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The Dismissal of Tenured Faculty for Reasons of Financial Exigency

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The Dismissal of Tenured Faculty for Reasons of Financial Exigency

Recent adverse economic conditions have forced colleges and universities to fire tenured faculty members for reasons of financial exigency. The authority to terminate tenured faculty because of economic hardships aids the college administrator in maintaining fiscal stability but also offers a possible pretext for dismissal stemming from conduct which would otherwise be protected by the institution's tenure provisions.[1] Therefore, it is imperative that courts dealing with this problem arrive at a definition of "financial exigency" which will prevent such abuse without handcuffing the administration in its attempts to deal with economic crisis. This note seeks to develop a workable definition of "financial exigency" which will maximize an institution's ability to respond to genuine financial stress without endangering the academic fredom[2] which tenure plans[3] seek to foster.

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[1] AAUP v. Bloomfield College, 129 N.J. Super. 249, 268, 322 A.2d 846, 856 (Ch. 1974); AAUP v. Bloomfield College, 136 N.J. Super. 442, ——, 346 A.2d 615, 618 (App. Div. 1975) (upholding the trial court's finding of bad faith).

[2] Tenure provides continuing appointment for college faculty until retirement, subject to removal for cause. The primary purpose of tenure is to safeguard academic freedom. *See* B. SMITH, THE TENURE DEBATE 200 (1973). The right to pursue new or unpopular ideas is the essence of academic freedom. *See* Jones, *The American Concept of Academic Freedom,* in ACADEMIC FREEDOM AND TENURE 231 (L. Joughin ed. 1969).

Tenure is designed to secure academic freedom by giving the faculty member sufficient job security to remove any fear of sanctions by colleagues or pressure groups in society. *See* Malchup, *On Some Misconceptions Concerning Academic Freedom, id.* at 177–78; Pettigrew, *"Constitutional Tenure:" Toward a Realization of Academic Freedom,* 22 CASE W. RES. L. REV. 475 (1971). The American Association of University Professors describes tenure as "a means to certain ends, specifically (1) freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability." *Academic Freedom and Tenure: Basic Statements,* in ACADEMIC FREEDOM AND TENURE, *supra,* at 34–35.

[3] A vast majority of public and private colleges in the United States have established some type of tenure plan. *See* C. BYSE & L. JOUGHIN, TENURE IN AMERICAN HIGHER EDUCATION 132 (1959); Matheson, *Judicial Enforcement of Academic Tenure: An Examination,* 50 WASH. L. REV. 597, 598 (1975). While these plans vary greatly, they generally provide for a method of attaining tenure, the grounds for dismissal of tenured faculty, and procedural safeguards to be followed in the event of dismissal. C. BYSE & L. JOUGHIN, *supra,* at 62–68.

Prior to receiving tenure status, faculty members serve a probationary period of three to seven years in which they are evaluated for retention and promotion. *Id.* at 9–10. The criteria for the acquisition of tenure include some or all of the following: research abilities, teaching, publication, advanced degrees, service to the university, and advising skills. *Id.* at 28–34.

While non-tenured faculty may ordinarily be terminated without special justification at the end of their contract term, universities give up their normal power to dismiss tenured faculty. Jones v. Hopper, 410 F.2d 1323, 1328 (10th. Cir. 1969), *cert. denied,* 397 U.S. 991 (1970). The power to dismiss is usually limited to termination for cause, which includes moral turpitude, criminal conviction, disability, or professional incompetence. *See* B. SHAW,

FINANCIAL EXIGENCY AND TENURE

The tenure plans of many colleges and universities embody various provisions whcih grant their administrations the authority to terminate the contracts of tenured faculty members for reasons of financial exigency.[4] At private institutions the tenure relationship is governed by the terms of the employment contract.[5] Some contracts delineate specific situations, such as reduced income or lack of demand for courses, which allow termination;[6] others[7] simply state that a bona fide financial exigency may be a proper ground for dismissal.[8]

ACADEMIC TENURE IN AMERICAN HIGHER EDUCATION, 62–65 (1971). Tenure provisions often include procedural standards to be followed in the event of dismissal, including adequate notice, formal hearings, legal advice, confrontation of witnesses, and appeal. C. BYSE & L. JOUGHIN, *supra,* 60–64, 68.

See also J. BRUBACHER, THE COURTS AND HIGHER EDUCATION (1971); M. CHAMBERS, THE COLLEGES AND THE COURTS (1973); M. CHAMBERS, THE COLLEGES AND THE COURTS SINCE 1950 (1964); R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955); Fuchs, *Academic Freedom—Its Basic Philosophy, Function and History,* 28 LAW & CONTEMP. PROB. 431 (1963); Perkins, *Developments in the Law of Academic Freedom* 81 HARV. L. REV. 1045 (1968).

[4] See B. SHAW, ACADEMIC TENURE IN AMERICAN HIGHER EDUCATION 62–65 (1971).

[5] Tenure plans may be an explicit part of the contract terms. However, courts have held that tenure provisions form a part of employment contracts even where they are not specifically mentioned. *See, e.g.,* Hillis v. Meister, 82 N.M. 474, 483 P.2d 1314 (Ct. App. 1971); Greene v. Howard Univ., 412 F.2d 1128 (D.C. Cir. 1969) (university's disclaimer of contractual obligation was ignored by the court).

