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DISMISSAL OF TENURED FACULTY MEMBERS FOR REASONS OF FINANCIAL EXIGENCY

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I. INTRODUCTION

The United States Supreme Court has held that a college faculty member dismissed from a tenured appointment has an interest in continued employment that is safeguarded by the due process clause of the fourteenth amendment.[1] Further, where private schools are involved and even in the absence of "state action," courts have been quick to find that a tenured faculty member has a contractual right to due process upon dismissal.[2] Therefore, a tenured professor whom university of-

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1. *See* Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972); Perry v. Sindermann, 408 U.S. 593, 601 (1972); Slochower v. Board of Educ., 350 U.S. 551 (1956).

As the title and introduction indicate, the scope of this article encompasses dismissals of tenured faculty only. Tenure may be defined as a legal entitlement to continued employment, terminable only for cause, such as incompetence or moral turpitude, or for reasons of financial exigency. *See, e.g.*, Gray, *Higher Education Litigation: Financial Exigency*, 14 U.S.F.L. REV. 375 (1980). The term "tenure" as used herein is meant to include not only formal tenure, but also *de facto* tenure as recognized in Perry v. Sindermann, 408 U.S. 593 (1972).

The Supreme Court has held that a nontenured faculty member has no constitutionally protected property interest in employment beyond the duration of his employment contract. Thus, he may be refused reemployment without being afforded a hearing or a statement of reasons for nonrenewal so long as: (1) the nonrenewal is not based upon constitutionally protected activity; (2) no charges of misconduct are made so as to give rise to a constitutionally protected liberty interest; and (3) neither the state law nor faculty member's employment contract provide for a pretermination hearing.

2. *See, e.g.*, Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978) where a tenured faculty member dismissed from a private college was held to have the full panoply of due process rights on the theory that such rights were explicitly or implicitly a part of the college's tenure system. It is important to realize that private universities may, under certain circumstances, be engaged in "state action" when dismisssing a faculty member. In such cases, the fourteenth amendment would apply.

ficials seek to dismiss is generally entitled to a hearing at which he is informed of the grounds for his dismissal and has an opportunity to challenge their sufficiency.[3] As a rule, the dismissal of a tenured faculty member may properly be based only upon cause — either what has been referred to as "adequate cause" or the existence of a bona fide "financial exigency."[4]

With increasing regularity, colleges, universities and courts all have faced legal problems connected with terminations based upon financial exigency. An increasing rate of inflation, declining enrollments, legislative budget cuts and diminishing public and private grants have geometrically contributed to this phenomenon.[5] The authority to terminate tenured faculty members because of an economic crisis is an important tool to college administrators in maintaining fiscal stability. However, it offers a possible pretext for dismissal stemming from conduct which would otherwise be protected by the institution's tenure provisions. Consequently, in order to preserve the financial integrity of educational institutions and at the same time protect and promote academic freedom, courts must

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See Board of Regents v. Roth, 408 U.S. 564, 581 (1972) (Douglas, J. dissenting) (stating that the extent to which actions by a private institution constitutes "state action" depends upon the amount of state and federal funding supplied to the institution). *See also* Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975); Buckton v. National Collegiate Athletic Ass'n, 366 F.Supp. 1152 (D. Mass. 1973)..

3. *See, e.g.,* Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd mem.,* 510 F.2d 975 (7th Cir. 1975).

4. While tenure creates a constitutionally protected property interest in continued employment, the parameters of such an interest are established not by the Constitution, but rather, by the terms of the grant of tenure. In Board of Regents v. Roth, 408 U.S. 564, 577 (1972) the Supreme Court observed:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Many of the "independent rules and understandings" which regulate the granting of tenure, such as state statutes and university by-laws, provide that a faculty member may be dismissed only for "adequate cause" or for reasons of "financial exigency." Where such rules refer only to cause, courts have held that the power to dismiss for reasons of financial exigency is either subsumed in the notion of cause or is an inherent power of university officials. *See infra* text accompanying notes 5-23.

5. *See* R. PHAY, REDUCTION IN FORCE: LEGAL ISSUES AND RECOMMENDED POLICY 1-4 (1980).

carefully balance the need of the institution to cope effectively with a bona fide financial crisis against the tenured faculty member's contractual or constitutional right to continued employment. In order for a court to balance effectively these two conflicting interests, it must necessarily consider the following three questions: (1) What is the nature of a university's authority to terminate faculty members for reasons of financial exigency? (2) What constitutes financial exigency and, correlatively, what is a bona fide response to it? (3) What process is due a faculty member dismissed for reasons of financial exigency, and who bears the burden of proving the presence or absence of financial exigency?

