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Shelley I. Gilman
Case Number 04CV3017
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L. CARLSON, NORMAN E. PENCE, DAVID SULLIVAN,
COLORADO FEDERATION OF TEACHERS

Appellee:

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Case Number: 05-CA-1251

OPENING BRIEF OF AMICUS CURIAE

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Developments in the Law—Academic Freedom, 81 HARV. L. REV. 1045, 1109
(1965) 31
Ehrenberg, Ronald & Zhang Liang, Do Tenure and Tenure-Track Faculty Matter?,
40 J. HUMAN RESOURCES 647 (2005) 13
Ehrenberg, Ronald, Book Review, 51 INDUS. & LAB. REL. REV. 138, 139 (1997)
. 14, 18

Ferris, Stephen & McKee, Michael, Matching Candidates with Academic Teams: A Case for Academic Tenure, 25 INT’L REV. L. & ECON. 290, 309 (2005)	18
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INTEREST OF AMICUS

The American Association of University Professors (AAUP) was founded in 1915 to advance the standards, ideals, and welfare of the American academic profession. One of the AAUP's central tasks, frequently undertaken in concert with other national organizations, is the formulation of statements intended to establish minimum standards of institutional practice in higher education. Paramount among these is the 1940 *Statement of Principles on Academic Freedom and Tenure (1940 Statement)*, drafted jointly with the Association of American Colleges and currently endorsed by over 190 learned societies and professional organizations. The 1940 *Statement* and the gloss of meaning placed on it by the AAUP has long guided faculties, administrators, boards of trustees, and courts¹ in matters of academic freedom and tenure. The AAUP has frequently participated as *amicus curiae* before both federal and state courts to inform them of how the principles the Association espouses speak to the law.²

¹E.g., *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003). See generally *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978); *Drans v. Providence College*, 410 A.2d 992 (R.I. 1980); *Browzin v. Catholic University*, 527 F.2d 843 (D.C. Cir. 1975).

²E.g., *Krotkoff v. Goucher College*, *id.*; *Drans v. Providence College*, *id.*; *Browzin v. Catholic University*, *id.* See also *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

The instant case addresses the extent to which the Board of Trustees of a public institution of higher learning may abrogate aspects of tenure it had previously committed itself contractually to observe. This issue goes to the core of amicus AAUP's constitutional purpose; and it is one where the Association's historical experience should assist this Court in understanding the significance of the issue and in reasoning to a sound conclusion.

STATEMENT OF THE CASE

Before 2003, those faculty members who had achieved the award of tenure at the Metropolitan State College of Denver were contractually guaranteed the following: In the event of a dismissal brought for alleged “cause,” *e.g.*, personal or professional performance, the faculty member was entitled to a hearing in which the administration had to prove that cause was presented. In the event of a termination due to a financially-driven reduction in force, the tenured faculty member had a superior entitlement to retention within a program of instruction over part-time and probationary faculty and to placement in a suitable position (if one existed) as conditions precedent to termination; and, after notice of termination, to preferential rehire to a qualified position for a three-year period thereafter. Further, after notice of termination due to a reduction in force, the affected faculty member was guaranteed access to an appellate

hearing procedure attuned to vindicate the issues at stake. These guarantees are recognized in American higher education as intrinsic to tenure.

In 2003, the Board of Trustees of Metropolitan State College unilaterally changed its rules. The faculty plaintiffs' asserted (and the Board did not disagree) that the burden of proof when an allegation of cause to dismiss is made was placed on the accused faculty member instead of the accusing administration. The tenured faculty plaintiffs further alleged that the new rules governing reductions in force, by abrogating the preferential entitlement accorded by tenure, the obligation of suitable position placement antecedent to termination, and the requirement of subsequent preferential reinstatement, deprived them of essential protections tenure affords in a retrenchment. Finally, the faculty plaintiffs alleged the new provision denied the possibility of any meaningful review under the due process clause of the Colorado Constitution: that it licensed the exercise of unfettered and hence unreviewable administrative discretion.

In response, the Board conceded that these changes were effected unilaterally. The Board argued that inasmuch as "tenure"—albeit in the limited sense of a commitment to a continuing appointment—was not abrogated per se, no contractually vested rights had been divested, only the "procedural framework" had been changed.

The Board further argued that the review provided for in a reduction in force afforded due process.

In this posture, the case was submitted. On dismissal for cause, the trial court disagreed with both the faculty plaintiffs' and the Board's construction of the new rule: The court found the amended provision to address only the burden imposed on the accused faculty member in waging his or her defense; it did not shift the burden from the accusing administration to prove cause to dismiss. Conclusion of Law No. 7. (folio 62-73)

However, on the matter of the new provisions governing reductions in force, the trial court concurred in the Board's position. The court's reasoning was supplied in its entirety in Conclusion of Law No. 11, (folio 63-64) that is:

11. *Although Plaintiffs present compelling policy reasons for their challenges to the 2003 Handbook, they fail to provide this Court with legal authority to support their position. As noted above, the Board of Trustees had legal authority to change the policies and procedures of Metropolitan State College, including the terms and conditions of tenured faculty members' employment. Plaintiffs did not have any contractual right to the procedures contained in the State Colleges Trustees Handbook. Plaintiffs' grants of tenure, as defined in the State Colleges Trustees Handbook, provided them with a property interest in continued employment that could only be terminated for cause or due to a reduction in force. The*

2003 Handbook did not eliminate that grant of tenure.
(Emphases added.)

This conclusion was supported in Conclusion of Law No. 12, (folio 64) solely by reference to *Brenna v. Southern Colorado State College*, 589 F.2d 475, 477 (10th Cir. 1978).

