

September 2016

Panel: Collective Bargaining Issues Concerning Post-Doctorates

Karen Rosenberg
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Recommended Citation

Rosenberg, Karen (2016) "Panel: Collective Bargaining Issues Concerning Post-Doctorates," *Journal of Collective Bargaining in the Academy*: Vol. 0, Article 71.

Available at: <http://thekeep.eiu.edu/jcba/vol0/iss11/71>

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**NATIONAL CENTER FOR THE STUDY OF COLLECTIVE
BARGAINING IN HIGHER EDUCATION AND THE PROFESSIONS**

43RD ANNUAL NATIONAL CONFERENCE – APRIL 5, 2016

**DISCRIMINATION AND HARASSMENT ISSUES IN HIGHER
EDUCATION: DISCIPLINING AND REMOVING TENURED FACULTY
FOR SEXUAL MISCONDUCT**

**Jill L. Rosenberg
jrosenberg@orrick.com
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 W 52nd Street
New York, NY 10019**

Telephone: 212-506-5215

www.orrick.com



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DISCIPLINING AND REMOVING TENURED FACULTY FOR SEXUAL MISCONDUCT

I. INTRODUCTION

The spate of recent headlines featuring high profile faculty members accused of sexual misconduct directed towards employees and/or students, sometimes repeatedly and over the course of employment at multiple institutions, has put a spotlight on universities' processes for disciplining and terminating tenured faculty. In September 2015, the California Institute of Technology suspended theoretical astronomer Christian Ott for one year after concluding an investigation into two Title IX complaints filed by graduate students.¹ In October 2015, astronomer Geoffrey Marcy resigned from the University of California at Berkeley after he was found to have repeatedly violated the university's anti-sexual harassment policy for over a decade.² In January 2016, in a speech on the floor of the U.S. House of Representatives, Rep. Jackie Speier (D., California), called out astronomy professor Timothy Slater's violations of sexual harassment policies while at the University of Arizona, which did not apparently prevent him from receiving an endowed chair at the University of Wyoming a few years later.³ In February 2016, Jason Lieb, a prominent molecular biologist, resigned from the University of Chicago after the university recommended that he be fired for making unwelcome sexual advances towards multiple female graduate students at an off-campus retreat and then engaging in sexual activity with a student incapacitated from alcohol and unable to consent.⁴

Dr. Marcy's case is of particular interest. After the most recent complaints about his behavior surfaced, Berkeley placed him on probation for five years, warning him that he could be suspended for a semester without pay if he touched his students, other than to shake their hands. Berkeley admitted that the complexity of the procedures necessitated by more formal discipline had deterred it from seeking harsher punishment: "Discipline of a faculty member is a lengthy and uncertain process. It would include a full hearing where the standards of evidence that would be used are higher than those that are applied by the Office for the Prevention of Harassment and Discrimination (OPHD) in the course of its investigations. The process would also be subject to a three-year statute of limitations."⁵ Dr. Marcy only resigned amidst an uproar in the astronomy community against Berkeley's failure to take more substantial action.

¹ Jeffrey Mervis, *Caltech suspends professor for harassment*, *Science*, Jan. 12, 2016, available at: <http://www.sciencemag.org/news/2016/01/caltech-suspends-professor-harassment-0> (last accessed Feb. 25, 2016).

² Sarah Brown, *Why Colleges Have a Hard Time Handling Professors Who Harass*, *The Chron. of Higher Ed.*, Oct. 22, 2015.

³ Robin Wilson, *Lawmaker Calls Out a Professor — and Colleges — on Sexual Harassment*, *The Chron. of Higher Ed.*, Jan. 15, 2016, available at: <http://chronicle.com/article/Lawmaker-Calls-Out-a-Professor/234938> (last accessed Feb. 29, 2016).

⁴ Amy Harmon, *Chicago Professor Resigns Amid Sexual Misconduct Investigation*, *The N.Y. Times*, Feb. 2, 2016.

⁵ Letter from Nicholas B. Dirks, Chancellor of University of California at Berkeley, and Claude Steele, Executive Vice Chancellor and Provost, *A message about Professor Marcy's resignation*, *Berkeley News*, Oct. 4, 2015,



Against this backdrop of heightened scrutiny, higher education institutions must ensure they have the right policies and procedures in place to take appropriate action when allegations of such misconduct arise. This paper will provide a brief overview on the development of tenure and focus on revocations of tenure for cause based on sexual harassment and related misconduct, the applicable procedural rights and the nature of judicial review of tenure revocation decisions.

II. OVERVIEW OF THE HISTORY AND DEVELOPMENT OF TENURE

Academic tenure developed in response to attempts to silence the expression of teaching and ideas deemed offensive to important benefactors and other economic or religious interests toward the close of the nineteenth century. These incidents led groups of academics to discuss the issue, to a greater level of professional organization, and ultimately to the promulgation of 1940 General Report on Academic Freedom and Academic Tenure of the American Association of University Professors (“AAUP”). The AAUP standards set forth in the report have had a great influence in the evaluation of, if not always the exact determination of, subsequent controversies over tenure in individual cases and institutions.

Academic freedom, and its corollary, academic tenure, have acquired a constitutional dimension, rooted in the First Amendment to the Constitution of the United States. In *Sweezy v. New Hampshire*, 354 U.S. 234 (1956), in which a professor had been cited for contempt for refusing to testify in a subversive activities investigation about his knowledge of the Progressive Party and people in it, the Court said:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id., p. 250. The Court further defined the four essential freedoms of a university as the rights “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Id.*, p. 263.

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), in which faculty members sought to enjoin their dismissal for violation of a state law requiring them to certify they were not members of the Communist Party, the Court added:

available at: <http://news.berkeley.edu/2015/10/14/a-message-about-professor-marcys-resignation/> (last accessed Feb. 29, 2016).



Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Id., p. 603.

Notwithstanding Justice Brennan's remarks in *Keyishian* about the sanctity of the classroom, the institutional prerogatives recognized by the Court in *Sweezy* have an obvious relationship to tenure issues. More importantly, taken together, these decisions recognize as protectible rights to academic freedom both the individual faculty member's right to follow scholarly inquiry wherever it leads and to teach, write and speak accordingly, and the institution's right to define itself, set its educational mission and maintain the integrity of an educational environment of free and open inquiry. There is a perpetual potential conflict inherent between these correlative rights. In situations in which the conflict becomes actual, the courts are often called upon to determine whose rights shall prevail. In the typical situation, the institution's primacy will be vindicated as long as it is not transgressing a clear constitutional right, such as the faculty member's freedom of speech to comment on matters of public concern.

In academic employment in public institutions, moreover, the Fourteenth Amendment to the Constitution of the United States is a source of protection of certain employment rights. To the extent a person has a clear claim of entitlement to his employment rights, the courts, under the Fourteenth Amendment, recognize a property interest that cannot be infringed without due process of law. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694 (1972). In addition to property rights, under the Fourteenth Amendment, a public employee has rights to liberty protected by due process where his good name, reputation, honor or integrity may be publicly damaged by the employer's actions or where his freedom to pursue other employment is foreclosed because of a stigma imposed upon him by his employer. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Academic tenure, therefore, is rooted in, and its contours are shaped by, considerations of academic freedom, and, in the public university context, by specific constitutional protections. It is also defined in both public and private employment by principles of contract law. Contractually binding limitations, both substantive and procedural, on the freedom of the institution to revoke tenure can be found expressly written in the faculty member's contract of employment. Often, however, the faculty employment contract will simply be a short-form agreement that purports to engage the faculty member for a period of time. The short-form agreement may, however, and often does, refer to or specifically incorporate by reference other documents that themselves contain language limiting the institution's freedom to revoke tenure and setting terms and conditions for doing so. These other documents may include such items as the institution's academic statutes or other governing regulations, a faculty handbook or manual, a collective bargaining agreement, or various memoranda of understanding. Any of these documents may make specific or casual reference to, or even expressly adopt, statements of principles or guidelines of outside organizations, such as those of the AAUP. In addition to express or incorporated contractual limitations, the faculty member faced with an effort to revoke



his or her tenure may be able to cite and rely upon testimony or other evidence of past precedent, custom or tradition at the institution to limit the institution's freedom to revoke tenure.

The most well-known and widely referred to external criteria limiting institutional freedom to revoke tenure are the Statement of Principles on Academic Freedom and the Statement of Principles on Academic Tenure developed out of the AAUP's 1940 General Report on Academic Freedom and Academic Tenure. The AAUP's Statement of Principles on Academic Freedom is often regarded as definitive:

- (a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
- (b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter, which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
- (c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence, he 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 he is not an institutional spokesman.

27 AAUP Bull. 40 (1941).

The purpose of tenure is to protect academic freedom. *Grimes v. Eastern Ill. Univ.*, 710 F.2d 386, 388 (7th Cir. 1983). Therefore, these AAUP principles of academic freedom work in tandem with and support the AAUP's Principles on Academic Tenure, also based upon the 1940 General Report, which are as follows:

- (a) After the expiration of a probationary period, teachers or investigators should have *permanent or continuous* tenure, and their service should be terminated *only for adequate cause*, except in the case of retirement for age or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

- (1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.



(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education, but subject to the proviso that when – after a term of probationary service of more than three years in one or more institutions – a teacher is called to another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person’s total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.

(4) *Termination for cause of a continuous appointment*, or the dismissal for cause of a teacher, previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

AAUP Bull. 40 (1941) (emphasis added).

