Furnishing Reasons for a Decision against Reappointment: Legal Considerations

Comments by William Van Alstyne

It is not at all awkward to make quite clear that a willingness to explain one's decision in respect to nonrenewal, denial of tenure, or denial of promotion carries no implication whatever of a "right" to reappointment, etc. and, indeed, no implication even of a "right" to further consideration of the matter even assuming the disappointed appointee may personally believe the reasons to be factually mistaken. While my own view (and that of the AAUP) is that additional procedural decencies should be available to a faculty member under these circumstances as a matter of sound policy and elementary fairness, I am also quite certain that neither constitutional nor contract law confronts a university with the limited choice of either furnishing reasons on request plus a great deal else or of not furnishing anything at all.

There is, related to this, a separate issue. The issue to which I have thus far spoken is the technical one—whether a willingness by the university to explain somehow itself generates a legal entitlement to additional, *intramural* recourse so to test the sufficiency of the reasons thus given on request. As I say, as to this, I am clear that it need not do so and that the policy can be formulated to avoid any contrary implication. The separate issue is, however, whether the university will be worse off by a willingness to provide reasons on request of the faculty member in a different sense: that the faculty member having received his or her explanation, and not being at all satisfied with it, will be emboldened to file private suit in civil court in an effort to show that the reasons in fact were mistaken, prejudiced, a cover-up of some ulterior and improper reason, etc. According to this view, "the less said the better," because disappointed faculty kept utterly in the dark, while possibly bitter and truly at a loss to understand what happened, will nonetheless be unable to challenge the university in court if only because they will be unable to state the grounds as a predicate for challenging the adequacy of those grounds. The AAUP considered this matter, too, in formulating its recommended standards, and I think you will find the whole statement of policy[1] more helpful than anything I can briefly reiterate here, by way of answer. Essentially, however, our answer runs this way.

Even if it were true that court challenges would become more likely under circumstances where faculty members are not "nonrenewed" without at least the minimum decency of being advised why, should they wish to ask, we would support the decency involved as a consideration of personal fairness and courtesy. For an academic community to operate in any other way is regrettable and a distressingly poor example to set. It may be a "nuisance" to have to explain to a student the basis on which we assessed his work as "F," but most of us have long since accepted that obligation as a part of our commitment. That a colleague should be treated with less compassion in circumstances where our collegial judgment terminates his career is something I can no longer defend or justify.

Second, however, as an eminently practical matter, I believe the conjecture about which policy is more likely to produce subsequent civil litigation is simply mistaken. An individual cut off from any willingness to explain has only the recourse of filing suit as the one remaining means of compelling an explanation. He may do that by pleading in good faith the tenure (or renewal) standards of the institution, by alleging affirmatively that he satisfied those standards, by alleging on belief that impermissible reasons significantly accounted for his termination and by thus forcing upon

WILLIAM VAN ALSTYNE is Perkins Professor of Law at Duke University. *He offered these comments in response to questions from an Association chapter about potential legal obligations incurred by an institution in providing reasons for a decision not to reappoint a nontenured faculty member. Since the issues to which Professor Van Alstyne responds have been raised at several other institutions, his comments are being published for the information of the profession.*

[1] "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," *AAUP Bulletin*, 54 (Winter, 1968), pp. 206-10.

the institution an exposure to discovery processes and a need to respond by denying the allegations. He may, of course, fail to win on the merits and may, indeed, lose out even pursuant to a motion for summary judgment accompanied by uncontested affidavits themselves denying the use of impermissible standards and asserting the basis of the nonrenewal. But I submit that his or her motivation to sue, to seek discovery, etc. is increased, rather than diminished, by the suspect policy of an institution that regards him as such an adversary in the first place as to give him no other recourse than to act like an adversary. Additionally, I am persuaded that courts are far more likely to give the university the benefit of the doubt when the university's own procedures are of a kind that seem to warrant that presumption. Finally, institutions which persist in policies of truly "hard-nosed" treatment must expect a "hard-nosed" response. One of these will rest in the felt necessity for collective bargaining.

A signal shortcoming of my own profession (of lawyers) has been the occupational hazard of thinking in we-they terms, i.e., a lawyer tends to think in terms of maximizing his client's leverage and to confuse short-term advantage with long-term interest. One result of this tendency is to encourage a client (here, a university) to do the very least "the law" allows, and to regard anything more generous as unwarranted and as unbusinesslike. Even as a lawyer, I wholly disagree with this view, engendering as it does the reciprocal likelihood that people treated as adversaries find themselves, however reluctantly, forced into the grim circumstances of fulfilling that prophecy. I hope very much that the distinguished and tenured faculty of your university will not accept that model of academic relations as it now considers its policy toward its nontenured colleagues.