

NEWSLETTER

Colorado State University Chapter American Association of University Professors (AAUP)

Academic Freedom for a Free Society Vol. 4:1 Spring (2011)

AAUP Update

State Conference/Around the State:

- **Annual Meeting Report:** The AAUP State Conference met on the CU Boulder campus on December 4, approving conference bylaws changes recommended by the Executive Committee and hearing reports and updates from chapters around the state. The Conference was pleased to have AAUP President Cary Nelson as its keynote speaker. **A synopsis of Nelson's speech is found in the right-hand column of this newsletter.**
- **State Conference Elections:** The following individuals were elected as Colorado Conference officers for the 2011-2013 term: Co-presidents, Dean Siatta (DU) and Steve Mumme (CSU); VP for Legislative Matters, Ray Hogler (CSU). Suzanne Hudson (CU-Boulder) will fill the remainder of the 2010-2012 Secretary/Treasurer term previously filled by Liz Nick (FRCC, retired). Other officers are: VP for Administrative Matters, Jonathan Rees (CSU-Pueblo); Immediate Past President, Laura Connolly (UNC-retiring); At-large member of the Executive Council, Linda Christian (Adams State).
- **CCPFR Update:** The State Conference CCPFR report on the Ward Churchill, Phil Mitchell, and Adrian Anderson cases is still pending.

Chapter Affairs

- **Chapter celebrates 5th Anniversary.** We are still celebrating. Thanks to all our members for your ongoing support!
- **Membership: Please renew your membership and invite a colleague to join AAUP.** With retirements and other departures, we have lost several members and need to renew our ranks. Don't hesitate to contact Steve Mumme for membership information, or go online at www.aaup.org

Campus Affairs

- **Contingent Faculty:** The CLA will offer "without term" appointment letters to qualifying special faculty starting this fall.

Job Security for Contingent Faculty: Not This Time

Ray Hogler

AAUP VP for Legislative Affairs
Professor of Management, CSU

The Nature of the Problem

Under existing Colorado law, public employees generally are defined as "employees at will." This legal term is a common law doctrine to the effect that an employee can be fired at any time, for any reason, so long as the reason is not illegal. The Colorado General Assembly enacted legislation in 1993 that covers public employment and defines an individual's employment status. In a memo dated May 18, 2010, a lawyer at the University of Colorado analyzed the statute (C.R.S., Sec. 24-19-101) and concluded that contingent faculty were covered by the law and they consequently had no rights in their employment. That is, they could be terminated or their contracts not renewed without giving a reason.

Assuming the legal opinion is correct, and I believe that it is, it puts contingents in a nonsensical position. One of the historical exceptions to at will employment was that an agreement for a specified term of employment was a binding and enforceable contract and required cause for termination. The term "at will" referred to an indefinite hiring; most contingent faculty, in contrast, have defined periods of employment. The result is that an institution can hire a contingent for, say, two semesters, but the promise of employment is illusory and unenforceable. In fact, the statute requires such contracts to state explicitly that they are at will. So, on the one hand, a person is told he or she will teach for an academic year, but legally, the faculty member can be fired at any time or not renewed after the

Also, the proposal for a new job classification, "Senior Instructor" has gone forward from the new Faculty Council Advisory Committee for Special and Temporary Faculty -- CoSTF. It should come up for a vote at the May FC meeting.

- **Faculty Council:** Our chapter may take partial credit for several recent Faculty Council developments: **1)** A proposal to place the Provost's guidelines for promotion and tenure in Section E.5. of the Faculty Manual was changed to eliminate the term "guidelines" and separate referral language from the main body of the Manual's procedural language; **2)** Faculty Council is now recommending adoption of revised academic freedom and shared governance protection in the Manual that tends to follow the Minnesota approach (see chart in web-link below) but certainly strengthens our overall protection and as supported by the Chapter; **3)** While HB 1057 went down this spring (see Ray's article in this issue), various Faculty Council members believe our efforts have significantly raised the visibility of the adjunct and temporary academic faculty issue on campus. Web-link: <http://www.aaup.org/NR/rdonlyres/1211228E-39C3-4CD1-B90A-BE99A4F02B6F/0/ChartpostGarcettipolicies0810.pdf>
- **Congratulations to AAUPers taking new positions on Faculty Council.**
Tim Gallagher elected President of Faculty Council; **Bill Timpson** has been elected to the Grievance Committee; **Mary Vogl** elected At-Large representative from CLA.

