Negotiating Our Position in Hard Times

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Faculty members face a dual challenge when confronting the Great Recession. The Obama administration, seeing the benefits of higher education, wishes to stimulate increased access and success in college. Yet states, facing budget shortfalls and unwilling to increase revenues, are cutting higher education appropriations. The result: demand increases as supply declines.

State-level retrenchment, in turn, allows administrators a freer hand to restructure, citing severe budgetary challenges. Many universities have capped enrollments and turned away qualified students. The California State University (CSU) system was among the earliest to announce enrollment caps, but 12 states—including California, Florida, Illinois, New York, and Texas, the five largest—have now limited enrollments at their flagships. Seven states have capped enrollments in public regional systems, including four of the five largest: California, Florida, Illinois, and New York.

Restructuring results in program elimination and faculty cutbacks. Institutions and systems are non-renewing large numbers of contingent faculty, and are laying off or furloughing staff, tenure track, and tenured faculty. They seek greater flexibility to achieve these layoffs by reducing employee due process rights. Good contract language is therefore critical to protect faculty and staff rights.

This essay focuses on events in California, Ohio, and Texas. California officials used the financial crisis to implement an extreme restructuring plan. We discuss measures taken by the California Faculty Association (CFA), a joint NEA and AAUP affiliate, to minimize faculty furloughs, nonrenewals, and planned program reductions.

The Ohio Board of Regents had increased resources available to public higher education. But restructuring efforts at several public colleges and universities resulted in faculty furloughs and salary freezes. It is a significant membership state for both associations.

The absence of faculty collective bargaining units in Texas allowed administrators a freer hand to implement a major layoff of faculty at the University of Texas Medical Branch at Galveston. The layoffs occurred despite the extraordinary wealth of the University of Texas (UT) system. In opposing these layoffs, the Texas Faculty Association (TFA), the higher education affiliate of the NEA, and the AAUP pushed for stronger due process language in the university's faculty handbook. This essay examines handbook language in several non-bargaining Texas systems.

We look at distinctive faculty and union responses to common problems: program reorganization, retrenchment, and cuts; faculty layoffs, non-renewals, and furloughs, and salary freezes and reductions. We also offer strategies drawn from units throughout the nation for negotiating in hard times.

CALIFORNIA

A confluence of political structures rendered California's finances disastrous. Passing a new tax or approving a budget requires a legislative super majority. Initiative, referendum, and recall provisions in the state constitution allow the public to restrict taxes while increasing mandates.

The fiscal crisis affects all of California public higher education. The University of California (UC) system increased tuition and fees by over 30 percent while furloughing staff and tenure track faculty. UC also restricted the timing of furloughs, counter to an agreement with the faculty senate. These actions triggered large demonstrations on the first day of classes last fall. Faculty denunciations of the enrollment caps and the layoffs continued all year.

Tuition at CSU also rose by 30 percent. Here, too, the system furloughed faculty and staff, nonrenewed hundreds of contingent faculty, and eliminated programs. Enrollment caps severely limited access for first generation students. CSU turned away 10,000 qualified students in 2009–10, and will turn away an estimated 40,000 more over the next two years. California's community colleges experienced similar stress as demand increased beyond capacity.

Retrenchment-related contract provisions are limited at UC and CSU. The UC lecturer contract, for example, only contains a "meet and discuss" provision; it neither defines conditions for layoff nor provides for appeals or recall. The university "will mail notice" of the date of layoff and the identities of laid off members to the union "as soon as practicable." Department chairs may meet with laid off faculty members, but the university agrees to meet with union representatives "if the department chair or unit head chooses not to consult."

The more detailed CSU contract permits layoffs for "lack of work, lack of funds, or programmatic change." The employer makes the determinations based on "student enrollment data and projections, available funds, and scheduled curricular and programmatic changes." Excluding faculty members from these determinations leaves an open door for management. The contract provides the union with the right to relevant information, and calls for managers to *consider* alternative savings measures.

Contingent faculty members at California's community colleges have few contract protections. The College of the Desert adjunct faculty contract states:

> In all cases, assignments shall be considered tentative and may be subject to change depending upon enrollment, assignment modifications of a fulltime faculty member's load, or other extra-ordinary circumstances (such as financial exigency; emergency situations; reduction in force; inappropriate behavior; or applicable Education Code sections) which render the assignment invalid.

