

RETRENCHING BY THE BOOK:

The Development and
Subsequent Application
of the AAUP's Recommended
Institutional Regulation
on Financial Exigency

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April 25, 1983

Our text for this morning, as the minister might say, is Regulation 4(c) of the Recommended Institutional Regulations promulgated by the American Association of University Professors in 1976.^{1/} Regulation 4(c) (which actually consists of thirteen lettered and numbered paragraphs of text) represents the AAUP's attempt to come to terms with one of the most intractable policy issues confronting higher education today -- what to do when a college or university invokes financial exigency as a justification for terminating tenured members of the faculty. To my knowledge, Regulation 4(c) is

^{1/}The full text of Regulation 4(c) is reproduced at the end of these remarks.

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the only systematic attempt by a higher education organization to distill practical rules of conduct for use by faculty members and administrators at financially troubled institutions. Some malign the AAUP's approach; others embrace it; but most commentators agree that Regulation 4(c) is the logical point of departure in any discussion of financial exigency.

Let me begin with a few general remarks. "Financial exigency," as I will be using that term this morning and as it is used in Regulation 4(c), has a narrow meaning. The term refers to a certain level or intensity of fiscal distress at an institution of higher education. A financial exigency exists when the only practical way to pull an institution back from the brink of financial crisis is to terminate the appointments of tenured professors. The term "financial exigency" does not describe other forms of faculty reorganization and reduction inspired by the decision to discontinue discrete programs or departments within an institution. The AAUP has separate standards for program discontinuance. They are contained in Regulation 4(d) of the Recommended Institutional Regulations, a provision with a history and meaning of its own. I will limit myself this morning to a discussion of financial exigency in its narrow sense -- in the sense that the term is used in Regulation 4(c). We will be talking about the termination of faculty members for financial reasons, rather than educational or programmatic reasons.

The AAUP has always stood for certain broad principles in this area, and Regulation 4(c) must be read with these principles firmly in mind. First and foremost, the Association believes that academic freedom -- the free search for truth and its free exposition -- is the bulwark of American higher education, and is threatened whenever tenure is threatened. Second, we believe that the best way to deal with the specter of financial exigency is to develop neutral procedures and to have them in place before a financial crisis arises. And third, because financial exigency unavoidably affects an institution's academic mission, we believe that faculty representatives must be consulted at every stage and must play a meaningful role in the decisions that are made.

Our Recommended Institutional Regulation on financial exigency is designed to further these objectives. In my remarks this morning, I want to begin with a brief discussion of Regulation 4(c)'s evolution. I will then focus on the text of the regulation itself, and go over in some detail the substantive and procedural requirements it imposes. Finally, I will consider how the AAUP standards have fared in the courts, at institutions, and as the subject of collective bargaining. Tomorrow, my colleague at the AAUP, Ann Franke, will discuss ways to prevent financial exigencies from occurring and will offer some conclusions about the AAUP's approach to the subject of financial exigency.

A VERY BRIEF HISTORY OF THE AAUP STANDARDS ON
FINANCIAL EXIGENCY

It was almost sixty years ago that the AAUP made its first official reference to financial exigency. The occasion was a conference of faculty members and administrators called by the American Council on Education in 1925 which resulted in a joint statement by the AAUP and the Association of American Colleges (AAC) on academic freedom and tenure. The 1925 Conference Statement permitted termination of tenured appointments "because of financial exigencies" -- a term that was not defined -- but only "as a last resort" and after exhaustion of "every effort . . . to meet the need in other ways and to find for the teacher other employment in the institution."^{2/}

The 1940 Statement of Principles on Academic Freedom and Tenure, also coauthored by the AAUP and the AAC, has long been recognized as the higher education community's most important expression of policy on matters relating to academic freedom. It contains two references to financial exigency (which is once again left undefined). The first is as one of three enumerated exceptions to the rule of permanent tenure: under the 1940 Statement, permanent appointments may be terminated for cause, upon retirement for age, or "under extraordinary circumstances because of financial exigencies." The second reference is an important gloss contained in the very last sentence of the Statement: "Termination of a continuous appointment because of financial exigency should be

^{2/} "Report of the Conference on Academic Freedom and Tenure," 11 A.A.U.P. Bull. 99, 101 (1925).

demonstrably bona fide." This sentence, which is really the seed from which all subsequent AAUP standards on financial exigency have come, was added to the 1940 Statement with the support of Henry Wriston, then the President of Brown University, who led the AAC delegation that joined with AAUP in formulating the document. In an address to the Association of American Colleges in 1939, President Wriston explained -- to an audience of presumably skeptical college presidents -- why it was necessary to limit their ability to terminate tenured positions on financial exigency grounds:

The plain fact is that dismissals directly due to financial emergency are really very rare. Speaking now as an administrative officer, it is much easier for me to say "no" to a man by pleading the exigencies of a budget than by denying a request on its merits. The displacement of a teacher on continuous appointment should not be merely an "economy move" but should be done only because of a genuine emergency involving serious general retrenchment. . . . [P]urity of purpose is no defense in the public eye, unless the purity is demonstrable. The provision is a protection to the administrative officer because it reminds him to establish the record so clearly that the exigency is as obvious to the public as it is to him.^{3/}

President Wriston was quite right in his initial factual premise: for many years after the 1940 Statement first appeared, financial exigencies were rare and faculty layoffs relatively uncommon. Although the AAUP has kept no statistics on the loss of tenured faculty positions, one can glean from our published

^{3/}H.M. Wriston, "Academic Freedom and Tenure," 25 A.A.C. Bull. 110, 122 (1939).

reports that financial exigency was not invoked very often.^{4/} In 1955, when two eminent scholars polled administrators at 352 colleges and universities to determine whether the financial exigency provisions in the 1940 Statement had ever been invoked, only 29 institutions admitted to having detailed regulations that authorized the termination of tenured positions for financial reasons. "The questionnaire replies do not indicate that termination of tenure because of financial exigencies is or has been a significant problem," the pollsters observed, and concluded:

[There are] many other less drastic means of meeting a financial crisis than the extreme measure of dismissing a teacher with tenure.... It is thus difficult to conceive of situations which would require dismissal of teachers with tenure because of financial exigencies.^{5/}

This may well have been true during the 1950s and '60s, a period of unparalleled growth in American higher education when student enrollments tripled and there were more faculty positions than candidates to fill them. But in the early 1970s, the boom slowed, with dramatic repercussions for institutions and their faculties.^{6/} As one would predict, many colleges and universities

^{4/} One quite interesting exception occurred in 1940 at Adelphi College in New York where five faculty members were dismissed ostensibly because the college could not balance its instructional budget. The Association formally censured the Adelphi administration in 1941. "Adelphi College," 27 A.A.U.P. Bull. 494 (1941). The college remained on the censure list until 1952, when it adopted a "Faculty Personnel Plan" incorporating the 1940 Statement. See 53 A.A.U.P. Bull. 278 (1967).

^{5/} C. Byse & L. Joughin, Tenure in American Higher Education (1959) 6, 49, 50-51.

^{6/} See E. Cheit, New Depression in Higher Education: A Study of the Financial Condition at 41 Colleges and Universities (1971). Other useful materials are cited in Note, "Financial Exigency as Cause for Termination of Tenured Faculty Members in Private Post Secondary Educational Institutions," 62 Iowa L. Rev. 481, 482 n.9 (1976).

faced with steady-state or declining incomes sought to balance their budgets by attacking fixed costs -- and the largest fixed cost was almost always the payroll. In 1972, Jordan Kurland, staff director of the AAUP's Committee A on Academic Freedom and Tenure, sounded the alarm at the Annual Meeting of the Association of American Colleges:

[Our] office . . . replies to requests for advice and assistance, on all kinds of problems bearing upon faculty members individually and collectively. . . . We receive literally thousands of these requests each year. . . . Over the past eighteen months or so, the largest single category of inquiries brought to AAUP concerns financial austerity and resulting retrenchment in academic programs. The problems in this area present difficulties in arriving at short-term and long-term judgments, and engender sheer human anguish, to a degree which makes such problems of the recent past as boycotts and sit-ins seem superficial by comparison. ^{7/}

Committee A's "Recommended Institutional Regulations", which included provisions on financial exigency in its first published form in 1968 and again when it was revised in 1972, was revised again in 1976 to include much more detailed financial exigency language. Regulation 4(c) of the 1976 edition is the Association's most comprehensive policy statement on the subject.^{8/} Professor Ralph Brown, a member of the Yale Law School faculty and a former President of AAUP and then Chairman of Committee A, prepared a careful annotation of the new financial exigency provisions that

^{7/}J. Kurland, "Reducing Faculty Positions: Considerations of Sound Academic Practice," 53 Liberal Education 304 (1972).

^{8/}The "Recommended Institutional Regulations" were further revised and reissued in 1982, but regulation 4(c) was not affected.

appeared in the AAUP Bulletin in 1976 along with the amended text of Regulation 4(c).^{9/} This provocative piece by Professor Brown is still, in my judgment, the most useful introduction to the subject ever published, and I commend it to all. Those who read it will see that Professor Brown's views have colored my own and those of many other contemporary commentators on financial exigency.