On the further but separate question of whether the new procedure in case of a reduction in force met constitutional muster, the court held the issue not ripe for a declaratory judgment for want of a current controversy. Conclusion of Law No. 17. (folio 64,65)

Amicus AAUP notes that Conclusion of Law No. 7 soundly disposes of the question of burden of proof in a dismissal for cause; but, it notes as well that the trial court failed to enter a declaratory judgment giving effect to it. Although *amicus* AAUP is accordingly in doubt of what the status of this decision is, *amicus* will proceed on the assumption that the trial court's construction resolves that part of the dispute. Consequently, only the remaining issues dealing with tenure and retrenchment will be addressed.

SUMMARY OF ARGUMENT

Two issues are presented: Whether the set of rights inhering in the award of tenure in a retrenchment situation may be abrogated; and, whether the new rules governing a retrenchment afford due process.

On the first, Colorado law distinguishes between those statutory (and contractual) rights that vest and those that do not by a balancing of these considerations:

(1) whether the public interest is advanced or retarded, (2) whether the retroactive provision gives effect to or defeats the *bona fide* intentions or reasonable expectations of affected persons, and (3) whether the statute surprises persons who have long relied on a contrary state of the law.

The abrogation of the rights at stake here clearly defeats the intent of tenure, unsettles a well-settled expectation, and is contrary to the public interest. There is no evidence on the record to the contrary.

On the second, and assuming the issue ripe for a declaratory judgment, the close interrelatedness of the standards governing administrative decision-making, the procedure—or lack of a procedure—mandated for their application, and the process of review to insure against arbitrariness need be explored. Once this is done, it is apparent that the hearing provided for is incapable of performing the critical constitutional function of checking the abuse of power.

ARGUMENT

I. A Public Employer May Not Unilaterally Abrogate Vested Contractual Rights

In Colorado, a public body may abrogate the terms of a contract so long as what is abrogated is “merely procedural” or “remedial.” *Johnson v. Colorado State Board of Agriculture*, 15 P.3d 309, 313 (Colo. App. 2003). Just as a legislature is privileged retrospectively to change a statute, even when parties have contracted with respect to it, so too is a public employer permitted to change its policies, even when these policies have been made part of a contract with it, when the statutory or contractual change respectively is “merely” of a procedural or remedial nature. *Id.*

Accordingly, close attention must be paid to determine whether the right at stake is vested or is “merely” procedural or remedial. *Id.* At this critical juncture, Conclusion of Law No. 11 (folio 63-64) falls silent: from what appears the trial court merely assumed without further analysis that the provisions at issue here were procedural. But, the law governing that distinction must be addressed. The distinction is not nominal—a matter of mere naming:

The distinction between substantive and remedial statutes lies in the fact that substantive statutes create, eliminate, or modify vested rights or liabilities, while procedural statutes relate only to remedies or modes of procedure to enforce such rights or liabilities.

Shell Western E & P, Inc. v. Dolores County Bd. of Commissioners, 948 P.2d 1002, 1012 (Colo. 1997). The repeal of a statute that confers a right—or the abrogation of a policy conferring a right made part of a contract—“does not erase that right *if* it is vested, but the right remains enforceable without regard to such repeal or abrogation.” *Ficarra v. Dept. of Regulatory Agencies*, 849 P.2d 6, 16 (Colo. 1993) (emphasis added); *In Re Estate of deWitt*, 54 P.3d 849, 857 (Colo. 2002).

The Colorado Supreme Court in *Ficarra* laid out the elements that govern the distinction between the vested and non-vested: “ ‘There are no bright line tests,’ ” “ ‘there is no fixed formula.’ ” 849 P.2d at 17 (reference omitted). The conclusion is the product of the balancing of several factors which the Court summarized as follows:

“(1) whether the public interest is advanced or retarded, (2) whether the retroactive provision gives effect to or defeats the *bona fide* intentions or reasonable expectations of affected persons, and (3) whether the statute surprises persons who have long relied on a contrary state of the law.”

Id. at 16 (reference omitted).

Because the institution’s obligations toward tenured faculty in a reduction in force are couched in terms of steps that have to be taken in order to effect a termination, these provisions may have appeared to the trial court to be “merely procedural.” Thus, it is analytically critical to stress that the Colorado Supreme Court eschewed so positivist an approach. *Shell Western E&P, Inc. v. Dolores County Bd.*

of *Commissioners*, 948 P.2d at 1012. The criteria laid down in *Ficarra* and *Estate of deWitt* require a close look at the *nature* of the changed rule, the *effect* of the change on the parties and, most importantly, on the *public interest*—not on a label attached to the provision. Were it otherwise the State could easily defeat the vesting of rights by the simple expedient of denominating them as “procedural.”

This is made manifest in *Estate of deWitt*. The case concerned the legislature’s revocation of extant designations of former spouses as beneficiaries of life insurance. 54 P.3d at 849. At first blush, this would seem to have worked a substantive change. But the Colorado Supreme Court, citing the criteria quoted above from *Ficarra*, 54 P.2d at 855, held that the beneficiaries’ rights under prior law had not vested. The Court stressed that that question had to be decided in light of “the public interest and statutory objectives,” *id.* at 857; and it emphasized that no new disability had been added because (unlike the instant case) insureds could contract around the statute to preserve the former spouses’ rights. *Id.* The conclusion of whether a statutory or contractual right vests is thus the product of reasoned analysis, not of labeling.³ Once

³ The same is so in federal labor law in terms of whether a change in legal doctrine has retroactive effect. In a leading case, *Oil, Chemical & Atomic Workers Int’l Union, Local 1-547 v. NLRB*, 842 F.2d 1141 (9th Cir. 1988), the National Labor Relations Board applied a reversal of a *presumption*—on its face a procedural matter—to a contract made under prior law. This was held impermissible by application of the very same criteria adopted in Colorado to govern the question of retroactivity:

whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, . . . the extent to which the party against whom the new rule is applied relied on the former rule, . . . the degree of

the criteria of *Ficarra* and *Estate of deWitt* are applied, it becomes obvious that the abrogations complained of were of vested rights.

