

Academic Freedom and Tenure The New Community College of Baltimore¹

I. Background

This report concerns the action taken by the administration of the New Community College of Baltimore to terminate the services of Professor Joseph G. Gardiner following an announced termination of tenure commitments with the transfer of the college's control from the city of Baltimore to the state of Maryland.

In 1947, the city of Baltimore established the Baltimore Junior College as a division of the city's Department of Education under the governance of the Board of School Commissioners. In 1961, the Maryland legislature authorized the establishment of community colleges throughout the state, and the Baltimore Board of School Commissioners became the board of trustees for the renamed Community College of Baltimore. The following year, the trustees adopted a set of bylaws that included a provision for awarding tenure after three years, later five years, of satisfactory service. A separate board of trustees for the college was created in 1968, with the members appointed by the mayor of Baltimore. In 1970, the college entered into a collective bargaining agreement with the faculty, which was represented by Local 1980 of the American Federation of Teachers. The initial agreement of 1971 incorporated the language of the bylaws concerning tenure.

During the 1980s, the college experienced declining student enrollment and reduced funding from the city of Baltimore, which itself, by the end of the decade, faced serious financial problems. In 1989, Mayor Kurt Schmoke proposed that the state of Maryland assume full financial responsibility for the college, and in January 1990 the board of trustees endorsed the mayor's plan. In the same month, Governor William Donald Schaeffer, who had called for the creation of a new college, included the plan in his legislative package. A

1. The text of this report was written in the first instance by the members of the investigating committee. In accordance with Association practice, the text was then edited by the Association's staff, and, as revised, with the concurrence of the investigating committee, was submitted to Committee A on Academic Freedom and Tenure. With the approval of Committee A it was subsequently sent to the faculty member at whose request the inquiry was conducted, to the administration of the New Community College of Baltimore, and to other persons concerned in the report. In the light of the responses received and with the editorial assistance of the Association's staff, this final report has been prepared for publication.

bill for this purpose passed the legislature in April 1990 and was signed into law on May 2.

The law went far beyond state assumption of funding for the existing Community College of Baltimore. It gave the college a new name, the New Community College of Baltimore (NCCB), and placed it under a new board of trustees to be appointed by the governor. The existence of the institution was extended until June 30, 1993, and meanwhile the two state agencies in Maryland responsible for higher education were to develop a plan for its future. The governor appointed Dr. James D. Tschechtelin, who had been the executive director of the State Board for Community Colleges, as director of transition for NCCB, and shortly thereafter the board of trustees appointed Dr. Tschechtelin as interim president, effective July 1, 1990.

The law establishing NCCB, while it gave the board of trustees the authority to set the terms and conditions for faculty appointments, called for the faculty of the former Community College of Baltimore to be retained as a group until December 30, 1990, by which time all the faculty members would be evaluated. The legislation, as President Tschechtelin stated in an April 8, 1991, letter to the Association's staff, was silent with respect to the status of tenure at NCCB. The legislation was also silent regarding the status of the Community College of Baltimore faculty union and of previously negotiated collective bargaining agreements. President Tschechtelin's administration made it clear, however, that faculty tenure had ended with the advent of NCCB and that the collective bargaining agreement with the faculty that had been in place no longer applied.

Under an evaluation process developed principally by the vice president for academic affairs, Dr. Ron D. Wright, faculty members were required to prepare a portfolio to be evaluated by the division dean, a faculty peer named by that dean, and a faculty peer named by the faculty member. Student information reports, the forms supplied by the Educational Testing Service, were to be used for the student component of the evaluation. The vice president for academic affairs, after assigning a composite score to each faculty member, giving the greatest weight to the evaluation by the dean, forwarded a recommendation to the president ranking members of the faculty as "excellent," "good," "fair," and "poor." Those who received "excellent" or "good" ratings were to be issued new appointments

for two years or one year, respectively. Those rated "fair" were to be retained through the academic year and reevaluated in the spring 1991 semester, with their future status to be determined on the basis of that second evaluation. Those who received a "poor" rating were to be discharged as of the end of the 1990-91 academic year. An appeals procedure was available to those faculty members who received a "poor" rating: first to a panel composed of deans and faculty, then to the president, and lastly to the board of trustees.

