

Academic Freedom and Tenure

HUSSON COLLEGE (MAINE)¹

This report is concerned with the action taken by the administration of Husson College in December 1984 to terminate the services of Professor Robert K. Diebold, effective at the end of the 1984-85 academic year. Husson College is an independent, coeducational institution which specializes in undergraduate and graduate programs of study in business, with a developing program in nursing. Its 350-acre campus is located one mile from downtown Bangor, Maine.

The college was founded in 1898 as a proprietary institution for vocational education and was then known as Shaw's Business College. In 1926 its name was changed to the Maine School of Commerce, Bangor Branch; in 1933 to the Bangor, Maine, School of Commerce; and in 1947 to Husson College in honor of Chesley H. Husson, who was associated with the institution for almost half a century, first as instructor, then as principal owner, and finally as president. It became a nonprofit corporation, now governed by a twenty-three-member board of trustees, in 1963.

The college, with approximately 650 students, is currently served by some thirty full-time faculty members. It offers the Bachelor of Science degree in business along with the Associate in Science and Master of Science in Business degrees. The institution has been accredited since 1974 by the New England Association of Schools and Colleges.

Mr. Delmont N. Merrill became the fourth president of Husson College in 1978. He had previously served for five years as administrative vice president. A 1954

graduate of the college with a degree in business education, Mr. Merrill subsequently received an M.A. degree in education and a certificate of advanced study from the University of Maine at Orono. He began his teaching career in the Bangor public schools while simultaneously teaching physical education at Husson College. During his career at the college he also served as a public relations representative, as director of athletics, and as baseball and basketball coach. In February 1986, Mr. Merrill announced that he would retire from the presidency effective at the end of the 1986-87 academic year.

The investigating committee has had before it a large array of documentation developed over several years—from Professor Diebold, from President Merrill, and from Dr. Jay L. Fennell, vice president and dean for academic affairs from 1978 to January 1984 (and currently president of Clinton Community College in Plattsburgh, New York). A pending lawsuit instituted by Professor Diebold has been the source of much of this written material, though at the same time it hampered direct conversation with the principal parties at Husson College, who were advised by college counsel not to meet with the investigating committee. A visit to Bangor by the committee in June 1986 yielded four separate discussions with Professor Diebold and three of his former colleagues, two of them former faculty members at Husson College and one a former administrator. Efforts by the staff and the committee chair to arrange interviews with current members of the administration and faculty proved unavailing.²

THE CASE OF PROFESSOR DIEBOLD

Professor Robert Diebold received his Ph.D. degree in English from Yale University in 1972. Between 1962 and 1969 he was an instructor in English at Carleton College. From 1969 to 1979 he was a member of the English Department at Talladega College and chair of the Humanities Division from 1972 on. He was granted tenure there in 1973. In the summer of 1979, Dr. Diebold was appointed professor of English and head of the Liberal Studies Division at Husson College.

It was agreed at the time of Professor Diebold's initial appointment that he would be granted five years

of credit for prior teaching toward eligibility for consideration for tenure at Husson College. He accordingly applied for tenure during the 1980-81 academic year, his second at the college. In the spring, his application was endorsed by the Faculty Promotion and Tenure Committee and by Vice President Fennell. The board of trustees, however, decided to postpone action until the next academic year on all applications for promotion and tenure then under consideration. In October 1981, the board rejected Professor Diebold's application. The reasons, communicated to him orally by Vice President Fennell, concerned the brevity of his service at Husson College and inadequate available data on scholarship. Arguing that his application was

¹The 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 Husson College, 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.