Ficarra and *Estate of deWitt* place greatest weight on the role of the public's interest; but before reaching it, the other criteria—of intentional and of settled expectations respectively—need be addressed. Once these are laid upon the page, the public's interest will be more powerfully apparent. *Amicus* AAUP will commence with the first of the retrenchment abrogations, the right to preference in retention. The ensuing abrogations follow this analysis.

II. The Entitlement to Preferential Retention in a Reduction in Force, as a Substantive Component of Academic Tenure, is a Vested Right

What follows applies the three criteria set out in *Ficarra* and *Estate of deWitt*, discussed in Section I, *supra*.

A. “*Bona Fide* Intentions or Reasonable Expectations of Affected Persons”

“The conferral of tenure,” Professor William Van Alstyne explains, means that the institution, after utilizing a probationary period of as long as six years in which it has had ample opportunity to determine the professional competence and responsibility of its appointees, has rendered

the burden which a retroactive order imposes on a party, and . . . *the statutory interest in applying a new rule despite the reliance of a party on the old standard.*
Id. at 1145 (emphasis added).

a favorable judgment establishing a rebuttable presumption of the individual's professional excellence.⁴

A probationary member of a faculty has not been determined, by the exacting process of a collegial and administrative evaluation over a long period of time, to possess such professional competence and responsibility as yet to warrant that presumption.⁵ The probationary and tenured classes are thus dissimilarly situated. It is partly as a consequence of this critical distinction that tenure confers a preference over the probationary in financially driven reductions in the complement of faculty—and to placement in a suitable position within the institution, if one can be found, as a condition precedent to termination. The intent of tenure is historically grounded, and deeply.

The need for a system of academic tenure was established in the AAUP's 1915 *Declaration of Principles on Academic Freedom and Tenure*; but the *Declaration* made no mention of reductions in force. The academic community first came to grips with the relationship of tenure to financially driven decisions to reduce the complement of faculty in 1925. In that year, the American Council on Education held a conference

⁴ William Van Alstyne, *Tenure: A Summary, Explanation, and "Defense,"* reprinted in MATTHEW FINKIN, *THE CASE FOR TENURE* 3, 4–5 (1996).

⁵ Interim President Kieft testified that the process to achieve tenure at Metropolitan State was "rigorous." Tr. at 111.

of major institutional organizations, including *amicus* AAUP, in part to deal with that question. The result was the 1925 *Conference Statement*, the predecessor to the 1940 *Statement*. It provided in pertinent part:

Termination of permanent or long-term appointments because of financial exigencies should be sought only as a last resort, after every effort has been made to meet the need in other ways and to find for the teacher other employment in the institution. Situations which make drastic retrenchment of this sort necessary should preclude expansions of the staff at other points at the same time, except in extraordinary circumstances.

In the wake of the Great Depression, negotiations commenced between the AAUP and the Association of American College (AAC), the then leading organization of four-year liberal arts institutions. The resulting 1940 *Statement* was intended to strengthen the protection of tenure in a time of financial crisis. It provided that, “Termination of a continuous appointment because of financial exigencies should be demonstrably bona fide.” The requirement of “demonstrable *bona fides*” built upon the 1925 *Conference Statement*’s requirement that such a termination be sought “only as a last resort,” when no less drastic alternatives are available, including the alternative of displacing non-tenured faculty. Section II.C., *infra*.

The reasoning is straightforward and fundamental: In a retrenchment, the tenured, those who have passed a probationary period and have been determined by the

institution to warrant a presumption of continuing professional competence and responsibility, are not to be displaced in favor of those who are on probation and who have not established any such continuing presumption, absent extraordinary circumstances.⁶ Such is the common understanding of tenure that is widely embraced in the academic community: it was made express in the AAC's 1971 *Statement on Financial Exigency and Staff Reduction* (Exhibit 7, page 3) ("Tenured members of the faculty should normally be retained in preference to probationary appointees") and by *amicus* AAUP in its *Recommended Institutional Regulations on Academic Freedom and Tenure*.⁷

The Board agrees that tenure, as the right to *continue* in one's academic position, cannot be abrogated; but, it argues, the abrogation of the contractual preference in *retention* in one's position can be abrogated. That defies the intent of tenure and, indeed, common sense.

Nor is *Johnson v. Colorado State Bd.* to the contrary. In that case, the adoption of a system of post-tenure review was challenged as imposing a new disability on the

⁶ The educational soundness of tenure has been more recently confirmed by empirical study: the increased use of part-time and non-tenure track faculty is associated with higher drop-out rates and lower rates of graduation of students, especially at public institutions. Ronald Ehrenberg & Liang Zhang, *Do Tenure and Tenure-Track Faculty Matter?*, 40 J. HUMAN RESOURCES 647 (2005).

⁷ The Recommended Institutional Regulations are "widely recognized as the definitive compendium of standard practice." Cathy Trower, *What is Current Policy?*, in THE QUESTION OF TENURE 32, 33 (Richard Chait ed., 2002).

tenured faculty. 15 P.3d at 309. This Court disagreed and the Court's conclusion is consistent with the academic community's understanding: "[T]enure does not insulate the professor from any and all form of later evaluation." Matthew Finkin, *The Tenure System*, in *THE ACADEMIC'S HANDBOOK* 136, 146 (A. Leigh DeNeef & Crawford Goodwin eds., 1995). "Properly designed systems of post-tenure review are fully consistent with the tenure system." Ronald Ehrenberg, *Book Review*, 51 *INDUS. & LAB. REL. REV.* 138, 139 (1997). *See, e.g., Post-Tenure Review: An AAUP Response*, in *AAUP Policy Documents & Reports* 50, 51–52 (9th ed. 2001). In *Johnson*, no new disability was imposed because the protection tenure afforded in a dismissal remained unaffected by the new policy: the dismissal of a tenured faculty member still required proof of "unsatisfactory performance over a substantial period of time," 15 P.3d at 313.

