majority of the bargaining unit will want protection against their colleagues as fully as they seek protection against the administration. (Not, I may say, an unreasonable position, particularly for the "non-establishment" group.)

In considering the coexistence of a system of self-governance with a collective bargaining system, there is the question of whether the former or the latter leads to greater efficiency and accountability. Since I returned to University teaching four years ago, after an absence of many years while I practiced law, I observe that self-governance which thrusts the faculty into the performance of managerial functions serves primarily the interests of the administration. I advance this, of course, as a generalization, recognizing that there are exceptions. Note, however, that self-governance predicated upon shared authority permits administrators to have their cake and eat it too. They can utilize the instrumentalities of self-governance as lightning rods for making unpopular decisions for which administrators do not want to take responsibility. The risks are minimal because the authority is shared, which means that if the faculty makes a managerial decision which is unacceptable to the administration, it can be vetoed if administration has the guts to do so. On the other hand, from the standpoint of the faculty, the performance of managerial functions is time-consuming, energy-consuming, and economically unrewarding (unless released time is granted).

I was favorably impressed by the remarks of Edward Bloustein, President of Rutgers University, which he made before the American Association of Colleges in San Francisco last January. He stated:

> *. . . We are told collective bargaining thrusts administrators into an unfamiliar and unwanted management role. Contract administration, with its emphasis on legalism, its grievance laden tendencies, and its use of adversary proceedings, will almost inevitably change the tone of the University administration and tend to polarize the campus.*
>
> *Does collective bargaining thrust administrators into a management role? In fact, administrators should have assumed such a role years and years go. What has been wrong with many of our great universities is that they were badly managed. To lay at the feet of collective bargaining the fact that presidents of universities are going to have to become good managers does not seem to me to impose a burden which they should not want to undertake quite willingly.*

It has been said that collective bargaining is intolerant of poor administration. What this means is that collective bargaining, if it works properly, exposes the incompetent administrator, the manager who cannot make a decision, the dean who is indecisive or dilatory, the department head whose record-keeping defies analysis, the chancellor whose decisions are uniformly determined by his judgment as to how to maximize his chances of survival. Since collective bargaining requires a strong effective management team, lest the operation be overrun by the employees, the persons ultimately responsible for institutional management (typically the board of trustees or the board of regents) recognize early on that they cannot afford the luxury of incompetent management, which either is forced to shape up or ship out. The result is an improvement in the efficiency of the institution and in the accountability of the institution to the consumers of its services. I believe in strong managements, and I believe that one of the pluses of collective bargaining is that it will force educational institutions to improve their managerial structure and most importantly their managerial personnel.

Lastly, why do faculty have this romantic attachment to self-governance? What is it anyhow? Is it really a hallmark of a profession or is it more like the medieval guilds which were dedicated to self-interest, self-indulgence, and artificial control of the labor market? The more I look at self-governance as it operates, the more it seems to me to be like an integrated bar association, that is, one in which the lawyer must have organizational membership as a condition of practicing law in the state involved. The purveyor of the service determines the standards for admission, the canons of ethics and other responsibilities, and effectively controls the disciplinary mechanism. But if one looks at this structure critically, is it designed to serve the community or designed to serve the members of the bar? Are the same standards, for instanace, applied to senator partners in the status law firms as are applied to struggling young lawyers seeking to get a "piece of the action?" Why is it that cynics have characterized the canons of ethics in the law as a set of rules pursuant to which old lawyers keep young lawyers from getting much business? Does not self-governance in higher education have many of the same characteristics?

If there is validity to these rhetorical questions, do they not tell us why, as Professors Ladd and Lipset state:

> *Faculty employed in the lower terra of academe, in terms of scholarly prestige, financial resources and economic benefits, and those holding lower ranks, lacking tenure and who are younger, are much more likely to favor organized collective bargaining.*

A Critique of Collective Bargaining

The most disappointing aspect of collective bargaining for faculty in higher education as it has thus far developed is the failure of the organizations to organize effectively around issues of concern to their constituencies, to build effective political alliances (particularly with the community which they serve), and the unimaginative and generally mediocre collective agreements

which they have achieved. The agreements that I have examined seem to me to be singularly unexciting, not only in quantitative terms, but also in terms of other occupational interests of the faculty. Let me be more exact. Where are the agreements that protect academic freedom and prescribe meaningful remedies for its abridgment? Where are the agreements that provide intelligent performance evaluation criteria and their joint administration with a review of capricious and arbitrary judgments by an impartial third party? Where are the agreements that shorten probationary periods which one must serve before he is eligible to acquire tenure? (What is this hang-up about tenure anyhow? It is, after all, only a species of job security. Why should the probationary period be six or seven years when it is more likely to be sixty days in the private sector and six months in the civil service?) Where is the collective bargaining agreement in higher education which manifests a genuine concern (other than some public relations con in the preamble) for the quality of the services provided to the students?

We do not have collective bargaining at the University of California and frankly I do not see it, at least not in the immediate future. But if we did have it, would we recognize the irony in the fact that while we restrict enrollment to students who graduate in the top 12½ percent of their high school class, we spend a much smaller percentage of our operational budget on teaching than the state university and college system which draws from students who finish in the top third of their high school class.

Why do the leading organizations of faculty in higher education continue to reject the concept that teachers should be rewarded on bases which include market place values? Are market place values irrelevant in determining what salary schedules should be for a law school or a medical school? Does it really make sense, in a time when political support for education is on the decline, to insist that the only legitimate criteria for determining value, *i.e.*, economic reward, is credited service and educational bookkeeping credits — both labeled and unlabeled?

How can AFT and NEA deny the fundamental inconsistency between the adversary model and the collegial model? Such a position is inconsistent with any realistic conception and understanding of the collective bargaining process. Collective bargaining requires an employer with whom bargaining must go forward; it is not an auto-erotic activity. Some of the positions taken by the AFT and the NEA sound as if they deny the legitimacy of a management role at the bargaining table, a position which indicates little understanding of the product they are selling.

But Collective Bargaining Can Be Constructive

Clearly there are tensions between the interests of the university in attaining levels of high quality and the interests of faculty members in job security. However, there would appear to be no reason why universities, like other enterprises, cannot handle this conflict with procedures less barbaric and less susceptible to abuse and caprice than the present system where self-governance is the going way of doing business. Aside from the difficult questions

posed by criteria appropriate to the measurement of competence, who is to administer those criteria, and what forms of "due process" are to be followed, there is the question as to whether all faculty should be measured by the same criteria or whether it does not make more sense to have more refined job descriptions than presently exist so that there is room for the man who has nothing to recommend him except that he is a virtuoso in the classroom as well as the man who has nothing to recommend him except that he is a superb researcher. The requirement that the same man must be both is obsolete (if not absurd) in multi-purpose institutions. Furthermore, as technology changes and people become expendable, there are devices for their graceful termination, *e.g.*, early retirement.

The concern of such persons as Prof. Garbarino about the "leveling" effect of collective bargaining among higher education faculty is not persuasive since this tends to be the policy pursued by administrators who are unfettered by the restraints of a collective bargaining system when they are faced with fiscal problems. Under these circumstances, the administration is likely to distribute salary increases unevenly, and without reference to merit, by giving the greatest amounts to newcomers so that the institution can remain competitive in seeking the best of the younger group, while at the same time giving smaller increases to the less mobile members of the faculty who, generally speaking, are the older faculty "rooted" in the community in a variety of ways, particularly by the retirement system, and for whom there is lessening demand in the labor market. These policies also produce a "leveling" effect. Accordingly, the suggestion that collective bargaining will produce a compression of salary levels is not persuasive. Indeed, collective bargaining may have the opposite effect if the faculty presses for the maintenance or improvement of expectancy levels.

As far as maintenance of a so-called "star" system is concerned, there is no reason why a collective bargaining agreement cannot contain minimum salaries and give the administration the freedom to negotiate higher salaries for persons whose preeminence and labor market propositions warrant such compensation levels. There are ample precedents for this in the private sector, for instance, in agreements between the newspaper industry and the American Newspaper Guild or many agreements in the entertainment industry.

As far as the argument over tenure is concerned – generated by such provisions as the one in the fourteen-campus Pennsylvania state college agreement which provides for "no dismissal of non-tenured faculty without just cause [and] full tenure following three years of satisfactory service" – there may be some merit (although I would think very little) to the argument that this is too sharp a restraint on administrative discretion. On the other hand, from the standpoint of simple humanity and decency, the situation which exists at such places as the University of California where a faculty member can work his tail off for five years, receive no adverse evaluations and no indication of dissatisfaction with his work, and then be placed on one-year terminal appointment at the beginning of his sixth year of service has nothing to commend it other than the fact that, given the present labor market, money can be saved and a superior replacement obtained (perhaps).

The simple and general fact is that the personnel policies of most universities and colleges have not kept up with the times, and a major appeal of collective bargaining is that it can be a force which will push the managers of educational institutions into the 20th Century of personnel administration.

However, if this is to occur, both faculty organizations and institutional managements are going to have to discard the old shibboliths, repudiate much of the academic theology, and drink generously of the wine of reality.

The Faculty Rights and Responsibilities Report: University of Michigan

by TERRENCE N. TICE
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In November 1971, the University of Michigan's Senate Assembly Committee on Faculty Rights and Responsibilities issued a 146-page report, accompanied by a 16-page resumé with recommendations, entitled *The Michigan Faculty.* Copies were made available to Senate Assembly members, were deposited in several campus libraries, and were issued to other faculty upon request. Except for the bibliography and appendixes containing surveys on faculty attitudes and on previous experience with governance (pp. 96-146), this document was also subsequently published in *The Michigan Daily.*

Included below are the original introduction, table of contents, resumé, Part A, and Part B. (A few revisions sent from the committee to Senate Assembly on February 18, 1972 are incorporated in this text. The language was changed from "should" to "shall," and section A.1.g was added, as were the last four sentences in section A.2.b. Parts A and B were not passed in their original form.) Also included are all the recommendations eventually passed by Senate Assembly, some of them in revised form.

University of Michigan Committee on Faculty Rights and Responsibilities, 1971 Resume of Report and Recommendations

In February of 1971, The University of Michigan Senate Assembly appointed a Committee on the Rights and Responsibilities of Faculty Members, 1971, and asked it "to report on the present and future nature of faculty organizations, chiefly in relation to the following questions:

"1. whether University of Michigan faculty government, in its present, or in a revised form, can more decisively affect University of Michigan financial and organizational policies, and,

"2. whether an even more effective participation in governance and support plans, might be attained through the formation of a unit affiliated with a state or national organization, and,

"3. whether the Senate Assembly should authorize further action."

The committee met frequently, interviewed numerous individuals, examined the available literature, and deliberated at length. The committee's extensive report to the Senate Assembly is on file and available for inspection at the SACUA office, 4084 Administration Building, and at various locations around campus (to be announced in the *University Record)* together with relevant documents. In order to achieve widest distribution and to promote broad discussion of the important issues involved, the committee here sets forth a table of contents of the full report, a brief resumé, and a list of the

committee's recommendations forwarded to Senate Assembly. The committee believes that its recommendations are more persuasive when supported by the entire report, and we urge all who will do so to examine the complete report.

Contents

Resume

The Committee has reached two general conclusions.

First, we gladly acknowledge that compared with faculties at many other universities the Michigan faculty has better relationships with its administration and governing board and a larger role in the University's important decisions. Nevertheless, we conclude that the University's best interests in the years ahead will be served by sharpening and enlarging the faculty's participation in University governance.

Second, we note that for some time, and particularly during the past five years, the economic status of the Michigan faculty has been suffering a relative decline. We believe that failure to reverse that trend will lead a significant portion of the faculty to be receptive to proposals for faculty unionization.

A nationwide movement to organize faculties for collective bargaining appears to have the State of Michigan as a focal area. Central Michigan University was the first four-year college in the country to elect a bargaining agent. In 1971, Oakland University was the first to sustain a faculty strike. As of September, 1971 about 130 colleges and universities had organized for collective bargaining, more than two-thirds of which were community colleges and 28 of which were in Michigan. Michigan State University has been the focus of organizing activity for several months. Faculties at nearly every college and university in Michigan have experienced formal organizing activities. The critical question that will ultimately face the University of Michigan faculty is: to what degree would collective bargaining be an opportunity to improve

the professional and economic status of the University of Michigan faculty or be a threat against it?

Despite many strengths, the University of Michigan may be unable (indeed — some of us think — will be unable) to avoid faculty organization and collective bargaining unless firm measures are undertaken by the faculty and administration to strengthen faculty participation in university governance and unless faculty compensation is markedly improved.

The committee believes that the substantive and structural changes it recommends will serve to support values fundamental to the very existence of a university community and to advance constructive changes in its life.

Recommendations

A. Faculty Compensation[2]

1. Consultative Negotiations

Senate Assembly shall present for early faculty discussion and approval a procedure involving consultative negotiations with administration officials on salary levels and other faculty compensation matters. This recommendation stops considerably short of full collective bargaining but aims at fulfilling similar goals. The following proposals indicate the approximate model to be used.

(a) The Senate Assembly shall reconstruct the present Committee on the Economic Status of the Faculty (CESF) as a professional consultative negotiating team, responsible for formulating specific requests regarding salaries and fringe benefits for academic staff.

(b) The CESF shall be charged with gathering information and then conferring with administrative officials. The results of this initial process shall then be embodied in specific proposals from the committee, coupled with specific replies from the administration. These proposals will have to be made sufficiently early so that the negotiations can be taken into account within the budgeting process.

(c) If a substantial agreement is reached between CESF and the administration, the policies contained therein shall be embodied in specific faculty-administration recommendations to the Board of Regents, together with any reactions or suggestions that may issue from Senate Assembly.

(d) After trying to seek agreement with administration officials, the committee shall have the right of consulting on these matters directly with the Board of Regents.

(e) In the event that agreement is not reached, the committee shall then report to Senate Assembly the areas of disagreement and the respective positions thereto.

(f) The Senate Assembly will then have a number of options, including but not limited to (1) accepting the report of the committee without comment, (2) instructing the committee to return to negotiations wih a modified

[2]Compare some similar recommendations in the Report of Committee T on "The Role of Faculty in Budgeting and Salary Matters," in: *AAUP Bulletin* 57, no. 2 (Summer 1971), 187-190.

set of proposals, or (3) directing an appeal to the Board of Regents. In the event that agreement still cannot be reached, Senate Assembly can request that the matter go to fact-finding or advisory arbitration, or it can register its dissatisfaction by adopting and publicizing a resolution of censure.

(g) It is hereby understood that negotiations for any given academic year must start by June, fourteen to fifteen months before the beginning of that academic year. Conjointly with the administration, CESF shall see to it that information concerning these matters is provided to state offices involved in making up the Governor's proposed budget bill. Consultative negotiations shall continue in the light of information obtained concerning available funds, long-range planning, possible budget priorities, and possible resource allocations until agreement is reached. Program and resource allocation review shall not be the immediate responsibility of the CESF but shall be coordinated with its primary tasks. Data on such matters shall be made available from related administrative or faculty sources, in time to be of use to the committee and the administration in the consultative negotiations.[3]

2. Other Responsibilities

(a) In addition to its role as a negotiating agency, CESF shall also be given the responsibility continually to investigate, analyze, and otherwise monitor the economic treatment of all individuals that comprise the University of Michigan faculty, to make regular reports, to propose guidelines on faculty compensation, and to make recommendations for faculty discussion and approval, subject to the supervision of Senate Assembly and SACUA.

(b) These duties, together with the responsibility for consultative negotiations, will at a minimum necessitate appointing a full-time faculty chairman and a paid staff consisting of an executive administrator and a secretary, and operating an office cooperative with but essentially independent of the administration. CESF shall receive from the General Fund $40,000 per year for operation of the committee. In addition, full-time release time for the chairman shall be provided. Appropriate office space shall also be provided rent-free. CESF shall have full authority for staff appointments and for disbursement of all funds for this purpose.

(c) CESF shall be charged with responsibility for considering the compensation of faculty members as individuals rather than as a mere group of averages, and shall be charged to uphold the right of every member of the university faculty to fair economic treatment in comparison with his peers. It must, therefore, develop procedures for working with the several schools,

[3]The above takes for granted that the administration will have the continuing responsibility, as at present, of dealing with the legislative process as it moves from the Senate to the House Appropriations Committee to final passage of the appropriation bills. Through SACUA, efforts could be made to enable the administration to utilize faculty members and faculty-related information for this purpose. On occasion CESF members may be appropriately involved in this way at the state level. It does not seem wise, however, for the CESF to be directly involved in lobbying as a general practice, though the administration may be able to draw from positions taken by CESF or from agreements reached between CESF and the administration.

colleges, and departments to prevent and to overcome inequities suffered by less advantaged faculty members.

(d) CESF shall continue to compare University of Michigan faculty compensations with those of other universities and with those of other wage-earning groups. Yet, because the operations of the traditional academic marketplace can lead to salary differences so wide as to be unconscionable, CESF shall recommend to Senate Assembly guidelines and procedures for assessing performance, determining salary ranges, and making salary adjustments. These criteria and procedures shall be made known to all faculty.

(e) Fringe benefits shall be considered an important part of the economic package, as in the past. There shall be more vigorous activity on the part of CESF to update neglected items in this area.

B. Planning, Budgeting, and Resource Allocation

1. Long Range Planning

Senate Assembly shall consider long-range planning as a process requiring both diverse approaches and concerted, integrative effort over the next three years. Each committee having special concerns that could be brought to the overall planning process shall be especially charged with this responsibility and all committees asked to bear in mind this need for long-range planning. In particular, the following committees and commissions may be expected to have complementary material to offer, without unduly overlapping in their activities: Academic Affairs, Financial Affairs, Economic Status, Proper Role, Resource Allocation, University Relations, and Research Policies.

2. Commission on the Future of the University

In addition, Senate Assembly shall immediately seek for the establishment of a Commission on the Future of the University, whose charge it shall be (a) to study proposals for change in the planning and financing of American higher education, in the operation of extension services, and in the interrelated structuring of undergraduate, professional, and continuing education, (b) to serve as a coordinating agency for long-range planning activities of other university committees, (c) to report its findings to Senate Assembly and the Central Administration, with any further publication within the University community that may be appropriate, (d) to place on file relevant bibliographies and materials, and (e) to make recommendations for further study and action.

3. Proper Role of the University

(a) Senate Assembly shall encourage the Proper Role committee to follow up its initial investigations reported in February and March, 1971, with specific charges relating to the University's position within the State of Michigan and within higher education generally.

(b) Thus far, there has not been any detailed study on the long-range future of the university by a faculty committee. Some elements that would be essential in any rational long-term planning are included in the two Proper Role reports. All committees shall be encouraged to study and consider these reports.

4. Campus Planning and Development
Senate Assembly shall work (a) to assure broader expertise and broader representation of faculty on the Campus Planning and Development Committee, (b) to achieve a position of shared authority for faculty in the formation of budgeting and allocation policy in the University, and (c) to obtain the input of values and interests from other committees and from other sectors of the University community in that process.

5. Commission on Resource Allocation
Senate Assembly shall ask the Commission on Resource Allocation to make at least an interim report containing specific findings and recommendations on all areas covered by its charge no later than June, 1972. Undue delay on matters of such crucial importance is not a luxury the University can afford at this juncture.

Alternative Proposal, Section A
Faculty Rights and Responsibilities Report

(Adopted by Senate Assembly on September 25, 1972)

The following document, prepared jointly by some members of the Rights and Responsibilities Committee of the Academic Affairs Committee, and of SACUA, is hereby presented for consideration and action by the Senate Assembly.

Section A. Faculty Compensation and Budget Priorities

It is proposed to amend the statement in the February, 1971, "Senate Assembly Committee Organization and Procedures" which describes the Committee on the Economic Status of the Faculty

from: Duties: This committee shall concern itself with budgetary matters, especially as they pertain to an improvement in the economic status of the faculty and shall advise and consult with University administrators and others concerned with problems of the budget.

to: **1. Duties**

a. Same as above.

b. It (CESF) shall serve as a faculty consultation committee responsible for the formulation of specific requests regarding salaries and fringe benefits for academic staff.

c. It shall gather information and confer with the Office of the President. It shall embody the results of this initial process in specific proposals from the Committee and obtain specific replies from the administration at a sufficiently early date so that detailed consultation can occur during the formative part of the budgeting process. When substantial agreement is reached, the policies contained therein shall be embodied in specific recommendations to the Board of Regents.

d. When it believes that the purposes of the consultation can be well served, the committee shall consult directly with the Board of Regents.
e. The committee shall keep the Senate Assembly informed throughout the consultative process, and the Senate Assembly may respond at any point by giving direction to the CESF and by making public its positions.
f. The CESF could recommend:
   1. That the Assembly sanction its work.
   2. That CESF be given guidance by the Assembly relative to:
      a) Positions to take on *substantive* budgetary matters, and
      b) *Procedural steps* to take in order to gain additional, clarifying information.
   3. That CESF be directed to take the faculty position directly to the Regents if this has not already been done or to return to the Regents again if consultation has already occurred.
   4. That the Assembly take the matter before the University Senate in order to arrive at an appropriate position relative to areas of disagreement.

2. Other Responsibilities

(a) CESF shall also be given the responsibility continually to investigate, analyze, and otherwise monitor the economic treatment of the University of Michigan faculty, to make regular reports, to propose guidelines on faculty compensation, and to make recommendations for faculty discussion and approval, subject to the supervision of the Senate Assembly and SACUA. It shall, therefore, develop procedures for working with the several schools, colleges, and departments to prevent and to overcome inequities. These reports, guidelines, and recommendations shall be made known to all faculty.

(b) The committee shall submit to the Senate Assembly such recommendations relating to compensation policies as it may deem appropriate, in sufficient time for discussion by the Assembly prior to budget deadlines.

(c) The committee shall review annually the policies which the Assembly has approved applicable to compensation programs and recommend any desirable changes.

(d) The committee shall seek effective ways to inform the faculty and, where appropriate, the University community generally, regarding its findings and proposals at each step in the budgetary process in sufficient time to permit thorough discussion of all issues.

(e) CESF shall continue to compare University of Michigan faculty compensations with those of other universities and with those of other wage-earning groups.

(f) Fringe benefits shall be considered an important part of the economic package, as in the past. There shall be vigorous activity on the part of CESF to update neglected items in this area.

3. Staff and Facilities
Senate Assembly asks the administration to make separate and independent provision for sufficient staff, including a director and office facilities, to enable the committee to fulfill its duties. SACUA shall have the responsibility to present nominations for staff appointments to be ratified by the Senate Assembly.

4. Relationship to Other Committees
No specific relationship to any other University committee is assumed at this time. The intent is rather to provide a well-informed faculty voice in budgetary matters and to work with existing committees as deemed appropriate.

5. Review
The above procedures shall be subject to review by the Assembly in the Fall of 1974, this being the earliest possible time at which the ultimate effectiveness could be evaluated.

Resolution

(Adopted by Senate Assembly, December 11, 1972)

RESOLVED: That the Senate Assembly direct the Committee on the Economic Status of the Faculty to devote itself primarily to improvements in compensation, with the understanding that it is not the CESF's duty to recommend or decide where the money is coming from.

Substitution for Part B of the Report of the Rights and Responsibilities of Faculty Committee

(Adopted by Senate Assembly on May 15, 1972)

RESOLVED: That SACUA study and report on the activities of the new committees, Long-Range Planning, Program Evaluation, Budget Priorities, and Steering, to safeguard the missions and integrity of present Assembly committees by arranging for the coordination and flow of information between present and the newly-constituted committees. SACUA will evaluate both sets of committees and report to the regular Assembly meeting in March, 1973.

SACUA's Progress Report on The Office of Budgets and Planning and its substantive committees

(Accepted by Senate Assembly March 19, 1973)

In response to the charge made to it by Senate Assembly May 15, 1972, SACUA recommends the continuation of the Long-Range Planning, Program Evaluation, Budget Priorities, and Steering Committees as constituted until the regular Assembly meeting in November, 1973. At present, SACUA finds no reason to doubt the value of goals outlined and procedures being followed by these committees nor their ability to interface with appropriate Assembly committees. SACUA, however, does not feel that there has been sufficient action by

these committees, or indeed sufficient time for such action, to justify a full evaluation.

SACUA believes that such an evaluation must be made before it can recommend continued support of these committees through appointment of faculty membership on them on a long term basis.

Part C (revised) Report of ad hoc Committee on the Rights and Responsibilities of the Faculty

(Adopted by Senate Assembly, October 16, 1972)

C. Senate Assembly Procedures

1. Patterns of Representation

(a) SACUA shall consider whether current patterns of Assembly membership are adequately representative of the membership of the Senate, and in the light of its conclusions in that regard, whether the adoption of general standards governing the procedures by which the various schools and colleges select their Assembly representatives should be proposed.

(b) SACUA shall keep its procedures for nomination of members to Assembly committees under continuing study to assure that those committees are adequately representative of the Senate membership.

2. Continuing Study

The administration of the University is hereby asked to support the research function of the Committee on the Economic Status of the Faculty by funding a continuing program of study by designated faculty and supportive personnel to ascertain the attitudes of the University community on issues affecting academic work.

3. Research Center on Faculty Governance and Collective Bargaining

Senate Assembly supports the establishment of a foundation-funded Research Center on Faculty Governance and Collective Bargaining, either at the University of Michigan or elsewhere.

