

# Academic Freedom for Contingent Faculty Members: Strategies for Establishing Due Process

Thursday, 7 January, 12:00 noon–1:15 p.m.

*305, JW Marriott*

Modern Language Association

2016 Convention

*Presiding:* Sue Rowe Doe, Colorado State Univ.,  
Fort Collins; Maria Maisto, New Faculty Majority

# Objective:

To help members of the MLA, and/or the MLA as an organization, devise and support concrete strategies for strengthening due process for contingent faculty, including:

- position/policy statements
- a working group or forum to work internally on the issue
- a proposal to support collaboration with other organizations and coalitions on concrete action(s)

# What is due process?

What is due process?

Generally: to protect against deprivation of life, liberty, or property without proper legal proceedings that are conducted “with fairness in both content and procedure” and “governed by standards of good faith in adherence to provisions of contracts and handbooks” (<http://lawhigheredu.com/>)

# What is due process?

- In higher education, liberty and property rights for faculty can be said to correspond to academic freedom (liberty) and job security (property) rights.
- Due process generally does not exist for most employees, including faculty, unless individual contracts (tenure) or union contracts spell it out.
- Part-time faculty are presumed to be at-will employees and therefore not granted due process unless explicitly stated.
- Even where due process does exist, it is open to interpretation and subject to uneven application and enforcement.

# Substantial vs. Procedural Due Process

**Substantial:** asks whether the government's/institution's exercise of authority "is a fair, reasonable and appropriate exercise of the police power."

**Procedural:** There are two important questions:

1. **1) Does the Fourteenth Amendment's Due Process Clause apply?**  
That is, are life, liberty, or property interests implicated by institutional decision making?
2. **2) If Yes to 1, What amount of process is due to grievant if the actions of university officials implicate due process rights?** The level or amount of procedural due process afforded depends directly on the severity of the deprivations or losses.

# 14<sup>th</sup> Amendment & Property Rights

- The Fourteenth Amendment and its connection to state governments connects the due process clause to the work of **public** colleges and universities. In **private** colleges and universities, the principles of due process are usually governed by standards of good faith in adherence to provisions of contracts and handbooks.
- Two Key Cases: *Board of Regents of State College v. Roth* (1972) & *Perry v. Sindermann* (1972)

# AAUP and MLA Positions on Due Process for Contingent Faculty

Due process rights for all faculty are consistently called for by the AAUP and the MLA but are recognized as being tied to tenure. As a result, documents in both organizations call for tenure for all faculty (a comprehensive solution).

Explicit due process protection for contingent faculty *while they are in contingent positions* is considered far more difficult to implement and enforce.

# Due Process & Academic Freedom

- Without assurance of job protection, there are substantial reasons to not explore difficult ideas, whether in the classroom or in the laboratory
- The AAUP ties academic freedom and grievance procedures centrally to the principle of tenure as a non-negotiable feature of the faculty role.
- Faculty evaluation often leads to affronts to due process.
- False Assurance: Just as job security is revealed as relative when budgets and enrollments are under stress
- So too ideas are revealed as unprotected when hegemonic ideas take on widespread adoption and zeal – think of McCarthyism, Creationism, & Patriotism as cases in point



*Contingent Appointments and the Academic Profession (AAUP, 2003)*  
*The Status of Non-tenure-track Faculty (1993)*  
*On Full-Time Non-tenure-track Appointments (1986)*  
*The Status of Part-Time Faculty (1980)*  
*Academic Freedom and Due Process for Faculty Members Who Serve  
Less Than Full Time (AAUP, 1979)*  
*Statement of Principles on Academic Freedom and Tenure (1940)*

## [MLA Toolkit on Academic Freedom \(2015\)](#)

[Professional Employment Practices for Non-Tenure-Track Faculty  
Members: Recommendations and Evaluative Questions  
Committee on Contingent Labor in the Profession \(June 2011\)](#)

## [Resolution 2009-1](#)

# Supporting Arguments

## [Delphi Project on the Changing Faculty and Student Success: \*The Imperative for Change\*](#)

### **Rehiring and Due Process**

Because non-tenure-track faculty do not routinely receive evaluations, contracts that do not specify the criteria for rehire or do not exclude the possibility of being rehired may increase the threat of legal action (Kezar & Sam, 2010). While due process is usually not designated for non-tenure-track faculty, the lack of clear processes around hiring and rehiring do expose institutions up to increased scrutiny of legal concerns and potential legal action (Toma, 1999).

Toma, J. D. (2011). Managing the entrepreneurial university: Legal issues and commercial realities. New York, NY: Routledge  
Toma, J. D., & Palm, R. L. (1999). The academic administrator and the law: What every dean and department chair needs to know. ASHE-ERIC Higher Education Report 26(5).