²Responding on behalf of the Husson College administration to the prepublication draft text of this report, counsel for the college stated that he did not consider it appropriate to comment on the report's substantive findings owing to the pendency of litigation. He asserted that the text "is clearly substantively deficient, contains numerous errors of fact and incorrect inferences," but he provided no specifications.

timely in view of the five years of credit he had received for prior service, and presenting further information on his published scholarship, Professor Diebold requested reconsideration by the board. At its January 1982 meeting, however, the board, following deliberations from which Vice President Fennell was excluded, again declined to grant Professor Diebold tenure. President Merrill so notified him, this time citing previously unstated concerns about his "effectiveness and cooperation in working with colleagues and the college administration" (one of the criteria for tenure set forth in the college handbook). Asked by Professor Diebold to explain the substance of these concerns, President Merrill responded by stating that the Academic Committee of the board "was of the view that you needed more time to develop your strength in these areas." He invited him to apply again in the future "if you feel that your effectiveness may have improved."

Professor Diebold first sought the Association's advice and assistance in the summer of 1983. He expressed the view that the difficulties he was having with President Merrill, including the denial of tenure, involved both subtle tensions and overt controversies within the college in which he had come to be aligned with Vice President Fennell. In 1978, Dr. Fennell had been appointed dean for academic affairs with a mandate to help the college to strengthen its academic program, especially in the area of Liberal Studies, to upgrade faculty credentials, and to raise academic standards and reverse a trend toward grade-erosion. His appointment entailed the recruitment of some new faculty members and a new division head in Liberal Studies who possessed stronger academic credentials than did those already at the college and who, according to President Merrill, "did not share the same perceptions, values, and objectives" as their older colleagues. One of Dr. Fennell's first appointees was Professor Diebold, who promptly set to work undertaking new programs, tightening academic standards, and conducting more rigorous evaluations of faculty teaching—activities that produced strains among the faculty and between the "old guard" and their new division head. In this small and once-proprietary college, friendship and professional relationship seem not to have been distinguished.

By the time another year and a half had passed, the situation had become both clearer and worse. In mid-January 1984, Vice President Fennell accepted a leave of absence with the intention of not returning to the college. On January 18, Professor Diebold was summoned to a meeting in the president's office. In the presence of Mr. Roderick Hotham, the college's treasurer and affirmative action officer, President Merrill handed Professor Diebold a memorandum, which stated:

I am fully aware of your critical and negative attitude toward the administration of this college and I wonder just what future you feel you have here at Husson. An individual who accepts payment from an institution should be loyal to that institution and those administrators whose responsibility it is to direct its operation. If one cannot, he should be sufficiently professional to seek employment elsewhere. If your performance as an administrator does not show immediate improvement in attitude and positive leadership, I will take whatever action I deem necessary to ensure that the best interests of Husson College are served.

Professor Diebold states that he was required to respond immediately. He did so with the following penned notation at the bottom of the memorandum:

I believe that my performance is not as described here. On the contrary, as the evaluations of my supervisor (Dr. Fennell) have always shown, my performance has been professional and cooperative in the performance of my duties. I believe I have a right (as does everyone else) to make criticisms, as others have the right to criticize me. But I have sought to do my best for the institution, to promote and maintain academic excellence. And I believe that my success in doing so is generally recognized.

In the spring of 1984, President Merrill conducted an evaluation of Professor Diebold's administration of the Liberal Studies Division. (Similar performance evaluations of other administrative officers at the college were reportedly undertaken at the same time for purposes, it was said, of improving effectiveness and not toward any decisions on replacement.) "Overall," the president concluded, "Robert Diebold... is seen by those who report to him as being a very poor administrator." Most of these individuals, the president stated, "consider it difficult to work with him." Among the "areas of greatest weakness were these: inability to communicate with all members of the staff and with other administrators; overreacts to issues before getting sufficient data for an objective resolution, thus ineffective in making timely decisions; evidence of bias and subjectivity in the evaluating process; too cursory (inconsiderate) in scheduling classes and assigning faculty; insensitive to proficiencies and accomplishments of personnel; impatient in allowing time for conclusions to be drawn maturely; lack of esprit de corps that is essential for administrative leadership."

