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ABSTRACT

Many colleges now confront 3 powerful forces - affirmative action, tenure, and unionization - but may not be fully aware of the emerging relationship among them. Federally mandated affirmative action programs have altered traditional college and university personnel practices substantially. Affirmative action has prompted college administrators to revamp recruitment procedures and revise other personnel practices such as promotions, retentions, transfers, and salary scales. To receive tenure, a faculty member must satisfy eligibility requirements, demonstrate performance, and reveal potential for growth and development. All three bases for awarding tenure apparently conflict with affirmative action guidelines. Unionization also threatens the traditional practice of tenure. Unions challenge tenure by addressing its traditional purpose: employment security and the protection of academic freedom. Unions aim to protect everyone within the bargaining unit; tenure protects only the tenured. In sum, affirmative action and unionization are likely to force an end to current tenure practices. (Author/PG)

AFFIRMATIVE ACTION, TENURE, AND UNIONIZATION:

CAN THERE BE PEACEFUL COEXISTENCE?

Many colleges now confront three powerful forces - affirmative action, tenure, and unionization - but may not yet be fully aware of the emerging relationship among them. Failing to recognize that it is basically triangular, colleges may not anticipate the struggles and strife ahead. Like a lovers' triangle, the three-sided relationship, wherein the three forces are concerned with similar matters yet disposed to different solutions, foreshadows quarrels and contention since all interests can not be mutually accommodated. Thus, where overlap occurs, conflict exists. And as with the lovers' triangle, the likelihood that all three forces will survive intact is slight indeed.

AFFIRMATIVE ACTION AND TENURE

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personnel practices such as promotions, retentions, transfers and salary scales. While affirmative action has had a critical impact upon these areas, the most significant ramification may be yet to come. Compliance with affirmative action regulations may well end, or at least drastically transform, academe's most established and distinctive personnel practice -- tenure.

Once awarded academic tenure by a particular college or university, a faculty member holds a continuous appointment at that institution until retirement or voluntary resignation. Tenure may be revoked only for "adequate cause," financial exigencies or to meet significant programmatic changes. To receive tenure, a faculty member must satisfy minimum eligibility requirements, demonstrate a certain performance level, and reveal adequate potential for growth and development. As traditionally used, all three bases for awarding tenure apparently conflict with affirmative action guidelines.

Institutions of higher education usually cast minimum eligibility requirements for tenure in terms of experience, academic credentials and rank. Although specific criteria and standards utilized to determine eligibility for tenure vary widely, several are commonly applied. For example, faculty must generally serve a three to seven year probationary period that usually follows graduate school. Herein lies the first apparent conflict with affirmative action.

The typical assistant professor, perhaps age 26-32, has between three and seven years to demonstrate worthiness for tenure. Yet, these years coincide very nearly with the years women usually bear children and remain at home to attend to the preschoolers. Female faculty, then, are considerably disadvantaged by the probationary requirement as maternal responsibilities may temporarily interrupt service, slow professional growth, and limit scholarly productivity. Consequently, women faculty members may present less persuasive records than male counterparts when a given cohort reaches consideration for tenure. While stopgap measures such as maternity leaves and extended probationary periods have become more commonplace, women still remain handicapped by present procedures. Thus, Florence Moog, Professor of Biology at Washington University, correctly concludes that beyond the doctorate the tenure system constitutes the foremost barrier for the female scholar. Should the courts agree that these procedures unlawfully discriminate against women or violate affirmative action guidelines, the probationary period as currently applied will have to be modified or perhaps abolished as Ms. Moog suggests.[1]

As a criterion for tenure, credentials too seem to be at odds with affirmative action since federal regulations prohibit the application of evaluative criteria that either tend to

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[1]Florence Moog, "Women, Students, and Tenure," Science, 174 (December 3, 1971), 983.

perpetuate a previously discriminatory situation or that do not relate to job performance. In a 1971 decision, Griggs v. Duke Power Company, the Supreme Court strongly affirmed these significant requirements.[2] The unanimous decision written by Chief Justice Burger invalidated a company policy that required for employment and promotion a high-school diploma and a passing score on a general intelligence test. Insofar as neither condition could be manifestly related to job performance, the Court ruled that the stipulations violated the 1964 Civil Rights Act.

Whether these practices were deliberately or inadvertently discriminatory had no relevance, since the act specified that good intent "does not redeem employment practices or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Indeed, the Court struck at the very heart of credentialism. "The facts of this case," the Court asserted, "demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability."

If the Griggs case appears too far removed from the educational realm, consider a recent lower federal court decision, Armstead v. Starkville Municipal School District.[3] In this

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[2]Griggs v. Duke Power Company, 401 U.S. 424; 91 S. Ct. 849 (1971)

[3]Armstead v. Starkville Municipal School District, 325 F. Supp. 560 (1971)

instance, the court declared a public school board had unlawfully discriminated against blacks by tying teachers' appointments and retention to the attainment of a master's degree and specified scores on Graduate Record Examinations that had not been validated as accurate predictors of job performance.