# Supporting Arguments

## [The Professoriate Reconsidered: A Study of New Faculty Models \(Delphi/AACU, 2015\)](#)

--Clear consensus among stakeholder groups re necessity/desirability of due process protections for contingent faculty groups:

**TABLE 6. STAKEHOLDER GROUPS' VIEWS ON FACULTY DEVELOPMENT, PROMOTION, AND EVALUATION**

*Including frequency of positive and negative responses on attractiveness for each group, in percentages*

FACULTY DEVELOPMENT, PROMOTION, AND EVALUATION		Tenure-Track Faculty	Full-Time NTTF	Part-Time NTTF	Provosts	Deans	Accreditors	Governing Boards	SHEEOs
Providing all faculty members with opportunities for promotion.	A	<u>86%</u>	<u>96%</u>	<u>97%</u>	<u>75%</u>	<u>92%</u>	<u>95%</u>	<u>70%</u>	<u>71%</u>
	U	5%	2%	2%	7%	4%	5%	10%	14%
Clearly defining expectations and evaluation criteria for all faculty members.	A	<u>96%</u>	<u>94%</u>	<u>95%</u>	<u>97%</u>	<u>97%</u>	<u>100%</u>	<u>100%</u>	<u>100%</u>
	U	2%	1%	3%	0%	0%	0%	0%	0%
Ensuring that all faculty members receive clear terms for notification of renewal or termination, as well as grievance processes.	A	<u>98%</u>	<u>96%</u>	<u>96%</u>	<u>98%</u>	<u>96%</u>	<u>96%</u>	<u>100%</u>	<u>100%</u>
	U	1%	1%	1%	1%	1%	0%	0%	0%

# Supporting Arguments

**TABLE 5. STAKEHOLDER GROUPS' VIEWS ON STATUS IN THE ACADEMIC COMMUNITY**

*Including frequency of positive and negative responses on attractiveness for each group, in percentages*

STATUS IN THE ACADEMIC COMMUNITY		Tenure-Track Faculty	Full-Time NTFF	Part-Time NTFF	Provosts	Deans	Accreditors	Governing Boards	SHEEOs
Ensuring that all faculty members have the same rights and protections with regard to academic freedom.	A	<b><u>92%</u></b>	<b><u>96%</u></b>	<b><u>95%</u></b>	<b><u>95%</u></b>	<b><u>90%</u></b>	<b><u>96%</u></b>	<b><u>100%</u></b>	<b><u>86%</u></b>
	U	3%	1%	3%	2%	1%	0%	0%	0%
Providing all faculty members equitable compensation for performing the same duties, as well as access to benefits.	A	<b><u>87%</u></b>	<b><u>94%</u></b>	<b><u>97%</u></b>	<b><u>80%</u></b>	<b><u>88%</u></b>	<b><u>91%</u></b>	80%	86%
	U	6%	0%	2%	10%	8%	5%	20%	0%
Permitting all faculty members to be involved in shared governance and decision making that affects their work.	A	<b><u>72%</u></b>	<b><u>92%</u></b>	<b><u>93%</u></b>	<b><u>67%</u></b>	<b><u>69%</u></b>	<b><u>91%</u></b>	<b><u>75%</u></b>	57%
	U	16%	5%	2%	16%	15%	0%	10%	14%
Providing all faculty members access to all the information and tools needed to do their jobs.	A	<b><u>96%</u></b>	<b><u>97%</u></b>	<b><u>98%</u></b>	<b><u>96%</u></b>	<b><u>99%</u></b>	<b><u>96%</u></b>	<b><u>90%</u></b>	<b><u>100%</u></b>
	U	2%	1%	2%	2%	0%	0%	0%	0%

**A** Attractive  
**U** Unattractive

**NOTE:** Values that are bolded and underlined indicate that more respondents in the corresponding stakeholder group viewed the potential attribute of future faculty models as feasible, rather than infeasible.

# Campaign for the Future of Higher Education

<http://futureofhighered.org/principles/>

## **Principle #3—Investment in Faculty**

- Faculty and professionals must have the academic freedom to exercise their professional judgment in educational decisions about what and how to teach in the best interests of a quality education and student success. They must be free and secure enough in their terms of employment to stretch and challenge students, and to apply high academic standards.
- The growing practice of hiring faculty into full and part-time contingent positions that are not eligible for due process protections of tenure inhibits the full application of academic standards and the free exercise of professional judgment.