[6] C. BYSE & L. JOUGHIN, *supra* note 3, at 49.

[7] *Id.* at 50.

[8] Some tenure plans may not include financial exigency as a criterion for dismissal. In the absence of explicit authority, courts may look to the practices and customs of these universities to determine the extent of the institution's power to dismiss. *See* Perry v. Sinderman, 408 U.S. 593 (1972); Greene v. Howard Univ., 412 F.2d 1128 (D.C. Cir. 1969).

Cases of dismissal for financial exigency might also arise in a university without a formal tenure plan. In their study of tenure system at 80 colleges and universities Byse and Joughin reported that 14 of those schools recognizing tenure failed to spell out its incidents in a formal document. C. BYSE & L. JOUGHIN, *supra* note 3, at 77 n.10. These authors suggest that "the absence of a full, written plan may . . . result from a conviction that custom and tradition, sometimes referred to as the common law of academic affairs, are preferable to written regulations." *Id.* at 135. *See* Browzin v. Catholic University of America, Civil No. 74–1474, at 9 (D.C. Cir., Dec. 8, 1975); Finkin, *Toward A Law of Academic Status,* 22 BUFFALO L. REV. 575 (1973).

In cases involving these informal tenure plans, the courts could apply the American Association of University Professor's policies on academic tenure.

> Paramount among these is the 1940 Statement of Principles on Academic Freedom and Tenure drafted jointly with the Association of American Colleges and currently endorsed by more than 90 educational institutions and disciplinary societies, and the Recommended Institutional Regulations on Academic Freedom and Tenure, which set forth regulations, deriving from the principle provisions and interpretations of the 1940 Statement, suitable for immediate implementation by institutions of higher education.

Brief for the American Association of University Professors as Amicus Curiae at 2, Browzin v. Catholic University of America, Civil No. 74–1474 (D.C. Cir., Dec. 8, 1975).

The AAUP has suggested regulations for dismissal which recognize termination for financial exigency. Regulation 4(c) provides:

> Termination for an appointment with continuous tenure, or of a probationary or special appointment before the end of the special term, may occur under extraor-

While most public colleges and universities have tenure systems, only one state has a statute providing tenure for its statewide university system.[9] In other public institutions, governing boards may promulgate tenure plans, which have the force of statutory law because of the quasi-legislative nature of these boards.[10] If such plans fail to provide explicitly for dismissal based on financial exigency, the extent of the institutions authority to dismiss depends on judicial interpretation of the legislative intent of such terms as "for cause upon written charges"[11] or "when the interests of the university shall require it."[12] The small amount of case law on this point seems to indicate that financial exigency is clearly subsumed within these terms.[13]

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dinary circumstances because of a demonstrably bona fide financial exigency which cannot be alleviated by less drastic means.

58 AAUP BULL. 428–33 (1972).

Because so many schools have adopted the AAUP's regulation on financial exigency, the courts could look to these AAUP's guidelines in giving content to academic "common law." *See also* Perry v. Sindermann, 408 U.S. 593, 602 (1972) (referring to the possible existence of a "common law" of a particular university); Finkin, *Toward a Law of Academic Status*, 22 BUFFALO L. REV. 575 (1973). These guidelines would also be appropriate in giving directions in cases such as *Perry* where the existence of tenure is implied by the court.

[9] WIS. STAT. ANN. § 36.13 (West Supp. 1975).

[10] State *ex rel.* Keeney v. Ayers, 180 Mont. 547, 556, 92 P.2d 306, 310 (1939); State *ex rel.* Richardson v. Board of Regents, 70 Nev. 144, 150, 261 P.2d 515, 518 (1953); C. BYSE & L. JOUGHIN, *supra* note 3, at 72; Perkins, *Developments in the Law of Academic Freedom*, 81 HARV. L. REV. 1045, 1100 (1968). *Cf.* Worzella v. Board of Regents, 77 S.D. 447, 93 N.W.2d 411 (1958), which held that the granting of tenure rights which restricted the Board's power of dismissal constituted an unlawful abdication of power by the Board.

[11] Johnson v. Board of Regents, 377 F. Supp. 227, 231 (W.D. Wisc. 1974).

[12] REV. STAT. NEB. § 85–106(7) (Reissue 1971). This statute is found in the section dealing with state universities and is not included in the section dealing with state colleges. However, the court in Levitt v. Board of Trustees, 376 F. Supp. 945, 952 (Neb. 1974) employs language similar to that of this statute in its findings of fact.

[13] In Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wisc. 1974), tenured faculty who were terminated in response to financial exigency and declining student enrollment sought a preliminary injunction to require the Board of Regents to continue their employment. *Id.* at 230. The statute under which these faculty members were dismissed did not refer specifically to financial exigencies but provided: "No teacher who has become permanently employed . . . shall be discharged except for cause upon written charges." WIS. STAT. ANN. § 37.31(1) (West 1966). The court resolved the case without being required to interpret the statute, but the judge expressed the opinion in dicta that the Wisconsin courts should hold that the colleges have the power to dismiss faculty because of financial exigency. 377 F. Supp. at 234–35.

