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Current Trends in Faculty Personnel Policies: Appointment, Evaluation and Termination

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CURRENT TRENDS IN FACULTY PERSONNEL POLICIES: APPOINTMENT, EVALUATION AND TERMINATION

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I. INTRODUCTION

As many a university president has learned to his or her dismay, the medical school, which is usually a school of the university, differs in many ways from the other university schools and colleges. In contrast to the traditional school of arts and sciences, the costs of providing a medical education program are staggering.[1] To be successful, the medical school must employ researchers and clinical practitioners as well as teaching faculty.

Consequently, much of the faculty's professional time is devoted to research and patient care, rather than to traditional teaching.[2] Full-time clinical faculty are required to contribute receipts from their patient care services to the school. In turn, this patient care revenue subsidizes the costs of medical education and research.[3] In addition, fulfillment of the medical school's

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1. *See* ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE FINANCING OF MEDICAL SCHOOLS: A REPORT OF THE AAMC TASK FORCE ON MEDICAL SCHOOL FINANCING (1996) [hereinafter AAMC, MEDICAL SCHOOL FINANCING]. This report by the Association of American Medical Colleges ("AAMC") provides a thorough introduction for understanding the factors impacting United States medical schools, including the financial structure of medical schools, sources of revenue, medical education and research costs, and reliance on patient care ("clinical") revenues to supplement research and medical educational expenses.

2. *See id.* at 16 (noting that "[a] full time clinical faculty member . . . may derive 100 percent of compensation from faculty practice plan revenues, yet devote 1.5 days per week to teaching and research").

3. *See id.* at 15-16. The legal structures of such "Faculty Practice Plans" vary. In general, Faculty Practice Plans share the following common elements: the clinical faculty member is an employee of the medical school or of a separately incorporated not-for-profit entity related to and controlled by the medical school; and all patient care revenues are deposited into the Faculty Practice Plan account and are used to pay the expenses of conducting the private practice, including salaries of the clinical faculty members, a "dean's tax," and in some cases, a

educational mission requires a complex set of relationships with hospitals and other health care providers and compliance with complex payment regulations that carry criminal as well as federal and state civil sanctions.[4]

Until relatively recently, medical schools and health care providers enjoyed a golden age of unprecedented growth and surplus funds. Revenues from faculty members practicing medicine in Faculty Practice Plans, and Medicare revenues to teaching hospitals, subsidized the medical school.[5] During this period, universities and medical schools expanded, without significant attention to expansion's consequences. The faculty appointment process, academic titles, and tenure policy for the medical school were in accordance with the universities' general policies.[6]

These policies typically followed the academic rules and standards articulated by the American Association of University Professors ("AAUP") in the 1940 *Statement of Principles on Academic Freedom and Tenure* ("1940 *Statement of Principles*") which solidly linked tenure and titles.[7] For example, a school following the 1940 *Statement of Principles* usually appointed all full-time faculty above the level of instructor as assistant, associate, or full-professor, with unmodified titles; as such, the faculty members were appointed to the tenure track.[8] A modified title, such as "clinical associate professor," indicated a non-tenure track and part-time appointment. This title was viewed as unfitting for a medical school faculty member who spent full-time in the service of the medical school, even if such service was largely spent in the practice of medicine, generating revenues to support him or herself and the

Chairman's tax. *Id*. The dean's tax provides unrestricted supplementary income for support of the teaching and research mission of the medical school. *Id*. at 16.

4. For a discussion of these laws and regulations, see Pamela H. Bucy, *The PATH From Regulator to Hunter: The Exercise of Prosecutorial Discretion in the Investigation of Physicians at Teaching Hospitals*, 44 ST. LOUIS U. L.J. 3 (2000).

5. *See* AAMC, MEDICAL SCHOOL FINANCING, *supra* note 1, at 15. The AAMC's 1994 survey indicated that eighty percent of academic funding was derived from faculty practice plan revenue.

6. For a thorough review of the history and legal significance of tenure in universities and medical schools see Lawrence White, *Academic Tenure: Its Historical and Legal Meanings in the United States and Its Relationship to the Compensation of Medical School Faculty Members*, 44 ST. LOUIS U. L.J. 51 (2000).

7. *See 1940 Statement of Principles on Academic Freedom and Tenure*, *reprinted in* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS & REPORTS 3 (1995) [hereinafter AAUP POLICY DOCUMENTS & REPORTS]. The *1940 Statement of Principles on Academic Freedom and Tenure* is also available online at (visited Jan. 3, 2000) <http://www.igc.apc.org/aaup/1940stat.htm>.

8. The 1940 *Statement of Principles* indicates that an individual with "the rank of full-time instructor or a higher rank" is subject to a probationary period; however, the individual "should have permanent or continuous tenure" after the probationary period expires. *Id*. at 4.

medical school's education and research activities.[9] As a consequence of tenure's "up-or-out" rule, and a desire to promote and retain valuable clinical faculty members, many medical schools awarded tenure to full-time clinicians.

With the advent of managed care and society's unwillingness to continue to pay ever-higher costs for medical care, clinical revenues of many medical schools declined, eventually causing concern about the ability of medical schools to continue to be self-sufficient, and resulting in a reexamination of medical schools' policies and obligations.[10] The 1993 elimination of the mandatory retirement age exemption for universities accelerated this process.[11] Medical schools, and their parent universities, discovered that many schools had failed to define the "economic security" that would be associated with tenure. Would the school or the university be responsible for the entire salary of a clinical faculty member, whose salary was derived largely from patient services revenues, if the faculty member ceased to be active as a clinical practitioner? In the case of a faculty member whose salary had been largely supported by grants from the federal government or industry, would the school or university be obligated for the researcher's entire salary, even if the funding sources dried up? Were there any systems in place to guarantee accountability, for example, performance expectations, linked with compensation?

As a consequence of these inquiries, a number of significant changes have occurred in medical school personnel policies in the past decade, all tending to create greater accountability and to introduce into the academic medical center environment the practices and realities of the business management world.[12] The changes in medical school policies have not been adopted across the universities, however, because faculties in other schools of universities continue to view themselves as different from medical school faculties, and thus exempt from such forces.

9. *See* Robert F. Jones & Jennifer S. Gold, *AAMC Paper-Faculty Appointment and Tenure Policies in Medical Schools: A 1997 Status Report*, 73 ACAD. MED. 211, 216 (1998) (noting that these tracks were sometimes "viewed as having 'second class' status").

10. *Id*. at 212.

11. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 6(b), 100 Stat. 3342, 3344 (1986). On December 31, 1993, this section repealed subsection (a) which temporarily added subsection (d) to 29 U.S.C. § 631. The repealed subsection (d) provided: "Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure . . . at an institution of higher education."

12. *See* Jones & Gold, *supra* note 9, at 212. The article reports the results of a 1997 AAMC survey to which all 125 United States allopathic medical schools responded. This survey is the most recent and comprehensive analysis of current policies and practices in medical school appointment and tenure, and together with articles referenced therein, provides the numerical basis for the discussion that appears in Part II of this article.

II. CURRENT TRENDS IN MEDICAL FACULTY PERSONNEL POLICIES

A. Academic Title and Tenure

It is difficult for the informed individual outside of academe to comprehend the importance of the academic title to a faculty member and the rigidity of the connection between academic title and tenure. In the university setting, the prestige titles such as assistant, associate, and full professor are "unmodified," because they have been nationally recognized as meaning that the individual is either tenured or on a tenure track, and as such, is committed on a full-time basis to the institution. In many universities, promotion from assistant professor to associate professor, or retention of an associate professor, is linked to tenure.[13]

In medical schools, this linkage, coupled with tenure's "up-or-out" rule, meant that medical schools recognizing valuable clinical assistants or associate professors for promotion or retention were forced to grant tenure to these individuals. Otherwise, under the rules of tenure in effect at almost all universities, these clinical assistants or associate professors could not be reappointed to a full-time position after the end of the tenure probationary period.[14] The resulting "Catch-22" was that clinical faculty were not likely to meet the common university tenure requirements of original scholarship and published research in peer-reviewed publications.[15] In the past ten years, three trends have emerged in this area:

- Modification of the link between title and tenure;
- Modification of the link between promotion and tenure; and
- Introduction of new full-time faculty tracks.[16]

Many medical schools' rules currently permit indefinite appointment of a faculty member on a non-tenure track on a full-time basis.[17] In addition, or concurrently, these medical schools have introduced separate and distinct

13. *Id*. at 215.

14. *See, e.g.*, *1940 Statement of Principles on Academic Freedom and Tenure*, *reprinted in* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 7, at 4 (stating that a probationary faculty member must be given notice of a school's negative tenure decision at least one year prior to expiration of the probationary period). *See also 1970 Interpretive Comments*, *reprinted in* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 7, at 7 (stating that if "the [tenure] decision is negative, the appointment for the following year becomes a terminal one").

