
As a result of discussions at these meetings, as well as research and other work undertaken between meetings, a number of proposed amendments to the Code are recommended by the Task Force. Both a bullet point summary and the complete proposed language of the amendments are attached. Many of the ideas which were discussed and which are recommended arise from the UNR experience last Fall using the existing Code procedures on curricular review. It is believed that the proposed amendments will help clarify these procedures. The Task Force discussed many other ideas for amendment to the financial exigency and curricular review procedures, but could not reach agreement. These ideas, and various views expressed by Task Force members, are described below.

I. Recommended Code Amendments.

First, the Task Force suggests separating the financial exigency and curricular review sections because it is believed that as written the procedures are easily confused. Under the proposed amendments, there would be two Code sections devoted entirely to financial exigency and two Code sections devoted to curricular review.

In both the sections on financial exigency and curricular review, the Task Force suggests similar language that would achieve the following:

a. Provide that the administrative units, projects, programs or curriculums that be affected by lay offs, furloughs or pay reductions are given the opportunity to present alternatives and require the criteria for selection of less than all the staff in an affected unit to be in writing. Remove the language "is threatened with" and change it to "is given notice of."

b. Add language requiring a written policy regarding the efforts to be made by administration regarding the possible continuation in
employment of faculty who are being laid off; the written policy would be established by the president after consultation with faculty senate.

c. Add language to give administration the opportunity to respond in writing before the reconsideration hearing; any such written response must be served no later than three days before the hearing.

d. Add language to require audio recording of the reconsideration hearing and the faculty member is given a copy upon request.

e. Add language to clarify that administration may respond at the reconsideration hearing.

f. Add a new section to clarify that notices and documents may be served electronically, by mail or hand-delivered.

g. Add a new section to clarify that an offer of reappointment must be made with tenure if an institution intends to hire tenure track faculty in the former faculty member’s subject area.

In addition, the Task Force recommends that the definition of “curricular reasons” be amended to clarify that “adverse economic conditions” are included. This language is proposed in recognition of the fact that curricular review is most often driven by resource allocation. The Task Force also acknowledged that under an ongoing academic planning process, resource shortages could be anticipated and appropriate action taken. However, a relatively sudden economic downturn, such as the current recession, may result in the need for reductions to occur in a shorter time frame. In addition, curricular review is the preferred process to address budget shortfalls which cannot be addressed through less drastic means. Under curricular review, faculty are given longer notice of layoffs, and layoffs, under the proposed amendments, would be the result of a transparent, collaborative process.

II. Other Issues Discussed.

A. Consolidation of Scope of Review.

The Task Force considered whether to consolidate the issues which may be considered by an Employment Review Committee on appeal. The following language was drafted for both financial exigency and curricular review, but is not included in the proposed amendments:

*The faculty member requesting reconsideration may have an advisor. Evidence presented must possess reasonably probative value, materiality and relevancy to the employment decision.* The faculty member requesting reconsideration has the burden of showing:
i. a material deviation from the procedures established on which such a specific decision to furlough, reduce pay or to lay off has been made; or
ii. there is insufficient evidence to support the specific decision to furlough, reduce pay or to lay off;
iii. or both.

Some members of the Task Force supported this amendment because it consolidates the issues which can be reviewed into one section and is not a substantive change. However, other Task Force members felt that there should be a substantive change to place the burden of proof on administration or revise or eliminate that prohibition on review of the policy decision to declare financial exigency or to undertake curricular review.

B. Effective Date of Layoff Notice.

The Task Force discussed whether the effective date of layoff notices should be changed. The following language was drafted to shorten the second notice period for layoffs, but is not included in the proposed Code amendments:

If a faculty member is notified of a lay off for curricular reasons on or before December 1 of the faculty member's current contract year, the layoff shall not be in effect until the following June 30. If a faculty member is notified of a lay off for curricular reasons after December 1 but before May 1 of the faculty member's current contract year, the layoff shall not be in effect until December 31 in the next contract year.