4. Handling Crisis Situations

SACUA is instructed to review the procedures currently being followed in the handling of crisis situations within the University, and to ascertain that appropriate and effective faculty participation in the handling of such situations is stipulated. If changes must be made to meet this assurance, SACUA shall prepare the appropriate recommendations for Assembly action.

Furthermore, the University Council is hereby asked to consider whether a faculty monitor system should be established to respond to any major campus disturbances that may arise.

5. Information and Communication

SACUA shall establish a regular procedure, not only through the *University Record* but by other means as well, to assure (a) greater knowledge of its

committees' work among the faculty, (b) a greater ease of access to them by faculty, (c) a more effective discussion within the University community of issues raised in their reports, (d) a more thorough monitoring and following through of programs proposed or instituted by Senate Assembly, and (e) the establishment of several resource stations within the University library system where faculty and others can expect to find up-to-date documentation on issues being considered by Senate Assembly by its committees.

Part D Grievance Procedures

(Approved by Senate Assembly, October 16, 1972)

Several inadequacies still inhere in the grievance procedures, requiring at least the following steps toward remedy:

1. Overcoming Reluctance to Use the Present Process

First, potential exposure to ill will and subtle sanctions at the early stages will discourage faculty from entering the grievance process. This situation shall be carefully and sensitively studied by the Senate Advisory Review Committee and a report made to Senate Assembly at the earliest opportunity.

2. Opportunities for Confidential Counsel

Opportunities to find out one's relative status, to explore a range of possible actions, or to get informal settlement in a strictly confidential setting are still lacking. In the spring of 1971 the Commission on Women and the Faculty Reform Coalition's Task Force on Women in the University both recommended confidential advocacy procedures for that group, with legal services available to offer advice and consultation to the Commission, and with grievance procedures revised to assure due process for all faculty. Some such further provision for all faculty, combining the virtues of the union steward, the legal advocate, and the ombudsman, shall be considered by the Senate Advisory Review Committee and recommendations made for action by Senate Assembly within the academic year 1971-72.

3. Dealing With Inequities between Units, Schools, and Colleges

Finally, the limited jurisdictional scope thus far allowed indicates the need for ways to deal with inequities between the various units, schools, and colleges and to handle problems that arise for staff not members of the Faculty Senate. Senate Assembly shall charge an appropriate committee with the task of considering this need and of reporting suitable remedies.

Respectfully submitted.

The Ad Hoc Committee on Faculty Rights and Responsibilities, 1971.

Isadora Bernstein
Merle Crawford
Claude Eggertsen
Albert Feuerwerker
James Gage
James Hayward
Helen Lloyd
John Reed, chairman
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Productivity and University Salaries: How Will Collective Bargaining be Affected

by PROFESSOR ROBERT J. WOLFSON
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The term *productivity* is freely used, but only vaguely understood, by the layman. It is widely accepted that there should be some simple connection between productivity of factors of production or inputs, and the rates of remuneration received by these inputs. Indeed, this connection, evenhandedly applied to different types of inputs, is generally seen as a necessary condition for economic justice.

In the present discussion what is most relevant is the proposition that univeristy faculty salaries, now in most cases settled by processes of individual bargaining which are tied to what are frequently implicit and at best vague and varying notices of productivity might, as collective bargaining spreads in that set of markets, begin to be explicitly tied to some more well and widely understood notions of productivity. But in order to speak meaningfully of productivity, to speak of it in such a fashion as to be clear about the nature of connections between productivity and remuneration, it is necessary to develop an understanding of productivity which will enable us to measure it for various sorts of inputs, in various sorts of production situations.

Properly used, the term *productivity* should appear only in such extended locutions as: "productivity of input x used in the production of y." That is, in order to measure productivity, and in order to use the notion correctly, we must speak of the way in which the presence of a unit of a particular kind of input affects the final outcome of a particular production process. A production process invariably, even in education, involves the combination of various amounts of several different sorts of inputs to produce some final result or product. In order to measure productivity both the inputs and the output must be reasonably unequivocally measurable. Moreover, a significant prerequisite for the measurement of productivity is the assignment of responsibility for some portion of the final result — the amount of output produced — to a standard unit of the input whose productivity is being measured. In principle the procedure is to estimate how much output would decline if a standard unit of the input in question were removed from the production process and all other units of that input and of all the other inputs used exactly as before. The resulting hypothetical change in output is known as the marginal product of that factor of production, or the marginal productivity of one unit of that factor. The employer who is concerned solely with profit should be willing to pay for a unit of that factor, an amount equal to no more than the amount by which his income would be reduced if he employed one less unit of that factor. Depending on the conditions of both the market for that factor of production and the market for the output, that amount might be as much as the value of the marginal product of that factor of production.

In the simplest case such measurement is conceptually straightforward, although in practice quite complex. The simplest case is that in which:

(a) there is a single, uniform, easily measured output; or a single easily measured criterion of production performance such as profit.

(b) all factors of production are uniform, and their amounts are unequivocally measurable.

(c) there is a regular, discoverable, relationship between the amounts of inputs consumed and the amount of output produced (i.e., a production function).

In such a case the primary practical difficulty arises in trying to uncover the production function – item (c) above. But with sufficient opportunity to observe the production at work, and to analyze its performance in circumstances which vary enough to support statistical estimation procedures, the production function can usually be identified.

However, we frequently find that one or another of the three conditions mentioned above are not met. In particular when we speak not of material outputs, but of the production of services (public or private production) the complexities multiply. In such a case the product is frequently measured in terms of the amount of inputs consumed by them. Thus, an office visit to a physician is really a measure of an input or inputs, not of an amount of anything produced.

In general, in the private production and sale of services, only if the service performed is some standard procedure such as an appendectomy or the drycleaning of a two piece suit, is there primarily a notion of output implicit in the way the product is measured and priced. If the procedures are nonstandard, as for example, the office visit for some as-yet-unidentified complaint, or the design of a media campaign which is not routine, or the conduct of an investigation by a private detective, then there is explicit reference in billing, and by implication in output measurement, to the amount of time spent by various resources, in the procedure. In the case of public production (i.e., the conduct of activities by government agencies) this too is explicitly what occurs. In such situations as these it becomes very difficult to measure productivity.

Higher Education

When we turn to higher education – the university variety of higher education in particular – the situation becomes even more difficult to deal with. To begin with, a small amount of thought makes fairly clear the fact that it is almost impossible to speak in terms of uniformity of the units of labor input. That is, even if they are both in the same field, are of the same rank and length of service, it is unlikely that an hour of Professor A's time is the same as an hour of Professor B's. Second, and probably even more important, there is a real question as to what the output of the higher education process actually is. There are some standard phrases which characterize the qualities that are believed to be involved in productive service in higher education: teaching,

research and publication, university and community service, etc. But how each of these is to be measured, and how they are to be combined to form a single measure of output is a difficult matter to agree upon. Opinions differ from field to field, from time to time, from type of institution to type of institution – four year college vs. university; public vs. private; first line university vs. more typical, of lower quality; land grant school vs. non-land grant; urban university or college vs. non-urban, rich institution vs. institution in financially stringent circumstances, etc.

Studies

There are probably as many answers to these questions as there are individuals worrying about them. Consider some of the numerous explicit and implicit formulations of academic merit as a basis for the award of salary rewards for merit. Thus, one department of which I know has recently made the explicit decision that 80% of any monies available for salary increases are to be awarded on the basis of academic merit defined as being at least 50% (i.e., at least 40% of these monies) on publications in a specific, short list of prestigious journals in the field in question. Among the proposals offered while these discussions were underway was one which would have made all of that 80% dependent on such matters, with teaching and other forms of service not to be taken as contributing to academic merit. The Oklahoma State Higher Education System has done analysis of output in which output is seen as depending overwhelmingly if not entirely upon the number of student credit hours produced. Whether this is to be seen as production by particular individuals or not is not clear to me from my reading and recollection of descriptions of this analysis. The University of Georgia, in a passage introductory to part of its Ford Foundation-supported PPBS project, commits itself as follows:

> *The most obvious output of higher education is the graduate: the much renowned but ill-defined* educated man. *One attainable measure of this output is the self-reported perceptions, opinions, and attitudes of the graduate about his college experience and its relation to his life after he leaves the campus.*[1]

Another study, taking earnings received as implicit indicators of what is being rewarded finds that research and publication, teaching quality (variously measured) and administrative responsibilities, as well as longevity, appear to play specific roles of differing importance, in the process of accounting for differences in academic salaries,[2] within a single, large department.

Depending upon whether the institution is in a condition of financial stringency, whether its main source of funds sees it as an institution whose primary

[1]L. Tisdel, J. Lechowitz and D. K. Kim, *Measuring One University Output: A Survey of Undergraduate Degree Holders from the University of Georgia From the Classes of 1970-1971.* Appendix 7 to the University of Georgia Ford Foundation Supported PPBS Project, Annual Report, October 1972, p. 1.

[2]c.f., J. J. Siegfried and K. J. White, "Financial Rewards to Research and Teaching: A Case Study of Academic Economists", University of Wisconsin Mimeo, December, 1972.

responsibility is to educate the undergraduate, to be a great university in the older tradition of scholarly work and scientific research, whether it is a public or private institution; depending on who is defining productivity – administrators, trustees, local citizenry, students or the faculty – one will get substantially different statements as to the fundamental components of academic productivity and their relative significance in the final mix.

But even aside from this, supposing that a generally acceptable statement could be agreed upon of the relative weights to be assigned to teaching, research and publication, university and community service, etc., there remain some difficulties. How should teaching be measured: in terms of credit hours, or classroom and contact hours; in terms of the level of the course (lower division vs. upper division vs. graduate); in terms of quality based upon some rating system – if so, whose rating? How should research and publication be measured: in some fields books are important, in others journal articles. Should the publisher of the book, or the journal in which the paper is published, make some differences? Should the printed output be weighed, measured, counted? How do you assign a quality measure to the quantity of research? Should citations be counted? Some of these questions sound silly, indeed as if they are raised by someone who is looking for trouble. But, as a moment's reflection will affirm, if a contract is to be negotiated on the basis of some measures of quantity and quality of input and/or output, worse trouble will come if measurement procedures remain unspecified than the trouble involved in approaching some understanding of the methods beforehand.

Thus, we see that there are real problems in moving toward definition and measurement of productivity in higher education. These problems involve *both* the measurement of inputs, and the definition and measurement of output, and therefore the possibiliy of uncovering the production relation (the production function) remains very murky. They are problems involving the possibility of measuring some things at all, and involving the difficulty, or impossibility of agreement as to how the measurement should be conducted.

But, there are circumstances, not in higher education, in which these problems either do not exist or are not as serious as they appear to be in higher education. And, of great interest, in many such circumstances collective bargaining has been conducted for a number of years. What can we learn about how collective bargaining is conducted in general? In particular, what can we learn about how collective bargaining deals with the productivity issue which might be of use to us in thinking about the way in which the productivity issue may affect collective bargaining in Higher Education?

Productivity Bargaining

Productivity bargaining in the United States began in mass production industry about twenty to twenty-five years ago. With the exception of special arrangements for piece-rate bargaining, which covers only very small numbers of workers in special circumstances where output can easily be associated with small groups of workers, productivity bargaining accepts, for the entire group covered by the contract, an annual rate of increase of productivity which is presumably equal to the estimated annual rate for the economy as a whole

(usually 3%). This estimated rate of increase in productivity is applied equally to everyone covered by the contract. There is, in this case, no attempt to assess individual productivity, nor the productivity skills.

Piece Rate Bargaining

Piece-rate productivity bargaining sets standard output rates, and piece rates based on those, for small groups of workers. One effect of this sort of arrangement is that great peer pressure develops against exceptionally efficient performance, on the grounds that if such performance appears with any frequency there will be a tendency, in subsequent rounds of bargaining, for these higher rates of output to come to be cited as easily attainable standard performance levels, thereby effectively lowering the rate of pay per piece of work. But piece work bargaining has been infrequently used.

Thus, even in circumstances in which productivity is measurable, albeit with a bit of difficulty, such involvement as there is between collective bargaining and productivity increase is largely based on estimated national increases in productivity rather than on measures of productivity which are specific to the situation for which bargaining is taking place.

All this suggests that it is unlikely that productivity notions of any great degree of sophistication are likely to show up in collective bargaining for higher education. Collective bargaining in this situation is more likely to concern itself with a number of other aspects of the employment situation. For instance, it seems probable that there will be serious attempts to tie faculty salary structures to price indices so that inflation will not continue seriously to erode the incomes of university faculty members. The form this could take might be to establish a blanket, or across-the-board increase pool contractually which is at least sufficient to cover increases in the appropriate price index. This pool may be defined so that the blanket increases will be sufficient to cover not only cost-of-living increases, but also to allow the national productivity increase of, say 3%, to be applied. Thus, the relative position of University faculty members, relative to other occupations, would be maintained.

Merit

A typical package might include, in addition to the across-the-board pool, some merit package which would be assigned to groups of disciplines (say colleges within the university) or individual disciplines, to be divided among individuals on the basis of individual merit by a faculty committee, as is commonly done at present. The particular basis for deciding when meritorious performance has been manifested might conceivably be peculiar to the field in some respects (i.e., research and publication performance recognized within that field) while in other respects more widely held notions of meritorious teaching and university service might also enter.

Another sort of pressure which could develop might be for a greater degree of equality between fields. Currently it is quite clear that differences in market pressures, from field to field, generate significant differences in salary structures within the university. Medical doctors, economists, lawyers, physicists, and

until recently mathematicians and engineers have been at the top of the economic heap, while humanists, nurses, home economists and journalists have tended to receive significantly lower salaries. In addition, there has been a close association between high salaries and low teaching loads, and conversely. Part of the pressure for collective bargaining has been generated by a desire for equalization. But it seems unlikely that the effects of the larger market, where it exists, can be removed. Differential alternative employment opportunities for lawyers, MD's, economists, etc. will continue differentially to affect the academic market. But what can, and very likely will happen is that salary floors and teaching load ceilings will be written into contracts. The experience of the University of California system, which for several decades has tied salary to rank and grade within rank, supports this conjecture. This system, arrived at without benefit of collective bargaining, also sets standard times in grade. The standard time in grade tends to become a maximum. But in those fields in which there is significant market pressure the time in grade tends to be less, so although for given rank and grade salaries are the same in all fields (except for medicine and law) promotion comes more rapidly in some fields than in others. And at the top of the structure there are supergrades which are individually negotiable, and which tend to be filled largely by those with the greatest alternative opportunities. Something like this may develop under collective bargaining.

Finally, we can expect a variety of concerns regarding fringe benefits to be pressed very hard. Initiation and improvement of research leaves and sabbaticals, disability, medical and health insurance; retirement; tuition benefits for dependents; etc. will be discussed.

Conclusions

Thus, summing up: productivity measurement is next to impossible in the University context. In all probability there will be some attempt to use collective bargaining to build floors under salaries and ceilings over service loads. Productivity considerations will enter primarily through the device of a national productivity dividend distributed equally proportionally to all (say 3%) even though there is no way of saying anything significant about the local character (local to the University) of productivity change. This productivity bonus, along with a cost-of-living adjustment, will serve to keep the relative position of university faculties, vis a vis other occupations, stable. The merit increase pool, its size and the basis for distribution of it, will be an object of serious bargaining, with the objective being to make it as large as possible, and for the faculty to have as much control over its distribution as possible. Fringe improvements will be a matter of some concern. Equalization will be pressed for by those in less-well rewarded fields, and their success will be determined in large measure by internal bargaining among segments of the faculty. But productivity measurement, if raised at all, is likely to be mentioned primarily by administrations as a bargaining ploy – not as a serious issue.

Management Rights Issues in Collective Bargaining in Higher Education

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Collective Bargaining in Higher Education

The management rights issue is not dead. Whenever administrators in an institution of higher education examine their decision-making task load, the rights issue emerges. To a man they will maintain that in the interest of effective and efficient management some decisions *must not* be shared and others would be better made if not shared with the faculty and its bargaining representatives. If sharing takes place, the process will change for the worse: inappropriate pressures, considerations and criteria will be introduced.

Of course, the academic administrator, unlike the traditional industrial manager, does not begin with a full battery of "rights" that the entering union slowly chips away. Shared authority is an old tradition. Faculties view themselves as self-governing professional bodies. Management rights have a counter-balance: faculty rights. Like the craft unions in the construction and printing trades, faculties have long had considerable control over working conditions and employment relations. In fact, they have been active in many decision areas which in private industry are considered exclusive management territory. But unlike the case of the craft unions, these faculty concerns have not been buttressed by a collective contractual relationship. Also unlike the crafts, the "rights" issue does not begin and end with local management. When it comes to matters of governance, boards of trustees and legislators typically are eager exponents of management rights, all too willing to stake out and defend the territory. On the management side, then, the picture is complex, for there is not just one management with one view of its rights. Instead, one is faced with the conflicting positions of administrators, boards of trustees, and legislators.

Structural factors have reshaped the rights picture in recent years. The development of large statewide multi-campus systems has served to move power away from local faculty groups. In these large bureaucratized academic institutions the rights context has become increasingly important as the area of shared faculty-administration goals has narrowed. There are signs that the traditional concept of shared authority is not being called into play in an increasing number of so-called "interests" disputes which are seen as matters of faculty versus administration. The notion of joint governance has weakened as more and more issues of the employer-employee type arise. As in union-management relations in industry, these issues inevitably take on a zero-sum, "you win, I lose" aspect.

Those seeking to understand these developments find that unfortunately, research on college and university government is still in the beginning stages.

Empirical studies are scarce. Professors of industrial relations have found little interest in research on problems in their immediate environment. Thus, as faculties move into collective bargaining relations, predictions about the potential consequences are based much more on conjecture than on solid facts.

The research reported here is a small part – a beginning – of a much larger research program that will focus on changes in the sharing of authority that take place after collective bargaining is initiated, stressing especially the points where sharing is difficult and where rights questions arise. It is our eventual goal to develop models of academic administrative power before and after the initiation of collective bargaining.

This report is based largely on our analysis of collective bargaining contracts in higher education that are in force at the present time. Our sample includes 91 in all, heavily weighted on the side of two year institutions, with 70 in that category as compared to 21 four year colleges.[1] This balance represents the state of affairs at the present time. If one wants to use our sample results to generalize about future developments, the fact that over three-fourths of the institutions are two year colleges undoubtedly serves as a biasing factor. In the future we will undoubtedly see the organization of faculties proceed more strongly at the four year and graduate level just as the two year colleges were spurred on originally by activity in the primary and secondary schools.

Affiliation

For the group as a whole, strictly local relationships are rare. Ninety-five per cent of the faculty associations are nationally affiliated, with 87% in either the National Education Association (56%) or the American Federation of Teachers (31%). However, the two year and four year institutions differ in their choice of parent organization. NEA is dominant in the two year colleges (64% of the total) while the AAUP has only one per cent of these colleges. On the other hand, the four year colleges are split almost equally among the NEA, the AFT and the AAUP.

Size and Geographic Location

Institutions in the sample run the gamut of sizes found in the universe, from under 1,000 to over 100,000. However, almost two thirds fall in the moderate 1,000 to 6,000 pupil size. Not surprisingly, the two year institutions fall at the low end of the size range, while the four year group dominates at the other end.

With regard to geographic location, 48% of the total sample is located in the East, 42% in the Midwest and 10% in the West. There is a regional bias with regard to the distribution of two and four year institutions. Three-fourths of our four year institutions are located in the East, whereas 90% of the Midwestern representatives are two year colleges. Our demographic variables are

[1]According to *College and University Business*, March 1973, Vol. 54, No. 3, in 1972 a total of 43 four-year institutions and 120 two-year institutions had collective bargaining agreements, but of these only 91 were available for distribution.

clearly interdependent. However, as we get into our data analysis we shall see that there are no clear blocks of "votes", all going one way or the other.

Management Rights Clause

The management rights clause in a collective bargaining agreement is at best a strange beast. It is a claim to rights found in a document whose whole purpose is their restriction. One might say that we even maintain management rights as a notion that then permits yielding to bargaining power.

Such imprecise rights have proven to be elusive and difficult to exercise at the workplace, and in this pluralistic society there is very little consensus on what they shall be. Nevertheless, judgments that they are dead are premature. In many places there are no unions and in many instances where unions exist they have little voice. Moreover, I think that the management that insists on one of these clauses tells you something about its philosophy with regard to the union-management relationship. It sees itself as a hard-liner. An expanding field of mutual interests is not its cup of tea, and it uses this device to warn grievance processors, arbitrators and others of this fact.

One might have anticipated that our sage academic brethren might have dispensed with this whole untidy matter when they sat down to spell out the details of their collective bargaining relationship. But interestingly, this did not prove to be the case. Sixty-eight per cent of our contracts, 70% of the two year colleges and 62% of the four year colleges, had such clauses in their agreements.

Some of these clauses were far from being meek, mild, tentative claims. Take the following as a prime example:

> 2.7 The Association recognizes that the College retains the sole right to manage the business of the College, including but not limited to the right to plan, direct, and control its operations; to determine the location of its facilities; to decide the business hours of its operations; to decide the types of educational service it shall provide and books to be sold; to maintain order and efficiency in its operations to hire, lay off according to department seniority, assign, transfer and promote employees; and to determine the starting and quitting time, work schedules, and number of hours to be worked; the number of faculty members, and to determine the qualifications of its employees; and all other rights and responsibilities, including those exercised unilaterally in the past, subject only to clear and express restrictions governing the exercise of these rights as are expressly provided for in this Agreement.

One wonders who was bargaining with whom.

We rated these clauses on a five point scale, assigning a lower rating to very general statements and increasing the score as contracts began to specify in detail the rights that management was retaining. On this basis, the clause presented above is one of fourteen that received a top rating. Forty-nine per cent of the clauses represented the general, "warning to the arbitrator," variety,

while 19% contained strong specific statements. College administrators with a strong proclivity for management rights did seem to be concentrated in one sector — in two year colleges in the Midwest, in the size class under 6,000.

The assertion of management rights is one side of the coin. The other side is the contractually established extent of association influence in various key areas. There is a common tendency to see this as a zero sum game in which all contractually achieved association powers are achieved at the expense of management. However, conceptually it is entirely possible for the association to gain power without any concomitant loss on management's part. The total amount of control over events in the institution may simply increase. Frequently management is not able to control adequately. Some areas may be essentially a "no man's land," where no effective controls exist. The entry of another party into a decision area may lead to improvement. A problem area will be highlighted and given greater attention. On the other hand, things may become worse than they were. Employee participation in decision-making is not new in the academic world, but the bargaining context is. For instance, one academic administrator claimed that the educational situation at his university had deteriorated because bargaining relations had "unduly favored the employment status of individual faculty members, at the expense of institutional interests."

The real loss of rights for management occurs when the new relationship leads to lessened or poorer control than previously existed. Clearly this is not a matter that can be satisfactorily analyzed by study of a collective bargaining agreement. This is a profound, many-faceted problem. The contract language gives us one kind of reading of the situation. One obviously needs many more in-depth readings of the prior and current situation to properly assess the impact of a new collective bargaining situation on management rights.

However, with all its limitations our analysis of contract terms did bring forth some interesting facts and conclusions relating to our problem. We shall report below the results of this research.

Extent of Association Influence

Researchers have found that as the level of employee skill and education increase, interest in participation in management functions becomes keener. On this basis one can anticipate a concerted drive in this direction on the part of professors and staff members in institutions of higher learning. On the other hand, one is faced by the academic administrator's considerable reluctance to share. As one of them put it, "You cannot escape responsibility by sharing it." This man represents many who feel that at least in some management functions sole authority is the corollary of maximum efficiency.

In this research we are seeking an answer to the following question: To what extent have faculty associations penetrated the managerial functions of the academic administrator *via collective bargaining*? Historically, these functions have been penetrated in other ways through the establishment of a variety of faculty councils and committees and representative bodies such as faculty Senates.

Interestingly, collective bargaining, U.S. style has eschewed this "participative route." Our unions concentrate on the role of critic, defending the members' interests, but doing this strictly as an outsider to the managerial apparatus. In Europe, one finds the unions engaged in area-wide collective bargaining. There is little involvement in the plant or in face-to-face relations with managers. This activity is left to the works councils, composed of elected representatives of the employees and entirely separate from the union.

We now have professors joining unions, politely referred to as "associations." Will these associations proceed to behave U.S. style as promoters of more and better bread and butter, leaving management essentially unfettered? Or will they strive to enlarge on the existing participative structures, getting for association members more and more of a determining voice in a variety of questions?

As a first step we selected seven crucial areas, all of which are the center of power struggles in academic institutions. Five are essentially personnel matters, appointment, evaluation, nonrenewal, promotion and tenure. On the surface personnel functions might seem to be a natural, easily accepted area for joint decision-making via collective bargaining. However, research shows that while sharing in the welfare and benefit aspects of the personnel functions is well accepted by employers, there is considerable resistance to substantial invasion of the hard core of the personnel area as exemplified by the above decision areas.

The other two areas involve the heart of the managerial function: governance, long range planning and budget (allocation of funds.)

We will consider each area in turn in order to establish the type and strength of contractually gained association controls in each one.

Appointment

Faculty voice in new appointments is a traditional but by no means universal matter. This practice flows from the concept of a faculty as a self-governing craft or professional group whose present members are considered the only ones qualified to select future members of the group.

