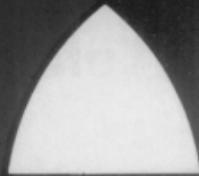


Professors & Instructors

# DUE PROCESS



# AND

# TENURE

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**NATIONAL SOCIETY OF PROFESSORS  
NATIONAL FACULTY ASSOCIATION OF  
COMMUNITY AND JUNIOR COLLEGES  
Statement on Due Process and Tenure**

**1. DUE PROCESS:** Due process refers to the standards and procedures which must be followed in dealing with any adverse action brought against an individual by the government or its agents. These procedures have their origins in the English Common Law and are meant to provide fair and equitable treatment for the individual by insuring as far as possible against arbitrary, capricious or inequitable actions. It is consistent with the fair and equitable treatment guaranteed to all American citizens by the first, fifth and fourteenth amendments to the Constitution.

There are two aspects of due process. Substantive due process means that the reasons for an adverse action must not be arbitrary or capricious; that they must be relevant to the competence of the individual to adequately perform the responsibilities and functions of his position; that they must not either directly or by their effect deny the individual the right to exercise any rights under the Constitution or laws of the

United States, nor be a retaliation for such exercise. Furthermore, the reasons given must be the genuine reasons, not a subterfuge disguising other, unconstitutional intentions; and finally, they must be sufficient to warrant the action taken.

Procedural due process means that there must be available procedural safeguards to ensure that any adverse action can be dealt with fairly and equitably so that the individual affected has every opportunity to face his accusers, respond to the charges and refute the evidence against him. Included in these procedures must be the following:

- That appropriate reasons and timely notice will be given before any adverse action is taken.
- That it will be the burden of the institution to substantiate its charges and justify its actions through the presentation of proper, relevant and sufficient evidence.

- That the individual adversely affected will have an opportunity for a hearing in which he and his representatives will be enabled to hear and see all the evidence, cross-examine any person giving evidence against him, and present his own evidence to refute the charges against him.
- That this hearing will be open or closed at the discretion of the of the individual.
- That the individual will have the right to be represented by counsel of his own choosing.
- That the hearing agency will render a decision based solely on the unrefuted evidence produced at the hearing.
- That the individual will have the right to appeal the decision to binding arbitration by a neutral third party (such as the American Arbitration Association).

These standards and procedures should apply to all members of the professional staff\* from the date of initial employment.

Few institutions of higher education in America today provide adequate due process for staff members. On the contrary, the violation of civil, professional and human rights by college and university administrators is a widespread phenomenon (witness the list of DuShane Fund cases involving institutions of higher education and the AAUP's list of censured institutions). In view of the above and in view of the serious and long lasting personal and professional damage done to individuals affected by current hiring and dismissal practices, all institutions of higher education from community colleges through graduate schools, both public and private, must be required to adopt genuine due process safeguards as defined above.

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\*Henceforth the term "staff" shall refer to teaching faculty and non-teaching professionals employed by institutions of higher education.

## **2. THE PROBATIONARY PERIOD:**

Probation refers to the period of time between the initial hiring of a staff member and the conferring of tenure during which his work is under evaluation to determine whether or not it meets known, predetermined standards of scholarship and teaching ability (or other appropriate standards for non-teaching professionals) which will warrant a tenure appointment.

During this period, the probationary staff member receives annual contracts of employment renewable each year. The conferring of the initial annual contract upon a probationary employee does, however, carry with it an expectation of renewal so long as his work meets the predetermined standards of scholarship and teaching. In any event, he has a right not to be denied renewal of employment for arbitrary, capricious or frivolous reasons or for reasons not related to known standards of performance or for no reason at all or in an arbitrary or capricious manner.

A number of inadequacies in current college and university practices must be corrected in order to provide the basis for fair and equitable treatment during the probationary period.

