

September 29, 2022

VIA ELECTRONIC MAIL

Chair Jon Rolph
Kansas Board of Regents
1000 Southwest Jackson Street
Suite 520
Topeka, Kansas 66612-1368

President Ken Hush
Emporia State University
1331 Market Street
Emporia, Kansas 66801

Dear Chair Rolph and President Hush:

Professors Douglas Allen, Michael Behrens, Rob Catlett, Dan Colson, Sheryl Lidzy, Christopher Lovett, Max McCoy, Katrina Miller, and Mel Storm have sought the advice and assistance of the American Association of University Professors as a result of having received similar letters, signed by President Hush and dated September 15, notifying them of the termination of their appointments effective May 16, 2023. Although only these nine faculty members have thus far sought our assistance, we understand from media sources that an additional twenty-four Emporia State faculty members may have received similar notice.¹

The letters state that the bases for the decision to terminate these appointments were “extreme financial pressures accelerated by the COVID-19 pandemic, decreased program and university enrollment, continuing and ongoing increases in the cost of operations across campus, and substantive changes in the educational marketplace.”

The letters further state that the decision to terminate the appointments was made pursuant to “Kansas Board of Regents (Board) policy Chapter II, Section C., Paragraph 6.b., and in accordance with the required framework approved by the Board.” Enacted in January 2021 to address “the extreme financial pressures placed on the state universities due to the COVID-19 pandemic,” the board policy provides that “any state university employee, including a tenured faculty member, may be suspended, dismissed, or terminated from employment by their respective university.” The policy, which is set to expire on December 31, 2022, also provides that “[d]eclaration of financial exigency and the processes associated with the declaration of financial exigency shall not be a prerequisite to any suspension, dismissal, or termination authorized by this provision, and no existing university policy hearing procedures shall apply to

¹ E.g., http://www.emporiagazette.com/gaz/article_14e228ba-3859-11ed-8578-83d32726e371.html.

such decisions.”² Because of this last provision, faculty members who wish to contest the terminations can do so only “through the Board of Regents office to the Office of Administrative Hearings.”

Regarding implementation, the policy stipulates that the president of a system institution must request board approval of “a framework for the university’s decision-making” under its provisions. Even though the board of regents had adopted the policy almost two years ago during one of the worst periods of the pandemic, no president made such a request until two weeks ago, on September 14, when President Hush solicited and received board approval for ESU’s “Framework for Workforce Management.” Faculty members received their termination notices the next day.

Professors Behrens, Colson, McCoy, and Storm hold appointments in the Department of English, Modern Languages, and Journalism. Professor Behrens joined the faculty eight years ago; Professor Colson was first appointed ten years ago; Professor McCoy began his career at the university sixteen years ago; and Professor Storm has served Emporia State for fifty-one years. Professor Catlett joined the Department of Mathematics and Economics in 1978. Professor Miller has held an appointment in the Department of Counselor Education since 2007. Professor Lovett has served in the Department of Social Sciences, Sociology, and Criminology for twenty-six years and Professor Allen has served in the same department for three years. Except for Professor Allen, whose appointment is probationary for tenure, all these faculty members hold appointments with indefinite tenure. Their letters provide no rationale why, in response to “severe financial pressures,” these particular positions were selected for termination.

* * * *

The interest of our Association in these cases derives from its longstanding commitment to fundamental tenets of academic freedom, tenure, and due process, as enunciated in the enclosed 1940 *Statement of Principles on Academic Freedom and Tenure*, jointly formulated by the AAUP and the American Association of Colleges and Universities and endorsed by more than 250 disciplinary societies and higher-education organizations. We are pleased to note that section 1B.07 of Emporia State’s *University Policy Manual* declares that “Emporia State University believes the policies and guidelines developed by the American Association of University Professors, in its 1940 Statement of Principles on Academic Freedom and Faculty Tenure with 1970 Interpretive Comments, are reasonable and prudent.”