Nor does *Brenna v. Southern Colorado State College* support the Board's position. In that case, during a reduction in force, a tenured professor was terminated in preference to a non-tenured member of his department who, the administration claimed, gave the department greater flexibility in teaching the remaining offerings. 589 F.2d at 475. The tenured professor claimed this to be in breach of substantive due process, as "a discharge for arbitrary and capricious reasons." *Id.* He grounded the claim on the preference tenure accorded over the non-tenured, which preference was

contested as a contractual matter. The Tenth Circuit addressed the claim in that posture:

It is not necessary for us to resolve this issue, *which essentially is a matter of simple contract law for state court interpretation*, in order to decide this case. It is enough to note that the interpretation applied by the college's administrative officials in selecting the criteria for deciding which faculty members would be terminated was sufficiently reasonable to put to rest any claim that their decision was arbitrary or capricious.

Id. at 477 (emphasis added).

It is clear from *Brenna* that the right of a tenured professor to a preference over the non-tenured is a matter of contract, not constitutional, law. The contracts with the tenured faculty at Metropolitan State before 2003 expressly conferred that preferential right. The question here, unlike *Brenna*, is whether the Board could abrogate it. This is separate from the constitutionality of the ground later applied to single out a faculty member for termination. Rather, the question here is whether the preference accorded by contract had vested; and such is the plain intention of the provision.

B. Upsetting a Settled Expectation

Under *Ficarra*, the degree to which the change unsettles persons who have relied on the prior rule is a factor in deciding whether or not the rule created a vested right. The conclusion is obvious from the statement and provenance of the contractual

obligation. The award of tenure *means* that there is a commitment not to be displaced in favor of the non-tenured. The very purpose of the preference is to engender reliance. See Section II.C., *infra*.

C. “Whether the Public Interest is Advanced or Retarded”

The most critical of the three factors laid out by the *Ficarra* court is “whether the public interest is advanced or retarded.” 849 P.2d at 16. The Supreme Court of Colorado has had more recent occasion to emphasize this element of retroactive abrogation analysis; the claim of vesting must “be balanced against the public interest and statutory objective.” *In Re Estate of deWitt*, 54 P.3d 849, 857 (Colo. 2002). Thus *Ficarra* and *deWitt* command a balancing test: on the one hand, the public’s interest in support of the prior tenure rules; and, on the other, the public’s interest in the rules supplanting them. Once that is done, it should be patent that the now abrogated rules at Metropolitan State College demonstrably advance the public interest while the supplanting rules are inimical to it.

1. The Public Interest Supporting the Preference Accorded by Tenure

The trial court conscientiously found the policy reasons testified to on plaintiffs’ behalf to be “compelling,” Conclusion of Law No. 11; but, regrettably, the court did

not attend to the next step commanded by this element of the law, *i.e.*, to connect the public interest to the balancing test commanded by *Ficarra* and *Estate of deWitt*.

The 1940 *Statement* provides in pertinent part:

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

The dual academic freedom and economic basis for the tenure system embody important principles of public policy; they make a strong claim for judicial vindication. In the leading decision on point, the president of a liberal arts institution, Bloomfield College, pointing to the balance sheet, terminated thirteen tenured professors and placed the remaining tenured faculty on probationary status. The trial court set those actions aside, in a well reasoned, indeed scholarly opinion. *American Association of University Professors, Bloomfield College Chapter v. Bloomfield College*, 322 A.2d 846 (N.J. Super. 1974), *aff'd*, 346 A.2d 615 (App. Div. 1975). The court emphasized that the concept of tenure is

the product of historical experience and long debate. Its adoption is not merely a reflection of solicitude for the staffs of academic institutions, but of concern for the general welfare by providing for the benefits of uninhibited scholarship and its free dissemination. The security provided

therefore by the consensus of learned authority should not be indifferently regarded. It should be vigilantly protected . . .

332 A.2d at 853–54.

The relationship of tenure to academic freedom was testified to by the plaintiff's expert and need not be rehearsed at length: It is seconded by Ronald Ehrenberg, Irving Ives Professor of Economics at Cornell University and then Vice President of the University for Academic Programs, Planning and Budgeting:

While as an economist I naturally resonate with the economic arguments in support of a tenure system, its more basic goal of protecting academic freedom and allowing scholarship on controversial subjects of inquiry to flourish should not be minimized.

Ronald Ehrenberg, *Book Review, supra*, at 139. So, too, has the United States Court of Appeals for the District of Columbia Circuit emphasized the policy supporting the special need to protect tenure in financial or programmatically-driven reductions. *Browzin v. Catholic University*, 527 F.2d 843 (D.C. Cir. 1975). Depriving the tenured faculty of a preference in retention places the tenured faculty at greater risk of being singled out “based on an administrator’s or a trustee’s distaste for the content of a professor’s teaching or research, or even for positions taken completely outside the campus setting.” *Id.* at 846.