Under these provisions, faculty members with tenure are considered to have a right to continuous employment that is terminable only for good cause or for bona fide financial exigency (the provisions regarding retirement for age having been superseded by the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621, *et seq.*), and its correlative state law enactments). In addition, under these provisions, tenure may be revoked only through a decision-making process that involves the faculty and affords the object of the proceeding rights to notice, an opportunity to be heard in his own defense, the assistance of counsel, and a record of the proceedings. The extent to which these elements are required by private institutions will vary, with the primary focus of a reviewing court being whether the institution in any particular case has followed the procedures it has bound itself to follow. In a public institution, these elements may be seen as representative of constitutional requirements of fundamental substantive and procedural due process.



III. NATURE AND EXTENT OF THE TENURE RIGHT

a. Public institutions

The tenure revocation activities of public institutions constitute state action. Therefore, the constitutional limitations upon interference with tenure rights will apply directly to such institutions with full force. Public institutions also, however, will be subject to contractual limitations and to implied standards, depending upon how the institution has conducted itself and what it has done in the past.

i. First Amendment

Pickering v. Board of Education, 391 U.S. 563 (1968): *Communication by teacher to a newspaper as a citizen was protected by the First Amendment.*

The teacher had been dismissed because of a letter he had written to the editor of the local newspaper. The letter castigated the school board's financial plans. The defendant school board argued that the letter was disruptive and would cause turmoil and inefficiency among the faculty. The Supreme Court rejected the school board's arguments.

Connick v. Myers, 461 U.S. 138 (1983): *Public employee's questionnaire to fellow employees asking for their opinions about staff morale, leadership and procedures in the office and supporting political candidates not protected by First Amendment.*

In this case, not an education case but seminal for First Amendment law applicable to all public employees, including faculty of public institutions, the employee, an assistant district attorney, had sent a questionnaire to her co-employees about issues and matters internal to the operations of the office under the district attorney, a political official. She was discharged for insubordination and disruption of the office. The Court held that her speech was a matter of personal interest, concerning her own gripes and dissatisfactions with her employment, and not about any matter of public concern. The Court, in upholding the termination, said: "[W]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without administrative oversight by the judiciary in the name of the First Amendment. *Id.*, p. 146.

Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989): *Collusion between student, who may have cheated and presented false medical excuses, and dean to force professor to raise student's grade and eventual termination by state university constituted a violation of the professor's First Amendment rights.*

Parate was not tenured, and the court refused to hold actions by his supervisors, such as criticizing his teaching methods, giving him low performance evaluations, and interrupting and taking over his classes in front of him to be violations of academic freedom. However, the court found that the attempt to force Parate to change the student's grade was a First Amendment



violation because the assignment of a letter grade is a symbolic communication to the student and a special prerogative of a professor that has First Amendment protection.

Jeffries v. Harleston, 828 F. Supp. 1066 (S.D.N.Y. 1993), *aff'd in part and vacated in part*, 21 F.3d 1238 (2d Cir. 1994), *certiorari granted and judgment vacated*, 115 S. Ct. 502 (1994), *on remand* 52 F.3d 9 (2d Cir. 1994): *Professor may be disciplined or fired for speaking even on a matter of public concern if the employer reasonably predicts the speech will be disruptive, the potential disruptiveness outweighs the value of the speech and the action against the professor is taken because of the expected disruption and not in retaliation for the content of the speech.*

Jeffries was chairperson of the black studies department at the City College of New York. At an off-campus symposium on black culture, where he was a principal speaker, he made derogatory remarks about Jews in his address. Because of the remarks and the ensuing controversy on campus and in the community, CCNY reduced Jeffries' term as department chairperson from the normal three years to one year. Jeffries sued, alleging violation of his First Amendment rights. The trial court found a First Amendment violation, holding that the speech was substantially on matters of public concern and caused no significant actual harm to the school. The trial court ordered reinstatement and also awarded punitive damages. On appeal, the United States Court of Appeals for the Second Circuit upheld the reinstatement order but vacated the punitive damage award. The United States Supreme Court, on certiorari, vacated the Second Circuit decision and remanded for reconsideration in light of *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878 (1994). On remand, the Second Circuit held *Waters* to allow discipline or termination for protected speech, that is speech on a matter of public concern, if "(1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on the disruption and not in retaliation for the speech." *Jeffries*, 52 F.3d 9, 13 (2d Cir. 1994). On remand, then, the Second Circuit held there was no violation of First Amendment rights because the CCNY officials reduced Jeffries' term because they reasonably expected that his speech would harm the school. Moreover, the court noted, the school, in reducing the term of his chairmanship, had made no effort to silence Jeffries, to interfere with his classroom teaching or to revoke his tenure.

Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992): *Chilling effect on free speech imposed by dean's creation of shadow section of professor's class to allow escape for students offended by professor's views violated First Amendment.*

Levin was a tenured professor at the City College of New York. He wrote a letter to the New York Times, a book review published in an Australian journal, and a letter published in the American Philosophical Association Proceedings. These writings contained a number of denigrating comments about the intelligence and social characteristics of Blacks. They aroused a critical response. Levin's dean then created an alternative section of the basic philosophy course taught by Levin so that those of Levin's students who wanted to transfer out could do so. The dean wrote to Levin's students, so informing them. None of the students had actually complained about unfair treatment on the basis of race. Although the school contended that it



had created the alternative sections because Levin's expression of his theories outside the classroom harmed the students and the educational process in the classroom, the court was unable to find any evidence that this was a factually valid concern. Indeed, the court found the school's "encouragement of the continued erosion in the size of Professor Levin's class if he does not mend his extracurricular ways [to be] the antithesis of freedom of expression." *Id.*, p. 88. The court therefore sustained an injunction against creation or maintenance of the parallel sections predicated solely upon Levin's protected expression of ideas. The court did not sustain the district court's injunction relating to threatening behavior of the president of CCNY in constituting a special committee to review whether Levin's tenure should be revoked, because the committee finally recommended no disciplinary action be taken and none was pending or likely at that point. However, the Second Circuit did issue a declaratory judgment that disciplinary proceedings, or the threat of them, predicated solely upon Levin's continued expression of his views outside the classroom was a First Amendment violation. Finally, the court declined to find a violation of constitutional rights in the school's claimed failure to prevent student disruptions of Levin's classes, saying there was no evidence the college treated student demonstrations directed at Levin any differently from other student demonstrations.

Saleh v. Upadhyay, 11 Fed. Appx. 241 (4th Cir. 2001) (designated unpublished by the circuit): *Threat to revoke tenure for presentation of paper to university's board of visitors charging a campus-wide campaign of racial discrimination in administrative and employment decisions, which qualifies as a matter of public concern, is tantamount to a threat of dismissal and is prohibited retaliation for the exercise of First Amendment rights.*

Saleh was a tenured professor at Virginia State University (VSU). He had come been recruited to VSU to establish a research facility and was not initially required to teach classes. In 1993, the Board of Visitors of VSU hired Moore as President of VSU and charged him with reforming VSU's finances. Moore hired Dawson as University Provost and Lyons as Dean of the School of Agriculture. The Legislature then issued a restructuring mandate to all state-sponsored schools requiring elimination of wasteful expenditures. Moore eliminated Saleh's research facility as a cost-cutting measure and transferred Saleh to a full-time teaching appointment. On July 6, 1995, Saleh and another professor presented a paper to a Board of Visitors meeting. The paper alleged acts of discrimination against white and foreign-born VSU faculty, and almost all of the acts were alleged to have been directed by Dawson and Lyons. The paper was discussed in a meeting of VSU's faculty council, in which a professor and former dean challenged Saleh's tenure. Moore then raised the issue with the Board of Visitors as to whether Saleh had properly ever been awarded tenure by the Board. The board determined, however, that Saleh did, in fact have tenure. Saleh found out about this in a threatening conversation directly with Moore in December 1995. Saleh sued for damages for retaliation against him for the making of his presentation to the Board of Visitors, charging systemic discrimination and received a verdict. The Fourth Circuit held that the presentation to the Board of allegations of a campus-wide campaign of racial discrimination in administrative and employment decisions qualified as a matter of public concern. It then held that the threat to revoke his tenure was sufficiently adverse to chill a reasonable person's willingness to exercise First Amendment rights to comment on matters of public concern and supported the award of



damages to him. The court also held that the restriction of Saleh's salary raises for three subsequent years by Lyons and Dawson and a report of Saleh to the state police on purported fraud allegations by Moore were adverse employment actions that chilled Saleh's First Amendment rights in retaliation for Saleh's accusations of racial discrimination against them in the Board presentation, and that a reasonable jury could so find.

