

ACADEMIC DUE PROCESS

*A Statement of Desirable Procedures
Applicable within Educational Institutions
in Cases Involving Academic Freedom*



AMERICAN CIVIL LIBERTIES UNION
170 Fifth Avenue New York 10, N.Y.

Published, February, 1954
Third Printing, September, 1959

THE AMERICAN CIVIL LIBERTIES UNION

Ernest Angell
Chairman, Board of Directors

Patrick Murphy Malin
Executive Director

ACADEMIC FREEDOM COMMITTEE

Samuel Hendel, *Chairman*
Edwin Linville, *First Vice-chairman*
Justus Buchler, *Second Vice-chairman*
Arthur W. Murphy, *Counsel*
Herbert Prashker, *Counsel*
H. Harry Giles, *Executive Officer*

Rebs pams
A505
.A 23
1959p

Robert Bierstedt
Lyle B. Borst
Dorothy Dunbar Bromley
Alan Campbell
Robert J. Christen
Dwight L. Durling
Stewart C. Easton
Gisbert H. Flanz
Walter Frank
John Hope Franklin

William J. Goode
Louis M. Hacker
Robert Hoopes
B. W. Huebsch
Beatrice Konheim
Frederick C. McLaughlin
Julian M. Sturtevant
David B. Truman
Melvin Tumin
Wellman J. Warner

ADVISORY COUNCIL

Clarence E. Ayres, *Texas*
Sarah Gibson Blanding, *New York*
Julian P. Boyd, *New Jersey*
Braisford R. Brazeal, *Georgia*
John L. Childs, *New York*
Margaret Clapp, *Massachusetts*
Morris L. Cooke, *Pennsylvania*
Thomas H. Eliot, *Missouri*
Charles W. Gilkey, *Massachusetts*
Frank P. Graham, *North Carolina*
Mordecai Johnson, *Washington, D.C.*
Horace M. Kallen, *New York*
Harry Kalven, Jr., *Illinois*
Richard B. Kennan, *Washington, D.C.*
Edward C. Kirkland, *Maine*

Milton R. Konvitz, *New York*
Robert S. Lynd, *New York*
Curtis D. MacDougall, *Illinois*
Douglas B. Maggs, *North Carolina*
Kirtley F. Mather, *Massachusetts*
Robert E. Matthews, *Ohio*
Alexander Meiklejohn, *California*
J. Saunders Redding, *Virginia*
Edgar A. Schuler, *Michigan*
Odell Shepard, *Connecticut*
Harold Taylor, *New York*
V. T. Thayer, *Virginia*
Edward C. Tolman, *California*
William L. Werner, *Pennsylvania*
Benjamin E. Youngdahl, *Missouri*

ACADEMIC DUE PROCESS

A Statement of Desirable Procedures Applicable within Educational Institutions in Cases Involving Academic Freedom

NOTE: This entire statement relates to *academic due process*. The *general legal* and *specific contractual questions* which may be involved in an academic freedom case are outside the scope of this discussion; these are questions of law which should be handled by the attorneys of the interested parties. Also excluded are the substantive criteria of academic freedom which are presented in other statements by the ACLU and other organizations.

Introductory Statement

AN ACADEMIC FREEDOM CASE in an American school, college, or university involves the rights and responsibilities of both the institution and the teacher, and the stake of the community in its educational system. All of these interests are best guarded and served by the application of a clear, orderly and fair procedure to the adjudication of a case. Good procedure will minimize elements of personal conflict, and thereby reduce the bitterness which has so often left all parties to a controversy distrustful of the processes of justice and the reality of academic freedom. Good procedure in academic freedom cases has the same excellent power that legal due process has in the courts—it substitutes the rule of law for the rule of men.

Both the administration of an institution and the teacher should carefully consider the manner and degree in which an academic freedom case is publicized. It is true that if academic due process is not being observed, an appeal to public opinion may represent the only possible path to a just judgment. On the other hand, if fair procedures are being followed, excessive or intemperate publicizing should be avoided. Such publicizing, by the administration, may create community hostility which will affect (powerfully though irrelevantly) the real issues of competence and integrity. Such publicizing, by the teacher, may likewise result in subordination of the issues of competence and integrity; general community hostility may develop against an institution and its staff, or the particular teacher concerned may find himself required to offer defense against a new and perilously vague charge—that of “conduct unbecoming a teacher.”