Administrations use non-renewal tactics even when contractual protections exist, but other contract clauses can impede managerial efforts to restructure, reduce, and retrench. CFA, for example, files individual grievances when reorganization affects faculty workload.

On the offensive, CFA recommended new revenue streams to assure stable funding for public higher education. It proposed a 9.9 percent severance fee on oil and natural gas extracted from California land and waters, similar to taxes in Alaska and Texas.[1] CFA lobbies to require transparency in university finances, and organizes creative job actions, including an "e-march" demanding a change in CSU's direction. The UC lecturers' union, working with students and senate faculty, has organized job actions. Shaping public perceptions and the policy agenda via public actions goes hand in hand with gaining an upper hand in public sector negotiations.

OHIO

The Ohio economy is in horrible shape, particularly when measured by unemployment. But the chancellor of the state Board of Regents, a former state legislator, convinced his former colleagues to increase support for public higher education. Despite this commitment to educate over 230,000 additional Ohio students, many of the state's colleges and universities are reducing programs and are seeking salary givebacks from faculty.

Most management rights clauses give administrators considerable flexibility. The Terra Community College and Edison Community College (ECC) contracts retain for the colleges "the responsibility and authority to manage and direct its operations and activities in such manner as the administration shall determine." The colleges can "direct, supervise, evaluate and hire employees," and "suspend, discipline, demote or discharge for just cause or lay-off for lack of work, transfer, assign, schedule or promote employees." The ECC contract provides an escape from tenure: "Any obligation assumed under tenure is conditioned upon adequacy of revenue and support through legislative action."

An "underutilization of staff, program retrenchment, or financial exigency" can trigger a retrenchment or "reduction in force" (RIF). The need for a retrenchment is "determined by the College" in many community college contracts. Some Ohio Education Association contracts require advance written notification to the association when a RIF is contemplated.[2] For example:

> Once the determination that a reduction in full-time faculty is necessary has been made by the College, written notification of this determination (which shall include a written description and rationale for the proposed reductions) shall be forwarded by the College administration to the Division Dean or immediate supervisor of the affected units or programs and to the Association. (Columbus State Community College)

But most retrenchment provisions neither detail the decision-making process nor provide for faculty involvement. Instead, they list the procedures to follow once a decision is made.

Some contracts define financial exigency as "an imminent financial crisis which threatens the viable operation of the institution" Southern State Community College, Ohio (SSCC), or where the "revenues are so limited that the College believes it can no longer continue to fulfill current and/or future financial obligation under the contract without disrupting the administration and program integrity of the College" (ECC).

The Wright State University contract defines exigency as "severe financial problems…which threaten the University's ability to maintain its operations at an acceptable level of quality."[3] When the university considers an exigency declaration, the contract calls for union receipt of relevant information. A joint committee on retrenchment considers defined issues, including order of layoff and recall rights. The University of Cincinnati contract defines exigency "as an imminent financial crisis which threatens the institution as a whole." Program discontinuance, "shall be based entirely on the consideration that the long-range educational mission of the University as a whole will be enhanced by the discontinuation." Cyclical or temporary variations in enrollment are insufficient cause; nor are "possible financial advantages which might accrue should the discontinuation occur."[4]

Several contracts provide for a faculty response before plans are finalized. The SSCC contract provides for a joint program review committee appointed by the administration and the Faculty Senate.[5] The Cleveland State University contract ensures faculty involvement:

> 17.1 Should the President reasonably anticipate the existence of an imminent financial crisis (exigency) of such severity that it threatens the survival of the institution as a whole and cannot be alleviated without terminating the appointments of faculty members, or determine that financial justification exists for the discontinuance of a program or department of instruction necessitating the termination of regularly appointed faculty members, all data and information upon which this decision is based, including the anticipated savings, shall be provided to the CSU-AAUP.

The president of Cincinnati State Technical and Community College (CSTCC) must give 60 days notice of pending layoffs resulting from financial exigency to the senate and the union. The senate and union "may offer their advice, recommendations, and alternatives" to the president, who "shall consider those and forward them along with his or her own to the Board of Trustees." Informed faculty participation requires access to detailed financial information to determine the authenticity of a financial exigency.