This assessment of Professor Diebold's administrative performance is in sharp contrast with the positive assessments he had received from Vice President Fennell. According to an evaluation prepared earlier by Dr. Fennell,

He has brought attention and organization to a situation in which disciplines operated independent of some policies and procedures, lines of communication were weak, timelines were not adhered to, and at times somewhat selfish interests prevailed. Further, he has awakened in the faculty a sense of need for the establishment [of] and adherence to high academic standards. Some faculty members have been challenged on their lack of regard for upholding academic excellence.

By letter dated December 14, 1984, President Merrill informed Professor Diebold of the administration's decision "to eliminate the position of Head of the Liberal Studies Division immediately" and "to eliminate a teaching position in English." The president stated that, since Professor Diebold was the last faculty member in English to be appointed, it was he who would not be retained for the academic year 1985-86. In later response to inquiry from Professor Diebold for clarification, the president wrote on April 4, 1985, that "the difficult decision to reduce staff is based upon [the college's] financial position and projections. The further decision to select English as one of the areas of reduction was based upon a balancing of requirements and choices for our students."

Professor Diebold sought the Association's assistance. The staff wrote to President Merrill on April

29, 1985, raising several concerns. The first related to the issue of whether Professor Diebold, with five years of previous service elsewhere credited to him, had exceeded the permissible period of probation under the 1940 *Statement of Principles on Academic Freedom and Tenure* and was therefore entitled to the protections of tenure in any action to terminate his services. Other concerns involved the existence and extent of the college's financial difficulties, the role of the faculty in the decisions reached, feasible alternatives to termination, adequacy of notice, and procedures for contesting the administration's action. In subsequent correspondence with President Merrill, the staff conveyed additional concerns resulting from allegations by Professor Diebold that the decision to terminate his services had been based significantly on considerations violative of his academic freedom. President Merrill held to the position that the termination of Professor Diebold's services was justified by the college's financial situation and that the action was taken in compliance with the provisions set forth in the Husson College handbook.

Over the summer of 1985, a full-time position in English became vacant when a faculty member failed to return his contract by the stipulated deadline. The administration did not offer this position to Professor Diebold, whose appointment was about to expire on grounds that it was necessary to reduce the number of English teachers, but instead conducted a search and engaged a new person to fill the vacancy. On October 3, the staff wrote to President Merrill to express concern about the failure to offer the vacant position to Professor Diebold. Responding on December 9, the

president stated: "To do so would not have been in consonance with the concept of affirmative action which requires us to advertise vacant positions. At the time we did so, Dr. Diebold's relationship with the College was fully severed. Nevertheless, he could have applied for the position. Had he done so, I can assure you that he would have been considered impartially on his merits relative to other applicants." The staff's reply of January 13, 1986, noted that Professor Diebold's appointment did not expire until August 31, 1985, after the advertisement for a vacancy appeared in the local press and *The Chronicle of Higher Education* and presumably after the position was offered to someone else. The staff questioned the need for Professor Diebold to apply for the vacancy, asserting that no one new should have been recruited unless and until Professor Diebold himself had been offered the position and declined to accept it. The staff also pointed to the existence of other teaching responsibilities in English that could not be covered by the regular full-time faculty at the college, questioning the administration's not having offered these courses—enough apparently to constitute a full-time load—to Professor Diebold but instead having them assigned to part-time teachers.

On December 31, Professor Diebold filed suit against Husson College in Penobscot County Superior Court, and President Merrill, replying to the staff's letter of January 13, stated that he could no longer respond substantively to the Association's concerns because of the pending litigation. With the Association's concerns relating to Professor Diebold's case remaining unresolved, the general secretary authorized this investigation.

ISSUES

Professor Diebold's Entitlement to the Protections of Tenure

The 1940 *Statement of Principles on Academic Freedom and Tenure* calls for a maximum period of probation not to exceed seven years, with service beyond the probationary period constituting continuous appointment or tenure. The regulations governing faculty tenure set forth in the Husson College handbook do not assure tenure after a fixed period of probation. They state that faculty members above the rank of assistant professor "shall normally be eligible for tenure" after they have served continuously for seven years, and that credit toward tenure for previous service elsewhere will be granted at the administration's discretion.