II. Authority to Terminate for Reasons of Financial Exigency

Many universities have tenure plans granting administrators authority to terminate tenured faculty members for reasons of financial exigency.[6] This is true of public as well as private educational institutions.[7] However, a significant number of colleges and universities have made no provision in their tenure plans for dismissals based upon financial exigency.[8] The absence of such provisions has not necessarily meant that college administrators are entirely without authority to act where financial difficulties dictate that tenured faculty members be terminated. On the contrary, recent decisions indicate that college administrators possess an inherent authority to dismiss tenured faculty members for reasons of financial exigency whether or not their tenure plans specifically provide such authority.[9]

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6. *See* Browzin v. Catholic Univ., 527 F.2d 843 (D.C. Cir. 1975); Scheuer v. Creighton Univ., 199 Neb. 618, 260 N.W.2d 595 (1977); AAUP v. Bloomfield College, 129 N.J. Super. 249, 322 A.2d 846 (1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (App. Div. 1975).

7. *See, e.g.*, University of Alaska v. Chauvin, 521 P.2d 1234 (Alaska 1974); Abramson v. Board of Regents, 56 Hawaii 680, 548 P.2d 253 (1976).

8. *See* Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978); Graney v. Board of Regents, 92 Wis. 2d 745, 286 N.W.2d 138 (Ct. App. 1979).

9. *See, e.g.*, Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978); Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd mem.*, 510 F.2d 975 (7th Cir. 1975); Graney v. Board of Regents, 92 Wis. 2d 745, 286 N.W.2d 138 (Ct. App. 1979).

In *Krotkoff v. Goucher College*,[10] Ms. Krotkoff had been hired to teach at Goucher College in 1962 and was granted tenure in 1967. The college by-laws specified with admirable brevity that a teacher's employment could be terminated "at age 65 or because of serious disability or cause."[11] The by-laws contained no other provisions regarding termination of employment. In June of 1975, the college notified Ms. Krotkoff that because of financial problems, her 1975-76 contract would not be renewed when it expired in June of 1976. Ms. Krotkoff brought an action against the college claiming, *inter alia*, that the by-laws did not give the college the authority to terminate her employment for reasons of financial exigency.

The United States Court of Appeals for the Fourth Circuit began its evaluation of Ms. Krotkoff's claim by noting that the "national academic community's understanding of the concept of tenure incorporates the notion that a college may refuse to renew a tenured teacher's contract because of financial exigency so long as its action is demonstrably bona fide."[12] The court found three bases for its conclusion. First, the Director of the Office of Academic Affairs of the American Council on Education had testified at trial that it was a "common understanding" in the academic community that a teacher with tenure would be employed for an indefinite period up to retirement, unless there was sufficient cause for dismissal, death, disability or financial exigency. Second, the court observed that the 1940 Statement of Principles on Academic Freedom and Tenure formulated by the Association of American Colleges and the American Association of University Professors (AAUP) specifically provided for termination of tenured faculty members in the event of financial exigency. Finally, the court found that several courts already had construed tenure as implicitly granting colleges the right to make bona fide dismissals for financial reasons,[13] while no court had

10. 585 F.2d 675 (4th Cir. 1978).

11. *Id.* at 678.

12. *Id.*

13. *Id.* at 679. The Fourth Circuit Court of Appeals relied on Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd mem.*, 510 F.2d 975 (7th Cir. 1975); Levitt v. Board of Trustees, 376 F. Supp. 945 (D. Neb. 1974).

held that financial exigency could not form a proper basis for dismissal of tenured faculty.[14]

The *Krotkoff* court observed that a concept of tenure which permits dismissal based on financial exigency is consistent with the essential purpose of tenure, that is, protection of the teaching profession's freedom of inquiry and instruction.[15]

> Dismissals based on financial exigency, unlike those for cause or disability, are impersonal; they are unrelated to the views of the dismissed teachers. A professor whose appointment is terminated because of financial exigency will not be replaced by another with more conventional views or better connections. Hence, bona fide dismissals based on financial exigency do not threaten the values protected by tenure.[16]

While granting that the parties to a contract could define tenure differently, the court found that there was no evidence that Ms. Krotkoff and the college had contracted with any particular understanding of tenure and, therefore, the contract could not exempt her from demonstrably bona fide dismissal if the college confronted a financial emergency.

