

April 2014

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Rudy Fichtenbaum

*American Association of University Professors*

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### Recommended Citation

Fichtenbaum, Rudy (2014) "Protecting Academic Freedom for Faculty Working on Contingent Contracts: Contract Language for Full--Time Faculty at Wright State University," *Journal of Collective Bargaining in the Academy*: Vol. 0 , Article 25.  
Available at: <http://thekeep.eiu.edu/jcba/vol0/iss9/25>

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**Protecting Academic Freedom for Faculty Working on Contingent Contracts:  
Contract Language for Full-Time Faculty at Wright State University**

By

Rudy Fichtenbaum  
Professor of Economics  
Chief Negotiator AAUP-WSU  
President of AAUP

*"Says James McKeen Cattell:*

*That a professor's salary should depend on the favor of a president, or that he should be dismissed without a hearing by a president with the consent of an absentee board of trustees, is a state of affairs not conceivable in an English or a German university.*

The reason for this anomaly is that the American college has not been organized on the principles of American government, but on those of American business; the college is not a state, but a factory. I have compared Columbia and Minnesota to department-stores and Clark and Johns Hopkins to Ford factories; and in so doing I was not merely calling names, but making a diagnosis. They are organized upon that basis, and run upon that basis, and the problem of changing them is simply one of the problems of Americanization. The college must become a democratic- republic, run by its citizens and workers.

That brings us to the second demand of the college professor; not merely must he have security in his job, he must have collective control of that job, he must say how the college shall be conducted, and what higher education shall be. That means that he must take from the trustees, and from their hired man, the president, the greater part of their present functions."

Upton Sinclair, *The Goose-Step*, (Pasadena, CA: published by the Author, 1922) p. 460

## Protecting Academic Freedom for Faculty Working on Contingent Contracts: Contract Language for Full-Time Faculty at Wright State University

### **Introduction**

When we think of threats to academic freedom it is likely that the first thing that comes to mind are legislative threats. For example, bills that threaten to withhold funds from institutions that are members of certain associations or simply run programs that teach about unions. We might also think of faculty who have been threaten with being fired for their use of social media or faculty removed from the classroom for teaching about controversial subjects, or faculty having their access to computer networks revoked because they have the temerity to protest budget cuts that will result in firing of faculty.

In New York and Maryland legislatures are considering bills that would prohibit colleges and universities from using state aid to fund academic groups or associations that have passed resolutions or taken official actions to promote boycotts against higher education institutions in other countries. In Michigan, the legislature is considering language that would prohibit any class, course, conference or program that encourages union organizing and threatens to withhold funding from Michigan State University for engaging in these subversive activities.

Another example that comes to mind is the recent decision of the Kansas Board of Regents to pass a social media policy that would allow top administrators “to suspend, dismiss or terminate from employment any faculty or staff member who makes improper use of social media.” And the improper use is defined roughly in the same way that the Supreme Court defined pornography i.e., administrators will know it when they see it. It is believed that this policy was issued in response to a Tweet from a faculty member at the University of Kansas that was critical of the National Rifle Association.

In Colorado, there was the case of Patti Adler, a professor at the University of Colorado, who was allegedly offered a choice of early retirement or staying on at the University, but being prohibited from teaching a course on “Deviance in U.S. Society.” This controversy erupted in response to the use of a skit, on the topic of prostitution that had been used in the class for 20 years. Apparently a complaint led the University to declare that the skit potentially violated the University’s sexual harassment policy.

Also in Colorado is the case of Tim McGettigan, a professor at Colorado State University – Pueblo, who in response to a threaten layoff of both tenure track and non-track faculty sent an email with the subject line “The Children of Ludlow” to a University listserv, comparing the proposed mass firing to the Ludlow Massacre. In response the University cut off his access to his computer by revoking his right to login to the University’s network.

While all of these are certainly examples of threats to academic freedom, they pale in comparison to what has become the greatest threat to academic freedom, mainly the growing use of faculty who are hired on contingent contracts.

The growth in the number of faculty working on contingent contracts has been and continues to be at the centerpiece of the corporate agenda to reshape higher education in the U.S. to meet corporate needs and fundamentally undermine higher education as a public good. To accomplish this goal, they have launched a drive to defund public higher education, dramatically reducing state appropriations for public higher education. This has had the effect of raising tuition, leaving students in debt and transforming higher education into a private good.

The goal of privatization is to transform what has been a world-class system of public higher education, whose aim was to provide a high quality education with a strong foundation in liberal arts and sciences, into a system more suited to serve corporate interests in our new gilded age. To accomplish this goal corporate interests and politicians from both political parties, particularly in a post-Citizen's United world, are transforming higher education into a highly segmented system.

