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Subject: [FACFOCUS] Proposed Changes to UA System Rules Are Grave Threat to Tenure and Academic Freedom

To: [FACFOCUS@ualr.edu](mailto:FACFOCUS@ualr.edu)

Colleagues:

Last week, the faculty senate received proposed changes to the UA System rules regarding tenure (Board of Trustees Policy 405.1), employment periods (Policy 405.4), and university and distinguished professorships (Policy 470.1). This email concerns the proposed changes to policy 405.1. As the subject of my email indicates, I believe that the proposed changes are a grave threat to tenure and academic freedom within the entire UA System. Most importantly, the revisions dramatically expand the grounds justifying termination for cause. They do so by (1) effectively establishing collegiality as a basis for termination, and (2) permitting dismissal after a single unsatisfactory rating in an annual review. In addition, the revisions critically weaken the procedural protections available at university committee hearings regarding terminations. If these changes are adopted, the damage to the University of Arkansas will be wide-ranging and likely permanent. It is thus imperative that we speak out about the threat.

Attached to this email is a redline of the proposed alterations to 405.1. I created the redline myself. The faculty senate was only provided a clean .pdf copy of the proposal. To create the redline, I had to convert the current rule and the proposal from .pdf to Word, and then run a compare using Word. Converting documents from .pdf to a word processing format is not an entirely reliable process. Thus, my redline may not be 100% accurate. As a result, I have also attached a clean copy of the proposed changes to 405.1. In addition, the current rule is available at the Board of Trustees website [here](#). (Note also that I converted the word redline back to .pdf so it will show up the same on all computers, phones, and other machines. This final conversion did not alter the document in any way.)

Note also that I have used the functionality of Microsoft Word to (1) insert comments into the redline regarding several of the proposed changes, and (2) highlight in yellow the specific language to which my comments refer.

Please keep in mind that I only received the proposal on Saturday night. Thus, my review has not been comprehensive. There may be other problems that I missed.

The rest of this email discusses some of the proposed changes and one other issue. Note that some of the material below is restated or expanded upon in the comments I inserted in the redline.

One final introductory point: if you have colleagues on other UA System campuses, please consider forwarding this email to them.

## **1. The University may not retroactively alter tenure rights.**

In my opinion, the proposed changes to 405.1 cannot retroactively alter the rights granted under existing tenure contracts. Well-established principles of contract law and constitutional law firmly support this conclusion. Thus, the changes to 405.1, if adopted, will only apply to faculty not yet tenured. However, I have not conducted exhaustive legal research on this point. In addition, while nothing in the proposal suggests that the university believes it can—or intends to—apply the changes retroactively, an express admission on these points is the only way we can be sure of the thinking of the Board of Trustees and the rest of the central administration.

Even if the changes are applied solely in a prospective manner, that only modestly reduces the damage that the new rules will cause. For example, all new hires will be subject to the revised standards. That is a serious problem. The changes will make it more difficult to hire the best entry-level and lateral faculty. And those who are hired will possess weakened tenure protections and more limited academic freedom, both of which will result in numerous harms to teaching, research, and service within the UA system.

## **2. The proposal dramatically expands the scope of what constitutes “cause” for purposes of terminating faculty.**

### **a. Introduction.**

Let me start by highlighting the critical textual changes to the definition of “cause.” The current definition is set forth in section I of Policy 405.1 (which is on page 2 of the policy):

“Cause” is defined as conduct which demonstrates that the faculty member lacks the ability or willingness to perform his or her duties or to fulfill his or her responsibilities to the University; examples of such conduct include (but are not limited to) incompetence, neglect of duty, intellectual dishonesty, and moral turpitude.

Compare that to the revised definition, set out in section I of the proposal on pages 1-2 (and on pages 1-2 of my redline):

Cause - Cause is defined as conduct that demonstrates the faculty member lacks the willingness or ability to perform duties or responsibilities to the University. A faculty member may be disciplined, or dismissed, for cause on grounds including but not limited to **unsatisfactory performance** or (1) professional dishonesty or plagiarism; (2) discrimination, including harassment or retaliation, prohibited by law or university policy; (3) unethical conduct related to fitness to engage in teaching, research, service/outreach and/or administration, or otherwise related to the faculty member’s employment or public employment; (4) misuse of appointment or authority to exploit others; (5) theft or intentional misuse of property; **(6) incompetence, job abandonment, pattern of disruptive conduct or unwillingness to work productively with colleagues,** or refusal to perform reasonable duties; (7) threats or acts of violence or retaliatory conduct; or (8) violation of University policy, or state or federal law, substantially related to performance of faculty responsibilities or fitness to serve the University

I have highlighted two pieces of the revised definition. First, I highlighted the addition of “unsatisfactory performance” near the beginning of the definition. Second, I highlighted certain language in item 6. Section 2.b. of this email addresses item 6. Section 2.c. of this email addresses the insertion of “unsatisfactory performance.” There is additional language in the proposal relating to the two pieces of the definition that I highlighted. That language is discussed in the sections below corresponding to the highlighted language.

**b. Establishing collegiality as a basis for termination dramatically reduces tenure protections and academic freedom.**

The language I highlighted in item 6 is very dangerous. “Pattern of disruptive conduct” is a deeply subjective standard. “Unwillingness to work productively with colleagues” is worse.

