

Tenure & the Trustees

TACTC CONFERENCE

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Origin & Purpose of Tenure

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

Community & Technical College Act

RCW 28B.50

- Establishes a tenure system to protect 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.

Probationary Review

- Board must provide for award of tenure following a probationary period not to exceed nine consecutive quarters (excluding summer and approved leaves).
- Notice not to renew a probationary appointment must be given no later than 1 complete quarter (excluding summer) prior to expiration of the appointment.
- 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.

Extended Probation

- Board may extend the probationary period for one, two, OR three additional quarters (excluding summer), but ONLY if
- 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.

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.
- Committee may consider factors pertinent to granting of tenure, such as declining enrollments.
- May consider academic or professional misconduct if probationer has opportunity to respond.

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.
- AAUP discourages “collegiality” as separate tenure criterion.
- Be wary of collegiality as potential pretext for discrimination.

Board of Trustees Review

- Final decision to grant or deny tenure rests with the Board after giving “**reasonable consideration**” to Review Committee recommendations.
- Granting of tenure is “non-delegable” duty that Board alone must perform.
- No voting by proxy or other delegation of decision.

“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. Statutory requirement of giving “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).

Open Meeting Requirements—Tenure Reviews

- 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."

Illustrative 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.
- 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

- 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.
- 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.
- However, 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 “dismissal for 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.

Expedited RIF due to Financial Emergency – RCW 28B.50.873

- SBCTC may declare a financial emergency upon (a) reduction of allotments by Governor; or (b) reduction by legislature of appropriated funds in constant dollars.
- If SBCTC has declared a financial emergency, local BOT may determine that a RIF is necessary due to the financial emergency.
- Triggers consolidated hearing, expedited timeline, limited issues

Defense & Indemnification—Common Law Immunity

- Peer reviewers enjoy a qualified privilege for communications made in the performance of their review duties.
- Privilege lost if statements are knowingly false or made in reckless disregard of truth or falsity.
- Statements communicating ideas or opinions cannot support a defamation claim.

Defense & Indemnification—Statutory Immunity

- Review Committee members have statutory immunity from damages arising from good faith performance of their duties.
- Same statutory privilege applies to individuals who provide oral or written statements in good faith.
- College must defend such individuals in any legal action arising from committee proceedings.

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 determine by resolution that the trustee acted in good faith within the scope of his/her duties.
- The AGO is authorized to provide a defense when a majority of the Board would be personally affected by such finding and determination. RCW 28B.10.842