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## Colleges Advised They Need Not Declare 'Exigency' to Lay Off Tenured Professors

Administrators at ACE seminars are told they may be unnecessarily limiting their options

By ROBERT L. JACOBSON

WASHINGTON

Most colleges and universities can exercise much more discretion than they realize in laying off tenured faculty members, says a lawyer who has been advising dozens of academic administrators in recent months under the aegis of the American Council on Education.

The lawyer, David J. Figuli, former chief legal counsel for the Montana University System and former general counsel for the South Dakota board of regents, also maintains that many institutions may be unnecessarily limiting their legal options by relying primarily on declarations of "financial exigency" as the basis for terminating faculty appointments.

In many cases, he says, college officials may be legally required to do little more than show that—for any one of several reasons beyond their immediate control—they have had to discontinue an instruc-

tional program and thus end the employment of certain faculty members.

As long as the officials have not acted arbitrarily or capriciously, or failed to provide due process, Mr. Figuli says, such

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**Excerpts** from two policy statements on laying off tenured professors—one by the South Dakota Board of Regents and one by the American Association of University Professors—will be found on Page 10.

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dismissals are unlikely to be overturned by the courts.

His advice runs counter to the longstanding position of the American Association of University Professors.

The association's widely endorsed 1940 *Statement of Principles on Academic Freedom and Tenure* says that, except for "adequate cause" or retirement, tenured

faculty members can lose their jobs "only under extraordinary circumstances because of financial exigencies."

Related regulations recommended by the A.A.U.P. have led many colleges to agree that tenured faculty members cannot be let go without cause unless the board of trustees first declares a state of financial exigency.

Mr. Figuli, who specializes in litigation and labor relations at a small law firm in Ohio, bases his contrary view on court rulings in various jurisdictions over the past eight years, and especially on a little-noticed decision last summer by the U.S. Court of Appeals for the First Circuit in a suit against Humacao University College of the University of Puerto Rico.

The case involved two tenured professors of physical education whose jobs were eliminated by the institution's governing council in 1978 after it determined that en-

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rollment in their program was inadequate.

In what Mr. Figuli calls a "break-through" decision, a three-judge panel of the court declared that—in the absence of statutory, regulatory, or contractual provisions to the contrary—"an institution of higher education has an implied contractual right to make in good faith an *unavoidable* termination of right to the employment [*sic*] of a tenured member of the faculty when his position is being eliminated as part of a change in academic program."

The court said that point had already been "uniformly" recognized by other federal courts, but Mr. Figuli maintains that the Puerto Rico decision amounts to a "quantum leap from where we were" in such matters. It recognizes "something that the courts have been implying but not articulating very well," he says.

## 'Extremely Uneasy'

The opinion means that colleges need not announce that they are in a state of "financial exigency" before tenured faculty members can be dismissed, Mr. Figuli says. He adds

that—from a public-relations standpoint, at least—it doesn't make sense for a college to make such a grave statement if it doesn't have to.

Mr. Figuli concedes that the courts have yet to make a definitive, all-encompassing judgment, but he says the evolving "case law" is clearly on the institutions' side and that "if I were a faculty member, I would be extremely uneasy."

Even if a college has no written policy, Mr. Figuli asserts, the courts will probably consider a demonstrated financial emergency legitimate grounds for dismissing tenured teachers. But he suggests that colleges can broaden the potential justification for such action by specifying in policy statements, faculty handbooks, or employment contracts that other factors also may cause them to make "programmatic changes" that lead to layoffs.

Informed of Mr. Figuli's observations, David M. Rabban, associate secretary and counsel of the American Association of University Professors, was skeptical that the decision in the Puerto Rico case would become a significant precedent. "One case does not make a legal argument," he

said, stressing that several other courts had relied on A.A.U.P. documents to guide them on dismissal actions involving financial exigency.

