

# Tenure & the Trustees

## TACTC CONFERENCE

October 18, 2011

Dave Stolier, Attorney General's Office

John Boesenberg, SBCTC

Lee Lambert, President, Shoreline Community  
College

# Origin & Purpose of Tenure

- *1940 Statement of Principles on Academic Freedom and Tenure* (AAUP Redbook)
- Traditional justification for tenure:
- Protects academic freedom
- Provides economic security to attract & retain qualified faculty

# Community & Technical College Act

## RCW 28B.50

- Establishes a tenure system to protect the concept of faculty employment rights and to involve faculty in the protection of those rights.
- Provides a “reasonable & orderly” process for tenuring faculty and for dismissing tenured faculty.
- Establishes a state-granted property right which may be removed only with adequate due process.

# Statutory Definition of Tenure

- “Tenure” means a faculty appointment for an indefinite period, revoked only for “adequate cause” and by “due process.”
- Compare with “probationary faculty appointment” which is for a designated period of time and which may be terminated without cause at the expiration of the term.
- Includes any full-time employment as teacher, counselor, librarian, or comparable.
- Excludes part-time, administrative, and “soft money” positions.

# Tenure Review Committee

- Probationary period must be one of “continuing evaluation” by Tenure Review Committee.
- Requires ongoing evaluation and regular written progress reports.
- Evaluation must place “primary importance” on probationer’s effectiveness in his/her appointment.
- Evaluators are immune from civil suit for good faith performance of their evaluative duties.

# Faculty Evaluation

- May consider academic or professional misconduct if probationer has opportunity to respond.
- May be additional locally bargained constraints on what committee may consider.
- College's failure to follow evaluation procedures may result in reinstatement of faculty member and additional probationary period.

# Faculty Evaluation -- Collegiality

- Typical tenure criteria are teaching, advising, professional development, and service.
- Courts recognize that ability to get along with others is essential to teaching and service, but . . .
- AAUP discourages “collegiality” as separate tenure criterion.
- Be wary of collegiality as potential pretext for discrimination.

# Board's Role -- Probationary Review

- Board must provide for award of tenure following a probationary period not to exceed nine consecutive quarters (excluding summer and approved leaves).
- Board may grant early tenure, provided it has given “reasonable consideration” to Tenure Review Committee recommendation. Board is not required to consider a recommendation to grant early tenure.
- Notice not to renew a probationary appointment must be given no later than 1 complete quarter (excluding summer) prior to expiration of the appointment.

# Extended Probation

Board may extend the probationary period for one, two, OR three additional quarters (excluding summer), but ONLY if all the conditions below are met:

- Formal recommendation by the review committee and written consent of probationer;
- Probationer needs additional time to complete a professional improvement plan that is already in progress;  
AND
- Tenure Review Committee believes probationer will satisfactorily complete the plan.

# Board of Trustees Decision

- Final decision to grant or deny tenure rests with the Board after giving “**reasonable consideration**” to Review Committee recommendations.
- The courts will give deference to the collective decision of the Board. The Board’s exclusive authority to make this decision has been a key factor in several courts upholding tenure decisions.

# “Reasonable Consideration”

- Statute does not define.
- Recommended practice is to review Committee’s written recommendations, any independent recommendations, and candidate’s self-evaluation.
- As long as the Board actually and in good faith considered the Review Committee recommendation, such consideration is likely “reasonable” if the Board’s final decision is not arbitrary or capricious, unconstitutional, or discriminatory (i.e., “unreasonable”).
- Board may consider the recommendations of the President and executive administrators, *Smith v. Greene* (Washington Supreme Court (1976)).

# Must the Board Give Reasons for Denying Tenure?

- No. The statutory requirement to give “reasonable consideration” to Review Committee recommendations does not itself require Board to state reasons for its decision.
- But a separate statute requires the appropriate administrator, upon request, to state the reasons for a review committee’s or administrator’s unfavorable decision on denying tenure, reappointment, or promotion (RCW 28B.10.648).

# Actions Against Trustees

- The Board may request the Attorney General to defend a trustee in any action relating to the performance of trustee duties.
- The Board must make a finding and determination by resolution that the trustee acted in good faith within the scope of his/her duties.
- RCW 28B.10.842

# Tenure Reviews -- Open Meeting Requirements

- Board may meet in Executive Session to evaluate qualifications of tenure candidates.
- May include President, VP, Tenure Candidate, Review Committee Members.
- Final action must be taken in Open Session.
- Public comments, if allowed, must be heard in Open Session.
- Process issues must be discussed in Open Session.