At the time of Professor Diebold's initial appointment in 1979, he was granted credit for five years of previous service. Under the applicable provisions of the 1940 *Statement of Principles*, he should have received credit for at least three of those years and a decision on tenure should have been made by the end of his third year at Husson College so as to allow for a year of notice if the decision was negative. Because the five years of credit for prior service made him eligible for tenure after two years under Husson College policy, Professor Diebold asked to be reviewed for tenure during the 1980-81 academic year, his second at the college. Although his candidacy was supported by the Faculty Promotion and Tenure Committee and by Vice President Fennell, it was rejected by President Merrill and the board of trustees. His appointment was re-

newed annually thereafter, and Professor Diebold, asserting that he had gained tenure *de facto*, did not again apply for tenure.

The investigating committee finds that under the 1940 *Statement of Principles* Professor Diebold was entitled to the protections of tenure beginning with the 1983-84 academic year, by which time he had served in excess of four years at Husson College following at least three years of creditable prior service elsewhere, and thus that he should have been afforded those protections when the administration acted in December 1984 to terminate his services. The committee finds further that the policies of Husson College, in failing to set a maximum probationary period and allowing for an indefinite succession of annual appointments renewable at the administration's pleasure, are fundamentally deficient when measured against the 1940 *Statement of Principles*.

The Reasons for Notifying Professor Diebold of the Termination of His Services; His Opportunity to Contest the Notification

The 1940 *Statement of Principles*, recognizing that the services of a tenured faculty member can be terminated because of financial exigency, requires that the termination be demonstrably *bona fide*. Financial exigency is defined in Regulation 4(c) of the Association's *Recommended Institutional Regulations on Academic*

Freedom and Tenure as an "imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means."

Writing on May 23, 1985, to the Association's staff, President Merrill stated that the decision to terminate Professor Diebold's services "was dictated by the financial exigencies of the college" and was justified by the college's "financial position and projections." The president had previously informed Professor Diebold that a position in English (among several others) needed to be terminated, and that notice had been issued to him because he was the junior full-time faculty member teaching English. The administration did not issue a formal declaration of financial exigency, however, nor did it provide documentation for the claimed financial difficulties or for selecting the English program as one in which an appointment required termination. The investigating committee is not aware of evidence that the college was facing an imminent financial crisis when Professor Diebold was notified that his services were being terminated.

The administration, of course, had not approved Professor Diebold's candidacy for tenure and did not recognize him as a tenured faculty member with attendant rights to procedural protections as set forth in Regulation 4(c). Rather, it viewed him as a probationary faculty member whose appointment was not being renewed because, according to the president, financial constraints and resulting judgments about curricular priorities led to a decision to eliminate one position in English. Professor Diebold, on the other hand, has alleged that the reasons advanced by President Merrill were pretextual, and that the president's action to terminate his services was based in significant measure on considerations violative of his academic freedom.

Even if one were to defer to the administration's position that Professor Diebold's status remained that of a probationary faculty member, he would still have been entitled under Association-supported standards to review by an independent faculty body of his allegation that the notice issued to him was based on impermissible considerations. Specifically, Regulation 10 of the Association's *Recommended Institutional Regulations* provides opportunity for review by a faculty body, and potentially an adjudicative hearing of record, on an allegation that reappointment was denied because of considerations violative of academic freedom.

The Husson College regulations are largely silent with respect to procedural standards governing nonreappointment. The faculty handbook does, however, refer to two different sets of grievance procedures for "any member of the instructional staff [who] feels aggrieved," one involving recourse to a seven-member Grievance Committee on Personnel appointed by the college's affirmative action officer, which deals with grievances "on a college-wide basis," and the other involving recourse to an elected faculty Grievance Committee on Academic Freedom, which is to consider grievances that "are clearly within the realm of academic freedom and may only be properly resolved by academicians." According to the handbook, appeals to either of these committees must be made within fifteen working days after learning of the event which occasions the grievance.