Despite the strength of this tradition, we found that half of our contracts made no provision for this function. At the next level we found the specification of some conditions, e.g., according to university policy, and vague criteria to guide this decision, e.g., ability and contribution. Stronger clauses establish procedures, e.g., faculty committee recommendation (twenty-five per cent of the contracts). The strongest clauses stated that the final appointment decision is to be made by the departmental committee.[1] Only 3% of the contracts had this provision. All were large schools in the East. In fact, strong gains in this area were concentrated in large (over 6,000 students) four year colleges in

[1]In scaling for extent of association influence we used the above pattern of grading for each area. The lowest rank in our five point scale was assigned when there was no contract provision. Increasingly higher ratings were given as the agreements moved from vague criteria and condition to the specification of procedures that give the faculty voice in the decision-making process. The highest rank was accorded when faculty members essentially made the final decision alone or as part of a joint committee.

the East. The following is an example of a strong agreement gained in one of these schools:

> §4.2 *Faculty Appointments*
>
> Commencing with the Spring semester of the 1970-1971 academic year, the initial decision on appointments of new full-time faculty members shall be made by the departmental personnel and budget committee in accordance with present practices; the initial decision on appointments of new adjunct faculty members shall be made in accordance with present practices. No appointment shall be rejected by an administrative officer without reason being supplied, in writing to the departmental personnel and budget committee. Except as provided in the 1966 Statement on Government of Colleges and Universities of the American Association of University Professors, no full-time faculty member will be appointed without the approval of the appropriate departmental personnel and budget committee.

Evaluation

Evaluation is a controversial area in academia. According to tradition the professional is to be judged by his peers, at his institution and in the outside world. High level administrators are not thought to be capable of doing this job, even if they have acquired a Ph.D. somewhere along the way. Administrators are more apt to become deeply involved in this function in institutions modeled after the traditional school system, such as junior colleges. Thus it is not surprising that we found here the greatest push for voice in the evaluation process.

Again, slightly over one-half (52%) of these contracts said nothing about this matter; 23% had weak provisions and 25% moderately strong or strong. A small group (7%) had achieved strong voice. Evaluation committees were established, and the criteria they were to use were specified. All of these were two year colleges in the Midwest or West.

Nonrenewal

Nonrenewal or dismissal obviously is a serious question. One would assume that all of the sectors included in this sample would be concerned about it, although the greatest concern will be felt in institutions with many (usually younger) people without tenure. The ranking on our five point scale depended upon the extent of faculty participation provided for, with the requirement of faculty approval receiving the highest score.

The stronger association pressure in this area is reflected in the fact that only 25% of the agreements had no clause relating to nonrenewal. Moreover, 38% included an appeals procedure and faculty participation in the decision. There seemed to be no marked differences among the various sectors' achievements in regard to this question.

Promotion and Tenure

Promotion and tenure will be considered together. Both involve a movement in rank and an increase in status, although tenure is a much more serious de-

cision because it involves a permanent commitment on the part of the institution.

As in other instances slightly over one-half of our contracts made no mention of this issue. On the other hand, 30% spelled out specific procedures that included the formation of a joint administration-association promotion committee. Four year institutions in the East made the strongest gains.

Tenure was once the sacred cow of academia, but recently it has come under attack. College administrators everywhere are seeking a fresh approach to this question because large tenured staffs are beginning to pose serious budgetary problems. Some small eastern schools have stirred up their faculty associations by proposing a limitation on the number of tenured positions. They would simply continue to issue contracts to those who are performing satisfactorily but for whom tenured posts are not available.

But while this larger debate continues, associations have concentrated on the immediate problems of the tenure decision. Who shall make the decision? What appeal rights shall be given to the aggrieved?

Association pressure is reflected in the fact that only 35% of the contracts were silent on this issue. In most of our areas there are no outstanding differences in the achievements of the NEA, AFT, AAUP and Independents, but in the case of tenure, the AFT definitely had made the greatest gains, as did the larger, eastern four year schools.

It should be noted that the provisions in some contracts fell short of full-blown tenure status. One business college contract read as follows:

"On successfully completing his probationary contracts, the new appointee shall be given tenured status. This tenured contract shall be issued annually, except when cancelled through the dismissal procedures of the agreement."

The contract of a community college stated:

"The granting of tenure shall be for a period of three academic years and may be renewed for successive three year periods."

Governance

Governance in a college or university includes a broad range of areas from health and safety and student affairs to long range planning and budgeting. For the purposes of our research, we selected the latter two as examples of critical areas lying at the heart of the management function.

Gains in these areas were predictably few in number. In the case of long range planning only six contracts established joint faculty-administration committees and eight made the same provision for faculty participation in budgetary committees.

One contract at least indicated that the views of the contractually established faculty budget (and personnel) committee are to be regarded as more than just casual advice:

The written, documented advice of the department Personnel and Budget Committees shall be implemented unless the department chairman, or in those departments which have no chairman, the supervising administrator, states in writing and in detail his/her reasons to the Personnel and Budget Commit-

tee. Unresolved disputes will be subject to the appropriate grievance procedure.

Conclusion

At the outset we noted that the management rights issue in higher education is by no means dead. For example, on March 5th of this year the administration of a midwestern community college fired 54 striking professors and replaced them with instructors chosen from hundreds of new applicants only three weeks after they walked off the job in support of demands clearly challenging management's right to manage. At issue was the 2:1 faculty administration ratio. When the administration proposed to hire two more administrators at a total cost of $50,000.00 the entire AFT organized faculty walked out, claiming this move was a gross misdirection of priorities because at the same time the administration was unable to supply even basic educational materials.

Students joined with the old faculty. The Board of Trustees then placed an ad in the local paper urging the students to return, saying they should not be intimidated by their former instructors. As they were no longer teaching their courses, they could not possibly hurt the students.

A Donnybrook on an issue of this sort is not surprising. Our analysis of the contracts revealed that faculty associations have seldom achieved participation in budgetary decisions. Undoubtedly this will be a key area for future struggles. As we have seen in this case, the administration is not going down without a fight. But faculty members are also willing to lose their jobs over matters such as this. Not all relationships are as show-down prone as this one, but in many cases the sentiments expressed lie just beneath the surface. The problem we are addressing is a real one.

Impact of the Bargaining Context. Even in the absence of the collective bargaining relationship, faculty members have traditionally had many institutionally provided forums – committees and councils that have enabled them to speak their minds on a variety of issues. These groups function in a manner somewhat similar to that of the works councils found in European industry. And like the works councils, some faculty committees have been effective and some, weak. As in the works council situation, then, collective bargaining faces a partly staked out territory. Still, an element is lacking – a regularized bargaining relationship at the "shop" level. Once initiated, this new relationship stirs up a whole series of questions about management rights that formerly lay dormant. The professor as a bargaining employee wants procedures governing crucial issues spelled out contractually, and the administration resists because now it feels it is giving up precious possessions, possessions it might have willingly surrendered on an informal basis. The philosophy of the zero sum game prevails.

The Results Thus Far. According to our analysis of collective bargaining agreements what "rights" has the administration surrendered thus far – or on the other side what gains has the association registered in the contract?

We must remember that we are examining largely new relationships and

therefore the contractually established provisions may reflect only the first steps. In fact, some of our contracts seemed to affirm more administration rights than faculty rights! And some agreements contained what appeared to be vague affirmations of usual practices. Strong contractual language is the exception rather than the rule.

Our study of the ninety-one agreements revealed that governance matters such as budgeting and long-range planning still are largely management territory. The contracts have much more to say about the personnel area. Without doubt, the employment status of the faculty member is receiving new emphasis. Still slightly over one-half of the agreements said nothing about appointment, evaluation or promotion, and less than ten per cent had achieved strong voice in these areas. The greater pressure on dismissal and tenure is reflected in contractual silence in only twenty-five and thirty-five per cent of these cases, respectively. Moreover, twenty per cent had strong provisions in these areas. It appears that these areas are slated for the greatest pressure on "management rights", not surprising because the actual loss of employment status is involved. Correspondingly, there is also a developing pressure on the administration to "innovate" in these areas in order to counteract the results of the pressures that are building up.

We also have discovered differences in the level of association achievements that are linked to region, size of institution, type of institution and type of bargaining organization. The East seems to run ahead of the Midwest and the West, larger institutions ahead of smaller ones, four year colleges ahead of two year, with some exceptions of course. The NEA and AFT seem to be stronger "invaders of management rights" than the AAUP and the independents, although our data do not permit a firm conclusion on this matter.

Analysis of the more potent agreements shows that vague pronouncements disappear in favor of the specification of decision-making rights and procedures, sometimes culminating in the requirement of faculty committee approval. The trend in this direction has interesting implications. If faculty associations move toward co-decision-making, the administrators' rights certainly will be diminished. But as the faculty becomes more of a manager will it become less of an effective bargainer? The mixing of these two roles creates tension the world over, in Socialist as well as in Capitalist countries. If what we have observed constitutes a true bargaining trend, the management rights' issue that came on strong at the start of bargaining may gradually simmer down.

Creation of a Distinction Between Management and Faculty

by Dr. Israel Kugler, *Deputy President*
Professional Staff Congress, City University of New York

In discussing the role of collective bargaining in the creation of the distinction between management and faculty, we must recognize that there is a serious difficulty in the "scholarly" approach to collective bargaining and in particular, this subject. That difficulty lies in the tendency for the scholar to adopt an abstract, purist approach. Documents, such as contracts are examined and criticized against *absolute* standards of what pure and classic bargaining should be. Professor Donald Wollett's keynote speech exemplifies this attitude which borders on "the luxury of irresponsibility of the nonparticipant". One must clearly understand that collective bargaining is a living, a dynamic, and an evolving process. A practitioner at the bargaining table, whether he be for management or the union must deal with variables that are a part of real life. Some of these elements entering into the bargaining process include the strength of the union, the resources of management, the skills of the negotiators, the practices and traditions of the institution and the legal parameters surrounding bargaining. Rival organizations, the American Federation of Teachers, the NEA, and AAUP have indulged in this game of comparing and contrasting contracts in their unnecessarily divisive campaigns. The very variety of contracts illustrates quite clearly the importance of these variables affecting the real life of collective bargaining.

We have to face the objective fact that a distinction *does* exist between management and faculty. We have seen it at first hand at colleges and universities across the nation where faculties have invited us to help organize a union. We have seen it in the titanic struggle at St. John's University, where 31 professors were fired without charges or hearings. We have seen it here in the New York City metropolitan region at negotiations not only at the City University but also at such public and private four year institutions as Long Island University, and Pratt Institute, and the federal United States Merchant Marine Academy, as well as the community colleges of Westchester County and the Fashion Institute of Technology. The fundamental truth is that the employer and employee relationship does exist when the effective determinative authority over salaries, work loads, sabbatical, reappointments, promotion, tenure and working conditions is in the hands of management represented by the governing board and the administration.

Without collective bargaining, this authority is virtually untrammeled. The only limitation is the academic market place. In times of general faculty shortage, such as the period which existed five years ago, the individual leverage masks this relationship because it is great enough to effectuate *individual* betterment. In some specific areas such as medicine and law, where outside employability continues in force, faculty members have extra-ordinary higher

education employability leverage to this day. When the market condition, however, is one of glut coupled with general financial stringency, such as exists today for the faculty generally, the distinction between management and faculty becomes all too clear. The management right to hire and fire at will is asserted and many historic academic procedures which obscure this distinction are abruptly brushed aside.

What are these traditional practices and myths which set up a facade hiding the distinction between management and faculty? One concept is the confusion between professional and employee status. As professionals presumably, faculty members have the training and expertise to determine the conditions under which the profession is practiced, but as employees, they don't have the power possessed by the self-employed professional, to set fees for patients and clients. It is, therefore, a falsehood to characterize the faculty not as employees but as officers of the institution on appointment.

Still another is the traditional use of faculty governance, a purely advisory instrument in the areas of terms and conditions of employment. We all know that history of endless faculty committees studying salaries, workloads, etc., only to have the recommendations buried in obfuscation with the appropriate expressions of gratitude for the committee's work, by college administrations. One could add the Search Committee involving the selection of administrators (purely advisory); the drive to get the faculty on governing boards (window dressing); college-wide personnel committee made up of department heads who often do the preliminary dirty work for the administration on reappointments, promotions and tenure, which the administration feels free to accept or reject; the concept that administrators are part of the faculty (enjoying, by the way, instant tenure with many of them holding top professional rank); that administrators have the panoramic wisdom that is superior to the working faculty; that administrators speak for the university; that decisions by the administrators with respect to non-reappointment, denial of promotion and denial of tenure are arcane academic judgements requiring no reasons; that tenured faculty can be granted *initial* authority against nontenured and relegate non-tenured staff to voiceless and voteless second class citizenship in the academic community; utilization by administrators, remote from the disciplines, of such slippery concepts of "excellence" and "quality" of publications to hide arbitrary and capricious judgements; repeatedly calling the union an outside, alien force. We could go on and on, ringing the curtain on these myths and practices which hide the distinction.

Where do we draw the line between faculty and management? The necessary bureaucracy and complexity of higher education today has separated management from the faculty function. We regard the management function to be valuable. We regard it to be the securing of the funds, the staff, and the facilities to make it possible for optimum teaching and learning conditions to exist, nothing more. This is an important enough function. It's an unfortunate fact however, that administration does not limit itself to this function, but seeks to exercise complete authority in all areas. By contrast, in a hospital the resident medical staff controls medical policy because of its external market place leverage. The hospital administrators recognize this fact only because of

"doctor power". Perhaps the area of greatest confusion in this distinction between management and faculty, is the department. It is the department that is involved in the search, selection, and the evaluation of the faculty. These functions are performed through peer evaluation. Individuals are added to the profession who are competent in terms of the standards and needs of the department. This is not unlike the function of craft unions selecting and upgrading apprentices and training them. It is somewhat similar to the control of entry exercised by practicing lawyers, dentists, professional engineers, and doctors through examination and licensing. It is our belief that the evaluative process should be animated by sympathetic, scrupulously fair series of observations and evaluations designed to call attention to defects in teaching and related faculty functions which are to be remedied or, if not corrected, the basis for nonreappointment. The reasons should be openly stated with the right of comment by the person being evaluated. The reasons and the attached procedures should be subject to the grievance procedure. The department should have an elected department chairperson *not* subject to the veto of management. This presiding officer then would be responsible *not* to management but to the department faculty. Under these conditions, department chairpersons are essentially *not* management. Administrations, however, seek to transform the department chairpersons into extensions of management. The faculty resists this, and the union will strive to keep the department as a democratic agent of the working faculty *even if the union has to defend a grievant against the department chairperson.*

The assortment of deans, presidents, provosts and chancellors are managers and the bargaining process of unit determination clearly establishes this. They exercise the effective authority over employees. We exert, with ample justification, a watchful eye on the traditional instruments of faculty governance other than the union. Their functions must be restricted to scholarship, scholastic standards, and curriculum with the authority over terms and conditions of employment which may stem from these areas residing in the bargaining process between management and the union.

All of the organizations represented here, unfortunately in a divided state, we hope will one day in the near future merge into a powerful national organization of educators. All of the organizations by participating in the bargaining process are clarifying the distinction between management and faculty. The growing trend toward bargaining is being challenged by assertion of management rights in the bargaining process, in commission reports and in legislative acts. In CUNY we have heard across the bargaining table that workloads, faculty voting rights, giving reasons for personal actions, are *not* mandatory items for collective bargaining. The Regents of the State of New York have borrowed the phrase from the SDS by stating these items are "non-negotiable" The Keast Commission, that the AAUP representative, Woodrow Osborne referred to, had recommended that the granting of tenure shall *not* be subjected to the bargaining process. The Kinzel Commission of New York State wants pensions removed from bargaining. Legislatures change tenure laws and seek to increase workloads. That is why, by the way, we consider contract provisions to be preferable to statutory provisions or institutional by-laws. It

raises the important question of supplementing traditional collective bargaining with rigorous activity on local, state and federal levels.

The contract provsions, we repeat, are dependent upon a number of variables: the subjective state of mind of the union membership and of management; the sanctions available to both sides; the market place; the availability of resources; the force of traditional practices; paternalism; the faculty governance prerogatives. Adversary relationships are inherent to the employer-employee relationship. They are clarified in the bargaining process, and in the accommodation of different perceptions embodied in the agreement.

The key aspect of the contract that sets forth the distinction between faculty and management is the grievance procedure. Are grievances affecting contract violations subject to impartial and binding arbitration or does the buck stop at management? Are academic judgements on tenure, reappointment, promotion subject to this process if allegations of capricious, arbitrary, or discriminatory nature are proven?

It is entirely natural for each side in the bargaining process, to muster support for its position. We can assure you that what Chancellor Kibbee called inflammatory rhetoric by the union (He wasn't referring to the Carnegie-Mellon University and he wasn't referring to the Pittsburgh Board of Education and he wasn't referring to any abstract organization— He *was* referring to the City University), was nothing less than our articulation of the issues as reported to our constituency, the instructional staff. How would you categorize the Board negotiating counsel's statement that collective bargaining was "industrial warfare"? Inflammatory rhetoric or polite description? Is it inflammatory rhetoric for the union to report to the staff the fact that the increments due September, 1972 for community colleges and in January, 1973 for the senior colleges for a year of past service were illegally withheld and characterized by a Public Employment Relations Board Officer as an act of coercion? How can one characterize a management statement calling for student participation in the collective bargaining process between the faculty and management? Isn't that a classic ploy by an employer to muddy up the bargaining process? We respect the rights of students and many of our contract demands opposed by the Board with regard to workload and working conditions are in the interest of students. We would hope that students would organize and bargain *on their own* with the administration. They would soon learn a lesson that the union has already absorbed.

What can one say, if after the merger of two organizations representing the sum total of the instructional staff and two contracts, recognition was withheld? What can one say if management persists in trying to split the bargaining unit at the negotiating table in direct contradiction to the outcome of a Public Employment Relations Board-administered election demonstrating overwhelming support for the union and a single bargaining unit? Can one blame the union for resisting the classic "whipsaw technique" designed to diminish the benefits already in existence and play one group against another in the instructional staff? Finally, for the employer to point to our internal officer election dispute as the reason for the failure of negotiations is nothing more than unmitigated nerve and unwarranted interference with the internal affairs

of the union. In effect, this audience was captive suddenly to inflammatory management rhetoric.

The adversary relationship of collective bargaining is limited by a *common* desire for continued viability of the institution. There are plenty of legislative and other external threats to the university. As a matter of fact, we are currently engaged in a joint effort with management and students to secure funds for the City University from the State of New York. United action, however, is most effective if built upon a record of negotiations based upon good faith. What we have unfortunately experienced on the part of management is nothing more than "Boulwarism" academic style. It was Lemuel Boulware of General Electric, who adopted the management "take it or leave it" posture—an open manifestation of the distinction between management and the faculty.

Collective bargaining is a continuing process. In one respect, the Chancellor was absolutely right. Eventually, we shall come to an agreement. In the process of arriving at that contract and the relations that will follow, the clarification of the distinction between faculty and management will become more manifest.

Certification of Units under Federal Law

by TRACY H. FERGUSON
Bond, Schoeneck & King, Syracuse, New York

I'm delighted to be here to see some friends who I usually see at other college and University symposia. Many are experts in the field, and I must say this, I'm delighted to see Nate Feinsinger here, who is one of the really great and knowledgeable men in the Labor Relations field in this country, and has been for many years.

Let me start out by giving you this simple story of a lady who had a horrible toothache, and a fear of dentists. Nevertheless, she came to the dentist's office, was ushered into the dentist's office, into his inner room, sat at the side of his chair, looked up to the dentist and said, "Doctor, I would rather have a baby than have my tooth pulled." The dentist replied, "Lady, make a decision because it sure's going to be a hell of a difference which way I tilt this table."

Now, this leads me, in perhaps not so nice a way, into a discussion of decisions. The Doctor in this case happens to be the National Labor Relations Board, who is now treating the patients of private colleges and universities, fourteen or fifteen hundred around the country. Their decisions are what are of concern to those of us involved, particularly in the private sector of higher education. It may be that many of you will feel that you are unconcerned with these decisions by the NLRB, since you come from state institutions where, of course, the organic law applicable is your State Public Relations Act; and in some other cases, your regular State Labor Relations Act. However, what I have to say may be of some concern to you, because your state agency's consideration and the state law inconsistent statutory provisions may very well be premised upon the precedents established by the National Labor Relations Board. Your state agency may turn to that Board for philosophic concerns on subjects which seem to be to me unique in the Labor Relations area of higher education—unique as compared to or with the industrial relations problems in the private sector.

I was interested to hear Don Wollett report yesterday about the committee which recommended the copying by California of the NLRA and if I have heard Don correctly, they practically gobbled up the language of the National Labor Relations Act. Should that come to pass in California, those few of you who are here from California, your Board, about to be created, will face the same problems as the National Labor Relations Board in interpreting the Wagner Act or the National Labor Relations Act as amended, as the case may be.

The Cornell University Case

Now, so far as this "Doctor," the National Labor Relations Board is concerned, it really took on its first patient as far as we're concerned in 1970. That was the *Cornell University Case.*[1] I had grave doubts as to whether we would be

[1]*Cornell University* 183 NLRB 41 (1970).

successful in that case, because in 1951 the Board declared in the *Trustees of Columbia University*[2] Case that it would not take jurisdiction over higher education in terms of those activities in those institutions which were non-commercial. In fact, those of you who are students of the Board's decision will know they had a feeling for a long time, discernible in their decisions, that non-profit institutions of education were not something beyond the pale of the National Labor Relations Act. However, the language got twisted in terms of saying their activities didn't affect "interstate commerce."

When I say I was concerned as to whether we would have been successful in Cornell, I should have indicated to you that the petitioner in that case was the university. New York State had a Labor Relations Act which just a year or two before included, for the first time, jurisdiction over higher education.[3] [I'm talking about the private sector only now, and unless I say to the contrary throughout my remarks that's all I'm talking about, the private sector in higher education.] It was deemed advisable however, to file a petition with the NLRB to see whether the ruling in the *Columbia* Case was still enduring, and as you now know I wouldn't be standing here discussing this subject were it not for the fact that the Board did reverse the *Trustees of Columbia* and exercised jurisdiction in the first *Cornell* Case.

That case, did not involve academia. It was a broad unit of non-academics, the clericals, the buildings and grounds, the non-professionals. The university position was that the broad unit geographically should consist of all of the 57 facilities in New York State.

CSEA which was the petitioning union before the state board joined in the federal preceding and also sought a broad unit. There was however, an intervenor, the Library's Association and the extension school of the Industrial Labor Relations School in New York City intervened for a smaller unit. The Board agreed with the university and the CSEA position and held that a broad unit was the appropriate unit.

Now, I mention that case, first of all, to establish that the Board assumed jurisdiction, but I emphasize, there's not a word said in the *Cornell* Case about the obligation to bargain with academics. The case was devoted exclusively to the jurisdictional problem of interstate commerce and to those who were in the non-academic arena.

Cases Following Cornell

Should the Board take jurisdiction over faculty units? That was the next "patient" to come before the Board. The arguments had been made that even if jurisdiction were asserted over the university, such jurisdiction should not be applied to its professional personnel. Now that position was adjudicated in the *Post Case*,[4] the *Fordham Case*,[5] and *Manhattan College*,[6] and the Board answered that contention saying that, "it was without merit."

[2]*Columbia University* 97 NLRB 424 (1951).
[3]N. Y. State Statute L. 1968 C 890.
[4]*C. W. Post* 189 NLRB 109 (1971); 198 NLRB 79 (1972); 200 NLRB No. 68 (1973).
[5]*Fordham University* 193 NLRB 23 (1971).
[6]*Manhattan College* 195 NLRB 23 (1972).

What were the grounds used by those who proposed to the Board that it not take jurisdiction over professionals? In the *Fordham* Case, it was argued that the faculty members were "supervisors" within the meaning of section 2(11) of the National Labor Relations Act. That contention was denied.

There is a current case before the Board, as we sit here today, the *NYU* Case[7] (and incidentally, briefs were filed on August 14 of this year), and here other grounds were asserted as to why the Board should not take jurisdiction over faculty cases. It was claimed that full-time faculty in the collective sense are "supervisors" within the meaning of the Act. Further in that case, it was urged that the faculty in the individual and collective sense are independent contractors within the meaning of section 2(3).[8] That's a definitional section within the Act which provides that any individual having the status of an independent contractor is not to be deemed an employee within the terms of the Act. The Board has been sitting on that case since August of '72. The issue also involved in that case concerns a separate unit for the law faculty.

These concepts urging exclusion of coverage from the Act point up the views of many that the Act is just inappropriate for the purpose of regulating labor relations in academia. Parenthetically, I must make comment concerning Don Wollett's statement yesterday. He rejected the contention that education is different. I disagree with Don, and let me tell you very briefly why. I've been at this business of labor relations since the Wagner Act was passed. I think that one of the most exciting experiences in the labor relations field is to be involved in labor relations for Academia. I can assure you on a competitive basis that there is no other like "animal." The subject of "collegiality" you just don't find any place else. I've tried to explore for comparison, for analogy, all other areas, professional, blue-collar, white-collar. "Collegiality," you won't find as a concept except in colleges. Now that's an over simplification. I find, too, that you're dealing with an entirely different kind of person. You're not dealing even with the white-collar or blue-collar classes. I'm not looking down my nose at those believe me. But the sophisticates in academia are attempting to search this thing through, the kind of situation you just don't see in any other area of labor relations. So I disagree with Don and I shall have more to say about collegiality—not my own views, but the Board's view in just a moment which I think will butress my position.