These cases plainly establish legal precedents and principles readily transferable to college faculties and to criteria used for awarding tenure, which is, after all, a condition of employment. Colleges and universities that hope to maintain present practice must be prepared to demonstrate that conventional criteria -- i.e., a terminal degree or its equivalent, a given probationary period, and the holding of a particular rank -- are manifestly related to job performance. Colleges must substantiate these contentions because the Griggs decision held that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

The implications of Griggs and related decisions are not limited to minimum eligibility requirements for tenure; traditional methods of judging performance and potential are also affected. Colleges and universities must be able to show that they use meaningful, concrete, non-discriminatory procedures and instruments for evaluating teaching performance. If only lip service is paid to teaching and what really counts is the candidate's publication record, then the institution, as the

employer, must be able to prove that the publications are "demonstrably" related to the job, which is teaching. Similar arguments will have to be advanced if potential is evaluated on the basis of present performance or on meeting minimum eligibility requirements as discussed above.

Affirmative action will affect far more than the criteria employed to award tenure so long as very few faculty members are detenured and more and more receive tenure. In 1972, colleges and universities with tenure systems (85 percent of the total) had a median of 41 to 50 percent of their faculties on tenure. In the spring of 1971, 42 percent of the respondents to a Keast Commission survey awarded tenure to all eligible faculty members, and two-thirds awarded tenure to 70 percent or more of those under consideration.[4] At this rate many schools will soon have faculties "solidified" by a very high proportion of tenured personnel.

A faculty solidified by tenure stands at cross-purposes with affirmative action, which requires a more fluid circumstance to be effective. To appoint more blacks, Chicanos, women, and other persons previously victimized by discrimination requires vacancies. In the current no-growth era, vacancies must arise largely from turnover, not from expansion. Tenure, however, limits turnover. Thus the immovable object meets the irresistible force at one corner of the triangle.

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[4]Commission on Academic Tenure in Higher Education, Faculty Tenure: A Report and Recommendations by the Commission on Academic Tenure in Higher Education (San Francisco, 1973), pp. 4-7.

TENURE AND UNIONIZATION

Unionization also threatens the traditional practice of tenure. Although not universally accepted, for some faculties have rejected it, unionization currently enjoys substantial support, especially among "lower-tier" institutions and junior faculty.[5] By the fall of 1973, 212 post-secondary institutions had collective bargaining agents.[6]

Whereas affirmative action challenges the criteria and procedures used to award tenure, unions challenge tenure by addressing its traditional purposes: employment security and the protection of academic freedom. As an alternate route to job security, unionization is likely to supplant tenure if only because it is more effective. Unions aim to protect everyone within the bargaining unit; tenure protects only the tenured. Unions seek to provide immediate job security; tenure requires a probationary period and affords little protection to probationary personnel. Unions shift the burden of proof onto management -- employees are presumed competent unless and until proven otherwise. Under a traditional tenure system, the employee must demonstrate worthiness for tenure during the probationary period. Not unexpectedly, therefore, unions concentrate on developing elaborate criteria and procedures the

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[5]Everett Carll Ladd, Jr. and Seymour Martin Lipset, Professors, Unions, and American Higher Education (Washington, D.C., 1973), pp. 25-40.

[6]The Chronicle of Higher Education, November 26, 1973, p. 8.

institution must use to prove an individual does not deserve to be retained; tenure systems, on the other hand, focus principally upon criteria the candidate must satisfy to merit tenure and only secondarily upon general criteria that should be applied to de-tenure someone.

The same institutions and faculty who turn to collective negotiations for economic security may also turn to unions for assurances of academic freedom. Lower-tier institutions have historically been more vulnerable to attacks on academic freedom. Financial dependency and lack of strong traditions have weakened the ability of these schools to withstand and repel such attacks. In addition, attacks on academic freedom have succeeded because academic freedom has never been fully defined. Unions propose, at least implicitly, to remedy this situation by developing a comprehensive definition of academic freedom that protects all unit members, not merely the tenured faculty. The new rubric will be "terms and conditions of employment," a broad umbrella of protection. As terms and conditions of employment, what is taught, when, where, and how it is taught (all issues traditionally but vaguely encompassed by the term academic freedom) will become negotiable and, hence, contractual. As an element of a legal contract, these issues will be protected as never before and the protection will spread wider than ever before to all members of the bargaining unit.

AFFIRMATIVE ACTION AND UNIONIZATION

While affirmative action and unionization both threaten traditional tenure systems, the two forces are by no means entirely compatible. Conflict exists at this corner as well. For example, the differences between tenure quotas and affirmative action plans are not that substantial: both programs strive to manage personnel so as to assure flexibility necessary to allow germane and diverse appointments. If faculty unions successfully argue that tenure quota policies are terms and conditions of employment (a matter now hotly debated but not settled), then it would seem but a small step to assert that affirmative action goals and timetables are also negotiable.[7] After all, affirmative action plans affect appointment and reappointment decisions perhaps as much as tenure.