The economic basis of the public’s interest in tenure lies in the need to attract academics of the highest promise. As a recent study of academic tenure in the United Kingdom, Canada, and the U.S. concludes, tenure and the rigor of the tenure policy is “a positive predictor of [academic] department performance and output.” J. Stephen Ferris & Michael McKee, *Matching Candidates with Academic Teams: A Case for Academic Tenure*, 25 INT’L REV. L. & ECON. 290, 309 (2005). Put bluntly: What person of academic promise would wish to invest in the years of study necessary to secure a Ph.D., and yet more years in probationary status—in which he or she has to prove his or her professional excellence and responsibility⁸—only to achieve an award of tenure that, when times get tough, means that he or she is to be thrown back into an undifferentiated pool of non-tenured faculty for administrative consideration of possible retention? This was *not* the promise held out by Metropolitan State to those who had achieved tenure before 2003. Indeed, the college’s obligation was quite to the contrary; and that obligation is supported strongly in public policy.

2. The Lack of a Public Interest Supporting the Abrogation Of These Rules

The record on appeal is devoid of any contemporaneous statement of reasons by the Board of Trustees in support of its action—of any identification by it of how the

⁸ See *supra* note 7.

public interest is served by the abrogation of the preference accorded by tenure in a reduction in force. The only rationale appearing on the record is *post hoc*: in the Interim President’s testimony that the institution would have to “diminish significantly its offerings of courses and programs if it did not have part-time and adjunct faculty,” Tr. at p. 104; his opinion that the current rules are “reasonable,” Tr. at 106; and his statement that he would be “concerned”—without more—should tenure confer an absolute preference in retention. Tr. at p. 112.⁹

This is the entirety of the evidence in support of the public policy interest in the Board’s action. Two observations only need be made. First, a general expression of “concern” by the Interim President, his personal belief in the reasonableness of the new rules, scarcely rise to the level of reasoned explication of the public’s interest. Second, any reduction in the complement of faculty, including the tenured faculty, will necessarily have curricular—and qualitative—consequences. But no evidence has been

⁹ The prior rule—“Reductions shall first occur from the nontenured list in the order of ranking”—did not expressly forbid termination out of that rank order in the truly extraordinary situation where, as in *Brenna*, the result would work a serious distortion of the institution’s offerings. The latter is an accepted exception to the preference accorded by tenure. See AAC 1971 *Statement, supra*; AAUP RIR § 4(c)(3) (“The 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.” AAUP, *Policy Documents & Reports* 24 (9th ed. 2001). *Amicus* AAUP suggests that the regulatory gap in addressing that exception is readily fleshed out by resort to accepted academic usage. Such is the thrust of *Krotkoff supra*.

offered that respect for the preference tenure affords is educationally detrimental.¹⁰ Indeed, the record at Metropolitan State is to the contrary.

Ms. Natalie Lutes testified for the Board. Tr. at 117–129. She was intimately involved with the budgetary and administrative consequences of a thirty percent (30%) roll-back in general operating support from the State over a three year period, in the fiscal years 2001, 2002, and 2003. Though the College undertook to renegotiate several business contracts and made significant administrative and non-instructional reductions, the tenured faculty, as a body, was not reached for retrenchment, though some were asked to consider early retirement.

In other words, in response to a really substantial reduction in financial support, the contractual provisions governing reductions in force were observed; they worked and worked well. No evidence of any actual “distortion of the academic program” resulting from adherence to the prior provisions was offered—or even adverted to.

Currently, the College has 291 tenured and tenure-track positions and 280 part-time faculty “lines,” which require 571 persons to occupy. (Tr. 123, lines 15-23) (The administration was unable to identify how many of these 291 are probationary.) There is no evidence on the record that a contractual preference to a smaller number of these

¹⁰ The empirical evidence is to the contrary. *See supra* note 8.

291 faculty in a total faculty complement of almost 900 has been or will be detrimental to the public interest. On the contrary, such provisions have proven their worth and workability throughout American higher education¹¹ and at Metropolitan State.

3. The Balance

On the one hand, “compelling” reasons of public policy, the trial court’s characterization, have been laid upon the record in support of the antecedent contractual provision. On the other hand, no reason has been offered as to how the public is better served by what supplants it. It cannot be because the antecedent provision has been tested in the crucible of an actual financial crisis and proven educationally detrimental, for the evidence is to the exact opposite. We are left with nothing but the Board’s desire to assume unfettered discretion to pick and choose whom to retain in the event of a reduction in force. That power is inimical to the public policies supporting academic tenure: to protect academic freedom—to insure *against* the exercise of *just* that degree of discretion—and to secure the very best to the profession.

III. The Rights to Placement in Suitable Positions and

¹¹ Professor Matthew Finkin, the faculty plaintiff’s expert witness, testified to the “massive disaster” encountered by the City University of New York when its budget was rolled back by 30%, not over a three-year period, but during the midst of an academic year. Tr. at p. 45. See *City University of New York: Mass Dismissals Under Financial Exigency*, AAUP BULL. 60 (Apr. 1997). No tenured faculty were terminated although approximately 1,000 part-time appointments were terminated. *Id.*

to Preferential Rehire, as Substantive Components of Academic Tenure, are Vested Rights

The Board's abrogation did more than eliminate tenure as a protected class in a reduction in force: it eliminated the contractual obligation to place the affected tenured faculty member in a suitable position, if such were to be available, and, if none were available, to reinstate the displaced faculty member to a position for which he or she is qualified, were one such to become available within a reasonable period of time, set at three years following termination. Whether or not these two contractual obligations are vested must be decided by consideration of the same factors discussed in Section I, *supra*, and applied in Section II, *supra*. Once that is done, it follows that these rights have vested.

