FINANCIAL EXIGENCY

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Termination of permanent or long-term appointments because of financial exigencies should be sought only as a last resort, after every effort has been made to meet the need in other ways and to find for the teacher other employment in the institution. Situations which make drastic retrenchment of this sort necessary should preclude expansions of the staff at other points at the same time, except in extraordinary circumstances. —1925 Conference Statement

It would be pleasant to say that the need has passed for expounding the application of "financial exigency" to the termination of faculty appointments. Perhaps the economy is flourishing; perhaps a severe decline in enrollments will not occur; perhaps inflation and constricted appropriations will both stop gnawing at the vitals of higher education. Perhaps. It is rather more plausible to suspect that, if the rules for dealing with hardship terminations have become sufficiently developed to be useful, this has taken so long that they are about to become obsolete.

Putting aside both optimism and cynicism, it seems likely that there will be strains of one sort or another in the future as there have been in the past (the epigraph from 1925, above, is still utterly relevant).[1] The episodes of the current era have led to heightened awareness of the aches and pains that fiscal stress entails, especially when faculties have learned that they do not have to accept with docility more than their fair share of those pains. Where traditional forms of faculty organization have not succeeded in prevention or cure, professors have turned to unions. The influence in collective bargaining of industrial models has already brought novel responses. We hear of our colleagues being "laid off," or "riffed," as they suffer a reduction in force—bits of industrial or civil-service jargon that a decade ago we would have applied to *them*, not to *us*. Now we have met with hard times, and them *is* us.

The recent concern of the American Association of University Professors has been to give content to the brief admonition in the 1940 *Statement of Principles on Academic Freedom and Tenure* that "termination of a continuing appointment because of financial exigency should be demonstrably bona fide." This is all the 1940 *Statement* has to say in interpretation of the narrow exceptions it allows to the fundamental principle that the service of teachers with tenure "should be terminated only for cause, except in the case of retirement for age, or under extraordinary circumstances because of

RALPH S. BROWN, Jr., is Professor of Law at Yale University. *Revised Regulation 4 of Committee A's* Recommended Institutional Regulations on Academic Freedom and Tenure, *on which this article focuses, is reprinted at the end of the article. The main burden of preparing the revision was borne by a subcommittee consisting of Professors Clark Byse and Walter Metzger, and Associate General Secretary Jordan Kurland.*

The writer has served on Committee A since 1968, and has accordingly had a part in the revision. The article attempts to convey some of the understandings and interpretations that have emerged from the discussions of this revision in Committee A and the Council, but it has not been reviewed by Committee A and should not be construed as an official Association document. Indeed, the opinions of the writer will often obtrude.

[1] The epigraph is from the "American Council on Education Conference Statement on Academic Freedom and Tenure," endorsed in 1925 by the Association of American Colleges and in 1926 by AAUP. *AAUP Bulletin*, (February, 1925), pp. 99-101.

There seems to be consensus that there will be substantial drops in enrollments in the 1980's, essentially because of declining birthrates. But the uncertainties of forecasting are pointedly suggested by comparing earlier warnings of financial crisis, e.g., E. F. Cheit, *New Depression in Higher Education: A Study of the Financial Conditions at 41 Colleges and Universities* (New York: McGraw-Hill, 1971), with the recoveries that have been accomplished; see H. R. Bowen and W. J. Minter, *Private Higher Education. First Annual Report on Financial and Educational Trends in the Private Sector of American Higher Education* (Washington, D.C.: Association of American Colleges, 1975). The warnings of course signaled the need to take corrective action, as Cheit reported a few years later. See Peterson, "Private Colleges Said to be Doing Well," *N.Y. Times*, Dec. 10, 1975. So also new policies, or exogenous forces, may alter enrollments; see *Chronicle of Higher Education*, Nov. 17, 1975, reporting an estimate from the National Center for Educational Statistics of a 9.7 percent increase in enrollments over 1974, at least twice what was expected. The increases were mostly in two-year colleges, and were thought to be related to the poor job market.

financial exigencies."[2] Beyond developing the meaning of the phrases "extraordinary circumstances," "financial exigency," and "demonstrably bona fide," the Association has wanted to do what it could to protect all faculty members, not just tenured ones, from arbitrary separations on financial grounds. It has also taken up the closely related problem of curtailment of entire programs and departments.

Above all, it has tried to point the way to good procedures. Most of the relevant policy formulation is to be found in the *Recommended Institutional Regulations on Academic Freedom and Tenure*,[3] first published in 1968. When the rather general statement in the 1968 text of Regulation 4 seemed to need explanation, tentative "Operating Guidelines" were issued in 1971, with revisions in 1972.[4] Next, a major expansion on Regulation 4 got under way. After Committee A and the Council had each twice overhauled it, the current revision was first published in the Winter, 1975, *Bulletin*.[5] The following comments are based on this version of Regulation 4 in the expectation that without major change it will become part of the *Recommended Institutional Regulations* (hereafter abbreviated as RIR).

The discussion falls into five parts. First, what is meant by financial exigency? Second, who decides whether the condition exists and what the response is to be? Third, what priorities should control when faculty terminations are mandated? Fourth, why (and how) are terminations accompanying the discontinuance of whole programs or departments allowable without a showing of financial exigency? Fifth, what auxiliary rights should be provided to cushion dismissals, and what final safeguards against improper separations, by way of internal or judicial review?

What is "Financial Exigency"?

The definition in RIR 4(c)(1) is an austere one: "an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means." Less drastic than what? Here is the heart of the matter. The Regulation is about terminations of tenure appointments, or other appointments before the end of their terms. That is, it describes crisis circumstances when it becomes permissible to break contracts. This is a very serious thing to do, both as a matter of academic custom and of positive law. So straight off and in all that follows, let us try to maintain the distinction between conditions that permit on the one hand the firing of teachers with tenure (or with expectations of tenure that are legally respected, or with term contracts prior to their expiration) and, on the other, a wide range of consequences that may fall under the milder term "retrenchment." Hard times may call for retrenchment; only a survival-threatening crisis authorizes termination, as that word is used in the 1940 *Statement* and in RIR.

As W. Todd Furniss of the American Council on Education observes, if "financial exigency" is used "to label all conditions that might justify mandatory staff cuts," "the term will not stand the pressure being put upon it."[6] He accordingly (though in a slightly different context) uses "retrenchment" for less-than-crisis responses, as I am doing. Failure to recognize these differences may account for apparent disagreements with AAUP policy. Thus, in correspondence with the Association's Washington Office, the president of a small Eastern liberal arts college, where elaborate planning and evaluation procedures had led to the proposed termination of two tenure appointments, set forth this local definition which had guided action:

> "Financial Exigency" is to be understood in the context that continuation of present expenditures and size of staff will create static academic and financial conditions, allowing for no salary increases or supplements in the years ahead, and eventually leading to the loss of better faculty and students. It is *not* to be defined in the sense of imminent and immediate bankruptcy threatened unless there are reductions of staff and other expenditures.