15. *See* Brent W. Beasley et al., *Promotion Criteria for Clinician-Educators in the United States and Canada*, 278 JAMA 723, 723 (1997) (noting that "emphasis placed on original research . . . has made achieving the rank of associate professor, let alone professor, difficult for clinician-educators.").

16. *See generally* Jones & Gold, *supra* note 9.

17. *See id.* at 215-16.

tracks for full-time clinical faculty whose primary responsibilities are in the areas of patient care, teaching, and research.[18] This medical research track typically creates anxiety within the university community as a whole, since faculty in the traditional science departments of the university do not see much difference between their appointments and those of the basic science faculty at the medical school. Consequently, the university faculty can be expected to view creation of such a track as the prelude to an attack on tenure.

Clinical tracks facilitate the promotion of faculty whose primary responsibilities are in the area of patient care and whose research represents only a minor portion of his or her academic contribution. More than a third of schools having clinical tracks allow faculty to use unmodified titles such as "clinical professor," "clinical educator," "clinical scholar," and "clinical pathway."[19] Schools that require modified titles, frequently use the titles "Clinical Professor" and "Professor of Clinical."[20] However, as noted by a 1997 AAMC report, using the "clinical" prefix "blurs the distinction between full-time clinical track faculty and part-time or volunteer faculty" who have traditionally carried the "clinical" title.[21]

Clinical track appointments are similar because they "de-emphasi[ze] . . . traditional research requirements in promotion decisions."[22] Nonetheless, tenure decisions are usually based upon "scholarship" that is verified, for example, by publications, speeches, and curriculum development.[23] The "prime motivator" behind clinician-educator track development, however, is "to provide for clinical faculty appointments without the financial obligations associated with tenure."[24] Hence, it is not surprising that the vast majority of medical schools having clinical tracks do not offer tenure tracks to such faculty.[25] Faculty in non-tenured clinical tracks typically enjoy all the

18. *Id*. at 216.

19. *Id*.

20. *Id.* at 215-16.

21. *See* Jones & Gold, *supra* note 9, at 215-16. *See generally* Maureen Parris & Edward J. Stemmler, *Development of Clinician-Educator Faculty Track at the University of Pennsylvania*, 59 J. MED. EDUC. 465 (1984) (following the evolution of the clinical faculty track).

22. Robert F. Jones & Susan C. Sanderson, *Tenure Policies in U.S. and Canadian Medical Schools*, 69 ACAD. MED. 772, 773 (1994).

23. Evidence of scholarship from the "medical school perspective" frequently includes: "publications of case reports, book chapters, and reviews; development of learning tools (software, CD-ROM, etc.); curriculum development activities; formal evaluations of teaching performance; speeches and presentations to professional groups; and development of model clinical service programs." Jones & Gold, *supra* note 9, at 216.

24. *Id*.

25. *See* Brent W. Beasley et al., *Promotion Criteria for Clinician-Educators in the United States and Canada*, 278 JAMA 723 (1997) (referencing unpublished 1997 AAMC data indicating that the percentage of schools offering tenure tracks for clinician-educators "is very low").

privileges of tenure-track faculty, except sabbatical leave and, in some cases, voting privileges in the faculty senate; however, the non-tenured clinical track employment relationship is governed by annual and multi-year employment agreements or letters of appointment.[26]

B. Compensation

Compensation issues become paramount as universities and medical schools realign to cope with diminished revenues. The amount of tenure-guaranteed salary and benefits becomes increasingly important, particularly if a school finds that it must reduce the total number of faculty employed at the school.

Typically, there has been no defined university policy for financial guarantees of tenure. At universities, if not at medical schools, faculty assume that their entire current salary is their tenured salary unless there is an explicit university policy or appointment letter to the contrary. Faculty salary support at medical schools may be drawn not only from the Faculty Practice Plan revenues, but also from contracts with affiliated hospitals and research grants that are not guaranteed. The trends in this area have been toward greater accountability and line-of-business financing:

- Defining the financial commitment associated with tenure;
- Linking compensation to productivity and salary source; and
- Initiating and revising periodic evaluation of all faculty, including those with tenure ("Post-tenure review").[27]

In a 1983 survey of American medical schools, forty-one percent of the medical schools responding indicated that "tenure guaranteed no more than a continued appointment at a designated rank—without salary guarantee."[28] Many of the schools reported having "no clear policy" as to the percentage of salary the tenure guaranteed.[29] In a repeat survey in 1994, sixty-nine percent of the responding schools stated that tenure entails a financial guarantee, while seventeen percent considered tenure only as "tenure of title."[30] In the interim between 1993 and 1994, many medical schools undertook defining the financial guarantee associated with tenure. In the 1994 survey only nine responding schools (four of which granted tenure only to basic science faculty) extended the financial guarantee of tenure to a "faculty member's total

However, the surveyors found that "schools are using and finding . . . a number of methods to evaluate [clinician-educators'] contributions and skills." *Id*. at 728.

26. Jones & Gold, *supra* note 9, at 216.

27. *Id*. at 217-19.

28. Jones & Sanderson, *supra* note 22, at 775.

29. *Id.*

30. *Id*. at 774. "Tenure of title" indicates tenure guarantees without financial guarantees. *Id*.

salary/compensation without any indicated exclusion except supplements for administrative duties and the bonus/incentive portions of clinical income."[31] The majority of the schools, however, defined financial guarantee as "the component of salary from university/state funds," or as an otherwise defined "base salary."[32] A number of schools excluded clinical income or research and clinical grant income from the financially guaranteed "tenure salary."[33] A substantial percentage of schools indicated that "the extent of the financial guarantee was not clearly defined."[34]

The experience of the Johns Hopkins School of Medicine ("Hopkins") is illustrative.[35] As late as 1995, Hopkins' handbook of policies and guidelines ("The Gold Book") guaranteed the medical faculty a full base salary by stating "the salary level established for any given year will serve as a salary base for subsequent years of a contract . . . ."[36] A committee comprised of members from clinical and basic science departments (the "Committee") conducted a financial analysis and found, in part, that Hopkins' ongoing salary obligations for faculty with tenure ("contracts to retirement" or "CTR") exceeded $509 million.[37] CTRs were designed when the mandatory retirement age was sixty-five;[38] however, subsequent elimination of mandatory retirement resulted in their indefinite continuation.[39]

The Committee conducted an in-depth review of compensation systems at comparable research-intensive private university schools of medicine, including Columbia University, Duke University, University of Pennsylvania, Stanford, and Yale. All of these schools had adopted a compensation system that included standard base-level salaries, a supplemental market-adjusted component, and a performance incentive segment.[40] After reviewing compensation systems at four additional peer medical schools, the Committee concluded that Hopkins was the only medical school in the nation that still guaranteed a full base salary.[41] As a result, Hopkins implemented a plan tying compensation more directly to performance.[42]

31. *Id*.
32. *Id*.
33. Jones & Sanderson, *supra* note 22, at 774.
34. *Id*. at 775.
35. *See* Elaine Weiss, *Rethinking Faculty Salaries*, HOPKINS MED. NEWS, Spring-Summer 1997, at 31.
36. *Id*. at 33.
37. *Id*.
38. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 6(b), 100 Stat. 3342 (1986) (codified as amended at 29 U.S.C. § 631 (1994)).
39. Weiss, *supra* note 35, at 33.
40. *Id.*
41. *Id.*
42. *Id.* at 31.

Most medical schools now employ a "Base, Supplement and Incentive" ("BSI") salary formula.[43] Under this formula, the base salary is the guaranteed or "tenured" salary upon which fringe benefits are based.[44] The base salary typically is uniform for all faculty at a particular rank and is fixed at the average salary for arts and science faculty in equivalent ranks at the university, or at some percentile of the Association of American Medical Colleges' ("AAMC") annual published average salary for the faculty rank.[45] The supplemental salary generally is a negotiated component reflecting the market value of the faculty member; is typically negotiated on an annual basis, is paid in equal installments over the year, and is contingent upon funds being available from a particular source, such as Faculty Practice Plan revenues.[46]

The incentive or bonus salary is usually paid quarterly, based upon achievement of milestones, either individually or by the department or division, and is contingent upon the availability of funds.[47] A number of medical schools, including the University of North Carolina, have implemented "withhold" systems that retain a percentage of the supplemental compensation until the end of the year and pay the full amount only if the department as a whole has reached its goals.[48] The Hopkins' faculty compensation plan currently allows individual departments to offer financial incentives for "exceptional accomplishments in teaching, research and/or

43. The University HealthSystem Consortium ("UHC"), comprised of academic medical centers associated with universities, has collected exemplary procedures, forms, and assessment tools from member institutions. Among others, the volume includes the salary plan for the University of Colorado School of Medicine, which was fully implemented for all faculty for the 1996-1997 fiscal year, which the author commends as a readable and workable model. *See University of Colorado Health Sciences Center Proposal for a Flexible Salary Structure (Including Implementation Guidelines)*, PHYSICIAN COMPENSATION RESOURCE MANUAL (University HealthSystem Consortium, Oak Brook, Ill.), 1998, at Tool 4-2 [hereinafter UHC PHYSICIAN COMPENSATION RESOURCE MANUAL, Tool 4-2]. For an in-depth introduction to current physician compensation strategies and economic models for financial management capabilities for academic health centers, see *Designing and Implementing New Economic Systems*, 1997 UHC RESEARCH PROJECT (University HealthSystem Consortium, Oak Brook, Ill.), 1997.