Suppose affirmative action goals are subject to negotiation. Even with the best intentions presumed, it would be difficult to foresee a union arguing for more turnover and more nonretentions to increase the opportunities for management to appoint more women and minority group members. Far more likely, the unions will argue for other "solutions" such as a lower faculty-student

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[7] In New Jersey, the American Federation of Teachers (through the Council of New Jersey State College Locals, New Jersey State Federation of Teachers) has waged a vigorous campaign publicly and at the negotiating table challenging the authority of the State's Board of Higher Education to establish tenure quotas in the State Colleges. The recently ratified contract represents a major A.F.T. victory, for the contract calls for the establishment of a blue ribbon commission to define those things encompassed by "terms and conditions of employment" and a moratorium on new regulations and guidelines affecting same pending the panel's report.

ratio or the addition of more students to generate additional faculty positions. While these solutions would certainly benefit affirmative action, few campus observers would agree that these proposals represent realistic alternatives. In fact, for affirmative action officers the dilemma seems to be how to add minorities and women as student-teacher ratios rise and the pool of available students shrinks.

Where new faculty slots do exist, unionized schools may be disadvantaged at the marketplace. Teacher unions have historically supported fixed pay scales, the so-called lockstep system. Allegedly, lockstep systems, based upon "objective" criteria such as length of service and academic credentials, bar or at least limit the opportunities for administrators to offer different salaries to equally qualified employees for extraneous reasons such as favoritism. In the realities of the marketplace, however, the lockstep system restrains the pursuit of affirmative action objectives. Simply said, the demand for affirmative action appointments exceeds the supply.. Hence, the market price for minorities and women frequently exceeds the salary level necessary to attract comparable male Caucasians. Yet a lockstep system will be unable to accommodate that reality since it prohibits salary disparities except those based upon seniority or academic credentials. Thus, for example, the recently (February 1974) negotiated contract between the State of New Jersey and the New Jersey State Federation of Teachers (A.F.T., A.F.L. - C.I.O.) bars the State colleges from hiring personnel at the assistant

professor level unless they possess the appropriate terminal degree or have completed all the requirements, except the dissertation, for it. Unable to pay the necessary "premium" to hire qualified minorities and women, unionized schools will lose these candidates to campuses that retain the flexibility to grapple with the marketplace.[8]

Finally, to the extent that union contracts replace tenure systems as the primary basis for employment security, conflict with affirmative action regulations will arise. With negotiated agreements as the cornerstone for job security, seniority will certainly be cited as the fundamental principle governing an employee's hold on a position. However, most minorities and women have only recently been appointed to faculty rank. If retrenchment and related cutbacks lead to layoffs, a circumstance that has already visited several campuses both large and small, then the newer appointees will be among the earliest casualties.[9] In short, minorities and women will face an all too familiar condition: the last hired will be the first fired -- unless affirmative action prevails.

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[8] Incidentally, the Equal Work, Equal Pay Act also appears to prohibit "premium" payments for reasons related to race or sex. To date, however, the practice of premium payments has not been tested as a violation of the Equal Pay Act.

[9] For example, the University of Wisconsin has sent layoff notices to eighty-eight tenured faculty and an even larger number of non-tenured faculty. St. Edward's University in Austin, Texas, was forced to release twenty of its fifty-two faculty. For additional examples, see The Chronicle of Higher Education, January 28, 1974, pp. 1, 3.

CONCLUSION

What will ensue when affirmative action, unionization and tenure collide? There are some clear signals. As construed by the Supreme Court in the Griggs case, the Civil Rights Act provides that "practices, procedures, or tests neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

Furthermore, even the Nixon Administration, not a noted advocate of civil rights, recently determined that long-established policies that produced and maintained employment discrimination must be abandoned. In a January, 1973 directive, then-Secretary of Labor James Hodgson commanded the Bethlehem Steel plant at Sparrows Point, Maryland "to correct a seniority system that has been found to perpetuate the effects of past discrimination in the assignment of blacks to jobs in departments with limited advancement opportunities."[10] Hodgson so ruled because the company's seniority system "locked" blacks into inferior positions. As authority to act, Hodgson cited Executive Order 11246, the same order that governs affirmative action for colleges and universities.

The parallels surely strike close to the campus. Tenure to a significant degree "freezes" the status quo, thereby

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[10] "Bethlehem Steel Required to Bar Racial Inequities," The New York Times, January 1, 1973, pp. 1, 12.

limiting opportunities for employment. Tenure also "locks" minority-group members and women into junior positions thus curtailing opportunities for advancement. In fact, should tenure quotas or limits gain additional support in the academic community, the "lock-out" from senior, tenured positions will become even more severe. And should more faculties unionize and accept a traditional labor role, then the courts as well as the state and federal governments will be more apt to regard tenure as a seniority system designed to enhance job security. To the degree that tenure practices and union seniority systems discriminate against minorities and women, external authorities will undoubtedly intervene and order the practices and systems revised or even eliminated.

In sum, affirmative action and unionization are likely to force an end to current tenure practices. And where affirmative action conflicts with unionization, federal and state agencies will hold for affirmative action.

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