A number of courts have held that local school boards have the power to dismiss tenured faculty for reasons of financial exigency despite the absence of express statutory provisions. Annot., 100 A.L.R.2d 1141, 1159–62 (1965); Annot., 63 A.L.R. 1410, 1418 (1929). The fact that courts often cite high school tenure cases as authority in cases involving college tenure indicates these cases on exigency may be viewed as appropriate precedent where statutory interpretation is required.

FINANCIAL EXIGENCY AS A GROUND FOR TERMINATION OF TENURED FACULTY

Courts faced with the dismissal of a faculty member for reasons of financial exigency must determine in each case (1) whether a financial exigency exists and (2) whether the dismissal represented a good faith effort to alleviate that exigency.[14] In addition courts will also be faced with the allocation of the burden of proof on each of the questions.[15]

What Constitutes Financial Exigency?

Establishing a clearcut test for the existence of financial exigency is impractical because the finances of each college and university will present a unique factual situation to the courts. For example, a loss in gifts from private sources may have no measurable impact on a state supported institution, while it could cause critical difficulties for a small, private college. Nevertheless, the few cases dealing with the dismissal of tenured faculty for financial exigency provide some guidance in ascertaining the relevant considerations.

In *Lumpert v. University of Dubuque*,[16] plaintiff, a tenured faculty member, had been dismissed under a contractual provision which stated that:

> After the expiration of the probationary period continuous appointment shall be established and services are to be terminated only for adequate cause. It is understood that continuous appointment is based upon the need for the services of the appointee and the financial ability of the institution to continue the appointment.[17]

The court in its instructions to the jury defined "financial ability" and "financial exigency" as follows:

> "Financial ability" as used herein, means the ability to provide from current income, both cash and accrued, the funds necessary to meet current expenses including current debt payment and sound reserves, without invading or depleting capital.
> "Financial exigency" means an urgent need to reorder the nature and magnitude of financial obligations in such a way as to restore or preserve the financial ability of the institution. . . .[18]

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[14] *See* AAUP v. Bloomfield College, 129 N.J. Super. 249, 267, 322 A.2d 846, 855 (Ch. 1974).

[15] AAUP v. Bloomfield College, 136 N.J. Super. 442, ——, 346 A.2d 615, 616–17 (App. Div. 1975).

[16] Lumpert v. University of Dubuque, Civil No. 39973 (Dist. Ct. Iowa, July 15, 1974).

[17] Brief for Defendant at 6, Lumpert v. University of Dubuque, Civil No. 39973 (Dist. Ct. Iowa, July 15, 1974).

[18] *Id.* at 2. The court's jury instructions indicate that it believed a lack of financial ability constituted exigent circumstances.

Despite evidence of a $100,000 current operating deficit, the jury returned a verdict for the plaintiff.[19] The court, however, sustained defendant's motion for judgment notwithstanding the verdict. In addition to the university's accounting records as evidence of exigency, the court emphasized that the trend shown by the books had convinced the university's creditors that failure to retrench would be negligent.[20]

The most recent case dealing with this issue is *American Association of University Professors v. Bloomfield College*.[21] Bloomfield, a small sectarian commuter college, had a tenure plan which provided that after seven years

> . . . a teacher will have tenure and his services may be terminated only for adequate cause, except in case of retirement for age, or under extraordinary circumstances because of financial exigency of the in stitution. . . .
>
> Termination of continuous appointment because of financial exigency of the institution must be demonstrably *bona fide*. A situation which makes drastic retrenchment of this sort necessary precludes expansion of the staff at other points at the same time, except in extraordinary circumstances.[22]

Under the authority of these regulations, the Board of Trustees terminated eleven tenured faculty members for reasons of financial exigency. At the same time, all other faculty members were placed on one-year terminal contracts, thus effectively ending the tenure system. The faculty brought an action for declaratory relief and specific performance[23]

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[19] Lumpert v. University of Dubuque, Civil No. 39973, at 2 (Dist. Ct. Iowa, July 15, 1974).

[20] *Id.* at 1.

[21] AAUP v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846 (Ch. 1974).

[22] *Id.* at 253, 322 A.2d at 848.

[23] The request for specific performance raises a side issue. The successful protection of academic freedom through tenure plans ultimately depends on the ability of the faculty member to enforce his tenure rights in the courts. In public institutions the discharge of a faculty member in violation of statutory provisions can be remedied by an order to reinstate the teacher since any such discharge would be beyond the authority of the governing board and a violation of state law.

The tenure rights of faculty at private universities are secured to some degree by contract. The remedy for breach of contract, however, is limited by the principle that courts will not decree specific performance of personal service contracts. A faculty member dismissed from a tenured position will not in most cases be able to gain reinstatement.