In another thoughtful communication, a dean in a state university, who had been nationally active in AAUP, wrote: "Financial exigency begins, not when a school is bankrupt, but when it has significant difficulty in supplying additional positions to departments in the ascendancy while maintaining reasonable equity in teaching loads, class sizes, and research opportunities appropriate to each discipline." The situation described is a good illustration of financial pressure, but it hardly conveys any sense of crisis or urgency. A certain amount of inequity in teaching loads is after all not uncommon.

The only close engagement, I think, that the courts have made with the phrase "financial exigency" has been in the celebrated Bloomfield College affair. Superior Court Judge Melvin Antell, in his full opinion following the trial,[7] made a close analysis of the College's shrinking income, and of the unique circumstance that it was carrying a valuable piece of real estate containing two golf courses, with a view to developing part of it and relocating on the remainder. While purporting to defer to the judgment of the trustees, he thought that the College's main financial problem was one of liquidity, which could be assuaged by the sale of the golf courses. Few hard-pressed institutions would have this kind of option; and anyway the Appellate Division of the Court later declared that the Board's "choice of alternative is beyond the scope of judicial oversight in the context of this litigation."[8]

[2] *AAUP Policy Documents and Reports*, 1973, p. 2. When other AAUP materials are referred to in this paper without specific reference they may be readily found in this collection.

[3] *AAUP Policy Documents*, p. 15, with 1972 revisions.

[4] *Ibid.*, p. 43.

[5] *AAUP Bulletin*, 61 (Winter, 1975), pp. 329-331.

[6] T. Furniss, "Retrenchment, Layoff, and Termination," *Educational Record*, 55 (Summer, 1974), p. 160. This valuable paper cites earlier work relating to financial exigency, i.e., from the early 1970's.

[7] *AAUP* v. Bloomfield College, 322 A.2d 846 (N.J. Super. | 1974). Affirmed, 346 A.2d 617 (App. Div. 1975).

[8] 346 A.2d 615 at 617 (App. Div. 1975).

Both the trial court and the higher court struggled for verbal definition. For Judge Antell, recognizing that "the term is highly relative and must be applied within a given context," the "applicable register of meaning" lay somewhere between "the board chairman's view of 'an urgent financial situation about which something had to be done'. . . ." and that of a Princeton economist who focused on the need to find that "the continued viability of the institution becomes impossible without abrogating tenure." Judge Antell later paraphrased "financial exigency" as "an immediate, compelling crisis."[9]

Judge Samuel Larner for the Appellate Division (the case was not further appealed) concluded that the evidence did show "extraordinary circumstances because of financial exigency." That "the financial strain [had] existed for some period of time" did not "negate the reality." The trial court's interpretation was "too narrow a concept of the term in relation to the subject matter involved. A more reasonable construction might be encompassed within the phrase 'state of urgency'. In this context, the evidence was plentiful. . . ." Note that the Appellate Division, while leaning toward the board chairman's formula, emphasized, as did the trial judge, that it was speaking strictly in the context of the case before it. A prudent reserve, in view of the legal novelty of the issue and the eccentricity of the facts.

At this writing, there have been no other worthwhile judicial explorations of the meaning of "financial exigency." A trial court in Iowa, in *Lumpert* v. *University of Dubuque*, now on appeal, simply equated a current operating deficit with exigency.[10] In two federal cases where the issue was the constitutional adequacy of termination procedures, the Nebraska and Wisconsin legislatures had cut appropriations; the courts accepted without examination the position that exigency was present and that some terminations were necessary.[11]

Returning to the language of RIR 4(c)(1), it boldly asserts that a crisis of survival must exist before terminations can be effected. And the survival is that of the institution "as a whole." This is an assertion that tenure and other contracts are not to be at the mercy of cost accountancy which may demonstrate that a department or school or campus is not paying its way. Higher education as a whole does not pay its way. Beyond the public and private sources that keep the whole show going, the flesh of an institution stays healthy because of circulation of funds from one part to another. If a part is not supportable on primarily educational grounds (which of course take into account what it costs), then the part can be eliminated. Terminations can then occur, as we will see in the fourth section of this article.

The survival risk is where possible to be "alleviated by less drastic means" than terminations. This clause of RIR is not very helpful to a hard-pressed administrator. But it may be a useful reminder; the Note following the section recommends that a faculty body inquire whether "all feasible alternatives . . . have been pursued"; and a faculty member marked for separation who calls for the hearing provided in RIR 4(c)(2) may, in putting the institution to proof of the "extent of the condition of financial exigency," press the question of less drastic alternatives.

A diligent search for economies elsewhere than in instruction will assist faculty on short probationary appointments as well as those with tenure. But it would be less than candid to deny that the nonreappointment of junior faculty may be one of the less drastic means that have to be invoked. It may be cold comfort in a survival crisis, but the faculty and the staff must consider that there is one more alternative that the board of the institution may in all good faith have to face: closing. Then, everyone goes.[12]

Who Decides?

A thorough study of how the multitude of episodes of financial exigency or retrenchment in the last five years have been met would be useful. But the RIR drafters, working while the tempest raged, did not have the benefit of any such systematic collection; and a catalog might not in any event have yielded pervasive principles. What the drafters could and did do was to try primarily to devise good procedures, so that arbitrary or mistaken decisions could be minimized. This is not to accept the view that good procedures are both the beginning and end of wisdom. But, as Furniss sagely observed in calling for the establishment of "reasonable procedures and good administration" in retrenchment separations, "Court cases and agency investigations arising out of good procedures are likely to result in good precedent; bad cases make bad law."[13]

Furthermore, if faculty representatives are fully involved in the decisions that attend money crises, the decisions are more likely to be accepted by the faculty—if not by the victims, then at least by members of faculty hearing committees.

Bolstered by these practical considerations, the Note to RIR 4(c)(1) cites existing policy on academic government as a source for prescribing the extent of faculty involvement in the several levels of decision that are necessary. First, as to the decision that a state of financial exigency exists or is imminent, a faculty body should *participate*. The mechanics of such participation,

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[9] 322 A.2d at 854, 858.

[10] The Association's *amicus curiae* brief before the Supreme Court of Iowa in *Lumpert* is a valuable source of historical and other materials on financial exigency.

[11] *Levitt* v. *Board of Trustees of Nebraska State Colleges*, 376 F. Supp. 945 (D. Neb. 1974); *Johnson* v. *Board of Regents of University of Wisconsin*, 377 F. Supp. 227 W.D. Wis. (1974).

