Comment of the Foundation for Individual Rights and Expression on the Florida Board of Governors of the State University System proposed regulation 10.003, Post-Tenure Faculty Review

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Introduction

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to free speech and free thought — the essential qualities of liberty. Because colleges and universities play an essential role in preserving free thought, FIRE places a special emphasis on defending these rights on our nation's college campuses. Since 1999, FIRE has successfully defended the rights of students and faculty nationwide.

In November 2022, the Florida Board of Governors of the State University System (the "Board") proposed regulation 10.003, Post-Tenure Faculty Review, in response to Senate Bill 7044, which amended section 1001.706, Florida Statutes, adding that the Board "may adopt a regulation requiring each tenured state university faculty member to undergo a comprehensive post-tenure review every 5 years."[1] FIRE submitted a comment on November 23, 2022, when the Board first published proposed regulation 10.003. We are pleased to see the references to section 1000.05(4), Florida Statutes, in proposed regulation 10.003(2)(b) have been removed, as we urged in our original comment. We thank the Board for this welcome change.

Still, a number of our concerns remain unaddressed. While FIRE does not take a position on the merits of post-tenure review, we recognize Florida's interest in

[1] *See* FLA. STAT. § 1001.706(6)(b) (2022).

maintaining a high standard of academic achievement, teaching acumen, and research accomplishments. However, tenure exists in significant part to shield faculty from institutional or political repercussions for their scholarship, teaching, research, or views. It is those who hold minority or dissenting viewpoints who are often most in need of tenure's protections. As written, the proposed regulations lack the express commitment to academic freedom that would be expected of any public university system committed to the principles of open debate and faculty members' academic autonomy.

If the crucial benefits of tenure are to be preserved, Florida's policies must affirmatively protect academic freedom and expressive rights for its faculty members. As such, we reiterate several of the concerns we highlighted in our initial comment.

Analysis

I. The proposal must clarify the "professional conduct" criterion.

Proposed regulation 10.003(3)(a) still requires that post-tenure review consider a "faculty member's history of professional conduct." The concept of "professionalism" is so elastic as to easily be abused as a pretext for viewpoint-based discrimination. In fact, university and college sanctions and grievance proceedings often include charges that a faculty member's underlying behavior was "unprofessional," even if the expression is clearly protected by academic freedom.

For example, in 2014, a political science professor at Marquette University published a personal blog post criticizing a graduate student instructor for stating that it was inappropriate for a student in a philosophy course to express opposition to same-sex marriage.[2] Citing "standards of personal and professional excellence," Marquette suspended the professor and revoked his tenure.[3] After nearly three years of litigation, the Wisconsin Supreme Court ruled that the university had violated the professor's academic freedom rights and ordered him reinstated.[4] As the Marquette University example illustrates, notions of "professional conduct" and what may be deemed "unprofessional" are

[2] *Wisconsin Supreme Court: Marquette University wrongly fired professor for opinions on personal blog*, FIRE (July 6, 2018), https://www.thefire.org/news/wisconsin-supreme-court-marquette-university-wrongly-fired-professor-opinions-personal-blog.

[3] Letter from Richard C. Holz, Dean, Marquette Univ, to Dr. John McAdams, (Jan. 30, 2015), https://www.thefire.org/research-learn/letter-marquette-university-dean-richard-c-holz-dr-john-mcadams-0.

[4] *McAdams v. Marquette Univ.*, 383 Wis. 2d 358 (Wis. 2018).

so vague and subjective as to empower administrators to target faculty holding disfavored views.

In a more recent example, a professor at the University of San Diego was investigated for comments he made on his personal blog criticizing individuals who did not believe COVID-19 originated in a lab in Wuhan.[5] The petition repeatedly cited "professionalism" as grounds for the professor's termination. The administration responded with a disciplinary investigation. While no further action was ultimately taken, the episode demonstrates how amorphous terms like "professionalism" may be employed against faculty members for speech that would be protected by the First Amendment at public institutions.

FIRE has similarly criticized amorphous tenure review criteria, including "collegiality" requirements, which suffer from the same vagueness and overbreadth.[6] Faculty have faced termination, discipline, and denial of tenure under collegiality (or similar) requirements simply for expressing unpopular viewpoints or criticizing their administrations.[7] FIRE's Scholars Under Fire database catalogs over a thousand examples of faculty targeted for sanctions over speech squarely protected under norms of academic freedom and

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[5] Sabrina Conza, *FIRE calls on University of San Diego Law to cease investigating professor for criticizing Chinese government*, FIRE (Mar. 23, 2021), https://www.thefire.org/news/fire-calls-university-san-diego-law-cease-investigating-professor-criticizing-chinese.