Warning must be given of an enormous range in the observance of due process. These pages set forth what the Academic Freedom Committee of the ACLU deems to be the best practice. This practice is observed by institutions which recognize the fact that democracy in the

constitutional and political structure of the United States calls for an analogous democratic spirit in the American educational system. The best practice is not observed by those institutions which operate as retreats from reality, as victims to the whims and fears of the day, or as the preservers of their own vested interest in mere survival. Similarly, teachers will vary greatly. Academic due process will be observed by a responsible teacher who recognizes that his personal interest is linked to the interests of his institution and his community. Due process, unfortunately, will be misunderstood or abused by irresponsible and unworthy teachers. The warning should be repeated: the best academic due process is possible only when the institution and the teacher both believe that justice must be based upon order.

The principle embodied in the legal concept of confrontation should govern academic due process. The teacher should be informed of all the charges and all the evidence against him; he should have full opportunity to deny, to refute, and to rebut.

Finally, it is a fundamental principle of fairness that charges against a person are to be made the basis of action only when proven, and that the burden of proof rests upon those who bring them. Through the centuries, the courts have applied this principle in the formulation of legal due process, and it should operate with equal force in academic due process. The responsibility for applying this principle in the world of education rests primarily upon the governing board and administration of an institution. Plenitude of power imposes the obligation to keep every step in an academic freedom case totally untainted by the color of prejudice.

A. Informal Conciliation

AN ACADEMIC FREEDOM CASE is likely to prove unfortunate for all, even if the best procedures are followed. The career and livelihood of the teacher are placed in danger. The reputation of the institution for fair dealing will be re-assessed by the educational world, sometimes without full knowledge of all the facts and issues. The community may become deeply divided between the camps of hypersensitive liberalism and truculent anti-intellectualism.

It is therefore especially desirable that the administrative authorities and the teacher (accompanied by an adviser) sit down together in a conciliatory session, confronting the charges and the evidence squarely, and sincerely attempting a solution of their common problems. A statement of the facts may clarify the situation; exposition of the teacher's point of view may persuade an administration not to review his competence and integrity; exposition of the administration's point of view may persuade a teacher to recognize his duty to cooperate with his institution, and to indicate how he may do so without sacrifice of principle. Any

one of these developments, or all of them together, may yield a solution if the participants in the discussion are moved by genuine good will.

B. Procedure Preliminary to the Hearing

IN THE PERIOD OF PRELIMINARY ACTION, the administration and the teacher should assist each other in preparing the ground for an orderly and comprehensive hearing. The following actions are generally necessary:

1. The administration should present to the teacher a statement meeting the demands of the principle of confrontation, and embodying:

- a. Relevant legislation, board or trustee by-laws and rulings, administrative rulings, faculty legislation, etc.
- b. The charges in the particular case.
- c. A summary of the evidence upon which the charges are based, and a first list of witnesses to be called.
- d. The procedure to be followed, including a statement of the nature of the hearing body.
- e. A formal invitation to attend with adviser or counsel.

2. The teacher should select from among his colleagues a person of established position, wisdom, and judicial temper, who will act as his official academic adviser, or should select counsel to advise him on legal matters. He may, in his discretion, be assisted by both an academic adviser and a legal counselor. The teacher should inform the administration of the identity of his adviser or counsel and should obtain written agreement to his appearance on the teacher's behalf. (In what follows it is understood that when reference is made to the teacher, he is deemed to be acting under the advice of his adviser or counsel.)

3. The teacher should review the statement offered him by the administration (see "1" above); he may wish to supplement "1a" (governing rules), or to suggest modifications in "1b" (charges) and "1d" (procedure); he should indicate the evidence by which he expects to refute the charges and should furnish a first list of witnesses he desires to call.

4. The administration and the teacher should, as completely as possible, at this point arrive at agreement on formulation of charges, governing rules, and procedure (if proper procedure has not previously been provided for). Such agreement will in no way prejudice, for either party, determination of the case on its merits. On the contrary, it will clarify the issues and make unnecessary at the hearing, or upon appeal, argument as to the *form* of the controversy, thereby permitting full attention to be given to matters of *substance*.

5. Communications, as a general rule, should be in writing, with

copies retained. Oral discussion should be followed by an exchange of memoranda indicating the understanding which each party has of the conversation.

C. The Hearing; Tenure Teachers, Holders of Permanent Certificates, etc.

ACADEMIC DUE PROCESS provides for summary suspension or dismissal of a teacher holding tenure only when serious violation of law or immoral conduct is admitted, or proved before a competent court. All other charges should first be heard in formal hearing based upon the preliminary action outlined above in section "B." The hearing should take the following form:

1. The hearing committee should be a standing or special group of full-time teaching colleagues, democratically chosen by and representative of the teaching staff, and selected by pre-established rules. The administration should dissociate itself from those performing a judicial function at the hearing.