As discussed below, disciplining or discharging faculty employed by public institutions based on classroom speech implicates First Amendment concerns. A plaintiff advancing a First Amendment claim must demonstrate that (1) his classroom speech was constitutionally protected and (2) the speech was a motivating factor in the decision to discipline him. *Silva v. University of New Hampshire*, 888 F. Supp. 293, 312 (D.N.H. 1994) (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). Thereafter, the defendant must show that it would have acted in the same manner even in the absence of the protected speech. *Id.*

Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996): *College's sexual harassment policy was unconstitutionally vague as applied to professor's use of profanity.*

Cohen was an English professor who used shock tactics to stimulate his students' thinking about controversial subjects, including obscenity, cannibalism, and consensual sex with children, and he assigned papers on subjects such as pornography. He was often vulgar and profane in the classroom. Some of his students made complaints to the administration of sexual harassment, based not only upon his remarks in class, but also upon claimed leering behavior and sexual offers to students. The faculty grievance committee held a hearing and found that Cohen had violated the sexual harassment policy by creating a hostile learning environment. Cohen was directed to rectify his behavior, attend a sexual harassment seminar and undergo a formal evaluation procedure of his teaching performance. The district court rejected his First Amendment challenge to the institution's sexual harassment policy; the court noted that the use of an obscenity for an educational purpose and the discussion and assignment of controversial topics were protected by principles of academic freedom and the First Amendment, and that Cohen's assignments and commentary in that connection did relate to matters of public concern and were protected, but it also found that profanity was not speech on matters of public concern and was therefore not eligible for First Amendment protection. 883 F. Supp. 1407 (C.D. Cal. 1995). Even as to Cohen's teaching tactics that were protected, the district court held, the protected right to engage in them had to be balanced against the disruption to the educational process they created. In the balance, the court held that the discipline imposed was not an unconstitutional infringement. *Id.*

The Ninth Circuit, however, reversed after finding that the college's "Policy is simply too vague as applied to Cohen in this case. Cohen's speech did not fall within the core region of sexual harassment as defined by the Policy. Instead, officials of the College, on an entirely ad hoc basis, applied the Policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years. Regardless of what the intentions of the officials of the College may have been, the consequences of their actions can best be described as a legalistic ambush. Cohen was simply without any notice that the Policy would be applied in such a way as to punish his



longstanding teaching style—a style which, until the College imposed punishment upon Cohen under the Policy, had apparently been considered pedagogically sound and within the bounds of teaching methodology permitted at the College.” 92 F.3d 968, 972 (9th Cir. 1996)

Silva v. University of New Hampshire, 888 F. Supp. 293 (D.N.H. 1994): *Tenured professor’s sexually-explicit lessons were deemed protected speech not prohibited by sexual harassment policy.*

Silva was a tenured professor who taught a technical writing class in which he analogized certain writing concepts to sexual acts, and, in explaining how to craft a good definition of belly dancing, referenced jello on a plate with a vibrator under the plate. Several students complained about these statements and the school initiated a formal hearing process pursuant to its sexual harassment policy which concluded with a recommendation that Silva be suspended for one year without pay, and required to pay for costs associated with any alterations in his teaching assignments and to participate in counseling sessions, among other things. Silva sued the university alleging a First Amendment violation. In identifying the existence of protected speech, the court examined whether he had notice that his speech was prohibited. Finding that the complainants “were under the mistaken impression that the word ‘vibrator’ necessarily connotes a sexual device,” the court held that Silva’s speech was not sexual in nature and that the university had disciplined him under its sexual harassment policy erroneously. 888 F. Supp. at 312-13.

Next the court analyzed whether the university’s regulation of his speech was reasonably related to legitimate pedagogical concerns by considering the “age and sophistication of the students, the closeness of the relation between the specific technique used and the concededly valid educational objective, and the context and manner of presentation.” *Id.* at 312 (quoting *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971)); *also citing Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Finding that the students were adult age, that Silva’s statements “advanced his valid educational objective of conveying certain principles related to the subject matter of the course[,]” and that the statements were made in a professionally appropriate manner, the court concluded that “the USNH Sexual Harassment Policy as applied to Silva’s classroom speech is not reasonably related to the legitimate pedagogical purpose of providing a congenial academic environment because it employs an impermissibly subjective standard that fails to take into account the nation’s interest in academic freedom.” 888 F. Supp. 293, at 313.

The court also rejected the defendants’ argument that Silva’s speech was not related to any matter of public concern and thus not protected:

The evidence before the court demonstrates that Silva’s classroom statements were not statements “upon matters only of personal interest,” but rather were made for the legitimate pedagogical, public purpose of conveying certain principles related to the subject matter of his course. Further, the content, form, and context of said statements demonstrate that they are directly related to (1) the preservation of academic freedom and (2) the issue of whether speech which is offensive to a particular class of individuals should be tolerated in American



schools. Accordingly, the court finds and rules that Silva’s classroom statements were related to matters of public concern.

888 F. Supp. at 316.

Finally, the court found that Silva’s classroom speech was a motivating factor behind his discipline and that defendants would not have acted in the same manner in the absence of said statements.

ii. Fourteenth Amendment

The Fourteenth Amendment to the Constitution of the United States is the source in public employment of rights to substantive and procedural due process. Protection under the Fourteenth Amendment requires the plaintiff to demonstrate that there has been, or that there is threatened, a deprivation of a recognized property or liberty interest.

1. Property interests

To the extent a public institution faculty member has a clear claim of entitlement to his employment rights, a property interest is recognized as a matter of substantive due process that cannot be infringed without due process of law. *Perry v. Sindermann*, 408 U.S. 593 (1972). A property interest exists for due process purposes “if there are such rules or mutually explicit understandings that support [the] claim of entitlement to the benefit and that [the claimant] may invoke at a hearing.” *Id.*, p. 601. However, only property rights that would be denied in violation of the Constitution of the United States, not under state law, are protected by substantive due process. *University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985). The denial of tenure to one who does not have it is not the infringement of a property right. *See, e.g., Sharf v. Regents of the University of California*, 234 Cal. App. 1393, 1407, 286 Cal. Rptr. 227 (1991); *but see Smith v. S. Maine Comm. Coll.*, 2005 WL 2716529 (Sup. Ct. Me. May 31, 2005) (finding that a non-tenured professor has a property interest in the duration of his employment contract). Revocation of tenure that has been granted, however, does affect a constitutionally protected property interest. Such an action can, as a matter of substantive due process, be taken only for just cause. *See Collins v. Marina-Martinez*, 894 F.2d 474, 479 (1st Cir. 1990).

2. Liberty interests

Constitutional liberty interests are invaded “where a person’s good name, reputation, honor or integrity are at stake because of what his government is doing to him,” and where the state has “imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.” *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). Hence, the creation of “shadow classes” to undermine the enrollment in sections taught by a professor who espoused and published offensive racial theories of intelligence was held to have been done with the intent and consequence of stigmatizing the professor solely because of his expression of ideas. *Levin v. Harleston*, 966 F.3d 85, 88 (2d Cir. 1992).



3. Procedural due process

Where constitutional property or liberty interests of public institution faculty members would be infringed by the actions of an educational institution, such action cannot be taken validly without affording procedural due process. Procedural due process requires at a minimum reasonable notice of the reasons and grounds for the proposed infringement, a hearing before an impartial decision-maker, and an a reasonable opportunity for the faculty member to prepare and present a defense. *Mathews v. Eldridge*, 424 U.S. 319, 332-333 (1976).

iii. Contract

The principles of contract law are an additional source of tenure rights in public institution academic employment. The greatest development of tenure rights as rooted in contract principles has occurred in private institutions, probably because the state action necessary to support constitutional protections for academic freedom is usually not available there. With public institutions the record is more mixed.

1. Handbooks, manuals, institutional bylaws and regulations⁶

Trustees of Indiana University v. Cohen, 910 N.E.2d 251 (Ind. Ct. App. 2009):
Faculty handbooks and ethics codes implicitly were incorporated into tenured professor's employment agreement.

Indiana University initially hired Cohen as chancellor of its campus in South Bend, Indiana. Following allegations that he had forcibly kissed and groped a female employee, Cohen agreed to resign as chancellor and continue employment under the auspices of a letter agreement which provided that he would serve as a “Professor of Physics, with tenure with the rights and responsibilities attendant to that position. ... Any future proven act of sexual harassment or retaliation by Dr. Cohen ... will be considered serious personal misconduct and will result in immediate steps to dismiss Dr. Cohen from the faculty.” 910 F.2d at 252. Subsequently, a student complained that Cohen had discriminated against her on the basis of her gender, religion, as well as sexually harassed and retaliated against her; several other students complained that Cohen behaved inappropriately by cursing and ridiculing them; and Cohen published a letter to the editor of a local newspaper stating that women who complain of sexual harassment were ugly. After the first complainant submitted a further complaint about Cohen’s intimidating behavior, a tenure revocation hearing was held and it was concluded that he had engaged in serious personal misconduct and violated the Code of Academic Ethics. Dismissal was recommended. Cohen argued that he was not subject to the code of ethics (or any of the other standards of conduct found in various faculty handbooks) because they were not expressly

⁶ The AAUP has prepared an overview of cases concerning the legal status of faculty handbooks on a state by state basis. See *Faculty Handbooks as Enforceable Contracts: A State Guide*, available at <http://www.fmp.hawaii.edu/publications/FacultyHandbooksEnforceableContracts.pdf> (last accessed on March 9, 2016).



referenced in his letter agreement. However, the court disagreed and upheld the discharge, stating that “[t]he language [in the letter agreement] does not in any way limit Cohen’s responsibilities under the University’s faculty handbooks. The clause at issue in Paragraph 3 reveals the parties’ intent that Cohen be responsible for fulfilling those obligations which he would have been required to fulfill had he been a professor at the University whether or not he entered into the Agreement. The responsibilities of members of the faculty at the University are set forth in the University’s faculty handbooks.” 910 N.E.2d at 258.

Goodkind v. University of Minnesota, 417 N.W.2d 636 (Minn. 1988): *School constitution was not incorporated into the contract of a tenured professor.*

Goodkind was a tenured professor who applied unsuccessfully to be department chairman. The court held that provisions in the school’s constitution referring to the hiring of department chairs were only general policy statements.

Garrett v. Mathews, 625 F.2d 658 (5th Cir. 1980): *Provisions of faculty handbook governing discharge of tenured faculty for cause were incorporated into the plaintiff’s employment contract.*

Plaintiff was a tenured professor at the University of Alabama. His department brought charges against him for insubordination and dereliction of duty. The charges were referred to a faculty hearing committee consisting of tenured faculty members selected at random. Plaintiff was given notice of the charges against him and had opportunity to respond to the charges. The faculty handbook was deemed part of the contract of employment. The committee found the plaintiff guilty of several of the charges but found that those offenses were not sufficiently serious to warrant dismissal. It recommended instead that tenure be revoked and status reconsidered after a year. The plaintiff appealed to the board of trustees, which accepted the committee’s findings of fact but concluded that the committee had exceeded its authority by recommending punishment not specified in the handbook. It remanded for further review and another recommendation by the committee. The committee adhered to its original recommendation. Faced with the conflict between the trustees and the committee, the president terminated the plaintiff’s employment. The district court ordered the original recommendation reinstated, and the Fifth Circuit affirmed, holding that not every violation by a university of its rules is a due process violation as long as there is no due process loss of substantive rights, and due process does not make imposition of a sanction less severe than one specified in the handbook constitutionally offensive.