While *Krotkoff* dealt with a grant of tenure defined by an employment contract in the context of a private college, courts have reached identical conclusions when considering statutes defining tenure as it applies to state universities. In *Johnson v. Board of Regents,*[17] for example, a federal district judge expressed the opinion that although section 37.31(1)[18] of the Wisconsin Statutes provided that a tenured teacher could not be discharged except for cause, Wisconsin courts presumably would hold that colleges have the power to dismiss tenured faculty because of financial exigency.[19]

The Wisconsin Court of Appeals recently had the opportunity to consider this precise question in *Graney v. Board of*

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14. 585 F.2d at 679.

15. *Id.* at 679-80. *See also* Browzin v. Catholic Univ., 527 F.2d 843, 846 (D.C. Cir. 1975); Note, *Dismissal of Tenured Faculty for Reasons of Financial Exigency,* 51 IND. L.J. 417 (1976).

16. 585 F.2d at 680.

17. 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd mem.,* 510 F.2d 975 (7th Cir. 1975).

18. WIS. STAT. § 37.31(1) (1971) provided in pertinent part: "(b) The employment of a teacher who has become permanently employed under this section may not be terminated involuntarily, except for cause upon written charges."

19. 377 F. Supp. at 234-35.

Regents.[20] In *Graney*, a number of tenured faculty members at the University of Wisconsin were dismissed in the spring of 1973 because of an alleged financial exigency. The teachers brought suit challenging the dismissal on the grounds that section 37.31 did not give the Board of Regents the authority to terminate tenured faculty for financial reasons.[21] The court of appeals concluded that while the Board's authority to dismiss employees for reasons of financial exigency was not expressly granted in the tenure statute, the authority was "implied under the general powers of the board for state universities governed by ch. 37, Stats. (1971), which provide that, 'the board of regents shall possess all other powers necessary or convenient to accomplish the objects and perform the duties prescribed by law.' "[22] The court further explained that a number of jurisdictions already had recognized that educational governing boards possessed an inherent authority to discharge tenured faculty in the event of financial exigency.[23] To find any differently, the court concluded, would "fly in the face not only of reason but of authority."[24] The court, therefore, found that the members of the Board of Regents determined, in their discretion, that the legislature's grant of limited funds required the dismissal of tenured faculty members and the exercise of such discretion did not interfere with the protection afforded by the tenure statute.[25]

The conclusion reached by the federal courts in *Johnson* and *Krotkoff* and the Wisconsin Court of Appeals in *Graney* would appear to make eminent sense. As recognized by the *Krotkoff* and *Graney* courts, dismissals based upon financial exigency do not endanger the academic freedom that tenure

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20. 92 Wis. 2d 745, 286 N.W.2d 138 (Ct. App. 1979). The *Johnson* and *Graney* cases involved identical parties. After the plaintiff faculty members had failed to obtain an injunction in federal court in *Johnson*, they brought suit in Wisconsin state court claiming their dismissals were illegal.

21. *Id.* at 757, 286 N.W.2d at 144-45.

22. *Id.* at 757-58, 286 N.W.2d at 145 (quoting WIS. STAT. § 37.02(1) (1971)).

23. *See, e.g.*, Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978); Browzin v. Catholic Univ., 527 F.2d 843 (D.C. Cir. 1975); Levitt v. Board of Trustees, 376 F. Supp. 945 (D. Neb. 1974); Steinmetz v. Board of Trustees, 68 Ill. App. 3d 83, 385 N.E.2d 745 (1978); State *ex rel.* Frank v. Meigs County Bd. of Educ., 140 Ohio St. 381, 44 N.E.2d 455 (1942); Funston v. District School Bd., 130 Or. 82, 278 P. 1075 (1929); *In re* Ritzie, 372 Pa. 588, 94 A.2d 729 (1953).

24. 92 Wis. 2d at 762, 286 N.W.2d at 147.

25. *Id.* at 765, 286 N.W.2d at 149.

systems are designed to protect. Moreover, the inability of an educational institution to dismiss tenured faculty members in the face of severe financial problems could cripple, and eventually destroy, many small private colleges. Where state universities are concerned, to hold that state officials may not engage in retrenchment programs involving the termination of tenured faculty members in the event of substantial budget cuts would be contrary to sound public policy and, accordingly, not in the public interest. Thus, there is a strong basis in reason and authority for finding that university administrators have the inherent authority to dismiss tenured faculty members for reasons of financial exigency.

III. WHAT CONSTITUTES FINANCIAL EXIGENCY?

Because financial exigency as a factual matter is ordinarily stipulated to or found by the trier of fact, it is difficult to formulate an entirely adequate definition of the term based upon appellate decisions. A careful review of recent cases and commentaries, however, may help define more precisely the dimensions of the concept.