[6] *See* Letter from Alex Morey, Director, Individual Rights Defense Program, FIRE & Jeremy C. Young, Senior Manager, PEN America, to Dr. Alfred Rankins Jr., Comm'n of Higher Educ., Bd. of Trustees of State Institutions of Higher Learning (Apr. 27, 2022), https://www.thefire.org/news/fire-pen-america-condemn-new-rule-forcing-some-mississippi-universities-consider-collegiality (urging the Mississippi Institutions of Higher Learning Board of Trustees to remove vague standards including "collegiality" from tenure decision-making criteria); Letter from Laura Beltz, Program Officer, Policy Reform, FIRE, to Daniel A. DiBiasio, President, Ohio Northern Univ. (May 23, 2017), https://www.thefire.org/research-learn/fire-letter-ohio-northern-university-may-23-2017-0 (expressing concern to Ohio Northern University about a policy requiring "civility" and "collegiality" in the Faculty Handbook).

[7] *See, e.g.*, Alex Morey, *Salaita's 'Why I Was Fired' Puts Civility in the Spotlight*, FIRE (Oct. 8, 2015), https://www.thefire.org/salaitas-why-i-was-fired-article-puts-civility-in-the-spotlight; Colleen Flaherty, *Requiring Civility*, INSIDE HIGHER ED, (Sept. 12, 2013), https://www.insidehighered.com/news/2013/09/12/oregon-professors-object-contract-language-divorcing-academic-freedom-free-speech; Ari Cohn, *Marquette's Consistent Inconsistency on Academic Freedom, Tenure, and Civility*, FIRE (Mar. 4, 2015), https://www.thefire.org/marquettes-consistent-inconsistency-academic-freedom-tenure-civility; Erica Goldberg, *Outspoken Professor Faces Dismissal from Idaho State University*, FIRE (Oct.29, 2009) https://www.thefire.org/outspoken-professor-faces-dismissal-from-idaho-state-university.

constitutional guarantees of free speech.[8] To avoid authorizing discipline for protected speech, the Board should revise its definition of "professional conduct" so that it includes only objective factors like viewpoint-neutral standards related to scholarship and teaching as determined by faculty peers.

II. The regulation's "substantiated student complaints" criterion is vague and requires clarification.

The proposed post-tenure review policy still includes "substantiated student complaints" as an evaluative criterion. Of course, institutions must fairly evaluate and, when appropriate, pursue complaints of harassment or other professional misconduct. However, FIRE's decades of experience defending faculty rights demonstrates that too often, student complaints are directed against faculty speech protected by the First Amendment.

As we noted in our previous comment, the University of Central Florida suspended and then quickly reinstated Professor Hyung-il Jung after he quipped in an exam review session, "It looks like you guys are being slowly suffocated by these questions. Am I on a killing spree or what?"[9] In Professor Jung's case, the alleged misconduct could have been deemed "substantiated" in the language of the criterion proposed here because the facts were uncontested. Thankfully, the institution eventually concluded that the professor had not engaged in wrongdoing because the First Amendment protects his speech. His case demonstrates that the term "substantiated student complaints" is both vague and overbroad because it could mean that in cases when a student complains and the facts are not disputed, the student complaint is "substantiated," even if the faculty member's speech is wholly protected under the First Amendment.

The Board must define the term "substantiated student complaints" narrowly, to include only those cases where the institution finds a faculty member responsible for misconduct that violates the law or university regulations after a process in which the professor is afforded a fair hearing and full procedural rights.

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[8] FIRE, Scholars Under Fire Database, https://www.thefire.org/research-learn/scholars-under-fire (last visited Mar. 9, 2023).

[9] FIRE, *University of Central Florida Professor Reinstated After Suspension for In-Class Joke* (May 21, 2013), https://www.thefire.org/news/university-central-florida-professor-reinstated-after-suspension-class-joke.

III. **The proposed appeal process is inadequate.**

Any policy that allows for the removal of a tenured professor must allow for a meaningful appeal. Yet the appeal process set forth in the proposal falls short of this standard. It states:

> Final decisions regarding post-tenure review may be appealed under university regulations or collective bargaining agreements, as applicable to the employee. The arbitrator shall review a decision solely for the purpose of determining whether it violates a university regulation or the applicable collective bargaining agreement and may not consider claims based on equity or substitute the arbitrator's judgment for that of the university.

Although due process does not necessarily preclude affording some deference to the findings of fact established through an initial process, it is unjust to accord total deference to such findings even when the factual conclusions are erroneous. The Board must therefore change the rule to make clear that an arbitrator may overrule university findings that are plainly contrary to the weight of the evidence.[10]

The value of an appeal is greatly diminished when the arbitrator or appellate body cannot overrule a university's factual judgments even when there is clear evidence that the factual findings of an initial determination are in direct conflict with evidence on the record. The Board must ensure that the appeal process for post-tenure review decisions provides a meaningful opportunity for faculty to dispute the university's findings.

IV. **Faculty must play integral roles in any post-tenure review processes.**

American institutions of higher education have long benefited when university administrators and faculty share the responsibility of governing institutional policies and practices. Faculty have historically defended freedom of expression, even when administrators have not. Faculty are naturally incentivized and well-suited to serve as a necessary check on administrative decision-making that might jeopardize academic freedom — after all, faculty rights are most directly affected when academic freedom protections are lacking.