[12] The "Operating Guidelines" offer some general advice on obligations to faculty and students when there is a "cessation of operation" and on the rights of tenure in the event of merger, which may be a solution short of liquidation. *AAUP Bulletin*, 60(Summer, 1974), pp. 267-268.

[13] Furniss, *Ed. Record*, 1974, p. 160.

which might well include students and staff, may seem cumbersome and slow to the administrators and trustees who see rough water dead ahead. Still, the president worthy of command should be able to expedite when expedition is necessary; the result will be more credible and more likely to be correct.

The next step—to decide "where within the overall academic program termination of appointments may occur"—comprehends elements of educational policy, and foreshadows the choices that are going to have to be made about individual faculty status. Such matters, according to the *Statement on Government of Colleges and Universities*,[14] are "primarily a faculty responsibility"; so the Note assigns them primarily to the faculty or its representatives. This is not to say that administrators would not have substantial, indeed indispensable, contributions to make to this part of the process. They are likely to have the best overall view of projected enrollments and course choices. But the faculty ought to choose the departments where cuts must be made and take responsibility for the choices.

The next step is the next to hardest one; it cuts close to the bone. What are to be "the criteria for identifying" those to be terminated? The solutions—none entirely satisfactory—will be discussed in the next part of this paper. Some kind of principled decisions ought to be made. Again the administration has valuable data and advice to contribute. But the Note assigns to faculty representatives the primary responsibility to determine, that is to prescribe, the rules to be followed.

In these two steps the decision makers have to keep always in view what our "Operating Guidelines" say are the first among all the difficult and competing considerations, namely "the retention of a viable academic program."[15] This is clearly, by AAUP standards, an area of primary faculty responsibility.

By now, the faculty has participated in the discovery of financial exigency, has made recommendations about where the curriculum is to be cut, and has developed the criteria for choosing the faculty to be terminated.

The ax is about to fall, not on programs and criteria, but on individual necks. Who is to wield it? Here the Note backs away from full faculty responsibility. It asks only that the headsmen "be designated or approved by the faculty." It goes on to recognize practically carte blanche eligibility for the chore, with what may be called fainthearted magnanimity. The size of the institution, the number to be terminated, and "other considerations of fairness in judgment" are hurriedly mentioned. Clearly, the drafters shrank from the sight of blood.[16] In extenuation, they believed that faculties might reasonably want to delegate this responsibility. Especially if the terminations were numerous, the selection from among the faculty of those who are to stay and sentence those who are to go would be deeply invidious. Indeed, who would select the selection committee?[17]

All these steps are set forth in a long Note; perhaps they are so located, rather than in the main text of the RIR, to suggest a degree of diffidence; and indeed they are all cast in terms which suggest some elasticity. Variations would be acceptable, if they are compatible with the goal of substantial faculty participation.[18]

Faculties themselves must see to it that policies and regulations providing for appropriate faculty participation and determination in the steps leading up to terminations are adopted. The courts so far have not required any significant degree of faculty participation at public institutions as a matter of constitutional right. In the Peru (Nebraska) State College case, the president and two deans, when faced with reduced appropriations, prepared a list of sixteen criteria and themselves applied them to select those to be terminated. This process was described by the court as an "objective evaluation" and accepted as "fair and reasonable."[19] If

[14] *AAUP Policy Documents*, p. 35.

[15] *Ibid.*, p. 43. Progress in making other economies ought somehow to be kept continually under review. This whole important aspect of demonstrable exigency has been inadequately examined. Some collective bargaining agreements that I have seen suggest priorities.

[16] I am here, if memory serves, indulging to some extent in self-criticism.

[17] Thus, University of Wisconsin regulations provide that "once the board has declared a state of financial emergency it shall be the primary responsibility of the tenured members of the affected department(s) to recommend which individuals are to be laid off." Wis. Admin. Code, Personnel Rules for Faculty, U. of Wis. System, Sec. 5.07 (1975). Yet terminations in 1973-74 had included tenured faculty; then the designations were made by the chancellors on each affected campus. See *Johnson* v. *Board of Regents*, 377 F. Supp. 227 (W.D. Wis. 1974).

[18] Compare the following passages from a Washington University statement on Academic Freedom and Tenure Policy of March, 1975 (this policy statement is not a set of detailed regulations):

> The faculty must have an important role in decisions relating to the reduction of academic programs. . . . Particular reductions shall follow consultation with the concerned departments, or other units of academic concentration, on the short- and long-term viability of programs to be reduced. If such reductions are made, care should be taken to see that affirmative action obligations are followed.
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> The advice of the Senate Council shall be sought in the reaching of any decision which would lead to the termination of faculty members with tenure, and the Senate Council shall be given all relevant information and shall have the right to confer with the Chancellor and to communicate its views to the Board of Trustees before such a decision becomes final.
>
> If a decision is made under the provisions of this section not to continue the appointment of a tenured faculty member, the faculty member shall have the right to a hearing before the Academic Freedom and Tenure Hearing Committee where the bona fides of the circumstances, the adequacy of the University's attempt to find an acceptable alternative position, and the adequacy of the proposed terminal compensation may be examined. Ultimate decision of all controverted issues rests with the Washington University Board of Trustees. [Pp. 15-17]

[19] *Levitt* v. *Board of Trustees*, 376 F. Supp. 945, 949 (D. Neb. 1974); cf. *Johnson* v. *Board of Regents*, n. 11 above, where the chancellors referred their preliminary selections to "reconsideration committees" of the faculty, whose recommendations were advisory only. 377 F. Supp., pp. 232-34. In *Paulsen* v. *St. Joseph's College*, Indiana Circuit Court, Jasper County, 1974 (unreported); the court found that a

more of this sort of response is to be anticipated, enforceable rights to faculty participation will only flow from declared policies and regulations which can be read into individual contracts, or insisted upon by faculty bodies.

About one right the RIR is uncompromising. A faculty member, before termination, "will have the right to a full hearing before a faculty committee." RIR 4(c)(2) then describes the issues that the faculty member may raise at such a hearing. They are of two sorts. First, there are the general issues that should already have had faculty participation. On the basic issue, the existence and extent of financial exigency, the burden of proof is explicitly put on the administration. Return for a moment to the 1940 *Statement*, which allows financial exigency terminations "under extraordinary circumstances," but requires that they be "*demonstrably* bona fide." The demonstration must be made by the institution. In formal contract law terms, the teacher's contract may be ended without being legally breached on the happening of a condition subsequent, namely financial exigency. The burden of establishing the existence of such a condition is on the party invoking it.[20]

But the facts need not be rehashed in every hearing. "The findings of a faculty committee in a previous proceeding involving the same issue may be introduced." They would presumably be persuasive unless a faculty member offered substantial new evidence, for example of a change in conditions.

