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Tenure Traps: Legal Issues of Concern

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WHEN asked what I do as the Head of the Department of Theatre Arts at Virginia Tech, my reply usually takes the form of something like "I recruit the best students, recruit the best faculty, and provide them the appropriate financial and physical resources for them to engage in the joy of studying and creating theatre." Although not stated in specific words, there certainly is a clear implication that the retention of "The Best Faculty" is a primary concern and responsibility. As a matter of fact, the actions associated with faculty retention, and the accompanying emotional energy it produces, may be the most important thing we do as departmental administrators. Decisions about continuation of contracts and the awarding, or not awarding, of tenure to a faculty member has obvious impact on the future and direction of a department. In short, the most significant choices we make as administrators can be put into very clear statements of action: "Who we hire and who we fire."

No sane administrator would ever offer a contract to a new hire unless there was a clear possibility of them being a successful member of the department. People are never hired in order to provide them an opportunity to be unsuccessful. Clearly, they are hired with the hope and expectation that they will be hard-working and contributing members of the faculty. They are encouraged and supported to grow as teachers and professionals. If, for any one of several hundred reasons, expectations are not met, then it is the Department Head's duty to terminate the contract as early in the probationary period as possible. As difficult as it may be, the action of *not* renewing a contract for someone who is not "working out" is easier and more sensible than waiting for the mandatory year for what most assuredly will be a negative decision. In spite of all our highest hopes and efforts, it does sometimes become necessary to render a negative tenure decision and we must be prepared to deal with both the emotional strain and the legal implications of that action.

Although each institution will have different expectations, their own criteria for evaluation, and a process unique to itself, there are some general observations and suggestions that might be of some value and assistance. As is obvious, the focus will be on those

circumstances where tenure is denied and the individual decides to contest the decision and pursue appropriate legal options through a law suit or an academic institutions faculty grievance process. I must acknowledge that I am in great debt to Kay Heidbreder, Legal Counsel, at Virginia Tech for her advice and assistance in identifying these six areas of concern and observations.

1. Statistics indicate those who are denied tenure will typically fall into two obvious groups and the method of defense will follow along two different lines.

   Group One would be those who fall into what might be described as being in a protected class. This would include those covered by what has become generally known as Title 7 designations which would include race, age, gender, religion, etc. Within this, gender is by far the most frequently cited issue for tenure reconsideration. Those protected under Title 7 as well as those covered by the Americans with Disabilities Act will typically build their case on issues of discrimination.

   The Second Group is usually identified as being white, male, and under 40. The national demographics of the professorate still reflects this as being the largest potential group. For them, the case is usually built on issues of contract.

2. It is essential for each institution (and, depending on the size of the department and college or university, even individual departments) to have published guidelines and procedures. More important, however, is the need to follow them! When the process is not followed is when the trouble begins. It is important not to grant exemptions or variations from the written guidelines. If you do for one individual, others will demand similar concessions.

   Written guidelines should be reviewed on a regular basis and revised. All procedural documents become dated, laws change, and expectations continually must be revised. As such documents do have the potential to be used in a court of law, the inclusive and overly specific language must be carefully monitored and assessed.

3. The use of "outside evaluators" in the preparation of a promotion and/or tenure dossier may or may not be a part of every institution's process, but certainly most will expect some sort of evaluation from others in the candidate's discipline. Both peer and outside reviewer evaluations have, in recent years, become a point of real concern. When one is asked to write a letter of evaluation, a level of confidentiality is clearly an expectation of the writer. The confidential nature of the letters as well as the deliberations of review committees have recently come under attack. The Supreme Court has been asked to respond to a case involving a request of access to confidential letters by the school's Equal Employment Opportunity/ Affirmative Action Office. The court ruled to afford access to the letters but only by that office, not the candidate for tenure. At other institutions where similar issues were raised, committees were appointed to draft a summary of the letters without indicating the author of the comments.

4. The Freedom of Information act has become another area of question. Under that act, one's personnel file is technically open for review and examination. Given that fact, all annual evaluations and meetings in which tenure issues or expectations are discussed should be recorded in writing and shared with the individual. Should a situation arise where legal concerns become an issue, personal or private notes not shared with the tenure candidate could become significant evidence against your unwillingness to communicate issues or evaluation criteria. There is no advantage to keeping separate files if all your conversations, advice, evaluations, or observations that may become a part of the tenure decision are written and shared with the individual. As much as we dislike to even consider the possibility, we must recognize that every untenured faculty member has the potential to bring us to court. As a result, we have no choice but to act accordingly.

5. Over the past several years, it is possible to follow some trends in the law as it related to issues of tenure. Some current "Hot Issues" include:
   a. Issues of sexual harassment are becoming more common in court cases involving tenure. The indication of actions that might be construed as sexual harassment by you, members of the department, or members of the Promotion and Tenure Committee can become cause for real concern. A candidates' record of such activities must be documented and can become a critical issue in the Promotion and Tenure deliberations.
   b. All issues of ethical behavior can and should be scrutinized. Publication of material created by students without permission or citation or the presentation of any work or research not fully the property of the candidate can and should raise serious question. In this age of sophisticated technology, it is expected that issues of unethical practices will become more prominent and difficult to assess.
   c. New laws concerning Family and Medical Leaves must be incorporated into the Promotion and Tenure system. Issues of how such leaves figure into the "ticking of the tenure clock" must be resolved. If a woman on your faculty takes the legal leave of 12 weeks for the birth and early care of a child during her tenure probationary period, will it count or not count toward the mandatory tenure review? What if a faculty member has a heart attack or undergoes major surgery? Does the tenure clock stop? In most cases, institutions have developed a position on this issue and it is your responsibility to know that position. As is obvious, the policy should be in place to fairly and equitable address all those who might be affected by such interruptions in their probationary time.

6. Given the current economic realities and natural reflexes to defend one's attempt to receive tenure, it is no surprise to note that suits are becoming more common in the academy. With that acknowledged, should we all take out special insurance policies to protect ourselves if we get sued? Perhaps not, but individual circumstances may

> suggest the option is worth investigation. Typically, when one sues they will sue the institution. You may be named in the suit, but the reality is that the institution, or its insurance company, has more money than you. Restitution of such cases is typically viewed in terms of dollars and the sources of the most money become the logical targets. The solvency and financial security of your institution becomes the key to your decision to buy a personal insurance policy. Although there are many sources for such insurance protection, the one I am familiar with is made available through membership in the American Association of University Professors (AAUP). Should you be sued, be sure to contact your Dean, Provost, or President immediately. The more who know and can help, the better.

Ultimately, the question becomes one of who should make decisions about gaining tenure, the academy or the courts. Or, put another way, members of the faculty or lawyers? I am convinced that none of us wants lawyers, or more specifically juries, to have that responsibility. As we all know, those outside of the academy are convinced we are all making much more money than we are worth and don't work but nine to twelve hours a week. Should those with such a clear understanding of what we do make the tenure decision? Clearly, it is to our advantage to handle the issues of tenure ourselves. To be able to do that, we must be willing to make the tough decisions early in the process, follow the established process, and be as clear as possible in our intentions and communication. Yes, it is difficult, time consuming, and fraught with legal implications, but I am not willing to consider the options.

REFERENCES AND NOTES

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