On December 7, the ninety-six full-time faculty members who were evaluated—a number that was later reduced to ninety-three after three faculty members retired—received their ratings: twenty-six were rated "excellent," forty-four "good," nineteen "fair," and seven "poor."² Of the seven faculty members rated "poor," four appealed. The rating of one was raised to "good." The three others were notified that the termination of their services remained in effect. Among the three was Professor Gardiner, who since 1972 had been a tenured faculty member in the Division of Humanities and Social Sciences at the Community College of Baltimore. Of the six faculty members whose services were terminated, and whose terminations were not reversed on appeal, four had attained tenure at the Community College of Baltimore.

Following the transfer of the college to state control, the American Federation of Teachers initiated litigation in U.S. District Court in behalf of the affected faculty members. Professor Gardiner was a named plaintiff in the class action suit, which challenged the college's position that NCCB had no obligation to afford the protections of tenure to faculty members who had attained tenure at the Community College of Baltimore. The court, in a decision dated June 11, 1991, dismissed the complaint on grounds that the legislation establishing NCCB did not violate the Contracts Clause of the U.S. Constitution and that the procedures available to faculty members to contest the terminations sufficiently comported with the requirements of due process. No appeal was filed. Professor Gardiner subsequently initiated litigation in state court in his own behalf against NCCB, challenging the evaluation which had served as the basis for terminating his services. On October 10, the court dismissed the complaint on grounds that, under state law, a community college is exempt from responding to appeals filed under the state's administrative procedures act.

Faculty members at NCCB had consulted with the American Association of University Professors about these developments. The Association's staff wrote to President Tschechtelin initially on October 5, 1990, conveying concern over the "continuing rights of faculty members at CCB with the transfer of the college to state control and subsequent reorganization." The staff questioned assertions from the state's attorney general's office that the appointments of faculty members previously granted tenure could be terminated without a showing of cause and the affordance of other pro-

2. The faculty senate of NCCB authorized an *ad hoc* committee to examine the process by which the 96 faculty members were classified. The committee's report, to be discussed below, was highly critical of the evaluation process.

tections of academic due process. President Tschechtelin did not respond that fall. He did so in a letter to the staff dated April 8, 1991, in which he asserted that NCCB was "a new college." He wrote that he appreciated "the importance of academic freedom and job security," and that he believed "these values can be sustained and preserved through a system of long-term contracts" which he intended to recommend to the board "at the appropriate time."

Professor Gardiner, informed that the board of trustees on March 20 had approved the president's recommendation to terminate his appointment, sought the assistance of the Association's Washington office, which wrote to President Tschechtelin on April 12, conveying new concerns regarding the evaluation process and termination as implemented in Professor Gardiner's case. The staff reiterated its recommendation that those faculty members at NCCB who had held continuous appointments that were now being terminated should be afforded the procedural safeguards called for in the 1940 *Statement of Principles on Academic Freedom and Tenure*. A staff member's telephone conversation with President Tschechtelin on April 22 and another staff member's meeting with him in Baltimore on July 17 led to no changes in the actions taken against Professor Gardiner and his similarly situated colleagues. Prior to the July meeting the Association's general secretary had authorized an investigation, and the undersigned *ad hoc* committee was subsequently appointed to investigate the issues of concern. The committee, after familiarizing itself with the available documentation, visited the New Community College of Baltimore on October 4, 1991. It met with President Tschechtelin, who was accompanied by legal counsel and by the current vice president for academic affairs, with Professor Gardiner, and with twenty other present and former faculty members. The investigating committee was received courteously by all concerned.

II. Issues and Findings

A. Tenure and the "New College" Argument

The administration of NCCB, in its meeting with the investigating committee and in its various pronouncements and publications, claims that NCCB is a new institution. Reference is made to a newly appointed board of trustees and a new college mission statement that emphasizes greater responsiveness to the needs of the college's students. Noted are new goals for enhanced quality and new appointees, including key administrators. Also noted are a fresh evaluation of existing faculty members and a critique of all thirty-one career programs, nine of which had been recommended for discontinuance. Cited, in addition, are new computer equipment, a new "student success" course, a renovated student cafeteria, a new in-house newsletter, and "a new spirit of energy and direction at the college."