An exception was made in the *Bloomfield* case, where the court ordered the university to return certain tenured faculty to their positions within the university. The court ordered specific performance of the teachers' contracts on the grounds that New Jersey had repudiated the doctrine of mutuality of remedy and that service of a seven year probationary period constituted full performance of the contract by the faculty. By its action the court elevated the degree of protection afforded tenured faculty at private institutions to that enjoyed at public colleges and universities where faculty have a right to reinstatement when university officials violate statutory provisions. The grant of specific performance in cases of dimissal for reason of financial exigency should be the rule rather than the exception.

claiming that the administration's actions were not " 'demonstrably bona fide' as having been taken 'under extraordinary circumstances because of the financial exigency of the institution'."[24]

Although Bloomfield College's assets exceeded its liabilities because of its ownership of a 322-acre tract of land, the enrollment figures and financial circumstances indicated that the college was experiencing serious problems. Annual cash deficits at the college were well over $100,000 for 1972, 1973, and 1974.[25] In 1973-74, the college's enrollment was 867, down from 1,069 in 1972,[26] a serious decline for a college gaining three-fourths of its financial support from tuition. In addition to these problems, the college also had a liquidity problem. As was the case in *Lumpert,* the magnitude of the college's financial difficulties seriously affected its credit, causing its creditors to lend, on a week-to-week basis, only what was necessary to meet payrolls.[27]

Despite all these problems, the trial court declared:

> Unless we are prepared to say that financial exigency is chronic at Bloomfield College, it is difficult to say how, by any reasonable definition, the circumstances can now be pronounced exigent.[28]

The court based this decision largely on the existence of alternatives to the dismissal of tenured faculty which would be equally effective in balancing the budget.[29]

While it is obvious that exploration of alternative methods of budget reduction is an important consideration in determining the existence of a financial exigency, courts should not require the exhaustion of every other alternative before tenured faculty can be released. Such a reading of the term would effectively negate the power to dismiss tenured

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In cases where faculty have been dismissed because of exigent circumstances there is no assertion by college officials that the particular faculty member is incompetent or otherwise unsuited to perform his functions. A request for specific performance does not, therefore, ask equity to enforce an undesirable personal relationship. A second important reason to allow specific performance is that damages would be very difficult to establish and could not compensate a tenured faculty member for the disruption of his professional career, especially in light of the fact that a new position at another institution will be as a non-tenured faculty member. Failure to grant specific performance under these circumstances undermines the value of tenure and may have a chilling effect on the exercise of academic freedom. *See* Finkin, *Toward A Law of Academic Status,* 22 BUFFALO L. REV. 575, 600 (1973).

[24] 129 N.J. Super. at 256, 322 A.2d at 849.

[25] *Id.* at 257, 322 A.2d at 850.

[26] *Id.* at 255, 322 A.2d 849.

[27] *Id.* at 258, 322 A.2d at 851.

[28] *Id.* at 270, 322 A.2d at 857.

[29] *Id.* at 259, 270–71, 322 A.2d at 851, 857. Bloomfield College owned a 322 acre tract of land known as the Knoll, consisting of two golf courses, two clubhouses, a swimming pool, and a few residences. The trial judge expressed the opinion that this property could be sold to solve the college's cash flow problems.

faculty because a court could generally find another avenue which might have been explored. Under some circumstances, such an approach might result in a fiscal policy which allows the retention of faculty while endangering the long-term stability of the institution.

In light of the serious financial problems of the college,[30] combined with a significant loss of enrollment, the court's conclusion that no exigency existed was questionable.[31] Predictably, the appellate court expressed the opinion[32] in dicta that there was insufficient evidence to contradict the existence of an exigency "in view of the admitted absence of liquidity and cash flow," and suggested that the trial court's interpretation of "exigency" was too narrow and that the phrase "a state of urgency" constituted a more reasonable construction of the term.[33]

It is important to note that neither *Lumpert* nor the Bloomfield appellate decision reads "exigency" to mean a financial problem which threatens bankruptcy or the imminent collapse of the institution. Instead, these cases focus on the ability of the college to meet current expenses and reject any suggestion that capital assets must be invaded to resolve cash flow problems. This is a particularly useful approach since it allows an institution to resolve financial problems before they become irreversible and places an emphasis on protecting long term stability.

However, it must be made clear that an exigency is more than a temporary or minor shortage. The appellate court's use of the phrase

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[30] Bloomfield was eventually placed in receivorship under Chapter XI of the Bankruptcy Act. The president of the college made the following statement:

> The implications of the [trial court's] decision have moved us from financial exigency to bankruptcy. It increased our deficit by $200,000 [the cost of the faculty salaries] and that was enough to push us over. Without Chapter XI we would have had to close this fall.

The Chronicle of Higher Education, August 19, 1974, at 2, col. 2.

[31] A number of other cases involving dismissals for reasons of financial exigency have reached the courts as a result of a due process challenge, thus avoiding any question of what constitutes an exigency. In Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), and Levitt v. Board of Trustees, 376 F. Supp. 945 (D. Neb. 1974), the exigency, which was not contested by the plaintiffs, was a result of legislative budget cuts. In the *Johnson* case, the budget cuts were 2.5% of the base budget for 1973–74 and an additional 2.5% for 1974–75. The *Levitt* opinion gives no specifics with respect to the extent of the budget reductions. Browzin v. Catholic University of America, Civil No. 74–1474 (D.C. Cir., Dec. 8, 1975), and Paulsen v. St. Joseph's College, Civil No. C–344–73 (Cir. Ct., June 12, 1974) also involved financial exigency, but in *Browzin* the parties stipulated that an exigency existed and in *Paulsen* the court merely stated that it found exigent circumstances. The fact that few plaintiffs have challenged the existence of an exigency, and the apparent ease with which the courts have determined that an exigency existed, indicate that courts are embracing an expansive meaning of the term. Indeed, there is no indication in any of these cases that a university must be insolvent or facing bankruptcy before its financial status is declared exigent.