Academic Freedom Report *Steve Mumme*

As many of us recently learned, harassment of faculty using state open records laws and federal Freedom of Information Act authority is now a new worry in academic freedom's outer trenches. This issue came to the fore when Wisconsin Republicans filed a scattershot open records request with the University of Wisconsin seeking all electronic correspondence on Dr. William Cronon's state email account referencing Wisconsin's incumbent governor, or AFSCME, or the terms "rally" or "union" or the names of over a dozen elected politicians. The initiative was clearly intended to embarrass Dr. Cronon, raise questions concerning the professional utilization of state owned facilities, and exert a chilling effect on faculty speech, particularly political speech.

first semester.

Any reasonable person would conclude that this particular way of dealing with employees is contradictory, confusing, irrational, and unethical. The rule, though, was enacted by the Colorado legislature, and not by reasonable people. When Representative Randy Fischer tried to bring some semblance of fairness and balance to the employment of contingent faculty, he was defeated in committee.

Rep. Fischer's Bill and the Outcome

In early 2011, Rep. Fischer introduced HB 1057. This bill amended the language of the 1993 statute and created an exception for "nonregular" teaching faculty. The amendment is quoted below:

Notwithstanding the provisions of paragraph (a) of subsection (1) of this section, an individual who is engaged in classroom teaching on a nonregular basis under an employment contract or employment contract extension with a system of higher education or a campus of a state institution of higher education and who receives a notice of termination of or refusal to renew the employment contract shall receive a written statement of the reasons for termination of or refusal to renew the individual's employment contract and shall have access to any dispute procedures available under the policies of the system or institution of higher education.

The protections offered by the amendment were actually minimal. It only required that a contingent be given written reasons for termination or nonrenewal and access to any existing dispute procedures. Who could object to such sensible safeguards for the individuals teaching most of the undergraduate credit hours in the state of Colorado?

At the House Education Committee hearing on February 9, supporters of the bill testified that its provisions imposed minimal burdens on college administrators and would be of significant benefit to contingent faculty. Steve Shulman, chairman of

Could this happen in Colorado? The short answer is yes. However, faculty should keep several things in mind. First, their political speech [regardless of topic or target] is protected under the 1st Amendment. Second, university professors as a rule are exempted from the Hatch Act, which limits the political activities of federal employees and some state employees. Third, the CSU faculty manual's protection of academic freedom is broad enough in principle to protect faculty political expression whether the topic is shared governance on campus or political concerns off campus. Fourth, the code of conduct of Academic Computing and Networking Services (ACNS) does not currently limit political statements or correspondence on the university's student or faculty or other professional email accounts. *Nor should it!* The current policy simply emphasizes the 3c's as campus users engage in email correspondence: common sense, common decency, and civility. This reasonable policy admits a wide range of political speech related to our common roles as citizens, colleagues, and scholars.

All the same, we must be vigilant. Our colleagues at community colleges have already suffered severe and, in my opinion, entirely unjustified restrictions on email correspondence and we can be sure that some politicians wouldn't mind handcuffing us. The solution, of course, is defending academic freedom and constantly pointing to the common good that springs from free speech and a free society, on campus and off.

Sources:

For more background see Cronon's Blog:
<http://scholarcitizen.williamcronon.net/2011/03/24/open-records-attack-on-academic-freedom/>

For ACNS email policy see:
<http://www.acns.colostate.edu/Policies/Email>

For Cronon's NYT piece
http://www.nytimes.com/2011/03/22/opinion/22cronon.html?_r=1

For information on political activities and the Hatch Act:
<http://www.osc.gov/hatchact.htm>

Colorado Open Records Law:
<http://www.colorado.gov/dpa/doit/archives/open/00openrec.htm>

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the Economics Department at Colorado State, said that he had difficulty hiring and retaining qualified faculty, and giving them some contract rights would help to recruit interested teachers. Don Eron, a contingent from the University of Colorado – Boulder told the committee he had taught writing and rhetoric at CU for over 20 years, and he still had no guarantees of security from semester to semester. A contingent faculty member from the community college system testified that he had been discharged in the middle of a semester and had no opportunity to correct any problems with his performance or to modify the course. The dean in charge of the institution refused to tell him why his contract had been terminated so abruptly.