There is convincing evidence, however, that in essential respects NCCB is not a new institution; it is, rather, a continuation of the Community College of Baltimore. The college had been preparing for an accreditation visit when the law transferring control of the college to the state was enacted. A campus self-study

report, then in preparation by the administration and shortly to be completed, emphasized that the "new" institution is "building on the foundation of the Community College of Baltimore. . . . New CCB is starting off with the physical assets, the personnel, the programs, and the student body of the old institution." The Commission on Higher Education of the Middle States Association of Colleges and Schools subsequently voted to "continue the accreditation" of NCCB, directing the college to prepare for a full visit during the 1992-93 academic year.

The continuance of accreditation is by no means the only evidence of continuity. In its submission to the federal court in connection with the litigation initiated by the American Federation of Teachers, the administration stated that NCCB continues to provide the "same courses as the Community College of Baltimore, that the faculty is largely the same, and that the facilities and equipment are the same." At no point did the college cease operations. Faculty members have retained their salaries, academic ranks, sick days, and retirement benefits. Students have advanced to the next year, retaining their grades and credit. The curriculum, while undergoing some modification, has been retained substantially intact.

A previous investigating committee has dealt with the issue of whether the shift of a college from city control and financing to state responsibility created a new institution.³ The committee concluded, as this investigating committee concludes, that it did not. NCCB's structure for institutional control and financing—state rather than municipal—is indisputably different from what existed for the Community College of Baltimore, but the significant changes the investigating committee can discern are the abandonment of faculty tenure at NCCB, the dismissal of six faculty members, and the abrogation of collective bargaining. By every other

3. "Academic Freedom and Tenure: Harris-Stowe State College (Missouri)," *Academe: Bulletin of the AAUP* (May 1981): 134-35.

4. Commenting on a draft text of this report sent to him prior to publication, President Tschechtelin characterized the status of NCCB and its faculty as follows. "Senate Bill 381 created from the Community College of Baltimore ('CCB') an entirely new college in New Community College of Baltimore, which included entirely new governance and financial support among other things. Major changes also occurred in personnel, purchasing, and fiscal operations. Although the drafters of the legislation creating New Community College of Baltimore wanted to keep the college open during the transition from City to State ownership so that there would be little disruption to students, it was clear from the legislative history and from the Bill itself that legislators sought a new and different governance structure, system of management, and quality and range of academic programs and services. Former employees of CCB were given temporary employment. Continued employment was conditioned upon obtaining successful performance evaluations at New Community College of Baltimore. The legislation did not provide for tenure or permit collective bargaining and expressly provided that 'no liability, contract, or obligation of [CCB] shall be a liability, contract, or obligation of [New Community College of Baltimore] unless such liability, contract, or obligation [was] expressly assumed by action of the Board of Trustees of [New Community College of Baltimore].'"

functional academic measure of what a college is or does, the investigating committee finds that the New Community College of Baltimore is essentially the same institution as the Community College of Baltimore.⁴

B. Evaluation of the Faculty, 1990-91

The law establishing the New Community College of Baltimore called for all faculty members to be offered "temporary employment" from July 1, 1990, to December 31, 1990. These "previous" employees were to be evaluated during this period, and those retained would be offered appointments on terms and conditions set by the new board of trustees. As noted above, the terms and conditions no longer included collective bargaining by the faculty and faculty tenure.

During the fall of 1990, the administration of NCCB devised and carried out its evaluation of all members of the faculty. As stated earlier, faculty members ranked "excellent," "good," and "fair" were to be retained, while those ranked "poor" were to be dismissed. The evidence available to the investigating committee indicates that the criteria for the evaluation, the weighing of the components of the evaluation, and the decisions for dismissal were principally the administration's.

In his meeting with the investigating committee, President Tschechtelin described the system of evaluation as fair. A committee of the faculty senate sharply disagreed. It objected to the evaluation system on several grounds: a lack of precision in the standards to be used by peer evaluators, resulting in scores that were highly unreliable; faulty procedures in administering the student evaluation instrument; repeated errors in the evaluations by deans; and mistakes in converting data obtained from criterion-referenced measurements for particular faculty members (e.g., questions dealing with qualities as a teacher) into scores comparing individual faculty members to a norm established for the entire faculty.

But even had there been no flaws in the system of evaluation, the evaluations carried out by the NCCB administration were fundamentally an improper means for determining which, if indeed any, faculty members should be dismissed. While incompetence can be adequate grounds for dismissal of a faculty member, a necessary predicate for an administration's commencing dismissal procedures against a tenured professor is that it afford the procedural safeguards that accrue with tenure. The NCCB administration failed to do so in the case of Professor Gardiner. Neither the legislation establishing NCCB nor the decision of the federal court required the administration to abandon the system of tenure that had been in place. The investigating committee finds that the administration, in evaluating and then dismissing faculty members without regard for previous tenure commitments, acted in violation of the 1940 *Statement of Principles on Academic Freedom and Tenure*.