The Professional School

The Board had decided in the *Fordham* Case that a law school should not be included in the broad faculty unit. Here I speak with some prejudice because some month's ago on behalf of *Syracuse University*[9] we filed a brief in which we attacked the rationale of *Fordham* Case. We are awaiting a decision from the Board.

As between AAUP and the University, there was no dispute basically on the faculty unit in terms of inclusion of law school. It was the AAUP position,

[7]*New York University* 2-RC-15719, 15757 (1972).
[8]Section 2, (3) "Labor Management Relations Act, 1947".
[9]*Syracuse University* 3-RC-5511 (1972).

as it was ours, that there should be a broad unit. Obviously our concern was one of fragmentation. Let me call your attention to a footnote 11 in the *Fordham* Case. Which reads as follows:

> *"Many of the factors set forth herein (referring to the law school's alleged differences) are equally applicable to the university's other professional schools. As an overall unit including the faculty of professional schools is appropriate, and as no party contends that the faculty of any professional school other than the law school should constitute a separate unit, we need not pass upon the appropriateness of any such separate unit."*[10]

The Board has not yet passed upon the other professional schools. There is concern that in an appropriate setting with appropriate petitioners, the Board may establish a variety of units. Some of the considerations which appeared in the *Fordham* Case to which we addressed our evidence, in terms of separate units, were a separateness of buildings, budget considerations, accrediting agencies, the establishment of clinical programs, the similarity or dissimilarity of salaries, hours and other terms of conditions of employment, even the participation in university affairs. There was a basic thrust by the law school professionals that the difference in disciplines and the method of teaching justifies severence. The argument being made in the *Syracuse* Case is that the footnote in *Fordham* carries an implication that the mere differences in disciplines are not justification for severance. The footnote did say that all professional schools are *included* in an overall unit, and the argument that was extended pointed out that it was the absence of a petitioner seeking to include the law school in the overall unit which was really to be the determinant.

Our experience in the industrial sector indicates that the Board pays great attention to the fact that there is someone seeking to represent those who would seek to be in a separate unit in an otherwise overall unit. In terms of separate units, there is a recent case, *Catholic University.*[11] A separate unit was determined for a law school. The Board repeated its rationale as set forth in the *Fordham* Case. The basic test after you've gone through all these varying factors is really this: Was not the faculty irrevocably submerged in the broader community of interest which they shared with other faculty members? The Board has further said that if a school is not so highly integrated with that of the remainder of the university as to compel a finding that only an overall unit would be appropriate, a separate unit is appropriate.

Part-time Faculty

I had thought that the law was perfectly clear when I drafted this material six months ago, but I received a phone call last week which casts doubt upon the clarity of the law on that subject. Let me tell you the story on part-time faculty. In the contested case, as in *University of New Haven,*[12] *Florida South-*

[10]See Footnote 5.
[11]*Catholic University* 201 NLRB No. 145.
[12]*University of New Haven* 190 NLRB 102 (1971).

ern College,[13] even in *Long Island,* there had been determinations that part-time faculty, under certain conditions and limitations, were to be included in the unit. *University of Detroit,*[14] *University of New Haven* are relatively new cases. The issue was contested in *Catholic University.* The Board, in the decision to which I earlier referred in February, included part-time faculty laying out a formula of what constitutes a part-time faculty,—¼ case load—(and I'm oversimplifying this) and teaching in the two semesters of the current three in the period when the election is held. Lo and behold, a week ago, I got a telegram from the National Labor Relations Board. The Board had cancelled the election in *Catholic University*[15] which was to be held, I think next week or the week after, and has set forth down for an oral argument on April 30th, the issue of the inclusion of part-time employees. It had decided the issue, there even being a motion for clarification and reconsideration which it had denied and then, it sends a telegram out indicating that they want oral argument. Courtesy copies came to some of us who have cases relating to that issue.

I cannot stand before you today and tell you exactly what the case law is by the Board on part-time employees. All I can do is to issue the notice to you that there will be an argument April 30 after which *Catholic University* will come down.

Now it's conceivable that the cases to which I've referred, *Detroit* and *New Haven* are still good law and that really all the Board is going to concern itself with is the part-time issue in law faculties. Since there are no parameters described in the Board's telegram, I report to you of what I know. In view of that, I shall omit any reference to adjunct professors which in most institutions is another name for it.

Broad v Narrow Units

Now let's try to guess for a moment of how broad the NLRB will make units. I described to you the first *Cornell Case,* the non-academic case, which held the state-wide unit. There's a second *Cornell Case*[16] which came down three weeks ago. An election was held last week, concerning dining facilities. Now mind you, we had a broad unit with CSEA at Cornell seeking a broad unit in the first case. In the second case, the Teamsters Union petitioned for a dining facilities unit for all employees, non-supervisory in various dining facilities. I think we had 18 or 20 on the Ithaca Campus. We put in our proof repeating the record in the first *Cornell* Case. There were additional proofs so that you could get a fair picture of the record of the integration of activities among the employees working in the dining facilities. The Board then decided that the dining facilities were an appropriate unit. Now, that may not seem symmetrical to you, a broad unit and then a narrower unit, but remember that the language in Section 9(a) of the Act that representatives designated or

[13]*Florida Southern College* 196 NLRB No. 133 (1972).
[14]*University of Detroit* 193 NLRB 95 (1971).
[15]*Catholic University* (II) 202 NLRB No. 111 (1973).
[16]*Cornell University* (II) 202 NLRB No. 41 (1973).

selected for the purposes of collective bargaining by the majority of the employees 'in a unit' appropriate for such purposes shall be the exclusive representatives. Of course, it has been clear for many years in the industrial cases that the Board need not determine the ultimate unit or the *most* appropriate unit. The Act requires only that the unit be appropriate.

We had thought, therefore, that the Board, after the first *Cornell Case*, was committed to a broad unit concept that would seek to avoid fragmentation. Within the same university now, we had two decisions, at variance in terms of the description of the unit, although I can't quarrel with the rationale of each decision. In terms of fragmentation there's the *Claremont Library's*[17] Case in California which held libraries to be separate. I caution you, that despite *Cornell* (first), libraries can be an appropriate unit. Now let me read you a quote from the *Claremont Case* on fragmentation units:

> *"Since the* Cornell *decision, the Board has found less than an overall unit appropriate where as, here, (referring to Claremont), the work situation shows a homogeneous group of employees who share a close community of interest. It has directed a separate election for faculty members in the law school of a University (Fordham), maintenance employees at a Univerisity (Stanford), policemen at a University (Stanford) and central plant employees comprising but a section of the physical plant department in a University (Cal Tech). None of the cases cited in the (Ralph Kennedy) dissent, holds that librarians and supporting personnel in a library system, which is not a part of any of the colleges which it serves, cannot organize themselves separately in an appropriate unit."*
>
> *Then member Kennedy's rejoinder was as follows:*
>
> *"It seems to me that with this decision, the majority members are opening up unpredictable difficulties for the Board as well as for the colleges of this country. Today, the majority members find a unit of library employees appropriate. Tomorrow can they logically refuse to find other college departmental units appropriate? Are there more reasons for finding a library unit appropriate, than, for example, a Physics Department Unit, or a Sociology Department Unit, or a Mathematics Department Unit? Such departmentalization can only engender divisiveness and cause breakdown of the collective process that the Act is designed to promote."*

Students

Graduate assistants have been included. Look at *Adelphi,* and excluded in *C. W. Post.*[18] There was a research associate included in *C. W. Post.* The Board included graduate students, but it was a stipulated case for those who worked at least twenty hours per week.

I should make a comment that in the *second Cornell Case*, students of Cornell University were excluded from the unit by the Board's decision and in the

[17]*Claremont University Center*—Libraries Case 198 NLRB 121 (1972).
[18]See Footnote 4.

Georgetown Case.[19] Students of their own institutions do not share in a community of interest with other employees – all of which raises the intriguing question of what happens when and if students of our university file a separate petition. It hasn't been done yet, but tomorrow it may very well be.

Collegiality

Because of the limitation of time, I'm going to skip over the department chairman cases.[20] They're fascinating cases. They've gone one way and then the other, depending upon the nature of activity of the department chairman. Obviously the issue which seems to bother the Board is "collegiality."

Superimposed over all the factual differences in department chairmen activities is a concept of "collegiality." This troubles the Board no end and I'm reminded, of course, of Don Wollet's statement yesterday that "collective bargaining is an adversary, not a collegial system," In fact he emphasizes it was a "turning away" from the collegial system. But in any event, this troubles the Board no end. Understandably the concept of that phenomenon appears hard to square with the structional and authoritarian concepts in the industrial sector.

I dwell for a moment on collegiality for two reasons. One, because of its impact on the status question of Department Chairman, (and others who perform certain functions with reference to terms and conditions of employment), but I also discuss it with you because there are some "lurking issues" which may have broader implications.

In *Fordham,* the Board made a passing sweep at collegiality when it referred to the University Handbook which provided that the general policies and rules included the concept that the most important duties of the chairman be carried out with the advice and consent of the members of the department. The Board characterized this concept as a structure of collegiality, but indicated that the structure falls far short of creating in a department chairman that kind of fully vested authority which the Board requires for a finding of true supervisory status. Then, in the *Adelphi Case,* where the Board held the chairman to be supervisors, who effectively recommend hiring and reappointment without the approval of the faculty, the Board was faced with determining the status of the university Personnel and Grievance Committee composed of 11 full-time faculty members elected at large by the university's several schools. The function of the committee was to pass on all matters of tenure, hiring promotions, granting sabbatical leaves, and questions of suspension and terminations of full-time members. Let me read you the quote from the Board and if you'll bear with me for just three minutes, I think I will finish.

> *"The difficulty both here and in* Post *may have potentially deep roots stemming from the fact that the concept of collegiality, wherein power and authority is vested in a body composed of all one's peers or colleagues, does*

[19]*Georgetown University* 200 NLRB No. 14 (1973).

[20]See the additional case of *Tusculum* College 199 NLRB No. 6 (1972) and *Rosary Hill* College 202 NLRB No. 165 (1973) and cases cited *supra* as *C. W. Post, Adelphi, Fordham, Detroit, Florida Southern."*

not square with the traditional authority structures with which the Act was designed to cope in the typical organizations of the commercial world. The statutory concept of "supervisor" grows out of the fact that in those organizations authority is normally delegated from the top of the organizational pyramid, in bits and pieces to individual managers and supervisors who, in turn, direct the work of the largest number of employees at the base of the pyramid.

Because authority vested in one's peers, acting as a group, simply would not conform to the exclusion of our Act as designed, a genuine system of collegiality would tend to confound us. Indeed the more basic concepts of the organization and representation of employees in one group to deal with a "management" or authoritarian group would be equally hard to square with a true system of collegiality. Nevertheless, both here and in Post, *the collegial principal is recognized and given some effect.*

It is therefore apparent, that these faculty bodies, — the more inclusive one in Post, *and the smaller, representational one here — are not quite either fish or fowl. On the one hand, they do not quite fit the mold of true collegiality, but on the other, surely they do not fit the traditional role of "supervisor," as that term is thought of in the commercial world or as it has been interpreted under our Act. We are not disposed to disenfranchise faculty members merely because they have some measure of quasi-collegial authority, either as an entire faculty or as representatives elected by the faculty . . . The delegation by the University to such elected groups of a combination of functions, some of which are, in a typical industrial situation, normally more clearly separated as managerial on the one hand, and as representative of employee interest on the other, could raise questions both as to the validity and continued viability of such structures under our Act, particularly if an exclusive bargaining agent is designated." (Now, the Board here is talking about that Grievance and Personnel Committee.) "We have not been asked to pass on these "lurking issues", (note the sinister word) and, in any event, would not do so in the context of a representation proceeding."*

I don't know what elected group the Board is referring to except that Grievance and Personnel Committee, but it is a fair implication, and these are my own comments, that the existence of these committees "could raise questions" both as their validity and continued viability under the Act particularly if a collective bargaining agent is designated. I ask rhetorically, does this portend problems in other governmental structures such as Faculty Senates, charged with some considerations of subject matters which are generally involved in the industrial sector at the collective bargaining table? I read this footnote to mean that the Board sees a problem which it would not pass upon in the context of a representation case. Thus, "collegiality" in terms of the Board's passing comment goes to the heart of some of the existing structures on the American campus.

I end on this note of concern for existing structures, demonstrated by the difficulties which the Board had to face in making decisions because of the uniqueness of the university problems in the labor relations field. It will take a

great deal of ingenuity, assuming the existence of collective bargaining, to adopt existing procedures within the needs of the university's community.

You've heard of the efforts of some institutions already, but to me, and I refer to my role as a lawyer, what will be exciting is the development in that area, the treatment by the Labor Board of cases which arise once the representation and certification stage has passed. Many things I haven't covered,[21] I hope we will have the time for them in questions and answers.

[21]*Addendum—Isolated Extracts.*

Addendum—Isolated Extracts

a. Clergy—Jesuits included in the Unit—*Fordham*—but reversed in *Seton Hall* College 201 NLRB No. 155 (1973).

b. Professional Librarians included—*Fordham.*

c. Division Directors—included—*Fordham.*

d. Executive Committee—like *Adelphi* Personnel and Grievance Committee included.

e. Administrative personnel do not share a community of interests with classroom teachers and are excluded as Dean of Students, Director of College Relations and Development, Business Manager, Director of Information Services, Associate for Alumni Affairs—*Tusculum.*

f. Librarian and Assistant Librarian included—*Tusculum.*

g. Professors Emeritus excluded under *Pittsburgh Plate Glass—Tusculum.*

h. Excluded: Graduate teaching and research assistants, sequence chairmen, director of field work program—*Adelphi.*

i. Included—Director of Admissions in School of Social Work—*Adelphi.*

j. Coordinator heading Training Center for School of Social Work included—*Adelphi.*

k. Merely because a professional hires a secretary does not make him a Supervisor—*Adelphi.*

l. *50 percent for professionals. If in excess of 50 percent, he has supervisory duties. He will be excluded. Adelphi.*

m. Director of Black Studies Program excluded like department chairmen in *Adelphi;* other directors may not have supervisory authority. *Adelphi.*

n. Librarians included since they are professionals. *Florida Southern;* but head librarian excluded as supervisory.

o. College Registrar—Admissions Director—primarily administrative and exercises supervisory powers—excluded. *Florida Southern.*

p. Director of News Bureau—administrative—excluded. *Florida Southern.*

q. Director of Alumni Affairs excluded—*Florida Southern.*

r. Athletic Coaches—*Manhattan College*—all full time and regular part-time included.

s. ROTC excluded even though they have the opportunity to obtain tenure—*Manhattan.*

t. Adjunct faculty included as reguar part-time—*Long Island.*

u. Librarians are professional and included—*Long Island.*

v. Managers of laboratories excluded as not professionals—*Long Island.*

w. Guidance Counselors included—*Long Island.*

x. Admissions counselors and academic counselors excluded as not professionals—*Long Island.*

Certification of Units in Higher Education

by JEROME LEFKOWITZ
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Significance of Unit Definitions

There is much confusion about the nature of bargaining units in labor relations. For some reason, the notion persists that a bargaining unit is an organization that represents employees. Just this week a draft bill was submitted to me for criticism by the staff of the Education Committee of the New York State Senate. It was designed to permit regional bargaining in primary and secondary education, and provided that employees would be represented by consolidated bargaining units. A bargaining unit is not a who, or a group of who's; rather, it is a what. It is similar to an election district in our general political life. Just as an election district determines the geographic perimeters within which our legislative representatives are elected, a bargaining unit determines the occupational perimeters within which a bargaining organization may be selected.

It was only a few years ago that the process of determining election districts was subjected to intense criticism leading to the Supreme Court one-man-one-vote decision. Although the court did not go so far as to declare gerrymandering unconstitutional, we were all sensitized to the dangers of gerrymandering. The party that defines the perimeters of election districts may often predetermine the complexion of the representative body. Similarly in labor relations, the determination of the perimeters of bargaining units can predetermine whether the employees shall have any representation and, if so, what organization shall represent them. For general community elections, control has been left to the political process itself. A party abusing its power to gerrymander might be called upon to answer to the electorate. In labor relations, an extra precaution has been taken; the approach has been to give the power to define bargaining units to a disinterested party, usually called a labor relations board.

Standards for Unit Definitions

Typically, the composition of a bargaining unit has been conceived as being of concern only to the employees involved. Accordingly, the standards in statutes such as the National Labor Relations Act and the New York State Labor Relations Act have provided that the bargaining units shall be designed to give to employees the "full benefit of their right to self-organization" (SLRA, Labor Law § 705.2) and "to assure to employees the fullest freedom in exercising the rights guaranteed by this act" (NLRA § 9(b)). As articulated in decisions of the National Board, this has come to mean that employees are entitled to the bargaining unit that they want, provided that the employees involved have *a community of interest*. There are some specific statutory res-

ervations, one of particular interest to faculty members of universities assures separate units for professional employees, should they desire such separation (NLRB § 9(b)(1).

A variation of the typical approach is found in the Taylor Law (CSL § 207.1). It provides three criteria that must be considered by the Public Employment Relations Board in defining an appropriate negotiating unit. The first is the community of interest that is pervasive in labor relations. The second is that "the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment upon which the employees desire to negotiate;". This criteria has had little impact on decisions under the Taylor Law. It would discourage multi-employer bargaining units, but there has been no demand for such units in any event. The third standard is that "the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public". This has been interpreted by PERB to mean that the administrative convenience of the public employer is a factor that it must consider in defining negotiating units. This standard has had considerable impact on PERB decisions.

A third approach to unit definition has been to specify units in a statute. One example of this is found in the Hawaii Collective Bargaining and Public Employment Law. Section 6 of that law specifies one unit for the "faculty of the University of Hawaii and the community college system" and another for "personnel of the University of Hawaii and the community college system other than faculty". A bill sponsored by the Governor of Indiana presently pending before the legislature of that State would provide that "the smallest permissible unit of employees of state institutions of higher education shall be a statewide unit of all eligible faculty employees employed by the institution, the employees to be in a unit separate from all other employees." This means one multi-college unit for the University of Indiana and a second multi-college unit for Purdue University.

Individual or Multi-College Units

Whether faculty at multi-college, multi-campus State universities should be represented in statewide of separate units for separate colleges is a question that has been troublesome. Although the answer to this question may vary with the structure of the State university and with the statute involved, it appears that the tendency is for the consolidation of the separate colleges into a single unit. As already mentioned, Hawaii has statutorily provided for such a multi-college unit and the Governor of Indiana proposes a similar statutory provision. The situation in New Jersey is of greater interest because the statute was not explicit and the nature of the university had to be explored by New Jersey's Public Employment Relations Commission. In its very first decision in any case, PERC dealt with the question of unit definition within the State university system. Its decision (PERC No. 1, April 9, 1969) stated:

"Inasmuch as each college has a measure of local autonomy; the employees

look to the individual college for their day-to-day supervision; each college affects the tenure of its staff and each governs their working conditions, the commission finds that the employees at each State College have community of interest within the respective State Colleges and therefore the appropriate unit is each of the six State Colleges..."

This decision was based upon the recommendations of a hearing officer who was impressed by the physical separation of the campuses and the distances between them. He was also impressed by the history of organization which revealed that the faculty at each of the colleges had its own independent organization. On the other hand, he recognized that bargaining issues having financial implications are settled on a statewide basis, but said that this need not necessarily be the case in the future. Recognizing that the circumstances presented a close case, he said, "It is my opinion that although there are arguments in favor of an over-all unit, the argument in favor of separate units is more compelling."

Almost four years later, this decision was reversed. In January, 1973 the New Jersey Commission adopted the report and recommendations of another hearing officer that a single bargaining unit should include the faculty at all eight State Colleges. In his report which was accepted without comment by the Commission, the hearing officer noted that compensation is fixed by each college in accordance with salary ranges and policies imposed by the Board of Higher Education. He further noted that the policies of the Board of Higher Education resulted in similar practices at each campus with respect to teaching hours, sabbatical leaves and sick leaves and that, by law, tenure and retirement provisions were the same at all campuses. There were campus-by-campus differences in school calendar, and subject to the minimum standards of the Board of Higher Education, the individual colleges engaged in their own recruitment, appointment and promotion. He and the Commission were persuaded that, on balance, the circumstances justified a consolidated unit, rather than separate college units.

A similar dispute was litigated before New York State's Public Employment Relations Board *In the Matter of New York State University*. The record disclosed that the trustees of the State University had initiated what it called its unified Master Plan. This plan called for centralization of administration as well as a centrally developed philosophy of education. No college educational project could be funded unless it was included in the central master plan and no campus was permitted to deviate from the master plan's blueprints without prior approval from central administration. As part of the centralized administration, individual salaries of the academic staff were subject to negotiations at the college level within standards imposed by the central administration. Merit increases and general salary increases were also covered by standards and guidelines issued by central administration. General personnel policies were negotiable only on a statewide level, as only the Board of Trustees had the power to determine or make effective recommendations with regard to them. Accordingly, on October 6, 1969 PERB defined a faculty unit as including the faculty of all the colleges of the State University (2 PERB ¶ 3070).

The union that sought campus units, the New York State Federation of College Teachers, appealed from this decision and it was affirmed by the Appellate Division on November 10, 1970 (*Wakshull* v. *Helsby*, 35 AD2d 183).

There are two other possible models for the definition of units at a multi-college university. One calls for overlapping units and would necessitate tiered bargaining; the other calls for a variation of individual college units that requires coalition bargaining. Both these procedures have been used with some success in the public sector, but to my knowledge neither has yet been applied to higher education.

The model of overlapping units and tiered bargaining has been applied in the United States Postal Service and, in a variant, exists in New York City. In the Postal Service, an employee may be included in a local bargaining unit in which he is represented by one organization for the negotiation of local issues, in a regional bargaining unit in which he is represented by a second organization for negotiation of regional issues, and in a national bargaining unit in which he is represented by a third organization for the negotiation of national issues. The local, regional or national organizations which represent a single employee may be affiliated or competitive. Accordingly, there are continual pressures from the various organizations to have negotiating issues defined as local, regional or national, respectively. This places considerable pressure on the labor relations board responsible for the resolution of such questions and generates some confusion for the parties. It has, nevertheless, proved to be a viable model. In New York City, negotiating issues are defined as local, department-wide and citywide, with the bargaining taking place in tiers. Bargaining units, however, are defined only on the local level, with the organization or coalition of organizations representing a majority of the employees in the department or the City responsible for negotiations of department-wide or citywide issues.

The New York City procedure approaches the coalition bargaining model. Coalition bargaining is the most common model in Europe, where exclusive representation of employees in precisely defined bargaining units is virtually unknown and employees are represented by unions that adhere to diverse political and ideological philosophies. Its most notable application in the United States is in TVA, where one unit exists for white-collar employees and another for blue-collar employees, with the representative in each of the units being a coalition of the different unions to which the individual employees choose to belong. Each of the unions makes a per-member contribution for the administration of the coalition organization and each has a voice in its affairs in proportion to the number of its members who are so represented.

During the course of the hearing in the New York State University case, it became apparent to the New York State Federation of College Teachers that more terms and conditions of employment were subject to central control than to individual college control. Accordingly, the Federation, which was seeking separate college units, proposed an alternative model under which separate units would be defined at each college, with statewide issues to be reserved for statewide negotiations, the separate college representatives to be

required to engage in coalition bargaining. This proposal – which most closely resembles the New York City model – was rejected by PERB.

Supervisory, Managerial and Confidential Employees

Several categories of employees are excluded from the protections of one or another labor relations statute and thus may not be included in any unit. Still others are entitled to representation rights, but may not be in the same units as other categories of employees. In the private sector, supervisory employees are not entitled to the statutory right of representation. This disability is not universal in the public sector, although in some statutes supervisors may not be included in a unit that also includes persons whom they supervise. The reason for the different treatment of supervisors between the public and private sector is that, to a greater extent than in the private sector, in public employment they are subject to terms and conditions of employment similar to those of rank-and-file employees; they are often part of the same civil service system under which they enjoy identical protections and fringe benefits, and pursuant to which their salaries are related by an index. Nowhere is this more true than in universities, where faculty self-governance assumes a major role.

Many of the unit decisions in higher education have avoided the issue of supervision. For example, the original New Jersey decision explicitly avoided the question of supervision in the hope that the number of disputed occupations would not be sufficient to affect the outcome of the election. More commonly, as in the case involving New York City University (2 PERB ¶ 3056) the parties agreed upon the positions to be eliminated from consideration by virtue of supervisory or managerial responsibilities. The issue of supervision was litigated in the New York State University case. In his report, the hearing officer said,

> *"The question of whether supervisors should be excluded from the general unit must be resolved in a university context. Given the faculty's role in faculty governance, meaningful or effective supervisory authority is exercised by fellow faculty members as well as high executive officials who have already been excluded as management. No reasonable basis appears, therefore, for excluding members of the professional service on the ground that they supervise the faculty."*

Some high-level administrative employees were excluded by virtue of their managerial responsibilities, and the refusal of PERB to go as far in this direction as the Federation wanted it to become an issue in the court review which led to the confirmation of PERB's decision.