Some of the Task Force members felt that this amendment would be appropriate in light of the Board of Regents’ action in 2005 to shorten the time periods for notice of nonreappointment for non-tenured faculty hired after that time. They noted that the time period for layoff notices, in Section 5.4.6(d), could allow as much as 19 months of notice if the layoff notice is given after December 2 or later (the layoff notice would be effective June 30 of the subsequent contract year). It was argued that this amendment would make the two notice periods more similar and would align them more with the notice periods given to non-tenured faculty.

However, faculty representatives strongly objected to this idea because faculty whose layoffs would be effective on December 31 would not be able to seek other employment in the normal higher education hiring cycle. Faculty also felt it diminished tenure to try to align the notice period for tenured faculty with that of non-tenured faculty.

The Task Force also discussed a proposal to make layoff notices effective one year after service of the notice on tenured faculty and effective six months after service on non-tenured faculty. This proposal was not supported because it was believed that this would make the process more chaotic and again, would not always allow faculty to seek other employment in the normal higher education hiring cycle.
C. Layoff of Non-tenured Faculty by Notice of Nonreappointment.

The Task Force considered whether the Code should be changed to clarify that institutions may give notices of non-reappointment to non-tenured faculty in order to maintain the employment of a tenured faculty member whose unit, project, program or curriculum has been eliminated or reduced in size. This proposal would amend Sections 5.4.6(b) of the current Code. Vice Chancellor Bart Patterson advised that under current Code language non-tenured faculty may be given notices of nonreappointment. In other words, the prohibition on termination of faculty in order to retain other faculty which is found in Sec. 5.4.6(b) of the Code, would not apply to non-tenured faculty who may be given notices of non-reappointment. Some Task Force members felt that specific language to this effect should be added in both financial exigency and curricular review for purposes of clarity.

This proposal led to an in-depth discussion about the idea of retaining tenured faculty by transfer into other subject areas in which they are qualified to teach. A scenario was proposed in which non-tenured faculty might be given notices of non-reappointment to facilitate the retention of tenured faculty who could transfer into the open position. It was acknowledged by everyone that transfer of tenured faculty to other disciplines should only occur in accordance with the applicable institutional procedures. Some Task Force members felt that this should at least be an option that is available for consideration by administration, but also noted that such actions could adversely impact the ability of institutions to recruit in the future.

Although termination of any faculty is not desirable, it was suggested that there could be situations where it would be in the institution's best interest in order to retain tenured faculty, particularly in community colleges and smaller institutions where faculty are qualified in multiple areas. Community college faculty representatives requested that each institution be allowed to determine this in response to their individual needs.

The Task Force will consult further with Vice Chancellor Patterson on this issue and may make a recommendation in the future.

D. Due Process and Tenure Home.

Legal research was conducted to confirm that procedures provided in the Code for lay off, furlough or reduction in pay as a result of financial exigency or curricular review satisfy the Fourteenth Amendment requirements of due process. In light of this research, it appears that the current reconsideration procedures under financial exigency and curricular review meet and exceed the constitutional due process requirements of notice and an opportunity to be heard. Faculty are given written notice of the basis of a decision, and afforded the opportunity at a hearing to challenge both the process followed and the specific decision to layoff, furlough or reduce in pay. In particular the "insufficient
evidence” standard would allow faculty to challenge a decision on many different
grounds, including the argument that the decision was “arbitrary and capricious”
or discriminatory. Although the policy decision to declare financial exigency or to
conduct curricular review cannot be reconsidered, the scope of review appears to
be broad enough to allow arguments at the hearing that cannot be anticipated
here.

The issue of tenured faculty’s “academic home” was discussed at length. If a unit, program or curriculum are eliminated, then the faculty tenured in that
area may be laid off. “Tenure home” is not defined in the Code and this is a legal
issue that was addressed by the Vice Chancellor for Administration and Legal
Affairs in an opinion issued on February 28, 2011 (see attached). The opinion
concludes that faculty are tenured in their particular department or program at a
college or university. Reassignment of tenure may also occur with the
president’s approval. It is expected that such reassignment would only occur
after consultation with the affected unit.