44. *See* UHC PHYSICIAN COMPENSATION RESOURCE MANUAL, Tool 4-2, *supra* note 43, at 3-4.

45. *See, e.g.*, *University of North Carolina, Chapel Hill, School of Medicine Clinical Faculty Compensation Plan*, PHYSICIAN COMPENSATION RESOURCE MANUAL (University HealthSystem Consortium, Oak Brook, Ill.), 1998, Tool 3-26, at 3-4 [hereinafter UHC PHYSICIAN COMPENSATION RESOURCE MANUAL, Tool 3-26].

46. *See, e.g.*, UHC PHYSICIAN COMPENSATION RESOURCE MANUAL, Tool 4-2, *supra* note 43, at 4-5; UHC PHYSICIAN COMPENSATION RESOURCE MANUAL, Tool 3-26, *supra* note 45, at 4-5.

47. *See, e.g.*, UHC PHYSICIAN COMPENSATION RESOURCE MANUAL, Tool 4-2, *supra* note 43, at 5; UHC PHYSICIAN COMPENSATION RESOURCE MANUAL, Tool 3-26, *supra* note 45, at 5.

48. UHC PHYSICIAN COMPENSATION RESOURCE MANUAL, Tool 3-26, *supra* note 45, at 5.

patient care" as supplements to the core salary.[49] By incorporating such flexibility into its compensation system, Hopkins seeks to protect itself in the event of economic downturn, and simultaneously encourage and reward faculty members' hard work and accomplishment.[50]

C. Annual and Post-Tenure Review

The fundamental purpose of periodic performance review is to facilitate continued faculty development consistent with the academic needs and goals of the university and consistent with the most effective use of the institutional resources.[51] It provides a way to recognize achievement and good performance of faculty and also serves to identify faculty performance deficiencies and provide such faculty opportunities and incentives to correct the deficiencies.[52] It further provides a quantitative and qualitative foundation and documentation upon which personnel decisions—merit raises, promotions, assignment of administrative duties, institutional academic awards such as sabbaticals, even sequencing for financial-exigency-related terminations—can be based.[53] Apart from the potential for improving performance, the expectation of a post-tenure review has been shown to result in faculty members voluntarily increasing their teaching load, or retiring.[54] A systematic, periodic performance review schedule or a system where evaluation is triggered by the happening of an objective event serves to belie any allegation of age discrimination.[55]

Experience shows, however, that annual reviews for salary increase purposes, particularly for tenured faculty, are often perfunctory, and that it is difficult for a department chair to tell individual faculty members that they are not doing well.[56] The concept of post-tenure review varies from school to

49. *See* Weiss, *supra* note 35, at 32.

50. *Id*. at 34. Not all of the departments at Hopkins, however, opted to include an incentive salary component. For instance, one department believed that such incentives could "destroy a sense of collegiality and team spirit." *Id.*

51. *See* John D. Copeland & John W. Murry, Jr., *Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L. REV. 233 (1996), for a comprehensive and useful discussion of legal issues relating to faculty evaluation, including substantive and procedural due process and categories and criteria for evaluation.

52. *Id*. at 239.

53. *Id.* at 239-40, 244.

54. *See Report: Post-Tenure Review: An AAUP Response*, 84 ACADEME 61, 65 (Sept.–Oct. 1998).

55. *See* Copeland & Murray, *supra* note 51, at 264-68. Basis for terminating tenure include, among others, incompetence, nonperformance, insubordination, or neglect of duty.

56. *See* Denise K. Magner, *More Colleges Conduct Post-Tenure Reviews*, CHRON. HIGHER EDUC., July 21, 1995, at A13.

school.[57] Post-tenure review usually involves the periodic comprehensive evaluation, of a tenured professor's teaching, research and service activities.[58] An AAUP report notes that a post-tenure review differs from regular salary increase review in the "frequency and comprehensiveness of the review, the degree of involvement by faculty peers, the use of self-evaluations and the articulation of performance objectives, the extent of constructive 'feedback,' the application of standards and principles, and the magnitude of potential sanctions."[59] Usually, a committee of colleagues or the department head conducts the review.[60] At other schools, the review may be triggered by objective events, such as three years of below average student evaluations, low ratings on annual merit reviews, or failure to receive research grants.[61]

The concept of post-tenure review has evoked vocal faculty resentment at a number of institutions. For example, the University of Minnesota's Board of Regents proposed a revised tenure code that included post-tenure review and other tenure policy changes that gave rise to an almost successful attempt to unionize the faculty.[62] As a result of the faculty's attempted unionization, a new "compromise" tenure code was established. The new tenure code establishes a system of post-tenure review triggered by problems in a tenured professor's performance.[63] Subsequently, a tenured professor will be evaluated by a committee of peers, who will be able to suggest ways in which the professor can improve. The tenured professor's pay can be reduced, however, if the professor's performance fails to improve after incorporating the committee's suggestions.[64]

Post-tenure review would likely be ineffective unless part of an overall faculty management plan that includes: specific salary and pay-raise or adjustment policies, a defined set of progressive administrative sanctions, a willingness to allocate resources to an improvement plan, and a full spectrum of retirement programs/options (phased or early retirement, retirement

57. *See* University of Texas System, *Summary of Various Post-Tenure Review Policies* (last modified Nov. 14, 1996) <http://www.utsystem.edu/News/exhibitc.htm >.

58. *See* Magner, *supra* note 56. Post-tenure review typically occurs every three to seven years, with some percentage of the faculty being evaluated each year. *See generally* University of Texas System, *Summary of Various Post-Tenure Review Policies*, *supra* note 57.

59. *Report: On Post-Tenure Review*, 83 ACADEME 44 (Sept.-Oct. 1997) [hereinafter AAUP, *Report on Post-Tenure Review*) (prepared by Committee A on Academic Freedom and Tenure, American Association of University Professors).

60. Magner, *supra* note 56.

61. *Id*.

62. *See* Denise K. Magner, *Fierce Battle over Tenure at U. of Minnesota Ends Quietly*, CHRON. HIGHER EDUC., June 20, 1997, at A14. The faculty voted 692 to 666 against formation of a collective bargaining unit. *Id.*

63. *Id*.

64. *Id.*

planning assistance and an attractive "academic afterlife").[65] Not surprisingly, the AAUP is concerned that post-tenure review could erode the security of tenure and has adopted a report outlining post-tenure review "minimum standards."[66] These standards include:

1. A process that does not intrude on an individual faculty member's proper sphere of professional self-direction;
2. Written standards and criteria developed and applied by faculty;
3. Provision of institutional resources to assist faculty development;
4. Opportunity for a faculty member to comment upon evaluations;
5. Recognition that a pattern of successive negative reviews does not equate to cause for dismissal; and
6. That all procedural safeguards and institutional burden of proof must be met before a tenured faculty member could be removed.[67]

III. LEGAL ISSUES IN APPOINTMENT, EVALUATION, AND TERMINATION

In attempting to implement the aforementioned changes in personnel policy, it becomes exceedingly important that medical schools and universities pay attention to principles of contract law, due process for state universities, and published practices and policies for both state and private universities.

A. Appointment

1. Contractual Consequences of the Letter of Offer/Appointment

In the spirit of collegiality that marks the academic culture, search committee and department chairs have been known to overlook contractual requirements for recording specific terms and incorporating institutional policies in letters offering appointment to the faculty. Since courts are likely to construe such letters as contractual, and, if issued by an individual with real or apparent authority, legally binding on the medical school or university, it is important that the medical school make certain that there is a clear process for making offers of appointment to faculty members and that this process is communicated to any individual in a position to make an offer of employment to a faculty member.

Even when a university has a clear process for making appointments, and appropriately states requirements for faculty appointment in the offer letter, it

65. *See generally* AAUP, *Report on Post-Tenure Review*, *supra* note 59.
66. *See id.* at 50-51.
67. *See id.*

is possible for a chair or dean to create an issue of fact as to whether or not subsequent oral representations created a subsequent and enforceable contract.