At the top of our higher education system are the elite private universities, funded with large endowments, where most of our top corporate leaders and politicians are educated. Just below these elite private universities are the top public research universities, who in addition to educating large numbers of corporate leaders, engage in high levels of funded research. Most of this funding comes from governmental sources to support basic research, which ultimately can be developed and commercialized. However, the time horizon for funded research at universities is too long for most corporations and it is not always clear how basic research will lead to commercial success. So public subsidies for research that ultimately add to corporate profit are essential and are a big part of the mission of top tier public institutions.

Below this top tier of public and private institutions are the majority of public and private universities and colleges, as well as community colleges where the emphasis is increasingly on vocational training. While there has always been a clear pecking order in American higher education, the differences between the education that is being provided at the elite schools and all other institutions is growing.

The transformation of large swaths of higher education into centers for vocational education with emphasis on degree completion and certification is transforming higher education to meet corporate interests. In today's information economy workers need a higher level of technical education and more skills than can be gotten with just a high school degree. So there is a need for today's workers to have a college education, but not the kind of college education that you get at an elite institution. What serves corporate interests is the undermining of a broad liberal arts education and placing more emphasis on various types of vocational and

professional training. What corporations want are workers with more skills but they are less concerned about critical thinking or the creation of an educated citizenry who might question growing levels of inequality, environmental degradation, and other social ills. This is exactly what programs like Pathways in the CUNY system are all about. The move to standardize curriculum and at the same time eliminate a variety of programs, particularly in the humanities in the name of enabling transfers and increasing graduation rates is happening throughout higher education.

So the question becomes how to accomplish this goal of transforming higher education from serving the public good into serving corporate interests? First and foremost you must undermine the ability of the faculty to fight back. As long as faculty have academic freedom and shared governance, there is an ability to resist these changes. Clearly the way to undermine the ability of faculty to resist these changes is to turn them into at will employees or temporary employees, whether full-time or part-time.

To accomplish this goal you must attack the tenure system for as was made abundantly clear in the 1940 AAUP Statement on Tenure, tenure is a means to an end and that end is to ensure academic freedom, because without academic freedom education can be transformed from serving the common good into a tool for furthering private interests.

This provides the context for explaining why we have seen such a dramatic transformation in the faculty in American higher education from a profession that was primarily tenured or tenure track to a system where the new faculty majority are faculty working on contingent contracts. Without the job security of tenure, faculty members are pressured into accepting the corporate driven agenda, which is transforming higher education.

So it is not surprising that faculty started looking for other alternatives to protect academic freedom and shared governance. Chief among these has been unionization. Of course, corporate interests have not been just sitting back watching an alternative to tenure emerge. As soon as faculty started organizing in large numbers, the Yeshiva decision was issued to stop the growth of unions, particularly at non-elite private institutions where revenue overwhelmingly comes from tuition.

Many other faculty in the public sector are also effectively precluded from engaging in collective bargaining because they live in states that have no enabling legislation, making it nearly impossible to engage in collective bargaining.

However, where faculty still have the right to engage in collective bargaining, it has become one of the best means to protect academic freedom and shared governance. This is true for tenure track faculty, but it is particularly true for the majority of faculty who are off the tenure track.

This introduction provides the context for the collective bargaining agreement that was recently negotiated for the full-time non-tenure track faculty at Wright State University by the local chapter of the AAUP.

### **The Contract for Full Time Non-Track Faculty at WSU**

Let me preface the remainder of my remarks by saying that for the most part, there have been no egregious violations of academic freedom, such as those I cited earlier, at Wright State University. To my knowledge none of our non-tenure track faculty have ever been fired for exercising their right to academic freedom. At the same time, like many faculty without tenure, most of our non-tenure track faculty have likely engaged in self censorship, fearing that if they exercised their rights there could be consequences.

It is also important to note that there has also been a history of full-time non-tenure track faculty participating in shared governance at Wright State University, although it was largely the erosion of shared governance that drove the tenure track faculty to unionize in 1998. Finally, in case you are wondering about the status of part-time faculty, Ohio law specifically excludes part-time faculty and graduate students from the protections of Ohio Revised Code 4117, which is our state enabling legislation.

The recent collective bargaining agreement (CBA) for non-tenure eligible (NTE) faculty at Wright State University provides an unprecedented level of employment security for NTE faculty once they enter their seventh year of employment. In effect, without using the word tenure, NTE faculty who have been at Wright State University for more than 6 years have almost all of the protections of tenure.

There are two articles in the CBA that contain most of the language that afford NTE faculty tenure like protections beginning with their seventh year of employment at WSU. The first is Article 13 Appointment and Promotion and the second is Article 15 Termination of Appointment or Suspension without Pay.