E. Miscellaneous Issues and Ideas Discussed by Task Force.

Although many different issues and ideas were discussed by the Task
Force, the amendments which are described in Sec. I above are offered as
practical clarifications of the Code procedures which help insure collaboration
between administration and faculty, and at the same time continue to allow for
institutional variation. Other issues and ideas which were considered are listed
below (a brief statement of some of the pros or cons expressed by Task Force
members may be included in italics):

1. Draft a third process, between financial exigency and curricular review, which
would require Board approval.

   The existing Code and proposed amendments provide appropriate
   processes to address adverse economic conditions in the System.

2. Should curricular review be conducted the same way at each institution?

   The existing Code and the proposed amendments provide a basic
   framework for curricular review and each institution should have some
   ability to tailor the process.

3. Restrict the evidence that is allowed to be presented at the reconsideration
   hearing.

   The existing Code and proposed amendments give faculty broad leeway
   to present arguments and documentation; this should not be limited.

4. Should outside review be part of the curricular review process?
Outside review would be too cumbersome.

5. Should a seniority system be used to determine faculty layoffs?

The existing Code and proposed amendments provide flexibility and transparency in the decision-making process; use of a seniority system should not be mandated.

6. Add language requiring consultation with faculty senates if the Board of Regents immediately implements a financial exigency.

The existing Code already requires consultation with faculty senates before a declaration of financial exigency; all Board action will take place at a public meeting and both administration and faculty representatives will be present and have the opportunity to speak regarding an immediate implementation of financial exigency by the Board.

7. Adopt AAUP Guidelines for declaration of financial exigency that place the burden of proof on administration.

The existing Code and suggested amendments insure consultation with faculty senates, require administration to provide an appropriate explanation of rationale and criteria, and provide due process for affected faculty. Faculty representatives requested the AAUP guidelines be adopted to retain the burden of proof at the administrative level, since the decision to declare an exigency can be made without faculty support.

8. Add “demonstrably bona fide” to criteria for declaring financial exigency.

The existing criteria for declaration of financial exigency are adequate because they already require consultation with the chancellor, presidents and faculty senates, and essentially require consideration of all available financial options for reduction of expenditures before a recommendation is made to the Board of Regents.

9. Add “demonstrably” in front of “bona fide” in Sec. 5.4.7 regarding layoffs for curricular reasons.

It was suggested that the word “demonstrably” would not add anything significant to the definition of “bona fide.”

10. Require consultation with the Faculty Senates regarding criteria used for selecting faculty for layoff.

The proposed amendments and current Code already require involvement of faculty senates. It is believed that in light of the proposed amendments,
the establishment of selection criteria would occur after consultation with the faculty senates.

11. Include retraining in efforts to retain faculty selected for lay off.

It is assumed the institution would lack funds for retraining, but an institution is not prohibited from considering retraining.

12. Require all offers of reappointment to be with previous rank, tenure and salary level.

This may make offers of reappointment less likely if an offer with tenure is mandated. Also, the institutions already have the option of offering tenure on hire. Faculty representatives felt it appropriate to reappoint with previous rank, tenure, and salary level as this only applies to reappointment within two years.

13. Is it clear that under Sec. 5.4.7, the phrase “the said process” in the proposed amendment to “Curricular Reason for Lay Off,” includes consultation with faculty senate both under the academic planning process and “adverse financial conditions”?

It is intended that consultation with faculty senates would occur under both.

14. The prohibition on challenging the “policy decision” to declare financial exigency or engage in curricular revisions, should be eliminated.

The Task Force members discussed and debated this issue extensively. Although an affected faculty member cannot challenge the policy decision itself, the Code sets forth a detailed process that must be followed by the administration, and administration is required to articulate the rationale used for any layoffs, furloughs or reductions in pay. Thus, a faculty member would have the opportunity to argue that the decision to layoff, furlough, or reduce in pay should be reconsidered if he or she can show a material failure to follow the process and/or failure to have legitimate reasons for the actions taken. Many faculty representatives requested this prohibition be eliminated.

While faculty senate consultation is required, a decision to declare exigency or reduce/eliminate a program may occur with or without support of the faculty senates. Consequently, faculty requested that AAUP guidelines recommending that hearings for terminated faculty members include consideration of the existence and extent of the condition of financial exigency or hardship be adopted.