Professor Diebold did not initiate a formal appeal at the time he received notice that his services were be-

ing terminated. He subsequently stated that he did not do so because he did not believe it would serve any useful purpose, since he expected the president's position to prevail no matter what a grievance committee might recommend, and because no election was ever conducted during his years at Husson College to constitute a faculty committee on academic freedom. Promptly after receiving the notice, he asked the president for clarification of the reasons, and he did not receive it until after the stated fifteen-day deadline had elapsed. He later sought assistance from the Association's staff, which, after its initial round of correspondence with President Merrill had not led to any corrective action, then proposed to Professor Diebold that he appeal on the issue of academic freedom so that his allegation could be tested through the one potentially available channel at the college. Accordingly, on June 27, 1985, he submitted a request to President Merrill for a hearing before the Grievance Committee on Academic Freedom. The president stated in reply that Professor Diebold's complaint "does not relate to academic freedom, but rather to not receiving a contract for next year. The proper committee for handling the matter . . . would have been the Grievance Committee on Personnel . . ." The president went on to state his belief that a grievance now would be untimely because the fifteen-day deadline had passed, but that Professor Diebold could file a grievance with the college's affirmative action officer if he wished to pursue the matter further.

Professor Diebold objected to the statement that his complaint did not involve academic freedom but went ahead with an appeal to the affirmative action officer, Mr. Hotham, who appointed a Grievance Committee on Personnel to hear the grievance. The committee concurred in the president's position that Professor Diebold's appeal was not timely and declined to deal with it. While recognizing the passage of the stated deadline, the staff urged upon President Merrill that the serious allegation of a violation of academic freedom, which bears on the integrity of Husson College, nonetheless be tested through a hearing on academic freedom before an elected faculty body. The president replied that a faculty panel (the appointed Grievance Committee on Personnel) had found the appeal untimely and that there was nothing further he could do.

The investigating committee has little doubt but that the president of Husson College would have been able to arrange for a faculty hearing on Professor Diebold's allegation had he desired to do so. The committee believes that under the circumstances the stated deadline should have been waived, and that an elected faculty committee on academic freedom should have conducted the hearing. It finds that the administration, viewing Professor Diebold as a probationary faculty member, denied him the due process to which probationary faculty members are entitled under Regulation 10 of the Association's *Recommended Institutional Regulations*.

The Adequacy of the Notice Professor Diebold Received

Professor Diebold was notified by letter of December 14, 1984, that his services would be terminated at the end of the 1984-85 academic year. The notification was timely under stated Husson College policy, which calls for notice by December 15 to faculty members who are

serving beyond their first year on renewable annual appointment and are not to be reappointed. The notification was untimely, however, under the Association's recommended standards, which require at least twelve months of notice in the case of all faculty members whose services are to be terminated after two years at the institution. The investigating committee accordingly finds that the Husson College administration did not provide Professor Diebold with the notice to which he was entitled under applicable Association-supported standards.

Professor Diebold's Academic Freedom

Professor Diebold, primarily in his capacity as head of the Liberal Studies Division, had been an outspoken critic over the years of a number of the administration's decisions and had taken controversial positions on various issues of academic policy which led to occasional clashes with other members of the Husson College faculty and administration, including President Merrill. During the 1981-82 academic year, in the midst of a protracted controversy involving the college's Supplemental Education Program and English placement test scores, President Merrill wrote to Vice President Fennell: "If Dr. Diebold persists in pursuing this matter, I would regard his action as insubordination." Two years later, the president issued a warning to Professor Diebold, quoted earlier in this report, concerning his "critical and negative attitude toward the administration" and stating that "an individual who accepts payment from an institution should be loyal to that institution and those administrators whose responsibility it is to direct its operation. If one cannot, he should be sufficiently professional to seek employment elsewhere."