For example, in *Johns Hopkins University v. Ritter*[68] the plaintiffs, husband and wife pediatric cardiologists (respectively "Dr. Ritter" and "Dr. Snider"), claimed that Hopkins agreed to employ them as full professors with tenure at the Hopkins Medical School, and breached that agreement by discharging them within months after they left their previous positions and began working at Hopkins.[69] At trial, the jury awarded the plaintiffs damages in the amount of $822,844 after finding, among other things, that Hopkins had offered and the plaintiffs had accepted contracts for tenured professorships.[70] The jury found, in part, that correspondence between the plaintiffs and the department director prior to the plaintiffs' accepting their appointments constituted only part of the contract.[71]

The correspondence at issue stated:

> You will be *proposed* for appointment as Professor of Pediatrics and be designated as the Helen Taussig Professor of Pediatric Cardiology. Dr. Snider will also be *proposed* for appointment as Professor of Pediatrics. Appointments at the rank of Professor carries [sic] tenure. *As I mentioned to you during our phone conversation, I cannot promise you the rank of Professor*. That must be decided by the Professors [sic] Appointment and Promotions Committee and approved by the Medical Advisory Board and the Dean. Your annual salary will be $150,000 plus fringe benefits, and the salary for Dr. Snider will be $135,000 plus fringe. These salaries are contingent on your appointments as Professors.[72]

In a subsequent letter, the department director confirmed that the plaintiffs would be "proposed" as Professors "and therefore we will not have a definitive decision until [the Professor's Appointment and Promotions Committee] have reviewed your curricula vitae."[73] The plaintiffs received a copy of the Hopkins faculty policies manual ("The Gold Book") that delineated a five-step process for appointment to the rank of full Professor.[74] This process first required the department director, aided by a departmental or interdepartmental committee, to review the candidates' credentials and make a recommendation to the Dean.[75] The Dean reviewed this recommendation and forwarded his recommendation to the Professorial Promotions Committee that subsequently

68. 689 A.2d 91 (Md. Ct. Spec. App. 1996).
69. *Id.* at 92.
70. *Id.* at 98.
71. *Id*.
72. *Id.* at 95 (emphasis added by the court).
73. *Ritter*, 689 A.2d at 95.
74. *Id.*
75. *Id*.

made a recommendation to the Advisory Board of the Medical Faculty.[76] The Advisory Board of the Medical Faculty would send any favorable recommendation to the Board of Trustees of the University ("Board").[77] The candidates would be appointed upon Board approval.[78]

In October, 1993, the appointment process began and in January, 1994, the plaintiffs began their employment at Hopkins as Visiting Professors of Pediatrics, a title often used for someone awaiting formal approval as Professor.[79] Subsequently, the appointment process proceeded. The Dean forwarded favorable recommendations to the Professorial Promotions Committee that reviewed and recommended Dr. Snider's appointment as a full professor, and a subcommittee of the Professorial Promotions Committee similarly recommended Dr. Ritter's appointment.[80] However, complaints about the plaintiffs' inability to get along with other members of the department abruptly halted the process, and, in October, 1994, the department director notified the plaintiffs that they would not be rehired after the end of the year.[81]

Given the text of the correspondence, the initial appointment of plaintiffs as "Visiting Professors," and the specificity of the faculty handbook sent to plaintiffs in advance of their acceptance of the appointment, one wonders how Hopkins could have lost at trial. This mystery is solved, and the answer must ring true to those familiar with faculty recruitment practices, in the oral representations made by the department director to the plaintiffs. The department director, who also chaired the Professorial Promotions Committee, assured the plaintiffs that "the procedure [was] simply . . . a rubber-stamp and there would be no problem going through the process."[82]

Indeed, the plaintiffs' testimony at trial, as well as that of other professors, was that the recruitment itself implies that one has the credentials to be recruited to the position, particularly if the individual is leaving another tenured appointment, and that it is the custom in academics that the title and appointment be negotiated before the appointment is accepted.[83] Other evidence supporting the plaintiffs' position was found in mortgage verifications given by Hopkins, which stated that the probability of continued employment was "[e]xcellent" and in the department director's advice to Dr. Ritter that he address himself professionally as "Professor."[84]

76. *Id*.
77. *Id.*
78. *Ritter*, 689 A.2d at 95.
79. *Id.* at 94-95.
80. *Id*. at 97.
81. *Id.*
82. *Id*. at 96.
83. *Ritter*, 689 A.2d. at 96.
84. *Id*.

From this evidence, the appellate court held that the jury could properly find, as it did, that, in the recruitment process, the director had promised that Hopkins would employ the plaintiffs as full professors, and that the result of the appointment process was assured.[85] Fortunately for Hopkins, the appellate division also held that the department director did not have the authority to bind the Advisory Board or the Board of Trustees to a waiver of the written appointment process, and accordingly reversed the jury verdict and dismissed the claims.[86]

While there are several cases to the contrary,[87] the *Ritter* court articulated the "prevailing rule:" [W]hen a tenure process is established in writing and is communicated to a prospective appointee, a subordinate official may not circumvent that process and bind the college to a tenure arrangement."[88] It is an open question whether or not the plaintiffs would have had a cause of action for misrepresentation against the department director individually, and if so, whether the institution might have to defend and/or indemnify the individual.

In comparison to other medical schools where appointment letters may begin "I am happy to offer you an appointment as Associate Professor," or "I am delighted to welcome you as a member of our department with the title of Associate Professor," Hopkins conducted its recruitment and appointment with remarkable discipline. The case illustrates the tension between attracting the individual recruited and paying homage to a process that very rarely fails to confirm the appointment.

2. The Importance of Clarity and Specificity

As medical schools implement changes, offer and appointment letters generally have become more specific, and department chairs and directors are increasingly aware of the need to incorporate precise terms into the letter, including: title, track, tenure eligibility or not, compensation, source of funding for compensation, any conditions on compensation, and continued employment and performance expectations.[89] In the article *New Bottles for Vintage Wines:*

85. *Id*. at 99.

86. *Id*. at 100-01. The court suggested that Hopkins "may find it necessary to amend its Gold Book procedures to allow for a 'quick track rubber stamp' procedure" to attract quality faculty. *Id.* at 101.

87. *See, e.g.*, Jones v. University of Cent. Okla., 13 F.3d 361, 365 (10th Cir. 1993) (finding that the plaintiff alleged facts and circumstances "that could potentially give rise to an implied contract" and that "[t]he district court erred in holding that an implied contract [of tenure] cannot exist simultaneously with a written contract [of tenure] without first referring to Oklahoma's [contract law].").

88. *See Ritter*, 689 A.2d at 100-01.

89. *See, e.g.*, The University of Southern California, *Proposed Faculty Contract and Proposed New language for Faculty handbook* (last modified Mar. 16, 1998) <http://www.usc.edu/dept/acsen/con.html>.

The Changing Management of the Medical School Faculty,[90] the authors present examples of two appointment letters, one from 1987 and one from 1997, to illustrate that medical schools generally have come to recognize the contractual nature of the letter of appointment and its role in setting expectations for faculty.[91] While the later letter shares with the earlier letter language designed to attract the faculty member to the school, it also states the specific expectations for teaching, percentage of salary to be covered by grants, and other performance requirements.[92] Indeed, in many cases, the appointment letter will be accompanied by a five-year business plan for funding the faculty member's position.[93] Such a plan describes, for research faculty, a decreasing percentage of salary to be funded by the medical school as grant funding is expected to increase over the period; and, for clinical faculty, the projected revenues and expenses expected to be associated with the clinician's practice.[94]

The precise wording of an appointment letter can be of often-unforeseen significance in case of a dispute. In *Keiser v. State Board of Regents of Higher Education*,[95] the Supreme Court of Montana considered the claim of a Montana State University ("University") tenured professor who, after directorship of a home economics program was no longer open to her, returned to being professor in her department.[96] The University offered her a reduced salary, contending that only the plaintiff's professorial rank, and not her salary, was tenured.[97] The plaintiff's immediately prior letter of appointment stated that she had "continuous tenure" and did not allocate any portion of her salary for the directorship.[98] Noting the absence of a definition of the term "continuous tenure" in plaintiff's appointment letter, the court looked to the AAUP rationale for tenure in the 1940 *Statement of Principles*.[99] The 1940 *Statement of Principles* provides:

90. Paul F. Griner & David Blumenthal, *New Bottles for Vintage Wines: The Changing Management of the Medical School Faculty*, 73 ACAD. MED. 720 (1998).

91. *Id.* at 722.

92. *See id.*

93. *See* Association of American Medical Colleges, *Fact Sheet: Faculty Appointment Business Plan: Joint Expectations, Joint Commitments* (visited Jan. 4, 2000) <http://www.aamc.org/camcam/factshts/no15.htm>.

94. *See id.*; *see also* John A. Kastor et al., *The Salary Responsibility Program For Full-time Faculty Members in an Academic Clinical Department*, 72 ACAD. MED. 23 (1997); *General Framework for Measuring Baseline Faculty Activity, UNC Hospitals*, PHYSICIAN COMPENSATION RESOURCE MANUAL (University HealthSystem Consortium, Oak Brook, Ill.), 1998, at Tool 3-12.

95. 630 P.2d 194 (Mont. 1981).

96. *Id* at 195-96.

97. *Id*. at 199.

98. *Id*. at 196.

99. *Id.* at 199.