NTE faculty at WSU consist of faculty holding the titles Instructors, Visiting Professors, Lecturers, Senior Lecturers, Clinical Instructors and Clinical Assistant Professors. The article states that NTE faculty members have either fixed-term or continuing appointments. Instructors and Visiting Professors always have fixed-term appointments, which can last up to three years.

Article 15.2.1 has a notification provision requiring the University to make a good faith effort to notify fixed-term faculty whether or not they will be offered an appointment the following year by February 1. This is actually a full month earlier than the Redbook standard for tenure track faculty in their first year of appointment and is consistent with the language in the CBA that covers tenure track faculty at WSU (See Article 13.6.3.2 of the CBA covering Tenure Eligible and Tenured (TET) faculty).

Following the first year, if an NTE faculty member is to be dismissed for poor performance, written notice is required 12 months in advance of termination. This is consistent with Redbook language and with the TET CBA Article 13.6.3.2). However, notice is not required if the appointment expires before a termination for poor performance would have taken effect. In addition fixed-term faculty cannot be dismissed for poor performance unless the poor performance is 1) documented in a written evaluation, 2) the faculty member is given a chance to improve (usually one semester) and 3) the poor performance does not improve.

The key language in Article 13 is in Section 13.1.3.3, which states “Lecturers, Clinical Instructors and Clinical Assistant Professors have *continuing appointments* [my emphasis] beginning with the seventh year of employment as Bargaining Unit Faculty Members.” The contract defines a continuing appointment as an appointment with “no identified date of termination.”

Section 13.2.4 states “Before a Lecturer or Clinical faculty member begins his or her sixth year as an NTE faculty member, the university will (a) notify that Member that the appointment will not be continued or (b) offer a continuing appointment with no identified date of termination; that is, if the university fails to notify that Member that the appointment will not be continued, then the Member will be given a continuing appointment with no identified date of termination.”

Instructors who have had four years of outstanding performance automatically earn the right of first refusal for openings as Lecturers. “If two or more qualified Instructors have the same seniority and one has significantly stronger performance than the other(s), that Member will have the right of first refusal for a Lecturer position.”

For the group of NTE faculty who have continuing appointments, the CBA explicitly states that they are not eligible for tenure. They can be terminated pursuant to Article 15. However, the language in Article 15 is what gives this group of faculty virtually the same protection as tenured faculty.

Article 15.1 states that NTE faculty appointments may be terminated due to (1) retrenchment, pursuant to Article 17, (2) completion of a fixed-term appointment, (3) poor performance, (4) enrollment or curricular changes that eliminate the need for their services pursuant to Section 15.4, and (5) just cause pursuant to Section 15.5.

For faculty on continuing appointments poor performance must be documented in a written evaluation by the department chair. To quote the CBA, symptoms of poor performance include:

- a pattern of classes that are missed without suitable reason (e.g., illness, approved professional travel) or of missed advising appointments
- persistent and justified complaints from students or peers
- persistently erratic classroom behavior
- persistent failure to be reasonably available to students and advisees
- persistent failure to communicate effectively with students
- a pattern of irresponsible or unprofessional conduct with or in the presence of students in a university setting
- persistent failure to comply with the established curriculum
- persistently outdated or inappropriate course content

Our view is that these symptoms are very close to “demonstrated incompetence” which is grounds for dismissal of a tenured faculty member. When a chair gives a member an annual evaluation and alleges poor performance, he or she must also state that if the performance is not improved it could be grounds for dismissal.

Article 15.2.3 states that after receiving such an evaluation, “The Member must then be provided a reasonable amount of time (normally, at least one semester) to correct the identified deficiencies. If the substandard performance continues, the department chair must specify, in writing, the basis for concluding that the Member’s performance is persistently poor.”

If a dean believes that the performance of a member with a continuing appointment is persistently poor or that the member “exhibits deficiencies in teaching that are so severe that the Member is not minimally effective” and therefore that the member should be dismissed, he or she must notify the Provost.

Following this notification the Provost is required to call a meeting with the member, the dean and a representative of the AAUP-WSU to clarify the facts and attempt to reach a mutually acceptable resolution. After this informal meeting if the Provost determines that the faculty members should be dismissed a hearing board must be appointed and a hearing held. The Provost selects half of the members of the hearing board and half are selected by AAUP-WSU. The members of the hearing board must have tenure, be a Senior Lecturer (all Senior Lectures have continuing appointments), or be a Clinical Assistant Professor with a continuing appointment.



Article 15.3.2.6 states “The Hearing Board shall communicate in writing the scheduled date, place, and time of the hearing and provide to all parties concerned an explanation of the rules under which the hearing shall be conducted.” Moreover, the University must provide the members and AAUP-WSU with all of the evidence in a timely manner and provide a list of potential witnesses who may testify at the hearing.