The Association's staff subsequently questioned President Merrill about this warning, and by letter of September 25, 1985, he responded as follows: "the comments I made to Dr. Diebold. . . concerned his performance in managing the Liberal Studies Department and his role as Division Head, and not as a teacher." In a letter to the Association's staff dated December 13 of that year, President Merrill challenged Dr. Diebold's allegation "that I somehow stifled his right to criticize and in so doing denied him his academic freedom. First, I think it important to recognize the distinction between academic freedom and the free expression of ideas as a faculty member and the obligation to manage a division in accordance with common sense and compassion for the people involved. . . . [T]here is substantial evidence that Dr. Diebold was not only publicly critical of his subordinates but vehemently so." (Professor Diebold has sharply disputed this latter statement.) The president has stated on other occasions that his dissatisfaction with Professor Diebold related to his performance as division head and manager, that he had no quarrel with his performance as scholar and teacher.

It may well be that Professor Diebold in his capacity as an administrator could not properly claim the degree of liberty to criticize colleagues and to dissent from intramural policies that a teacher or researcher can claim under commonly accepted tenets of academic freedom. To be effective, an administrator needs to maintain good working relations with others and to command the confidence of those in superior and subordinate positions, and Professor Diebold has himself

acknowledged that his tolerance for people he considered to be incompetent was not high. President Merrill, however, did not notify Professor Diebold, functioning simultaneously as administrator and teacher, that his services were being terminated because of dissatisfaction with his administrative work but rather because financial constraints required the elimination of the teaching position.

One thus might argue that in the issuance of notice to Professor Diebold in December 1984, assuming the *bona fides* of eliminating one position, a question of infringement on his academic freedom as a faculty member did not arise. One might suspect that President Merrill was not unhappy that the position being eliminated was the one occupied by Professor Diebold, but one might also concede that, with the reduction of a faculty position in English in the offing and with Professor Diebold's continuance in administrative work unwelcome, the president could reasonably assert, especially since he did not recognize Professor Diebold as having tenure, that there was no longer a place at this small college for him to fill.

A place for him to fill did, however, unexpectedly become available in late July of 1985, when the administration determined that a professor senior to Professor Diebold in the English program would not be returning for the academic year soon to begin. It is evident that Professor Diebold was qualified professionally to teach essentially what this professor had been teaching, yet, as was noted earlier, the administration did not offer the position to Professor Diebold. It instead advertised for and subsequently recruited a new appointee. This appears to have been done when Professor Diebold's faculty appointment had not as yet expired, President Merrill's statement to the contrary notwithstanding. It was done in the face of the president's assertion that Professor Diebold's services were being terminated because of the lack of a position and that his performance as a teacher was not in question. It was done in the face of concerns raised by Professor Diebold and by the staff that the notice he had received may have stemmed from considerations violative of his academic freedom.

The investigating committee is unconvinced by the president's statements that a commitment to affirmative action required the college to conduct a search to fill the position and that Professor Diebold could have applied for it if he was interested and would have been considered. The administration, in the committee's judgment, was obligated to offer the position to Professor Diebold before turning to anyone else. The committee finds that the administration, in failing to do so, made manifest its desire to remove Professor Diebold from any faculty position as well as from his administrative assignments at Husson College. The committee finds strong *prima facie* evidence, based on the administration's own statements and un rebutted by the administration in any institutional proceeding, that the administration, having characterized Professor Diebold's teaching and scholarship only in positive terms, terminated his services because of his expressed disagreements with the administration. Under generally accepted principles of academic freedom, in the investigating committee's judgment, those expressions of disagreement fell within the ambit of protected conduct, perhaps not for an administrative officer but certainly for a member of a college faculty who would no longer have significant administrative responsibilities.