Eldeeb v. University of Minnesota, 864 F. Supp. 905 (D. Minn. 1994), *aff’d* by 60 F.3d 423 (8th Cir. 1995). *While handbook provisions may be incorporated into contract of employment and in turn incorporate the University’s tenure code, references to “due process” and “academic freedom” in the code are too indefinite to use in determining whether there has been a breach of contract.*

The plaintiff was a dentist and faculty member who was promoted to full professor during the pendency of his various complaints. He claimed national origin discrimination in connection with his efforts to become promoted and relied upon the University’s tenure code and



its nondiscrimination brochure for breach of contract claims. The court held that the terms of “academic freedom” and “due process” in the tenure code, while incorporated into the contract of employment, were policy statements that were too indefinite to determine whether there had been a breach of contract. The court reached the same conclusion with respect to the University’s nondiscrimination brochure, holding it was a statement of policy too general to create a contract.

Silva v. University of New Hampshire, 888 F. Supp. 293 (D.N.H. 1994): *AAUP principles on academic freedom and tenure definition were incorporated into contract of employment through the collective bargaining agreement.*

Silva was a tenured communications instructor who frequently used sexually explicit examples in class, which generated student complaints of sexual harassment. The university imposed suspension for a year and required him to undergo sexual harassment counseling at his own expense. The court upheld claims of First and Fourteenth Amendment violations. The court also upheld Silva’s breach of contract claim, holding that the university had breached its employment contract with him because it had breached the AAUP’s academic freedom provisions, which were incorporated into his employment contract through the collective bargaining agreement. The court also held that the university had failed to follow the sexual harassment grievance procedures it had promulgated in its faculty handbook.

Brady v. Board of Trustees, 242 N.W.2d 616 (Neb. 1976): *Institution’s bylaws and regulations were incorporated into the plaintiff’s contract of employment and precluded his discharge without due process.*

Brady was a tenured associate professor who was discharged without a hearing for reasons of financial exigency. The bylaws of the institution, which required notice and a hearing prior to dismissal, were held incorporated into his contract of employment. The court held the discharge invalid in the absence of the procedures required by the bylaws.

Young v. Plymouth State College, 1999 WL 813887 (D.N.H. Sept. 21, 1999): *College handbook not incorporated into employment contract by virtue of handbook disclaimer.*

Young, a tenured professor, was terminated based on allegations that he sexually harassed students. He asserted a breach of contract claim, arguing that he was deprived of certain termination procedures described by the college handbook. The court dismissed that claim after finding that the handbook’s disclaimer language, which provided that “this Handbook and its provisions do not, and should not be construed to ... establish any legally binding conditions of employment’ effectively disclaims any agreement to abide by the complaint and termination procedures in the Handbook.” 1999 WL 813887, at *11.



2. Custom and practice

Board of Regents of Kentucky State Univ. v. Gale, 898 S.W.2d 517 (Ky. Ct. App. 1955): *Custom in the academic community relied upon to construe appointment to endowed chair as one of indefinite tenure.*

A tenured professor was appointed to an endowed chair. The court found that there was no temporal limitation on the holding of the chair in the advertisement for the position and relied upon custom and the general procedure and understanding in the higher education community to hold that an endowed chair was intended to be held a distinguished scholar for life.

Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973): *Court gave meaning to term “tenure” in handbook by relying upon the common law of the institution.*

The plaintiff was a professor at San Jacinto Junior College, which had no explicit tenure system. She was discharged. The word “tenure” was used in the faculty handbook. The court referred to the “common law of the institution” to find that she had a legitimate expectancy of re-employment under the policies and practices of the institution that constituted a protected property interest under the Fourteenth Amendment and entitled her to procedural due process.

Perry v. Sindermann, 408 U.S. 593 (1972): *A case with facts similar to those in Zimmerer, in which the Supreme Court of the United States approved reference to the common law of the institution in order to determine the faculty member’s property interest.*

Perry was relied upon by the Fifth Circuit in *Zimmerer*. *Perry* was a faculty member at Odessa Junior College, which also did not have an explicit tenure system, but the Court held that *Perry* was entitled to the opportunity to prove that the claim of reasonable expectation of re-employment was grounded in custom and practice in the institution.

3. AAUP standards

Silva v. University of New Hampshire, 888 F. Supp. 293 (D.N.H. 1994): *AAUP standards deemed incorporated into employment agreement.*

The court, in determining the plaintiff’s breach of contract claim over academic discipline imposed for sexual harassment, held that the AAUP standards on academic freedom and tenure were incorporated into *Silva*’s contract of employment through the terms of the collective bargaining agreement.

iv. State Law

Some states may promulgate statutes applicable to public higher education institutions that address due process in connection with dismissal. For example, in New Jersey, “[n]o professor, associate professor, assistant professor, instructor, supervisor, registrar, teacher or other persons employed in a teaching capacity, in any State college, county college or industrial



school who is under tenure during good behavior and efficiency shall be dismissed or subject to reduction of salary, except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause.” N.J.S.A. 18A:6-18. The statute provides for written charges, a hearing, an initial decision by the Office of Administrative Law, and a final decision to be issued by the Board of Trustees.

Farahani v. San Diego Cmty. Coll. Dist., 175 Cal. App. 4th 1486, 1490 (2009): *Tenured professor cannot waive due process rights afforded by state education code.*

Following a finding that Farahani, a tenured professor, had sexually harassed students, he entered into an agreement whereby he consented to certain disciplinary and remedial measures, including: (1) if he failed to comply with its provisions, he could be terminated “at the Chancellor’s discretion, without the issuance of charges under the Education Code or District policies...[,]” and (2) he purported to waive any all appeal rights he had to challenge the discipline or pre-disciplinary notice. The court found that the agreement was unlawful and unenforceable pursuant to the California Education Code, which provides for certain rights and protections for tenured professors, and which expressly renders “any contract or agreement, express or implied, made by any employee to waive the benefits of this chapter or any part thereof [] null and void.” Educ. § 87485.

b. Private institutions

i. Contract

Contract rights will be the principal source of protection of tenure rights for faculty in private institutions, in which the state action necessary to support constitutional limitations is normally absent. The extent to which rights that are not matters of express and specific written agreement will be implied in the faculty-institution relationship varies widely.

Greene v. Howard University, 412 F.2d 1128 (D.C. Cir. 1969): *Faculty handbook held to govern the relationship between faculty members and the university and required a form of notice and fair procedure in dismissals.*

The faculty handbook contained a disclaimer stating with regard to notice of dismissals that the university was without any contractual obligation. Nevertheless, the court found the manual to summarize the usual and customary practices that had developed in the faculty-university relationship and determined that the usual practice, which it held contractually enforceable, required advance notice of non-reappointment by January or April for the following year. The court held that the failure to do so was a breach of contract, and that the handbook was contractually binding. The court also found numerous other provisions of the handbook in conflict with the purported disclaimer of contractual obligation.



Taggart v. Drake University, 549 N.W.2d 796 (Iowa 1996): *University rules, regulations, policies and bylaws can be incorporated into the faculty member's contract of employment through a faculty handbook or manual.*

The court held that for such provisions to be contractually enforceable, the document containing them had to be sufficiently definite to create an offer; the document had to be communicated to and accepted by the employee; and the employee had to continue working to create consideration. In this case, the conditions were met and defeated the plaintiff's claims.

Lewis v. Loyola University of Chicago, 500 N.E.2d 47 (Ill. Ct. App. 1986): *Tenure promise in letter, not contained in letter of appointment, was admissible to support tenure claim.*

A candidate for department chairman received two letters from the dean proposing salary, stipends, budget and space, and promising to propose early approval of tenure. The candidate received a letter of appointment, which incorporated the faculty handbook but said nothing about tenure. The dean forgot to propose Lewis for tenure, and he was not considered at the appropriate time. Subsequently, he was informed his contract would not be renewed. The defendant attempted to exclude the two letters under the evidence rule. The court rejected that argument, holding that the form contract did not embody the complete agreement of the parties. The court indicated that under the practice of the institution Lewis would have been tenured but for the dean's oversight and allowed the letters to be considered in evaluating the claim of breach of contract.

Keleher v. LaSalle College, 147 A.2d 835 (Pa. 1959): *Claim of tenure based upon purported oral contract of employment denied where written contract was for the term of a year and did not mention tenure.*

A philosophy professor was appointed through a series of annual contracts. The contract did not mention tenure. The professor was denied reappointment for a subsequent year on grounds of financial exigency. The professor claimed he had an oral contract of employment that gave him tenure. The court rejected the claim on the ground that varying the written terms, as plaintiff desired would violate the parole evidence rule.

ii. Standards of the profession and the AAUP standards

McConnell v. Howard University, 818 F.2d 58 (D.C. Cir. 1987): *Dismissal for insubordination is invalid without a fair hearing under standards of general usage and custom at the university and within the general academic community.*

After a test demonstrated poor results, a professor of mathematics had admonished his students to forego some of their outside activities and devote more time to their studies. One of the students called the professor a condescending, patronizing racist. The professor refused to teach the class until the student apologized. When he refused to follow the direction of the dean to resume teaching the class, the university summarily discharged him. The court held that the professor was entitled to an opportunity to prove that his dismissal was not for cause, but over



his need to have appropriate control over his classroom, and that termination did not comply with the university's contract obligations. In particular, the court interpreted the contract to require an opportunity to be heard and evaluated by a grievance committee according to the standards of the academic profession. The court specifically relied upon general usage and custom at the university and within the academic community at large to give meaning to the written contract terms.