Some contracts provide for a joint management-faculty committee that reviews the rationale for a financial exigency declaration. The Joint Review Committee at Shawnee State University has equal union and management representation. Upon receiving objections, with reasons, to the president's preliminary report on financial exigency,

> the President will convene a Joint Review Committee consisting of the appropriate Dean or other representative designated by the Provost, two (2) individuals selected by the President, and three (3) individuals selected by the Association. The committee shall elect a chair who shall be responsible for convening and presiding over committee meetings.[6]

Grievance rights are important. In spring 2009, the ECC president sent out "friendly" notices—letters of intent to layoff individual faculty, and notified some departments that their programs were on the bubble. But he did not submit a report justifying financial exigency, a contractual requirement. The academic senate voted "no confidence" in the president, and the faculty union grieved the notices saying the administration failed to follow the contract when intending to engage in a RIF.[7] It also grieved non-renewal cases appearing to retaliate for union activity. The administration abandoned the RIFs.[8]

In Ohio, as in California, negotiating hard times means influencing public opinion to strengthen the faculty position at the bargaining table. University of Toledo faculty members fought furloughs by publishing "Pigs at the Public Trough," a table analyzing senior academic administrator salaries, bonuses, and raises.[9] The board pulled furloughs off the bargaining table when a newspaper carried the story, embarrassing the administration. Public image and public pressure matter.

TEXAS

In states where legalities and politics preclude collective bargaining agreements, faculty and staff look to handbook language established through the governance procedures. In Texas, one such state, faculty and academic programs are at risk even in the wealthier public systems, such as UT.[10] In 2006, the TFA averted massive salary cuts at the University of Texas Medical Branch at Galveston (UTMB). TFA helped faculty members to file grievances asking for salary restoration, initiated Public Information Act queries about the cuts, started a blog on UTMB developments, and contacted local legislators.[11]

But in 2008–09 the university, citing the depth of the current recession, laid off 127 tenure track faculty members and 41 tenured faculty members.[12] The faculty handbook neither required a demonstrably bona fide exigency before implementing the layoffs, nor provided for faculty involvement in determining exigency. Layoff provisions did not apply to the institution as a whole. The limited role reserved for faculty members in deliberations about cuts began *after* the determination of exigency when the president appointed an ad hoc administrator-faculty committee.

Even more troubling, tenure was only a determining factor in order of layoff when the faculty members at risk were "equally qualified." Tenured faculty members are considered released for cause when cut before other faculty. Their discharge should have therefore triggered a range of due process procedures. But the handbook neither specified the criteria for dismissal, nor defined the period of notice.[13] The president—not a standing faculty committee—appointed a committee to hear appeals. The hearings were closed and the *appellant* had to demonstrate that the layoff action was "arbitrary and unreasonable." The president decided the outcome.

The UT system handbook gives the president total discretion; it does not require faculty involvement in decisions on academic program elimination or the resulting layoffs. The language for layoffs refers to "elimination for academic reasons," meaning "abandonment of an academic program" or "elimination of an academic position" for "bona fide academic reasons." But these situations "should be reviewed in depth through *a procedure determined by the president*."[14]

The Texas State College system handbook mentions, but does not define financial exigency. It neither requires demonstrable bona fides, nor attaches exigency to the entire institution. It contains no reference to faculty committee involvement. It only mentions the opportunity for individual faculty members to respond in a hearing of undefined procedure.

Tenure governs order of layoff, unless the administration "deems" a difference in merit or in need for continuing a program.[15] Faculty members have opportunities for appointment in a related area, and have rehire rights if the college reestablishes their positions within three years. The expansive conditions justifying layoff of tenured and tenure track faculty include "Reductions in legislative appropriations for faculty salaries,…significant loss of enrollment, consolidation of departments or other reorganization, dropping of courses or programs for educational or financial reasons."[16]

The Texas A & M faculty handbook defines financial exigency as "pressing need to reorder the nature and magnitude of financial obligations in such a way as to restore or preserve the financial stability of any system academic institution."[17] Thus, "A bona fide financial exigency may exist without the entire system academic institution being affected." The handbook permits a declaration of financial exigency to preserve current income and expenses without depleting capital—far short of maintaining the financial health of the entire institution.[18] It also permits a declaration based on "substantially declining enrollments, substantial revenue cutbacks, and substantial ongoing operating budget deficits."[19]

The handbook notes a need for "early, careful, and meaningful sharing of information and views with appropriate faculty representatives on the reasons…."[20] That statement suggests a faculty senate role, though the role is undefined. The handbook also refers to a need to "seek recommendations from faculty representatives on alternatives." But it fails to list ways to elicit these recommendations.