Despite the clear justification for the bill and the testimony in its favor, the committee refused to move it forward. According to Rep. Fischer, the mysterious, highly-paid lobbyists working on behalf of higher education exercised their influence to kill the legislation. They did not testify before the committee, and they never made their opposition public. A low-level functionary from one of the community colleges did say that allowing contingents to protest a termination would create work for the human resource department. Of course, that's the job she was hired to do, and it hardly amounted to a justification for rejecting the amendment. In the end, though, the bill was stopped at the committee level.

A Concluding Comment

Whether Rep. Fischer is willing to try this on again is not certain. AAUP made an effort to get broad support for the bill, and many members did contract their representatives. Our grass roots activism fell short of the kind of pressure needed to overcome administrative resistance to any degree of fairness and justice for contingents. One option is to try to implement due process procedures at the institutional level, but that alternative would no doubt encounter the same intractable resistance that was expressed in the committee. In short, contingents are still subject to arbitrary and capricious treatment in their employment, despite AAUP's attempt to change the law. Perhaps the next legislative session will be more favorable to such attempts.



**Cary Nelson's Speech to
the Annual Meeting of the
AAUP Colorado
Conference, 4 December
2010**

*Summarized by Dean Saitta,
DU Chapter President and
Colorado Conference Co-
President*

National AAUP President Cary Nelson was Keynote Speaker for the annual meeting of the AAUP Colorado Conference in Boulder on December 4, 2010. He began by informing us that a new AAUP policy document is forthcoming regarding personnel decisions and politically controversial faculty members. Although the document is "haunted" by the Ward Churchill case at CU-Boulder the document mentions Churchill only once by name. There are other cases out there (including others at CU) that warrant AAUP taking an explicit policy stand on this issue. Nelson suggested that, at the end of the day, the standard for terminating a tenured faculty member for any violation of AAUP principles should be "beyond a reasonable doubt."

Nelson noted a couple of impending AAUP investigations into bad administrative behavior that erodes shared governance. The AAUP has already approved an investigation into the abolishment of the Faculty Senate at Rensselaer Polytechnic Institute. The Senate was abolished when it endeavored to grant voting rights to "clinical" faculty members (RPI's term for full-time, non-tenure track faculty members who focus almost entirely on teaching). Approval is pending for an AAUP investigation of the State University of New York at Albany for closing its departments of French, Italian, Russian, Classics and Theater. The AAUP has already written to George M. Philip, president of SUNY-Albany, urging him to reconsider plans to end all admissions to these programs. The letter acknowledges the deep budget cuts faced at Albany and other SUNY campuses, but questions whether these cuts are necessary and whether faculty members were appropriately involved in the process to plan budget reductions. The letter endorses a view already expressed by faculty

members at SUNY-Albany that eliminating these departments will erode the "core academic mission" of the university. The AAUP letter notes that the SUNY system is already on the Association's censure list for faculty layoffs made in 1977. Those layoffs included an earlier round of language program eliminations at Albany.

Nelson underscored that shared governance is the primary challenge facing faculty for at least the next decade. As evidence he noted that the AAUP's recent Shared Governance Conference was filled to overflowing, with some people having to be turned away for shortage of hotel rooms. This is striking because the previous shared governance conference scheduled by the AAUP had to be cancelled for lack of interest.

Nelson noted that the biggest obstacle to faculty empowerment is fear. SUNY-Albany faculty have been unwilling to speak out against department closures for fear that their unit will be next on the chopping block. Nelson emphasized that we must guard against succumbing to the kind of fear that gives way to the protection of narrow self-interest. Numerous times Nelson mentioned that *faculty solidarity* is key to protecting the values that we hold dear.

