



August 28, 2018

BY ELECTRONIC MAIL AND USPS

Professor Deepa Kumar
President

Professor David Hughes
Vice President

AAUP-AFT Rutgers
11 Stone Street
New Brunswick, New Jersey 08901-1113

Dear Professors Kumar and Hughes:

This letter responds to the chapter's request for our comment on principles of academic freedom applicable to the case of Professor James Livingston. Professor Livingston's posts on May 31 and June 1, 2018, on the social media site Facebook, which concerned gentrification and which caused public uproar when he indicated that he "hate[d] white people" and wished to "resign" from the "Caucasian race," were the subject of a review by Rutgers University's Office of Employment Equity. The report of the findings of that review, dated July 31, concluded that Professor Livingston's posts were not protected by the First Amendment and furthermore violated the university's policy on discrimination and harassment. While it is our understanding that the administration has yet to take disciplinary action against Professor Livingston on the basis of these findings, in our view, doing so would likely violate Rutgers University's academic freedom policy, which was adopted by the board of governors in 1967, and, since the collective bargaining agreement between Rutgers University and AAUP-AFT Rutgers "recognizes" that policy, doing so may violate the collective bargaining agreement as well.

The review of Professor Livingston's Facebook posts by the Office of Employment Equity analyzed the institution's obligations toward Professor Livingston only from the perspective of the First Amendment. As a result, it entirely ignored Professor Livingston's freedom of extramural utterance under principles of academic freedom—principles to which Rutgers University has had a historical commitment, both through action by its board of governors and through "recognition" of that action in the collective bargaining agreement between the institution and AAUP-AFT Rutgers.

The conception of academic freedom as a professional right of faculty members has a longstanding history in the United States that predates by many decades its judicial recognition under the First Amendment. The 1915 *Declaration of Principles on Academic Freedom and Academic Tenure* (enclosed for your convenience), the founding document of the AAUP, defined academic freedom as consisting of three constitutive elements: “freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.” The 1940 *Statement of Principles on Academic Freedom and Tenure* (also enclosed for your convenience), a joint formulation of the AAUP and the Association of American Colleges and Universities that has received the endorsement of more than 250 professional societies and scholarly organizations, recognizes freedom of extramural utterance as one of the constitutive elements of academic freedom:

College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline...

The AAUP has acknowledged that there are limitations to this freedom. The current position of the Association on the nature of these limitations can be found in the *Committee A Statement on Extramural Utterances*:

The controlling principle is that a faculty member’s expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness to serve. Extramural utterances rarely bear upon the faculty member’s fitness for continuing service.

Rutgers’s own institutional regulations—section 60.5.1: “Academic Freedom”—recognize freedom of extramural utterance as a constitutive element of academic freedom together with limitations that are consistent with the AAUP’s position:

Outside the fields of instruction, artistic expression, research, and professional publication, faculty members, as private citizens, enjoy the same freedoms of speech and expression as any private citizen and shall be free from institutional discipline in the exercise of these rights. The conduct of the faculty member shall be in accordance with standards dictated by law.

The origins of this institutional policy directly relate to the case at hand. As was documented by my former AAUP staff colleague B. Robert Kreiser, the board of governors amended the academic freedom policy in 1967, as a result of developments in the case of Professor Eugene Genovese, whose extramural utterances concerning the Vietnam war caused significant public uproar and calls for his dismissal. Prior to its amendment, the institutional policy on academic freedom stated as follows:

Outside the fields of instruction, research, and publication, the faculty member shall be free from institutional discipline unless his actions or utterances are both reprehensible and detrimental to the University.¹

Thus, the Board of Governors removed the restriction that extramural utterances can be subject to institutional discipline if they are “both reprehensible and detrimental to the University” and replaced that provision with the observation that “the conduct of the faculty member shall be in accordance with standards dictated by law.”

As a result of the governing board’s amendment of the policy on academic freedom, it appears that any disciplinary action against Professor Livingston for a statement made “outside the fields of instruction, artistic expression, research, and professional publication” would directly violate that governing board policy, unless, perhaps, if it were unlawful, which has not been alleged here. Furthermore, Article II of the collective bargaining agreement between Rutgers University and AAUP-AFT Rutgers contains the following provision: “The parties hereto recognize the principles of academic freedom as adopted by the University's Board of Governors on January 13, 1967.” Thus, any disciplinary action against Professor Livingston may also constitute a violation of the collective bargaining agreement.

Finally, I would like to comment specifically on the following paragraph in the report of the Office of Employment Equity:

I further note that Professor Livingston’s inflammatory social media activity has generated widespread media attention, with headlines that describe his words as “racist,” a “racist rant,” “profanity laced,” and an example of “white privilege.” These reports have inflicted reputational damage on the university, and the Department of History and SAS [School of Arts and Sciences] in particular, which could realistically impact recruitment and fundraising in the future. It is reasonable, therefore, to predict a disruption to university operations, rendering Professor Livingston’s speech subject to university Policy.

The position taken in this paragraph—that the impact of a faculty member’s extramural speech on “recruitment and fundraising” makes that speech subject to university policy—not only contravenes the governing board’s action, in 1967, to expunge language that would have made extramural speech sanctionable for being “detrimental to the University,” but exemplifies a stance that the Association has had reason to criticize repeatedly in the investigative reports of Committee A on Academic Freedom and Tenure. One example is the 1949 investigative report regarding the dismissal of a faculty member from Evansville College because of his support for

¹ See B. Robert Kreiser, “Championing Academic Freedom at Rutgers: The Genovese Affair and the Teach-In of April 1965,” *Journal of Academic Freedom* 7 (2016).

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the presidential campaign of Henry A. Wallace. The administration invoked the danger of “a loss of enrollment and of financial support” as the rationale for its action. The report went on to state that

[w]hat the Administration failed to see was . . . that if it yielded because of this danger, it would be embracing a greater danger to institutional welfare, namely, the loss of freedom, without which no institution of higher education can fulfill its obligations to the students and to society.

The Association subsequently censured the administration of Evansville College for its actions. It should be noted that in 1966 the AAUP bestowed its Alexander Meiklejohn Award upon Rutgers University President Mason W. Gross and the board of governors for their defense of Professor Genovese’s academic freedom. It would be a matter of great disappointment to this Association if the Rutgers administration were now to fail to live up to the example set by their predecessors in the Genovese case.

I hope this information is helpful. Please do not hesitate to contact me if I can provide further assistance to the chapter. Please feel free to share this letter with the administration, in particular in the context of any proceedings that could lead to disciplinary actions against Professor Livingston. Should such actions subsequently be taken by the administration and should Professor Livingston desire our further involvement, please encourage him to contact me directly.

Sincerely,

A handwritten signature in cursive script, appearing to read "H. J. Tiede".

Hans-Joerg Tiede
Associate Secretary