Satellite Personnel

Having removed high-level administrators from the unit, PERB concluded that there was a community of interest between non-academic professionals of a lower level and the academic professionals "as evidenced by their com-

mon fringe benefits, related salaries, common mission, and substantial amount of interchange . . ." and thus concluded that the two groups should be included in a single unit. New Jersey reached a different conclusion in *Matter of Middlesex Community College Board of Trustees* (PERC No. 29). It found that, "Department Chairmen, the Director of Admissions, the Director of Student Activities and the Registrar are supervisors within the meaning of the Act because they do effectively recommend the hiring and discharging of personnel and in discipline of such employees".

In the New York City University case (2 PERB ¶ 3056), a request was made for a separate unit of science technicians, a group of permanent employees who did not enjoy faculty-rank-status. The request was rejected on the basis of a conclusion that the interests of the technicians and the faculty-rank permanent employees where not in conflict.

For those who feel more comfortable in dealing with specific job titles, then the concepts of the listing of positions contained in the recent New Jersey case will be useful. In its 1973 decision, New Jersey included the following seven categories of employment within the basic faculty negotiating unit:

1. Full-time teaching and/or research faculty
2. Department Chairmen
3. Administrative staff (non-managerial)
4. Librarians
5. Student Personnel staff
6. Demonstration teachers
7. Professional Academic Support Personnel (holding faculty rank)

Its listing of excluded categories of employment was:

1. College President and Vice Presidents
2. Deans, Associate and Assistant Deans and other Managerial Executives
3. Secretarial staff
4. Maintenance staff
5. Bookstore, Food Service, etc. staff
6. Adjunct and part-time professional staff
7. Graduate Assistants
8. All others

This listing is probably a sound indication of what a labor relations board is likely to do when confronted with a litigated case.

Casual Employees

As a general proposition, persons with only a casual relationship to the employer are not entitled to representation by virtue of that employment and are thus not included in any unit. A test often used to measure whether or not employment is casual is the number of hours spent on the job. For example, PERB has ruled that lifeguards employed on a seasonal basis are "casual" if they work fewer than 20 hours a week (*Matter of State of New York*, 5 PERB ¶ 3022 and ¶ 3039). In establishing this standard, the Board recognized that

"it might not apply to teachers, especially in institutions of higher education." Because the work schedules in higher education are so different from those in other occupations, normal definitions of casual employment do not apply. One case in which a standard was applied was New York State PERB's City University case. In that case, PERB excluded non-annual lecturers who teach fewer than 6 hours a week.

The City University case dealt with a second issue that touches on casual employment. Two faculty units were established – one for the faculty in tenured and tenure-bearing positions; another for the annual and non-annual lecturers who teach 7 hours or more and are in positions that do not carry tenure. With one member dissenting, the Board concluded that there was a conflict of interest between the two groups, the protections enjoyed by the faculty in tenure-bearing positions being of a sufficiently different sort from those enjoyed by the other faculty as to suggest different negotiations interests. Special circumstances persuaded the Board majority to establish two units. These circumstances were that of the almost 8000 members of the faculty and related occupations (other than non-annual lecturers who teach fewer than 6 hours) almost one-half in non-tenure-bearing positions. The Board majority said,

> *"The faculty-rank-status personnel are the heart of the University. It might be compromising to their independence and to the very stability of the University for non-tenured instructional personnel, in numbers almost equal to that of faculty-rank-status personnel, to be included in the unit of faculty-rank-status personnel."*

Students

Students pose two problems for collective bargaining in universities. The first is that as a vitally interested consumer group they may wish to participate in negotiations in order to protect their own interests. In this connection, students of New York City University have sought to initiate procedures before PERB leading to the creation of student bargaining units and the certification of student bargaining representatives. There is no basis for such a procedure in the statute and these requests of the students have been rejected. This is not to say that students do not have rights that can be affected by negotiations and that their rights cannot be protected in other ways, but that is not the subject before us.

More directly in point is the decision of the Michigan Supreme Court last month in *The University of Michigan* v. *Michigan Employment Relations Commission* (495 GERR E-1). In that decision the Michigan Supreme Court found that interns, residents and post-doctoral fellows connected with the University of Michigan Hospital are employees and, therefore, entitled to bargaining rights. The court recognized that these employees are also students and that, because of this joint status, their bargaining rights might not cover all subjects that would be bargainable by full-time employees.

> *"For example, the Association clearly can bargain with the Regents on the*

salary that their members receive since it is not within the educational sphere. While normally employees can bargain to discontinue a certain aspect of a particular job, the Association does not have the same latitude as other public employees. For example, interns could not negotiate working in the pathology department because they found such work distasteful. If the administrators of medical schools felt that a certain number of hours devoted to pathology was necessary to the education of the intern, our Court would not interfere..."

The reasoning of the Michigan Court would seem to apply to graduate students in other fields who hold teaching and research fellowships, although it is not unlikely that the employment of many of them is casual and that they are, thus, excluded from any coverage. This would have to be determined on a case-by-case basis. The special circumstances of graduate students as described by the Michigan case would appear to justify their exclusion from the regular faculty unit and their inclusion in separate units. In this connection, note the exclusion of Graduate Assistants from the faculty unit in the 1973 New Jersey case.

Conclusion

The definition of bargaining units for professional employees of universities will present university administrators, union leaders and labor relations boards with difficult problems. The peculiar relationship of the faculty of the university with its traditionally substantial role in university governance precludes the application of much of the precedents that have evolved in other employment. The relatively few contact hours demanded of much of the faculty also creates circumstances that require innovations. Fortunately, universities and their faculties have been able to reach accommodations on most of the questions that have been discussed in this report. For example, PERB has not been presented with a single litigated case involving representation in community colleges. Obviously this practice of accommodation should continue because the universities and their faculties know better than the labor relations boards what structures are likely to work for them. Moreover, the spirit of accommodation that is derived from years of cooperation in university governance, if applied to the procedures of representation, will ease the negotiations difficulties that will follow. Slowly, however, body of law is being created in litigated cases and this experience will assist the various parties in assessing the future.

Academic Judgement and Due Process

by CHARLES BOB SIMPSON
Director, Division of Higher Education, National Education Association

Academic Judgement is a term which was coined in the 1969-72 City University of New York-Professional Staff Congress bargaining contract and references certain restrictions upon the Congress regarding grievances which may grow out of appointments, reappointments, tenure or promotions made by the university and its employees.

Specifically, "Grievances relating to appointment, reappointment, tenure or promotion which are concerned with matters of academic judgement may not be processed by the Conference[1] (Congress) beyond step two of the grievance procedure. Grievances within the scope of these areas in which there is an allegation of arbitrary or discriminatory use of procedure may be processed by the Conference (Congress) through step three of the grievance procedure. In such case the power of the arbitrator shall be limited to remanding the matter for compliance with established procedures. It shall be the arbitrator's first responsibility to rule as to whether or not the grievance relates to procedure rather than academic judgement. In no event, however, shall the arbitrator substitute his judgement for the academic judgement."[2]

Insofar as I can ascertain, this kind of language is not in evidence in any other bargaining contract in the United States. The Congress is now attempting to modify this provision through negotiation with City University by defining academic judgement as follows:

"Academic judgement shall mean the judgement of academic authorities including faculty

A. As to the procedures, criteria, and information to be used in making determinations as to appointment, reappointment, promotion and tenure.

B. As to whether to recommend or grant appointment, reappointment and tenure to a particular individual on the basis of such procedures, criteria, and information."

Procedures and criteria pertaining to academic judgement would be determined through negotiation between the Congress and the University. Any grievance then would be based upon alleged violation of these adopted criteria and procedures. It is critically important to understand that the exercise of academic judgement by any employee of the university (whether faculty or administrator) must be recognized as an action of management authority.

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[1]Parenthesis mine.
The Legislative Conference is now the Professional Staff Congress by name change accomplished during 1972.

[2]The City University of New York Agreement-Board of Higher Education, and the Legislative Conference September 15, 1969, pages 7-8.

Due Process

The treatment of due process and tenure at the higher education level has been of central concern to the National Education Association and its affiliated units, the National Society of Professors and National Faculty Association of Community and Junior Colleges. Within the next three months we expect to adopt a policy statement covering this vital area. It should be of interest to this group to share in the basic principles which are to be incorporated into this policy document.

Due process refers to the standards and procedures which must be followed in dealing with any adverse action brought against an individual by the institution or its agents. These procedures have their origins in the English Common Law and are meant to provide fair and equitable treatment for the individual by insuring as far as possible against arbitrary, capricious or inequitable actions. It is consistent with the fair and equitable treatment guaranteed to all American citizens by the first, fifth and fourteenth amendments to the Constitution.

There are two aspects of due process. Substantive due process means that the reasons for an adverse action must not be arbitrary or capricious; that they must be relevant to the competence of the individual to adequately perform the responsibilities and functions of his position; that they must not either directly or by their effect deny the individual the right to exercise any rights under the Constitution or laws of the United States, nor be a retaliation for such exercise. Furthermore, the reasons given must be the genuine reasons, not a subterfuge disguising other, unconstitutional intentions; and finally, they must be sufficient to warrant the action taken.

Procedural due process means that there must be available procedural safeguards to ensure that any adverse action can be dealt with fairly and equitably so that the individual affected has every opportunity to face his accusors, respond to the charges and refute the evidence against him. Included in these procedures must be the following:

- That appropriate reasons and timely notice will be given before any adverse action is taken.
- That it will be the burden of the institution to substantiate its charges and justify its actions through the presentation of proper, relevant and sufficient evidence.
- That the individual adversely effected will have an opportunity for a hearing in which he and his representatives will be enabled to hear and see all the evidence, cross-examine any person giving evidence against him, and present his own evidence to refute the charges against him.
- That this hearing will be open or closed at the discretion of the individual.
- That the individual will have the right to be represented by counsel of his own choosing.
- That the hearing agency will render a decision based solely on the unrefuted evidence produced at the hearing.

- That the individual will have the right to appeal its decision to binding arbitration by a neutral third party (such as the American Arbitration Association).

These standards and procedures should apply to all members of the professional staff* from the date of initial employment.

Few institutions of higher education in America today provide adequate due process for staff members. On the contrary, the violation of civil, professional and human rights by college and university administrations is a widespread phenomenon (witness the list of DuShane Fund cases involving institutions of higher education and the AAUP's list of censured institutions). In view of the above and in view of the serious and long lasting personal and professional damage done to individuals effected by current hiring and dismissal practices, all institutions of higher education from community colleges through graduate schools, both public and private, must be required to adopt genuine due process safeguards as defined above.

The Probationary Period

Probation refers to the period of time between the initial hiring of a staff member and the conferring of tenure during which his work is under evaluation to determine whether or not it meets known, predetermined standards of scholarship and teaching ability (or other appropriate standards for non-teaching professionals) which will warrant a tenure appointment.

During this period, the probationary staff member receives annual contracts of employment renewable each year. The conferring of the initial annual contract upon a probationary employee does, however, carry with it an expectation of renewal so long as his work meets the predetermined standards of scholarship and teaching. In any event, he has a right not to be denied renewal of employment for arbitrary capricious reasons or for reasons not related to known standards of performance or for no reason at all or in an arbitrary or capricious manner.

A number of inadequacies in current college and university practices must be corrected in order to provide the basis for fair and equitable treatment during the probationary period.

First, probationary contracts must be clearly distinguished from temporary contracts. A temporary contract should be given only where the assignment is to perform a specific function (ex. a person working under a one-year research or teaching grant) which has a clearly terminal date (*i.e.*, the appointment terminates with the grant). Such appointments do not carry with them an expectation of re-employment after the terminal date, nor is the holder of such a contract eligible for tenure. The temporary employee is, however, entitled to all safeguards of due process during the term of his contract. In any case, the number of such appointments should be strictly limited and temporary contracts must not be applied to persons in a probationary situation.

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*Henceforth the term "staff" shall refer to teaching faculty and non-teaching professionals employed by institutions of higher education.

Full-time staff should be employed wherever there is a sufficient and continuing student demand in an academic discipline (or course) to provide a full-time teaching load.

Second, the initial annual contract of a probationary staff member must include a clear description of the duties and responsibilities of his assignment and a statement of the standards and criteria of scholarship and/or teaching competence on which the probationary staff member's performance will be judged. These criteria and standards must not be unilaterally changed during the probationary period without the *consent* of the individual effected.

Third, definite, known dates must be established for the renewal of annual contracts after which such contract is automatically renewed. An annual contract may be terminated only when the holder of such a contract has received appropriate and *timely* notice of non-renewal accompanied by a statement of reasons.

Fourth, regular, formal evaluation of the performance of the probationary staff member must be carried out on the basis of known standards and criteria as defined in the initial contract of employment. Current evaluation practices at most institutions of higher education are either nonexistent or totally inadequate. Without adequate criteria and evaluation procedures, non-renewals *must* be arbitrary and capricious. Only a truly effective system of evaluation can insure that non-renewals will be based on proper reasons and adequate evidence rather than personal bias, rumor and whimsy.

Fifth, the institution has an obligation to provide every assistance possible to the inadequate staff member to help him overcome his deficiencies or difficulties before taking adverse action against him.

The length of the probationary period may vary depending upon the type of institution (e.g. community colleges, four-year colleges, universities, graduate centers, etc.) and the experience brought to the institution by the employee. The probationary period should be no longer than necessary to adequately evaluate the individual's ability to perform the functions for which he was hired. This may be as little as one year, but should in no case exceed three years. Any new staff member who has already achieved tenure at another institution of higher education should not be required to serve more than one year's probation at the new institution.

Tenure

Tenure is a professional status conferred upon a staff member at such time as he is judged to have demonstrated his scholarship and teaching ability sufficiently to warrant recognition of his achievement of a predetermined level of professional competence, as defined in the initial contract of employment. The recognition so conferred is widely known in that academic world as tenure. It is not unlike the status of master craftsman conferred by the craft guilds of the middle-ages on those of its members who demonstrated a predetermined level of technical competence in their craft.

Every probationary staff member is eligible for and entitled to tenure upon reaching the prescribed level of competence. Hence, the practice of establish-

ing institutional tenure quotas must be abolished. Such artificial barriers to the achievement of tenure are unrelated to *any* standard of professional competence and constitute a dismissal (*i.e.*, non-renewal of contract) for arbitrary, capricious and frivolous reasons.

The conferring of tenure on a staff member should carry with it a continuing contract of employment with the institution which is not annually renewed and can be terminated only for just cause. Just cause shall mean only flagrant and continuing failure to fulfill contract obligations without legitimate reasons.

Whether probationary or tenured, a staff member whose employment with the institution is terminated should receive severance pay. The amount of this severance pay should be at least one half year's salary for a second year teacher and should increase in proportion to the number of years service the employee has performed at the institution.

Reduction in Force

In the economic atmosphere which prevails today in higher education, many staff members will face the threat of reduction in force. Safeguards are needed to protect staff members – both probationary and tenured – against the effects of such actions.

First of all, a reduction in force (RIF) should be treated as a layoff – temporary in nature – not as a termination.

Second, procedures should be established by which any reduction in force will be accomplished. *Objective* criteria must be established to determine who shall be RIFed and in what order *i.e.*, all temporary staff should be RIFed before any probationary staff are effected and all probationary staff before any tenured staff. Within any academic discipline or other appropriate administrative division RIF's should proceed according to seniority – the least senior staff member in terms of length of service at the institution first, followed by the next least senior and so on until the most senior member of the staff is reached. Where minority staff members have been recently hired under a newly implemented minority hiring program exceptions should be made to this procedure to guarantee the integrity of the minority hiring program. Where two institutions have been merged all years of service accrued at the former institutions must be counted toward seniority at the merged institution.

Third, staff members who have been RIFed should be guaranteed certain rights and benefits, among which the following are essential:

(A) Before being RIFed, the staff member should have the right to fill any existing vacancy for which he is qualified or to transfer to any other division or department or to another college within a multi-institution system and to fill any vacancy therein for which he may be qualified.

(B) The institution should provide a retraining program to assist any staff member to meet the necessary qualifications to fill any such vacancy.

(C) The right of recall to any position (whether a newly created one or a vacancy) for which the individual is qualified must be provided.

Recall should be by reversed seniority – the most senior first, the next most senior next and so on to the least senior. In no case should any new staff member be hired to fill a position for which a RIFed staff member is qualified.

(D) Staff members who have been RIFed should suffer no loss of benefits. They should retain all accrued benefits (such as annual increments, retirement benefits, sick leave, tenure, etc.) and should be placed at the next salary step above their former step upon recall.

(E) A RIFed staff member should receive from the university – in addition to unemployment benefits where available supplemental financial benefits in an amount of from ½ to ¾ of his annual salary.

Implementation

How can the procedures and criteria spelled out above be achieved?

The National Education Association and its state affiliates are seeking legislation and court rulings which will guarantee to all staff members of educational institutions and all levels the rights of substantive and procedural due process herein described. This is, however, a long term process dependent upon the new attitudes and viewpoints by legislators and judges.

A quicker and more effective method of securing these rights on an institution-by-institution basis is through collective bargaining.

Collective bargaining is a process of bi-lateral decision-making in which the staff through its duly designated representative meets on a basis of equality with the duly designated agents of the college or university to negotiate a mutually acceptable agreement which defines the principles and procedures by which the institution's employment practices will be governed. These principles and procedures are embodied in a written and binding contract which is enforceable at law.

This system offers the best possibility of achieving the goal of securing due process procedures as defined above for all staff in institutions of higher education. Mutual agreement on such procedures can be reached at the bargaining table – the only arena where the power of the staff and that of the administration are equalized. Once embodied in a collective bargaining agreement, these principles will have the same effect as a law or court decision for a particular institution. As the Supreme Court has said, the collective bargaining agreement establishes a code of governance regulating the employment relations of a particular institution.

The role of the staff association under a collective bargaining agreement is to serve as the advocate for the staff. It is not the function of the association to sit in judgement upon the worth and abilities of its members or the merits of their claim to justice. Under collective bargaining the association is charged with the duty and responsibility of making and enforcing an agreement covering terms and conditions of employment with the college. Its function is to see to it that the agreement is lived up to by the administration in all of its particulars and that staff members – both collectively and individually – are accorded fair and equitable treatment under the terms of the agreement. As such, it must act as the staff's advocate.

In the same way, the pretense of most college and university boards that they are acting impartially in their treatment of a staff member must be seen for what it is. Even under the best conditions where the staff member is actually accorded a hearing on his appeal against an adverse administration action — the board is in effect simultaneously acting as judge, jury and prosecutor — for the administration is the agent of the board invested with its delegated authority.

Hence, the vital need exists in any collective bargaining agreement for an ultimate appeal to binding arbitration by a genuinely neutral third party (such as the American Arbitration Association) which stands outside the framework of the institution and is capable of rendering a truly unbiased judgement on the merits of a dispute under the terms of the collective bargaining agreement.

Special Issues in Arbitration of Higher Education Disputes: Academic Judgment and Tenure Quotas

by MILTON FRIEDMAN, *Arbitrator*
New York City

All kinds of "special issues" are dealt with by arbitrators in different industries and collective-bargaining relationships. But two of those listed in the program today are unique to higher education: academic judgment and tenure quotas. These problems, which I want to discuss, are not found elsewhere, even in education below the college level. Professor Christensen, among other matters, will give you "due process."

Perhaps some introductory words on arbitration generally are appropriate, particularly for management in higher education and union officers, who occasionally may have felt despondent when they opened their mail and found an arbitrator's award upsetting some cherished notion they had counted on to win their case.

Arbitrators deal with the collective-bargaining agreement presented to them by the parties, who must assume responsibility for what is good in it or bad in it, depending upon their respective points of view. Arbitrators have not imposed the terms of the contract, or formulated its language. As arbitrators, they must be unconcerned with whether the substantive provisions are liberal or barren of benefit. They are not the judges of its wisdom, its fairness, its equity or its reasonableness.

No one should be misled into believing that he need not worry about a restrictive contract because an arbitrator will loosen it up. That is not within the arbitrator's province, even though on rare occasions, like many weird phenomena, it may occur.

Arbitrators will not do this on their own initiative, nor will they do it at the urging of a party whose ox at the particular moment is being gored. After all, that party probably hopes to use a different provision on some happier day to gore the other side's ox.

The limitations on the arbitrator are the same in higher education as in a warehouse, in a public school district, or in a factory. They are of universal application, for the function of an arbitrator — as most agreements gratuitously emphasize — is to interpret and apply the agreement, but not add to it, subtract from it, or vary it in any way.

These preliminary remarks may seem elementary and superfluous in sophisticated circles, and are unnecessary for many present here today. But they are worth mentioning in gatherings of those concerned with a field new to arbitration. Although some us feel we have spent a lifetime in higher education labor disputes, it really is just several years, at least in this part of the country, that collective-bargaining has been mandated in the public sector, where most of the organization has taken place, and arbitration has become big business.

No doubt the most active user of arbitration in higher education in the East is the City University of New York. There are not many institutions of higher education with more than 16,000 in the unit, which require the frequent services of a permanent panel of eight arbitrators. Consequently, much of this discussion will focus on CUNY and its 20 colleges in New York City.

The first three-year agreement between CUNY and two faculty unions (now one) expired last August. I see no reason why negotiations, mediation, fact-finding, improper practices hearings, further negotiations if necessary, and super-conciliation should not finally produce a new agreement. The parties are in the fact-finding stage now. Meanwhile, arbitrations still go on of grievances under the expired agreement.

CUNY's Nota Bene

Many of the CUNY grievances which have gone to arbitration concerned reappointments, tenure and promotions, and were therefore governed by an interesting little contract provision with a Latin title, "Nota Bene." Parenthetically, a disgusted attorney for CUNY once told an appellate court in this State that the arbitrator's award at issue showed that this well-known Latin expression was Greek to the arbitrator.

The Nota Bene states:

> Grievances relating to appointment, reappointment, tenure or promotion which are concerned with matters of academic judgment may not be processed by the Conference beyond Step 2 of the grievance procedure. Grievances within the scope of these areas in which there is an allegation of arbitrary or discriminatory use of procedure may be processed by the Conference through Step 3 of the grievance procedure. In such case the power of the arbitrator shall be limited to remanding the matter for compliance with established procedures. It shall be the arbitrator's first responsibility to rule as to whether or not the grievance relates to procedure rather than academic judgment. In no event, however, shall the arbitrator substitute his judgment for the academic judgment. In the event that the grievant finally prevails, he shall be made whole.

Note well that academic judgment is specifically placed outside the arbitrator's purview. He has no power to judge it, modify it or deny it, or do anything about it, once he finds that the grievance relates solely to this rather than to procedure. *Prior* to the exercise of academic judgment, or in the course of exercising it, an arbitrary or discriminatory use of procedure gives the arbitrator jurisdiction. But even after a finding of the use of arbitrary or discriminatory procedures, the arbitrator is *limited* to remanding it back to the Board for compliance with proper procedures. He is told directly that he may not reverse the academic judgment itself, no matter what his private opinion of it.

Personnel and Budget Committees

In the City colleges ultimate responsibility for deciding on reappointments,

including reappointments with tenure, and on promotions rests with the presidents, whose recommendations must go to the Board of Higher Education for approval, although this is virtually always a formality. But – it is a big but – the basic, essential decisions are usually made by faculty bodies, that is, the peers of the affected professor, who are organized in departmental or college-wide personnel and budget committees. They are the ones whose academic judgment is applied, and they are not often overruled.

P&B Committees function in councils which are cloaked with confidentiality. Discussions are privileged, at least within the university community, if not in law. They vote by secret ballot. Presumably these representatives have all the virtues and all the vices of people generally, including intellectuals. Some may be thoroughly civic-minded, concerned solely with furthering the interest of their colleges, and completely selfless. Others may be petty, self-centered, or concerned largely with feathering their own nests, or indifferent to the best interests of their colleges. Their "academic judgment" is a product of their viewpoints, broad or narrow, which they have developed over the years.

But such committees are the instruments which historically have been an aspect of self-government in a community of scholars organized as a college. It is the precise opposite of a management-labor type structure, since in effect it gives "labor" a major voice in determinations affecting it.

Consequently, where grievances are raised below the president's level, they are grievances in which a faculty member charges his *faculty colleagues* with impropriety, including non-feasance or malfeasance. He may not, under the CUNY Agreement, challenge their academic judgment, but he certainly may and often does challenge the procedures which have been used. Perhaps he was not observed when he should have been, or he was not given an evaluation by his chairman, or he had not been the beneficiary of any proper evaluation discussion.

What if the faculty member believes that the College P&B Committee is prejudiced against his department and therefore against him because, for example, it feels that the Sociology Department is too fuzzy in its thinking? Is that an arbitrary and discriminatory use of procedure, or is it an exercise of academic judgment? If the P&B seems narrow-minded, is it an academic judgment at all?

The remand provision in the Nota Bene is a significant element in emphasizing that arbitrators may not substitute their judgment for the academic judgment. If they find an arbitrary use of procedure, someone else, not they, still must determine whether an individual should be promoted, or reappointed, or tenured. In the recently decided *Perlin* case, the New York State Court of Appeals held that an arbitrator may not cure even a blatent misuse of procedure by directing reappointment, since he would be substituting his academic judgment for that of college bodies.

Remand

Thus where CUNY arbitrators have found no impropriety in procedures in Nota Bene cases, they have not proceeded further. Where they have found an

arbitrary or discriminatory use of procedure, however, they have directed the Board to comply with *procedures.*

Of course, sometimes compliance with procedures leaves the Board no alternative but to reappoint. This has been true in cases where failure to follow procedures can be corrected only if a grievant denied reappointment is back in the classroom. Examples of this are failure to observe a teacher, or a chairman's failure to follow required procedures in evaluating him. How can these be corrected without reappointing the teacher so he can be properly observed or evaluated? He certainly cannot be observed in the classroom if he is not there. If the evaluator failed to convey to him adverse criticisms of his work, so that he might correct his shortcomings, he cannot obtain even procedural redress unless he then returns as a teacher.