² The KBOR was not alone in adopting such a policy. During the height of the pandemic, a small number of institutions adopted similar policies suspending key regulations governing tenure and academic due process in order to facilitate program closures and layoffs of tenured faculty. In May 2021, the AAUP issued a special report discussing the cases of eight such institutions: https://www.aaup.org/file/Special-Report_COVID-19-and-Academic-Governance.pdf. In January 2021, at the behest of the Kansas state AAUP conference, the AAUP’s staff provided an analysis of the numerous ways in which the board policy directly contravened Association-supported principles and standards. On September 12, 2022, the Kansas conference forwarded that advisory letter to the KBOR when it wrote to lodge its objections to what was then only the possibility that President Hush would ask the board to approve ESU’s Framework for Workforce Management.

Procedural standards derived from the 1940 *Statement* are set forth in the *Recommended Institutional Regulations on Academic Freedom and Tenure* (also enclosed). Under these standards, the only acceptable process for terminating tenured appointments for financial reasons is that set out in Regulation 4c, Financial Exigency, of the *Recommended Institutional Regulations*. It requires that the “termination of an appointment with continuous tenure . . . may occur under extraordinary circumstances because of a demonstrably bona fide financial exigency,” defined as “a severe financial crisis that fundamentally compromises the academic integrity of the institution as a whole and that cannot be alleviated by less drastic means” than terminating tenured appointments. Additionally,

- “an elected faculty governance body” will participate “in the decision that a condition of financial exigency exists or is imminent and that all feasible alternatives to termination of appointments have been pursued”;
- the faculty as a whole or a representative body thereof will have “primary responsibility” for “determining where within the overall academic program termination of appointments may occur” and for “determining the criteria for identifying the individuals whose appointments are to be terminated”;
- prior to the making of any proposals on discontinuing programs, “the faculty or an appropriate faculty body will have the opportunity to render an assessment in writing of the institution’s financial condition”; and
- those faculty members whose programs are being considered for discontinuance “will promptly be informed of this activity in writing and provided at least thirty days in which to respond to it.”

With respect to the due-process protections available to affected faculty members, Regulation 4c(3) requires affordance of “an on-the-record adjudicative hearing” before an elected faculty body similar in basic respects to what the AAUP recommends for dismissal (see Regulation 5). In such a hearing, an affected faculty member may contest

- “the existence and extent of the condition of financial exigency,” with the burden of proof resting with the administration,
- “the validity of the educational judgments and the criteria for identification for termination,” with the important qualification that “the recommendations of a faculty body will be considered presumptively valid,” and
- “whether the criteria are being properly applied in the individual case.”

Among the final provisions are these three.

- A tenured faculty appointment will not be terminated before an untenured appointment “except in extraordinary circumstances where a serious distortion in the academic program would otherwise result” (Regulation 4c[4]).
- Prior to terminating an appointment for reasons of financial exigency, the institution, with faculty participation, “will make every effort” to find another “suitable position within the institution” for the affected faculty member (Regulation 4c[5]).

- “In all cases of termination of appointment because of financial exigency,” affected faculty members with tenure will be afforded notice or severance salary of “at least one year” (4c[6]).

The ESU administration appears to have observed none of these procedural standards in terminating the appointments of tenured faculty members. The decision to terminate tenured appointments did not involve a declaration of a bona fide financial exigency, appropriate faculty involvement in the process leading to the declaration, consideration of “all feasible alternatives” to termination of tenured appointments, any indication that seniority and tenure were taken into account in the order of layoff, any attempts to make every effort to find other suitable positions within the institution for the affected faculty members, adequate notice or severance salary, and, most crucially, affordance of academic due process—that is, a faculty hearing in which the administration would bear the burden of proof on the contested issues.

By requiring due process and extensive faculty involvement in key decision-making, Regulation 4c safeguards tenure and academic freedom during a financial emergency. Section 3C.10, Financial Exigency, of the ESU *University Policy Manual* incorporates procedures that comport in most essential respects with Regulation 4c. Unfortunately, citing “extreme financial pressures,” the Framework for Workforce Management suspends section 3C.10, the very purpose of which is to address extreme financial pressures, perhaps because the administration found its governance provisions inefficient. However, as our *Report of an AAUP Special Committee: Hurricane Katrina and New Orleans Universities* (2007) noted,

However cumbersome faculty consultation may at times be, the importance and value of such participation become even greater in exigent than in more tranquil times. The imperative that affected faculties be consulted and assume a meaningful role in making critical judgments reflects more than the values of collegiality; given the centrality of university faculties in the mission of their institutions, their meaningful involvement in reviewing and approving measures that vitally affect the welfare of the institution (as well as their own) becomes truly essential.