In its *1976 Recommendations for Institutional Regulations on Academic Freedom and Tenure*,[26] the American Association of University Professors defined financial exigency as an imminent financial crisis which threatens the survival of the university as a whole and which cannot be alleviated by means less drastic than termination of an appointment with continuous tenure. In addition, the *Recommendations* insisted on rather elaborate due process for protection of the faculty, including faculty participation in the decision that a condition of financial exigency exists and that all feasible alternatives to termination of tenured appointments have been pursued. Finally, the *Recommendations* endorsed a requirement that every effort be made to place the threatened faculty member concerned in another suitable position within the institution before terminating the appointment.[27]

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26. The most relevant portions of this document may be found in Wilson, *Financial Exigency: Examination of Recent Cases Involving Layoff of Tenured Faculty*, 4 J. COL. & UNIV. L. 187, 195-97 (1977).

27. *Id.*

Courts have not adopted wholesale the rather stringent standards embodied in the AAUP *Recommendations*. Financially exigent conditions, most courts have concluded, need not threaten the survival of the institution nor affect the institution as a whole. Further, university administrators are permitted a great deal of discretion in determining what measures are required to meet the financial exigency and which appointments are to be terminated.

Shortly before the publication of the 1976 *Recommendations*, a New Jersey court, in *American Association of University Professors v. Bloomfield College*,[28] applied a standard somewhat similar to that suggested in the AAUP statement in ruling that a college had improperly terminated the employment of thirteen tenured faculty members. The court held that tenure should be "vigilantly protected," and that dismissals of tenured faculty for reasons of financial exigency should be allowed only where "the survival of the college is imperiled, and then only where the good faith of the administration in seeking the severance of tenured personnel has been clearly demonstrated as a measure reasonably calculated to preserve its existence as an academic institution."[29] The court also held that even though the college had been operating at a deficit for several years, it did have capital assets which it could have sold as an alternative to terminating tenured personnel. Thus, financially exigent conditions of a kind necessary to justify termination of tenured faculty members were not present.[30] Moreover, the court ruled that even had the requisite conditions existed, the college's response in terminating the tenured faculty members was not a good faith measure reasonably calculated to resolve the financial problems. In addition to terminating the employment of thirteen tenured faculty members, the college had immediately hired twelve nontenured teachers, and, in effect, had suspended the tenure of all remaining faculty members. Therefore, the court held that the the actions of the college administrators were calculated not to deal with the financial exigency, but rather to do away with the college's formal system of tenure.[31]

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28. 129 N.J. Super. 249, 322 A.2d 846 (1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (1975).

29. *Id.* at _, 322 A.2d at 854.

30. *Id.* at _, 322 A.2d at 852.

31. *Id.* at _, 322 A.2d at 856-57.

On appeal, the Superior Court of New Jersey, Appellate Division,[32] held that the standard applied by the lower court for determining when financially exigent conditions existed was too rigorous, and that the evidence adduced at the trial (as well as the subsequent bankruptcy of the college) was sufficient to show the requisite financial exigency. Further, the appellate division applied a non-intervention philosophy by deciding that whether to sell capital assets in order to secure financial stability on a short-term basis or whether to undertake the long-term planning involved in the dismissal of tenured faculty members is a policy decision for the institution. The courts, it stated, should refrain from interfering.[33] The court, however, further stated:

> The existence of the 'financial exigency' *per se* does not necessarily mean that the termination of tenure was proper. The key factual issue before the court was whether that financial exigency was the *bona fide* cause for the decision to terminate the services of 13 members of the faculty and to eliminate the tenure of remaining members of the faculty. Causation and motivation therefore emerged as the prime factual issue for determinaion by the trial judge. Was the financial exigency the true *bona fide* reason for adoption of the termination resolution?[34]

The court ruled that there was credible evidence to support the trial court's finding that the actions of the university were not, in good faith, related to the condition of financial exigency, and therefore affirmed the lower court's judgment. More importantly, however, it refused to adopt a *per se* rule which would presume that the college's actions were illegal and admonished courts to inquire into matters of causation and motivation.[35]

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32. AAUP v. Bloomfield College, 136 N.J. Super. 442, 346 A.2d 615 (1975).

33. *Id.* at _, 346 A.2d at 617.