First, probationary contracts must be clearly distinguished from temporary contracts. A temporary contract should be given only where the assignment is to perform a specific function (ex. a person working under a one-year research or teaching grant) which has a clearly terminal date (*i.e.*, the appointment terminates with the grant). Such appointments do not carry with them an expectation of re-employment after the terminal date, nor is the holder of such a contract eligible for tenure. The temporary employee is, however, entitled to all safeguards of due process during the term of his contract. In any case, the number of such appointments should be strictly limited and temporary contracts must not be applied to persons in a probationary situation. Full-time staff should be employed wherever there is a sufficient

and continuing student demand in an academic discipline (or course) to provide a full-time teaching load.

Second, the initial annual contract of a probationary staff member must include a clear description of the duties and responsibilities of his assignment and a statement of the standards and criteria of scholarship and/or teaching competence on which the probationary staff member's performance will be judged.

These criteria and standards must not be unilaterally changed during the probationary period without the *consent* of the individual affected.

Third, definite, known dates must be established for the renewal of annual contracts after which such contract is automatically renewed. An annual contract may be terminated only when the holder of such a contract has received appropriate and *timely* notice of non-renewal accompanied by a statement of reasons.

Fourth, regular, formal evaluation of the performance of the probationary staff member must be carried out on the basis of known standards and criteria as defined in the initial contract of employment. Current evaluation practices at most institutions of higher education are either nonexistent or totally inadequate. Without adequate criteria and evaluation procedures, non-renewals *must* be arbitrary and capricious. Only a truly effective system of evaluation can insure that non-renewals will be based on proper reasons and adequate evidence rather than personal bias, rumor and whimsy.

Fifth, the institution has an obligation to provide every assistance possible to the inadequate staff member to help him overcome his difficulties, before taking adverse action against him.

The length of the probationary period may vary depending upon the type of institution (e.g. community colleges, four-year colleges, universities, graduate centers, etc.) and the experience brought to

the institution by the employee. The probationary period should be no longer than necessary to adequately evaluate the individual's ability to perform the functions for which he was hired. This may be as little as one year, but should in no case exceed three years. Any new staff member who has already achieved tenure at another institution of higher education should not be required to serve more than one year's probation at the new institution.

- 3. TENURE:** Tenure is a professional status conferred upon a staff member at such time as he is judged to have demonstrated his scholarship and teaching ability sufficiently to warrant recognition of his achievement of a predetermined level of professional competence, as defined in the initial contract of employment. The recognition so conferred is widely known in the academic world as tenure. It is not unlike the status of master craftsman conferred by the craft guilds of the middle-ages on those of its members who demonstrated a predetermined level of technical competence in their craft.

Every probationary staff member is eligible for and entitled to tenure upon reaching the prescribed level of competence. Hence, the practice of establishing institutional tenure quotas must be abolished. Such artificial barriers to the achievement of tenure are unrelated to *any* standard of professional competence and constitute a dismissal (*i.e.*, non-renewal of contract) for arbitrary, capricious and frivolous reasons.

The conferring of tenure on a staff member should carry with it a continuing contract of employment with the institution which is not annually renewed and can be terminated only for just cause. Just cause shall mean only flagrant and continuing failure to fulfill contract obligations without legitimate reasons.

Whether probationary or tenured, a staff member whose employment with the institution is terminated should receive severance pay. The amount of this severance pay should be at least one half year's salary for a second year teacher and should

increase in proportion to the number of years service the employee has performed at the institution.

#### **4. REDUCTIONS IN FORCE:**

In the economic atmosphere which prevails today in higher education, many staff members will face the threat of reduction in force. Safeguards are needed to protect staff members both probationary and tenured—against the effects of such actions.

First of all, a reduction in force (RIF) should be treated as a layoff—temporary in nature—not as a termination.