On the other general issues—the educational judgments as to where cuts can be made, and the criteria for identifying those to be terminated—the RIR declares that the recommendations of a faculty body "will be considered presumptively valid." Accordingly, the burden of upsetting these determinations would rest on the faculty member. This seems reasonable, if the determinations have in fact been made by representative faculty bodies.[21] If they have been handed down by the administration or the trustees, they will have to be defended by them.

If the general issues have been properly found and formulated, the faculty member who seeks a hearing must intend to challenge "whether the criteria are being properly applied in the individual case." This is the point at which issues of good faith will probably be tried. For it is not enough that there be financial exigency; it must be *the* cause for the termination, and not a subterfuge. In the recent important decision, *Browzin* v. *Catholic University*, Judge Skelly Wright of the United States Court of Appeals commented on this very point in a discussion of RIR 4(c) in its 1968 version. After observing that in financial exigency or program discontinuance cases "the same elaborate procedural safeguards do not apply" as in removals for cause under RIR 5, the Regulation dealing with dismissal for cause (a gap that is narrowed in the revision under discussion), Judge Wright said:

> But the obvious danger remains that "financial exigency" can become too easy an excuse for dismissing a teacher who is merely unpopular or controversial or misunderstood—a way for the university to rid itself of an unwanted teacher but without according him his important procedural rights.[22]

A footnote at the end of the quoted passage cited the *Bloomfield College* case, where the financial crisis was used to cloak a wholesale abrogation of tenure. Accepting the trial court's findings to this effect, the appellate court affirmed that "not only must the financial exigency be demonstrably bona fide but the termination *because* of that exigency must also be bona fide."[23]

Because, as the Bloomfield court said, causation and motivation may emerge as pivotal questions, because invasions of academic freedom may lurk beneath the surface and, above all, because a hearing is most likely invoked to answer the poignant question, "Why me?," its procedures cannot be casual. The 1968 version of RIR 4(c), on which Judge Wright was commenting, simply said that "Regulation 5 will not apply, but faculty members will be able to have the issues reviewed by the faculty. . . ." We now say that a "hearing need not conform in all respects with a proceeding conducted pursuant to Regulation 5"—RIR 5, since it is about dismissal for cause, deals with such matters as charges and suspension from duties—"but the essentials of an on-the-record adjudicative hearing will be observed." What are these? One hesitates to make a quick catalog of the parts of a legal leviathan, for fear that any omission will be pounced on; and we cannot stop here fully to portray the creature. But everyone knows that at least these elements must be present: an unbiased tribunal, counsel if desired, opportunity to call and confront witnesses, a verbatim record with identified exhibits, and a reasoned decision based solely on the record.

What happens if the hearing committee finds the proposed termination improper? RIR 4 does not say; but it is part of a larger document, and at this point it presumably connects with Regulation 5(c)(16), which calls for referral to the president if termination is not recommended, remand by him if he disagrees, followed at the end of the road by Regulation 6, on action by the governing board.

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financial exigency existed, but directed the defendant to reinstate plaintiff who had been terminated (or pay him substantial damages). Among other elements in an artless but penetrating opinion, the judge criticized the absence of faculty participation in the process. Note that Paulsen is a tenure contract case; Levitt and Johnson were constitutional due process claims.

[20] These principles were applied in *AAUP* v. *Bloomfield College*, n. 7 above.

[21] "Faculty representatives should be selected by the faculty according to procedures determined by the faculty." Statement on Goverment, *AAUP Policy Documents*, p. 39.

[22] *Browzin* v. *Catholic University of America*, — F.2d — (D.C. Cir. 1975). The case was directly concerned with the "suitable position" rule, and will be discussed further in this article.

[23] 346 A. 2d at 615; emphasis in original.

In briefest summary, the question "Who Decides?" is answered in RIR 4 by positing four steps toward decision: (1) identification of the crisis, (2) response in terms of educational cutbacks, (3) identification of criteria for picking people to be terminated, (4) response in terms of individual selection. The faculty is assigned a participatory role in steps (1) and (4), and a dominant one in steps (2) and (3). The fifth step, if decision is challenged by a victim, is a hearing conducted by a faculty committee, subject, as RIR 4(f) puts it, to "ultimate review" by the governing board.

Who Must Go?

It must be conceded that the RIR, if it is voluble on procedure, falls almost silent on the substance of making selections for termination. There are two brief references in the Note already analyzed, one to "affirmative action," the other to "age and length of service." To these we will return. There is one major pronouncement in 4 (c)(3):

> The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result.

There is more to this than may meet the eye. It represents an abnegation of a strict priority of tenured over nontenured, even though the protection of tenure is what the narrow exception for exigency in the 1940 *Statement* is all about. Furthermore, it is the tenured (and the surely smaller number whose term contracts may be disturbed) who wear the armor of contract. Other faculty members whose services are terminated will be on annual contracts, or on longer term contracts that will expectably expire during the period of required notice. For them nothing can be claimed beyond a failure to reappoint, under circumstances that imply no reflection on their competence, so long as the reason for nonreappointment truly is, and is stated to be, exigency or retrenchment.

It may be thought that the concession does not amount to much. After all, nontenured faculty may not be preferred over those with tenure except in "extraordinary circumstances," to avoid "serious distortion." But consider the alternatives. Other policy statements on separations incline toward strict seniority formulae, with no notable regard for educational needs, partly because they aspire toward objective criteria, and partly because seniority has its own claims in terms of training, experience, and rank (along with tenure—these considerations are further discussed below).

Seniority rules may be quite mechanically, if not simplemindedly, stated. Consider the draft statement of 1973 issued by the National Society of Professors and its parent the National Education Association. Speaking to "reductions in force," it declares:

> Objective criteria must be established to determine who shall be riffed and in what order, i.e., all temporary staff should be riffed before any probationary staff are affected and all probationary staff before any tenured staff. Within any academic discipline or other appropriate administrative division, RIF's should proceed according to seniority—the least senior staff member in terms of length of service at the institution first, followed by the next least senior, and so on until the most senior member of the staff is reached.[24]

The AAUP position, while protective of the fundamental rights of tenure, also recognizes, in words of the "Operating Guidelines," previously quoted, that, "among the various considerations, difficult and often competing, . . . the retention of a viable academic program should necessarily come first." So, when Furniss, in a sophisticated discussion of objective as compared to evaluative approaches, suggests that "the junior Asian historian may stay, while one of the four senior European historians must go"[25] we might agree (but if one of the European historians is truly willing and able to retrain as an Asian historian, then the junior person may go after all).