> 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.[100]

Based upon the 1940 *Statement of Principles*, the court concluded that tenure included salary as well as rank.[101] The court specifically noted that the University had drawn the appointment contract and could have specified any deviation from continuous tenure of the plaintiff's full salary within the contract.[102]

It is essential that every individual involved in the recruitment process understand that letters of appointment are very likely contractual, and that the university will not always necessarily defend the actions of a department chair who exceeds authority in the offer process. The process for approval to recruit should be clearly articulated.[103] Ideally all recruitment and offer letters should be reviewed by the finance and legal staff as well as by human resources staff prior to issuance.

3. The "Reasonable Compensation" Component

Section 501(c)(3) of the Internal Revenue Code provides that a corporation is exempt from taxation if it is "organized and operated exclusively for . . . charitable, scientific, testing for public safety, literary, or educational purposes, and no part of the net earnings of the corporation inures to the benefit of any private shareholder or individual."[104] Most medical schools, or their universities, are tax-exempt organizations; therefore, offers of employment must comply with federal and state requirements applicable to tax-exempt organizations.[105]

100. *See 1940 Statement of Principles on Academic Freedom and Tenure*, *reprinted in* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 7, at 3 (emphasis added).

101. *See Keiser*, 630 P.2d at 199.

102. *See id.*

103. For an exemplary set of recruitment procedures see *Pennsylvania State University Faculty Recruitment Authorization Sample Forms*, PHYSICIAN COMPENSATION RESOURCE MANUAL (University HealthSystem Consortium, Oak Brook, Ill.), 1998, at Tool 4-4.

104. 26 U.S.C. § 501(c)(3) (1994).

105. All institutions, whether tax-exempt or for-profit, must also consider federal and state laws prohibiting payments for patient referrals, *see* 42 U.S.C. § 1320a-7b(b) (1994 & Supp. III 1997) (the "anti-kickback" statute), and prohibiting physician referrals of designated health care services to an entity with which the physician has a "financial relationship." *See* 42 U.S.C. § 1395nn (1994 & Supp. III 1997) (the "Stark Laws"). Although beyond the scope of this article, these are complicated laws that contain exceptions and safe harbors for certain business arrangements that, although technically violating the laws, are viewed as beneficial to business and less likely to increase unnecessary referrals of government reimbursed health care programs.

The basis for an organization's tax-exempt status is that it is organized and operated exclusively for exempt purposes and not for the benefit of an individual's or an entity's private interests.[106] If the Internal Revenue Service ("IRS") determines that an individual or entity is benefiting financially from a tax-exempt organization activities, the IRS may revoke the organization's tax-exempt status and/or impose "intermediate sanctions" upon certain involved individuals who have unduly benefited from activity.[107] Section 4958 of the Internal Revenue Code imposes a two-tiered excise tax on "excess benefit transactions" between 501(c)(3) organizations and "disqualified persons" with respect to such organizations.[108] An "excess benefit transaction" is defined as:

> [A]ny transaction in which an economic benefit is provided by an applicable tax-exempt organization directly or indirectly to or for the use of any disqualified person if the value of the economic benefit provided exceeds the value of the consideration (including the performance of services) received for providing such benefit.[109]

Although the intermediate sanctions are aimed primarily at compensation agreements, they also apply to other kinds of transactions in which a disqualified person receives payment based on the revenues from one or more of the organization's activities ("revenue-sharing transactions").[110]

In proposed regulations, the IRS has extended the definition of a "disqualified person" to include, among others, any person (or family member of a person) who is in "in a position to exercise substantial influence over the affairs of the organization" including voting, managerial, or budget authority.[111] "Facts and circumstances" indicative of those having substantial influence include substantial contributors to the organization or any individual whose compensation is based on revenues derived from activities of the organization that the individual controls (e.g., the director of a Faculty Practice Plan or departmental Faculty Practice Plans).[112]

These safe harbors are contingent upon strict adherence to listed criterion. *See, e.g.*, 42 U.S.C. § 1395nn(h)(2)(the "bona fide employment relationships" safe harbor); 42 U.S.C. § 1395nn(h)(3) (the "personal service arrangements" safe harbor). Thus, each case requires careful factual analysis and reinforces the need for specifying the expected services and corresponding compensation for any physician appointment.

106. *See* Gen Couns. Mem. 39,862 (Dec. 2, 1991), *reprinted in* BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 561 (3d ed. 1997).

107. 26 U.S.C. § 4958 (1994); Failure by Certain Charitable Organizations to Meet Certain Qualification Requirements: Taxes on Excess Benefit Transactions, 63 Fed. Reg. 41,486, 41,488 (to be codified at 26 C.F.R. pt. 53) (proposed Aug. 4, 1998).

108. 26 U.S.C. § 4958 (a)-(b).

109. 26 U.S.C. § 4958 (c)(1)(A). More simply, an excess benefit transaction arises when a "disqualified person" receives more than reasonable fair market value for his or her services.

110. 63 Fed. Reg. at 41,492.

111. 26 U.S.C. § 4958(f)(1).

112. 63 Fed. Reg. 41,490.

The disqualified person who receives an excess benefit is subject to a two-tiered tax on the excess benefit transaction. The first tier tax is equal to twenty-five percent (25%) of the excess benefit the disqualified person receives.[113] If the disqualified person does not pay the first-tier tax excess before the IRS issues a notice of deficiency for or assesses the first-tier tax, the disqualified person must pay the second-tier tax equal to two hundred percent (200%) of the excess benefit that he or she receives.[114]

A separate tax is imposed on any "organization manager" involved in an excess benefit transaction knowingly, willfully, or without reasonable cause.[115] An organization manager is defined as "any officer, director, or trustee" or someone having similar authority within the organization.[116] An organization manager involved in an excess benefit transaction must pay a tax equal to ten percent (10%) of the excess benefit, up to $10,000 per transaction.[117] If more than one organization manager participates in the excess benefit transaction, then each such manager is jointly and severally liable for the tax owed.[118]

The proposed regulations to Section 4958 presume that a compensation arrangement between a tax-exempt organization and a disqualified person is based upon fair market value if three conditions are met:

> 1. [T]he compensation arrangement . . . [is] approved by the organization's governing body or a [designated] committee . . . composed entirely of individuals who do not have a conflict of interest with respect to the arrangement or transaction;
>
> 2. [T]he governing body, or committee thereof, obtained and relied upon appropriate data as to comparability prior to making its determination; and
>
> 3. [T]he governing body or committee adequately documented the basis for its determination concurrently with making the determination.[119]

Accordingly, the institution's trustees or directors must conduct an appropriate and detailed review of all compensation agreements, aided by documentation that supports the market reasonableness of a proposed salary.[120] In the case of physicians, this might include evidence of a bona fide competing salary offer, surveys by compensation experts, or the AAMC salary studies.[121]

113. 26 U.S.C. § 4958(a)(1).
114. 26 U.S.C. § 4958(b).
115. 26 U.S.C. § 4958(a)(2).
116. 26 U.S.C. § 4958(f)(2).
117. 63 Fed. Reg. 41,487.
118. 26 U.S.C. § 4958(a)(2), (d).
119. 63 Fed. Reg. 41,492.
120. *Id.* at 41,493.
121. *See, e.g.*, 63 Fed. Reg. 41,504-05 ("Example 2").

The financial penalties that can be imposed on those who approve unreasonably high compensation for individuals in a position to influence the affairs of the organization, as well as on the disqualified person him or herself, have made it imperative that there be an appropriate review of salaries offered to such individuals. Additionally, a salary statement in any offer of appointment or reappointment should take cognizance of the compensation review process and incorporate appropriate qualifications into the offer of any particular salary.[122]

4. Reserving the Right to Make Future Changes

A university's bylaws, governance requirements, and faculty contracts as interpreted from relevant documents govern the university's right, or not, to make changes to faculty compensation. Institutional documents should expressly allow the institution to make compensation and benefit changes. An example of useful language is:

> The tenured faculty member's compensation is subject to adjustments regarding salary, benefits and the conditions of employment.[123]

Where the university has retained the right, through its written policies, to make changes to compensation and tenure policies, the courts will uphold reductions in compensation, even of tenured faculty members.[124]

In *Williams v. Texas Tech University Health Sciences Center*,[125] the Fifth Circuit upheld an annual $20,000 reduction of a tenured professor's salary, finding that he had no contractual right to demand augmentation of his salary from a special fund.[126] Further, the court found that the professor had not established a property right in his entire salary,[127] although noting that "[a]n expectation of employment carries with it some protected expectations as to a salary . . . [which i]n *some* situations can encompass an employee's entire salary."[128] The court held that a tenured faculty member's contract is subject to tenure regulations permitting annual adjustments regarding salary, rank, and

122. There are also IRS prohibitions, articulated through court decisions and IRS Revenue Rulings, that define physician recruitment practices that will be deemed in violation of the private inurement prohibition for 501(c)(3) organizations. *See, e.g.*, Rev. Rul. 97-21, 1997-1 C.B. 121.