WHAT REGULATION 4(c) REQUIRES

Regulation 4(c) serves four functions. First, it offers a general definition of financial exigency. Second, it assigns faculty members certain responsibilities with respect to the declaration of a financial exigency and the implementation of remedial measures. Third, it establishes hearing procedures for faculty members who wish to contest the termination of their appointments when a financial exigency is declared. And finally, it contains objective criteria that a college or university must satisfy in order to show that the financial exigency is "demonstrably bona fide" as required by the 1940 Statement. I will focus on each of these aspects in turn.

The Definition of Financial Exigency

Regulation 4(c)(1) defines the term "financial exigency" as "an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means." This definition, I think we can agree, is exceedingly restrictive, as befits an exception to the rule of academic tenure. An institution may not declare a financial exigency unless four conditions are satisfied:

^{9/}R. Brown, "Financial Exigency," 62 A.A.U.P. Bull. 5 (1976) [referred to hereinafter as "Financial Exigency"].

- (1) The institution faces a financial crisis;
- (2) The crisis threatens the survival, not of a department or program, but of the institution as a whole;
- (3) The crisis is imminent; and
- (4) The only practical way to avert the crisis is by terminating tenured appointments.

The Association spent an extraordinary amount of time and effort developing this definition in the early 1970s, and we are still not wholly satisfied with it. Unlike the other provisions in Regulation 4(c), which are drafted to serve as actual operating regulations for institutions that wish to adopt them, we have never expected that our definition of financial exigency would become a working definition. It is more an expression of policy. It is more an indication of the intensity that a financial exigency must reach before faculty terminations are justified than it is a technical definition that is suitable for all institutions under all circumstances.

Should the definition be longer, more objective, more operational? Some years before Regulation 4(c) was promulgated in 1976, a special AAUP committee on financial exigency addressed these questions. The committee considered a "balance sheet" approach that would have defined financial exigency formulaically using variables such as enrollment and budget data. The other approach eventually prevailed -- in large measure, I suspect, because the

members of the special committee despaired of ever finding a formula that was both sufficiently universal to cover all colleges and universities and sufficiently objective to withstand manipulation.^{10/}

I should mention briefly one specific feature of our definition that frequently draws fire. We insist that a financial exigency exists only if the survival of the whole institution is threatened. It is not enough, under our definition, for an institution to show that one department or one program is imperiled. If, for educational reasons, the institution concludes that a particular program is no longer making an important contribution, that is one thing; Regulation 4(d) of our Recommended Institutional Regulations provides a procedure for retrenching under those circumstances. But if the ostensible reason for discontinuing a program is financial rather than educational, then our Recommended Institutional Regulations stubbornly draw the line. The only terminations that can be justified on financial grounds are those necessary to save the institution as a whole from the effects of an imminent crisis. We feel -- and I think our experience shows -- that any departure from this rule invites the kind of abuse that

^{10/}Our files, for example, contain this warning from the director of finance at the University of Rochester:

The amount of manipulation possible in the current funds statement is limited by little more than the imagination of college financial officers and the permissiveness of their auditors. To say that the current funds' purported "surplus" or "deficit" is indicative of the institution's financial health is to diagnose the patient's ills by no more than his thermometer reading. We need to look at the total picture.

President Wriston of Brown University described in 1939. If we allow financial exigency to be invoked easily, it will be invoked constantly.

The Faculty's Role

Regulation 4(c)'s most creative contribution may be its recognition that an institution copes with a financial exigency in discrete stages, and that the role of the faculty is different at each stage. Essentially, Regulation 4(c) identifies three stages of decision-making whenever a financial exigency is declared, and for each stage ascribes certain responsibilities to administrators and faculty members.

The first decision confronting the institution is whether a state of financial exigency actually exists and is sufficiently grave to warrant the termination of tenured faculty appointments. Regulation 4(c) takes an interesting and eminently sensible approach. The note following Regulation 4(c)(1) makes it clear that the decision to declare a financial exigency rests with the institution's board of trustees; but the note also suggests that a faculty body should participate in that decision, and specifically makes reference to the following passage from the AAUP's 1972 Statement on the Role of the Faculty in Budgetary and Salary Matters:

Circumstances of financial exigency obviously pose special problems. At institutions experiencing major threats to their continued financial support, the faculty should be informed as early and specifically as possible of significant impending financial difficulties. The faculty . . . should participate at the department, college or professional school, and institutionwide levels, in key decisions as to the future of the institution and of specific academic programs within the institution. 11/