[32] AAUP v. Bloomfield College, 136 N.J. Super. 42, ——, 346 A.2d 615, 617 (App. Div. 1975).

[33] AAUP v. Bloomfield College, 136 N.J. Super. 42, ——, 346 A.2d 615, 617 (App. Div. 1975).

"state of urgency" in the *Bloomfield* case indicates that the fiscal problems must be of a serious nature. But more importantly, it signals the court's awareness that the adoption of an overly expansive definition of financial exigency in order to allow institutions to deal with economic problems opens the door for the use of financial exigency as a pretext for the dismissal of tenured faculty members for activities otherwise protected by a tenure plan.[34]

While these cases help to clarify the meaning of exigency, the point at which a cash flow problem is serious enough to become exigent is unclear. With respect to this point, the analysis of future cases might be easier if they are divided into two broad categories. The first includes those colleges which have experienced financial losses resulting from, or occurring in conjunction with, a decline in enrollment. The second category encompasses colleges with financial problems arising from a loss of income or a reduction in the value of assets not accompanied by enrollment decline.

In the first situation, where the institution is experiencing financial losses from, or occurring in conjunction with, declining enrollment, the degree of seriousness required to satisfy "exigency" should be smaller than where enrollment is stable. A significant decline in enrollment creates a surplus of teachers and it would be unreasonable to require a university to retain faculty not needed to meet student course demand. In light of these considerations, courts faced with such cases should adopt an analysis similar to that developed in *Lumpert*. The court in *Lumpert* found an exigency where expenses exceeded income[35] without requiring the administration to exhaust all alternatives to dismissal of tenured faculty members,[36] thus allowing the college the needed flexibility to deal with the twin threat of shrinking enrollment and revenues. However, such a test must clearly be modified by the requirement that expenditures which cannot be justified as necessary to the development of a sound academic program may not be considered in evaluating the institution's financial condition.

This mode of analysis recognizes the authority and expertise of the college administrator yet provides reasonable limits within which that authority can be exercised, in an attempt to maximize the ability of the institution to respond to legitimate financial stress. Furthermore, the increased possibility of abuse inherent in such an approach can be

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[34] *See* text accompanying note 1 *supra*.

[35] *See* text accompanying note 21 *supra*.

[36] *Cf.* AAUP v. Bloomfield College, 129 N.. Super. 249, 322 A.2d 846 (Ch. 1974), discussed in text accompanying notes 28–29 *supra*.

dealt with by the requirement that the institution must demonstrate that its actions were in good faith.[37]

In the second situation, where student enrollment remains fairly stable yet the institution suffers financial reverses from the loss of other income, the university must be required to explore other alternatives before dismissing tenured faculty.[38] Indeed, a definition of exigency that allows the dismissal of tenured faculty only as a "last resort" seems appropriate as long as capital is not depleted.[39] In view of the variety of alternative methods of budget reduction, termination of tenured faculty under these circumstances should engender close judicial scrutiny.

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[37] *See* text accompanying notes 40–48 *infra.*

[38] Several alternatives are available to reduce expenditures in the short run, such as: a freeze on all new hiring, filling vacancies and granting raises, non-renewal of non-tenured faculty contracts, a reduction in summer session expenditures, or a cut back in areas not directly related to the academic functions of the institution.

While these measures may solve immediate problems, long term solutions will be necessary. The Carnegie Commission on Higher Education has outlined the dimensions of the financial crisis facing American colleges and universities and suggested the following long range approaches:

> (1) Reducing the number of students by (a) accelerating programs and (b) by reducing the number of reluctant attenders. We believe that the former will reduce operating costs by at least 10 and perhaps 15 percent, and capital costs, in the 1970s, by one-third.
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> . . . .
>
> (2) Making more effective use of resources in relation to the students in attendance. We suggest particularly:
>
> • Halting creation of any new Ph.D. training and federally supported research in fewer institutions.
>
> • Achieving minimum effective size for campuses now below such size; and for departments within campuses, particularly at the graduate level.
>
> • Moving toward year-round operation so that more students can move through the same capital facilities.
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> • Cautiously raising the student-faculty ratio . . . .
>
> • Reexamining the faculty teaching load.
>
> • Improving management by better selection and training of middle management, by giving more expert assistance to the college president, and by improving the budgetary process.
>
> • Creating more alternatives off campus through "open" universities; credit by examination; and so forth—saving capital expenditures and increasing competition with traditional approaches.
>
> • Establishing consortia among institutions; and also merging some.

CARNEGIE COMMISSION ON HIGHER EDUCATION, THE MORE EFFECTIVE USE OF RESOURCES 16–18 (1972).

