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## Negotiating Over Academic Freedom in Higher Education

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## **National Center for the Study of Collective Bargaining in Higher Education 42<sup>nd</sup> Annual National Conference, April 19- 21, 2015**

### **Research Panel: Negotiating Over Academic Freedom in Higher Education**

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References to academic freedom appear in most AAUP collective bargaining agreements, whether those contracts cover solely tenure-track faculty, non-tenure track faculty, or both.

#### Negotiability

The first question in negotiating academic freedom is how the applicable bargaining law may limit the union's ability to bargain over academic freedom. If an administration asserts that academic freedom is not a mandatory subject of bargaining and as a result refuses to address this topic at the table, union responses typically incorporate some combination of legal and political arguments. The specifics will vary by jurisdiction and the particular circumstances, but may include:

- That any restrictions on how a faculty member teaches and conducts research is an aspect of working conditions, and thus is a mandatory subject of bargaining;
- That pursuant to the law in almost every jurisdiction, the parties are permitted to incorporate permissive subjects of bargaining into a collective bargaining agreement, and the importance of academic freedom is such that it behooves the parties to define its parameters and to include appropriate protections in the collective bargaining agreement.

#### Enforcement considerations

A second line of defense for some administrations is that the topic of academic freedom may be addressed in the collective bargaining agreement, but it will not have the same status as other topics. So, for example, there may be an explicit statement that contract language dealing with academic freedom is hortatory only, and not enforceable through the contract's grievance procedure.

Alternatively, some collective bargaining agreements provide that academic freedom provisions may properly be the subject of a grievance, but are not arbitrable. Sometimes, contracts specifically cordon off "matters involving academic judgment", so that an arbitrator would be prohibited from either ruling on any allegation of an infringement of academic freedom, or ordering any remedial measures if a contract violation is found.

Some faculty collective bargaining agreements preserve full grievance and arbitration rights to challenge abridgements of academic freedom, including in the tenure process:

*Art. XXII, E. 3. Grievance of Tenure Decisions. If in the opinion of the candidate and the Association, the failure to recommend the award of tenure was, at any level, based substantially on the candidate's exercise of his/her constitutional rights or was due to a violation of this Agreement, the candidate may file a grievance at Step One of the Grievance Procedure (Article XVII). If the grievance proceeds to arbitration, the arbitrator's authority shall be limited to a determination of whether the alleged violation did occur.*

(Wayne State University, combined TT / NTT unit)

[note: academic freedom guarantees appear elsewhere in the contract.]

In the absence of full grievability and / or arbitrability, there may be an alternative forum enshrined in the collective bargaining agreement for airing academic freedom concerns:

#### *4.2.3.3 Academic Freedom Committee*

*The CSU-AAUP President and the CSU Chancellor shall jointly convene an Academic Freedom Committee[...] This Committee shall consist of[...] individuals[...] who are not employed at the University from which the allegation arises.*

xxx

*4.2.3.6 The Committee shall have the power to adjudicate substantive issues and to direct a remedy. A remedy may not be retroactive beyond the date of the incident that gave rise to the violation. The Committee's decision shall be final and binding upon all parties.*

(Connecticut State University, combined TT / NTT bargaining unit]

### Definitions

How academic freedom is defined is of great importance. Many contracts' strong affirmations of the importance of academic freedom derive directly from the AAUP's *1940 Statement on Principles of Academic Freedom and Tenure*. <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>

Contract language may simply mirror AAUP's, or there may be an explicit reference to AAUP policies:

*Article IV.C. All teachers (whether faculty or not) will enjoy academic freedom as set forth in the Association of American Colleges - American Association of University Professors' 1940 Statement of Principles on Academic Freedom and Tenure, and in no case will dismissal be used to restrain their exercise of academic freedom or other rights of American citizens.*

(Bard College, combined TT / NTT bargaining unit]

Also:

*Article VII: Academic Freedom. The University and the Union subscribe to the following principles of full academic freedom for all members of the University community.*

*a. Academic freedom is the right to engage in research, scholarship and other creative work and in the publication of the results, subject to the adequate performance of his/her academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.*

*b. The faculty member is entitled to freedom in the classroom in teaching and discussing his/her subject, but he/she should be careful not to introduce into his/her teaching controversial matter that has no relation to his/her subject.*

(Adelphi University, combined TT / NTT bargaining unit)

Also:

*Article 9, 2.1 The University, the BGSU-FA, and all Bargaining Unit Faculty Members (tenure track and non-tenure track) shall respect each Bargaining Unit Faculty Member's academic freedom to teach, both in and outside the classroom; to conduct research; to produce creative work; to engage in other scholarly activities, and to publish or otherwise disseminate the ideas and results.*

(Bowling Green State University, combined TT / NTT bargaining unit)

Also:

*Article 6, Academic Freedom and Responsibility, 6.1 The University and United Academic-Adjuncts agree that academic freedom is essential to the mission of the University and that providing an environment of free and honest inquiry is essential to its functioning. Nothing contained in this Agreement shall be construed to limit or abridge any unit member's academic freedom.*

(University of Alaska, combined TT/ NTT bargaining unit)

Also:

*Article 4, Academic Freedom, 1, 3. A lecturer is entitled to academic freedom in the classroom to teach effectively his/her subject consistent with the academic requirements of the University. In addition, he/she may present in his/her teaching various scholarly views as long as those views are related and relevant to the subject being taught. " ... "However, a lecturer who believes he/she was disciplined in violation of his/her academic freedom can file a grievance under Article 9, Discipline.*

(Suffolk University, NTT bargaining unit)