Collegiality, the AAUP believes, is never more important than in the initial stages of a financial crisis. One of the Association's most significant contributions to the law of financial exigency is its repeated insistence that a duly authorized faculty committee be informed immediately of any threat to the institution's financial health and be given the opportunity to participate in the development and implementation of austerity plans. As Professor Brown observes, "if faculty representatives are fully involved in the decisions that attend money crises, the decisions are more likely to be accepted by the faculty"^{12/} -- a sentiment that is one of the most common refrains in the literature on financial exigency.^{13/}

Once an exigency is declared, the institution moves to the second decision-making stage. It must identify particular areas in the overall academic program that are likely candidates for retrenchment, and it must develop objective criteria for identifying particular faculty members in those areas whose positions are to be terminated. Unlike the decision to declare a financial exigency, which is primarily financial, the identification of programs and faculty positions involves considerations of educational policy. It is at this stage, according to Regulation 4(c), that the faculty's role changes

^{12/} "Financial Exigency" 7.

^{13/} See, e.g., J. Kurland, "Reducing Faculty Positions: Considerations of Sound Academic Practice," 53 Liberal Education 304, 305-6 (1972); W.T. Furniss, "Retrenchment, Layoff, and Termination," 55 Educ. Record 159, 160 (1974).

from consultant to primary decision-maker. According to the note following Regulation 4(c)(1), these decisions should be "the primary responsibility of the faculty or of an appropriate faculty body."^{14/}

Under the AAUP approach, the faculty is responsible for developing objective criteria for translating a financial exigency into specific program cuts. Four objective criteria are suggested in Regulation 4(c), although nothing prohibits the faculty from using other criteria as well. The four that are identified are not entirely free of controversy. They are:

First, length of service. This criterion rests on two premises: that seniority can be determined without subjective judgments; and that it is the decent and moral thing to do to recognize long years of academic service by preferring a senior faculty member over a junior colleague.^{15/}

^{14/} The note goes on to cite the 1966 Statement on Government of Colleges and Universities, which goes somewhat farther than the note itself:

[In] such fundamental areas as curriculum, subject matter and methods of instruction, research, [and] faculty status . . . the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances, and for reasons communicated to the faculty.

52 A.A.U.P. Bull. 375, 379 (1966).

^{15/} These arguments are developed in more detail in "Financial Exigency" 11-12.

The use of seniority is a recurring source of friction in many financial exigency situations. We see many cases that resemble this hypothetical example: The faculty determines that one position in the Department of Music should be terminated. There are only two faculty members in that department, both tenured -- one a vigorous young professor, the other a senior faculty member whose teaching and scholarship, while adequate, are no match for the younger colleague's. Seniority dictates that the older faculty member be reinstated; but administrations are frequently persuaded that it is better for the institution to keep its younger teachers. As I said, many of the AAUP's financial exigency cases fit this mold.

Second, age. Age and seniority are frequently equivalent. When they are not, difficult problems can arise. Who gets the teaching slot -- the 35-year old full professor who has been at the institution for seven years, ever since receiving the Ph.D., or the 40-year-old full professor who has been at the institution for only five years? The age criterion suggests one answer, the seniority criterion another. Complicating matters is the Age Discrimination in Employment Act, a federal statute that restricts, to some degree, an institution's reliance on age as an employment factor.

In a major case decided just last month, a federal appeals court in St. Louis substantially broadened the applicability of the Age Discrimination in Employment Act in higher education cases.

The court ruled that the Act was violated when a college administration attempted to reduce the size of the faculty by reserving some teaching positions for non-tenured faculty members and requiring tenured professors to compete with each other for the remaining positions. The decision makes it clear that it is against the law for an institution faced with a financial exigency to single out older faculty members as special targets of retrenchment plans.^{16/}

Third, affirmative action. The AAUP is very sensitive to the fact that women and minorities comprise a large proportion of the junior faculty at most institutions, and are therefore especially vulnerable to layoffs based on age or seniority. Regulation 4(c) recognizes that affirmative action goals are a matter of legitimate educational policy, the implication being that faculty members would be acting appropriately by implementing an affirmative-action exception to other criteria. This is a complicated area of the law -- too complicated in fact to treat here.^{17/} It has not yet arisen in any significant way at an American institution of higher education, so the AAUP has not been forced to confront these difficult questions. Whether this will continue to be true, as the number of financially exigent institutions grows and the number of affected faculty members increases, only time will tell.

^{16/} Leftwich v. Harris-Stowe State College, No. 82-1676 (8th Cir. March 15, 1983).