# Judicial Review of Board's Decision Denying Tenure or Reappointment

- Standards of judicial review are narrow and generally deferential.
- Courts will reverse only if the decision was:
  - (1) unconstitutional;
  - (2) ultra vires (outside statutory authority);
  - (3) made by persons not entitled to decide; or
  - (4) arbitrary & capricious.
- Petitioner bears burden of showing "substantial prejudice."

# Quotes from Illustrative Tenure Cases

- Courts will not disturb an institution's "genuinely academic decisions."
- Courts will defer to professional judgments based on subjective criteria, unless the decision is such a departure from accepted academic norms as to show that those responsible did not actually exercise professional judgment.
- Courts do not sit as "ersatz deans or educators" or as "super tenure review committees."

# Failure to Follow Procedures

- Scrupulous adherence to tenure review procedures is generally required.
- Substantial compliance with procedures may suffice if no prejudice can be shown.
- Beware of collective bargaining act overlap.
- Courts addressing serious deficiencies in tenure review procedures have fashioned remedies, short of granting tenure, that correct the procedural error.
- Typical remedy is reinstatement with new tenure review.

# Removal of Tenure -- Dismissal for Cause

- Tenure is a valuable property right that may only be removed with sufficient due process of law.
- Tenured faculty (and probationers during the term of their contracts) may not be dismissed except for sufficient cause.
- Faculty member has the right to a formal evidentiary hearing before a Dismissal Review Committee.
- Review Committee and/or hearing officer issues “recommended decision to the Board.
- The final decision for dismissal rests with the Board and cannot be delegated to the Review Committee.

# Board Review of Dismissal Action

- The Board conducts a “record review” limited to the record made before the Dismissal Review Committee. The Board must “personally consider” the whole record or such parts of it as may be cited by the parties.
- Board must not be consulting with administration or faculty member prior to its review.
- Unless limited by contract, the Board’s review is *de novo*. The Board must give “due regard” to the Committee’s opportunity to observe witnesses, but is not bound by the Committee’s factual findings or legal conclusions.
- While the Board usually cannot receive new evidence, the Board must allow written arguments and may allow oral arguments.

# Reductions in Force

- Faculty contracts typically recognize that the dismissal of faculty because of a reduction in force constitutes “sufficient cause.”
- Courts generally will not disturb a management decision to implement a RIF for bona fide financial or programmatic reasons.
- However, dismissed faculty have a right to a hearing on whether they are the proper individuals to be dismissed under applicable layoff rules.

# Declaration of Financial Emergency

- RCW 28B.50.873 provides:
  - Expedited lay off process for tenured and probationary faculty; and,
  - Establishes conditions for declaration and employee rights.

**Legislature recognized extraordinary job security provided in RCW and need to realize budget savings ASAP.**

# Authority

- State Board may declare a financial emergency if:
  - Governor reduces spending authority.
  - Legislature reduces appropriations, as adjusted by inflation:
    - From one biennium to the next; or
    - From one year to the next within a biennium.

# State Board Action

- Calculation shows a 17.1% budget reduction from the 2009-11, after adjustment for inflation.
- State Board declared a Financial Emergency for the 2011-13 biennium on September 15, 2011.
  - Encouraged continued collaboration on alternatives to RIF.
- Previously declared a “Financial Emergency” in 2009 and 1982.

# Next Steps

- Trustees assess district's financial situation and determine need to layoff tenured or probationary faculty, citing the State Board's declaration of financial emergency.
- If faculty layoffs are necessary, President provides written notice to affected faculty members.
  - Notice cites basis and includes statement that separation is not due to job performance.

# Impact of “Declaration”

- Expedites RIF process by:
  - Limiting basis of appeal;
  - Consolidating appeals;
  - Requiring hearing process to be completed within 60 days; recommendation to trustees within 10 days.
  - Making the hearing officer’s decision not subject to review by tenure review committee.

# Impact on Collective Bargaining Agreements

- Does not affect provisions:
  - Defining layoff units;
  - Defining seniority and how it's applied in a RIF;
  - Re-employment or recall rights.

# Impact on Collective Bargaining Agreements

- Affects provisions, if any, that provide for:
  - Appeals based on reasons other than seniority;
  - Separate appeals and scheduling considerations;
  - Program or performance review;
  - Retraining of affected faculty;
  - Selection and payment of hearing officer;
  - Limiting effective date to coincide with expiration of annual employment contract.

# Effective Date

- Board receives and considers hearing officer's recommended decision.
- Separation is effective upon final action of Board of Trustees.

# Thank you

- Any lingering questions?