The handbook lists some recall rights, and accords faculty members an opportunity to respond in a hearing before an appropriate faculty committee. Most important, "In this hearing the burden of proof rests with the system academic institution to demonstrate by some credible evidence that a bona fide financial exigency exists…."[21] But considerations other than exigency can justify layoffs. The academic conditions are restricted to program discontinuance rather than reorganization. Other rationales include decreased program enrollment, "need to shift substantial resources to other programs, or a substantial modification or redirection of a unit's mission."[22]

Leadership from a key faculty member, working with senior administrators and faculty senators, improved existing language in the University of Houston system handbook. The handbook defines financial exigency in detail, as a bona fide: "actual or impending financial crisis that threatens the survival of the university in its current structure…." "The financial problems," it adds, "must threaten the existence of the entire university, and not just a part thereof."[23] The board must declare exigency in an open session in which it considers the recommendations of the faculty senate and the president.[24] It must meet openly to consider the plan.[25]

Faculty members have considerable involvement. Before the declaration, the university must provide "written supporting documentation, including detailed financial data," and the faculty senate can provide its own recommendation.[26] Groups that disagree can go directly to the president. The handbook lists ways to avoid termination of faculty, including "reduction or postponement of non-academic expenses" and "sale of assets and other means to increase revenue."[27] After a declaration of exigency, "Proposals to terminate or significantly alter academic programs shall be submitted for consideration to the existing academic review committees by the Chancellor/President."[28]

Tenure has priority in the order of layoff "except in extraordinary circumstances where a serious distortion in an academic program would otherwise result."[29] "Care must be taken," the handbook adds, "to consider the employment of groups entitled to affirmative action."[30] It specifies services provided to laid off faculty, including job placement, group insurance, tuition-free access to courses, and recall rights within three years. A faculty committee hears appeals. "The burden of proof in dismissal proceedings rests with the university."[31] An 18-month notice to tenured faculty prior to termination resulting from "discontinuance of academic programs," is a disincentive to such an action.[32]

The University of Houston handbook language suggests opportunities for faculty members to shape their terms of employment at institutions without collective bargaining.

A NATIONAL PERSPECTIVE

This section identifies desirable contract provisions covering financial exigency and program elimination elsewhere in the nation. It identifies articles calling for faculty involvement in decision-making, order of layoff, appeals, recall and reemployment, and grievance for tenured, tenure-track, and contingent faculty and for graduate student employees.

A side letter to the 2006 to 2010 Southern Illinois University, Carbondale faculty contract states, "No faculty member shall be laid off for financial exigency during the 2006–2007, 2007–2008, 2008–2009, and 2009–2010 fiscal years."[33] Short of such guarantees, financial exigency should apply to the entire institution, not to particular units. "If financial exigency is asserted as the basis for a layoff, the financial exigency must be demonstrated to be University-wide" (Eastern Illinois University).

The contract for Eastern Michigan University (EMU) specifies alternatives to faculty layoffs, and provides for academic input into decision making surrounding retrenchment:

> VIII.A.1. Prior to a final decision by EMU to curtail, merge, reorganize, or eliminate a department or program for reasons other than financial exigency, EMU shall seek the recommendations of the Faculty regarding the need for, and plan for, effecting such curtailment, merger, reorganization or elimination….

Management at the Connecticut State University system must inform the union *before* the trustees when it believes a bona fide financial exigency may result in involuntary separation of tenured or tenure track faculty. Management must meet the union within five days to document the potential exigency and suggest courses of action. The union has two weeks to suggest alternatives. Absent an agreement with management, the union may appear before the board's designated subcommittee, and the entire board upon the subcommittee's recommendation. In case of possible involuntary separation, the president must seek the advice of the curriculum committee on "how the problem can be solved with minimal disruption of the educational programs of the institution."