[39] The AAUP's 1925 Conference Statement on Academic Freedom and Tenure advocated the "last resort" approach in the following regulation:

> Termination of permanent or long-term appointments because of financial exigencies should be sought only as a last resort, after every effort has been made to meet the need in other ways and to find for the teacher other employment in the institution. Situations which make drastic retrenchment of this sort necessary should preclude expansions of the staff at other points at the same time, except in extraordinary circumtances.

Quoted in Browzin v. Catholic University of America, Civil No. 74–1474 (D.C. Cir., Dec. 8, 1975).

In its 1968 regulations *supra,* the AAUP dropped the term "last resort." Instead, dismissal was permissible where the exigency could not "be alleviated by less drastic means."

Was the Dismissal Bona Fide?

In addition to an evaluation of the seriousness of the fiscal problems facing a particular college, the court must ascertain whether the dismissal of faculty was in good faith. The court in *Levitt v. Board of Trustees of Nebraska State College* stated in general terms the significance of a finding that the administration acted in good faith:

> Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts which it believes for the best interest of the school, and there is no showing that the acts were arbitrary or generated by ill will, fraud, collusion or other such motives it is not the province of a court to interfere and substitute its judgment for that of the administrative body.[40]

The trial court in *Bloomfield* conceded the college's financial status was poor but ordered reinstatement of the faculty because the university failed to demonstrate that its action was "in good faith related"[41] to a condition of financial exigency within the institution. A variety of evidence was cited to support the court's finding: internal memoranda written by Bloomfield's president that evidenced an anti-tenure motive, placing the entire faculty on one-year terminal contracts when that action did not alleviate the fiscal problems, failure to utilize remedial measures such as across-the-board salary reductions, termination of non-tenured faculty and sale of real estate holdings, hiring twelve new faculty without adequate justification, and failure to seek faculty advice on new program developments.[42] Although these facts are peculiar to the Bloomfield case, they are indicative of evidence which might help ascertain good faith in other cases.[43]

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58 AAUP BULL. 428–33 (1972). The revision may have resulted from a recognition that a "last resort" approach might endanger the long term stability of the institution. The goal of protecting long term stability can also be achieved by limiting the choice of alternatives to those which do not deplete capital. *See* text accompanying note 18 *supra*.

40 Levitt v. Board of Trustees, 376 F. Supp. 945, 950 (Neb. 1974).

41 AAUP v. Bloomfield College, 129 N.J. Super. 249, 268, 322 A.2d 846, 856 (Ch. 1974). The findings of the lower court with respect to good faith were sustained on appeal without specific comment on the evidence supporting the decision. AAUP v. Bloomfield College, 136 N.J. Super. 42, ——, 346 A.2d 615, 618 (App. Div. 1975).

42 AAUP v. Bloomfield, 129 N.J. Super. 249, 268–72, 322 A.2d 846, 856–57 (Ch. 1974).

43 The American Association of Colleges has issued the following guidelines on program curtailment which might serve as a standard against which to measure good faith in cases of dismissal:

> In situations where curtailment or elimination of educational programs may be necessary for reasons of financial exigency the following guidelines may be useful:
>
> 1. Consultation. Early in the process of making recommendations or decisions concerning program reduction, administrators and faculty policy groups should consult widely with their colleagues, students, and others in the college community. It is especially important that faculty members whose educational programs or positions may be adversely affected have an opportunity to be heard by those who will make the final decision or recommendation.

Specifically the *Bloomfield* trial court stated that the failure of the college to terminate non-tenure faculty first indicated a lack of good faith. While this is a useful standard which can be applied in future cases, the Commission on Academic Tenure in Higher Education has offered an important caveat:

> Although there is general agreement that in staff reductions the interests of the tenured faculty should normally predominate over the interests of those who are on term appointments, sometimes the quality of the educational program may be seriously compromised if that principle is automatically applied. Circumstances can be envisaged in

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2. Data and Documentation. Every effort must be made to determine the nature of the fiscal limitations and within those constraints to establish appropriate educational priorities. Careful documentation of the evidence supporting a staff reduction decision is essential. Appropriate financial information, student-faculty ratios, qualitative program and course evaluations, enrollment data, and other pertinent information should be used to support a case of financial exigency. Except for confidential material of a personal nature this information should be widely shared among the college community.

3. Timing. Institutions should provide as much lead time as possible in making financial exigency decisions. In cases where faculty appointments are to be terminated timely notice of termination or nonreappointment must be given. In extreme situations, if timely notice cannot be given, financial compensation to the faculty member proportional to the lateness of the notice may be an appropriate substitute for full notice.

4. Academic Due Process. When program reductions in response to financial exigency involve termination of faculty appointments special care must be taken to insure fairness and to protect and honor accepted procedures and rights appropriate to a faculty member's tenured or probationary status. Faculty members must have an opportunity to be heard by those who will make the staff reduction decisions and those decisions must be subject to review by the highest institutional authority. Care should be taken not to confuse termination because of financial exigency with a proceeding that might lead to dismissal for cause.