34. *Id.*

35. *Id.* at _, 346 A.2d at 617-18. The court's position in this respect appears quite sound. Allowing courts or faculty members to second guess the response of university administration to a bona fide financial crisis would serve to protect neither the financial stability of the institution nor the academic freedom of the faculty. The summary question must be one of causation and motive; if the institution's decision to terminate a tenured faculty member was caused by financial exigency and the university has no other improper motive for the termination, then the question of whether the termination was the best response under the circumstances is a purely

In *Krotkoff v. Goucher College*,[36] too, the United States Court of Appeals for the Fourth Circuit cited the *Bloomfield* case approvingly when holding that whether to sell capital assets instead of diminishing tenured faculty is a policy decision for the college and not a question for the trier of fact.[37] Additionally, the *Krotkoff* court did not require the college to show that it was on the verge of bankruptcy in order to justify the dismissals. The fact that the college had operated at a deficit from 1968 through 1974 before terminating tenured faculty members in 1975 was sufficient to show the requisite financial exigency.[38] It also held, in agreement with the *Bloomfield* court, that the dismissal of tenured professors must be bona fide and that the college must not use financial exigency as a pretext for subverting academic freedom. Tenured faculty members had a right, the court stated, to insist that the college use reasonable standards in selecting the faculty members to be terminated and use reasonable efforts to find alternative positions for those faculty members within the institution.[39]

In the two cases discussed above, financial exigency was found where a private college had operated at a deficit for several years. Financially exigent conditions also have been found when legislative budget cuts have necessitated the termination of tenured faculty members at state institutions. A number of recent cases have held that termination of tenured faculty members is proper when a state university is faced with a genuine financial emergency, when the terminations are part of a uniform set of procedures which are adopted and applied for the purpose of meeting the emergency, and when the procedures are not arbitrary or capricious in nature.[40]

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administrative one.

36. 585 F.2d 675 (4th Cir. 1978).

37. *Id.* at 681.

38. *Id.*

39. *Id.* at 682-83. *See also* Note, *Financial Exigency as Cause for Termination of Tenured Faculty Members in Private Post Secondary Educational Institutions*, 62 IOWA L. REV. 481, 504-05 (1976).

40. *See, e.g.*, Brenna v. Southern Colo. State College, 589 F.2d 475 (10th Cir. 1978); Klein v. Board of Higher Educ., 434 F. Supp. 1113 (S.D.N.Y. 1977); Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd mem.*, 510 F.2d 975 (7th Cir. 1975); Levitt v. Board of Trustees, 376 F. Supp. 945 (D. Neb. 1974).

Brenna v. Southern Colorado State College[41] is just such a case. There, a state college was forced, by reason of budget cuts, to reduce its faculty from 340 to 308. The administrators allocated the budget cuts among various departments of the college, and department heads were asked to designate the faculty members they could best get along without. The plaintiff, who was tenured, was terminated even though there was an untenured faculty member in the department. Testimony showed that one reason the plaintiff was terminated was that the college had lost its accreditation in the plaintiff's primary area of training and expertise. The Court of Appeals for the Tenth Circuit held that the college's selection of the plaintiff for termination was proper because the fourteenth amendment did not require the college to use any particular selection process so long as the procedure chosen was reasonable and not arbitrary and capricious.[42]

In *Klein v. Board of Higher Education*,[43] also, the City University of New York System suffered a thirteen percent budget cut in 1976-77. In response to the decreased budget, the Board of Higher Education formulated certain guidelines for retrenchment of instructional personnel.[44] The guidelines provided that the president of each C.U.N.Y. branch would determine, after consultation with faculty and student representatives, which programs should be cut back or eliminated. Further, the guidelines established certain criteria to be used in determining which individuals must be terminated, and set forth procedures for review and appeal of retrenchment decisions. The plaintiffs, eight members of the C.U.N.Y. instructional staff who lost their positions during the retrenchment program, claimed that the action of the Board of Higher Education was arbitrary and capricious because "the system managed by [the] defendants was allegedly rife with wasteful practices and defendants knew of the impending budgetary problems yet did nothing to consult, plan ahead or save money and simply made 'wholesale' reductions in the instructional staff at the last moment instead of cutting administra-

41. 589 F.2d 475 (10th Cir. 1978).
42. *Id.* at 477.
43. 434 F. Supp. 1113 (S.D.N.Y. 1977).
44. *Id.* at 1115.

tive costs."[45] The Federal District Court for the Southern District of New York held that the plaintiff's claims were wholly unsupported by the record. In finding that the terminations pursuant to the retrenchment program were not arbitrary and capricious, the federal court stated:

> "[W]here lack of funds necessitate[s] releasing a sizeable number of the faculty, certainly it [is] peculiarly within the province of the school administration to determine which teachers should be released, and which retained.
>
> Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts which it believes are for the best interest of the school, and there is no showing that the acts were arbitrary or generated by ill will, fraud, collusion or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body."[46]

Again, motivation and causation were examined — this time against the background of the fourteenth amendment. Because the Board of Higher Education had established a series of criteria and procedures for determining who would be terminated in response to budget cuts, the court held the Board's actions to be proper.