Absent countervailing information, the AAUP is compelled to regard the administration’s actions that resulted in the termination of tenured appointments as having been taken without a legitimate basis and in disregard of key provisions of the 1940 *Statement on Academic Freedom and Tenure*—provisions which, again, Emporia State’s *University Policy Manual* describes as “reasonable and prudent.”

* * * *

In the case of Professor Allen, whose appointment is probationary for tenure, the applicable AAUP-supported standards are set forth in Regulation 2 of the *Recommended Institutional Regulations*. It specifies, among other requirements, that a tenure-track faculty member notified of nonrenewal must be afforded a written statement of the reasons for the decision, adequate notice (in Professor Allen’s case, twelve months), and the opportunity to contest the decision

with an elected faculty body. The most evident departure from Regulation 2 in Professor Allen's case is the failure to afford him the latter opportunity. Under the Framework, affected faculty members have thirty days to file an appeal through the board of regents, the very body ultimately responsible for the adverse decisions.

* * * *

Our Association's keen interest in these cases is further intensified by allegations (which remain unrebutted in the absence of a faculty hearing) that some appointments may have been selected for termination because the faculty members in question were outspokenly critical of the administration and governing board. Professor McCoy, for example, published a September 13 article in the *Kansas Reflector* titled "Emporia State University is About to Suspend Tenure. Here's Why You Should Care," the first sentence of which is "I may be fired for writing this."³

If the administration targeted faculty members because of their speech, these terminations have been effected in violation of principles of academic freedom, which protect not only teaching, research, and extramural expression, but also faculty speech regarding the institution and its policies (intramural expression).

* * * *

The information in our possession regarding these cases comes to us almost entirely from the affected faculty members, and we appreciate that you may have additional information that would improve our understanding of what has occurred. We would therefore welcome your comments.

Assuming the essential accuracy of the account set out in this letter, we strongly urge that the Emporia State administration immediately rescind the notices of termination issued to these nine faculty members and their similarly situated colleagues. As we hope we have made clear, the AAUP considers the process by which the termination decisions were reached to have been illegitimate and the terminations themselves to be summary dismissals.

We further urge that any subsequent actions that would result in the termination of faculty appointments be made in accordance with the provisions of Regulation 4c.

We must emphasize that tenure is inseparable from the due-process protections, such as those set forth in Regulation 4c(3), that define it. As the Framework omits such protections, it effectively eliminates tenure and, by extension, academic freedom. In combination with the curious fact that, reportedly, many if not most of the university employees whose services were terminated were tenured faculty members, it is difficult not to construe what has happened at Emporia State as a direct assault on tenure and academic freedom, with grave implications for tenure and

³ <https://kansasreflector.com/2022/09/13/emporia-state-university-is-about-to-suspend-tenure-heres-why-you-should-care/>.

Chair Jon Rolph and President Ken Hush

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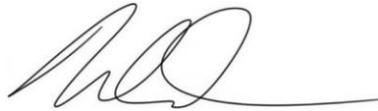
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academic freedom not only at Emporia State but throughout the Kansas system of public higher education.

On October 11, the Association's senior professional staff will be meeting with Executive Director Julie Schmid to confer with her regarding the appointment of an ad hoc committee to investigate Emporia State (see the enclosed *Association Procedures in Academic Freedom and Tenure Cases*). As always, we would welcome a resolution that would render that discussion unnecessary.

We look forward to your timely response.

Sincerely,



Michael DeCesare

Senior Program Officer

Department of Academic Freedom, Tenure, and Governance

Enclosures by electronic mail

cc: Dr. Brent Thomas, Interim Provost and Vice President of Academic Affairs; Dean,
College of Liberal Arts and Sciences
Professor Shawn Keough, President, Faculty Senate
Professor Janett Naylor-Tincknell, President, Kansas AAUP Conference
Professor Ronald Barrett-Gonzalez, Chair, Kansas AAUP Committee A
Professor Douglas Allen
Professor Michael Behrens
Professor Rob Catlett
Professor Dan Colson
Professor Sheryl Lidzy
Professor Christopher Lovett
Professor Max McCoy
Professor Katrina Miller
Professor Mel Storm