



August 30, 2018

BY ELECTRONIC MAIL

Professor Marcus Alfred
Howard University
1355 6th Street, NW
Washington, District of Columbia 20059

Dear Professor Alfred,

As requested by the Howard University chapter of the AAUP, I am providing comments on the consistency of provisions in the document titled “Proposed Faculty Handbook Revision,” dated July 5, 2018, with AAUP-supported principles and procedural standards in the areas of academic freedom, tenure, due process, and governance. As that document does not track changes relative to the faculty handbook currently in force, my comments are not specific to changes that are being proposed but concern the proposed document in its entirety, including provisions that are included in current regulations. The quoted AAUP policy documents and reports can all be found in the 2015 edition of the AAUP’s *Policy Documents and Reports* (the so-called *Redbook*). However, the *Recommended Institutional Regulations on Academic Freedom and Tenure*, which contain AAUP-supported procedural standards in language suitable for use in faculty handbooks, has undergone changes since the publication of the 2015 *Redbook*, and so I am including the most recent version. Please let me know if you wish me to provide you with electronic copies of other statements. As general background reading, I would recommend the introduction to the 2015 edition.

Chapter A: The University and its Governance

A2: Academic Organization and Governance

Widely-adopted standards of academic governance are set forth in the *Statement on Government of Colleges and Universities*, which was formulated by the AAUP jointly with the American Council on Education and the Association of Governing Boards of Universities and Colleges. The *Statement* identifies areas of primary responsibility of the faculty, which are “such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process,” and further specifies that in areas of faculty primacy “the governing board and president should...concur with the faculty judgment except in rare instances and for compelling reasons which should be

stated in detail.” The role of the faculty that is outlined in section A2.1 falls short of the principles of the *Statement on Government*, as it identifies that role in terms of “engagement,” “interaction,” and “dialogue.” Similarly, the role of the administration and board outlined in section A2.2 does not reflect the expectation of deference given to faculty recommendations in areas of faculty primacy. The same departure from AAUP-supported standards of academic governance can be found in section C2: Appointment, Reappointment and Search Procedures. That said, the faculty handbook refers to other documents, such as the bylaws of schools and colleges and the faculty senate constitution, for additional information about the role of the faculty in governance. These have not been reviewed for this analysis.

A3: Academic Committee Structure

Section A3.1 permits the administration to create university-wide committees and task forces and to appoint members to them after “consult[ing] with the chair of the Faculty Senate.” This mechanism of selection of faculty representatives is inconsistent with generally-observed principles of academic governance. The *Statement on Government* observes that “faculty representatives should be selected by the faculty according to procedures determined by the faculty.” The mechanism of membership selection for both college-wide and departmental committees, which is the subject of the next two sections and which, in turn, refer the matter to the appropriate bylaws, should be in accord with the same principle. Again, those documents have not been reviewed for this analysis.

A4.2.1 Faculty Participation in Academic Planning

The AAUP’s derivative statement on *The Role of the Faculty in Budgetary and Salary Matters* provides that the faculty’s role in this area should depend on the degree of relationship of the budgetary matter to areas of faculty primacy, noting that budgetary decisions that directly affect areas of faculty primacy “should be made in concert with the faculty.” The faculty role specified in section A4.2.1 appears to fall short of this provision. Further, this section provides that “the regular members of the faculty of a school/college shall have an opportunity to make recommendations on proposals concerning the creation, consolidation, or elimination of departments, institutes, or other academic or research units making up a part of that school/college,” but it fails to recognize that these are in fact areas in which the faculty exercises primary responsibility.

Chapter B: Terms and Conditions of Faculty Employment

Section B1.1 contains a comprehensive definition of academic freedom that is longer than those found in many other faculty handbooks. The sentence “each faculty member has the right to criticize and seek alteration of institutional regulations and policies through appropriate means” in the penultimate paragraph seems to be misplaced, as it refers to academic freedom related to

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institutional governance, while the remaining paragraph is concerned with speech of faculty members in their role as citizens. In particular, the next sentence, beginning with “however,” does not seem to apply to speech related to institutional governance. For further information, see the *Committee A Statement on Extramural Utterances, On the Relationship of Faculty Governance to Academic Freedom*, and *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos*.