123. *See, e.g.*, Williams v. Texas Tech Univ. Health Sciences Ctr., 6 F.3d 290, 294 (5th Cir. 1993).

124. *See generally* Gerald Bodner, *Does Tenure Protect the Salaries of Medical School Faculty?*, 72 ACAD. MED. 966 (1997). Mr. Bodner concludes that it is not clear "that tenure was . . . intended to protect full salaries" of medical school faculties, and "that in appropriate circumstances, reductions in salaries of tenured faculty are legally achievable." *Id*. at 970-71.

125. 6 F.3d 290 (5th Cir. 1993), *cert. denied*, 510 U.S. 1194 (1994).

126. *Id.* at 293.

127. *Id*. at 294.

128. *Id*. at 293 (emphasis added).

conditions of employment.[129] The court also observed that the university's tenure regulations allowed augmentation of a faculty member's contract to "be determined annually based on the recommendations of various administrators and approval of the president."[130]

Under principles of contract law, when one party acquires vested rights under a contract, the terms of the contract may only be modified through mutual consent and consideration.[131] Accordingly, one party may not unilaterally deprive another of his or her contractual rights.[132] Employment contracts that expressly incorporate university policies and regulations may create vested contract rights in the employee.[133] In *Zuelsdorf v. University of Alaska*,[134] non-tenured assistant professors claimed entitlement to an additional year of employment when the University of Alaska amended its policy on notice of nonretention, thereby giving less deference than was previously required under the original policy.[135] The Supreme Court of Alaska held that plaintiffs' rights to a continued year of employment had vested as of the original policy's deadline date.[136] The court noted, however, that the University of Alaska could amend its policies and regulations, which had not vested or accrued under the contract during the contract term.[137]

When an employment contract does not contain specific guarantees or policies concerning compensation or benefits, however, a university has greater latitude to make institutional and individual changes. In *Gertler v. Goodgold*,[138] a New York University School of Medicine tenured faculty member alleged that he had been deprived of contractual rights of his tenure, including laboratory research space, assistance in submitting research grants, and fair teaching assignments.[139] The court held that the university had never expressly obligated itself to provide the services that the faculty member claimed that he was entitled to receive; therefore, the university retained authority to make its own academic judgment and to allocate its resources without judicial intervention.[140]

129. *Id.* at 294.
130. *Williams*, 6 F.3d at 294.
131. *See* Zuelsdorf v. University of Alaska, 794 P.2d 932, 935 (Alaska 1990).
132. *See id*.
133. *See id*.
134. 794 P.2d 932, 935 (Alaska 1990).
135. *Id*. at 933.
136. *Id*. at 935.
137. *See id.*
138. 487 N.Y.S.2d 565 (N.Y. App. Div. 1985), *aff'd*, 66 N.Y.2d 946 (N.Y. 1985).
139. *Id.* at 567.
140. *Id*. at 568-69.

B. Evaluation

Courts have generally accorded significant deference to the decisions of universities and medical schools in academic matters.[141] This deference extends in many cases to decisions with respect to evaluation and termination of faculty, unless there has been a violation of due process in the case of a public university or, in the case of a private university, a failure to accord process promised in the institution's policies or in an individual's contract. Additionally, adverse decisions made on the basis of race, sex, religion, disability status protected by federal, state, or local law may also be subject to judicial review.

Tenured faculty members have a vested property right and, in the case of a public university, must be accorded both procedural and substantive due process before the vested property right may be negatively impacted.[142] Substantive due process requires that actions affecting such rights be supported by "just cause." Courts have consistently upheld the right of universities and medical schools to determine performance and apply standards for personnel decisions, as well as the right to modify and heighten their standards for promotion and tenure, even as to faculty members who began their employment under lesser standards.[143]

Under general principles of good personnel management, employees are evaluated for job performance on a regular basis by supervisors. Typically, this includes review of performance in the context of established objectives, the results of which are communicated in a personal meeting with the person being reviewed, during which objectives for the upcoming period are set; the results of the evaluation are recorded in a personnel file. Traditionally, this model has not been embraced by the academic community for faculty members, although it is likely to be in effect for the rest of the university's staff.

141. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) (academic decisions require deference and are only overturned if they are "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment"). *See generally Gertler*, 487 N.Y.S.2d at 565.

142. *See* Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972) (holding that the Fourteenth Amendment does not require a university hold a hearing prior to nonrenewal of a nontenured teacher's contract without proof that the teacher had a property or liberty interest in continued employment absent a formal contract or tenure); Perry v. Sindermann, 408 U.S. 593, 599-600 (1972) (finding that a teacher was entitled to a hearing to prove that he had a legitimate claim to job tenure because a college had a "de facto" tenure policy arising from official rules and regulations).

143. *See, e.g.*, *Williams*, 6 F.3d at 294; Lewandoski v. Vermont State Colleges, 457 A.2d 1384 (Vt. 1996) (refusing to interfere with a college president's "interpretations [that] were careful and considered . . . and not arbitrary").

The trend toward accountability for medical school faculty requires that evaluations be carefully made and considered, since evaluation will be the basis not only for promotion, retention and termination determinations, but also for salary adjustment.[144] The authors of *Getting Tossed from Ivory Tower: The Legal Implications of Evaluating Faculty Performance*[145] describe in detail the elements of a faculty performance system designed not only to withstand judicial scrutiny, but also to assist in making intelligent personnel decisions.[146] Essential elements include: clearly stated evaluation purposes; written criteria and standards for evaluation, based upon expectations that have been communicated to the faculty member; training for competent evaluators; documentation of the basis for any decisions that are made; preparation of a report that contains a summary of the faculty member's strengths, weaknesses, and suggestions for advancement or correction; and a meeting between the chair or director and the faculty member, who should receive a copy of the report, acknowledge it with his or her signature, and have an opportunity to provide a written response for his or her file in the event there is any disagreement with the report.[147]

The bylaws or faculty handbooks of many universities and medical schools provide for an opportunity for faculty members to appeal or "grieve" adverse decisions; in such cases, the procedural steps provided in the bylaws or handbook must be followed.[148] While individual post-tenure review procedures will vary, they tend generally to follow the a pattern similar to the University of Alabama-Birmingham's working draft:

> 1. The faculty as a group in each department or division will develop specific statements of faculty expectations by rank for tenured faculty in their units. All tenure-track faculty are . . . [eligible] to participate in this process. These . . . departmental expectations[] are reviewed by the relevant academic dean to ensure that departmental expectations remain consistent with the written guidelines in the

144. Legal issues related to implementation of compensation plans that may have the effect of reducing salary to tenured faculty, as well as issues specifically related to termination of tenured faculty, are intentionally omitted from this article, which was prepared as a companion presentation to Lawrence White's *Academic Tenure: Its Historical and Legal Meanings in the United States and Its Relationship to the Compensation of Medical School Faculty Members*, 44 ST. LOUIS U. L.J. 51 (2000) which includes as well an analysis of the most recent legal decisions in these areas.

145. Copeland & Murry, *supra* note 51.

146. *Id*. at 318-27.

147. *Id*. at 319-23.

148. *See, e.g*., Holm v. Ithaca College, 669 N.Y.S.2d 483, 485 (N.Y. Sup. Ct. 1998) (holding that authorized faculty handbook provisions were binding on the college and the faculty); McConnell v. Howard Univ., 818 F.2d 58 (D.C. Cir. 1987) (holding the faculty handbook defines the rights and obligations of an employee and employer and must be followed).

[Faculty Handbook and general duties, responsibilities, and minimum qualifications for the faculty classification.]

2. Faculty members file with the department office an annual curriculum vitae, resume, or other "academic profile" appropriate to their field of endeavor, including information on teaching, research, and service or other professional activities.

3. Excluding probationers and those granted promotion or tenure within the past three years, the department chair notifies faculty to be reviewed each academic year and solicits from them any additional material they care to submit concerning their scholarly and instructional activities beyond what exists on file in the department office.

4. The department chair then reviews the faculty member's performance vis-à-vis . . . the departmental expectations. This process is the responsibility of the chair alone and is not to be delegated to a departmental committee.

5. When the departmental chair concludes that a faculty member has met the reasonable expectations . . . the chair so informs the faculty member and the dean, and the review is complete.

6. Should the chair find specific deficiencies in teaching, research, or service, the chair is to work with the faculty members to develop a mutually agreeable faculty development plan to address the deficiencies. If extra-departmental resources are needed to fund the plan, the approval, and agreement of the dean are sought. To assist in the development of achievable and appropriate faculty development plans, the faculty member may call on the services of the Departmental Promotion and Tenure committee for concrete help and mentoring.

7. When no agreement can be reached between the department chair and the faculty member on the content, funding, or timetable of the plan, the dean is informed and will attempt to mediate and finalize a plan acceptable to all three parties.