The heart of the matter seems to be—and in this I think Furniss concurs—that it is not practical to attempt to generalize for all types of institutions, or even for hypothesized types: at any given time, any institution's needs and constraints may be unique. This does not mean that the institution need wait unprepared for hard times to descend. Its own shape and plans ought to make it possible for it to engage with the framing of criteria, at least in a general way, before urgency creates suspicion and asperities.

Perhaps the most severe situation of financial exigency awaiting resolution as this is written is that of the City University of New York, dragged down by the financial state of its parent government. When New York's Board of Higher Education adopted "Emergency Guidelines and Procedures for Retrenchment" on August 15, 1975, the document stated (p.10) that there were no retrenchment procedures in the University's collective bargaining agreements. This may have reflected the desperate optimism that characterized the city's fiscal affairs. Some—almost any—preparatory planning would have been better than the August policy that emerged during a time of crisis.[26]

Criteria and procedures can be blocked out either by

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[24] "Due Process and Tenure in Institutions of Higher Education," *Today's Education* (February, 1973), pp. 60-62.

[25] Furniss, *Ed. Record*, 1974, p. 167.

[26] The Board of Higher Education procedures were scored as inadequate in a letter of September 16, 1975, from the Director of the AAUP Northeast Regional Office to the Board. The faculty of CUNY is represented for purposes of collective bargaining by the Professional Staff Congress, an affiliate of the American Federation of Teachers and the National Education Association.

In discussing financial exigency in the context of collective bargaining, Matthew Finkin, Robert Goldstein, and Woodley Osborne stress in their *Primer on Collective Bargaining for College and University Faculty* that "this is an area where 'preventive medicine' is invaluable. It is much easier to negotiate financial exigency procedures *before* an exigency occurs, and a faculty bargaining agent is well advised to address this issue thoroughly in negotiations, whatever the current financial state of the institution." *Primer*, AAUP, 1975, p. 87.

regulations or, in a unionized institution, as part of the collective bargaining agreement which, in cases of dispute, is customarily submitted to an arbitrator rather than to the courts. A collective bargaining agreement may have the advantage that it is regularly reviewed, while regulations can slumber in unnoticed obsolescence. AAUP bargaining agreements that I have seen contain an interesting variety of practices. They range from stiff seniority tables, appropriately from Michigan institutions, that would serve as well for the United Auto Workers, to a casual arrangement in a small Eastern college which says in effect that the board shall determine the existence of financial exigency, the AAUP chapter executive committee the number to be terminated, and the faculty senate who is to go, so as to "most appropriately meet financial exigency with the least academic loss."

An agreement that comes close to the intentions of the new RIR 4(c)(3) is found at Temple University. It lists the "order of retrenchment" in conventional seniority terms: first, part-time, then, nontenured, and last, tenured faculty, with length of service at Temple apparently controlling within categories. A twelve-member committee of which nine will be faculty members may, however, consider a different order "to take into account such important factors" as the following:

1. The faculty remaining shall have the requisite qualifications to perform the work required
2. Affirmative Action goals
3. Academic excellence
4. Early retirement. [Article VII.D.]

A majority vote of the entire committee is required to effect a variation from the seniority order.

This device is not free from ambiguities of interpretation and application. For one thing, a majority of the whole committee could be mustered that would not comprise a majority of the faculty members. But, according to the AAUP chapter president, "This clause is viewed positively by the faculty" and "key administrative officers have also praised it." Who dares quibble with such benignity?[27]

Cross-currents: Seniority, Age, Affirmative Action

Nice calculations of seniority usually do not figure much in academic life (except for such vital marginalia as office and parking space), so that it may be worthwhile to reiterate that seniority may have several elements: tenure, rank, time in rank, length of service (with a rather parochial emphasis on length of service in the institution—a real impediment to mobility), and qualifications (if an institution puts great store on the doctorate, those with slighter or unconventional training may be forever handicapped). For a profession that ought to see itself as a meritocracy, the disruption of careers by mechanical applications of seniority unrelated to merit ought to give pause. But, of the various components of seniority, only length of service in the institution bears little relation to quality of performance. Training qualifications say something about ability—at least the ability to leap hurdles. Rank ought to reflect merit. The conferral of tenure, unless it degenerates into mere time-serving without getting into trouble, ought to represent the most exacting appraisal of merit. Furniss, after stressing the importance of systematic evaluation, concludes that seniority, in the end, "is a reliable indicator of quality." Yet hard times and retrenchment drive boards and administrators on restless crusades to "get rid of deadwood"—that burden on every bureaucratic organization—and to fire faculty on some kind of judgment that they have discovered "deadwood."

They should remember that while hard times understandably spur the drive for efficiency, termination of faculty members who have received the merit badge of tenure must be justified by the extraordinary circumstances of exigency, or must be for cause. If for cause—and severe petrifaction may be cause—due process requires proof in a hearing based on specific charges. If efficiency and economy were the sole goals, one could construct a plausible case for applying a FIFO—first in, first out—principle,[28] by arguing that younger faculty are by and large more energetic, and less expensive. But, no one, so far as I know, has had the audacity to put FIFO to the test; and even if it would stand up as an excuse for ending contracts, humane considerations intrude.

Professor Walter Metzger of Committee A, an unabashed meritocrat, put the matter this way in a memorandum prepared for the Committee in 1974:

> Apart from everything else, seniority makes a strong appeal to a sense of common decency. There is something repellent in the spectacle of long years of academic service earning little institutional gratitude and, in the upshot, no respect. We say that financial exigency may relieve an institution of its tenure obligations. Do we mean to say that it may also relieve it of the obligation of compassion?

Accordingly, RIR 4 notes that criteria for termination "may appropriately include considerations of age and length of service." In any event, there are now legal barriers against discrimination on account of age. The Age Discrimination Employment Act of 1967 applies to colleges and universities. At first feebly enforced, it has recently been applied with increasing vigor and sometimes startling effect.[29] C. L. Haslam has recently published a comprehensive paper on "Age Discrimination in Campus Employment" in which he considers financial exigency along with other problems. Among his

[27] Dubeck, "Collective Bargaining: A View from the Faculty," *Academic Collective Bargaining Information Service, Orientation Paper No. 17*, (October, 1975), p. 4.

[28] See William Van Alstyne, "Financial Exigency: Avoidance of Litigation and Friction," in *Formulating Policy in Postsecondary Education*, ed. by Hughes (Washington, D.C.: American Council on Education, 1975), pp. 17-29.

[29] See "The Ax and Older Workers," *New York Times*, June 23, 1974, p. F-3. The Act is in 29 U.S. Code § 623. But note that the protection of the Act is limited to "older workers" between 40 and 65.

conclusions: "It is clear that faculty members may not be terminated on the basis of age regardless of the economic condition of the institution." The reader is referred to Haslam's paper[30] for further guidance to the likely impact of a statute that impatient youth may view as a triumph of gerontocracy over meritocracy.