These standards create a serious potential for abuse. It takes little imagination to see how the standards could be employed to stifle academic freedom by dismissing or otherwise punishing tenured faculty on the pretextual grounds that they are “disruptive” and/or “uncollegial.” Note that including a collegiality requirement in tenure standards violates AAUP principles. This change would thus move the UA System out of compliance with the AAUP. See *On Collegiality as a Criterion for Faculty Evaluation* at page 1 (and throughout), available [here](#).

The importance of the changes in item (6) is highlighted by the fact that the “work productively” collegiality standard is repeated in the section of 405.1 that concerns academic freedom. The proposal amends section IV.A.14.c, on page 10 by inserting the following language: “Faculty are expected to work productively with colleagues in carrying out the mission of the University.” By adding this to the academic freedom section, it is clear that the drafters intend the language to circumscribe the scope of academic freedom everywhere within the University of Arkansas.

**c. The proposal permits termination after a single unsatisfactory rating in an annual review; this also dramatically reduces tenure protection and academic freedom.**

Under the current standard, termination for performance issues may result only from “incompetence,” “neglect of duty,” or the like. Under the proposed standard, a mere finding of “unsatisfactory performance” in a *single* annual review is sufficient grounds to warrant termination. That is a profound change.

To elaborate, the proposal inserts new standards regarding annual reviews in section V.A.9. Here is the pertinent language:

Any campus procedures regarding post-tenure review shall not allow greater than one academic year, with active cooperation from the faculty member, for an overall unsatisfactory performance rating to be substantially remedied prior to a recommendation of dismissal on the basis of unsatisfactory performance. In other words, if a faculty member’s overall performance is evaluated as unsatisfactory for an academic year, any improvement plans or other remedial measures are expected to result in a satisfactory evaluation by the end of the following academic year; if not, the faculty member may be issued a notice of dismissal on twelve months’ notice as provided for in this policy. Again, such period of time for remediation assumes the active cooperation and engagement of the faculty member; otherwise, a shortened timeframe may be utilized.

On the surface, this provision appears to provide that termination is only permissible after two unsatisfactory ratings. In the first yellow block, the provision states that “any improvement plans or other remedial measures are expected to result in a satisfactory evaluation **by the end of the following academic year**; if not, the faculty member may be issued a notice of dismissal . . .” (Emphasis added.) That *suggests* that two unsatisfactory ratings are required. But now consider the last sentence of the language I quoted, also highlighted in yellow: “Again, such period of time for remediation assumes the **active cooperation and engagement** of the faculty member; **otherwise, a shortened timeframe may be utilized.**” (Emphasis added.) This means that if the university, in its subjective judgment, determines that a person is not being sufficiently “cooperative” or “engaged” in the remediation plan, termination is possible well before the end of the first academic year after the unsatisfactory rating. In short, a single unsatisfactory rating, combined with a judgment of insufficient “cooperation” or “engagement,” can result in termination.

That is a dramatic change from the existing rule. To repeat, the current standard requires “incompetence,” “neglect of duty,” or something comparable. Those words denote performance that is *considerably* worse than suggested by a mere finding of “unsatisfactory.” Indeed, “incompetence” and “neglect of duty” are much worse than *multiple* findings of unsatisfactory performance.

This change also violates AAUP standards. For example, in a report regarding Greenville College in Illinois, the AAUP said this:

As the writers of the 1958 *Statement on Procedural Standards* had assumed, most institutions have indeed developed their own standards of what constitutes adequate cause for dismissal. They most commonly tend to be “incompetence,” “professional misconduct,” “gross neglect,” and the like. In comparison, Greenville’s standard of “unsatisfactory service” not only is nebulous and subjective, but also sets too low a bar for adequate protection of tenure and academic freedom . . . .

*Report, Academic Freedom and Tenure: Greenville College (Illinois)* at page 86, available [here](#).

Likewise, the AAUP’s formal statement on post-tenure review explains that the appropriate standard for “cause” is “incompetence, malfeasance, or failure to perform . . . duties.” *Post-*

*tenure Review: An AAUP Response* at page 230, available [here](#). The report proceeds to explain that if “the standard of dismissal is shifted from ‘incompetence’ to ‘unsatisfactory performance,’ . . . then tenured faculty must recurrently ‘satisfy’ administrative officers rather than the basic standards of their profession,” which fatally undermines academic freedom. *See id.*

As these AAUP documents make clear, the proposed change of the cause standard from “incompetence” and “neglect of duty” to mere “unsatisfactory” performance is fundamentally inconsistent with core principles of academic freedom. And that would be true even if the proposal required multiple findings of unsatisfactory performance. As I explained, however, a single finding of unsatisfactory performance can justify termination under the proposal (when combined with a finding that the faculty member is not sufficiently cooperative or engaged in remediation of the unsatisfactory performance).

### **3. The proposal critically weakens procedural protections.**

Section IV.C. of 405.1 concerns the procedures for dismissing a tenured or tenure-track faculty member. Part of the termination process is a hearing before an impartial committee. The proposal revises section IV.C.5., on page 14, to strip away the committee’s ability to grant procedural protections equivalent to those afforded in a court of law. See comment j7 on page 12 of the redline, which explains this point in more detail.

\* \* \*

Note that the redline contains a few other substantive comments.

As I said, this proposal is a striking attack on academic freedom and tenure. It is thus imperative that we make our voices heard.

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