Yet the arbitrator must limit himself to a direction that procedures be complied with, leaving it to the Board to take the inevitble step in its academic judgment. For the step is inevitable, unless the Board violates the Award by not complying, as directed, with procedures. Of course, the remand may identify the procedures to be followed, but in any event good-faith compliance often involves restoration to the payroll.

In cases of reappointment *prior* to the tenure year this is not as significant as when tenure must follow one more reappointment. I am not sure that the parties and the grievant can waive the right to tenure in order to effectuate a reappointment for another year, although the Perlin case suggests that a special form of appointment, outside the tenure levels, may be feasible.

Otherwise a serious problem arises where all, except the grievant, might agree that he should not be given tenure, and yet there has been an arbitrary use of procedure in his case. Should the faculty, the students and the college be required to pay the price of permanent tenure for an individual who was mistreated procedurally but who – the various college bodies believe – does not deserve tenure in any case?

No doubt the gravity of lifetime tenure is one of the key reasons why outsiders like arbitrators have been denied the right to fix a remedy if academic judgment is involved. It distinguishes higher education from the plant where, if a termination of employment was improper, the remedy of reinstatement may not be challenged.

Even when it comes to procedures, there may be variations in the way arbitrators judge them. One CUNY arbitrator held that it is not for him "to judge the professional quality of the observation of a faculty member by a peer." He stated that if an observer is "inattentive and uninterested and, accordingly incompetent or unqualified to make a meaningful evaluation," the arbitrator still may not "evaluate the evaluators in their exercise of their academic judgment of evaluating."

In contrast, some would probably feel that when the Bylaws of the Board of Higher Education and the Agreement itself discuss classroom observations and their purposes they do not contemplate the use of unqualified observers. A drunken observer would not meet the procedural anticipations of the Bylaws. Neither would one who pays no attention to the lesson being given. Under the Nota Bene, the Arbitrator may not evaluate the evaluators to

determine whether their judgment was professionally sound. But he may determine whether the procedures used were arbitrary or discriminatory, as could occur if non-competent observers were used.

Whether an observer is not competent in procedural, as distinguished from substantive, terms is a factual matter. Obviously, if he has pedagogical status it will be assumed that he is substantially qualified, even if the arbitrator would have arrived at different conclusions. The arbitrator may not substitute his judgment for the academic judgment of the observer. But the Union could not be barred from trying to prove that the judgment was not, in fact, an academic judgment if there were external considerations like the observer's failure to be observant, to listen, to remain awake, to be sober. This does not put in issue the *professional* competence to observe, but rather the procedures involved in the observation, and *there* the Agreement has given the Union and the faculty specific protections.

What is academic judgment? It may be described as the academician's free, honest, uncoerced decision on a professional matter. But, of course, the decision is not an academic judgment if it is based on the toss of a coin or the color of someone's skin, or any kind of external suasion. These are exactly the opposite of academic judgments, and if they have occurred, there has been an obviously arbitrary or discriminatory use of procedure.

Quotas on tenure are intimately related to academic judgment. They apparently exist in many universities, and the subject is being widely discussed as both an educational and a labor relations matter. As an issue in arbitration it arose in the City University of New York several years ago. I do not know that it has been much arbitrated elsewhere, although it will emerge more and more as collective bargaining spreads among colleges and universities.

Is the very establishment of a "quota," or a guideline figure for the number of candidates who should be on tenure at any one time, a matter of academic judgment? Or is any such consideration an extraneous interference which constitutes an arbitrary use of procedure? The reaction to it may depend on who established the quota, and on how it is applied by those charged with such responsibilities.

For example, a Department P&B Committee may decide that no more than 60% of the department should be tenured so that there will be ample flexibility in future years to attract and retain outstanding candidates. Is that an indication of academic judgment or a model expression of it? It can be argued that looking ahead in this manner is conceptual as well as practical evidence of academic judgment.

Whether there should be such limitations on tenure is in the forefront of academic problems today. Kingman Brewster of Yale, in his 1971-1972 Presidential Report, listed as one of two very expensive policies to be examined, any award of tenure or lifetime appointment. He discusses the danger of "becoming stuck with the obsolete," and perhaps removing the "incentives to higher levels of performance," which he finds not to be true at Yale. When retrenchment is necessary, he pointed out, the junior faculty is diminished, although they may be more up-to-date in their field than the tenured faculty. President Brewster warned that with finite resources every tenured position

"blocks the hope for advancement" by younger men. His comments suggest that tenure is not easily granted at Yale, whether this is due to "quotas," guidelines, administration aims, or the aims of the faculty itself.

In the City University during the fall of 1970 the Chancellor wrote to the Presidents of the Colleges reminding them of *their* consensus in the previous spring. It was that no department should have more than three-fourths of its members tenured and that throughout each college new appointees should have a 50-50 chance of tenure, that is, if three years ago 20 new instructors had been hired, tenure now should not go to more than 10 of them. Neither limitation was iron-clad, but could be exceeded, provided the College's President explained the justification for doing so.

This approach was designed to ensure future flexibility and also to guard against a tendency, particularly in newer colleges, to reappoint just about everyone and to grant tenure to virtually everyone up for tenure. On the other hand, in some colleges faculties appear to have developed a built-in quota system of their own, at least as evidenced by the relatively modest way in which *they* granted tenure.

Apparently the Chancellor's letter was designed to guard against the kind of future freeze recently described at Columbia University by the chairman of the 51-member Department of History, which had 35 (or almost 70%) tenured. The chairman wrote that "no vacancies will open at the tenurial level during the next few years except those created by resignation or death." He noted the adverse effects on morale of such bleak prospects for younger faculty. His remarks reflected the presence at this time of a *de facto* quota system, although the report he made does not indicate that any formal policy existed.

If a P&B Committee or a college President seeks to apply quotas or guidelines on tenure is there automatically a failure to exercise academic judgment, and consequently an arbitrary or discriminatory use of procedure? To some extent the Union's approach in CUNY cases arising in 1970 verged on that view. It opposed any quotas in principle and, in effect, contended that each faculty member should be judged on his individual merits without regard to percentage limitations on tenure. In other words, academic judgment apparently would be exercised on a case-by-case basis without reference to overall impact on a department or faculty.

In 1970, after the Chancellor's letter on tenure some Presidents looked to their faculty bodies to implement it, but some declined to use any percentage criterion, and even recommended tenure for just about everyone being considered, which of course is the antithesis of a quota or guideline approach.

However, if a P&B Committee may appropriately use a percentage guideline, whether this is done formally or it is in the back of the committee's mind, may a President also do so? The Agreement does not say what factors may be used in the exercise of academic judgment, and the Bylaws charge the President with responsibility for promoting the best interests of his college.

In two somewhat similar cases which arose following the Chancellor's reminder that the Presidents themselves as a body had recommended ceilings on the number to be tenured, the arbitrator arrived at different conclusions. For in one case the arbitrator found that the President had applied "quotas"

as the result of external pressure, which caused him to reverse his own earlier academic judgment granting tenure. However, in the second case the President himself took into consideration the "quotas" or "guidelines" in arriving at his original tenure recommendations. This was held to be a proper exercise of the President's academic judgment.

Both the Agreement and the Bylaws indicate that individuals up for tenure must be appraised on the basis of their own qualifications. If this is done, but consideration is also given to future effects on the department and on the college, can it be charged that a bona fide academic judgment has not been exercised?

The concept of no guideline ceiling at all in tenure decisions comes close to the public schools' usual approach that a satisfactory teacher will be reappointed with tenure. The New York Times on March 25 quotes a high official of the NEA as saying of college faculties: "Our position is that all faculty should be tenured, although we recognize that there could be appointments for specific periods."

CUNY officials have argued that a consideration should be the possibility of obtaining a *better* candidate in making each tenure determination. Whether this view is right or wrong, most authorities no doubt would find a significant distinction between what is required of a "community" of scholars" in a university, and what is required of a public school faculty.

It is significant that the quota dispute in CUNY a few years ago was not the result of the promulgation of an ironclad limit, but represented what the Chancellor assured the Union were guidelines, which permitted a flexible approach. In contrast, there now appear to be moves in various jurisdictions to clamp firm lids on the number who can obtain tenure.

To the extent that it may be possible in large universities to divide a faculty into teachers without research commitments, and scholars who also teach, perhaps there may be fruitful explorations of two separate systems of job security. But in the long run would it redound to the best interest of anyone – students, faculty, institution or community – if any sort of guideline or rule of thumb, *per se*, for the granting of tenure were held to represent an arbitrary or discriminatory use of procedure?

It is noteworthy that the Max-Kahn Report, an adopted policy of the NYC Board of Higher Education, carefully points out that failure to reappoint a teacher should not be construed as evidence of his inadequacy. The possibility of subsequently not being able to recruit a more desirable individual because of the constraints resulting from an over-tenured faculty, is a consideration expressed in the Max-Kahn Report, which indicates that the consequent failure to reappoint is not therefore a disparagement of the terminated teachers' competence.

Collegiality vs. Job Security

There is a basic dichotomy between the exercise of collegiality and the pressure for job security among the younger faculty seeking reappointment and tenure. A union usually wants to be able to ensure that its competent,

qualified members shall retain their positions and be promoted, and not be at the mercy of a hierarchical structure, any level of which may subjectively determine that, while the candidate is a fine teacher and scholar, in its judgment he should not be granted lifetime tenure.

Life might be simpler for unions in Academe if there were a traditional Union-Management relationship. It would permit the Union to challenge Management's tenure decisions on their merits, and require objective proof for every personnel action. But it would spell the demise of governance by the faculty, which to a greater or lesser extent exists in most institutions of higher education. For Management could not be placed in a position where the substantive decisions of fellow-Union members are challengeable as contract violations, thus subjecting the employer to penalties and damages.

However, to impose such a "just-cause" approach is possible only by placing the faculty in a subordinate relationship to college management. Making employees out of professors, who would be controlled by foreman known as chairmen, superintendents known as deans, and plant managers known as presidents, would utterly transform much of higher education in a way few here on any side of the table would consider desirable.

It is probably difficult for a union at CUNY to explain to its members why an able, dedicated, hard-working individual was not deemed worthy of reappointment, his place perhaps going in the following year to a stranger, upon the gamble that the latter would prove more desirable. And yet throughout the country this is a recurring phenomenon. Inadequate as the Union may find job security at CUNY, it probably is close to the head of the field in this matter. For the Board of Higher Education at least is contractually obliged to avoid any arbitrary and discriminatory uses of procedures in the appointment process, and there is preserved for faculty bodies the fullest exercise of infrequently reversed academic judgment. This, of course, is in addition to contract provisions with protections against discrimination, excessive workloads, arbitrary discipline, etc.

Finally, it should be noted that the Union at CUNY, the Professional Staff Congress, may be more concerned with the personnel decisions of Presidents than of peers. The Union has asserted publicly that it believes the administration should give reasons for denying reappointments. Presumably this refers only to reversals of favorable action by faculty bodies, since the latter's collective judgments by secret vote do not lend themselves to particular explanation of why the body acted as it did.

These are some of the labor relations issues which have produced a substantial number of grievance arbitrations at CUNY in the last several years. What lies ahead is not readily foreseeable, either at CUNY or in higher education throughout the country.

Due Process and Academic Judgment

Speech by MR. THOMAS G. S. CHRISTENSEN

My topic is, basically, "due process" although I shall also make some comments in the area of academic judgment. I do not think you can speak of the basic problems of due process without inevitably getting into questions of academic judgment. I confess this has probably given me more problems than others, because I have served, as a member of faculty, on tenure committees and other committees and I am keenly aware, I think, of the problems that arise when one tries to judge one's peers. The other side, of course, is brought before me every time I have an arbitration case involving City University or another institution of higher education where you hear the anguished screams of the collective representatives and the, frequently, very genuine complaints of individual teachers who feel that they have been deprived of some particular advantage in their employment or even employment itself.

One approach to due process in educational institutions is to see what parallels there are or could be between due process in this particular area and in industry and the so-called private area of our economy. I think there are some parallels. In this respect I have observed an interesting phenomenon, at least to me, in the industrial field in that there is a growing tendency to import many of the concepts of due process, particularly those that are applicable to the criminal law field, into industrial relations. For example, the Supreme Court has said a great deal about an individual's right to counsel We are now getting cases in the industrial area as to whether or not there isn't a right to "counsel" by employees in various situations and especially those involving disciplinary proceedings. I would guess that the experimentation as to right to counsel that is occuring in industrial areas as a form of due process is fairly easily transferable into the educational area.

Another area of development is that of illegal searches and seizures, a problem we are familiar with in our criminal law but which is also bobbing up with increasing frequency in the industrial area in situations such as this. An employee is suspected of having company property illegally or at least against a company rule in his or her possession. The company goes to that individual's locker, opens it without permission from the employee and finds the particular property there. The question then arises as to whether this was an illegal search and seizure or only exercise of an inherent right of the employer to control his own property. There is no easy answer, incidentally, to that particular proposition. Arbitration cases go both ways depending, in good part, on the precise factual circumstances involved. But again, this has implications for the educational field. I am not aware of any case which has, to date, probed deeply into that area, but it is easy to see that, for example, searches of a teacher's desk or files, particularly files, could conceivably raise a question of whether or not these are private property that should have some protection against search by others, even employers.

There are many other problems, however, in the area of due process in edu-

cation which have no industrial parallel. We have a long tradition, in many states, of legislatures creating certain procedures as to university or college or even lower school treatment of individual teachers and methods of appealing various actions taken by the educational institution. Again, while the problem is still fairly dim in scope, I think we are having some difficulties about whether or not these statutory methods of protection should take precedence over any contractual method of protection. Whether they should exist, statutory and contractual, and at the same time, gives rise to the old "two bites of the apple" proposition on the part of the teacher who alleges himself or herself to be injured.

The City University contracts have a very fascinating form of contractual protection of due process. It consists of contractually required systems of evaluation and observation for individuals who are under consideration for appointment or reappointment and there is a fairly specific set of rules set forth in the contract. When it comes to a situation where there is a reappointment involved, and I would say the great majority of cases I have heard have involved that question, by the terms of the Nota Bene (Section 6. 2, Ed.) it must be determined whether or not there was academic judgment involved or whether there was an arbitrary or discriminatory use of procedure. Due process in this respect, is thus made by these contract terms, a matter of procedural devices. That has two very interesting consequences that I have been able to observe. I think most of you may be aware of the long debate in the legal profession and particularly at the Supreme Court level of whether there is such a thing as substantive due process as well as procedural due process. The surface view of the City University contract reveals that in these areas of appointment only, a form of procedural due process exists and I would like to go into that in a few moments. But, I suggest to you that there has been an enormous pressure put on the arbitrators to create or find some forms of substantive due process implicit in the other terms of the agreement.

Perhaps the best example I can give you is the very first case that I have heard involving City University. This was a case where an individual had been first offered, by lower levels of the City University, a particular position. At a subsequent point in the processing of that application the University decided that they were not going to appoint the individual. A grievance was filed. We came into the hearing room and the City University's attorney, a very able individual, said "Professor Christensen, this is a very simple case. If you will take a look at the Nota Bene, you will see that this is a matter involving appointment of an individual and it is not a question of any abusive procedure. There was no procedural defect here. There was no opportunity to observe because the individual was never employed." I thought, well that makes an interesting, very profitable day for me, but then the Union attorney spoke up, and he said, "Professor Christensen, there is a Nota Bene in this agreement, but if you look a few pages in front of that Nota Bene, you will see another article of the agreement. This article says that City University agrees that it will not discriminate as to employment because of race, sex, creed, or political activity." I said, "Yes, where do we go from here?" He said, "Professor Christensen, I would like to introduce you to the individual that was denied em-

ployment. She is black and has a record of considerable political activity at the college at which she received her degree." I turned back to the University. The University took a stand which I think it felt in all good conscience it had to take. The attorney said, "Professor Christensen, we are simply not going to tell you why we made the decision not to appoint this individual." I went back to my apartment and struggled with that particular issue. Rightly or wrongly, and an arbitrator can be wrong, I said that in this instance I was determining an alleged violation which was not covered by the Nota Bene. I think knowingly or unknowingly, I thus created some form of substantive due process in which, if an individual can show that a separate restriction accepted by the University in some other portion of the Agreement has been breached, then the authority of the arbitrator is no longer limited to the particular type of review and the limited form of remedy set forth in the Nota Bene.

Perhaps that case also illustrates one other problem which I would like to emphasize. It arises where the parties insert procedural limitations as to arbitrability in an agreement. I think any arbitrator that you hire should, and usually will, attempt to stay within the limitations. We may not always like it, but if you have given us clear instructions we will bite the bullet. If you have very limited procedural due process standards placed in the contract, then there is a tendency on the part of the arbitrator, particularly in a case where that arbitrator feels that an injustice may have been done, to require perhaps even overly strict observance of those particular procedural rules of due process.

This brings you, of course, into some other problems. Where you have a situation in which there have been contractually required observations of teachers in their particular classroom, arbitrators encounter difficulties when the allegation is made that there is some flaw in a particular observation. This, however, leads us right back to the question of what is academic judgment in these particular circumstances. How can an arbitrator evaluate either the content or type of observation without really inserting himself or herself into the academic process? I guess I am particularly bothered by this because, as I mentioned before, I have served on Faculty committees which made pretty binding rulings as to tenure. The minutes of those meetings and the votes were always kept a matter of utmost secrecy and rightfully so, I think. They can contain judgments (as, for example, on personal or physical aspects of individuals) that I find a little difficult to say are academic judgments. Conversely, my whole feeling as a teacher is that peer judgments are essential in the selection of those who are to serve on the faculty with me. I am intrigued with the idea that peer judgments may be academic judgments even though they have nothing to do with what is taught in the classroom.

On this same point, City University has another clause in its contract which has brought up some problems. It is a clause which seemingly gives a fairly clear protection to an individual lecturer. The protection is that an individual may not be denied reappointment for reasons of "professional incompetence" unless two of the past three evaluations have been unstatisfactory. Part of the problem begins wherre an individual has been denied reappointment and there is testimony that the denial was made by the departmental committee,

not because they felt that the teacher was doing a particularly bad job or that any observation or evaluation reached that conclusion, but because the department felt that the chances were good of recruiting someone better. The grievance alleges a denial of reappointment because of "professional incompetence" despite observations and evaluations which did not bear out that particular conclusion. The question then becomes what constitutes "professional incompetence." Does it mean an absolute failure to perform properly in the classroom or does it extend to comparative levels of ability, a matter that has to trouble every faculty, exery administration in the country?

One final comment in this area which goes back to the question of what is academic judgment and what is due process. An issue has also arisen in the City University system as to whether or not a college in the system could require that a lecturer, to get reappointment after a set terms of years, must be pursuing work toward a doctoral degree, i.e., must be either in receipt of that degree or, at least, showing active progress in that direction. The particular college in question denied reappointment to one lecturer on the grounds that there was no indication of either the degree or progress thereto. A grievance was brought. One arbitrator, not myself, held that because a provision in the agreement stated that lecturers, by definition, would be individuals without a research commitment, the College action was an attempt to change, in breach of contract, the nature of the particular class of represented individuals. The arbitrator concluded that this could not be a matter of academic judgment because, in effect, it set working conditions and rules apart from the academic judgment area. I disagreed in another case which was brought up sometime after that to me. I must say that I am not enthralled with the doctoral degree. To me, nevertheless, if a college faculty decides that receipt of such degree is a concomitant of continued employment, such a decision, as I stated in my decision, is as pristine a form of academic judgment as I could imagine. Fortunately, we were able to distinguish the two cases, so you did not have the unhappy situation of two arbitrators under the same agreement disagreeing in binding awards as to the meaning of a particular contract clause. The prospect of such conflict, however, is obviously there. It disturbs me greatly because it would mean, in effect, the determination as to an individual grievant would become a matter of Russian roulette depending upon which arbitrator happens to be the one assigned that case.

A few final sets of comments. I think much of what I have said, adds up to this: arbitrators need instructions. Instructions which are ambiguous such as "professional incompetence" or, particularly, "academic judgment" are simply a temptation to give us more authority that we probably should have. I believe it is true that most of all arbitrators who serve on these panels are acutely conscious of the fact that we are not just dealing with the lives of particular faculty members. We are dealing with a very intricate educational system, one with a long tradition of its own, a long history of customs of its own. I think it is impossible in any collective bargaining agreement and certainly in initial agreements to iron out in specific detail all of these problems. But this task at least has to be started. There must be an attempt made more openly and plainly to define what protections will be granted in the contract. What areas

of unilateral or semi-unilateral authority are going to be left in the hands of others? I hope in the future these contracts will become increasingly complex but increasingly clear in their instructions to the arbitrator. After all, I can remember the first time I went out on a mediation assignment involving a school system. I walked into a meeting of the union that was representing the teachers and said "let me see your demands." They handed them to me. I was leafing through them and I found the demand that the contract define the words "academic freedom." I immediately went into shock remembering faculty meetings which I had attended in the past when a faculty of 65 could be counted on to submit 130 different conclusions on that subject. Nevertheless, a definition of academic freedom was written into that particular contract. It has appeared in other contracts. I leave you with the hope and the thought that if we can define "academic freedom" in a contract, perhaps we can define our other basic points of reference.

Collective Bargaining and Collegiality

by JAMES P. BEGIN
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Union officials might find either confusing or amusing academic discussions of collective bargaining and collegiality which assume that collective bargaining and collegiality are two different processes. The reason that this may be the case is that many of the labor scholars who have so eloquently described collective bargaining as having introduced into industry a system of industrial democracy which provided for shared authority have also made some of the most negative comments about the destructive effects of collective bargaining on the collegial system. Traditional academic support of the labor movement is indicated by the words of a noted author who has described one aspect of collective bargaining, the grievance process, "as one of the greatest achievements of our society (Aaron, 1971, p. 55)." In contrast, another noted labor scholar has stated that faculty bargaining would lead to "a surrender of the environment of excellence, of toughminded application of high standards through traditional joint agencies of faculty and administration (Oberer, 1969, p. 143)." What is the basis for this apparent contradiction of labor scholars?

What is Collegiality?

Part of the contradiction arises from the fact that the two alternate systems of collegiality, collective bargaining and the traditional collegial procedures, have different origins. According to Webster, collegial is defined as "marked by power or authority vested equally in each of a number of colleagues." While this is a good partial definition, it must be supplemented by a description of the basis or reason for the existence of shared authority, and the manner in which shared authority is implemented.

In a typical private sector bargaining context, shared authority between employees and employers is acquired by power – power brought into play because of the desire of workers for protection against the arbitrary and uncontrolled discretion of employers. The power of private sector employers which is being challenged by the unions is lodged in the control of capital and, hance, the hiring and payment of labor. In contrast, many decisions in the higher education context relating to educational policy and personnel actions (such as hiring, promotion and tenure) have been traditionally shared with or delegated to the faculty.

Why have college and university administrators been willing to share decision-making in regard to policy matters? Because they acknowledge the validity of the professional claims of certain occupations – professors, doctors, lawyers – to exercise significant control over recruitment, training, certification and standards of practice, in part, due to the possession by these occupations of an esoteric body of knowledge. Thus, traditionally collegial mechanisms in higher education are an outgrowth of faculty professionalism.

A basic difference between doctors and lawyers and professors, besides income, is that professors almost always work within bureaucratic organizations. In the unhierarchial medieval university, the freedom of professors approximated the autonomy enjoyed by many modern doctors and lawyers. But as universities have grown, become more bureaucratized, procedures such as senates and an elaborate network of committees have developed as a means of providing professional autonomy within a bureaucratic framework.

It should be recognized, of course, that colleges and universities differ significantly in the degree to which the faculty is provided the power it has wanted in educational and personnel matters. But the question arises that in instances where the faculty already have a degree of shared authority, why do they need collective bargaining? Although this question will not be thoroughly explored here, many commentators on the origins of faculty bargaining believe that a perceived loss of professional autonomy by the faculty which the existing collegial process has been unable to stem has been an important precipitating force. Thus, bargaining is seen as a means of strengthening or recapturing faculty authority. Many doctors and lawyers working in bureaucratic organizations are also adopting the principles of collective bargaining, including the staff attorneys of the National Labor Relations Board.

The point, then, is that the traditional collegial mechanisms which were based on the professional competence of the faculty have been joined at many institutions by additional decision-making procedures, in part because of the inability of the traditional mechanisms to provide adequate faculty muscle under changing conditions. A basic issue is whether the decision-making system which develops under collective bargaining will supplement or supplant traditional collegial systems.

Collective Bargaining vs. Collegiality

How is collective bargaining likely to affect traditional collegiality? Or the question could be turned around as follows: How is the strong sense of faculty autonomy which usually goes along with traditional collegiality going to affect collective bargaining? If they haven't already, faculty bargaining agents may come to appreciate the latter statement.

The following discussion of the impact of collective bargaining will center on two aspects of the collegial system – senates and the peer judgment process. It is expected that the contract negotiation process will have the greatest impact on senates, while the grievance process will be a major way by which faculty bargaining will bring about changes in the peer judgment process. The remarks concerning the impact of bargaining which follow must be measured against the existing range of faculty control in institutions of higher education.