5. Elimination of a Faculty Position. If an appointment is terminated before the end of the period of appointment, because of financial exigency, or because of the discontinuance of a program of instruction, the released faculty member's place will not be filled by a replacement within a period of two years, unless the released faculty member has been offered reappointment and a reasonable time within which to accept or decline it.

6. Preferential Treatment. Tenured members of the faculty should normally be retained in preference to probationary appointees. This preferential status should include wherever possible an opportunity to transfer or readapt to other programs within the department or institution. If retention is not possible the institution should assume responsibility for assisting the faculty member in securing other employment. Preferential retention of tenured faculty should not, however, leave a reduced academic unit in the highly undesirable situation of lacking any probationary faculty. In some cases, tenured and probationary faculty may both have to be reduced.

7. Alternatives. Early retirement and transfer from full-time to part-time service may be acceptable alternatives to termination in some situations of financial exigency. However, such decisions should be governed by the same guidelines and procedural safeguards as those which result in termination.

ASSOCIATION OF AMERICAN COLLEGES, *Statement on Financial Exigency and Staff Reduction* (November 8, 1971).

> which it may be necessary to terminate a tenure appointment rather than a non-tenured one.[44]

The American Association of University Professors supports this position in its statement concerning operating guidelines for institutions with financial problems, recommending that the retention of a viable academic program is the highest priority when budget reductions are required.[45]

The *Bloomfield* court also argued that an institution cannot establish good faith unless faculty members are involved in the evaluation of any program changes.[46] The history of faculty participation in academic decisionmaking in American higher education suggests this would also be a useful criterion in evaluating bona fides.[47]

Finally the court stated that only extraordinary circumstances can justify expansion of staff during periods of financial stringency. Here again the court announces a principle which can be applied generally but is not without exceptions. It is possible to envision increasing enrollment pressure on a particularly popular program which might justify hiring new faculty if those being dismissed lacked the necessary expertise to fill the positions available. If such extraordinary circumstances did arise, the university should be required to attempt to place the affected faculty members in other suitable positions within the university in order to establish good faith.[48]

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[44] COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE 87 (1973).

[45] AAUP, *Policy Documents and Reports* 43 (1973).

[46] AAUP v. Bloomfield College, 129 N.J. Super. 249, 270, 322 A.2d 846, 857 (Ch. 1974).

[47] *See, e.g.*, J. CORSON, GOVERNANCE OF COLLEGES AND UNIVERSITIES (1960); H. MASON, COLLEGE AND UNIVERSITY GOVERNMENT (1972).

[48] A large number of colleges and universities have adopted the AAUP guidelines on tenure as part of their employment contracts. *See* note 8 *supra*. AAUP regulation 4(c) provides in part:

> Where termination of appointment is based upon financial exigency, or bona fide discontinuance of a program or department of instruction, Regulation 5 [dealing with dismissals for cause] will not apply . . . . In every case of financial exigency or discontinuance of a program or department of instruction, the faculty member concerned will be given notice as soon as possible, and never less than 12 months' notice, or in lieu thereof he will be given severance salary for 12 months. Before terminating an appointment because of the abandonment of a program or department of instruction, the institution will make every effort to place affected faculty members in other suitable positions. If an appointment is terminated before the end of the period of appointment, because of financial exigency, or because of the discontinuance of a program of instruction, the released faculty member's place will not be filled by a replacement within a period of two years, unless the released faculty member has been offered reappointment and a reasonable time within which to accept or decline it.

54 AAUP BULL. 448, 449 (1968).

Whether or not the "suitable position" requirement applied to cases of financial exigency was litigated in Browzin v. Catholic University, Civil No. 74-1474 (D.C. Cir., Dec. 8, 1975). The university had dismissed Browzin for reasons of financial exigency and within a two

A basic consideration underlying the inquiry into good faith is whether the reduction in the number of faculty was reasonably calculated to relieve the exigency. If staff reduction will have little or no effect on the institution's financial problems, the university may not be acting in good faith. Therefore, the administration must be able to show that it has developed a comprehensive plan to reorder financial obligations and reduce expenditures and that the elimination of some staff positions will contribute to that goal.

If challenged, the determination of the bona fides of a particular administrative action will necessarily depend on a case-by-case analysis. The requirement that dismissals for financial exigency must be done in good faith is nevertheless necessary to the protection of academic freedom.

Who Should Bear the Burden of Proof?

Because the concepts of bona fides and financial exigency escape concrete measure, the allocation of the burden of proof in a given case will be important. In an attempt to allocate the burden of proof, the court in the *Levitt* case adopted the standard of review normally applied to the decisions of administrative agencies.[49] According to this test, an administrative agency's decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable, and the agency's factual determinations must be accepted if supported by substantial, credible evidence.[50] Under this standard the faculty member would be required to show either that the college had acted in bad faith or that no condition of exigency existed.

The trial court in *Bloomfield* also stated that it would apply an administrative review standard "[e]xcept for policy differences touching upon the presumption of correctness and burden of proof . . . ."[51]

year period had filled new positions for which the plaintiff felt he was qualified. The lower court held that the "suitable position" rule did not apply to cases of financial exigency. The appeals court avoided the question by finding that the "suitable position" rule applied to discontinuation of a program of instruction. Since Catholic University chose to meet its financial exigency by terminating Browzin's program, the court held it must attempt to find a suitable position for him. The dismissal of the case was upheld on the grounds that the plaintiff failed to show that the university had not attempted to find a suitable position for him.