A specific age-related device that has been frequently employed in conditions of stringency is early retirement. Voluntarily effected, with adjustments in retirement income that make it acceptable to a faculty member, it raises no problems. Difficulties arise when the mandatory retirement age is unilaterally lowered, as a one-shot measure for trimming the size of the faculty and saving the relatively high salaries of the senior people whose retirements are accelerated. When it is put into effect with little lead time, as is likely to happen in a financial crisis, early retirement can be a real hardship for those who suddenly find their incomes sliced, at an age when only a few star performers are likely to find posts.

One-sided action of this sort raises a real issue of contract violation. One position is to urge that at the beginning of tenure a faculty member acquires a vested right to be retired not earlier than the age established at the time tenure is conferred. The AAUP, however, accepts that courts are not likely to acquiesce in freezing a status that will not ripen for thirty-five or forty years. But, along with other organizations, it urges that, somewhere along the way, one begins to plan for retirement, and then expectations should become fixed. Committee A has proposed that where the age of mandatory retirement is reduced, "the higher age should still apply in the case of faculty members who are within twenty years of that age at the time of the change."[31] Regrettably, the Supreme Court of Ohio, in a case of first impression, rejected both of these positions. The facts were these: following upon the merger of Case Institute, where the plaintiff had tenure, and which had a retirement age of seventy, with Western Reserve University, where the age was sixty-five, a uniform policy set the new age at sixty-eight. Professor Rehor was then almost sixty-five. The level of his retirement income was maintained, but for him the change was now three years away instead of five. The court saw nothing unreasonable about this, and held that the trustees, in conferring tenure, reserved a power (of troublingly undefined scope) to alter conditions of it.

Professor Matthew Finkin, the Association's Associate General Counsel, has subjected the problem and the decision to close analysis.[32] Better luck next time, we hope.

[30] *Human Rights*, 4 (Summer, 1975), p. 321, quotation on p. 342 (*Human Rights* is published by the ABA Section on Individual Rights and Responsibilities and edited by the School of Law of Southern Methodist University.)

[31] *AAUP Bulletin*, 61(Spring, 1975), p. 16.

[32] M. Finkin, "Contract, Tenure and Retirement: A Comment on Rehor v. Case Western Reserve University," *Human Rights*, 4(Summer, 1975), p. 343. The case is reported in 43 Ohio St. 2d 224, 331 N.E. 2d 416 (1975).

We come finally to a real cross-current, the depth and strength of which is as yet untested, namely how to balance a need to terminate appointments with the prohibition against discrimination and the affirmative obligation to increase the number of women and minority faculty in order to overcome the effects of underutilization or past discrimination. Although an institution may have responded during the past four or five years to the social and legal mandates of our time by effectively implementing affirmative action principles in the appointment process, whatever gains that might have resulted may be wiped out by the termination of junior faculty appointments at institutions afflicted with financial exigency.

The Association has recognized that affirmative action is an element of educational policy,[33] and the Note to RIR 4(c)(1) acknowledges that the value of affirmative action as an element of educational policy is a permissible consideration. The exact mechanisms for implementing affirmative action during retrenchment will depend on the particular legal obligations of an institution,[34] as well as an evaluation of particular educational programs and institutional needs.

Discontinuing a Program or Department

Termination of appointment of tenured faculty (or those with unexpired terms) "may occur as a result of bona fide formal discontinuance of a program or department of instruction," says RIR 4(d). This option

[33] "Affirmative Action in Higher Education: A Report of the Council Commission on Discrimination," *AAUP Bulletin*, 59(Summer, 1973), pp. 178-183.

[34] An attempt at proportional retrenchment of minorities and women may be a consideration where an institution has adoped an affirmative action plan with goals and timetables under Executive Order 11246. See, e.g., *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3d. Cir), cert. denied, 404 U.S. 85.4 (1971), and C. Poplin, "Fair Employment in a Depressed Economy: The Layoff Problem," *UCLA Law* Review, 23 (December), p. 177.

The Supreme Court has, in several cases, emphasized the independence of each civil rights statute and remedy. See *Alexander* v. *Gardner Denver* 415 U.S. (1974) and *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). Therefore, faculty challenging the discriminatory impact of retrenchment based solely on seniority or tenure status would have a wide range of avenues for possible legal relief. See also, G. R. La Noue, "Tenure and Title VII," *Journal of College and University Law*, (Spring, 1974), pp. 206-221, and C. I. Polowy, "Collective Bargaining and Discrimination Issues in Higher Education," *Monograph No. 1—Academic Collective Bargaining Information Service* (August, 1975). Compare *Meadows* v. *Ford Motor Co.*, 510 F. 2d 939 (6th Cir. 1975) where constructive seniority as a remedy for discriminatory hiring practices is permitted under Title VII (1964 Civil Rights Act) with other last hired-first fired cases decided to date, each of which enforced union contract protection of seniority: *Jersey Central Power & Light Co.* v. *IBEW Local Unions*, 508 F.2d 687 (3d Cir. 1975); *Watkins* v. *Steelworkers*, Local 2369, 516 F.2d 41, (5th Cir. 1975); *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974).

meshes only imperfectly with financial exigency terminations. Recognition of it has developed independently, and without any explicit foundation in the 1940 *Statement of Principles*. It is accepted as a fact of academic life that such events occur; and indeed it is healthy for the institution that they should. The position is sometimes taken that tenured faculty who are willing to stay on wholly in a research capacity should be entitled to do so, but the AAUP has not so insisted.

The imperfect fit of discontinuance with financial exigency comes from an impractical desire to keep the two wholly separated. This desire arises from the observation that "discontinuance" may be invoked in hard times as a substitute, perhaps a subterfuge, for an exigency crisis that cannot be convincingly asserted. A little redefinition here, a showing of declining enrollments there, and—presto—the Professor of Italian is terminated, because the Italian program in the Romance Languages Department has been discontinued.

It is entirely natural that the educational value of fields of instruction or research should be viewed with a colder eye in bad times than in good. The only way to keep the process from getting out of hand is to insist on good faith educational judgments, and to hope that the faculty, exercising its primary responsibility in such matters, will make them. Until a late stage in the drafting of the new RIR 4, it declared, in (d)(1), that the decision to discontinue "will be based *solely* upon educational considerations." Realism prevailed, and "solely" was changed to "essentially."

A Note admonishes that " 'educational considerations' do not include cyclical or temporary variations in enrollment." The Note is directed, in part, at a pernicious practice, extensively employed in large state systems, of measuring appropriations by formulae that reflect minute fluctuation in enrollments. The intent is doubtless to measure competing claims objectively, but the result must be harmful to stability of employment or of program. To require terminations on the basis of such variations misconceives the qualities of higher education.