Senates

One of the most common generalizations about the effect of collective bargaining on higher education is that the bargaining process will cause tradi-

tional modes of faculty participation, the senates, to atrophy. To the extent that this prediction is borne out, it is possible that faculty union organizations will have enlarged their power and control not only at the cost of the administration, but at the cost of the traditional avenues of faculty participation as well. However, the potential range of outcomes is broad. Under appropriate circumstances one can envision at least the following possibilities: The complete replacement of traditional procedures by the bargaining process; the incorporation and protection of traditional procedures within the contract; the development of a dual system of faculty participation (one for personnel matters, the other for educational policy); or, finally, the improvement of senate operations in competition with bargaining to the point that the bargaining agent is undermined.

The interaction of traditional procedures and the bargaining process which develops from a particular bargaining relationship will depend upon how the faculty choose to exercise their decision-making power in the bargaining context – though what procedures, by whom and over what issues? At issue in this regard is how the more direct and legally based authority available under collective bargaining is to be meshed with the more consultative aspects of traditional governance so that the strengths of each are balanced?

The first alternative, the complete replacement of traditional procedures, is more likely to occur where the traditional union model for decision-making is followed. In this model the bargaining agent is the sole conduit for faculty input on all issues, including any consultation activities which occur on non-negotiable matters. It is this model of course to which many allude when they say that faculty collective bargaining is incongruous with the characteristics of institutions of higher education. However, there are two other decision-making models which would tend to preserve traditional faculty consultation procedures. The first type has been described by Joe Garbarino as the "constitutional" model. This model would establish or protect traditional mechanisms by incorporating them into the bargaining agreement (Garbarino, 1972). In this model the bargaining agent would agree to delegate most of its consultation activities to other bodies, but it protects this transfer of authority by giving contractual status to the other decision-making forums so that the administration can no longer unilaterally change these processes.

In the constitutional model, substantive decisions on salary and related matters would be made in the traditional union pattern and incorporated into an agreement, while a "procedural agreement" is made to codify procedures for making input on other kinds of decisions, usually those dealing with educational policy. The epitome of the constitutional model is probably represented by the Boston State and Worcester State College agreements in Massachusetts, which set up a governance system at Boston State where none had existed before and established a new system at Worcester State.

A second type, the "informal model," differs from the first primarily in the way in which the traditional governance procedures are related to the bargaining process (Begin, 1973). Here there are no formal, contractual relationships between the two systems of governance, but there is informal agreement among the parties at the table, or it is only broadly alluded to in the agreement,

that the traditional procedures will be preserved. The relationship beween the processes has not been formalized primarily because the faculty at the institutions will not support any obvious dilution of established, traditional procedures. Rutgers University and Central Michigan University primarily fit this model.

At Rutgers the reluctance of the faculty to permit interference with the traditional Senate has been indicated on two occasions in the last year. In the first instance, the AAUP and the university administration had wanted to make the University Senate, which includes faculty, students and members of the administration, into a faculty and student senate. But the members of the Senate refused to allow the administrators to be removed from the membership despite the fact that only a few years ago there were strong attempts to develop a senate without administrators. On the second occasion, attempts by the AAUP to set up a liaison committee between the AAUP and the Senate again was defeated by the Senate members. Officers and members of the AAUP who were also Senate members did not speak out strongly in support of the AAUP's positions in either instance.

To the extent that the constitutional and informal models described above develop and become stable, then collective bargaining and traditional governance procedures have been molded together in a way which tends to preserve traditional forms of collegiality. The strengths of traditional procedures are protected, in fact, reinforced, since the faculty organization now acts like a watch dog to ensure more effective consideration of faculty views. In preserving the more deliberative, traditional prcedures, the system imbalance created by upsetting established procedures is minimized. Moreover, meaningful professional participation by a larger number of faculty on a wider range of issues is preserved, and this participation occurs continuously, not just at negotiating time.

However, a number of factors operate to make such an amalgam unstable, particularly in the informal model. First of all, the bargaining agent, as the exclusive representative of the faculty, has a monopoly on representing faculty interests. Referring issues to other forms is a complicated and somewhat risky business for the faculty organization because there is no guarantee that a senate which might contain different constituencies (faculty not supporting bargaining, administrators not involved in bargaining, competing union organizations and students) will produce the desired outcomes. Rules changes which result from a consultation process usually would be excluded from the contract and may not be subject to the grievance procedure. Nor would the bargaining agent get full political credit from decisions reached in other forums. As a consequence, a faculty organization may be reluctant to delegate its consultation activities to another body even under ideal conditions.

Another major problem in working out a compromise between the two systems of faculty participation is confronted when an attempt is made to differentiate between negotiable issues and issues to be left to traditional means of faculty deliberation. Early in a bargaining relationship it is usually difficult to separate the negotiable from the non-negotiable issues since both parties to the negotiations are less willing to explicitly admit to the negotiability of many

issues. Indeed, disputes over the forum in which issues are to be considered are what may make the constitutional and informal models unstable over the long run.

The type of bargaining relationship which develops in a given academic environment is also extremely important in shaping the fate of traditional faculty governance. It would appear that the problem-solving exchange of the cooperative relationship would be an important prerequisite to a compromise between traditional modes of faculty governance and the collective bargaining process. A high conflict, adversary relationship is certain to interfere with efforts to preserve traditional faculty inputs because the number of matters over which the parties deal informally in active consultation outside of the contract will most likely be affected (Walton and McKersie, 1965).

Other factors are also important in respect to the type of decision-making model which develops at any given institution. The existence of competing employee organizations may hinder the conservation of traditional procedures if the competing employee organizations are fighting it out in the senates or if the competing union controls the senates. If an administration tries to use senates negatively as a means of undermining union authority by attempting to give the senates broader authority, then this will also not bode well for the survival of the traditional procedures.

On the other hand, efforts to preserve senate procedures may be enhanced if the senate procedures are used as an alternate means of protecting the local faculty autonomy where the bargaining structure introduces into negotiations parties external to the institution, for example, state-wide governing boards. It is possible that senates could be the device for providing local negotiations over issues for which the local administration has jurisdiction. But in instances where the effective management authority is above the local institutional level, it is unlikely in the long run that the senates will be perceived by the faculty as providing them with an effective voice on anything other than issues over which the local administration had jurisdiction.

In sum, it is possible that the collective bargaining process and the traditional senates may be mutually facilitative, particularly if a senate is viewed as part of a consultation process. But a number of contextual factors, some of which are not under the control of the parties, may serve to make the relationship between collective bargaining and traditional procedures unstable.

Peer Judgment Process

Where a collegial peer judgment process is in operation, it is unlikely that a faculty would permit its bargaining agents to *negotiate* changes in the procedures which would undermine in any major way existing faculty prerogatives. Nevertheless, while faculty bargaining agents may have no intention of purposely altering traditional paths to faculty membership and promotion, subjecting peer decisions to the grievance process may bring about changes in the peer judgment process.

When a faculty member files a grievance against his departmental colleagues charging unfair treatment, higher levels of administration must either

automatically defend the departmental decision on the grounds of faculty responsibility, or overturn the decision and in the process be charged with eroding faculty authority. To minimize grievances at the departmental level, administrators will tend to enforce more uniform adherance to procedural rules governing decisions at the department level, for example, meeting notice requirements, and insist that the conditions of appointment and reappointment be clearly spelled out.

Thus, faculties, in their management role, will be held more accountable for the extent to which peer decisions with respect to hiring, promotion, and tenure adhere to the institution-wide procedures, particularly through the external review of their decisions provided by the grievance process. As a body of precedent builds, decision-making flexibility is decreased as the faculty and the administration must produce evidence to meet the developing criteria for determining whether or not a person was justly denied tenure or promotion.

The degree to which faculty authority is subjected to increased external review through the grievance process will depend, in part, on the scope of the grievance procedure. An examination of early agreements from four-year institutions indicates that most of them restrict grievances to matters of procedure rather than substantive matters of academic judgment. However at CUNY and Rutgers, and probably other institutions as well, it appears that the division between procedural and substantive matters is extremely difficult to maintain.

Many people have reacted very adversely to the intrusions into the peer judgment process which are described above. As indicated previously, one author felt that bargaining would lead to "a surrender of the environment of excellence, of tough minded application of high standards through the traditional joint agencies of faculty and administration (Oberer, 1969, p. 143)." However, there is substantial evidence to indicate that perhaps some improvements in the peer judgment process are in order.

Recently, the dean of faculty at a prestigious, private university decried the effect which Federal civil rights policies, specifically Federal affirmative action requirements, are having on the peer judgment process at his institution. He felt that these external, legal requirements would substantially undermine the peer judgment process at colleges and universities. A subsequent check of the record of his institution in respect to the percentage of women at the associate and full professor ranks turned up the fact that only 1.1 percent of the faculty at these ranks were women. Why haven't more women, and minorities, percolated to the top of the academic hierarchy at his or other institutions of higher education? Part of the answer, of course, lies in the fact that through a lack of accountability to wider social goals, or even university-wide policies, the peer judgment process has selected out qualified and interested individuals.

By providing for more effective due process, collective bargaining may stimulate the peer judgment process to serve one of the purposes for which it was originally intended-to ensure that personnel decisions are based on merit and not upon arbitrary and discriminatory actions of a few individuals who have

the power. In higher education, of course, the faculty often wields the power which is challenged through the grievance process. At Rutgers, many of the tenure grievances last year were against a grievant's departmental colleagues.

The dean's comments about the impact of public policy on the peer judgment process illustrates another important point. Other forces besides collective bargaining, particularly those emanating from the civil rights movement, will have important effects on the peer judgment process. The collective bargaining process will primarily reinforce attempts of public policy to alleviate discrimination by providing a faster and more immediate means than external administrative and court channels for putting pressure on institutions of higher education to provide equal treatment. At Rutgers, both parties would probably agree that the bargaining process has substantially speeded up efforts to alleviate discrimination against women by bringing to bear existing public policy. The parties have negotiated an elaborate procedure for identifying women who are being paid and promoted below average and for distributing to these women $250,000.

In sum, there is no doubt that faculty peer decisions will become increasingly subject to external review through the grievance process. And in the short run, the faculty are likely to resent this intrusion into their jurisdiction and administrators are likely to be anxious about confronting faculty jurisdiction. However, to the extent that systematic procedures reduce the number of questionable peer decisions of the type which discriminate against certain groups, then it would appear that the operation of the peer judgment process has been refined and improved, not destroyed. In the long run, faculty and administration anxiety is likely to give way as the parties adjust to the requirement that systematic, objective information be presented to back up decisions. In short, the organizational impact of individual due process mechanisms brought about by collective bargaining in most instances will be within acceptable limits. An exception to this statement may be CUNY which has had approximately 80 first level grievances.

Summary

Members of the labor profession who continue to predict doom for traditional governance mechanisms without the benefit of empirical evidence are doing a disservice. Because if there is one generalization that can be stated about the collective bargaining system which has developed in the private sector, indeed, if there is one word which describes this system, it is variability. In response to variations in labor markets, product markets, organizational structure, rules, traditions and personalities, a versatile bargaining system has evolved.

Since traditional systems of collegiality have been an integral part of the structures of many institutions of higher education and of the expectations of the participants, it seems reasonable to expect that the collective bargaining system which develops in higher education will reflect these factors. As further evidence develops in regard to the impact of collective bargaining on traditional collegial mechanisms, we will find that, in many instances, collective

bargaining has supplemented not supplanted tradition mechanisms, that the changes have been evolutionary, reflecting particular circumstances, and not revolutionary.

Finally, as observers of the developing faculty bargaining movement, we must be prepared to separate the effects of bargaining from other significant forces affecting institutions of higher education, for example, state and Federal legislation and external governing boards. Furthermore, we must be realistic about the pre-bargaining state of affairs in regard to traditional forms of collegiality. To ignore or underestimate either of these factors is to attribute too much of the change in higher education to the bargaining process.

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The Question of Tenure

by WILLIAM B. BOYD
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The question of tenure has been raised to a new level of urgency by the advent of collective bargaining in academic life and, even more dramatically, by the end of the era of expansion and the beginning of the era of steady state. This represents a transition from a period of easy tenure to one when it will be more difficult to come by, and hence more highly valued. In the days of our prosperity, faculty members could with pride indicate their indifference to tenure. To admit caring about it was to imply a low estimate of one's self. That secure attitude is fast giving way. Soon, perhaps, only the arrogant will strike such a posture.

But even before these new forces focused internal attention on tenure, it was the subject of re-examination. The campus unrest of the 1960's produced many villains. Among some people, notably right wing university haters from off campus, and disenchanted students and young faculty from on campus, tenure was regarded as partly responsible for the evils against which protest seemed necessary. Visions of "deadwood" were raised by the rhetoric of critics, and the existence of tenure was blamed for that neglect of teaching of which we were widely believed to be guilty.

One of the important groups which addressed that problem was the Special Committee on Campus Tensions established by the American Council on Education. Its report, released in 1970, had this to say about tenure:

> *"Tenure policies . . . need to be reappraised. Tenure was not devised in the spirit of trade union systems to guarantee job security. But it has come to serve this function too, at a cost. . . . At a time when an increasing number of teachers . . . are organizing for collective bargaining, the Committee recognizes that a challenge to the present concept of tenure is no small matter. . . . Nonetheless, we urge the American Association of University Professors and the Association of American Colleges (co-sponsors of the basic 1940 statement on Academic Freedom and Tenure) . . . to reexamine existing policies. Scholarly communities must be protected as effectively as tenure now protects individual professors."*

In that same year, 1970, the President's Commission on Campus Unrest, popularly known as the Scranton Commission, similarly urged a reexamination of tenure which, it noted, granted "faculty members a freedom from accountability that would be unacceptable by any other profession."

Challenged by two national commissions, the AAC and the AAUP approached the Ford Foundation for support of a new commission to study the question of tenure, a subject which turned out to be inseparable from a complex of interdependent problems of university government and personnel policy. The Commission was funded by the Ford Foundation with the understanding that it should be a national body reporting to the public, not merely the creature of its sponsors.

An eleven member Commission was appointed in the summer of 1971, and worked for approximately one year. Its members consisted of two university board members, five professors, the President of the Public Broadcasting System, two college presidents, and the inevitable student, who, in the ultimate triumph of tokenism, was student, female, and black. Both board members and two of the professors were also attorneys, bringing with them a knowledge of labor law and practice, as well as a refined concern for due process.

In addition to its own deliberations, the Commission worked in several different ways. Critiques and recommendations were solicited from a number of scholars and academic administrators. Organizations were also invited to make presentations. These included at least three who would be interested in this conference: the AAUP, the AFT, and the NEA. Thirdly, a series of studies was commissioned to deal with the history of tenure, tenure and the law, and tenure and collective bargaining.

Finally, and I think most importantly of all, public hearings were held on campuses across the nation. At these hearings faculty, students and administrators testified. Almost without exception, some local atrocity added passion and interest, helping to probe the wide variety of problems which are associated with the development and implementing of decisions to grant or withhold tenure. Everywhere we learned of the increasing difficulty of coping with the consequences of each decision to withhold what has now become the principal prize in academic life.

Most of us Commission members were at the mid-point of an academic career. One is actually an emeritus professor whose name is a byword to professors interested in academic freedom and due process, which he has championed all his life. We regarded ourselves as experienced and sophisticated about academe. But most of us were soon startled to discover how wide was the diversity of campus understanding of the meaning of tenure, and how variable were the procedures employed for dealing with it.

Five Problems Associated with Tenure

Some generalizations are easy, however. Most colleges and universities grant tenure, and most give it quickly and generously. As we moved from campus to campus we became conscious of a number of common practices which we finally came to believe represented bad practice, and served to discredit tenure by lowering the quality of decisions. Perhaps the most common malpractice, one which is widespread among universities below the first rank, is the failure to make a decision at all – the tendency to permit tenure to be acquired by default, by the mere passage of time which brings to an end a probationary period devoid of evaluation and explicit decision. The quality of faculties at these institutions was thus dependent on the quality of the initial appointment process – and that during a period when the market place was dismal for all but first rank institutions.

A second and related bad practice was a tendency toward brief probationary periods. Short periods deprive departments of an adequate opportunity to appraise the quality and rate of development of a junior college. They deprive

the probationer of an adequate opportunity to overcome initial handicaps. In universities which emphasize research, the probationer is compelled during that period of evaluation which will affect his entire career to concentrate so zealously on scholarly productivity that he or she has little time, energy or motivation to learn the art of teaching. When one learns to survive as a teacher without learning to teach, the prospects for future development are bleak.

A third widespread problem which was frequently lamented by untenured faculty members was the failure of institutions to state the criteria on which the judgment would finally be based. They were vaguely and impressionistically known, but the vagueness created extreme anxiety and was perceived as a handicap by many ambitions or anxious young teachers.

A fourth bad practice – one which came about partly from carelessness and partly from deliberate ideological considerations – was the formal involvement of untenured professors in the tenure decisions of their departments. We became convinced that no matter how scrupulously professors behave, this situation places them in a conflict of interest. Two dangers were identified. One was that the untenured member of a screening committee would want the general rule to be generosity, so that he might expect the same treatment when his moment of decision came. Another was that where tenured billets were limited, the untenured committee member would want to keep them unfilled against the time when he was a candidate for one of them. Either possibility was a threat to the integrity of the process. Untenured faculty members need an opportunity to be involved, to give testimony, to influence decisions, but they ought not, we concluded, be judges. Their contribution at that stage is not curcial enough to warrant the real or apparent contamination their presence might threaten.

A fifth bad practice revealed by the inquiry was the tendency on many campuses to make the screening for tenure almost exclusively departmental in scope. Deans were accepting or rejecting (needless to say, almost invariably accepting) recommendations coming directly from departments that were themselves employing widely divergent standards and criteria. At the departmental level there was also a tendency to treat tenure decisions as if they were exclusively a judgment on the merit of the individual, without acknowledging the validity of concern for future programmatic needs of the university or its students. This leads to inequity on campus and we found widespread evidence of resentment on the part of young professors. That observation led the Commission to recommend that colleges institute school-wide reviews of departmental recommendations, in the interest of higher and more uniform standards, applied more equitably. A future generation of students should be the beneficiaries of such a change. And so would many young faculty who, when departments are unchecked, are as apt to be damaged by the petty tyranny of colleagues as by the caprice of administrators.

End of Growth Period

An important reason why the problems associated with tenure have not been more dramatically exposed until now has been the happy circumstance that

the percentage of faculty holding tenure has remained fairly constant during the period that most of us have been working academics. That this should be true even in the face of short probationary periods and generous policies is a commentary on the rapid expansion of faculties during this same period. The growth rate, the addition of substantial numbers of new faculty each year, has offset the tenure rate, holding the percentage near the 50% level. That is a comfortable level, one which permitted tough questions to go unasked, one which permitted the continuation of a generous attitude toward tenure, and one which therefore kept the anxiety level of untenured faculty reasonably low at all except the really exacting institutions of first rank. That happy period is ending for most of us now, however, and problems at the crisis level are imminent for many. Changes in government and in attitude will be required if we are to cope with the new situation.

As growth ends and colleges plateau or decline in faculty size, an interesting phenomenon occurs. If tenure is given at the same rate, if the same number of teachers receive it after the same brief probationary period, the percentage on tenure which has stayed at 50% for years will suddenly move to 85% in three years at many typical institutions. Given the age distribution in the colleges that have experienced rapid growth in the last twelve years, there is a serious middle-age bulge afflicting institutions as well as professors. In many cases the age distribution is such that there will be a small percentage of retirements over the next ten to fifteen years. This means that numerous colleges are on the verge of becoming virtually tenured-in, with little prospect that natural attrition will create many new positions for more than a decade. That presents the grim prospect of a closed door – and the door thus closed has traditionally been the principal entry to the intellectual life in American society. If an effort is made to ameliorate this situation by changes in appointment procedures, in probationary periods, or in the percentage of faculty receiving tenure, a different set of tensions is created on campus, and problems of equity and morale are raised.

The Tenured-in Problem

To get people to take this problem seriously one must first convince them that it really matters, that harmful consequences follow if a university becomes tenured-in. I believe that there are such consequences. Because they are widely disputed, they deserve a brief review.

To some degree, a tenured-in university has its program congealed. Its ability to respond to new demands or to new discoveries is limited by the relatively static state of its faculty's competence. The knowledge obsolescence problem, always chronic in a university, would become acute were there not a periodic infusion of scholars trained in the latest developments. This obsolescence would result not because faculty members decline in competence with age, but rather because new competencies are required.

Sabbatical programs barely suffice to keep old competencies alive. I believe it totally unrealistic to assume that even a generous expansion of those programs could substitute for the disciplined rigor characteristic of advanced

graduate study. I have observed sabbaticals at a wide range of institutions without ever noting one that could fill that bill. Faculty development in the new era will require something more heroic than the traditional leave programs of the past. New sanctions and new inducements may have to be invented.

The Commission saw a classic example of obsolescence at a prestigious university which, as recently as 1957, established a new and specialized science department under the leadership of a Nobel Laureate. Top scholars were added and quickly tenured in. After a few years, stability was achieved and the department plateaued in size, neither adding new members nor retiring any of its middle-aged and distinguished professors. By 1972, only fifteen years after its establishment, the former chairman had to admit ruefully that he could not in good conscience recommend the department to a really first rate student. The field to which these professors had contributed much of the literature had now moved beyond them, at least in technique and instrumentation. While this problem would be less acute in disciplines experiencing less movement, one can imagine few fields so moribund that they would be totally unaffected.

There is also something unseemly about a department engaged in growing old together. That would seem to be a bad model for the young whom we would like to attract and with whom we wish to work and study. The tenured-in university closes out opportunities for the young. It ties their opportunity rate to our death rate – or at least to our retirement program, a grim prospect. This is an emotion-laden subject, particularly in a youth oriented culture such as ours. I do not propose an unqualified subscription to the slogan that "youth must be served." The mature – including the aged – are as essential to the strength of a faculty as the young. But I do argue that where the effect of policies is to exclude the latter, then we must make changes to keep academic life available for aspiring young scholars.

More importantly, a tenured-in university would perpetuate the racial and sexist discrimination which has been a part of our past. Tenured-in, we give the lie to our professions of affirmative action. Just when minorities and women are led to expect their fair share of positions on our faculties, we say to them: "We are ready to accept you now: no more discrimination; but sorry, no openings. Come back in fifteen years." I do not know what I would think about this situation if I were an untenured, young, white male. But I believe that if I were black or female, I would demand that universities open the door for me after years of virtual exclusion.

I labeled as "crisis" the need for immediate reconsideration of policies for the granting of tenure. There ought to be a stronger word than that. There has been a crisis of the month for so long that a new nomination has limited appeal. There is a high level of urgency about our present situation. Policies that served us well enough in a past era are a poor fit now. Failure to make prompt changes will deteriorate the quality of our institutions and aggravate a set of social problems we have been attempting to solve. Needed changes, on the other hand, may produce anxiety and severe morale problems among younger faculty members.

The Commission report, in addition to a strong endorsement of tenure, contains recommendations designed to help institutions and preserve equity for individuals. Press stories have publicized some of the recommendations – especially the "atrocity" of establishing quotas – but the full text has just been made available by Jossey-Bass. That being true, I shall not attempt to catalog the recommendations here. Given the preoccupation of this conference, it is enough to note that the Commission recommends that tenure and related personnel matters not be included within the scope of collective bargaining. (Note that it is the wisdom of negotiating tenure, not the negotiability of tenure which is questioned). We know from our hearings that that is arguable, if not inflammatory.

Arguments Pro and Con

I will share some of the arguments advanced by advocates of varying positions. Because I wish to dispose of it first, I shall start with the question, "Why include tenure in the scope of bargaining?" At the simple, primitive level, it is a good union tactic to include it in a contract. Once tenure is made a matter of contract rather than of university policy, the faculty is dependent upon the union rather than upon the regents for its preservation. To be the trustees of someone else's treasure is to hold a position of considerable power. Moreover, once tenure has been included in the bargain, it becomes another item in the inventory of things readily available for subsequent bargaining. It can be preserved on that shelf, or taken off as barter for something regarded as even more desirable. Many believe that to include tenure in a contract makes it inviolable, but some argue that to include tenure in the contract demonstrates precisely the opposite, – namely, that it is negotiable.

At institutions whose evolution has not kept pace with aspirations or pretensions, the arguments for the inclusion of tenure run stronger. Poor personnel policies or capricious administrative practice create a void needing to be filled by proper procedure and due process. The contract promises relief and can be the guardian of faculty rights.

Even at better, more highly evolved universities, some anxious faculty really believe that a tenure system rooted in statute, which can be changed, or in regental by-laws, which can be repealed, or in tradition, which is in poor repute these days, is too precious (precarious means dependent upon prayer, and prayer depends for its effectiveness upon the friendliness of a higher power). Such thoughts create insomniacs, and some faculty would prefer to rely on the sanctity of contract. In the jargon of the day, hyper-anxious or suspicious academics are popularly labeled "paranoid." But it is only fair to admit, as Sanford has pointed out, that even paranoids have enemies. For the period of its life, a contract does protect the rights which it includes, and that is the essence of the powerful argument advanced by its proponents.

Related to that line of thought is a hope that bargaining may permit the exclusion of administrative judgment from the decision-making process. Our world is not yet demythologized, and for the administrative offering of "collegiality" there is a faculty equivalent – "the self-determining community of

scholars." Some see a contract as a means of moving closer to that ideal. A growing need for relief from ever more pressing demands of public accountability may increase that motivation.

