

TENURE: Fact or Fallacy?

At State Universities Tenure Protects Only When No Protection Is Needed *

The award of tenure may increase the paycheck, but it is no guarantee that the paycheck will continue. In fact, tenure does not protect a professor's employment and could lead to life-shattering consequences. Allow me to explain.

In the last 18 of my 27 years of practice I have focused on representing faculty, staff and students at state and private universities. I have discovered and confirmed that tenure at state universities only protects what needs no protection. Tenure in essence only protects professors who the administration does not want to fire. It does not protect tenured faculty who the administration has decided to terminate. How so?

From a legal standpoint, at a state university the law (particularly civil rights law) mandates that to fire a tenured faculty member, the administration must provide due process. This means that the faculty member must be, at a minimum, given notice of the reasons for his or her termination and a fair opportunity to respond to the allegations, all within a meaningful time. It also means that there must be a reason given, or good cause shown, for terminating the tenured professor. The reason given generally must constitute adequate cause for dismissal. However, this does not mean that the administration must be right or correct in their decision to terminate a tenured faculty member. Nor does it mean that their stated reason has to justify termination. It only means that the faculty

* This article primarily applies to tenured faculty at state funded universities in Texas. The rights of a private university tenured faculty member are governed by their contract with the private university. While some of the observations in this article apply equally to both state employment and private employment, the main difference involves due process requirements for state employee tenured professors versus contract rights of private employee tenured professors.

member must receive adequate (including timely) due process. Thus, once a state university administration has decided to fire a tenured professor (for whatever reason) the administration can essentially do so without fear of liability (under current case law) so long as they state a reason and go through the motions of due process in a timely manner. The fact that due process may not be given within a meaningful time and in a meaningful manner provides an argument for the fired tenured professor that the law has not been followed, and little more.

Unfortunately, the way this has played out in the cases in which I have been involved, is that administrations (administrators) who decide to fire a tenured professor, will generate some pretextual reason for the termination and then put the hapless professor through the nightmare of defending against false or embellished accusations when (unknown to the professor) the outcome has been predetermined. Of course, the administration puts on the show of due process, usually in the form of one or more hearings before faculty hearing committees, which the professor must suffer through, all the while metaphorically screaming his or her innocence. The key factor which renders tenure useless is that the administration has no obligation to follow any finding or recommendation of the faculty hearing committees. The final say is still up to the administration and none of the so-called protective process can stop the termination. Indeed, in my experience it has become very common for Presidents and administrations to ignore committee findings which are favorable to the accused professor and fire the professor nonetheless.¹ The end result is that the professor is fired despite his or her tenure, despite exoneration by the so-called protective process, and despite his or

¹Actually, the final step of the process is normally a decision by the Board of Regents to either support or reject the President's recommendation or a faculty committee's recommendation. My experience has shown that with a recommendation to terminate from the top administrators, a Board of Regents is always inclined to uphold that recommendation and "close ranks" behind the top administrators regardless of how faculty committee hearings turn out.

her innocence of the pretextual allegations which, of course, are not the real reason the administration is firing the professor anyway.

At the risk of over-explaining, let's take two examples in which parts are taken from real cases: Dr. A and Dr. B are both tenured professors at a state university. Dr. A is liked by the administration and never openly questions or criticizes the President or Provost, while Dr. B is not liked and often questions or objects to the actions of the administration. Also, Dr. B has been a little "too free" with his academic freedom, at least in the opinion of the President and Provost. Dr. A gets into a shouting match with a university employee over equipment usage. The same day, Dr. B also gets into a shouting match with a different employee, Ms. X, over equipment availability. Both incidents are witnessed by members of the administration.