8. Where there is no agreement about whether deficiencies exist in a faculty member's professional activities, the question may be referred by the Dean to the appropriate school wide faculty evaluation review committee for a recommendation. Should the committee find that the faculty member is not meeting departmental expectations, the individual must develop an acceptable professional development plan or face administrative sanctions. On the other hand, if the committee

> determines that the faculty member has met departmental expectations, then the review is deemed completed.[149]

In disputes with faculty members, universities and medical schools should not hesitate to provide internal hearings to aggrieved faculty members. These proceedings assist in promoting a culture of disciplined decision-making; they afford the institution an opportunity to remedy mistakes or ill-advised decisions, when appropriate; and they provide valuable discovery and framing of issues, in cases that can be expected to be litigated.

C. Terminations

In the case of a non-medical school faculty member, the word "termination" tends to mean simply the end of employment at the institution.[150] In the case of medical school faculty, however, it is important to focus on exactly which relationship is to be terminated. Under the bylaws of many hospitals in academic medical centers, a faculty appointment at the associated medical school is a prerequisite for medical staff privileges at the hospital. Termination of the faculty appointment then effectively results in termination of hospital privileges.

Conversely, it may happen that a tenured faculty member's hospital privileges are terminated by the hospital for clinical reasons; in such cases, unless the medical school successfully brings a proceeding to revoke tenure, the faculty member remains on the medical school faculty. A worse result occurs in the case of medical schools that have permitted "tenure of title," i.e., the faculty member has been accorded life-time tenure as "Professor of _____, at _____ Medical School," and after accepting paid employment at a competing hospital, continues to carry the academic medical center's medical school's title to his new employment.

1. Process

The policies and practices of individual institutions dictate the process (in the case of a public institution) or the due process (in the case of a private institution) required in the event of termination of a faculty member having a vested property right. Terminations based upon clinical performance may be subject to additional due process requirements and may require reporting such terminations to a state or federal agency. The federal Health Care Quality

149. *See University of Alabama-Post-Tenure Review Process, copy of working draft from 1995*, PHYSICIAN COMPENSATION RESOURCE MANUAL (University HealthSystem Consortium, Oak Brook, Ill.), 1998, at Tool 3-17. (based on a working draft for procedures at the University of Alabama-Birmingham, which in turn is modeled after the procedures in place at the University of Hawaii, one of the first medical schools to implement a post-tenure review process).

150. *See* BLACK'S LAW DICTIONARY 1471 (6th ed. 1991).

Improvement Act ("HCQIA"),[151] for example, requires reporting of termination and other actions taken against physicians for reasons relating to competence in rendering clinical care.[152] The HCQIA grants immunity to individuals and institutions from claims by the terminated individual, provided that the institution has complied with requirements of due process enunciated in the HCQIA and has acted in good faith.[153]

The due process standard regarding termination of faculty members does not require courtroom style adversary proceedings. Rather, as noted by a Wisconsin federal court, due process only requires that the faculty member be provided with:

- [A] reasonably adequate written statement of the basis for the initial decision to [terminate];
- [A] reasonably accurate description of the manner in which the initial decision had been arrived at . . . [including] disclosure . . . of the information and data upon which the decision-makers had relied; and
- [A meaningful] opportunity to respond.[154]

As stated by the court in *Texas Faculty Ass'n v. University of Texas at Dallas*,[155] "[a] procedure ensuring that (1) an instructor was not terminated for constitutionally impermissible reasons, (2) the administration's actions were taken in good faith, and (3) objective criteria were employed and fairly applied in determining whom, from *among the faculty at large*, to terminate, is all that the Fourteenth Amendment requires."[156] However, a school or university must be careful to comply with its own policies, practices, or individual contracts that are more protective of, or that prescribe more specific procedures for faculty members. A school or university's failure to comply with its own policies and practices can provide a basis for a faculty member's claim of breach of contract.[157]

2. Effect on Hospital Privileges

As previously noted, a faculty appointment at a university's associated medical school usually linked to medical staff privileges at the hospital.

151. 42 U.S.C.A. §§ 11101-11152 (1995).

152. 42 U.S.C.A. § 11133.

153. 42 U.S.C.A. § 11111.

154. *See* Johnson v. Board of Regents, 377 F. Supp. 227, 240 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

155. 946 F.2d 379 (5th Cir. 1991) (holding that a public university must afford tenured faculty members who were terminated when their academic programs were eliminated a "meaningful" opportunity to be heard).

156. *Id*. at 387.

157. *See supra* note 148 and accompanying text.

Accordingly, termination of a medical school faculty member can be more complicated than termination of a faculty member at a non-medical institution.

For example, in *Ostrow v. State University of New York at Stony Brook*,[158] a faculty member held an appointment at a medical school on a non-salaried, voluntary basis, at the university president's discretion, and also held an appointment to the medical staff at the medical school's associated hospital.[159] The hospital's bylaws contained provisions for review and appeal of any non-reappointment to the medical staff, as well as stating: "termination of faculty appointment shall also result in non-reappointment [to the hospital's medical staff]."[160] In May 1990, the university told the faculty member that it was terminating his appointment due to "unsatisfactory" teaching and inadequate fulfillment of department obligations.[161] Due to the hospital's bylaws, the faculty member's hospital staff membership was also terminated; however, because the faculty member was not being terminated pursuant to an "adverse recommendation" by the hospital's medical board, the faculty member was not entitled to a hearing under the hospital's bylaws.[162]

Pursuant to applicable New York law, a hospital may only terminate a medical staff appointment for reasons of clinical competence, qualifications, or other reasons related to the hospital "objectives;" any termination must state the reasons for the termination and accord the medical staff member opportunity for a hearing.[163] In *Ostrow*, however, the faculty member initiated a proceeding, claiming that the hospital's termination had been "arbitrary and capricious" and demanded a hearing.[164] The lower court remitted the matter to the hospital's medical board to conduct a hearing and review procedure in accordance with the hospital's bylaws.[165]

The hospital's medical board upheld its original determination on the ground that termination of the faculty member's hospital staff appointment was based solely upon the termination of his faculty appointment, which was not in dispute.[166] The lower court ordered the hospital to conduct a new hearing, addressing the merits of the termination as argued by the faculty member.[167] On appeal, the court held that lower court's order was improper, and further held that the hospital's requiring its medical staff members to also have a faculty appointment was related to the hospital's objectives: "[T]o wit, as a

158. 609 N.Y.S.2d 83 (N.Y. App. Div. 1994).
159. *Id*. at 84.
160. *Id*.
161. *Id*.
162. *Id*.
163. *See* N.Y. PUB. HEALTH LAW § 2801(b) (McKinney 1993).
164. *Ostrow*, 609 N.Y.S.2d at 84.
165. *Id*.
166. *Id*.
167. *Id*. at 84-85.

teaching institution, the Hospital sought to staff itself with faculty members whose academic performance was, at the very least, satisfactory."[168]

On the other hand, when a faculty member resigns from a hospital or where his or her hospital privileges are terminated, the faculty member's faculty appointment at the medical school will not necessarily be terminated, unless the university or medical school had the foresight to provide (either contractually or in the faculty handbook) that termination or resignation of hospital privileges would automatically terminate or be cause for termination of the faculty appointment. In the case of a tenured faculty member, the medical school may be left with no alternative but to bring an action to terminate the tenure of the individual.

This is particularly true in the case of an unsalaried tenured faculty member who has tenure of title. If the university's procedures require that a university faculty committee, rather than a medical school committee, act upon tenure revocation, it may be difficult to convince a non-medical school faculty committee that loss of hospital privileges is a cause for termination of tenure. In such a case, the medical school may face, with no recourse, the unwelcome prospect of the individual who carries a tenured title using it to the advantage of a competing hospital.

It is helpful to clarify which functions a faculty member provides on behalf of the medical school and which are provided by the faculty member in his or her hospital medical staff capacity. The faculty member may have an administrative appointment, paid or unpaid, which it the only appointment to be terminated. In *Hanna v. Board of Trustees of New York University Hospital*,[169] Dr. Hanna commenced an action for a mandatory injunction to restore his title of Chief of the Division of Pediatric Urology and operating room time at the hospital.[170] He claimed that his professional privileges had been improperly withdrawn, because the hospital failed to state the reasons for termination him and failed to afford him an appropriate review process.[171] New York University successfully defended the action at the appellate level on the grounds that the title had been given to Dr. Hanna in connection with his supervision of the medical school's residency training program in pediatric urology, a function which he had ceased to perform, and on the grounds that withdrawal of a block of operating room time (which had been accorded

168. *Id*. at 85. *See also* Schwartz v. Society of the N.Y. Hosp., 605 N.Y.S.2d. 72, 74 (N.Y. App. Div. 1993) (upholding the necessity of remaining on the faculty as *sine qua non* for maintaining hospital staff privileges).

169. 633 N.Y.S.2d 738 (N.Y. App. Div. 1995), *rev'd*, 663 N.Y.S.2d 180 (N.Y. App. Div. 1997) (mem.).

170. *Hanna*, 633 N.Y.S.2d at 739.