IV. GROUNDS FOR REVOCATION OF TENURE

If tenure rights are determined to exist, whether by reason of the presence of a constitutionally protected property interest or an enforceable contractual obligation, then the employer is not free to revoke the tenure or terminate the employment at will. The grounds recognized for revocation of tenure in the AAUP's 1940 Principles, which are of general acceptance, are (1) adequate cause; (2) retirement for age; (3) financial exigency. Termination of tenured employment because of the discontinuance of academic programs has also emerged as an acceptable ground. Mandatory retirement, on the other hand, has generally been eclipsed as a legitimate reason because of the later application of age discrimination in employment statutes to higher education.

a. Revocation of tenure for cause based on sexual harassment

Tenure may be revoked for cause based on, among other things, poor performance,⁷ neglect of duty,⁸ criminal conduct,⁹ insubordination,¹⁰ academic dishonesty,¹¹ and a broad array of misconduct which violates university rules or policies, such as sexual harassment and other forms of sexual misconduct. Sexual harassment can take many different forms, and may be variously described by institution's policies, but it is generally defined as any verbal or physical conduct that has the intent or effect of unreasonably interfering with an individual or group's education and/or work performance, or creating an intimidating, hostile, or offensive educational and work environment. Specifically prohibited conduct typically includes physical assault, unwelcome sexual advances or propositions, graphic comments about a person's body, displaying sexually suggestive objects or pictures in the workplace, using sexually degrading words to describe a person, unwelcome touching, patting, pinching or leering and *quid pro quo*

⁷ *Mole v. Univ. of Massachusetts*, 2001 Mass. Super. LEXIS 25 (Mass. Super. Ct. Jan. 11, 2001) (Low student evaluations and unfavorable evaluations from an ad hoc committee of faculty for several successive years constituted adequate cause to revoke a professor's tenure); *Chung v. Park*, 514 F.2d 382 (3d Cir. 1975) (Poor performance ratings warranted tenure revocation).

⁸ *Garrett v. Mathews*, 625 F.2d 658 (5th Cir. 1980) (Recognizing dereliction of duty as an appropriate ground for discipline of tenured faculty member);

⁹ *Iatauro v. St. John's University*, 744 N.Y.S.2d 347 (2d Dep't 2002) (Endangering the welfare of a child).

¹⁰ *Gross v. University of Tennessee*, 448 F. Supp. 245 (W.D. Tenn. 1978), *aff'd* by 620 F.2d 109 (6th Cir. 1980) (Violation of policy on external activities and outside income).

¹¹ *Agarwal v. Regents of the Univ. of Minnesota*, 788 F.2d 504 (8th Cir. 1986) (Plagiarism).



propositions. Other myriad sexual misconduct includes consensual sexual relationships between faculty and students or other employees that are prohibited by institutional policies.

i. Sexual conduct directed towards students

While a faculty member's unwelcome sexual advances towards a student or offer of *quid pro quo* typically fall squarely within the scope of behavior prohibited by sexual harassment policies, ambiguity can arise in the context of consensual (or allegedly consensual) sexual relationships between faculty and students, particularly where a school's policy does not expressly prohibit such relationships. In the absence of an explicit prohibition on such relationships, some institutions have relied upon the AAUP's Statement on Professional Ethics, which provides, in relevant part: "2. ...Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors... They avoid any exploitation, harassment, or discriminatory treatment of students. ..."

Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984): *Court rejected plaintiff's argument that he was unaware that consensual sexual relationships with students were prohibited by school's ethics code.*

Korf, a tenured music professor, was terminated following complaints from current and former male students that he made unwelcome sexual advances and offered good grades contingent upon sexual involvement. Following a hearing, during which Korf admitted that he had had one consensual sexual relationship with a student, the faculty committee concluded that he had violated the provision of the AAUP Statement on Professional Ethics (which the university had adopted) prohibiting "exploitation of students for [a professor's] private advantage...[.]" and recommended discharge. Plaintiff alleged he did not have notice that his conduct violated university policy. Korf contended that the provision at issue "could not be reasonably interpreted to include what he labels 'consensual sexual relationships' with students" and pointed to the fact that he was the first faculty member to be disciplined for such behavior at the university. 726 F.2d at 1226. The court rejected this contention, holding that "Common sense, reason and good judgment should have made him cognizant of the fact that his conduct could and would be cause for termination. One cannot be heard to complain that it is somehow unfair to be the first one disciplined under a particular law, rule or regulation since if that were the case, no new law, rule or regulation could ever be enforced." *Id.* at 1226-27.

The court further found that the "University's interpretation of the AAUP Statement was entirely reasonable and rationally related to the duty of the University to provide a proper academic environment. '[A] University has a right, and indeed a duty, to take all reasonable and lawful measures to prevent activities which adversely intrude into the teaching process or which might adversely affect the University's image and reputation. It has a right to expect and demand the highest standards of personal behavior and teaching performance from its teachers and professors. It does not have to settle for less.'" *Id.* at 1229 (omitting internal quotations and citations).

Korf also alleged an Equal Protection violation based on the school's supposed selective enforcement of its policy against him due to his sexual orientation. However, the court rejected



this contention, noting that Korf had failed to present any evidence that the university would respond differently to complaints of a professor's sexual conduct with a student of the opposite sex.

***Tonkovich v. Kansas Board of Regents**, 159 F.3d 504 (10th Cir. 1998): Tenured law professor dismissed for violating sexual harassment policy alleged violations of his First Amendment speech rights, and his Fourteenth Amendment due process and equal protection rights. Court dismissed claims after finding that defendants did not subject plaintiff to a violation of a clearly established right of constitutional dimension and were entitled to qualified immunity.*

After graduating, one of Tonkovich's former law students alleged that, while she was a first year student, he engaged in a sexual act with her after discussing grades. The Chancellor found that, based on these allegations, Tonkovich had violated the Faculty Code, which prohibited professors from exploiting a student for the professor's private advantage. The Chancellor recommended a one year paid suspension. Tonkovich was warned not only that repeating such behavior would be cause for dismissal, but also that "if past misconduct were brought to the University's attention, it might be cause for further disciplinary action." 159 F.3d at 511-12. Tonkovich requested a hearing. Approximately one month later, certain other faculty members signed a letter asking students to report any misconduct or sexual harassment by faculty members. Additional students came forward to complain of Tonkovich's conduct, and presented their allegations to the associate vice chancellor, who interviewed them and subsequently recommended plaintiff's dismissal. An administrative hearing was held, after which the faculty committee concluded that Tonkovich had sexually harassed the first complainant, and had violated the ethical provisions of the Faculty Code by holding another student's hand while asking her who her favorite professor was, as well as engaging in various other inappropriate social behavior with other students. The committee recommended dismissal.

In advancing his substantive due process claim, Tonkovich argued that he did not have fair notice the conduct at issue violated the Faculty Code. The court "acknowledge[d] that the allegations against Professor Tonkovich required Dean Jerry and other University officials to confront a difficult question: when does sexual contact between participants in an unequal power relationship become exploitative? However, the fact that reasonable minds might not agree with the way in which the majority of the Hearing Committee, the Chancellor, and the Regents resolved that question is insufficient to support a substantive due process claim." 159 F.3d at 529. Relying on *Korf*, the Tenth Circuit rejected Tonkovich's lack of notice argument, and found that "if common sense, reason, and good judgment were not adequate to notify Professor Tonkovich, certainly the Faculty Code's prohibition against exploiting students concretely notified him that he could be terminated for having sex with one of his students after discussing her grades." *Id.* at 529-30.¹²

¹² Tonkovich also argued that he did not have notice that holding a student's hand violated any school policy, and thus his termination on that ground was improper. However, the Tenth Circuit found this argument unavailing because "the record plainly shows that Plaintiff would have been fired solely for his student sexual encounter." 254 F.3d 931, 945 (10th Cir. 2001).



Like Korf, Tonkovich also unsuccessfully asserted an Equal Protection violation based on the university's failure to discipline other faculty members who allegedly were openly dating law students. In dismissing the claim, the court reasoned that Tonkovich had not been terminated for dating a law student, but for exploiting a student by discussing grades with her prior to engaging in a sexual act.