Chapter C: Types of Faculty Appointments, Appointment and Reappointment Procedures, Resignation, Retirement, and Separation of Faculty Due to Financial Exigency

Section C1 describes the types of faculty appointments at Howard University as follows:

“Faculty members at Howard University hold appointments in one of three broad categories: (1) tenured and probationary tenure-track faculty; (2) faculty serving on non-tenured renewable term appointments; and (3) temporary faculty.” Neither faculty serving in non-tenured renewable term appointments nor temporary faculty are eligible for tenure. However, the former may be reappointed without limit, while the latter may not “serve more than seven (7) years in full-time status.” The category of temporary faculty members includes both part-time and full-time faculty members.

These provisions are not consistent with the 1940 *Statement of Principles on Academic Freedom and Tenure*, which specifies that,

[a]fter the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause ... or under extraordinary circumstances because of financial exigencies.

The 1940 *Statement* further specifies that “[b]eginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years...” The Association believes that all full-time faculty appointments with seven or fewer years of service should be probationary for tenure and that all full-time faculty appointments with more than seven years of service should carry the protections of tenure. (See also Regulation 1b of our *Recommended Institutional Regulations on Academic Freedom and Tenure*, which derives from the 1940 *Statement* and other foundational documents. Regulation 1b states, “With the exception of special appointments clearly limited to a brief association with the institution, . . . all full-time faculty appointments are of two kinds: (1) probationary appointments; (2) appointments with continuous tenure.”)

The argument of the 1940 *Statement* is essentially this: Excellence in teaching and research is necessary for the public good; academic freedom is required for excellence in teaching and

research; and the protections of tenure are necessary to protect academic freedom. Academic freedom being a requisite condition for all who teach and conduct research, all full-time faculty members should either have tenure or be eligible for tenure. Furthermore, as the *Recommended Institutional Regulations* observes in footnote 14, “There should be no invidious distinctions between those who teach and/or conduct research in higher education, regardless of whether they hold full-time or part-time appointments or whether their appointments are tenured, tenure-track, or contingent.”

Nevertheless, over seventy percent of higher-education faculty members today are serving in what we call contingent appointments—i.e., either part time or full time but ineligible for tenure. The AAUP has issued a number of reports that address this problem. Our *Contingent Appointments and the Academic Profession* describes the detrimental effects of the use (and abuse) of contingent faculty on “the quality of student learning, . . . equity among academic colleagues, . . . the integrity of faculty work, and . . . academic freedom.” Our most recent report (2010) on the subject, *Tenure and Teaching-Intensive Appointments*, points to “[a] broad and growing front of research” demonstrating that “the system of permanently temporary faculty appointments has negative consequences for student learning” and recommends, among other solutions, converting non-tenure-track appointments to the tenure track.

It is apparent from sections C2.3.2 and F3 that temporary faculty members do not have appeal rights when their appointments are not renewed, which is at odds with the relevant provisions of the *Recommended Institutional Regulations* (Regulations 2 and 13).

Section C2.4, Standards for Notice of Non-Reappointment of Non-Tenured Faculty Members, provides the following guidelines: “For full-time temporary faculty members, at least three (3) months (90 calendar days) prior to the date of termination of the current appointment following two (2) years of service.” This provision appears to apply equally to full-time and part-time temporary faculty members and, in the case of full-time faculty members, is at odds with AAUP-supported standards. These are specified in *Standards for Notice of Nonreappointment*, which provides for the applicability of the following deadlines to all full-time faculty on renewable term appointments:

1. Not later than March 1 of the first academic year of service, if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

2. Not later than December 15 of the second academic year of service, if the appointment expires after the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

3. At least twelve months before the expiration of an appointment after two or more years in the institution.

Multiple elements of section C5: Separation of Faculty Due to Financial Exigency are at odds with Association-supported standards regarding termination of faculty appointments because of financial exigency. These include the definition of a financial exigency, the role of the faculty in declaring a financial exigency, and provisions for severance pay. Regulation 4c of the *Recommended Institutional Regulations* contains the relevant Association policies.