# Strategies for Asserting and Implementing Due Process Rights for Contingent Faculty

1. Campus/local governance: Proactively articulate them in governing documents: faculty handbooks, employment agreements, state legislation (possible in CB and non-CB contexts)
2. Bargain due process rights into employment contracts (in CB contexts)
3. Legal action: use existing case law and emerging legislation to establish that contingent faculty have liberty and property rights that give them access to due process

# Strategy #1: Campus governance

## From Texas Tech University:

In theory, the State of Texas hires university faculty members at its discretion. "at will." In fact, Texas courts have determined that tenured faculty members possess a proprietary interest in their employment status and cannot be deprived of it without due process (which TTU spelled out in various Operating Procedures). Non-tenured faculty here traditionally worked under "letters of appointment," but on November 13 of 2007 an OP revision entitled them to actual contracts ... However, they are not entitled to reasons for non-reemployment ... They can contest perceived abuses under the grievance policy **except** those "relating to... termination, termination procedure, and notice of non-reappointment" ... They can register complaints in exit interviews , a non-remedy not usually signaled to the individuals involved.

There is now “relatively misleading text in the faculty handbook ... If the tenure advisory committee is to serve as the gateway committee for due process for contingent faculty, then this enhances the importance of the AAUP’s efforts to maintain that committee’s faculty perspective.”

[http://www.orgs.ttu.edu/aaofuniversityprofessorsttuchapter/Current%20Issues/du\\_e\\_process%20for%20non%20tenured.htm](http://www.orgs.ttu.edu/aaofuniversityprofessorsttuchapter/Current%20Issues/du_e_process%20for%20non%20tenured.htm)

# Grievance—Colorado State University Faculty Manual

## **K.3.1 A Grievable Action does not include:**

a-f XXXXXX

g. Termination of “at-will” employees. For information about the university’s policy regarding at-will employees and the recommended steps and considerations for termination of at-will employees, employees should refer to the university policy for Administrative Professionals and Non-Tenured Academic Faculty (“At Will” Employment) found in the CSU Policy Library (see also Section D.5.6 and E.2.1 of the *Academic Faculty and Administrative Professional Manual*). Employees may contact the University Grievance Officer with questions about disciplinary action or termination of at-will employees.

## **K.4.1 Persons Entitled to Grieve**

Any faculty member or administrative professional may pursue resolution of a Grievable Action. Grievances by more than one employee from a single administrative unit may be joined into a common grievance if, in the opinion of the UGO, their Grievances have sufficient commonality to be heard collectively, and if those employees filing Grievances from a single unit agree to join in a common Grievance.



# Strategy #2 Collective Bargaining Units & 7 Tests for Just Cause

Contained within the typically simple  
(underdetermined) language of a CBU:

"Discipline and discharge shall be for just cause"

Few if any union-management agreements contain a definition of "just cause." Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

--Robin Sowards, New Faculty Majority

# The Daugherty 7 Tests for Just Cause— Traditional Criteria and Guidelines

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

# Updated Guidelines: The Robert Schwartz Just Cause Test

- Fair Notice:** Workers have to know of the rule they are accused of violating.
- Prior Enforcement:** Management can't start suddenly enforcing a rule that has gone unenforced for a long time.
- Due Process:** Management must conduct an interview or a hearing before issuing discipline, and can't increase the discipline after the fact.
- Substantial Proof:** Discipline should be based on sound evidence, not rumors.
- Equal Treatment:** Those committing the same offense should not receive "disparate treatment."
- Progressive Discipline:** The employer should start with lesser penalties rather than moving immediately to suspension or firing.
- Mitigating and Extenuating Circumstances:** Discipline must be proportional to the gravity of the offense, taking circumstances into account.

See Robert Schwartz [\*Just Cause: A Union Guide to Winning Discipline Cases\*](#),

# Two Cases in which CBUs were Central

- A union rep in the Peralta C.C. District in CA
  - Reinstatement stemmed from previous contract arguing that part-time instructors who have worked six out of ten consecutive semesters and have received above-average evaluations are entitled to a minimum number of course assignments.
- An instructor at Moraine Valley C.C. in Illinois
  - her protection stemmed from her role as a union leader

# Strategy #3—Legal/Legislative Action

## Crucial Supreme Court Rulings

### ***Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)***

The Court noted that in *Roth*, which it handed down on the same day as *Perry v. Sindermann*, *faculty members who lack tenure have a right to a hearing only if they are deprived of liberty or property interests.*

### ***Perry v. Sindermann, 408 U.S. 593 (1972)***

The plaintiff argued that the *de facto tenure provision* in its Faculty Guide created an understanding or expectancy for continued employment and thereby created a property interest. The Court, in recognizing that rules and understandings may entitle faculty members to continued employment, did not order the plaintiff's reinstatement to his job. However, *the Court reasoned that officials at the plaintiff's college had to provide him with an opportunity to show he had a property interest that entitled him, not to automatic reinstatement, but to a due process hearing.*