In a similar case, *Johnson v. Board of Regents*,[47] the Board of Regents of the University of Wisconsin adopted policies and procedures for the layoff of tenured faculty necessitated by a two and one-half percent reduction in the system's budget for 1973. The chancellor of each campus was given authority by the central administration to determine which programs on campus would be subject to budget reductions. A one-year notice of termination was given to laid-off faculty members with the provision that efforts would be made to find another place for them within the university system. Provisions also were made for review and reconsideration of the termination decisions.[48] A group of tenured faculty members who had received notice pursuant to the procedures set up to

45. *Id.* at 1116.

46. *Id.* at 1118 (quoting Levitt v. Board of Trustees, 376 F. Supp. 945, 950 (D. Neb. 1974)).

47. 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd mem.*, 510 F.2d 975 (7th Cir. 1975).

48. *Id.* at 230-34.

deal with the budget reductions brought an action in federal court seeking an injunction to prevent the university system from laying them off. In refusing to grant the injunction, the federal court stated that the university had been faced with financial exigency, and the decision to lay off certain tenured personnel was a "legislative determination" with which the court would not interfere so long as the action was not arbitrary or capricious.[49]

In the foregoing cases, the universities all faced the financial conditions affecting the university or university system as a whole. Courts also have considered the propriety of terminating tenured faculty members for reasons of financial exigency when only one department or program of the college or university had been affected by the financial problems.

In *Rose v. Elmhurst College*,[50] Mr. Rose had been employed as an assistant professor of religion at Elmhurst College in 1967, and had been granted tenure in 1971. The administration had made significant cutbacks in funding for the religion department in 1975, and Mr. Rose's employment was discontinued in 1976. The Illinois Court of Appeals held that the uncontradicted evidence showed the curtailment of the religion department was due to declining enrollments, and there was no suggestion in the record that the action of the college was in bad faith or arbitrarily directed at Mr. Rose individually. Thus, the termination of the plaintiff's employment was proper.[51]

Similarly, in *Scheuer v. Creighton University*,[52] an assistant professor of pharmacy was terminated under the "financial exigency" clause of his employment contract. The pharmacy program at the university relied primarily on federal "capitation funds"[53] for its yearly budget. While the federal funding had increased from 1971 through 1976, the department had continued to operate at a deficit. In 1975, the vice-president for the Health Services Division of the university

49. *Id.* at 238-39.

50. 62 Ill. App. 3d 824, 379 N.E.2d 791 (1978).

51. *Id.* at _, 379 N.E.2d at 793-94.

52. 199 Neb. 618, 260 N.W.2d 595 (1977).

53. Under a capitation funding program, the funding granted to a particular school, college or program is directly proportionate to the number of enrolled students.

learned that not only was the department facing a larger deficit in the 1976-77 school year, but also the federal funds available for the department would be reduced.[54] In response to the deficit and budget cuts, the Health Services Division took a number of steps to cut costs in the department, including the termination of Professor Scheuer's employment. Scheuer thereafter brought an action in state court claiming that the "financial exigency" clause in his contract contemplated financial problems which threatened the survival of the institution as a whole and not merely one department or college. The Supreme Court of Nebraska rejected this argument:

> To accept plaintiff's definition would require Creighton to continue programs running up large deficits so long as the institution as a whole had financial resources available to it. The inevitable result of this type operation would be to spread the financial exigency in one school or department to the entire University. This could likely result in the closing of the entire institution.[55]

Therefore, the court held that the term "financial exigency" as used in the professor's contract of employment could refer to financial exigency in a department or college of the university, and was not restricted to one existing in the institution as a whole.

These and other cases generally indicate that courts will not adopt standards as stringent as those suggested in the *Recommendations* of the American Association of University Professors.[56] Instead, courts have allowed university officials fairly broad discretion in determining when financial exigency exists and when termination of tenured faculty members is a step reasonably calculated to ease the financial problems. Operating deficits and budget cuts will generally be viewed by the courts as giving rise to financial exigency. Such exigency

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54. 199 Neb. at _, 260 N.W.2d at 596.

55. *Id.* at _, 260 N.W.2d at 600.