The administration, already predisposed against "that troublemaker Dr. B," decides it is time to fire him. An administrator meets with Ms. X and convinces her to file a complaint against Dr. B. The complaint will likely be somewhat embellished. Dr. B is called in and informed that he is accused of disruptive and unprofessional behavior and also of conveying a threat against the employee, and he may even be charged with sexual harassment. Dr. B is immediately suspended and banned from campus pending the investigation because he is a threat to the orderly operations of the university. Some time later, Dr. B appears before one or more committees who all find that while his behavior was less-than-exemplary, it was not adequate cause for dismissal. The committee(s) recommend perhaps some counseling. The President, however, recommends to the Board of Regents that Dr. B be terminated because of his unprofessional behavior and because of the great threat that he poses. The President discounts the committee recommendations as the result of

biased faculty committee members who are just protecting their own. Dr. B, after suffering through the process and being suspended for as long as the process took (sometimes up to a year or more) is terminated. His tenure did not protect his position and, in fact, only forced the administration to invent adequate or good cause which will hurt Dr. B's chances for acquiring a position at another university and which will irreparably harm his academic career.

Meanwhile, Dr. A will probably never hear about his shouting match. Even if the employee lodges a complaint, only administration can "decide" if it is adequate cause for dismissal or other disciplinary action. If pressured to go forward, the administration may refer Dr. A's case to a committee who would in all likelihood recommend against termination and the matter would end there. The administration will point to Dr. A's case as proving the worth of the protections of tenure.

While somewhat simplistic,² this example in my experience is all too common and demonstrates that tenure only protects what needs no protection. The administration will not seek termination of those who they want to keep. Academic freedom is protected only so long as what is being taught or said or, possibly even written in e-mails, agrees with the administration. A wanted faculty member needs no tenure to protect against unjust termination. However, an unwanted faculty member can easily be terminated despite his or her tenure. In fact, it is his or her status as tenured which forces an administration to concoct and perpetuate the career-ending allegations in order to meet the requirement of adequate cause to dismiss the tenured faculty member. Thus, though it is sadly ironic, the non-tenured annually-contracted professors have greater protections.

²The allegations supporting adequate cause are usually far more extensive and are increasingly more likely to include, if the administration can arrange it, a criminal investigation and, in some cases, even an indictment.

An unjust termination of such an individual will only subject the university to a possible grievance action: far easier to deflect than a civil rights due process claim. The state university will also use its sovereign immunity shield to protect against a breach of contract action, and they will win this kind of fight easily. Furthermore and significantly, if the administration wants to be rid of an annually-contracted professor, they will simply not renew his or her contract at the end of the year. There is no need for the administration to “cook up” any charges to remove this category of professor. Thus, although the contract professor is subject to annual dismissal, his or her life will not be shattered if an administration decides to be rid of this kind of troublemaker.

The tragedy for the state tenured faculty member who finds himself or herself at the center of an administration campaign to create adequate cause for a firing is that a lifetime of work ahead, or just completed, is about to be irretrievably ruined. The cost to fight the State, whose attorneys are paid by the taxpayers, is often staggering, if not altogether cost prohibitive. In fact, the State uses their unlimited legal budget to try to wear down any opposition to what the administration wants to do. The hapless professor is left with few options: to fight and face financial ruin and at the same time attempt to preserve his or her credibility to what is truly an incredibly small universe of educators, or give up and decide that used car sales may be the next best career choice. I often counsel with faculty members who expect attorneys to take on these fights with state universities on a contingent fee basis. I have to explain that the fight is normally so protracted, and the outcome so unsure, that contingent fee representation is usually not an option.

Where are the bright spots? Unfortunately, there are not many. However, for those faculty who can stay the course through litigation, most juries don't like what they hear and see about what

administrators are doing to faculty, and as a result are willing to punish the perpetrators.

Faculty organizations continue to play an important role in shaping what administrators feel they can get away with. The watchword is to stay active, know your rights and do not assume it will not happen to you. Every client interview starts out with the faculty member saying to me they cannot believe what is happening, and that it is happening at their university and that it is happening to them. Tenure is a fact, but it is fallacy to think it can protect you from having your academic freedom limited or keep you from being terminated.

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