Also:

*Article X. Academic Freedom*

*A. It is the policy of the University to maintain and encourage full freedom within the law of inquiry, discourse, teaching, research, and publication and to protect any member of the non-tenure track system bargaining unit against influences, from within or without the University, which would restrict the member's exercise of these freedoms in the member's area of scholarly research and interest.*

*B. As a citizen, a faculty member may exercise the same freedoms as other citizens without institutional censorship or discipline. A faculty member should be mindful, however, that accuracy, forthrightness, and dignity befit association with the University and a person of learning, and that the public may judge that person's profession and the University by the individual's conduct and utterances.*

*C. A faculty member who believes that he or she does not enjoy the academic freedom which it is the policy of the University to maintain and encourage shall be entitled to a hearing on written request before the Committee on Academic Freedom and Tenure of the campus senate. Such hearing shall be conducted in accordance with established rules of procedure. The committee shall make findings of facts*

*and recommendations to the president and, at its discretion, may make an appropriate report to the senate. The several committees may from time to time establish their own rules of procedure.*  
(University of Illinois at Chicago, NTT bargaining unit)

### “Rights and responsibilities”

Issues arise when contract language delineating professional responsibility is included alongside language protecting academic freedom. The substance of language addressing “rights and responsibilities” is, ironically enough, often drawn directly from AAUP pronouncements, such as the *1940 Statement’s* admonition that faculty “should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.” While this passage was never intended to curtail academic freedom (see footnote 4 of the *1940 Statement*), it can be applied out of context in attempts to limit faculty expression. Strong efforts are often made at the bargaining table to resist such language appearing in the contract in inappropriate ways. Arguments include:

- That such language is intended to be a counsel of prudence, rather than an absolute requirement;
- That such guidelines are more appropriately included in institution-wide policies, rather than in a document that establishes rules that may lead to disciplinary action.

### Procedural protections

Some contracts do not spell out the parameters of academic freedom, but do address it in a procedural context. So, for example, there may be express contractual limitations on discipline for exercise of academic freedom.

### Unsettled aspects of the right to expression

Contract language on academic freedom has adapted and expanded to accommodate the rise of new communications technologies. So, for example, parties have found it prudent to specify that academic freedom applies to the voicing of views in digital, as well as traditional, media:

*Article 9, Section 2... The principles of academic freedom and freedom of inquiry shall be interpreted to include freedom of expression in both traditional print and newly emerging electronic formats such as the creation of digital images, web sites, or home pages.*  
(University of Akron, combined TT/ NTT bargaining unit)

Also:

*Article IV, Academic Freedom and Responsibility, Section 2...The principles of academic freedom and freedom of inquiry shall be interpreted to include freedom of expression in both traditional print and newly-emerging electronic formats such as the creation of digital images, web sites, or homepages... [Members of the bargaining unit] are entitled to freedom in the classroom (including the virtual classroom)...*  
(Kent State University, NTT bargaining unit)

Finally, parties have crafted contract language designed to clarify the unsettled area of law arising out of the 2006 decision in *Garcetti v. Caballos*. In that case, the U. S. Supreme Court allowed a Los Angeles district attorney's office to discipline a deputy district attorney for having criticized his supervisors' actions. The Court ruled that when public employees speak "pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

The majority opinion in *Garcetti* expressly left open whether its ruling should apply to "speech related to scholarship and teaching" in public colleges and universities. And, in fact, Justice Souter's dissenting opinion expressed his hope that the decision "does not mean to imperil First Amendment protection of academic freedom in public colleges and universities..." But *Garcetti* did open the door to possible significant restrictions of the scope of faculty speech that enjoys legal protection, and some subsequent federal court decisions have indeed relied on this case to restrict Constitutional protections for faculty speech.

So, unless and until this matter is resolved decisively in the courts, it behooves the parties to a collective bargaining relationship to include contract language that delineates the specific protections afforded faculty speech relating to institutional academic matters and governance.

Examples of such language include:

*Article 5, Academic Freedom, Free Speech and Faculty Responsibility, Preamble. This policy establishes a robust view of academic freedom and freedom of speech in order to ensure that faculty have the freedom to conduct research, to teach, to engage in internal criticism, and to participate in public debate.*

(University of Oregon, combined TT / NTT bargaining unit)

*Article 2, Purpose. Academic freedom also encompasses the freedom to address any matter of institutional policy or action whether or not as a member of any agency of institutional governance."*

(University of Delaware, combined TT / NTT bargaining unit)

Also:

*Article 5, Academic Freedom and Professional Responsibilities, 5.1.3 Academic freedom is the freedom to teach, both in and outside the classroom; to conduct research and to publish, display or perform the results of those investigations; and to address any matter of institutional policy or action whether or not as a member of an agency of institutional governance."* (Wright State University, NTT bargaining unit)

Note as well that because of the unsettled state of law in this area and other factors, an administration's claim that general "First Amendment free speech protections" will suffice to protect faculty speech is usually rejected out of hand. (Of course, for institutions in the private sector, First Amendment protections do not come into play.)

In any event, specific contractual protections for academic freedom are essential elements of academic collective bargaining agreements. Supplementing these with provisions encompassing statutory or constitutional protections is all to the good, of course:

*Article 5, Academic Freedom, Free Speech and Faculty Responsibility, Section 3. All bargaining unit faculty members are guaranteed the protections of freedom of speech, as derived from the First Amendment of the Constitution of the United States of America and Section 8 of the Article I of the Constitution of the State of Oregon.”*

(University of Oregon, combined TT / NTT bargaining unit)