C. The Dismissal of Professor Joseph G. Gardiner

Professor Gardiner's affiliation with the Community College of Baltimore began in 1969, when he was appointed assistant to the dean of community services. In 1972, following the elimination of the community

services program, Professor Gardiner joined the faculty as a tenured instructor of English. In a letter dated January 22, 1991, Professor Gardiner was notified by Vice President Wright that, based upon his review and analysis of Professor Gardiner's "ratings" by his peers, students, and divisional dean, he was forwarding to President Tschechtelin an "overall performance evaluation of 'poor.'" According to an "explanation of rating" attached to the letter, Professor Gardiner had a "total performance score" of 375.36, which was 64.64 points below the "total performance mean" for all members of the faculty. The letter further informed Professor Gardiner that his appointment was being renewed for the period from January 1, 1991, to June 15, 1991, and that he had a right to appeal the vice president's recommendation to an appeals board composed of faculty members and administrative officers.

Professor Gardiner filed an appeal with the appeals board, which, in a report dated February 28, stated that it had voted 4-1 to reject Vice President Wright's "poor" rating of Professor Gardiner's "overall performance." The board questioned the reliability of the vice president's data for each component of the evaluation. It noted that the administration had failed to administer the student evaluations in one of Professor Gardiner's classes. The board noted further that some of Professor Gardiner's students may have given him a negative rating because they thought the standards he set were "unreasonably stringent, when in fact the standards were appropriate. . . ." With respect to evaluations by Professor Gardiner's peers, the appeals board found that the criteria were so unclear that one colleague gave Professor Gardiner a rating of seventy-five on the mistaken assumption that this was an "above competent" score. The board concluded that the peer evaluations were "unreliable." Lastly, the appeals board questioned the validity of the evaluation by the dean, who had stressed failure rates in Professor Gardiner's classes as a negative reflection on his teaching skills. The board found no necessary connection between the two.

Two weeks later, President Tschechtelin, in effect overruling the appeals board, informed Professor Gardiner that he intended to recommend to the board of trustees that it affirm the vice president's rating of "poor." He also informed Professor Gardiner of his right to appear before the board—"your statement before the Board of Trustees," the president stated, "will be limited to five minutes"—and of the availability of a college-paid outplacement counseling workshop. Professor Gardiner met with the trustees on March 20. In a letter dated May 17, President Tschechtelin notified Professor Gardiner that the board of trustees, at its meeting on March 20, had accepted the recommendation to affirm the "poor" rating, and that his services would accordingly be terminated effective June 15.

Professor Gardiner had attained tenure at the Community College of Baltimore. Because the investigating committee has found that the college continued as essentially the same institution when it came under state control, the committee finds that Professor Gardiner was entitled to retention at NCCB absent demonstration of cause for dismissal under the

safeguards of academic due process set forth in the 1940 *Statement of Principles on Academic Freedom and Tenure* and the complementary 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings* (like the 1940 *Statement*, a document issued jointly by the AAUP and the Association of American Colleges). These principles and standards call for the administration to establish cause for its action in a full hearing of record before a duly-constituted faculty committee. The board of trustees will either sustain the decision of the hearing committee or return the proceeding to the committee with specific objections, making a final decision after study of the hearing committee's reconsideration.

The investigating committee finds that the administration of the New Community College of Baltimore denied Professor Gardiner academic due process in dismissing him without having afforded him opportunity for an appropriate hearing.⁵

D. Adequacy of Notice

At its meeting in June 1991, the board of trustees approved the provisions to be included in the contracts issued to full-time faculty members at NCCB. These provisions state that faculty members with a one-year contract will be entitled to ninety days of notice; faculty members with a contract of two or more years will be entitled to 180 days of notice of nonreappointment. In the case of dismissal of a faculty member, the contract "shall automatically terminate as of the effective date of the dismissal," whether or not there has been a finding of moral turpitude. The provisions also state that "failure to provide reasonable advance notice shall not entitle an employee to renewal of contract," and that "it is specifically understood and agreed that the faculty member shall not be deemed to be granted tenure or similar status by virtue of entering into this contract."