Parkman v. University of South Carolina, 44 Fed. Appx. 606 (4th Cir. 2002) (ordered non-published by the circuit): *Reassignment because of findings of sexual harassment investigation. Continued employment without diminution of pay or benefits in transferred position deprives plaintiff of claim that property or liberty interests were infringed, and reconsideration and continued pendency of investigation and disciplinary proceedings, despite arguable unfairness, vitiates breach of contract claim.*

The tenured head music librarian and the university was disciplined for sex discrimination and sexual harassment by being reassigned to a special project without supervisory responsibilities, but without a reduction in pay or benefits. After a finding of sexual harassment by the university's equal opportunity program office, which investigated the complaints, the librarian was permanently reassigned to the special project position and informed that any future violations would result in a recommendation of tenure revocation. The librarian then appealed to the faculty grievance committee, where he testified on his own behalf and presented written statements from 27 witnesses and live testimony from two. The librarian was unable to obtain the identity of the witnesses against him or the substance of their statements. The faculty grievance committee concluded that the librarian's procedural due process rights had been violated and referred the case to the university's general counsel for mediation. Mediation was unsuccessful. The librarian then filed his own equal employment complaint, alleging an abuse of process against the professor who had succeeded him and who was the chief complainant against him. Two years after the initial equal employment investigation was concluded, the equal employment officer finally furnished the librarian with a list of the witnesses against him, without, however, addresses, telephone numbers or the substance of the witness statements. The librarian sent the university a list of 33 witnesses in his favor. The university declined to seek these witnesses out. The librarian then filed a civil action. He retired for medical reasons prior to the completion of most proceedings in the district court. The court rejected the librarian's substantive due process claim because his reassignment left his tenure status and rate of compensation intact. He did not have a protected property right to perform certain services. The court also rejected the librarian's liberty interest claim because he had remained employed after a public announcement of the reasons for his reprimand and reassignment. Because he could not show a protected property or liberty interest that had been infringed, he had no constitutional claim for procedural due process. The librarian's breach of contract claim was rejected because the university had reinvestigated the complaints after the faculty committee recommended mediation or reinvestigation, and the proceeding was still open when he resigned. Moreover, the librarian was unable to show any compensable damages as a result of the clumsy handling of the procedure.



ii. Sexual harassment directed towards other faculty or staff

Haegert v. University of Evansville, 977 N.E.2d 924 (Ind. 2012): *Tenured professor properly discharged for touching colleague in a sexually suggestive manner.*

Though Haegert had been the subject of multiple informal sexual harassment complaints over the course of several years and had received prior warnings to adjust his behavior, an incident in 2004 where he stroked the chin of a fellow faculty member prompted her to file a formal complaint that resulted in a hearing which led to Haegert's dismissal. Haegert argued that his conduct was not prohibited by the university's sexual harassment policy because he had no intent to sexually harass his colleague; "Haegert's defense largely revolved around him saying he was simply in a joyous mood that day, and that he viewed the whole matter as harmless or inconsequential." 977 N.E.2d at 943. The court disagreed, stating that "the Faculty Manual makes clear that it is not only the intent behind the conduct that matters, it is also the effect of the conduct. In that regard, the record clearly shows that the effect of Haegert's verbal and physical conduct unreasonably interfered with McMullan's work and job performance and created an offensive work environment..." *Id.*

Furthermore, the complaining faculty member had kept an "anecdotal file" which contained earlier student complaints against Haegert. He argued that the anecdotal file was improperly provided to the Review Committee, which had investigated the complaint and found that Haegert violated the university's sexual harassment policy, as well as to the Faculty Professional Affairs Committee ("FPAC"), which undertook an informal inquiry into the matter to determine if dismissal was appropriate, and that he had not had an opportunity to review the file prior to the determinations made by those bodies. The court disagreed with Haegert for several reasons. First, the Faculty Manual permitted the Review Committee access to all potentially relevant information (including the anecdotal file) and only required that the Committee make available to respondent the information that was relevant to the its decision. Because the Review Committee based its decision solely on the 2004 incident, it did not apparently deem the anecdotal file relevant to its decision and was thus not obligated to turn it over to Haegert. Similarly, the FPAC based its recommendation of dismissal on the 2004 incident alone. Thus, while the Review Committee and FPAC may have considered the prior complaints against Haegert, they did not base his termination upon those incidents.

b. What procedural rights must be afforded

Revocation of tenure in public institutions is subject to the requirements of procedural due process. The essential elements of procedural due process are (1) reasonable notice of the basis for the proposed revocation; (2) a hearing before an impartial decision-maker; and a reasonable opportunity to present a defense. *Mathews v. Eldridge*, 424 U.S. 319, 332-333 (1976). These due process requirements are also set forth for public employees who can only be terminated for cause in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). In that case, the Supreme Court required (1) oral or written notice of the charges; (2) an explanation of the employer's evidence; and (3) an opportunity for the employee to present his side of the story. *Id.* As a matter of constitutional law, however, these procedural requirements only apply when a



constitutionally protected property or liberty interest is infringed. *See Collins v. Marina-Martinez*, 894 F.2d 474, 476 (1st Cir. 1990).

Levenstein v. Board of Trustees, 1997 U.S. Dist. LEXIS 619 (N.D. Ill. January 10, 1997), *aff'd* by 164 F.3d 345 (7th Cir. 1998): *Trumped up sexual harassment charges and kangaroo proceedings give professor who challenged apparent financial irregularities in college of medicine causes of action for constructive termination of employment in deprivation of a property right, violation of procedural due process of law, and violation of equal protection for selective prosecution in retaliation for making constitutionally protected speech.*

The court determined the matter on a motion to dismiss. Levenstein was hired to join the University of Illinois and, within five years, rose to the position of Chairman of the Primary Care Institute of the University's College of Medicine. Shortly after this appointment, Levenstein became suspicious of unexplained financial losses at the medical school, and he questioned the use of state funds. Levenstein was then placed on an extended suspension with pay pending an investigation of sexual harassment charges against him. The suspension occurred before anyone had filed formal charges against him, and the dean withheld Levenstein's raise because he expected the suspension to continue. The dean also sent an e-mail to another dean expressing his desire to get rid of Levenstein before the Faculty Appeal Panel could review the evidence. University personnel attempted to obtain Levenstein's resignation on at least four occasions. The complainants were recruited and the evidence was doctored by the University's affirmative action officer, who functioned as an aide to the prosecution. The hearing process accorded Levenstein on the sexual harassment charges was a sham, and it was reasonable to conclude that the Plaintiff was eventually forced to resign. The court held that the suspension with pay did not implicate any constitutionally protected property interest. The court also held that Levenstein's property interest arose from his tenure contract, but that that contract did not entitle him to be free from suspensions with pay. However, the court held that Levenstein had presented sufficient evidence of constructive discharge to overcome the contention that he was not deprived of a property interest. As for procedural due process, Levenstein admitted that he had notice of the charges, a general understanding of the University's evidence against him, and an opportunity to explain his position to two faculty panels. That Levenstein did not have an opportunity to present his side of the story to anyone with the authority to decide whether to revoke his tenure did not establish a denial of procedural due process. However, the requirements of notice and an opportunity to be heard are not satisfied if the hearing is a sham or a pretense, and Levenstein allegations of bias and improper use of the proceedings were sufficient to maintain a claim of denial of procedural due process. Levenstein was also permitted to maintain an equal protection claim that he was singled out for selective prosecution and that he was retaliated against for engaging in his constitutionally protected rights to free speech on a matter of public concern – his questioning of financial affairs.



Levenstein v. Salafsky, 414 F.3d 767 (7th Cir. 2005): *Professor's resignation prior to the conclusion of prolonged investigatory and administrative proceedings not deemed constructive discharge, and not deemed a deprivation of a property interest.*

Following a bench trial, the court determined that plaintiff had not shown that he had been constructively discharged, nor had he established an equal protection violation. Because plaintiff had resigned prior to the conclusion of the hearing, the university did not deprive him of any property right protected by the Constitution. Furthermore, the court found he was not constructively discharged because the investigation was underway, his reassignment was temporary, and the eleven-month adjudicatory period was not unreasonable. “We conclude that a person who is on leave with pay, with a temporary (though unsatisfying) reassignment pending an investigation of serious job misconduct, who resigns rather than waits for the conclusion of reasonable prescribed due process procedures of the institution, has not from an objective standpoint been constructively discharged.” 414 F.3d at 774-75.

i. Notice

The notice that is required for procedural due process is “adequate notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Collins, supra*, 894 F.2d at 480, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The notice may be oral or written and must include an explanation of the employer’s evidence. *Collins*, p. 480. The notice should include all bases upon which the ultimate determination may be based. *See Young v. Plymouth State College*, 1999 WL 813887 (D. N.H. Sept. 21, 1999) (college’s consideration of two previously resolved sexual harassment complaints in connection with tenure revocation proceeding ostensibly based on third complaint raise material factual issue as to whether plaintiff had received adequate notice of the charges against him); *Silva v. The University of New Hampshire*, 888 F. Supp. 293, 322-23 (D. N.H. 1994) (“[T]he court further finds that a genuine issue of material fact exists as to whether Silva received adequate notice that incidents not mentioned in in the student complaints and incidents upon which no evidence was presented at the hearings would be considered by the hearing panel and appeals board in their determination of whether his conduct constitutes sexual harassment.”).

ii. Hearing

The requirements for a hearing sufficient for purposes of procedural due process are variable, but the hearing must be granted at a meaningful time and in a meaningful manner. *Collins*, 894 F.2d at 481. The form of hearing required depends upon an “analysis of the governmental and private interests that are affected.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 334 (1975). Courts should consider the following factors in determining the degree to which a hearing in a particular case must resemble a full blown judicial trial: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation and value of additional procedure; and (3) the state’s interest regarding fiscal and administrative burdens involved in such hearings. *See id.* at 335; *see also Anderson v. Ohio State University*, 2001 WL 99858, *5 (S.D. Oh. Jan. 22, 2001) (“In applying the *Mathews* balancing test to professor loss of tenure



cases, the Sixth Circuit has held that less than a full evidentiary hearing is required prior to termination.”) (omitting citations).

iii. Opportunity to defend

The tenured employee must be given an opportunity to present his side of the story. *Collins*, 894 F.2d at 480; *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

Tonkovich v. Kansas Board of Regents, 159 F.3d 504 (10th Cir. 1998)

In advance of his administrative hearing, Tonkovich requested written statements from the student complainants who had reported incidents of his alleged sexually harassing behavior to other faculty members, but was told that these students had not provided written statements. The school’s formal written complaint contained charges of ethics violations, sexual harassment and moral turpitude, and certain of these were based on the allegations made by the additional student complainants. During discovery, Tonkovich again requested copies of the written statements from the complainants, but was instead only provided with summaries and many of the witnesses declined to be interviewed by plaintiff’s attorney. The university also refused to produce a tape recorded interview of one of the complaining students. At the hearing, it was revealed that certain of the complainants had, in fact, prepared written statements, but when faculty members were called to produce them, it was discovered that some statements had been discarded. The committee asked all complainants to provide copies of their statements, but two did not, nor did those two return to testify further at the hearing. Ultimately, the hearing committee found that Tonkovich had violated the Faculty Code and recommended dismissal.