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[10] *See, e.g.*, *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1312-13 (11th Cir. 2013) ("[N]ew trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence.").

The proposed rule, however, does not fully allow faculty stakeholders to participate in the post-tenure review process. Section 4(i) states:

> With guidance and oversight from the university president, the chief academic officer will rate the faculty member's professional conduct, academic responsibilities, and performance during the review period. The chief academic officer may accept, reject, or modify the dean's recommended rating. The chief academic officer may request assistance from a university advisory committee in formulating an assessment.

As written, faculty peers are not guaranteed participation in this rating process. At the very least, this language should *require* consultation with a university advisory committee comprised of faculty. Even better, tenure should not be revokable without substantive involvement from faculty stakeholders.

V. The Board must hold fast in its decision to remove mandatory compliance with an unconstitutional law.

As originally proposed, regulation 10.003(3)(a)(5) would have required post-tenure review to take into consideration "[a]ny violation of section 1000.05(4), Florida Statutes." We noted in our previous comment that after students and professors represented by FIRE and other organizations filed a constitutional challenge to the higher education provisions in that statute, a federal court enjoined the Board, through its members, from enforcing section 1000.05(4), Florida Statutes.[11] We urged the Board to remove that section as a tenure review criterion in the proposed regulation 10.003, as well as the reference to that section in proposed regulation 10.003(2)(b).

Thankfully, in the latest proposal, both references to section 1000.05(4), Florida Statutes, have been eliminated. The Board must stand firm in its decision; requiring the application of an enjoined statute would be unlawful.

[11] *Pernell v. Fl. Bd. Governors State Univ. Sys.*, No. 4:22cv304-MW/MAF, 2022 WL 16985720, at *52 (N.D. Fla. Nov. 17, 2022). Section 1000.05(4)(a)–(b), Florida Statutes, which is colloquially known as the "Stop WOKE Act" has been enjoined. Board of Governor Regulation 10.005(2)–(3) and (4)(d) is the Board's regulation implementing that statute. The regulation has also been enjoined.

VI. The proposal should maintain its prohibition on viewpoint and ideological discrimination while adding explicit protections for academic freedom.

Tenure is fundamental to ensuring protection for faculty with unpopular viewpoints or with viewpoints that differ from those held by others within the university community. The proposed regulation helpfully states: "The [post-tenure] review shall not consider or otherwise discriminate based on the faculty members' political or ideological viewpoints." FIRE continues to encourage the Board to adopt this provision in the finalized regulation.

While FIRE is pleased to see that the proposed post-tenure review procedure includes these protections, the Board should recognize that institutions often attempt to mask viewpoint-based discrimination by pretextually asserting that disfavored viewpoints are discriminatory themselves or otherwise unprofessional as set forth herein.[12] To guard against this, the Board should make clear that the review process will protect to the greatest degree the academic freedom that lies at the core of American higher education. As the Supreme Court warned some 65 years ago:

> The essentiality of freedom in the community of American universities is almost self-evident. . . . No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[13]

Post-tenure review has the potential to reduce academic freedom by weakening or eliminating procedural safeguards typically associated with tenure. To obviate this concern, the Board must reaffirm its commitment to academic freedom by explicitly stating so in the final regulations.

More specifically, the policy should expressly recognize that the First Amendment and Florida law guarantee faculty the right to teach, research, and speak about matters within their areas of expertise and on matters of public

[12] *See* Jeannie Suk Gersen, *Laura Kipnis's Endless Trial by Title IX*, New Yorker (Sept. 20, 2017), https://www.newyorker.com/news/news-desk/laura-kipniss-endless-trial-by-title-ix.

[13] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

concern without facing punishment — even when some find their views, ideas, findings, or methods "uncomfortable, unwelcome, disagreeable, or offensive."[14] It must protect all classroom speech germane to the topic of the course — as broadly construed — and even speech not germane to the course if it is of short duration. Moreover, the policy should make clear that educators on college and university campuses are free to speak their minds, ask tough questions, and facilitate learning without the threat of institutional censorship, coercion, or intimidation. Finally, the proposed regulations should make clear that professors have a First Amendment right to speak as private citizens on matters of public concern.

Conclusion

While FIRE is grateful for the critical changes the Board has made to the proposed regulation thus far, the policy still poses significant threats to academic freedom and the First Amendment at your member institutions that require further revisions. FIRE thanks the Board of Governors for its attention to our concerns. Of course, we would be happy to discuss our concerns with the Board further at its convenience.

Respectfully submitted,

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[14] FLA. STAT. § 1004.097(2)(f) (2022); *see also Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 683 (6th Cir. 2001) (holding that a college instructor's speech, "however repugnant," that is "germane to the classroom subject matter and advances an academic message, is protected by the First Amendment").