^{17/} For further elucidation, see the cases and articles described in "Financial Exigency" 12 n.34.

And fourth, tenure status. Regulation 4(c)(3) provides that "[t]he appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result." The permissive "may" in Regulation 4(c)(1) ("[t]hese criteria may appropriately include considerations of age and length of service") is replaced here by the imperative "will," suggesting that the administration must use tenure status in determining positions to be preserved. But the AAUP permits tenured faculty members to be terminated "in extraordinary circumstances" determined by reference to the needs of the academic program (a determination that should obviously be made by faculty members in the first instance). In this important respect, AAUP standards differ from those of other educational organizations that insist on rigid adherence to the priority for tenured faculty members.^{18/}

All four of the criteria specified in paragraph 4(c) -- seniority, age, affirmative action, and tenure status -- share an important characteristic. They are objective. They do not require the exercise of judgment or the making of subjective evaluations. The neutrality of these criteria is their biggest advantage, and the reason why the AAUP prefers them, when appointments must be terminated because of financial exigency, to other criteria we sometimes see -- relative value to department, and so

^{18/} "Financial Exigency" 10 n.24 and accompanying text.

forth. The more subjective the criterion, the more it lends itself to potential abuse and the more controversy it generates when it is applied to individual faculty members. Neutral criteria have the advantage of depersonalizing, to some extent, the highly-charged debate that inevitably occurs in a retrenchment situation.

The last stage of a financial exigency, and the most painful, is the identification of specific faculty members for termination. This responsibility, according to the note following Regulation 4(c)(1), "should be committed to a person or group designated or approved by the faculty." The note does not require that the task be performed by the faculty itself; indeed, Professor Brown suggests that it would be deeply divisive for faculty members to single out their peers for termination.^{19/}

Hearing Procedures for Affected Faculty Members

So far, we have defined financial exigency and seen how the faculty and administration apportion responsibility for identifying professors who must lose their jobs to keep the institution solvent. We turn now to an examination of the rights of those professors.

Regulation 4(c)(2) provides that any professor who receives notice of termination may request "a full hearing before a faculty committee." The regulation then provides detailed guidance with respect to the nature of that hearing.

^{19/} Id. 8.

When? The hearing must take place after receipt of notice and before termination.

What kind of hearing? The hearing "need not conform in all respects" with the full-blown evidentiary hearing required when a faculty member is dismissed for cause. But it must provide "the essentials of an on-the-record adjudicative hearing" -- meaning at a minimum, an unbiased tribunal, the opportunity to be represented by counsel, the right to call witnesses and to cross-examine adverse witnesses, the right to introduce documentary evidence, verbatim record of proceedings, and a written decision containing reasons and based solely on the hearing record.

On what subjects? Regulation 4(c)(2) is most specific. The affected faculty member may contest the existence and extent of a bona fide financial exigency. (If he or she does so, then the administration bears the burden of proving that a state of exigency exists and is grave enough to warrant the termination of faculty appointments.) Or the faculty member may challenge the criteria by which particular programs or departments were selected for reductions (with an important procedural caveat -- "the recommendations of a faculty body on these matters will be considered presumptively valid"). Or the faculty member may contend that the criteria were misapplied in the individual case; here, presumably, by negative inference, he or she bears the burden of persuasion.

In what forum? The hearing must be conducted by "a faculty committee." Presumably (although Regulation 4(c)(2) does not so state), it will not be the same committee that initially participated in the decision to declare a financial exigency and developed criteria for implementing retrenchment plans.

With what rights of appeal? Regulation 4(f) of the Recommended Institutional Regulations provides for final institutional review by the institution's governing board.

Before we leave this subject, you should note that the AAUP standards, if adopted in full, would require separate, parallel hearing procedures, one for disciplinary proceedings and one for financial exigency terminations. Different rules of procedure would apply. This may look unduly complicated, and indeed early critics of the AAUP approach wondered why separate hearing procedures were necessary when most institutions already had a general-purpose procedure for handling terminations.^{20/} But on balance, I am convinced that it makes good sense to have a separate procedure for financial exigencies. The issues are usually very different. In contrast to a hearing on the individual fitness of a faculty member, where the faculty member's own conduct is at issue, a financial exigency hearing puts the institution on trial. Evidentiary and proof issues are entirely different. The burden of proof may be shifted. Having separate

^{20/} See W.T. Furniss, "Retrenchment, Layoff, and Termination," 55 Educational Record 159 (1974).

procedures emphasizes the distinctive nature of a financial exigency hearing, and guards against the perception that terminations on financial exigency grounds are merely a variation of terminations for cause and therefore can be handled by the same hearing apparatus.