I shall move now to the second question, "Why omit tenure? Why exclude it from bargaining?" The most compelling argument seems to me to be the simplest: To include tenure in a contract is to end tenure, or more correctly, to end the assumption of its permanence. It ceases to be tenure once its life span becomes coterminous with a mortal contract. Law or policy would seem better risks for longevity. If tenure owes its life to the existence of a contract, then it dies – or at least goes on the critical list – when the contract expires. Its rebirth is dependent upon continued commitment and success at the bargaining table. One year, or even three, hardly sounds like tenure to those accustomed to think of it as lasting until mandatory retirement age.

The second argument I would advance as an admitted partisan of the exclusion position, is that collective bargaining has a kind of Midas touch. Not that everything it touches turns to gold, but that everything it touches turns rigid. The need to be explicit leads to ever more elaborated procedures. Joseph Garbarino has noted that under the influence of collective bargaining, personnel policies become not merely more explicit, but more formal, more subject to review and appeal, more uniform, more centralized. I take the liberty of paraphrasing those happy phrases as meaning "more rigid." After centuries of sloppiness in university government, the virtues of uniformity and centralized administration may seem attractive, but Garbarino adds a sobering reflection: "One suspects," he notes, ". . . that in those key institutions in which the untidy, unsystematic process of peer evaluation has worked with demonstrated success, the introduction of procedures that can be defended before an arbitrator, or perhaps a judge, will incur a real cost in quality."

As procedures become more elaborated, it finally becomes almost impossible to follow them without violating them. Moreover, the conflict becomes so debilitating that there is a tendency to avoid acting at all, at least in marginal cases, simply to avoid the endless hassle and expense. That kind of situation is demoralizing and paralyzing. Personnel policies constitute too vital an area in which to permit that to happen. Courageous, discriminating judgments need to be encouraged, not inhibited. One would wish to achieve equity for our campuses, but not at the price demanded by the levelers. The new procedures may also be objectionable on more grounds than complexity. They may end by permitting substantive judgments to be made off campus by strangers whose commitments and understanding include neither teaching nor scholarship.

Another reason why this partisan would wish to exclude tenure from bargaining is a personal opinion that some union attitudes toward tenure are antithetical to institutional quality, given our present entry into a period of steady state. Examples are an apparent union preference for short probationary periods, and for pressures to give tenure to virtually everyone whose work cannot be demonstrated to be unsatisfactory. Prosperity first raised tenure to the level of an expectation; now there is a prospect that it will be enshrined as a right. The spectre of a civil service rears its head.

The idea that an institution might aspire to be more than merely satisfactory finds hostile ground, and the tendency is to push for the requirement that an institution show cause for a decision not to give tenure, treating it in the same way as an action to terminate a person with tenure. To obliterate that distinction would be a mortal blow to the selection process which the building of a top faculty requires. Stating reasons which can be challenged is appropriate; showing cause is another matter. The infrequency with which tenured faculty have been fired gives a clue as to what might happen to standards if the procedures for denying tenure were the same as those for terminating it. Bargaining threatens to press in that direction.

Most of us accept Whitehead's assertion that scholarship is an unnatural discipline. Rigorous selection and discriminating judgments will continue to be required wherever scholars strive to create an environment suited to their peculiar work. Those are human tasks, fraught with the perils of human error or prejudice. But any system which is thrown out of balance by an excessive preoccupation with safeguards will, I fear, lay the clumsy hand of bureaucracy on the fragile processes of the university.

Is Tenure a Bargainable Issue?

by Woodley B. Osborne
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The question I have been asked to address: "Is tenure a bargainable issue?" has so many and varied implications that I have had great difficulty in deciding where to focus my attention.

The short answer to the question posed is: "Yes, tenure is a bargainable issue." As defined in the recent report of the Commission on Academic Tenure in Higher Education, the "Keast Commission," academic tenure is, and I quote:

> *"an arrangement under which faculty appointments in an institution of higher education are continued until retirement for age or physical disability, subject to dismissal for adequate cause or unavoidable termination on account of financial exigency or change of institutional program."*

As so defined, tenure, whatever its philosophical underpinnings, and whatever its differences from ordinary job security in the industrial sense, is quite clearly a "condition of employment" as that term is used in the National Labor Relations Act and in most state public employment bargaining legislation to describe the scope of bargaining. In other words, tenure is a mandatory subject of bargaining under familiar principles of labor law.

Apart from the legal proposition that tenure – and by "tenure" I mean to include the procedures by which the grant and denial of tenure is decided in individual cases – is a mandatory subject of bargaining, it seems to me quite appropriate, and in many cases essential, that faculties undertake to bargain formally with their administrations over the issues relating to tenure and academic freedom.

Keast Commission

I would take the foregoing to be unexceptionable were it not for the Keast Commission's conclusion that tenure should not be "exposed to the exigencies of the collective bargaining process" and its recommendation that collective bargaining should not "extend to academic freedom and tenure and related faculty personnel matters . . . " While the Commission report is in many respects an excellent statement, it seems to me that its recommendations with regard to collective bargaining reflect a fundamental misunderstanding of collective bargaining in general and academic collective bargaining in particular. The Commission pins its conclusion that collective bargaining and tenure do not mix to the unassailable assertion that academic freedom and tenure are central to the entire academic enterprise. But what the Commission fails to understand is that for those faculties engaged in it, collective bargaining is neither more nor less than their form of academic government; and that, like

other methods of academic government, this form must deal with precisely those matters which are central to the academic enterprise.

More seriously, the Commission seems to equate what it perceives to be the results of collective bargaining in the industrial sector – the too much-maligned "industrial model" – with what it perceives *will be* the results of academic collective barganing. In so doing the Commission evinces a disturbing lack of faith in the ability of a faculty bargaining agent to be sensitive to the needs of their institution and fails completely to recognize the impact on collective bargaining of the great diversity in institutions of higher education which is so well described in the balance of the report. Although all of us at this conference are attempting to draw conclusions from what is still scanty evidence, it seems fair to observe that the results of academic collective bargaining will vary widely depending upon the character of the relationship of faculty to administration which preceded collective bargaining. Indeed, there is already some evidence of this.

AAUP Agreements

The AAUP agreement at Rutgers leaves a wide range of critical issues to resolution by the University Senate and provides for a grievance procedure which ends with the President and Board of Trustees.

In sharp contrast, the AAUP agreement at the University of Rhode Island specifies the procedures to be followed in a number of governance matters and provides a grievance procedure which ends in arbitration. Still other agreements, such as those at Oakland University and at St. Johns University, incorporate by reference existing university governance procedures and subject those procedures to review through the grievance process. The point is that collective bargaining does not yield uniform results. It is a highly flexible *process,* the results of which are largely dependent upon the resourcefu'ness, creativity and good will of the participants. It is not a rigid set of doctrines, which are sought to be imposed from the outside, and which are inherently inconsistent with any of those concepts which are, to again use the Commission's words, "central to the academic enterprise."

Collegiality and Tradition

Much has been said, at this conference and elsewhere, about the impact of collective bargaining on collegiality and the traditional academic procedures. If we permit tenure, and all it connotes, to be subjected to collective bargaining, these traditions, we are told, will be swept away, to the detriment of all. But this argument ignores the fact that the collegial system and the shared authority it entails are correctly perceived by many faculties as existing at best in form only. Under such circumstances it seems to me idle to claim that the intrusion of collective bargaining into this arena is inappropriate.

The fact is that collective bargaining can have a positive impact on provisions for tenure. By incorporating the traditional mechanisms of collegial judgment into a collective bargaining agreement, one can insure that they are

binding upon the administration and the faculty. By subjecting alleged violations of agreed-upon procedures to arbitral review, one can reinforce the integrity of the process by which faculty status is determined; and by incorporating provisions for tenure into a binding agreement, a college or university can protect those provisions against incursions from outside the institution.

It is also suggested that subjecting tenure to collective bargaining may result in its being "bargained away." But there is no more reason or likelihood that faculties engaged in collective bargaining will bargain away tenure than that faculties participating in other kinds of academic government will compromise tenure arrangements. In the absence of collective bargaining, tenure may be subject to limitation, modification or even abolition by a board of trustees, by a state board of higher education or by a state legislature, and such action against tenure has, in fact, occurred without prior faculty consultation, let alone concurrence. Whatever may be said about the likelihood of such an occurrence under collective bargaining, it would heem more appropriate to blame the factors which produced the decision than to blame the collective bargaining process itself.

There is some danger, perhaps more imaginary than real, that when tenure rights are derived entirely from a collective bargaining agreement, those rights will become subject to unilateral modification or abolition if and when the agreement expires without having been renewed. To the extent that this danger is real, it can be eliminated through appropriate wording of those portions of the agreement relating to tenure. In any event, any actual elimination or dilution of tenure will, as noted above, inevitably be the product of a number of substantive factors and is hardly likely to hinge upon contractual technicalities.

I have dwelt on this point – perhaps too long – not only because of the Keast Commission's recommendations, but also because of some rather disturbing trends we are experiencing in some of our current negotiations. A number of administrations have apparently come to the bargaining table determined not to negotiate meaningfully with their faculties over matters of faculty status and academic governance insisting instead on the retention of what they perceive to be their management prerogatives. These administrations have cited the Keast Commission reasoning as authority for their stance. This attitude, however, it may be cloaked, is quite familiar to those of us who have had experience in the industrial sector. It is, I think, unseemly for university administrations to fight for the retention of management prerogatives while supporting this stance with pious homage to principles of collegiality and shared authority. I am quite sure that the Commission did not intend such a result.

Issues Raised

All of this is not to imply that the bargainability of tenure does not raise serious questions. I think that it does. There is the tendency we see toward shortening the probationary period—thereby raising the question of whether or not collec-

tive bargaining threatens tenure's traditional meaning as a reward for an individual's proven competence and value to the institution.

There is the whole question of collective bargaining's impact on meaningful peer evaluation at the departmental level. Will effective departmental evaluation be replaced by a bargaining agent's grievance committee, and, if so, will this be necessarily harmful?

There is the problem of the pressure to attach a heightened degree of due process to the nonrenewal of non-tenured faculty members. Will this pressure, spurred by collective bargaining, result in effect, in "instant tenure."

There is the whole problem of the impact of arbitration and bargaining agent control of access to arbitration on traditional academic procedures.

I don't mean to dismiss these and other issues lightly. They deserve our serious consideration. Not so that we can decide whether or not we approve of collective bargaining, but so that we can decide how best to employ it.

But beyond that I find it impossible to conclude that collective bargaining has produced these issues. Rather I think it quite clear that these and many other issues were there first. Collective bargaining has simply been seized by faculties as a means to deal with them.

Rather than speculate with you about which came first, collective bargaining or the issues; or argue with you about how it's all going to turn out, I would like to focus briefly on what I consider to be a major issue relating to tenure and collective bargaining: the issue of tenure's status in today's academic job market.

The Tenure Attack

Tenure, as we all know, is under considerable attack from a number of directions. The circumstance of tenure under attack is not new. But the nature of the attack is somewhat different from what we have been accustomed to in the past.

In the past tenure has been criticized as encouraging mediocrity and as stifling the flexibility necessary to meet the rapidly changing demands of higher education. This criticism continues today. Moreover, it is said, the impact of this negative aspect of tenure is compounded by the drastically contracted job market. Given the static state of growth higher education presently finds itself in, it is widely claimed that colleges and universities will become "tenured in" unless tenure is abolished or tenure procedures are drastically revised.

There is, of course, a very poignant human side of this issue. And the criticism from this quarter points directly at the AAUP's seven year "up or out rule." What kind of a rule is it, we are asked, which results in highly qualified faculty members being denied tenure and perforce being turned loose in an utterly hopeless job market.

While not for a moment denying the realities which prompt these complaints from administrators and faculty members, I must state my belief that the attack on tenure is misdirected. The fact that higher education has stopped expanding and that Ph.D's are a glut on the market is not the fault of the

tenure system. Certainly these circumstances do not warrant the elimination of job security or a diminished concern for the preservation of academic freedom. Quite the contrary.

Nonetheless, we cannot ignore the fact that many highly qualified individuals, who have committed themselves and a good portion of their lives to the teaching profession, are being forced out of work and their talents, in many cases, lost to society.

I do not have any easy answers to this problem. I doubt very much that there are any. I do not propose abolition of the seven year rule. This would not, in my judgment, solve the problem.

What I do suggest is that this, more than ever, is not a time to take much comfort in uniform policy statements. The situation instead calls for the kind of intense attention to problem solving, on a localized basis, to which collective bargaining is ideally suited. When those who have a vital stake in the success of the enterprise are forced to sit down together to bargain, more often than not some fair accommodation can be reached.

Moreover, the collective bargaining process can help keep both sides honest. At a time when there are hundreds of applicants for every faculty vacancy, the pressure on an administrator to deny tenure to an associate professor and replace him with a cheaper instructor is great. And it is not beyond the realm of possibility for that administrator to blame the seven year rule for the associate professor's plight. This, as well as a faculty's tendency to blame an administration for circumstances over which it has no control, can be minimized when both must share responsibility for a hard course of action.

In short, I am suggesting that a central problem facing higher education today is the need to devise means to minimize the human loss occasioned by today's academic job market while not at the same time sacrificing the fundamental value of the tenure system. Collective bargaining, I believe, offers an excellent framework within which the parties may devise fair and workable solutions to this very complex problem.

So, yes, tenure is a bargainable issue.

Management Structure and the Financing of Bargains in Public Universities

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Each one of you comes from an already existing institutional management structure – good, bad or indifferent, you will be working within it. Each college is unique, and the management structure you have inherited developed in the way that it has to meet the needs of your institution. Collective bargaining will not change management structure and practices overnight, but it will have a significant impact on both the cost and conduct of institutional management. Given the fact that, nationwide, management in higher education barely rates a passing grade and that some institutions even deserve to be flunked, collective bargaining may well become a force for improved administration and greater fiscal responsibility in academe. One thing is certain, collective bargaining has little tolerance for poor or sloppy management – be it in structure, policy or practice!

If you are from a public college or university system, your source of funds is the tax dollar. Those of you from private institutions must raise private capital for any enterprise. With regard to financing the cost of collective bargaining, I cannot tell you how to increase your share of the public revenue nor can I be very helpful in providing foolproof fund raising techniques for private institutions. In fact, I will not talk at all about financing the basic economic package of salaries and fringe benefits in a negotiated contract. I will, however, share with you some of the hidden costs that are proof positive that collective bargaining "ain't" no bargain.

Management's Options

The organizational drive for union membership marks the start of the collective bargaining process. The union, be it a local faculty group, (AAUP chapter, Faculty Senate, Legislative Conference, etc.) or affiliate of a national labor organization, such as AFT or NEA, makes known its intent to represent the faculty as a collective bargaining agent. At this stage, management has a number of options, among which are:

1. It can adopt a not uncommon administrative posture of "hear no evil, see no evil and speak no evil" and do nothing in the hope that the problem will just disappear in time.
2. It can decide that unionization in academe is a threat to academic values and traditions which must be actively resisted.
3. It can decide that unionization is a bad idea whose time has come and reluctantly accept the inevitability of learning to cope with it.
4. It can decide that collective bargaining as a force for good or ill in academe, will depend largely on what its practitioners and their respective

constituencies want it to be, and that management has a responsibility for not only coping but assisting in its positive development.

Regardless of what the institutional response is, management at this stage normally attempts to find out a little more about Collective Bargaining than it knows.

Management representatives are sent to collective bargaming conferences and workshops or they are sent to visit and talk with administrators on other campuses where collective bargaining has already been experienced. Quite often, management, in the wake of a union organizing drive, seeks special consultant services for both spcific and general help. All of these activities obviously cost money and the cost may range from a few hundred to several thousands of dollars.

If an adversarial posture is determined, management may invest money in a campaign to fight unionization. Printed material, meetings and the cost of time and energy of administrators begin to increase the negative personnel costs of the institution. I label these negative personnel costs because money and time expended in these endeavors are not for the improvement of anything but rather to resist change. At this stage, too, management may suddenly discover how little it knows about its own personnel structure and begin to expend some money in generating data. You would be surprised how few public institutions, prior to the advent of a collective bargaining drive on their campus, have accurate information regarding their employees, both in terms of actual numbers and function or workload.

Following a successful union campaign for membership comes the "recognition, certification and unit determination" period. The union may request voluntary recognition and, undoubtedly, there is a cost saving in management granting such recognition. The stakes in collective bargaining, however, are usually so high that management insists on an election and certification under the requirements of the legislation governing collective bargaining for public employees. At this juncture the management usually discovers the need for experienced labor counsel. More often than not, the in-house legal staff in institutions of higher education are rarely versed in the special requirements of labor law. Management may have to invest money in the employment, either on a full-time or consultative basis, of special legal help. In the exercise of its prerogatives under he law, management may find itself differing with the union as to what constitutes a proper unit or units. Unit determination hearings under the auspices of the appropriate State agency may be held and management may be forced not only to pay extra legal fees but the cost of supplying employee personnel data for use in unit determination hearing. Depending on the State law, the cost of elections may be borne by the State agency or not, but in any instance, management must supply tally counters, certified lists, etc., all of which represent costs.

Three Stage Bargaining Cycle

Following an election and certification of a collective bargaining agent, management, like the groom at a shot gun wedding, must face the inevitabiliy

of a new legal relationship, regardless of how it got there. From that point on, management structure must respond by adaptation, modification or change to the requirements of a repetitive three stage collective bargaining life cycle:

1. Preparation for negotiations
2. Contract negotiation
3. Contract administration

From contract period to contract period, this cycle is inexorably repeated. Each stage, of course, makes its own demands upon both the structure and cost of management.

In the initial preparatory stage management is faced with the questions of who? how? and how much? Who is to be involved in the collective bargaining process? The Board of Trustees? The chief educaional officer of the university system? The central staff? Local unit heads, presidents, deans, etc.? How does management go about tooling up for negotiations? Are labor relations and collective bargaining negotiations to be assigned to an existing unit or person within the management structure? Is there a unit, staff or person capable of handling the new demands upon management of collective bargaining? Is there a need for additional personnel and the development of a new structure? Regardless of whether management decides to redistribute responsibilities, within its existing structure and organization, to handle collective bargaining or decides to employ additional full or part-time staff, it is obvious that without any knowledge of the bargain that is yet to be made, the cost of financing that bargain is already beginning to be felt. (At CUNY, collective bargaining called for a reassessment of the entire management structure and the reeducation of the entire administration, from trustees to deans, at considerable financial cost, and some psychic cost.)

Preparation for negotiations also requires the generation and analysis of a considerable amount of data upon which the management will base its position or response to union demands. Staff time and energy devoted to these ends, as well as computer time and costs, have to be seen as part of the financing of collective bargaining. At CUNY those costs were astronomical.

The determination of the management negotiating team and the back-up or policy committee are momentous decisions. The number of people on the team and whether the team shall include a professional negotiator or lawyer are all decisions which come with a price tag. Similarly, management decision with regard to giving released time to union faculty negotiators has to be seen as part of the financng of collective bargaining. Even the matter of a selection of a site for negotiation represented a potential cost. In some instances, negotiations alternate between a management conference room and the union's conference room. In some instances, the parties decide to rent neutral ground in a hotel or conference center. In rare instances, management supplies the facility, but in all instances, there is more or less of a cost.

A realistic assessment of contract negotiations must include the possibility of exhausting all of the procedures available to the parties under the law, namely, direct negotiations across the table, impasse procedures, including mediation, arbitration and fact-finding and, finally, a legal or even an extra legal strike. In short, what I am saying is that the negotiation process itself is

a very movable feast, which may take anywhere from several weeks to a year or more to conclude. Accordingly, the drain on the management structure, as well as the cost involved, may vary from being considerable to exorbitant.

Contract Administration

The foregoing notwithstanding, there will come a day, sooner or later, when the authorized signatures of both parties appear on a negotiated agreement. Like with most tribal rituals in our society, that ceremonial occasion signifies a new life cycle stage, in this instance, the contract administration stage. Parenthetically, let me tell you that I am one of those people who believes strongly that management deserves the contract it signs. If, during the course of contract negotiation, management has buttressed its good faith approach to negotiations with facts and figures to support well reasoned positions, and has been skillful in the art of negotiating a contract, the chances are that the contract that emerges will do little damage to the management structure and contain few, if any, hidden costs. If, on the other hand, management has been sloppy, unprepared or lacking in understanding and skill regarding the negotiating process itself, it may find itself saddled with a contract which its management structure is incapable of properly administering, and one which contains significant hidden costs.

Even a contract that is "good," from management's view, especially if it is the first contract, will have some impact upon institutional management and institutional costs. For exemple, colleges and universities hitherto accustomed to viewing departmental chairman as administration, or at least quasi-administrators, may suddenly find that such chairmen are designated as employee members of the unit and may have to shift their first line of administration from chairmen to deans. Similarly, institutions accustomed to in-house due process procedures with an admixture of faculty and administrative personnel and committees, may suddenly have to shift to accommodate the negotiated grievance and arbitration clause in a contract. At CUNY, for example, a three step formal grievance procedure was instituted – Step One, presidential review at the local college; Step Two, an appellate review at the Chancellor's level; and Step Three, binding arbitration. College presidents charged with Step One grievance review delegated the responsibility to a member of the staff. An academic dean, the dean of administration, the personnel officer or some other staff person was asked to assume this responsibility, in addition to regular duties. It soon became apparent that given the number of grievances – and at CUNY during the past four years we had well over 1,000 grievances – such arrangements were impractical. Thus, by the third year of the first contract, almost every president had hired a full-time labor designee – in some instances, full fledged lawyers, simply to handle contract compliance and grievances on the campus. Labor designees, in turn, required secretarial and clerical assistance, as well as physical facilities and equipment – office space, telephones, typewriters, files, etc., etc.

Similarly, the central administration of the University discovered that the

Vice Chancellor for Administration and his staff were not sufficient to cope with the new demands upon the administration as a result of the negotiated contracts. A new management position, Vice Chancellor for Faculty and Staff Relations, had to be created to head a unit sufficiently staffed to handle on-going university-wide contract administration, Step Two grievance procedures and general university labor relations. At the moment this requires a staff of six full-time professionals and several part-time specialists, with supportive secretarial and clerical staff and all the physical and other facilities that go with such an operation. In addition, we have not yet developed our own legal staff to the point where it can effectively handle arbitration and unfair labor practice cases which have stemmed from contract disputes and have relied for the past three years on outside legal counsel for this service. Mind you, all of this was necessitated by only one contract article. In CUNY's instance, currently there are two different contracts, each with some thirty different articles.

Let me continue with some further illustrations. A consulation clause which requires specified periods for consultation between the union and the president and between the union and the Chancellor, take their toll of time and energy. Released time for union grievance officers on each campus, and in our contract currently being negotiated, full released time for union officers may account in costs for the equivalent of twelve to fifteen full-time faculty positions. Then, too, provisions for union campus chapters to have among other rights the right of access to meeting rooms and the use of mail rooms may be minor, but nonetheless do cost something. Something as simple as a union dues check-off clause requires management to assign personnel and carries with it a cost to the university. There is, of course, an article which deals with professional evaluation and observation of faculty that stipulates, with a high degree of specificity, the observation of all non-tenured faculty, evaluation conferences, based on the observation, in addition to a yearly evaluation of every faculty member. I do not think I have to spell out the involvement of personnel and the time-consuming, ergo money-consuming, effort involved in this process.

I guess I could go on almost to the point of absurdity with this litany and include the cost of computer lists with names and addresses of all faculty which have to be supplied to the union, the cost of computer lists of every job, and title, and salary, that have to be supplied to the union, the cost of arbitration – and, by the way, I have come to the conclusion that the only people who win anything in collective bargaining are arbitrators, mediators, and lawyers, and the lawyers win even when they lose – the cost of printing the contract, the cost of keeping new records. If naught else, we seem to be supporting single handed the Xerox Corp. – but I believe you get the point that I am making.

I would hazard an educated guess that at The City University of New York, we have spent, conservatively, on the average of two million dollars a year in financing our bargain. I would also hazard a guess that at this very moment many of you are thinking – such a bargain I would rather do without.

Thank you!

Conclusion

The National Center for the Study of Collective Bargaining in Higher Education was founded last year at Baruch College, City University of New York at a time when collective bargaining for faculty members and other professionals is one of the newest and fastest growing phenomena in higher education.

This swiftly emerging trend holds many challenges for administrators and faculty members. The Center takes no position for or against collective bargaining, but seeks to be a source of reliable information.

Conceived as national in scope, objective in approach and comprehensive in service, the Center will embrace the following activities:

1) A national databank on collective bargaining in higher education with emphasis on faculty bargaining. A grant from the Elias Lieberman Memorial Foundation has enabled the Center to establish The Elias Lieberman Higher Education Contract Library. The library has prepared its contract collection for computerization with a FULL-TEXT retrieval capability which is unavailable anywhere else in the country.

2) An information clearinghouse with suitable media for information circulation and exchange, including a periodic newsletter, annual journal, and special bulletins on significant developments.

3) An ongoing program of interdisciplinary research and analysis on issues in the field.

4) A program of collective bargaining training for education leaders through seminars, institutes, and other programs. Its long-range goal is to develop a corps of skilled and informed leaders for both sides of the bargaining table.

As part of this program, the National Center has scheduled its Second Annual Conference for April 8 and 9, 1974 in New York City.

M.C.B.

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M. C. B. editor