First, the "suitable position" rule is deeply grounded historically in the content of tenure: it was an express element of the 1925 *Conference Statement* and has been carried forward in the interpretive gloss on what tenure means in both the AAC's 1971 *Statement* (Exhibit 7) and in subsequent AAUP standards. Section IV, *infra*. By its express terms, it was part of the "*bona fide* intention" of Metropolitan State's rules. Second, the reliance interest—the unsettling of a settled expectation worked by the abrogation—is palpable. Third, the same public interests undergirding the preference tenure accords in a reduction in force apply with equal weight here. As Judge Wright

put it, the “obvious danger” of a termination that is finance-driven in lieu of one predicated on personal misconduct is that it

can become too easy an excuse for dismissing a teacher who is merely unpopular or controversial or misunderstood—a way for the university to rid itself of an unwanted teacher but without according him his important procedural rights. The “suitable position” requirement would stand as a partial check against such abuses. An institution truly motivated only by financial considerations would not hesitate to place the tenured professor in another suitable position if one can be found, even if this means displacing a nontenured instructor.

Browzin v. Catholic University, 527 F.2d at 846 (reference omitted). The preferential rehire right is a prophylactic against such abuse as well as an economic inducement to the profession. *See* Section II, *supra*.

Now to the balance of the public’s interest commanded by *Ficarra* and *Estate of de Witt*: On the one hand, the public interest in support of the suitable position and preferential reinstatement aspects of the tenure commitment is well established. On the other hand, nothing in the record shows how the abrogation of these rules is in the public interest; not even a generalized expression of “concern” over the educational impact of these rules has been elicited in support of the Board’s action. As with the abrogation of preference in retention, Section II, *supra*, the balance of the public’s interest weighs in only one direction.

IV. Because the Procedure Applicable to a Reduction

**in Force is Incapable of Providing Meaningful
Review it Fails to Afford Due Process**

The trial court held it premature to address the constitutional adequacy of the 2003 procedure in cases of reductions in force. *Amicus* AAUP has no expertise in Colorado's law of declaratory judgments. However, *amicus* AAUP has had almost a century's experience with the process due in terminations of academic appointments. Consequently, the following, bringing that experience to bear, will be relevant should this Court find the issue timely.

It is not in dispute that, as the faculty plaintiffs have tenure, process would be due in order to terminate their appointments even in the case of a termination predicated on financial, as opposed to personal, grounds. Nor is it disputed that the resolution of the question of what process is due has to be attuned to the issue to be decided and to the special institutional setting: “[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.” *Cafeteria & Restaurant Workers Local 746 v. McElroy*, 367 U.S. 886, 895 (1961).

The government function in effecting a reduction in force in an institution of higher learning is not only to reduce expenditures, but to do so while preserving the

academic program and insuring that academic freedom and tenure are respected. The threat to the latter posed by pointing to the former has long been recognized. It is well to take note of the remarks of Henry Wriston, President of Brown University and author of the “financial exigency” clause of the 1940 *Statement*, in presenting that document for the Association of American Colleges’ adoption:

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. . . .” It is a reminder that purity 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.*

Bulletin of the Association of American Colleges (March, 1939) (emphasis added) (internal citations omitted). As the previous section has shown, the preference accorded tenure and the “suitable position” and preferential rehiring components of tenure work to assure that a reduction in force is not a subterfuge for an administration to rid itself of an outspoken faculty member or one whom it might wish to dismiss on personal grounds without affording the procedural safeguards essential in those cases.¹²

¹² As the national Commission on Academic Tenure in Higher Education observed, during a period of financial constraint in higher education:

There may be a temptation to use financial exigency as an opportunity to eliminate from the faculty a member who is allegedly incompetent, troublesome, uncooperative, conservative, or radical. Procedures for dealing with financial exigency should be designed for scrupulous avoidance of any taint of suspicion that they are being so used. If incompetence or irresponsibility is in question, proceedings should be undertaken with

Further, the due process questions presented in a financial or programmatically driven faculty reduction differ from those presented in a dismissal on *ad hominem* grounds. *Jimenez v. Almodovar*, 650 F.2d 363, 368 (1st Cir. 1981), *citing Browzin v. Catholic University, supra*. The *Browzin* court opined of the tenure system that it

is designed to eliminate the chilling effect *which the threat of discretionary dismissal casts over academic pursuits*. It is designed to foster our society's interest in the unfettered progress of research and learning by protecting the profession's freedom of inquiry and instruction.

Id. at 846 (reference omitted) (emphasis added). “[R]emovals based on *ad hominem* or *personal grounds* which ‘touch on the qualifications or *performance* of the professor’s duties’” must accordingly be subject to an exacting hearing procedure. *Jimenez v. Almodovar, supra*, at 368 (reference omitted) (emphasis added). However, the issues presented in a financial or programmatically driven termination are not *ad hominem*. A hearing tests “the authenticity of the reasons asserted by the institution for the termination of the faculty member’s position” and the “reasonableness of the standards employed to single out his position for termination.” *Id.* at 369, *citing Browzin v. Catholic University of America, supra*, at 847.

full due-process guarantees under recognized procedures and standards for dismissal or other disciplinary action.

COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE 87 (1973).

Faculty contracts at Metropolitan State before 2003 responsibly addressed these concerns. First, as the trial court found in Finding of Fact No. 10, (folio 41) in the event of a reduction in force a “program priority analysis” was mandated setting out the criteria to be applied and requiring the “direct participation of the academic units” involved, *i.e.*, of the faculty, to rank order programs, program components, and courses for elimination. Second, the order of reductions in faculty driven by the program priority analyses were set out. Finding of Fact No. 11. (folio 42) Third, a review process was given over to a faculty committee that had access to “*all* available pertinent data required for complete investigation.” Finding of Fact No. 12 (emphasis added). Finally, provision was made for a hearing before a hearing officer who was charged with making findings of fact and conclusions in a written report after a hearing largely tracking that provided for in a dismissal for cause. Findings of Fact Nos. 14, 15. (folio 42-43)

All of these were abandoned by the Board in 2003. The new policy abrogated the mandate of any “program priority” analysis. Instead, the President is directed, after giving “consideration” to “tenure, years of service . . . program needs, academic expertise, *performance, teaching record*, and other relevant factors” to pick and choose whom to retain. Finding of Fact No. 16 (emphases added). (folio 49) The

President is directed to give “primary consideration” to the “maintenance of sound and balanced educational program” as a result of which he or she would decide on “*any combination* of terminations . . . which [he or she] *determines* is in the best interest of the College.” *Id.* (emphases added). Provision for faculty participation in or in review of these decisions was eliminated.