On appeal, Tonkovich argued that he was denied due process because, among other things, the insufficient discovery process prevented him from cross-examining witnesses effectively. The court rejected this contention, stating:

The fact that Professor Tonkovich was unable to discover every piece of evidence is of no consequence as a matter of procedural due process. The Due Process Clause does not guarantee that parties to an adversarial proceeding may discover every piece of evidence they desire. ... Furthermore, Professor Tonkovich has not adequately alleged that he was denied the right to cross-examine adverse witnesses. As we have discussed, he had notice of the charges, and of his accusers, well before the hearing. He was able to cross-examine each of them, albeit not in exactly the way he would have liked. On these facts, we cannot say that the cross-examinations violated Professor Tonkovich’s procedural due process rights simply because he did not have access to several of the witnesses’ prior statements. As his complaint admits, the University did provide him with summaries of the complainants’ statements. ... Professor Tonkovich next argues that the Hearing Committee members violated his procedural due process rights by failing to compel the return of various witnesses who had previously testified. The Hearing Committee members argue that they did not have the authority to compel the attendance of witnesses. They did, however, attempt to assist Professor Tonkovich with the re-appearance of witnesses by sending certified



return-receipt mail, as Professor Tonkovich himself acknowledges in his complaint. Professor Tonkovich has cited no law, clearly established or otherwise, which states that an administrative tribunal runs afoul of the Due Process Clause for its failure to compel the attendance of witnesses when it lacks subpoena power.

159 F.3d at 520-21 (omitting citations).

Anderson v. Ohio State University, 2001 WL 99858 (S.D. Oh. Jan. 22, 2001): *Tenured professor's inability to call a particular witness during termination hearing did not deprive him of due process.*

Anderson, a tenured professor, engaged in various instances of misconduct with a high school student enrolled in a program for which he served as a youth development agent. When he persisted in pursuing a romantic relationship with the student despite the university's instruction that he refrain from contacting her, the university sought to terminate him. During the termination hearing, Anderson was represented by counsel, examined and cross-examined witnesses and submitted a post-hearing brief. The hearing panel recommended termination, which recommendation the president of the university upheld. Anderson argued that he was deprived of due process because, among other reasons, he was not allowed to call the high school student as a witness. However, the court found that because the charges against Anderson were based on his admitted conduct with the student, her testimony was irrelevant, and moreover, the hearing procedures at issue easily satisfied the requirements of due process.

iv. Necessity to follow adopted procedures

In general, an institution will be required to follow the procedures it has adopted if those procedures are contractually binding.

McNeil v. New England School of Law, 1994 Mass. Super. LEXIS 592 (Sup. Ct. Suffolk Co. July 12, 1994):

McNeil served as Chair of the law school's placement committee. He submitted his year-end report to the dean. The board of trustees requested that the dean investigate the authenticity of the report. The dean believed portions of the report were untrue or misleading. He was unable to resolve the discrepancies with McNeil. He therefore requested the faculty tenure committee to consider revocation of McNeil's tenure. The tenure committee found insufficient cause for revocation of tenure. Nonetheless, the dean forwarded the tenure committee's report and a transcript of the hearings to the board of trustees, together with his own recommendation that the board revoke McNeil's tenure. The trustees revoked McNeil's tenure. The court reviewed the tenure revocation rules of the school and held that the board of trustees could only consider revocation of tenure if the tenure committee had first found sufficient cause to revoke. Since the tenure committee found insufficient cause to revoke McNeil's tenure, the tenure revocation proceedings should have terminated at that point. Nevertheless, the court denied the professor's motion for a preliminary injunction, holding the threat of irreparable injury was



insufficient since the professor did not show that he was without other opportunities for employment or that he could not be compensated adequately in money damages.

Chan v. Miami University, 73 Ohio St.3d 52 (1995): *Termination of tenured professor pursuant to sexual harassment policy rather than tenure termination policy was improper.*

The university terminated Chan, a tenured professor, pursuant to its sexual harassment grievance policy, rather than the tenure termination process set forth in the school's manual, which was incorporated into Chan's employment contract. Chan alleged that the university breached his contract when it failed to provide him with the procedural rights afforded under the tenure termination provision of the manual. Both processes included an investigatory component and a formal hearing, as well as a right of appeal. However, the sexual harassment grievance procedure could be commenced by any grievant, whereas under the tenure termination procedure, the president must file the complaint. The grievance process was subject to much shorter deadlines and only offered the respondent the right to an advisor or counselor from the university or faculty staff (not necessarily an attorney) at the hearing. The tenure termination policy afforded a respondent the right to an attorney at both a preliminary conference with administrators, as well as at the hearing. The court agreed with Chan, holding:

It is simply not reasonable to assume or conclude that a procedure established for the resolution of affirmative action grievances between or among members of the university is intended to take the place of a procedure that expressly provides for the determination of whether conduct by a tenured faculty member constitutes grounds for terminating the university's contract with the faculty member. Likewise, it is unreasonable to assume that the university considers discrimination or sexual harassment to be a less serious offense against a person than an offense that does not constitute an affirmative action grievance. The purpose of the two procedures is different, the due process afforded the tenured faculty member is different, and the entity rendering the final decision is different.

73 Ohio St.3d at 58.

The requirement to follow internal rules in tenure revocation proceedings at the peril of having a revocation set aside or a verdict in money damages becomes potentially more onerous the more complex the adopted procedures are. The AAUP guidelines on tenure revocation, which have been influential across the academic landscape and, in more than a few jurisdictions, have been deemed incorporated into the professorial contract of employment with the institution by custom and practice, if not by direct reference, have gotten extremely detailed and complex.

The AAUP's Recommended Institutional Regulations on Academic Freedom and Tenure derive from the 1940 Statement of Principles on Academic Freedom and Tenure and the Statement on Procedural Standards in Faculty Dismissal Proceedings. First formulated in 1957, the recommended regulations have been revised most recently in 2014. With respect to dismissal procedures for tenured faculty, they provide as follows:



5. Dismissal Procedures

a. Adequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens.

b. Dismissal of a faculty member with continuous tenure, or with a special or probationary appointment before the end of the specified term, will be preceded by

(1) discussions between the faculty member and appropriate administrative officers looking toward a mutual settlement;

(2) informal inquiry by the duly elected faculty committee [insert name of committee], which may, if it fails to effect an adjustment, determine whether in its opinion dismissal proceedings should be undertaken, without its opinion being binding upon the president; (3) a statement of charges, framed with reasonable particularity by the president or the president's delegate.

c. A dismissal, as defined in Regulation 5a, will be preceded by a statement of charges, and the individual concerned will have the right to be heard initially by the elected faculty hearing committee [insert name of committee]. Members deeming themselves disqualified for bias or interest will remove themselves from the case, either at the request of a party or on their own initiative. Each party will have a maximum of two challenges without stated cause.

(1) Pending a final decision by the hearing committee, the faculty member will be suspended, or assigned to other duties in lieu of suspension, only if immediate harm to the faculty member or others is threatened by continuance. Before suspending a faculty member, pending an ultimate determination of the faculty member's status through the institution's hearing procedures, the administration will consult with the Faculty Committee on Academic Freedom and Tenure [or whatever other title it may have] concerning the propriety, the length, and the other conditions of the suspension. A suspension that is intended to be final is a dismissal and will be treated as such. Salary will continue during the period of the suspension.

(2) The hearing committee may, with the consent of the parties concerned, hold joint prehearing meetings with the parties in order to (i) simplify the issues, (ii) effect stipulations of facts, (iii) provide for the exchange of documentary or other information, and (iv) achieve such other appropriate prehearing objectives as will make the hearing fair, effective, and expeditious.

(3) Service of notice of hearing with specific charges in writing will be made at least twenty days prior to the hearing. The faculty member may waive a hearing or may respond to the charges in writing at any time before the hearing. If the faculty member waives a hearing, but denies the charges or asserts that the charges do not support a finding of adequate cause, the hearing tribunal will evaluate all available evidence and rest its recommendation upon the evidence in the record.



(4) The committee, in consultation with the president and the faculty member, will exercise its judgment as to whether the hearing should be public or private.

(5) During the proceedings the faculty member will be permitted to have an academic adviser and counsel of the faculty member's choice.

(6) At the request of either party or the hearing committee, a representative of a responsible educational association will be permitted to attend the proceedings as an observer.

(7) A verbatim record of the hearing or hearings will be taken, and a copy will be made available to the faculty member without cost, at the faculty member's request.

(8) The burden of proof that adequate cause exists rests with the institution and will be satisfied only by clear and convincing evidence in the record considered as a whole.

(9) The hearing committee will grant adjournments to enable either party to investigate evidence as to which a valid claim of surprise is made.

(10) The faculty member will be afforded an opportunity to obtain necessary witnesses and documentary or other evidence. The administration will cooperate with the hearing committee in securing witnesses and in making available documentary and other evidence.

(11) The faculty member and the administration will have the right to confront and cross-examine all witnesses. Where the witnesses cannot or will not appear, but the committee determines that the interests of justice require admission of their statements, the committee will identify the witnesses, disclose their statements, and, if possible, provide for interrogatories.

(12) In the hearing of charges of incompetence, the testimony will include that of qualified faculty members from this or other institutions of higher education.

(13) The hearing committee will not be bound by strict rules of legal evidence and may admit any evidence which is of probative value in determining the issues involved. Every possible effort will be made to obtain the most reliable evidence available.