Demonstrating the "Bona Fides" of a Financial Exigency

Under the 1940 Statement, a financial exigency must be "demonstrably bona fide" before it may be invoked as a reason for terminating tenured appointments. To give substance to this standard, Regulation 4(c) requires the institution to comply with certain procedures during and after a financial exigency. Failure to honor these procedures gives rise to an inference that the exigency, instead of being bona fide, was a pretext for dishonoring the tenure commitment.

Restrictions on new hiring. Regulation 4(c)(3) imposes a logical prohibition on new hiring during a financial exigency. Regulation 4(c)(6) refines this by conditionally prohibiting an institution from hiring a replacement for any faculty member whose appointment is terminated on financial exigency grounds. You would be surprised how blatantly some administrations have ignored these restraints. One celebrated example involved the president of an independent college in New Jersey who dismissed twelve tenured faculty members because the college allegedly was financially exigent, yet paid them a required additional year of salary while not allowing them to teach that year and at the same time turned around and hired eleven replacements immediately to teach pretty

much the same courses! Needless to say, we were not convinced that the college faced an "imminent financial crisis." Neither did the judge to whom the matter was subsequently submitted, who ordered the twelve original faculty members reinstated.^{21/}

Intrainstitutional placement. Before a tenured faculty member's appointment may be terminated, Regulation 4(c)(4) requires the institution to "make every effort to place the faculty member concerned in another suitable position within the institution." This provision is the lineal descendant of a sentence that first appeared in the 1925 Conference Report, and is thus one of the most venerable requirements in Regulation 4(c). Like the prohibition against new hiring, this provision is eminently sensible; if there is a position elsewhere in the institution for which a soon-to-be-terminated faculty member is qualified, then offering the transfer is an indication of good faith and from that individual's perspective it is usually preferable to a layoff.

Notice. Under Regulation 4(c)(5), a tenured faculty member is entitled to one full year's notice before his or her appointment is actually terminated. Notice requirements serve an important deterrent function. They force institutions to engage in some form of advance planning, since institutions that have adopted our notice standard know there will be a one-year lag between the decision to terminate and an actual reduction in payroll.

^{21/}AAUP v. Bloomfield College, 322 A.2d 846 (N.J. Super. 1974), aff'd, 346 A.2d 617 (App. Div. 1975).

The AAUP views the notice requirement as a material and very important part of the relationship between professor and institution, and we almost always react vigorously when our notice standards are breached. And they are breached sometimes, particularly when a financial crisis strikes an institution so suddenly and so hard that it cannot afford to wait a year to react. We are sometimes put in the difficult position of being told by a college president, we can lay off five faculty members now or twenty next year if you insist on a full year's notice. Our position has always been, and I think it must be, to insist on a full year's notice, even if the threatened result is additional layoffs. As Committee A observed in 1975, "an institution is in a better position to absorb an extra year of faculty service, than is the faculty member in a position to absorb a year of forced unemployment or underemployment that might have been avoided by adequate notice."^{22/} We simply feel too uncomfortable making a "financial exigency" exception to the notice rule that in time might swallow up that rule.

In particular, we object to language included in many institutional regulations pledging to make "every effort" or "all reasonable efforts" to comply with notice requirements in the event of financial exigency. Our view is that it is at least as crucial to comply with notice requirements during times of financial exigency as at other times. As Jordan Kurland of

^{22/}"Academic Freedom and Tenure: 1975 Reports on Cases of Late Notice," 62 A.A.U.P. Bull. 95, 96 (1976).

our staff observed more than a decade ago, "To stint on due notice at a time when it is sorely needed by the recipient not only inflicts injury on him; it serves to dampen the spirits of those who remain. . . . [S]hort cuts in this area tend to be remembered long after the money saved is spent."^{23/} In sum, our notice standards are important, and we want administrators to understand that before financial troubles brew, so they can plan accordingly.

Recall rights. Finally, Regulation 4(c)(6) gives a faculty member whose appointment is terminated on financial exigency grounds the right of first refusal if, within three years, the institution decides to fill the vacant position. As Professor Brown suggests in his commentary, we view the three-year limit as a minimum, not a fixed requirement; in some collective bargaining agreements, faculties have negotiated recall provisions of indefinite duration.^{24/}

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With that, we come to the end of our excursion through Regulation 4(c). Let me summarize before we move on.

^{23/} J. Kurland, "Reducing Faculty Positions: Considerations of Sound Academic Practice," 58 Liberal Education 304, 309 (1972).

^{24/} "Financial Exigency" 15.