Second, procedures should be established by which any reduction in force will be accomplished. *Objective* criteria must be established to determine who shall be RIFed and in what order *i.e.*, all temporary staff should be RIFed before any probationary staff is affected and all probationary staff before any tenured staff. Within any academic discipline or other appropriate administrative division RIF's should proceed

according to seniority – the least senior staff member in terms of length of service at the institution first, followed by the next least senior and so on until the most senior member of the staff is reached. Where minority staff members have been recently hired under a newly implemented minority hiring program exceptions should be made to this procedure to guarantee the integrity of the minority hiring program. Where two institutions have been merged all years of service accrued at the former institutions must be counted toward seniority at the merged institution.

Third, staff members who have been RIFed should be guaranteed certain rights and benefits, among which the following are essential:

- (A)** Before being RIFed, the staff member should have the right to fill any existing vacancy for which he is qualified or to transfer to any other division or department or to another college within

a multi-institution system and to fill any vacancy therein for which he may be qualified.

- (B)** The institution should provide a retraining program to assist any staff member to meet the necessary qualifications to fill any such vacancy.
- (C)** The right of recall to any position (whether a newly created one or a vacancy) for which the individual is qualified must be provided. Recall should be by reversed seniority – the most senior first, the next most senior next and so on to the least senior. In no case should any new staff member be hired to fill a position for which a RIFed staff member is qualified.
- (D)** Staff members who have been RIFed should suffer no loss of benefits. They should retain all accrued benefits (such as annual increments, retirement benefits, sick leave, tenure, etc.) and should be placed at the next salary step above their former step upon recall.

- (E) A RIFed staff member should receive from the university – in addition to unemployment benefits, where available, supplemental financial benefits in an amount of from  $\frac{1}{2}$  to  $\frac{3}{4}$  of his annual salary.

## 5. IMPLEMENTATION:

How can the procedures and criteria spelled out above be achieved?

The National Education Association and its state affiliates are seeking legislation and court rulings which will guarantee to all staff members of educational institutions and all levels the rights of substantive and procedural due process herein described. This is, however, a long term process dependent upon the acceptance of new attitudes and viewpoints by legislators and judges.

A quicker and more effective method of securing these rights on an institution-by-institution basis is through collective bargaining.

Collective bargaining is a process of bi-lateral decision-making in which the staff through its duly designated representative meets

on a basis of equality with the duly designated agents of the college or university to negotiate a mutually acceptable agreement which defines the principles and procedures by which the institution's employment practices will be governed. These principles and procedures are embodied in a written and binding contract which is enforceable at law.

This system offers the best possibility of achieving the goal of securing due process procedures as defined above for all staff in institutions of higher education. Mutual agreement on such procedures can be reached at the bargaining table – the only arena where the power of the staff and that of the administration are equalized. Once embodied in a collective bargaining agreement, these principles will have the same effect as a law or court decision for a particular institution. As the Supreme Court has said, the collective bargaining agreement establishes a code of governance regulating the employment relations of a particular institution.

The role of the staff association under a collective bargaining agreement is to serve as the advocate for the staff. It is not the function of the association to sit in judgement upon the worth and abilities of its members or the merits of their claims to justice. Under collective bargaining the association is charged with the duty and responsibility of making and enforcing an agreement covering terms and conditions of employment with the college. Its function is to see to it that the agreement is lived up to by the administration in all of its particulars and that staff members—both collectively and individually—are accorded fair and equitable treatment under the terms of the agreement. As such, it must act as the staff's advocate.

In the same way, the pretense of most college and university boards that they are acting impartially in their treatment of a staff member must be seen for what it is. Even under the best conditions

where the staff member is actually accorded a hearing on his appeal against an adverse administrative action – the board is in effect simultaneously acting as judge, jury and prosecutor – for the administration is the agent of the board invested with its delegated authority.

Hence, the vital need exists in any collective bargaining agreement for an ultimate appeal to binding arbitration by a genuinely neutral third party (such as the American Arbitration Association) which stands outside the framework of the institution and is capable of rendering a truly unbiased judgement on the merits of a dispute under the terms of the collective bargaining agreement.

THE NATIONAL EDUCATION ASSOCIATION – HIGHER EDUCATION.

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