Opportunity for a hearing is retained; but, contrary to the prior rule, only “*public documents*” (folio 44 ¶ 7) used in making the decision, not, as previously, “all available pertinent data,” (folio 44 ¶ 8) would be available; the burden is placed on the faculty member and “by clear and convincing evidence” to prove the President’s decision to have been “arbitrary and capricious”; and, if the hearing officer rejects the faculty member’s contentions, he or she is no longer required fully to explain why that is so but is merely required “by a single unelaborated statement” to “notify” the President and the faculty member of that decision. Finding of Fact No. 18. (folio 44)

The most salient defects in these go to the standards governing decisions to terminate appointments, the procedure deployed in applying them, and so the procedure governing an appeal. The third is directly controlled by constitutional strictures of procedural due process; but, it is inextricably intertwined with what precedes.

A. The Want of Due Process in a Decision to Terminate on
ad hominem Grounds

The new rules allow the college administration to take a professor's "performance" and "teaching record" into account in deciding to terminate without affording anything like the safeguards otherwise required to dismiss on personal grounds. It would allow the administration to act opportunistically, when finances are strained, "to eliminate from the faculty a member who is *allegedly* [*i.e.*, whom the President is given discretion to 'determine' to be] incompetent . . . [or] uncooperative" without affording those procedural protections essential to insure the legitimacy of that judgment. *Commission on Academic Tenure in Higher Education*, *supra* note 13, at 87. This is precisely the "obvious danger" of misuse that Judge Wright adverted to earlier in *Browzin v. Catholic University*. 527 F.2d at 846.

The allocation of proof here inverts the presumption of competence and responsibility tenure accords, Section II, *supra*, places the burden on the faculty member to prove matter within the administration's particular knowledge, and casts a pall over the exercise of academic freedom. It fails to afford the process due when personal or professional "performance" is in issue, in contradistinction to the apersonal programmatic and financial considerations authentically applicable to a reduction in force.¹³

¹³ *Amicus* AAUP acknowledges that the prior rules may not have been totally faultless in this regard for, in ordering priorities for termination within the cohorts of the tenured and the probationary "teaching performance" was allowed to play a role. However, the prior rule did *not* provide for consideration of

B. The Want of Due Process in Terminations Based on Apersonal Criteria.

The analysis proceeds by taking up two elements of the new rule—the standards governing how faculty will be singled out for termination and the process provided to apply these standards—before considering the hearing process.

1. The Standards Governing Termination Decisions

The new rule sets out a congerie of considerations that can combine to justify any decision so long as the President determines the discrete termination to be in the “best interests” of the college. As the expert witness testified, the academic community has witnessed how such unchannelled delegations play out, most recently in the termination decisions taken—and later withdrawn—in a reduction in force at San Diego State University (SDSU) in 1992. Tr. at pp. 59–61. The criteria adopted to govern programmatic reductions at SDSU were: “(1) quality, (2) centrality, (3) curricular and community need, (4) diversity, (5) program size, and (6) cost (and resources generation) when all else is equal.”¹⁴ As the AAUP report of the *ad hoc* committee of investigation at SDSU observed:

“performance” at large; and, insofar as the prior hearing procedure replicated the procedure in a dismissal for cause, it corrected the defect by protecting the faculty procedurally in a manner the 2003 rules do not.

¹⁴ *San Diego State University: An Administration’s Response to Financial Stress*, reprinted in MATTHEW FINKIN, *THE CASE FOR TENURE*, *supra*, at 130, 144.

These criteria might have provided an adequate framework for a rigorous, systematic process of programmatic review by the San Diego State faculty. Their all-embracing character, however, allowed the freest play to justify almost any departmental termination decision. That is, unless one could find departments that fall afoul of virtually all of them—small, peripheral, unneeded, or poor quality, cost-ineffective, and composed of senior white male faculty members—any one criterion could be pointed to as justifying a decision, the others to the contrary notwithstanding, even as the same factor is discounted in a determination in another case.¹⁵

At SDSU, however, no such systematic process was undertaken; nor, under Metropolitan State's *new* rule is any such required

2. The Process of Termination

Contrary to the program analysis previously required, the President is now given *carte blanche* in how to apply these standards. Here, too, the academic community's experience illuminates what such a delegation can produce. At SDSU the administration acted

largely on the basis of anecdotal evidence of programmatic quality and as the product of catch-as-catch-can consultation. [T]he [termination] decisions . . . were the product of *ad hoc* bargains between the academic vice president and the deans. As late as the time of our visit, we encountered faculty members vainly striving to find some pattern, some

¹⁵ *Id.* (emphasis added). The reports of *amicus* AAUP's *ad hoc* committees of investigation, of which there are now several hundred (commencing in 1915), are a repository of academic judgment. *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1109 (1965). Judge Wright has quite correctly cautioned that, "Although the AAUP's investigations are noted for their thoroughness and scrupulous care, the reports remain the product of an organization composed of professors alone." *Browzin v. Catholic University*, *supra* note 8, at 848. These reports are plainly appropriate for argument, however, the foundation for which was established in the expert witness' testimony.