A paragraph from a statement by a university dean deserves full quotation:

> Must every zig and zag of student fad or fashion be followed? Manifestly not. Rather, it is the task of the university, faculty and administration analyzing such shifts cooperatively, to follow broad trends along curves as smoothly as can be managed, not to lurch up and down every angular rut. The university is a long-breathed institution, under an obligation to cherish values in temporary eclipse, to maintain modes and subjects of study against the day when their importance will be recognized and prized anew, and to acknowledge that programs of excellence are more easily destroyed than reconstructed. Crude quantification of subtle qualities will not do, for all we have still to learn from program budgeting and other management techniques.

What is a program? What is a department? Here also we must rely on good faith, and on faculty involvement. An example of questionable judicial definition, albeit to a good end, is found in the *Browzin* case earlier mentioned. The issue was whether an adequate attempt had to be and had been made to place Professor Browzin in another suitable position. The trial in the lower court had concentrated on financial exigency. An ambiguity in the 1968 RIR seemed to relate the obligation to seek a suitable position only to cases of abandonment of program. Judge Wright, striving to give effect to what he thought were underlying goals, concluded that "financial exigency is in the case, but so is *abandonment of a program of instruction*" (italics Judge Wright's). Since courses in Soil Mechanics and Hydrology, "Browzin's particular responsibility," were given up, "The University did discontinue Browzin's program of instruction"[35] (!-mine). If the issue had been solely whether Browzin could be terminated because of a program discontinuance, I do not think we would want to accept this notion of a one-man program. The case would then seem to be a simple breach of tenure, in the absence of financial exigency.

Why then is a larger carnage acceptable? Only because it does not seem to be right to require a university to maintain a program, and the people in it, when a serious educational judgment has been made, in the language of the Note, that "the educational mission of the institution as a whole will be enhanced by the discontinuance."

Because this whole area is so problematical, the safeguards and auxiliary rights that are required to accompany it essentially parallel those in financial exigency cases, with some nuances that are best discovered by reading the two sections of the RIR side-by-side. Again, there must be a full hearing on request; and it may be claimed in order to appeal either a termination or an unwanted relocation. Some aspects of relocation in another suitable position will be mentioned in the next section, to which we now turn.

Cushions and Safeguards

"Cushions" is not meant to imply cushioned ease, but something to break a fall. Perhaps "crash pads" or "safety nets" would be more expressive, for other images in this paper may have conveyed connotations of impending fatality. These are exaggerations. Still, to be fired from what appeared to be a secure position *is* a serious deprivation, especially so if it is not an isolated episode, but part of a deep recession of opportunities so that other openings are scarce. Accordingly, a number of auxiliary rights are specified or implied in the RIR.

The first of these is the obligation to try to find the faculty member "another suitable position within the institution." This derives from the joint 1925 Conference Statement of AAUP and the Association of American Colleges that is the direct predecessor of the joint 1940 *Statement* and is now taken to be subsumed in the good faith requirement of 1940. In the case of terminations because of discontinuance of a program or department, the relocation obligation extends to provid-

[35] *Browzin* v. *Catholic University*—F.2d—(D.C. Cir. 1975). Slip opinion at 10 and 11.

better than resort to third parties who may not understand academic ways.[43]

But, in the end, in our law-ridden society, we will turn to the courts. At many points in this paper judicial responses—so far, there are only a handful—have been examined. We have seen that when the claim is based in contract, a court should know what to do. In two cases, *Bloomfield* and *Browzin*, the response has been surefooted and gratifying. One notable advance, not before emphasized in this paper, is a willingness to require reinstatement, and not to turn faculty members away with money damages only, as older doctrine might do. Courts should also be able to reach beyond contract to hold state agencies or governing boards responsible for their imprudence or ineptitude, so that the consequences of it will not be visited on the faculty. This combination of contract and tort is suggested by Professor Van Alstyne's article on financial exigency.[44]

On the other side, *Rehor*, the Ohio accelerated retirement case, is a disappointment. The Iowa lower court opinion, in which an appeal is pending, is a disaster.[45]

The response of federal courts to which constitutional claims have been carried has not, as we have seen, been helpful. But this should not be a cause for alarm. The present U.S. Supreme Court, for better or worse (mostly worse), appears to be trying to curb the trend for litigants to rush to the federal courts every dispute that has any suggestion of due process or equal protection arguments. When Judge James Doyle, an able jurist, offered the Wisconsin petitioners only a minimal due process hearing, he felt constrained by recent decisions of the Supreme Court.[46] So, the Constitution as reinterpreted by the Court may no longer be the old rugged cross to which we can cling with assurance of salvation.

But law is not dead, nor do we, in the financial exigency problems that have been reviewed, have to rely entirely on the courts. Good contracts make good cases that will not have to be litigated. Salvation lies in the shaping of good contracts and in the development of good academic custom. This process needs guidance. The policy statements of the American Association of University Professors, "widely circulated and widely accepted,"[47] can provide that guidance.

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[43] For a discussion of strengths and weaknesses in the use of arbitration in resolving academic disputes, see "Arbitration of Faculty Grievances: A Report of a Joint Subcommittee of Committees A and N," *AAUP Bulletin*, 59 (Summer, 1973), pp. 168-170.

[44] Van Alstyne, note 28 above.

[45] *Lumpert* v. *University of Dubuque*. See note 10 above.

[46] Especially, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

[47] Judge Wright, at note 38 above.

Termination of Faculty Appointments Because of Financial Exigency, Discontinuance of a Program or Department, or Medical Reasons

(1975 REVISION)

Committee A's Recommended Institutional Regulations on Academic Freedom and Tenure (AAUP Bulletin, *Vol. 58, No. 4, Winter, 1972, pp. 428-433) include, as Regulation 4, procedures for termination of an appointment by the institution when the intended action is not a dismissal for cause but is based rather on factors beyond the affected individual's direct control.*

It was recognized in the 1940 Statement of Principles on Academic Freedom and Tenure *that, in addition to a dismissal for cause, an appointment can be terminated because of a demonstrably* bona fide *financial exigency. Since their first publication in 1968, the* Recommended Institutional Regulations *have recognized that an appointment can also be terminated because of a* bona fide *discontinuance of a program or department that is not mandated by financial exigency; and because of medical reasons. With the pronounced recent increase in cases of termination of appointment because of financial exigency, Committee A has formulated a revised Regulation 4. It is designed to provide more specific procedural guidance in cases resulting from an assertion of financial exigency and to distinguish between those cases and cases of formal programmatic or departmental discontinuance not mandated by financial exigency.*

[The Regulation that follows was adopted by Committee A and the Council, respectively on June 23 and 24, 1976.]