171. *Id.*

uniquely to Dr. Hanna by the prior urology department chairman) did not constitute diminishment of a professional privilege.[172]

Delineation of the entity for whom services are rendered also has relevance in connection with various reporting responsibilities of hospitals and medical centers. While termination of a faculty member for incompetence in teaching or irregularity in conducting grand rounds is not a reportable event under HCQIA, termination for incompetence in clinical care would be reportable.[173]

3. Tenure Buy-Outs and Retirement Programs

An academic medical center must confront four principal areas of legal concern when it elects to negotiate the involuntary termination of a tenured faculty appointment:[174]

1. Pension law issues;[175]
2. Tax issues;[176]
3. Potential age discrimination issues;[177] and
4. Contract issues, in view of the fact that the involuntary termination of a tenured appointment is so problematic.

Benefits, particularly pension benefits, are of primary significance. Because of the peculiar nature of the defined-contribution retirement plans in which most university faculty members are enrolled, faculty members who surrender compensated tenured appointments are doubly disadvantaged: their accumulations are reduced and their actuarial longevity following retirement is greater. The result is drastically reduced annuities. Retirement-plan contributions and other benefit-related concerns are often particularly

172. *Hanna*, 663 N.Y.S.2d at 181 (appellate decision).

173. *See, e.g.*, 42 U.S.C.A. § 11133(a)(1)(B) (requiring a health care entity to report if it "accepts the surrender of a [physician's] clinical privileges" while the physician is "under investigation . . . relating to possible incompetence or improper professional conduct").

174. For an excellent analysis and summary of these issues, see Randolph M. Goodman, Encouraging Departures Without Violating the ADEA: A Practical Discussion of Incentives to Leave Academic Employment Early, Address at the Annual Conference of the National Association of College and University Attorneys (June 16-19, 1996) (copies available for a small charge from the National Association of College and University Attorneys at (202) 833-8390).

175. 29 U.S.C. §§ 1002, 1169 (1994 & Supp. III 1997). The Employee Retirement Income Security Act of 1974 ("ERISA") can be found at 29 U.S.C. §§ 1001–1461 (1994 & Supp. III 1997).

176. *See, e.g.*, the nondiscrimination requirements of 26 U.S.C. §§ 401(a)(4) and 403(b)(12) (1994 & Supp. III 1997); the prohibition against accruals under 26 U.S.C. § 411(b)(1)(H) (1994); and the potentially adverse tax consequences associated with deferred compensation under 26 U.S.C. § 457 (1994 & Supp. III 1997).

177. *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994 & Supp. III 1997); Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990).

contentious negotiating issues. Furthermore, the Employee Retirement Income Security Act of 1974 ("ERISA") provides additional bases for legal action by a faculty member who is involuntarily terminated or whose salary is reduced.[178]

The magnitude of these concerns can vary greatly among categories of faculty. Clinicians with substantial incomes from independent private practice are in a markedly different position from tenured basic science faculty who often have relied upon their salaries as sole support. Of course, some such faculty may have significant royalty incomes from publications or patents.

4. Voluntary Retirement Incentive Plans

Voluntary early retirement incentive plans do not violate the Age Discrimination in Employment Act's ("ADEA") prohibition against age discrimination "in compensation, terms, conditions, or privileges of employment," provided that the plans are otherwise consistent with the ADEA's purposes of "promot[ing] employment of [qualified] older persons" and preventing "arbitrary age discrimination in employment."[179] A recent amendment to the ADEA adds a "safe harbor" for institutions of higher education that offer age based reductions or eliminations of supplemental benefits to tenured faculty members who have elected to retire.[180] This safe harbor, however, is subject to three conditions:

i. The institution must not implement any age-based reduction or cessation of benefits other than these supplemental benefits;

ii. These supplemental, age-based benefits must be in addition to any retirement or severance benefits that have been available to tenured faculty members generally, independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

iii. Any tenured faculty member who attains the minimum age and satisfies all non-age based conditions for receiving such a supplemental benefit has an opportunity for at least 180 days to elect to retire and receive the maximum supplemental benefit that could then be elected by a younger but otherwise similarly situated

178. *See, e.g.*, Tavolini v. Mount Sinai Med. Ctr., 26 F. Supp. 678 (S.D.N.Y. 1998), *aff'd*, 1999 WL 972656 (2d Cir. 1999) (dismissing the claims of a tenured medical school faculty member who alleged that a salary reduction to the minimum level allowed by the faculty handbook for his rank constituted breach of contract, constructive discharge, and violation of ERISA).

179. 144 CONG. REC. H9081 (daily ed. Sept. 26, 1998).

180. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 941, 112 Stat. 1581, 1834-35. (to be codified as amended at 29 U.S.C. § 623(m)); 144 CONG. REC. H9081 (daily ed. Sept. 26, 1998).

> employee, and must have the ability to delay retirement for at least 180 days after making that election.[181]

This safe harbor is available to plans offering benefits only to employees having unlimited tenure (contractually or otherwise); however, the safe harbor also applies to a tenured employee who is no longer tenured when benefits are actually provided, so long as he or she was tenured when the retirement incentive was offered.[182]

The legislative history of the Higher Education Amendments of 1998 provides the following examples of acceptable plans:

> i. [A] college or university plan . . . [could] offer[] to tenured faculty members who voluntarily retire between ages 65 and 70 a monthly bridge benefit, payable until age 70, equal to 50 percent of their final monthly salary, with the expectation that the faculty members would wait until age 70 to commence their regular retirement benefits. The bridge benefit could be made available between other ages, such as 60 and 65, or 62 and 69, could involve a different or varying percentage of pay, and could be subject to other conditions, such as a minimum service requirement for eligibility, or limitation of the plan to one or more schools, departments, or other classifications of tenured faculty.[183]
>
> ii. [A] plan could . . . provide lump sum retirement incentives that are reduced based upon age at retirement and eliminated at a specified upper age (e.g., 65 or 70).[184]
>
> iii. [A plan could offer] a voluntary phased, planned or similar retirement program for eligible tenured faculty members under which the retirement incentive takes the form of subsidized pay or benefits for part-time work or decreased duties, and the amount of the subsidy or duration of the part-time work or decreased duties, or both, is reduced or eliminated based upon age in each case, the age-based benefits provided would be in addition to, and not in lieu of, any retirement or severance benefits available within the preceding 365 days to tenured faculty members generally (other than benefits under a prior early retirement or exit-incentive plan).[185]

The legislative history notes that in each example, a faculty member who could not receive the maximum benefit under the applicable formula due to age restrictions, would be given a minimum six month period to elect retirement and receive the maximum benefit allowed under the various

181. *See id.*
182. *See* 144 CONG. REC. H9082 (daily ed. Sept. 26, 1998).
183. *Id.*
184. *Id.*
185. *Id.*

examples, and, after electing retirement, would have an additional six months for retirement planning.[186] For example:

> [I]f the plan offered decreasing lump sum benefits to all tenured faculty members retiring between ages 65 and 70, inclusive, with fifteen or more years of service, all tenured faculty members with 15 or more years of service who were older than age 65 when the plan was first implemented would have a 180-day period in which they could elect to retire and receive the highest lump sum benefit (the benefit that would otherwise be available only to 65-year-old retirees). A similar 180-day opportunity would be offered to tenured faculty members who completed 15 years of service at an age higher than 65, they could elect the highest benefit then available to a younger (but otherwise similarly situated) faculty member.[187]

While this new legislation must be considered by over-staffed and/or financially stressed institutions, early reactions to it are not overly optimistic. The necessity that the program be offered across-the-board and the 180-day window requirement window make the plans potentially very expensive and rob the institution of the desired selectivity as to targeted faculty. In other words, some feel that the most productive and marketable faculty will take the package and move elsewhere while the less productive may simply choose to insist on their tenure rights.

IV. FINAL COMMENTS

After decades of steady growth for medical schools, the trustees and administrators of these institutions appear to be taking lessons from non-academic mature industries, adopting programs for increased accountability, reengineering, line-of-business accounting, and even consolidation. While many individuals regard these changes as necessary and long overdue, it is important to bear in mind that schools and universities are different from other businesses. In contrast to other industries, the university is its faculty. Medical schools that have successfully adopted and implemented personnel policy changes, such as the University of Colorado and the University of Vermont, have done so through the involvement of their faculties in the process of change—and through the preservation of the level of benefits prior to the change for current faculty.[188]

In academic institutions, not only is the tradition of collegiality and autonomy deeply rooted, but also the bylaws of many schools and institutions specifically provide for faculty concurrence in changes that may be proposed by the administration. As managers of universities with medical schools have

186. *Id.*

187. 144 CONG. REC. H9082 (daily ed. Sept. 26, 1998)

188. *See* Billy Goodman, *Fiscal Constraints Threaten Tenure at Medical Schools* (visited Jan. 3, 2000) <http://www.the-scientist.library.upenn.edu/yr1998/may/goodman_p1_980511.html>.

re-discovered in recent years, it is not necessarily easy or possible to exercise all the legal authority for change that may reside in the institution's managers.