This leaves open the question of whether the "suitable position" rule applies to financial exigency. While the literal language appears to exempt exigency from the rule, reading the rule as a whole would suggest that it does apply and could be used as a measure of good faith.

[49] Levitt v. Board of Trustees, 376 F. Supp. 945, 950 (Neb. 1974).

[50] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 29.01–.02 (3d ed. 1972).

[51] AAUP v. Bloomfield College, 129 N.J. Super. 249, 267, 322 A.2d 845, 855 (Ch. 1974).

The defendant Bloomfield College was therefore required to prove that an exigency motivated the dismissal of the tenured faculty. Although these two courts purported to apply the same standard of review, they allocated the burden of proof to opposite parties.

The major advantage offered by the administrative review standard is that courts are familiar with its application from cases involving review of administrative agency decisions. The standard prevents de novo consideration by the courts, thus giving weight to the expertise of administrators and avoiding duplication of their efforts by the courts. Moreover, because the test does not provide rigid guidelines, courts would have some flexibility in the manner in which it is applied.

However, despite these advantages this standard does not seem appropriate when applied to a party directly involved in a contract dispute. The standard was developed for use in reviewing the decisions of supposedly independent agencies. Under the circumstances of these dismissal cases, a college board cannot be compared to an independent, objective factfinder whose decisions are entitled to a presumption of correctness. The *Bloomfield* court was apparently sensitive to these differences when it required Bloomfield College to affirmatively prove the existence of a financial exigency.[52]

Corbin suggests that a party who relies on the existence of a factor to discharge a contractual obligation should bear the burden of proof on that issue.[53] In these cases financial exigency, if proven, excuses the college from the performance of its contract duties, and thus the college should be required to establish an exigency. Placing this burden on the university officials seems reasonable in light of their ready access to and understanding of budget statements. Almost certainly, the university's budget officials will have already documented the financial problems for administrative purposes and could easily adapt such data for use in litigation. Conversely, it would be difficult for the faculty member to disprove an exigency without extensive and expensive pre-trial discovery.[54]

The college should not however also be required to show that its actions were in good faith. Because of the difficulty involved in negating charges of arbitrariness, it should be sufficient for the college to establish its prima facie case by showing that a financial exigency existed. The faculty member should then have the affirmative duty to show arbi-

[52] *Id.* at 268, 322 A.2d at 856.

[53] 5 A. CORBIN, CORBIN ON CONTRACTS § 1228 (1964).

[54] "The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." United States v. New York, N.H. & H. R.R., 355 U.S. 253, 256 n.5 (1957).

trary or capricious motive, according to the normal requirement that plaintiff assumes the burden of persuasion and production of evidence.[55]

CONCLUSION

In developing a definition of financial exigency, courts must balance the ability of educational institutions to cope with financial crises against the need to protect faculty from arbitrary dismissal. While the financial circumstances of each institution will present a new set of facts, these cases can be divided into two broad categories for purposes of analysis. The first would include schools suffering from a decline in enrollment as well as a loss of funds and the second would consist of schools where enrollment remains stable despite a fiscal crisis.

In the first group of cases, recovery may require a thorough reordering of priorities as well as a reevaluation of program offerings. An expansive definition of exigency is appropriate in these cases in order to maximize the ability of the college to avert financial collapse. A narrower definition of exigency is appropriate where enrollment is stable. Under these circumstances the immediate future of the institution would appear more secure and the college should be expected to dismiss faculty only as a "last resort."

Whether a given case calls for a broad or narrow definition of "exigency," the protection of academic freedom requires that the dismissal of any tenured faculty member in fact be related to the exigency. A requirement of good faith lessens the danger of an abuse of power, especially in cases where enrollment loss gives the administrator greater freedom of action.

Finally, courts must allocate the burden of persuasion as to the existence of a financial exigency and of a good faith dismissal. In view of the institution's reliance on the existence of a financial exigency as grounds for dismissal and its possession of the records necessary to prove such a condition, the institution should be required to prove that

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[55] *See* C. MCCORMICK, MCCORMICK ON EVIDENCE 786 (2d ed. E. Cleary 1972); 5 A. CORBIN, CORBIN ON CONTRACTS § 1228 (1964). *Cf.* Browzin v. Catholic University of America, Civil No. 74-1474 (D.C. Cir., Dec. 8, 1975) where the court upheld the assignment of the burden of proof to the plaintiff based on the failure of the plaintiff to raise objections at trial. The issue in that case was not whether the dismissal was bona fide but whether the university had attempted to place the dismissed faculty member in another suitable position within the institution. The court, while indicating that the plaintiff normally has the burden of proof on such an issue, nevertheless found "some merit" in the argument that the burden should have been on the defendant.

Contra, AAUP v. Blomfield College, 136 N.J. Super. 42, 346 A.2d 615 (App. Div. 1975).

an exigency actually existed. However, if the institution meets this burden, the faculty member should then be required to establish that he was dismissed for reasons other than financial exigency.

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