Revision of Regulation 4, Recommended Institutional Regulations on Academic Freedom and Tenure

4. *Termination of Appointments by the Institution*

(a) Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may be effected by the institution only for adequate cause.

(b) If termination takes the form of a dismissal for cause, it will be pursuant to the procedure specified in Regulation 5.

Financial Exigency

(c) (1) Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur under extraordinary circumstances because of a demonstrably *bona fide* financial exigency, i.e., an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means.

[NOTE: Each institution in adopting regulations on financial exigency will need to decide how to

share and allocate the hard judgments and decisions that are necessary in such a crisis.

As a first step, there should be a faculty body which participates in the decision that a condition of financial exigency exists or is imminent,[1] and that all feasible alternatives to termination of appointments have been pursued.

Judgments determining where within the overall academic program termination of appointments may occur involve considerations of educational policy, including affirmative action, as well as of faculty status, and should therefore be the primary responsibility of the faculty or of an appropriate faculty body.[2] The faculty or an appropriate faculty body should also exercise primary responsibility in determining the criteria for identifying the individuals whose appointments are to be terminated. These criteria may appropriately include considerations of age and length of service.

The responsibility for identifying individuals whose appointments are to be terminated should be committed to a person or group designated or approved by the faculty. The allocation of this responsibility may vary according to the size and character of the institution, the extent of the terminations to be made, or other considerations of fairness in judgment. The case of a faculty member given notice of proposed termination of appointment will be governed by the following procedure.]

(2) If the administration issues notice to a particular faculty member of an intention to terminate the appointment because of financial exigency, the faculty member will have the right to a full hearing before a faculty committee. The hearing need not conform in all respects with a proceeding conducted pursuant to Regulation 5, but the essentials of an on-the-record adjudicative hearing will be observed. The issues in this hearing may include:

(i) The existence and extent of the condition of financial exigency. The burden will rest on the administration to prove the existence and extent of the condition. The findings of a faculty committee in a previous proceeding involving the same issue may be introduced.

(ii) The validity of the educational judgments and the criteria for identification for termination; but the recommendations of a faculty body on these matters will be considered presumptively valid.

(iii) Whether the criteria are being properly applied in the individual case.

(3) If the institution, because of financial exigency, terminates appointments, it will not at the same time make new appointments except in extraordinary circumstances where a serious distortion in the academic program would otherwise result. The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result.

(4) Before terminating an appointment because of financial exigency, the institution, with faculty participation, will make every effort to place the faculty member concerned in another suitable position within the institution.

(5) In all cases of termination of appointment because of financial exigency, the faculty member concerned will be given notice or severance salary not less than as prescribed in Regulation 8.

(6) In all cases of termination of appointment because of financial exigency, the place of the faculty member concerned will not be filled by a replacement within a period of three years, unless the released faculty member has been offered reinstatement and a reasonable time in which to accept or decline it.

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[1] See "The Role of the Faculty in Budgetary and Salary Matters" (*AAUP Bulletin*, 58, Summer, 1972, pp. 170-72), and especially the following passages:

> The faculty should participate both in the preparation of the total institutional budget, and (within the framework of the total budget) in decisions relevant to the further apportioning of its specific fiscal divisions (salaries, academic programs, tuition, physical plants and grounds, etc.). The soundness of resulting decisions should be enhanced if an elected representative committee of the faculty participates in deciding on the overall allocation of institutional resources and the proportion to be devoted directly to the academic program. This committee should be given access to all information that it requires to perform its task effectively, and it should have the opportunity to confer periodically with representatives of the administration and governing board. . . .
>
> Circumstances of financial exigency obviously pose special problems. At institutions experiencing major threats to their continued financial support, the faculty should be informed as early and specifically as possible of significant impending financial difficulties. The faculty—with substantial representation from its nontenured as well as its tenured members, since it is the former who are likely to bear the brunt of the reduction—should participate at the department, college or professional school, and institutionwide levels, in key decisions as to the future of the institution and of specific academic programs within the institution. The faculty, employing accepted standards of due process, should assume primary responsibility for determining the status of individual faculty members.

[2] See "Statement on Government of Colleges and Universities" (*AAUP Bulletin*, 52, Winter, 1966, pp. 375-79), and especially the following passage:

> Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy.

Discontinuance of Program or Department Not Mandated by Financial Exigency[3]

(d) Termination of an appointment with continuous tenure, or of a probationary or specified appointment before the end of the specified term, may occur as a result of *bona fide* formal discontinuance of a program or department of instruction. The following standards and procedures will apply.

(1) The decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof.

[NOTE: "Educational considerations" do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance.]

(2) Before the administration issues notice to a faculty member of its intention to terminate an appointment because of formal discontinuance of a program or department of instruction, the institution will make every effort to place the faculty member concerned in another suitable position. If placement in another position would be facilitated by a reasonable period of training, financial and other support for such training will be proffered. If no position is available within the institution, with or without retraining, the faculty member's appointment then may be terminated, but only with provision for severance salary equitably adjusted to the faculty member's length of past and potential service.

[NOTE: When an institution proposes to discontinue a program or department of instruction, it should plan to bear the costs of relocating, training, or otherwise compensating faculty members adversely affected.]

(3) A faculty member may appeal a proposed relocation or termination resulting from a discontinuance and has a right to a full hearing before a faculty committee. The hearing need not conform in all respects with a proceeding conducted pursuant to Regulation 5 but the essentials of an on-the-record adjudicative hearing will be observed. The issues in such a hearing may include the institution's failure to satisfy any of the conditions specified in this section. In such a hearing a faculty determination that a program or department is to be discontinued will be considered presumptively valid, but the burden of proof on other issues will rest on the administration.

Termination for Medical Reasons

(e) Termination of an appointment with tenure, or of a probationary or special appointment before the end of the period of appointment, for medical reasons, will be based upon clear and convincing medical evidence that the faculty member cannot continue to fulfill the terms and conditions of the appointment. The decision to terminate will be reached only after there has been appropriate consultation and after the faculty member concerned, or someone representing the faculty member, has been informed of the basis of the proposed action and has been afforded an opportunity to present the faculty member's position and to respond to the evidence. If the faculty member so requests, the evidence will be reviewed by the Faculty Committee on Academic Freedom and Tenure [or whatever title it may have] before a final decision is made by the governing board on the recommendation of the administration. The faculty member will be given severance salary not less than as prescribed in Regulation 8.

Review

(f) In cases of termination of appointment, the governing board will be available for ultimate review.

[3] When discontinuance of a program or department is mandated by financial exigency of the institution, the standards of section 4(c) above will apply.