The US Supreme Court's 2006 *Garcetti v. Ceballos* decision came up frequently in this context. In *Garcetti*, a Los Angeles deputy district attorney named Richard Ceballos claimed that he had been passed up for promotion because he had criticized the legitimacy of a warrant. He argued that the district attorney's denial of his promotion violated his constitutional right to free speech. The Court, in a 5-4 decision, rejected his claim on grounds that his criticisms were not protected speech because Ceballos made them as a public employee, not as a private citizen. The Court ruled that statements made in pursuit of official duties have no constitutional protection against employer discipline. Although the Court did not extend this ruling to faculty at public universities, federal courts have applied the *Garcetti* ruling to speech directly related to faculty governance at public institutions. It is becoming clear that, under the *Garcetti* progeny, the reduction of faculty to "employees" poses a serious threat to faculty governance. Nelson urged that faculty take the initiative to strengthen protections for shared governance speech in faculty handbooks. Penn State is a recent example. Using language akin to that used by faculty at the University of Minnesota

in what has become a model for post-*Garcetti* handbook revision (<http://www.aaup.org/AAUP/newsroom/highlights/archive/2009/Minn.htm>), Penn State's Faculty Senate has proposed a policy stipulating that *"Faculty members are free to discuss governance issues of their respective departments, colleges, units, libraries, and of the University as a whole, and are free to speak and write on all matters related to their professional duties without institutional discipline or restraint"* (see <http://www.insidehighered.com/news/2010/12/14/pennstate>). Nelson mentioned that AAUP staff are happy to look at faculty handbooks and offer advice on how they might be revised to better reflect AAUP guiding principles (see also <http://www.aaup.org/AAUP/protectvoice/overview.htm>).

Nelson gave special attention to the need for faculty to take a bigger role in campus financial planning. Instead of complaining about how little money we have we need to press administrations for details about the money we do have and how it is being spent. Nelson noted an example of how faculty and students successfully exerted pressure at his campus, the University of Illinois at Urbana-Champaign, to dissuade their administration from spending \$1.7 million to hire a consultant to help promote "teamwork" on campus. Nelson noted that expertise for thinking about how to work in teams can be found, for free, among the faculty. This is the challenge for today's faculty: how to get into the decision loop regarding the distribution of already existing resources.

The question and answer period following Nelson's formal remarks raised many issues. The ones that stuck with me were questions about the National AAUP's position on (1) mandated arbitration in grievance procedures, (2) assessment of student learning, and (3) state-level "Committee A" investigations into violations of academic freedom and due process. Audience members urged that the National AAUP should explicitly support including an arbitration step in faculty grievance procedures akin to those that already protect NCAA athletes and workers who stuff Doritos into bags on Frito-Lay assembly lines. These folks have arbitration procedures written into their contracts and thus are better protected than faculty at institutions of higher learning.

Nelson's response (offered rather tongue-in-cheek) to a question about the burgeoning

	<p>“assessment bureaucracy” was that faculty should “just say no.” In Nelson’s view, structures and approaches for evaluating student learning are not broken and some fields (like his specialty of modern American poetry) just don’t lend themselves to the kind of assessment of student learning that is being pushed at many institutions. Others noted that assessment in the form of standardized testing enables the dumbing down and instrumentalization of higher education and “breaks the heart of the teaching enterprise.” One audience member who I understood to be broadly sympathetic to the assessment movement offered a sobering message about the challenge it poses. He noted that it took 20 years of collaboration among physics professors from 10 different institutions working under Nobel Laureate Carl Weiman to produce an assessment rubric for evaluating student learning in that “hardest” of sciences...and that this accomplishment required participating faculty to sacrifice other aspects of their careers.</p> <p>Finally, Nelson applauded the effort that we’re making in Colorado to conduct a Committee A-style investigation of the Churchill termination and the termination of two non-tenure track Instructors at CU-Boulder. He noted that the Colorado AAUP’s forthcoming report will serve as a model or “wedge” that can be used nationally for investigating administrative violations of academic freedom and due process for faculty members.</p>