(14) The findings of fact and the decision will be based solely on the hearing record.

(15) Except for such simple announcements as may be required, covering the time of the hearing and similar matters, public statements and publicity about the case by either the faculty member or administrative officers will be avoided so far as possible until the proceedings have been completed, including consideration by the governing board of the institution. The president and the faculty member will be notified of the decision in writing and will be given a copy of the record of the hearing.

(16) If the hearing committee concludes that adequate cause for dismissal has not been established by the evidence in the record, it will so report to the president. If the president rejects the report, the president will state the reasons for doing so, in writing, to the hearing committee



and to the faculty member and provide an opportunity for response before transmitting the case to the governing board. If the hearing committee concludes that adequate cause for a dismissal has been established, but that an academic penalty less than dismissal would be more appropriate, it will so recommend, with supporting reasons.

6. Action by the Governing Board

If dismissal or other severe sanction is recommended, the president will, on request of the faculty member, transmit to the governing board the record of the case. The governing board's review will be based on the record of the committee hearing, and it will provide opportunity for argument, oral or written or both, by the principals at the hearing or by their representatives. The decision of the hearing committee will either be sustained or the proceedings returned to the committee with specific objections. The committee will then reconsider, taking into account the stated objections and receiving new evidence, if necessary. The governing board will make a final decision only after study of the committee's reconsideration.

Recommended Institutional Regulations on Academic Freedom and Tenure, available at <http://www.aaup.org/file/RIR%202014.pdf>.

It will be seen that this recommended procedure, which has been adopted by a considerable number of institutions – especially those with strong faculty collective bargaining organizations – places substantial responsibility and almost determinative influence in the hands of the faculty. Fitness matters are to be investigated and conciliated by one committee chosen by the organized faculty, formal charges developed either with it or after it has had the first drafting opportunity, charges are to be heard and determined by a second committee chosen by the organized faculty – and in the normal case the governing body of the institution is expected to accept the faculty determination. If the governing body declines to accept the faculty determination, then, by adoption of these provisions, it can only make a contrary decision by re-referring the matter to the faculty committee and asking for reconsideration. The provisions afford the full procedural rights of a formal adversary proceeding to the accused faculty member, falling just short of those available in a judicial trial – and even, in its preference for “explicit findings with respect to each of the grounds of removal presented, and a reasoned opinion,” going beyond the requirements usually applicable in arbitration. *Compare with* 9 U.S.C. and Article 75 of the New York Civil Procedure Law and Rules (“CPLR”).

Lehman v. Board of Trustees of Whitman College, 89 Wash.2d 874 (Wash. 1978): *Upholding college's dismissal of tenured professor for making sexual advances towards students, other faculty members and wives of faculty members after finding that school had properly implemented the AAUP's model procedures.*

In response to complaints from two female students that Lehman had made sexual advances towards them, the president of the college advised plaintiff of the complaints, cited the faculty code provision which would be violated if the allegations were true, and set up appointment with the Lehman, the president and dean of faculty to discuss the matter, and told plaintiff he could have another person present. The president then provided Lehman an outline of charges including sexual advances to students, teaching deficiencies and improper behavior



toward faculty and college administration. An advisory investigatory committee of faculty was appointed, held 21 sessions, heard testimony from 20 persons and recommended dismissal proceedings based on evidence of sexual advances towards female students, faculty members and wives of faculty members. These charges were referred to an academic council. Lehman was advised in writing of his right to appear before that council. He was represented by counsel, presented witnesses and cross-examined the school's witnesses. The council found that he had engaged in sexual misconduct and recommended dismissal with one year's severance. Lehman contended that his contractual rights were violated and that he was denied due process. The court found that (1) the college's adoption of the principles and procedures of 1940 Statement Of Principles on Academic Freedom and Tenure and the 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings adopted by AAUP rendered those procedures controlling; (2) the plaintiff had failed to identify any failure on college's part to follow those procedures; and (3) because the college was a private institution, the plaintiff was not entitled to due process under the Fourteenth Amendment.

c. Relative role and power of faculty, administration and trustees

As noted, the tenure revocation procedures recommended by the AAUP and adopted by many institutions having a strong AAUP presence place considerable power and discretion in the organized faculty in tenure revocation matters. In such situations, the administration and the governing body will find their power to control the institution at worst seriously weakened, but more likely complicated by the procedural complexity of these formal requirements and the first instance deference to the organized faculty they require. The trade-off, and benefit, of such a regimen is that if it is followed scrupulously, a decision – even a controversial one – will be seen to be one made by the accused faculty peers and should be almost immune from interference by the courts.

In institutions where the faculty is not well-organized or has little collective strength, it is doubtful that such rigorous, formal procedural requirements and power-sharing will be found. The administration may essentially run the show, lining up cooperative faculty participation on an ad hoc basis and marshalling support on the board of trustees. Even so, if the essentials of fair procedure are honored, a decision will often survive scrutiny by the courts because of the deference the latter traditionally accord to internal academic decision-making. *See Maas v. Cornell Univ.*, 94 N.Y.2d 87, 92 (1999) (administrative decisions of educational institutions involve the exercise of highly specialized professional judgment and these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters); *Olsson v. Bd. of Higher Educ.*, 49 N.Y.2d 408, 413 (N.Y. 1980) (cautioning courts to exercise the utmost restraint in applying traditional legal rules to disputes within the academic community).

V. JUDICIAL DEFERENCE TO TENURE REVOCATION DECISIONS

As indicated in the federal cases discussed above, the federal courts will review tenure revocation decisions for constitutional violations involving infringements of First Amendment



rights or property or liberty interests, and, in the case of such infringements, for procedural due process violations. In state courts, long-standing principles of deference to internal academic decision-making often apply.

Gutkin v. University of California, 101 Cal. App. 4th 967 (2002): *In California, the exclusive judicial remedy for tenure decisions is an evaluation of the fairness of the administrative hearing in an administrative mandamus action under Code of Civil Procedure § 1094.5.*

Gutkin's tenure was revoked for serious neglect of duty and he was dismissed, based upon the findings of a faculty peer panel after a hearing. He sued, alleging causes of action, among others, for fraud and deceit, breach of contract, defamation, intentional infliction of emotional distress, and intentional interference with prospective economic advantage. He claimed he was constitutionally entitled to a jury trial on these claims. The court disagreed, noting that courts have been reluctant to substitute their judgment for academic peers on the merits of a tenure decision because academic peers are equipped to evaluate teaching and research according to methodological principles agreed upon by the academic community and courts are not. The court held that, in California, judicial review of tenure decision is limited to evaluating the fairness of the administrative hearing in an administrative mandamus action under Code of Civil Procedure § 1094.5. The scope of the inquiry in such proceedings is simply whether the employer has proceeded without, or in excess of jurisdiction; whether there was a fair trial and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the employer has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. Because the conduct alleged by Gutkin was strictly confined to the academic employment relationship, the gravamen of his claims, despite their designation in his complaint as ostensible torts, was that the university employed a procedure to dismiss him that was not sanctioned by the faculty handbook. The action, therefore, was a tenure review claim, and Gutkin was limited to his administrative mandamus remedy.

Hermann v. Brooklyn Law School, 432 F. Supp. 236 (E.D.N.Y. 1976): *Tenure revocation decision is appropriately reviewed in New York under article 78 proceeding.*

The plaintiff's tenure had been revoked, and he had been dismissed, as a professor of law. He sued in diversity jurisdiction in federal court, claiming his dismissal was arbitrary and capricious, violated the rules and standards of the law school and the professional law school association and violated his procedural due process rights. The court held that the controversy was in substance one seeking judicial review of an action by a tribunal or board provided for under Article 78 of the CPLR, that holding the action in diversity jurisdiction would require the federal court to inquire into the policies and structure of the law school, the good faith of the plaintiff and the various members of the faculty, and into the procedures used to determine whether there was compliance with the law school's regulations and with administrative due process. The court held that this special proceeding was not a suit of a civil nature at common law or in equity that was appropriate for diversity jurisdiction and dismissed the complaint for lack of subject matter jurisdiction.



Gertler v. Goodgold, 107 A.D.2d 481, 487 N.Y.S.2d 565 (Dep't 1 1985), *aff'd* by 66 N.Y.2d 946 (1985): *Tenure decisions in New York are subject to judicial review only via a CPLR article 78 proceeding.*

The plaintiff was a practicing physician and tenured faculty member in the school of medicine. He sued claiming actions to undermine his career and deprive him of the basic benefits and privileged of his academic tenure. The claims were breach of contract, intentional interference with contractual relations and prospective advantage, and prima facie tort. The claims involved space for research, teaching assignments, cooperation in allowing and promoting research grants and the adequacy of grievance procedures. The plaintiff could not point to any contractual basis for these claimed privileges of tenure. The court held that academic and administrative decisions of educational institutions involve the exercise of subjective professional judgment, and therefore public policy compels restraint removing such determinations from judicial scrutiny. In matters wholly internal, such institutions are peculiarly capable of making the decisions, which are appropriate and necessary to their continued existence. Therefore, private colleges and universities are accountable for their actions in a CPLR Article 78 proceeding, and the judgment of professional educators is subject to judicial scrutiny in such a proceeding only to determine whether they have abided by their own rules, and whether they have acted in good faith or their action was arbitrary or irrational. Since the plaintiff was unable to establish a clear contractual right to the amenities of tenure he claimed, his claims were reviewable, if at all, in an Article 78 proceeding. However, as such, these claims were barred by the four-month Article 78 statute of limitations. In addition, the plaintiff's claims were doubly barred because he had failed to avail himself of the university's internal faculty grievance review procedures.