Regarding the definition of “financial exigency,” Regulation 4c(1) states that it is “a severe financial crisis that fundamentally compromises the academic integrity of the institution as a whole and that cannot be alleviated by less drastic means.” Regarding the role of the faculty in declaring a financial exigency, the same regulation states, “As a first step, there should be an elected faculty governance body, or a body designated by a collective bargaining agreement, that participates in the decision that a condition of financial exigency exists or is imminent and that all feasible alternatives to termination of appointments have been pursued.” When the appointments of tenured faculty members are terminated, Regulation 8 specifies that a year’s salary be given as severance.

In addition to the deficiencies enumerated above, it is particularly noteworthy that appeal rights are limited to instances in which “other faculty members in the same department are retained.” Further, this specific appeal right is not identified in section section F1: Grievable Matters, and thus the handbook is silent on further procedures for this appeal. Regarding the right to appeal, Regulation 4c(3) provides:

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 [on dismissal for cause], but the essentials of an on-the-record adjudicative hearing will be observed. The issues in this hearing may include the following:

- (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.

For further information about the Association's position on these issues, see *On the Role of the Faculty in Conditions of Financial Exigency*.

Chapter D: Faculty Tenure, Promotion and Evaluation

According to a July 5, 2018, memorandum by Provost Anthony K. Wutoh, language on extending the tenure clock in section D2.3 is newly added to this proposed edition of the faculty handbook. While the provisions in this section are generally consistent with Association recommendations, the inclusion of any "unforeseen circumstances that adversely affect the faculty member's ability to conduct scholarly work or fulfill other faculty responsibilities" as a reason for extending the tenure clock in addition to those already included would appear to go beyond what the Association recommends. It is important to keep in mind that extensions to the probationary period should not be granted solely to allow a faculty member to complete a project or to improve an academic record. Such a practice is contrary to what is meant by maximum probation and may tempt institutions to resort to such a step in cases in which it is difficult to reach a clear decision. The result would be a general erosion of the concept of probation and tenure.

Chapter E: Disciplinary Matters

Before going into details of this chapter, it may be most productive to review the basic position of the Association with respect to disciplinary actions taken against faculty members. Regulation 5 of the *Recommended Institutional Regulations* contains Association procedures for faculty dismissals. Their essential elements are

- a written statement of specific charges.
- a pretermination hearing before an elected body of peers.
- the burden of proof resting on the administration.
- the standard of proof based on clear and convincing evidence in the record as a whole.

- the faculty member's right to present evidence and cross-examine witnesses.
- the decision based on the record of the hearing.
- the faculty member's right to appeal to the governing board.

Regulation 7 of the *Recommended Institutional Regulations* provides that the administration can impose major sanctions, such as suspensions or demotions, only when using the same procedural safeguards as those specified in Regulation 5, but that minor sanctions, such as a letter of reprimand, can be imposed without such safeguards, provided that the faculty member has access to a faculty body to which to appeal the minor sanction. As Regulation 5c(1) states, "pending a final decision by the hearing committee, the faculty member will be suspended, or assigned to other duties in lieu of suspension, only if immediate harm to the faculty member or others is threatened by continuance. Before suspending a faculty member, pending an ultimate determination of the faculty member's status through the institution's hearing procedures, the administration will consult with [an appropriate faculty body] concerning the propriety, the length, and the other conditions of the suspension."