Note: The governance of some colleges and universities provides only for hearing committees established by the trustees or the president. The great majority of school system hearings are controlled by a hierarchic order of authority which culminates in the superintendent or board of education. Immediate and persistent efforts should be made by all teachers to bring such practices into conformity with the desirable procedure stated above in section "C-1."

2. The teacher should have the right to be present and to be accompanied by his personal adviser or his counsel throughout the hearing.

3. Both the teacher and the administration should have the right to present and examine witnesses and to cross-examine witnesses.

4. The administration should make available to the teacher such authority as it may possess to require the presence of witnesses.

5. The principle of confrontation should apply throughout the hearing.

6. A full record should be taken at the hearing; it should be made available in identical form and at the same time to the hearing group, the administration, and the teacher. The cost should be met by the institution.

7. The full text of the findings and conclusions of the hearing committee should be made available in identical form and at the same time to the administration and the teacher. The cost should be met by the institution.

8. The hearing committee should promptly and forthrightly adjudicate the issues.

9. In the absence of a defect in procedure, the conclusions of the hearing committee should be taken as final by the administration and governing board in all matters relating to the teacher's competence and integrity.

10. But in the event of a finding unfavorable to a teacher, there should exist established procedures and channels for appeal, eventually leading to the ultimate authority responsible for the control of the institution.

D. The Hearing; Non-Tenure Teachers, Holders of Temporary Certificates, etc.

AMERICAN EDUCATIONAL PRACTICE permits great fluidity in the testing of teachers as to their permanent usefulness in a particular institution. This experimental phase of a teacher's career is wisely characterized by a minimum of formal judgment; teachers come and go without recorded praise or blame. Furthermore, non-tenure appointments often fall within the marginal area of an institution's educational and financial program; the dropping of a teacher may have no bearing whatsoever upon his professional capacity. But, although non-retention does not necessarily raise an academic freedom issue, such an issue may be present in non-retention. For example, improper consideration may have been given to non-academic matters, such as a teacher's race, or his religious or political beliefs and associations. Such improper consideration is a violation of academic freedom and the non-tenure teacher is entitled to all the protections of academic due process. (It is understood, of course, that an institution of publicly declared faith may limit employment to teachers of that faith. Similarly, an institution of special function may establish particular criteria; for example, a school for young girls might properly hire only women.)

Action in non-tenure academic freedom cases should take this general form:

1. If the non-tenure teacher believes that improper considerations have unmistakably affected the decision not to retain him, he should, with appropriate advice, determine whether he can assemble adequate proof in support of his contention.

2. The teacher should decide whether he is willing to hazard the possible disclosure of professional weaknesses he may have displayed at an early point in his career.

3. If his decisions under "1" and "2" are positive, he should request an opportunity for informal conciliation as set forth in section "A," above.

4. If such informal conciliation is denied, or unsuccessful, he should then request a formal hearing, and submit a written waiver of the tradi-

tional right of non-tenure teachers to non-disclosure of the grounds upon which they have been released.

5. The administration should then grant to the teacher the entire procedure for adjudication set forth above in sections "B" and "C."

Academic Due Process for Students

THE GENERALLY PREVALENT ASSUMPTION that enrollment in an educational institution is a matter of privilege rather than a right, an assumption which has not been adequately studied or tested, places the American student at this time in an unhappily vague position. He knows he has the right to freedom of inquiry and expression possessed by all citizens, but he does not know the degree or manner in which this right may be exercised in a particular institution where his presence is a matter of grace. Nor, if conflict arises about his right, does he ordinarily encounter established rules and procedure for the consideration of his case. In the best institutions he will, it is true, find his situation controlled by a genuinely democratic spirit which results in effective due process. But in other institutions he will be subjected to an irritating paternalism or even to summary autocratic judgment.

It is most desirable that each educational institution should have in its governing regulations a comprehensive and exact set of rules establishing academic due process in student cases. Where such rules do not exist, an appropriate committee (with effective student representation) should be appointed for their formulation.

A teacher in an academic freedom case will normally consult local professional groups, such as his school or college committee on academic freedom, and his local or state teachers' association. Inquiries about the principles of academic freedom or academic due process may also be addressed to the following national organizations:

AMERICAN CIVIL LIBERTIES UNION
170 Fifth Avenue
New York 10, New York

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS
1785 Massachusetts Avenue, N.W.
Washington 6, D.C.

NATIONAL EDUCATION ASSOCIATION
1201 Sixteenth Street, N.W.
Washington 6, D.C.

Price of this pamphlet 10¢.
Quantity prices on request.