56. A university administration could bind itself to meet the standards articulated in the AAUP *Recommendations* by adopting those standards in a faculty handbook or in individual employment contracts. In light of the increasing number of tenured faculty terminations based on financial exigency and because courts have generally imposed less stringent standards upon university officials, administrators will undoubtedly encounter increasing pressure from faculty members to adopt standards similar to those recommended by the AAUP.

may exist in a single department or college of a university rather than in the institution as a whole. Although university officials should seek to avoid the termination of tenured faculty members as a response to financial problems, they nevertheless are not required to liquidate the university's capital assets as an alternative to a cutback in personnel. If faculty terminations are required, the university should attempt to place the faculty member in any other suitable employment within the university or system. Administrators also should adopt reasonable and fair policies and procedures for determining which faculty members should be dismissed. If these guidelines are followed, a prima facie showing will have been made that any terminations on these grounds are a bona fide response to financial exigency rather than a mere pretext for subverting academic freedom.

IV. Due Process and Burden of Proof

If a university must terminate a tenured faculty member as a reasonable and bona fide response to financial exigency, it must then be determined whether the faculty member has a right to a hearing at which he may challenge the determination made by university officials. Where a faculty handbook, or the individual faculty member's contract of employment, provides specifically for a pretermination hearing, the terminated faculty member has a right to such a hearing.[57] Where there is no express contractual provision for a hearing, courts have generally required university officials to provide a tenured faculty member some due process when he is terminated for reasons of financial exigency. However, they have not deemed it to be constitutionally necessary to provide a hearing prior to the termination.

In *Johnson v. Board of Regents*,[58] the Federal District Court for the Western District of Wisconsin concluded that tenured professors, who had been dismissed by the Board of Regents in response to budget cuts, had sufficient interest in their employment to be afforded "minimal procedural protection." The court held, however, that a decision to discontinue employment based upon grounds of financial exigency is a

57. *See* Skehan v. Board of Trustees, 431 F. Supp. 1379 (M.D. Pa. 1977).
58. 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd mem.*, 510 F.2d 975 (7th Cir. 1975).

"legislative" rather than "adjudicatory" decision, and that the procedural safeguards required by the due process clause were, therefore, different from those required when a faculty member is dismissed for cause.[59] The court further stated that faculty members need not be allowed to participate in termination decisions, and that the minimal procedures required by the fourteenth amendment may be provided after, rather than before, the decision has been made to lay off particular tenured faculty.[60] In order to satisfy the fourteenth amendment, the minimal safeguards should include: (1) furnishing each affected faculty member with a reasonably adequate written statement of the basis for the initial decision to lay off; (2) furnishing each faculty member with a reasonably adequate description of the manner in which the initial decision had been arrived at; (3) making a reasonably adequate disclosure to each faculty member of the information and data upon which the decisionmakers had relied; and (4) providing each faculty member the opportunity to respond.[61] Similarly, the courts in *Bignall v. North Idaho College*,[62] and *Klein v. Board of Higher Education*,[63] held that tenured faculty members whose employment had been discontinued due to financial exigency were not entitled to a hearing prior to termination decisions, and had no constitutional right to participate in the formulation of retrenchment programs.

Based upon these decisions, it is clear that just as courts have generally adopted a policy of judicial nonintervention with respect to purely administrative decisions,[64] neither will they allow faculty members to interfere with processes which are properly left to university officials. Therefore, so long as administrators provide the affected faculty member with a reasonably adequate statement of the reasons for the dismis-

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59. *Id.* at 237-40.

60. *Id.* at 239.

61. *Id.* at 240. The American Association of University Professors was highly critical of the due process protection provided by the *Johnson* court, stating that the "protection was minimal indeed, in that the court declined to prescribe any faculty participation in the separation decisions, once 'reasonably adequate' statements of reasons were provided by the administration, with some opportunity for the faculty member to respond." *The Bloomfield College Case*, 60 AAUP BULL. 320 (1974).

62. 538 F.2d 243, 245-46 (9th Cir. 1976).

63. 434 F. Supp. 1113, 1118-19 (S.D.N.Y. 1977).

64. *See supra* note 33.

sal, an explanation of the manner in which the decision was made, and an opportunity to challenge the propriety of the grounds for dismissal, both academic freedom and the integrity of the educational institution are preserved.

While most courts have agreed that a tenured faculty member has a right to a hearing regarding his termination for reasons of financial exigency, courts are split on the question of who bears the burden of proof with respect to whether financial exigency truly exists and whether the termination was reasonable.