rationale to explain these decisions, refusing to acknowledge the obvious—and compelling—explanation that they were in a fundamental sense arbitrary, that is, inherently lacking any rationale or coherent governing principle other than as an *ad hoc* response to budget reduction.¹⁶

This is not necessarily to maintain that the Colorado’s due process clause commands more finely tuned criteria than those set out in 2003, for, as the SDSU report by the AAUP observed, categories of this kind can supply an “adequate framework for a rigorous, systematic process of programmatic review.” In terms of administrative law, an agency can, by later policy and practice, adequately cabin an almost unchanneled grant of discretion. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).¹⁷ Nor is this necessarily to maintain that due process mandates the “systematic process of programmatic review” by the Metropolitan State faculty the rules previously required, *cf. Minnesota Community College Faculty Association v. Knight*, 465 U.S. 271, 288 (1984) (First Amendment does not command a system of academic governance), though such is the generally recognized (and strongly recommended) academic practice. *Commission on Academic Tenure in Higher Education, FACULTY TENURE*, *supra* note 13, at 87 (calling for the faculty to “play a key

¹⁶ *San Diego State University: An Administration’s Response to Financial Stress*, *supra* note 13, at 151–52.

¹⁷ *But see* Bernard Schwartz, ADMINISTRATIVE LAW § 2.17 (3d ed. 1991).

role in decisions about the institution’s response to fiscal crisis”) and AAC, *Statement on Financial Exigency and Staff Reduction* (1971) (Exhibit 7) (on “consultation” and “data and documentation”). But it is to maintain that the absence of such a review process colors the capacity of the hearing procedure to correct administrative arbitrariness: the transparency of the process, emphasized by President Wriston as critical to assure institutional *bona fides*, has been abandoned.

3. The Hearing Procedure

Key to analysis is the interrelationship of the absence of a faculty review process, of the provision for the information available in the hearing procedure, and the burden placed on the potentially aggrieved faculty member.

a. Information

In contrast to the contract before 2003, where “all available” data were to be made available to the faculty committee in review of the retrenchment process and to the terminated faculty member, the 2003 rule requires only that “pertinent financial or other information” be disclosed in the notice of termination and that only the “*public* documents that were used in making the decision” be made available to a complainant thereafter. No reasoned explication of the decision by the President is required.

“Public documents” is left undefined. Arguably, the rule looks to the disclosure of “public records” to which Metropolitan State is subject. Colo. Rev. Stat. § 24-72-202(1.5) (2005 Supp.). But state law insulates the disclosure of documents that are part of a governmental “deliberative process,” subject to a judicial balance were compulsory disclosure sought. Colo. Rev. Stat. § 24-72-205(3)(XIII) (2005 Supp.).

As the SDSU experience of the AAUP indicates, the actual considerations that go into decisions to single out one faculty member over another may not be reflected in public documents—the *ad hoc* bargains with deans and departmental heads, the *ad hominem* considerations. Yet *these* are where the elements of arbitrariness (and worse) are most likely to come into play; they would not be evidenced in the publicly available financial and other institutional information—faculty line allocations, enrollment trends—which data do not, by themselves, drive inexorably to one decision as opposed to another. As a result, the dismissed faculty member has to prove a decision to have been arbitrary where the actual decisionmaking process is shielded from disclosure.

b. The Hearing Process

As a general principle, a complainant bears the burden of persuasion, unless the complainant is asked to establish facts particularly with the knowledge of the other party. *Schaffer v. Weast*, 126 S. Ct. 528 (Nov. 14, 2005). In *Schaffer*, parents, not the

school board, had to show how the board's treatment of their children fell afoul of statutory standards; but, they bore that burden in part because the procedures leading up to the hearing involved them deeply in the decisional process, which outcome they could then challenge. "They are not left to challenge the government without a realistic opportunity to access the necessary evidence. . . ." *Id.* at 536. Just as the decisional process in *Schaffer* fully involved the affected family, the decisional process at Metropolitan State before 2003 fully involved the affected faculty. The decisional process was transparent. The terminated faculty member had a realistic opportunity fully to be apprised of how the decision was actually made. Not so now.

4. Summary

Under the new rule, a terminated tenured professor need only be given notice containing: "a statement of the conditions justifying termination of the faculty member's employment . . . a general description of the procedures followed in making the decision; a disclosure of pertinent financial or other information upon which the decision to terminate was based" and notice of the right to appeal. No explication of the decision is required, nor is there any transparency in the process leading up to the issuance of notice. Even so, the faculty member is required to show, and by clear and convincing evidence, that the decision wanted a rational foundation.

Amicus AAUP submits that the following Presidential notice would comply with the new rule in all respects:

Dear Professor _____:

The College has been required to reduce its expenditures by ____ amount. I have consulted with the relevant officers of administration. Attached are our current and projected budgets, income and enrollment projections, projected staffing needs and long-term mission statement. On the basis of these, and to maintain a sound and balanced educational program, I have determined that it would be in the best interests of the College to terminate your tenured appointment. If you wish to contest this decision, a copy of the hearing procedure is enclosed.

More than a half century ago, Justice Jackson observed that procedural due process “is more elemental and less flexible than substantive due process.” *Shaughnessy v. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting). “Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied.” *Id.* *Amicus* AAUP submits that the provision for a hearing, under this combination of ingredients, would be incapable of assuring fairness and regularity: it is incapable of dispelling “the chilling effect which the threat of discretionary dismissal casts over academic pursuits.” *Browzin v. Catholic University*, 527 F.2d at 846.

Dated this 6th day of January, 2006.

CERTIFICATE

The undersigned hereby certifies that the **OPENING BRIEF OF AMICUS CURIAE** complies with the applicable word limit. The Brief's word count is 8,812.

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