The Association's recommended standards for notice of nonreappointment call for notice not later than March 1 in the first academic year of service; not later than December 15 in the second year; and at least twelve months before the expiration of an appointment after two or more years at the institution. The 1940 *Statement of Principles on Academic Freedom and Tenure* also provides, in cases not involving moral turpitude, for at least one year of notice or severance salary for a tenured faculty member who is dismissed.

Professor Gardiner, having served under two successive half-year appointments during the academic year 1990-91 after he had held tenure for eighteen years at the Community College of Baltimore, received formal notice on May 17 of the termination of his services effective June 15. Notice of less than a month is severely inadequate even for a first-year faculty member under the standards currently in force at NCCB. It might be argued that Professor Gardiner effectively received no-

5. President Tschechtelin, in his comments on this report, stated that "we exercised great caution throughout the evaluation process to be fair and objective. . . . New CCB does not have tenure. Professor Gardiner was evaluated in accordance with a comprehensive process that was developed with extensive faculty input. His performance was rated poor, and after a lengthy appeal process he was terminated from the college."

tice on December 7, 1990, when he was informed that his performance had been rated "poor." Even if the December date is viewed as operative, however, the investigating committee finds that the notice received by Professor Gardiner fell distinctly short of what was due a tenured faculty member, or any faculty member beyond the second year of service, under relevant Association-supported standards.

E. Conditions for Academic Freedom in the Absence of Tenure

According to the Transition Report for the Middle States Association, prepared by the administration of NCCB at the time of the institution's transfer to state control in June 1990, seventy-five percent of the full-time faculty had tenure. While the legislation creating NCCB, as noted previously, was silent on the subject of tenure, a system of tenure does not currently exist at the college. Nor, according to what President Tschechtelin told the investigating committee, should it be expected that the system of tenure will be restored. He stressed the need for accountability by faculty and said that this could be achieved through multi-year term contracts, which presumably would be renewable at the discretion of the administration. President Tschechtelin acknowledged the importance of tenure in protecting academic freedom in the advancement of knowledge, but he questioned its applicability in a community college where research is not a prime component of the work done by faculty members and alternate means could be found to protect academic freedom.

The contract for full-time faculty members at NCCB states that "Faculty members will enjoy and be subject to the policies and procedures governing academic freedom, as they may be established, modified or amended from time to time." The draft contract also states that "The Board may dismiss or suspend the Faculty Member for cause at any time on recommendation of the President of the College provided that, in the event the President recommends dismissal, the Faculty Member is given at least thirty days written notice of the grounds for dismissal and afforded an opportunity for a hearing before the President." In circumstances in which tenure has been abolished, safeguards for academic due process are minimal, and faculty members have been dismissed over the objections of their faculty peers, it is not surprising that faculty members should have expressed concern to the investigating committee about widespread insecurity at NCCB to the detriment of academic freedom. The importance of retaining tenure as a protection for academic freedom for teachers at community colleges, no less than at any other college or university, has been reiterated many times over by the American Association of University Professors. It suffices here to recall what was stated in the report of another investigating committee:

Tenure, with its requirement that cause for action against a faculty member be established under full safeguards of academic due process, secures the freedom to teach and to pursue knowledge by removing the fear of arbitrary dismissal. An ad-

ministration or governing board that abolishes an existing system of tenure, and thus leaves vulnerable the academic freedom that tenure protects, jeopardizes the integrity of an institution of higher learning.⁶

III. Conclusions

1. The administration of the New Community College of Baltimore, in terminating the services of Professor Joseph G. Gardiner, violated the 1940 *Statement of Principles on Academic Freedom and Tenure* by not establishing cause for the dismissal pursuant to the requisite safeguards of academic due process. The notice of termination was seriously inadequate under the standard set forth in the 1940 *Statement of Principles*.

2. The administration has endangered academic freedom at the New Community College of Baltimore by not honoring the safeguards of tenure previously assured to the members of the faculty and by limiting commitments to faculty members henceforth to term appointments renewable at the administration's discretion.

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Investigating Committee

Committee A on Academic Freedom and Tenure has by vote authorized the publication of this report in *Academe: Bulletin of the AAUP*.

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6. "Academic Freedom and Tenure: Westminster College of Salt Lake City," *Academe: Bulletin of the AAUP* (November-December 1984): 9a.