Nevertheless, Mr. Rabban conceded that college officials did have options beyond those outlined in the A.A.U.P.'s recommendations. "It is conceivable that institutions will try to promulgate regulations that explicitly disclaim the 1940 *Statement*," he said. "Those kinds of contracts can be written."

Mr. Rabban said he doubted that many campus administrators would want their discretion to be so broad that it went against widely accepted academic practice or "fair and proper procedures."

## South Dakota's Approach

Mr. Figuli has been presenting his interpretations at "leadership seminars" sponsored by the American Council on Education. If administrators have to lay off faculty members, he told one such gathering here this month, they should "sit down and make some programmatic decisions and [not] get into the muddy water of financial exigency."

As an example of the approach he would use, Mr. Figuli points to a policy of the South Dakota board of regents that provides for terminating faculty appointments when the board judges it to be necessary "because of legislative action, significant loss of enrollment, consolidation of departments, or other reorganization, dropping of courses, programs, or activities, or financial exigency."

## Part of Union Agreement

The South Dakota board has been on the A.A.U.P.'s censure list for 20 years. Its policy, first adopted in 1979 when Mr. Figuli was its counsel, is part of a statewide collective-bargaining agreement with the Council of Higher Education, an affiliate of the National Education Association.

The council's director, Robert A. Stevens, admits that the state organization is less than comfortable with the provision, but he says "there didn't appear to be any alternative" to including it in the contract.

The regents' initial proposal would have given it even more discretion to dismiss faculty members, he explains. He adds, however, that the council does not expect the regents to make "massive use" of the provision.

Various court decisions in recent years have reinforced some aspects of the A.A.U.P.'s recommended provisions while undercutting others. However, most of the rulings suggest that an institution that dismisses a tenured faculty member for reasons unrelated to his job performance will be held liable for breach of contract unless it can prove otherwise.

## Easy to Prove

Mr. Figuli acknowledges that such a burden of proof rests on the institution, but he emphasizes that if its stated policies are broad enough, the required evidence can be relatively easy to provide. In South Dakota, for instance, a simple showing that some courses have been dropped could be enough to satisfy the burden of proof, he says.

Thomas A. Emmet, special assistant to the president of Regis College in Denver and director of the American Council on Education seminars, agrees with Mr. Figuli that many college officials do not fully appreciate how much discretion they have to discontinue programs, even in the absence of a financial emergency.

Mr. Emmet told participants at this month's seminar that they did not have to "blindly follow" the A.A.U.P.'s recommended policies.

"There is a very clear problem with some of the guidelines, and it's time to take a look at them," he said.

## AAUP Committee Splits over Faculty-Rights Issue

WASHINGTON  
A special subcommittee of the American Association of University Professors has split 2 to 1 over proposed recommendations for handling faculty rights in the event of internal campus reorganizations or the merger of two institutions.

In either case, the panel says in a draft statement scheduled to be published next month, "a reorganization cannot be allowed to affect the commitments to term and tenure appointments that institutions have made."

However, the panel concedes that when financial exigency leads to the acquisition of one institution by another, it "may not always be feasi-

ble" for all tenured faculty members from the acquired institution to be accommodated.

"Regrettable as such a situation is," the statement goes on, "the association believes it would be counterproductive to require closure of the institution—and the resulting dislocation of its entire faculty and student body—as a necessary precondition to efforts made in good faith by other institutions to acquire the largest possible proportion of its faculty."

The statement is favored by two subcommittee members—Peter O. Steiner, a former president of the A.A.U.P. who is professor of economics and law at the University of Michi-

gan, and Paul Strohm, chairman of the English department at Indiana University. It is opposed by the third member, Walter P. Metzger, professor of history at Columbia University.

In a strongly worded dissent, Mr. Metzger, a member of the association's policy-making council, warns that the proposal "might unwittingly contribute to a debacle we should be straining to avert—the massive elimination of tenured faculty as a precipitate response to a reduced economy."

Jordan E. Kurland, associate general secretary of the A.A.U.P., said he did not think the association would decide soon whether to adopt the proposal as its official policy. —R.L.J.