A financial exigency is an evolutionary process, at each stage of which the focus grows narrower. In its early stages, it involves the institution as a whole. Does a state of financial exigency exist? This question is answered by reference to the institution's assets, enrollment, and budget. At the next stage, the focus shifts to departments and programs within the institution. What programs are not paying their way? What departments are overstaffed or overfunded? In the final and most difficult stage of an exigency, decisions center on individual men and women. Who in this department goes? Who should be spared?

Regulation 4(c) reflects the same involuted structure. It begins with 58 words of general definitional language. As it reaches succeeding stages of the exigency, it grows more expansive and more specific. The text describing the process for identifying individual faculty members for termination is almost four times as long (223 words) as the definitional section; and the last portion of the paragraph, dealing with the rights of individuals who receive notices of termination, is longer still (335 words).

This reflects, to some extent, the fact that it is tricky business to define a term like financial exigency; if the AAUP's definition is not wholly satisfactory for its brevity, we know of no definition that is more satisfactory. But it also reflects the fact that the AAUP has more experience with rules of procedure, and perhaps more faith in them as well. In 1934, when the

Great Depression was exacting a painful toll on the members of the teaching profession, the members of Committee A stated in their annual report that "[t]he observance of proper procedure in the relations between administrations and teachers remains one of the most important safeguards of our professional liberties."²⁵ Their words are particularly pertinent today, when the same economic threats to the profession are again on our minds.

APPLICATION OF AAUP STANDARDS

So far, we have focused on Regulation 4(c), the AAUP's model institutional regulation on financial exigency. We move now from the world of theory to the world of practical affairs. How widely have AAUP financial exigency standards been accepted and applied?

The results so far, I think, are somewhat mixed. We have succeeded to some extent in waging the battle against retrenchment on our own ground. Largely because of our work, many in the higher education community realize that the declaration of a financial exigency should be an extraordinary event calling for special procedures, unusual protections, and heightened sensitivities. Today, it is not easy to lay off tenured faculty members. But at the same time, we are somewhat chagrined that many institutions have still not adopted financial exigency regulations in the seven years since the current Regulation 4(c) first appeared, and that all too many of the new provisions that have been adopted are inconsistent in whole or in substantial part with AAUP standards.

²⁵/ "Academic Freedom and Tenure: Report of Committee A," 21 A.A.U.P. Bull. 148, 150 (1935).

We are also very disturbed by the imaginative lengths to which some institutions have gone to avoid the practical limitations imposed by the AAUP's financial exigency standards. The biggest offenders are also, by happenstance, the nation's largest higher education systems -- the State University of New York and the California State University system. In both instances, institutions faced with cuts in state appropriations reacted by identifying "programs" for retrenchment that were in some cases no larger than a single faculty member. At SUNY in 1975 they were called "retrenchment units," and at Sonoma State University in California in 1982 they were called "teaching service areas"; the practical effect was to permit university administrators to identify specific faculty members for termination under the guise of using objective programmatic criteria -- a grave threat, in our view, to academic freedom on those campuses.

There are other disturbing portents as well. One that is causing us particular concern is the rise in the number of financial exigencies in state higher education systems. In the last couple of years, we have witnessed a sudden surge of financial emergency situations at public institutions. The cause is simple enough to understand. Almost every state has a constitutional or statutory provision that requires a balanced budget at the end of the fiscal year. (According to the National Conference of State Legislatures, every state but Vermont has such a provision in its constitution or code.) If state revenues are unexpectedly lower than projected, then the balance

must be achieved by cutting expenditures. We are now witnessing the effects of an extended national economic recession, a resulting drop in state revenues, and the perceived necessity for making cuts across the board, including higher education expenditures, to preserve balanced budgets.

To an extent greater than in the financial exigencies of years past, the situations on these campuses are tremendously volatile and confused. Crises can arise and abate overnight. Faculty members, even administrators, cannot keep up with rapidly shifting circumstances. Recent events in West Virginia provide a good example, events in which the AAUP was deeply involved and played an important role. State officials did not know until November of 1982 that revenue shortfalls would be significant enough to merit budget cuts. Governor Rockefeller responded that month by ordering a relatively modest three percent reduction in state spending. Between November 18 and December 31, the state's tax commissioner again adjusted his revenue projections downward, forcing the Governor to increase his budget cut to ten percent of expenditures. Faculty members knew little until the West Virginia Board of Regents announced on January 13 that a \$16 million cut in higher education expenditures was to be achieved by mandatory payless furloughs of seven to ten days, beginning in March. But in February, the tax commissioner adjusted his projection upward, and the payless furlough plan was rescinded. The situation literally changed from day to day. Obviously, faculty morale suffers under such circumstances and long-range educational planning becomes more difficult.