Several of the policies in Chapter E are inconsistent with the principles outlined above. Suspension pending a hearing is permitted, according to section E1 and may be based on "a single incident involving a serious violation of University policies or procedures, a violation of local, state or federal law, or behavior that suggests the faculty member may pose a risk to persons or property, or may expose the University to immediate legal liability," which goes beyond the standard of a threat of "immediate harm to the faculty member or others." There is no provision for consultation with a faculty body. The section further provides that "the suspension may be with or without pay." The Association's position is that the suspension ought to be with pay.

Section E2 exempts minor sanctions from appeal to the Faculty Grievance Commission.

According to section E3, in hearings concerning major sanctions, the burden of proof is on the administration only in dismissal proceedings, but not in cases involving other major sanctions. The cited standard of proof here and in section F1.2.3 is the "preponderance of the evidence" standard, which is weaker than the "clear and convincing" evidence standard, cited above. Thus, both policies on major and minor sanctions are at odds with Association-supported procedural standards.

The grounds for imposition of major sanctions, including dismissal, enumerated in section E3 would benefit from a recognition that they should be "related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers," as Regulation 5a specifies. While none of them strike me as outside of the norm of what most

reputable institutions of higher education include in institutional regulations, without such a recognition, they could be invoked to penalize private behavior that has no relation to the professional fitness of a faculty member.

This chapter observes that “alleged violations of the University’s Title VII (Employee) Policy Against Sexual Harassment in the Workplace and/or Title IX (Student) Policy on Prohibited Sexual Harassment and Gender–Based Discrimination in Education Programs and Activities, the procedures for disciplinary action stated in the University’s Title VII and Title IX policies, up to and including suspension or termination, are followed instead of the procedures described in this section.” I have not reviewed the cited policies and thus cannot comment on their adherence to Association standards.

Chapter F: Faculty Grievances, the Faculty Grievance Commission (FGC), and FGC Procedures

As noted above, temporary faculty members do not have appeals rights, but section F1.1 further excludes temporary faculty members from having the access to the grievance process, which is at odds with Association-supported standards. This section further observes that “for sanctions imposed as a result of falsification or misrepresentation of credentials or experience, or admission or conviction of a felony, there shall be no grievance right.” The Association does not recognize sanctions for certain kinds of misconduct as being exempt from academic due process.

Section F2.3.5, Final Decision, provides as follows: “In cases wherein the recommended sanction was termination, the President may impose a lesser sanction; however, if the President elects to impose a lesser sanction, the President may not impose a sanction greater than that recommended by the FGC [Faculty Grievance Commission].” The second part of this sentence is unclear in that it is silent on whether the president may ever impose a sanction greater than that recommended by the FGC. It seems to suggest that the president may impose a greater sanction, unless he or she wishes to impose a lesser sanction at the same time, but it is unclear under what circumstances that would ever happen. Perhaps this sentence is the result of an editing infelicity.

Section F2.3.5 further provides that “the President’s decision is final.” Association-supported procedures recommend the availability of a final appeal to the governing board.

Chapter G: Revising or Amending the Faculty Handbook

This chapter observes that “at any time, information contained in Chapter A, except A2.2, A2.5, A2.6, A2.7, A3.1, A4.2.1, A4.2.2, A4.3.4, and A4.3.7 may be amended by the President or Board of Trustees or through an administrative update, as needed.” The sections that are included in this

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provision include, among other things, section A1.1 Mission. The Association holds that unilateral changes to the mission of an institution of higher education should not be made with meaningful participation of the faculty. Without considering each of the sections included in this provision in turn, it may be sufficient to point out that the Association holds that faculty consultation, depending on the relationship to areas of faculty primacy, should be sought in all changes to institutional regulations.

I do hope that you find these comments useful and would be happy to discuss them further with you or other members of your campus community should questions arise.

Sincerely,

A handwritten signature in black ink, appearing to read "H. J. Tiede".

Hans-Joerg Tiede
Associate Secretary

Enclosure

cc: Professor Richard L. Wright, Chair, Howard University Faculty Senate