The contract also requires the president to consult with affected faculty and departments about alternatives, prior to involuntary separation. These alternatives include "early retirement; prorated reduced load; retraining; reassignment; special sabbatical or other leave." It specifies that financial and enrollment considerations should not trigger program reorganization and elimination. It also ensures faculty involvement in planning academic programs:

> 5.18 … Both parties to this Agreement recognize that the role and importance of a department/area of study to balanced academic offerings is not accurately and properly evaluated on the sole basis of number of students studying courses in the department/area.

Most contracts that specify notice and order of layoff prioritize tenure status and type of employment—from tenured, to tenure track, to non-tenure track full-time, to non-tenure track less than full-time.[34] Equally important, but usually absent, are provisions that specify notice about layoffs, furloughs, and salary reductions for contingent faculty and employees without annual contracts, continuing contracts, or tenure.

Notice should include options for other current or future employment, including transfers, bumping employees with lower seniority and rank, recall, and retraining.[35] The Ferris State University (Michigan) contract provides for retraining sabbaticals:

> 8.8 Retraining Sabbatical. A tenured member notified of layoff or laid off is eligible for a retraining sabbatical. (S)he may prepare a proposal which describes the intended education or work-related program and submit it to the VPAA [Vice President for Academic Administration]. If the VPAA believes the proposal has merit, it shall be granted.

Many contracts detail recall rights. The Lansing Community College (Michigan) contract calls for three academic years of recall eligibility:

> E. 2. A faculty member may resume his/her continuing contract appointment upon recall. For purposes of determining salary and seniority, the faculty member shall receive the same credit for years of service held on the date of layoff, and shall receive at least the same salary he/she received at the time of layoff plus any increases that would have been received.

The Oakland University (Michigan) contract distinguishes recall from employment of laid-off full-time faculty in part-time or visiting positions.

Contracts seldom apply grievance rights to layoff and recall judgments, even when they provide for an appeal.

> 11.9 Appeals (a) The requirements of this article are subject to the grievance procedure only by the Faculty Forum Executive Committee and not by individual bargaining unit members. (b) The need for a reduction in force, the disciplines that would face reductions or elimination and the determination of qualifications for placement in positions outside a seated discipline are at the sole discretion of the College and the Board of Directors and not subject to the grievance procedure. (Central Oregon Community College)

Oakland University faculty members may grieve aspects of the recall process, but they cannot grieve the university's failure to follow a unit's advice in recalling a faculty member.

Few contracts include layoff protections for contingent faculty and graduate student employees. Wayne State's contract provides reassignment alternatives for graduate student employees:

> B. Class Cancellation and Procedures for Reassignment. In the event that an assigned class has been cancelled due to inadequate course enrollment and all other appointment possibilities in the department have been exhausted, first priority will be given to finding the graduate employee another instructional assignment appropriate to the employee's experience and expertise. If such an assignment is unavailable, the employee will be offered non-instructional duties. If these non-instructional duties are unacceptable for whatever reason, the employee may, at his or her choice, forego the appointment. Employees who elect to forego an appointment to non-instructional duties shall be provided two weeks pay in lieu of the appointment.[36]

Two recently negotiated contracts preserve the positions of furloughed faculty. The University of Connecticut contract freezes salaries in one year and provides for seven furlough days over several years in return for no loss of employment during the life of the contract. A Memorandum of Agreement (MOA) at Rutgers defers salary equivalent to savings from furloughs until the next calendar year. The MOA disallows furloughs in the subsequent fiscal year. It calls for a University Committee on Budget and Finance, with union and administration representatives, "to increase transparency and accountability with regard to the university budget and finances."

CONCLUSION

Too few contracts offer sufficient due process protections for faculty from furloughs or retrenchment, especially for colleagues in contingent positions. Just as few contracts involve faculty in decision-making. Faculty must be involved in defining financial exigency, and in deciding on program reorganization and reduction. Vague fluctuations in demand and arbitrary managerial determinations of new strategic directions do not justify program reductions. Contracts should specify due process in notice, order of layoff, appeals, recall, and reemployment. They should allow for grieving managerial actions and should ensure these actions are subject to binding arbitration.

Faculty members must have full access to financial and other relevant information to participate meaningfully in exigency and program reduction decision-making. Successful negotiations in hard times require timely, relevant, and meaningful data.