In both *American Association of University Professors v. Bloomfield College*,[65] and *Bignall v. North Idaho College*,[66] the institutions used the 1940 AAUP statement concerning termination of tenured faculty members when formulating their faculty handbooks. The colleges had, for example, provided that faculty members could be terminated "under extraordinary circumstances because of financial exigency," and that the termination of continuous employment "because of financial exigency of the institution must be demonstrably bona fide." The courts in both instances understood these provisions of the faculty handbook to be part of the contract of employment between the faculty members and the institutions. The courts went on to hold that the existence of a "bona fide financial exigency" was a condition precedent to the termination of tenured faculty members, and under the basic principle of contract law, the colleges would bear the burden of proving the existence of the conditions.[67]

A very different view was taken by the courts in *Johnson v. Board of Regents*[68] and *Levitt v. Board of Trustees*.[69] There, neither state institution appeared to have adopted conditions for the termination of tenured faculty members for reasons of financial exigency. The courts held that even though the plaintiffs had a fourteenth amendment right to at least a post-termination hearing, the terminated faculty members carried the burden of proof regarding the nonexistence of

65. 136 N.J. Super. 442, 346 A.2d 615 (1975).

66. 538 F.2d 243 (9th Cir. 1976).

67. *See* Bignall v. North Idaho College, 538 F.2d 243, 249 (9th Cir. 1976); AAUP v. Bloomfield College, 136 N.J. Super. 442, _, 346 A.2d 615, 616-17 (1975).

68. 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd mem.*, 510 F.2d 975 (7th Cir. 1975).

69. 376 F. Supp. 945 (D. Neb. 1974).

financial exigency or the unreasonableness of the procedures adopted to evaluate and select those faculty members whose employment would be discontinued.[70]

One recent commentator has suggested that the different results reached by the courts regarding burden of proof might be explained in terms of the courts' differing analytical approaches. In *Bloomfield* and *Bignall,* the courts took a "contractual" approach, that is, the courts viewed the provisions in the faculty handbook as part of a contract and allotted the burden of proof based upon contract principles. In *Johnson* and *Levitt,* the courts took a "constitutional" view, that is, the courts saw the hearing as being required by the due process clause of the fourteenth amendment, and placed the burden of proof on the party challenging the sufficiency of the grounds for termination.[71]

If a differing judicial analysis produces differing results with respect to burden of proof, colleges and universities would be well advised to refrain from including in their faculty handbooks or by-laws any provisions or conditions relating to their authority to terminate the employment of tenured faculty members for reasons of financial exigency. The inclusion of such provisions or conditions may well encourage a court to adopt a "contractual" analysis and thereby place the burden of proof upon the institutions. Conversely, by avoiding such provisions or conditions, the burden of proof in a termination hearing probably would rest with the faculty member. Faculty members or their representative organizations undoubtedly will attempt to have such provisions or conditions inserted in their individual contracts, the faculty handbook, or the university by-laws. Universities, on the other hand, undoubtedly will seek the opposite.

V. CONCLUSION

Where state statutes, university by-laws, faculty handbooks, or individual employment contracts so provide, university officials have the authority to dismiss tenured faculty

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70. *See* Johnson v. Board of Regents, 377 F. Supp. 227, 240 (W.D. Wis. 1974); Levitt v. Board of Trustees, 376 F. Supp. 945, 950 (D.C. Neb. 1974).

71. *See generally* Wilson, *Financial Exigency: Examination of Recent Cases Involving Layoff of Tenured Faculty,* 4 J. COL. & UNIV. L. 187 (1977).

members for reasons of financial exigency. Moreover, even where no authority has been explicitly granted, courts have held that the power to dismiss based upon financial problems is an inherent power vested in university officials. Courts have generally recognized that to hold otherwise would be to impair severely the financial stability of educational institutions. The definition of "financial exigency" can best be determined by looking to the fact situations of cases in which such conditions were found to exist. While operational deficits and budget cuts affecting the institution as a whole will ordinarily be found to be sufficient financial exigency, several courts have found that financial problems in a single department or college may be an adequate basis for dismissal of tenured faculty.

In determining whether the dismissal of tenured faculty members is a bona fide response to a true financial emergency, courts must strike a careful balance between the institution's need to maintain financial stability and the faculty members' rights to continued employment. On the one hand, a purported financial exigency must not serve as a mere pretext for the improper dismissal of tenured faculty members and thereby undermine academic freedom. On the other hand, so long as academic freedom is adequately protected, neither courts nor faculty members should be allowed to interfere with the purely administrative process of diverting the impending financial disaster.

Although the "minimal due process" standard adopted by the Fourth Circuit Court of Appeals in *Johnson v. Board of Regents* has come under some criticism, the standard appears to strike a reasonably good balance. By requiring university officials to provide the dismissed faculty member with a reasonably adequate statement of the reasons for his dismissal, an explanation of the manner in which the termination decision was made, and an opportunity to challenge the dismissal, academic freedom is sufficiently protected. By adopting a policy of judicial nonintervention, and similarly preventing faculty members from interfering in the administrative decision-making process, the administrative and financial integrity of the institution is preserved.