# Legislation—Colorado bill 2012

EACH SYSTEM OF HIGHER EDUCATION AND EACH CAMPUS OF EACH STATE INSTITUTION OF HIGHER EDUCATION MAY, SUBJECT TO THE APPROVAL OF THE CHIEF EXECUTIVE OFFICER OF THE SYSTEM OR INSTITUTION AND ANY RULES OR LIMITATIONS ESTABLISHED BY THE CHIEF EXECUTIVE OFFICER, HAVE IN EFFECT AN UNLIMITED NUMBER OF TERM EMPLOYMENT CONTRACTS OR TERM EMPLOYMENT CONTRACT EXTENSIONS HAVING A DURATION OF NOT MORE THAN THREE YEARS

REDACTED language in order to obtain opportunity for multiyear contracts:

(III) A TERM EMPLOYMENT CONTRACT OR TERM EMPLOYMENT CONTRACT EXTENSION EXECUTED PURSUANT TO THIS PARAGRAPH (d) SHALL INCLUDE A PROVISION STATING THAT ANY DECISION OF TERMINATION OR NONRENEWAL OF THE CONTRACT WILL FURNISH THE EMPLOYEE A STATEMENT OF REASONS FOR THE TERMINATION OR NONRENEWAL OF THE CONTRACT AND PROCEDURAL DUE PROCESS PROTECTIONS IN THE FORM OF NOTICE, HEARING, AND ADMINISTRATIVE REVIEW. EXHAUSTION OF DISPUTE PROCEDURES IS REQUIRED AS A CONDITION PRECEDENT TO ANY LEGAL ACTION AGAINST THE INSTITUTION.

# Faculty Manual Language at CSU—Susceptible to legal interpretation?

The following language exists for full-time tenure track, for part-time tenure-track and for senior teaching appointments but not for part-time or full-time appointments without senior teaching status:

- **There is no specified ending date for a regular full-time appointment with tenure.**
- **There is no specified ending date for regular part-time appointments with tenure.**
- **There is no specified ending date for a senior teaching appointment.**

# Legal Action - Research and Policy Advocacy at State & Federal Levels

Emulate or collaborate with NCTE &/or others?



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A Professional Association of Educators in English Studies, Literacy, and Language Arts

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A network of NCTE, CCCC, and TYCA volunteers track state policy developments impacting English language arts, English studies, literacy, and the humanities. These volunteers, one covering P12 education and one covering higher education in each state, provide other members with analyzed information about state policies. With this knowledge, educators can better participate in the policymaking process that affects them, their students, their institutions, and their communities.

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# Resources

## Legal Citations

- Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).
- Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972):  
<http://lawhigheredu.com/20-board-of-regents-of-state-colleges-v-roth.html>
- Perry v. Sindermann, 408 U.S. 593 (1972):  
<http://lawhigheredu.com/97-perry-v-sindermann.html>
- Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978).
- Board of Regents v. Roth, 408 U.S. 564 (1972).
- Civil Rights Act of 1871, Section 1983, 42 U.S.C. § 1983.
- Lochner v. New York, 198 U.S. 45 (1905).
- Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985).
- Wood v. Strickland, 420 U.S. 308 (1975).

## Further Reading

- Beckham, J. (2005). Faculty. In J. Beckham & D. Dagley (Eds.), Contemporary issues in higher education law (pp. 89–130). Dayton, OH: Education Law Association.
- Legal Information Institute. (n.d.). Due process. Retrieved June 26, 2009, from [http://topics.law.cornell.edu/wex/due\\_process](http://topics.law.cornell.edu/wex/due_process)
- Russo, C. J., & Thro, W. (2005). Student equal protection and due process. In J. Beckham & D. Dagley (Eds.), Contemporary issues in higher education law (pp. 257–275). Dayton, OH: Education Law Association.

# Additional Resources

- [https://www.law.cornell.edu/wex/due\\_process](https://www.law.cornell.edu/wex/due_process)
- <https://www.thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/>
- <http://lawhigheredu.com/48-due-process-rights-in-faculty-and-staff-dismissal.html>
- <https://www.thefire.org/pdfs/due-process-2.pdf>
- <http://www.aaup.org/sites/default/files/files/Faculty%20Handbooks%20as%20Contracts%20Complete.pdf>
- <http://www.faculty-rights-coalition.com/caselaw/due-process-and-nontentured-faculty-members.html>
- [Delphi-- http://www.uscrossier.org/pullias/wp-content/uploads/2013/02/IMPERATIVE-FOR-CHANGE WEB.pdf](http://www.uscrossier.org/pullias/wp-content/uploads/2013/02/IMPERATIVE-FOR-CHANGE_WEB.pdf)
- [Campaign for the Future of Higher Education-- http://futureofhighered.org/principles/](http://futureofhighered.org/principles/)