In turn, successful negotiations means educating bargaining unit members, policymakers, and the public about current challenges and their context. In 2009, the United Faculty of Florida staved off a substantial cut to the state's higher education budget by mounting a petition campaign to the state legislature.[37]

Faculty leaders should oppose the current managerial focus on limiting and cutting academic salaries, programs, and positions. Administrative positions, salaries, and expenditures grew disproportionately for three decades while the proportion of educational expenditures in the total institutional budget decreased. As a result, tenure track faculty positions flatlined, and low-paid, unprotected contingent positions increased. Faculty salaries account for a minority share of the institutional budget, even the academic affairs portion. We must give higher priority to the educational side of institutions—in positions, people, and programs.

Academic managers often ignore the procedures governing their institutions. Public statements on the immediacy of a financial crisis, on the need for faculty to sacrifice, and on the need for greater managerial flexibility often accompany a bypass of procedures. Faculty and staff must assure that managers follow contractual requirements, even if limited.

Responding to a declaration of exigency requires a two-pronged approach. First use every power the contract gives faculty and staff—especially grievance procedures. Second, develop a public relations campaign detailing the implications of faculty cutbacks for the education of students. Colleges and universities often cannot meet normal demands, much less the increased demands resulting from recession-induced student enrollments. We need an even larger increase in resources to meet President Obama's graduation and retention goals.

Bargaining units and faculty groups in nonbargaining institutions should strengthen handbook and contract language, and educate members and the public about the realities of higher education. They must uphold academic priorities and possibilities to fulfill higher education's promise.

NOTES

1 Wayne, 2009.

2 The contracts for Lakeland Community College, Columbus State Community College, Edison Community College, Shawnee State University, and Youngstown State University include this provision.

3 Section 17.2.

4 Articles 28.1 and 29.2.

5 The Cincinnati State Technical and Community College contract includes a similar provision.

6 The Cleveland State University contract calls for an advisory administration-union financial exigency committee, with each party having three appointments. The administration and the union jointly appoint the appeals committee at ECC, Shawnee State University, the University of Cincinnati, and Youngstown State University (YSU). Management has one more vote than the union at ECC and at YSU. "Decisions on the disposition of the recommendations shall rest with the President" at ECC.

7 "Academic Senate, ECC, to Dr. Kenneth A. Yowell."

8 Moltz, 2009a and b.

9 "University of Toledo Faculty Union...."

10 "TFA Protest Causes UTMB to Back Away from Draconian Cuts in the Salaries of Tenured Professors," http://www.tfaonline.net/news_utmbsalaries.shtml.

11 TFA used the Texas Public Information Act to learn that UTMB had planned to award $3 million in bonuses to administrators at the time of the 2008 layoffs (Haurwitz, 2009).

12 AAUP is investigating the circumstances surrounding this retrenchment.

[13] AAUP's "Recommended Institutional Regulations" call for a longer notice than accorded to UTMB faculty.

[14] Rule 310003, 2, Section 2. Italics ours.

[15] Section 4.62.2.a&b.

[16] Section 4.6.

[17] *Texas A&M Faculty Handbook, 2008–2009*, Section 9.2.1.

[18] Ibid., Section 9.2.2.

[19] Ibid., Section 9.2.3.

[20] Ibid., Section 9.3.2.

[21] Ibid., Section 9.3.5.

[22] Ibid., Section 9.2.4.

[23] University of Houston, 2008–2009, Financial Exigency Policy, Section A.

[24] Ibid., Section D.

[25] Ibid., Section C.

[26] Ibid., Section B.

[27] Ibid., Section F.

[28] Ibid., Section D.

[29] Ibid., Section G.

[30] Ibid.

[31] Ibid., Section I.

[32] University of Houston, *Faculty Handbook*, Faculty Dismissals-Justifications, Section D.

[33] Page 89.

[34] The load of contingent faculty members is sometimes the determining factor.

[35] The CSTCC contract gives laid off tenured faculty the right to displace non-tenured faculty, but it subordinates that right to affirmative action and equal employment opportunity considerations.

[36] The CSTCC contract ensures substantial notice for non-renewed term faculty.

[37] Fain, 2009; Peterson, 2009.

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