It is certainly no disparagement to say that the AAUP standards were not drafted with this new generation of large-scale financial emergencies in mind. By its very nature, our recommended institutional regulation on financial exigency presupposes an aura of deliberative calm and enough advance notice of an emergency to explore and exhaust the alternatives to faculty layoffs. For example, Regulation 4(c) envisages a deliberative role for a duly constituted faculty committee prior to the declaration of an exigency, a careful review of alternatives to layoff, placement of at-risk faculty members in other suitable positions, and (under appropriate circumstances) the implementation of training programs to prepare faculty members for service elsewhere in the institution. These steps take time. They are not always suited to an emergency that is invisible one day and bursts upon an institution the next.

We are also disturbed by the relatively hostile reception given to our standards by state legislatures and courts. In New Jersey, Washington, and several other states, financial exigency bills and regulations have been enacted in the last few years that bear startlingly little resemblance to the AAUP's recommended institutional regulations.^{26/} When faculty members have challenged terminations in court, they have not in general

^{26/} Cf. Washington Education Ass'n v. State of Washington, 652 P.2d 1347 (Wash. 1982) (en banc); Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO v. State Board of Higher Education, 91 N.J. 18 (1982).

been successful in arguing that institutional regulations do not comport with AAUP standards.^{27/} In particular, courts have been extremely reluctant to adopt the AAUP's definition of a financial exigency, and have given great deference to institutional determinations that a state of financial exigency exists.^{28/} The AAUP's procedural standards have fared somewhat better; several courts have recognized that faculty members cannot be terminated without receiving the minimal procedural protections guaranteed by Regulation 4(c)(2) of the AAUP Recommended Institutional Regulations.^{29/}

The current version of Regulation 4(c) is only seven years old. It has already had an influence on the debate over financial exigency, and I suspect that it will grow in importance as more institutions face up to the task of drafting regulations on this subject. On collective bargaining campuses, financial exigency and program discontinuance provisions are higher education's equivalent of the job security provisions that many industrial unions demand. In an age of fiscal austerity, when salary

^{27/} For a useful introduction to the burgeoning case law on financial exigency, see S. Stroup, N. Van Gieson & P. Zirkel, Deficits, Declines, and Dismissals: Faculty Tenure and Fiscal Exigency (ERIC Clearinghouse on Teacher Education 1982). See also Note, "The Dismissal of Tenured Faculty for Reasons of Financial Exigency," 51 Ind. L.J. 417 (1976).

^{28/} See Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978); Scheuer v. Creighton Univ., 260 N.W.2d 595 (Neb. 1977). But see AAUP v. Bloomfield College, 346 A.2d 615 (N.J. App. 1975).

^{29/} See Johnson v. Board of Regents of the University of Wisconsin System, 377 F. Supp. 227 (D. Wis. 1974), aff'd, 510 F. 2d 975 (7th Cir. 1975).

increases and fringe benefits are difficult to negotiate, job security has become the principal demand of many unions, and we are seeing the same trend in higher education. In some instances, the negotiating process has yielded good and workable language modeled closely on Regulation 4(c). My colleague Ann Franke will have more to say on this subject tomorrow. For now, let me simply observe that college and university faculty members -- both those engaged in collective bargaining and those who are not unionized -- are realizing how important it can be to have exigency guidelines in place before an emergency strikes. We can say with some satisfaction that the AAUP's recommended institutional regulation is a model to which faculty members frequently turn.

Financial exigency is a gloomy business, and one can easily despair when one studies the subject at any length. Some months ago, when the recession was at its worst and state universities were being battered by budget cutbacks, I wrote a despondent memorandum suggesting that the new macro-exigencies were simply too much for our recommended institutional regulation to cope with. In due course, Professor Walter Metzger of Columbia University, a longtime member of our Association and a thoughtful analyst of financial exigency matters, received a copy of my memorandum. After he read it, he sent me a long letter taking me to task for exhibiting excessive pessimism. His message, colloquially phrased, was this: Sure, times are tough and faculty members are losing their jobs. But how many

more would have been laid off if it had not been for AAUP standards? The closing paragraph of Profesor Metzger's letter is an excellent summary of what AAUP policy is and should always be:

I find it hard to be measured when I contemplate yet another sign that we have lost confidence in our rules. . . . A gloomy prognosis will always strike me as premature when it appears that we have not really tried to hold the line we have committed ourselves to defend, always unconvincing when it appears that we do not know precisely where that line was drawn, always dangerous when the consequence of abandoning that line is to place tenure in mortal jeopardy.