The member has the right to cross-examine any witnesses during the hearing and can summon and present witnesses. The member has the right to be present during the entire hearing and may be accompanied or advised by any full-time faculty member employed by Wright Sate University. The AAUP-WSU and the University have the right to have representatives present at the hearing. Most importantly, “The Dean or designee has the burden of demonstrating to the Hearing Board that, on the basis of clear and convincing evidence, the assertion of poor performance according to the criteria in Section 15.3.2 is true.” This is absolutely critical for it clearly states that the burden of proof is on the University.

Article 15.3.2.9 states the hearing board must evaluate the evidence evaluation as to whether or not, on the basis of clear and convincing evidence, the assertion of poor performance according to the criteria in the CBA. The evaluation is made by a majority vote of all its members and is then communicated in writing to the University President, the Member, the AAUP-WSU, and the Dean.

The President then has 20 working days to recommend to the Board that 1) the member should be terminated for poor performance or 2) conclude that the member’s performance does not warrant termination. If the President recommends to the Board that the member should be terminated the AAUP-WSU has the sole discretion to take the member’s case to binding arbitration.

A member with a continuing appointment can also be terminated for “lack of need” due to enrollment declines that persist over at least three semesters or because of curricular changes. However, before a member is terminated for “lack of need” the University will attempt to find alternative courses that the member is qualified to teach. The University is required to assign courses that the member is qualified to teach “that would otherwise be taught by persons who are in neither the TET or the NTE Bargaining Unit.” In other words, members with continuous appointments would be given courses that might be taught by staff, including department chairs, or courses that might be taught by adjuncts.

Terminations for “need” are done in order of inverse seniority. If a member is terminated for “need” he or she has the right to teach classes he or she is qualified to teach before they are given to non-bargaining unit faculty and “will be paid a rate proportionate to pay he or she would have received for teaching the class on a full time basis.” Within two years of termination for need, if the University has a position for which the member is qualified, the member will be offered that position.

If a dean anticipates terminating a member(s) for need he or she must notify the Provost and this notification triggers a meeting with the AAUP-WSU to clarify the facts and determine whether there are alternative to termination. Within 20 working days of this meeting the Provost will state in writing whether the member(s) shall be terminated for need. Following this determination, the member and the AAUP-WSU will have an opportunity to present a rebuttal to the President. Within 20 days of receiving the rebuttal the President will either confirm or reverse the termination(s). If the decision is to terminate then the member will not be terminated any sooner than one year from the date of the President's decision or the University at its discretion may provide salary and full-benefits for all or part of one year. Finally, the AAUP-WSU has the sole discretion to take the case(s) to binding arbitration.

Finally, a member may be dismissed for just cause. Just cause is defined in Article 15.5.1 as "(a) fraudulent credentials pertaining to employment at WSU; (b) demonstrated incompetence or dishonesty in teaching, scholarship, or professional service; (c) substantial and manifest neglect of duty, (d) personal conduct which presents a serious threat to health or safety of any person in the University community, manifests severe and continuing harassment or discrimination, or otherwise substantially impairs the Bargaining Unit Faculty Member's fulfillment of the institutional responsibilities; (e) malicious conduct that directly obstructs the performance of instructional or scholarly programs authorized or permitted by the university; or (f) conviction of a crime involving an offense of violence as defined in division (A)(9)(a) of Section 2901.01 of the Ohio Revised Code as of January 1, 2008 or a substantially equivalent offense under a municipal ordinance."

To dismiss a member for "just cause" there is a hearing process, which is similar to the hearing process for poor performance. However the accused faculty "may choose not to testify or answer questions at this hearing. However, such failure may be taken into consideration by the Hearing Board." As was the case with dismissal for poor performance, the University has "the burden of proving to the Hearing Board that, on the basis of clear and convincing evidence, the charges are true." During such a hearing a member may choose to be represented by counsel at his or her own expense. Finally, the AAUP-WSU has the sole discretion to take the member's case to binding arbitration.

## **Summary and Conclusions**

In summary this CBA that covers full-time NTE faculty at Wright State University, gives faculty with continuing appointments virtually all of the same protections that are afforded to tenured faculty. We believe that this contract with all of these protections breaks new ground and offers substantial protection for academic freedom and allows NTE faculty to participate in shared governance without fear of retaliation by administrators.

While it is important to continue fighting to reverse the trend to hiring more faculty off of the tenure track, we have no illusions that this deleterious trend will be reversed anytime soon. Therefore, it is important that faculty and organizations, which represent faculty, begin to develop alternative methods for protecting academic freedom and shared governance. Clearly this collective bargaining agreement is one such alternative.