

Lives In The Balance: Compensation, Workloads And Program Implications

Presented at the Legal Issues in Higher Education 13th Annual Conference

By Donna R. Euben, AAUP Counsel

October 6, 2003

Workload and compensation issues may be sources of campus conflict between faculty and administration.

I. Workload Issues

"I tell people that my job is flexible—I can work whichever 60 hours I choose. . . . But, as professors, we're working in our minds and hearts all the time."

Laura D. Kaplan, associate professor of philosophy, University of North Carolina at Charlotte, winner of the 2001 U.S. Professor of the Year

A. AAUP Policy

The AAUP's Statement on Faculty Workload With Interpretive Comments (hereafter "Faculty Workload Statement"), which was recently revised in 2000, sets forth the following guidance. It

(1) defines the "maximum teaching loads for effective instruction at the undergraduate . . . level[]" as a "teaching load of twelve hours per week, with no more than six separate course preparations during the academic year," and "[f]or instruction partly or entirely at the graduate level, a teaching load of nine hours per work," based on an academic year of not more than 30 weeks of classes; and

(2) recommends that "faculty should participate fully in the determination of workload, both initially and in all subsequent reappraisals."

B. What Is Faculty Workload?

"In the American system of higher education, faculty 'workloads' are usually described in hours per week of formal class meetings." AAUP Faculty Workload Statement. But, of course, "[f]aculty workload and hours in the classroom are not the same thing." AAUP, "The Work of Faculty: Expectations, Priorities, and Rewards," Policy Document & Reports (hereafter "Redbook") 158 (Ninth Edition). Instead, "[w]orkload should be thought of as total professional

effort, which includes the time (and energy) devoted to class preparation, grading student work, curriculum and program deliberations, scholarship . . . , participation in governance activities, and a wide range of community services. . . ." Id.

Some institutions define faculty workload beyond "credit hours" to "contact hours," which includes not only in-class time, but also student instruction time, such as laboratory time or externship work. A few schools measure faculty workload based on "student load," which refers to the total number of students in a given semester or year assigned to a professor.

Defining faculty workload in academe raises many challenging issues because of the unique nature of academic work and the differing nature of disciplines. To give just a few examples, how should we credit time spent on team-taught courses, on course development, on supervising student independent studies and research, or faculty supervision of practicum and student teaching?

How should institutions count the time spent by faculty teaching students in laboratories? On the one hand, lab time for science professors can be more demanding than lecture time, given the individualized attention demanded of faculty and the close supervision they provide. On the other hand, students are more independent when they engage in carrying out experiments, faculty are not required to prepare formal lectures, and the labs often involve fewer students. See, e.g., Jennifer Jacobson, "Do Science Professors Get Enough Credit?," *The Chronicle of Higher Education* (Dec. 4, 2002).

Different institutions count laboratory time differently:

University of Houston: "Laboratory teaching where the faculty member is present in the laboratory with or without a teaching assistant: Two laboratory class hours are normally equated to one semester credit hour." <b3308-adm.cl.uh.edu/PolicyProcedures/fachandbook/fac6.1.html>

University of Nebraska at Omaha: "Workload credit for undergraduate and graduate laboratory instruction will normally be computed as 67% of the number of scheduled contact hours"

Widener University: Professors with lab time receive one hour of credit for every hour they spend teaching a laboratory course. < HYPERLINK "http://www.widener.edu"

C. Some Research on Faculty Workload

As we know, workload involves more than simply the time spent by faculty in the classroom.

Data indicate that faculty members on average work between 45 to 55 hours a week. Valerie Martin Conley, "Supplemental Table Update" (update to the 1993 National Study of Postsecondary Faculty Report, "Part-Time Instructional Faculty and Staff: Who They Are, What They Do, and What They Think"), National Center for Education Statistics, U.S. Department of Education, Washington D.C. (Apr. 2002) (Table 29).

Recent studies suggest that "faculty at nearly every type of institution are spending more time engaged in research and more time teaching and preparing for teaching" than they have in the past. See Jeffrey F. Milem et al., "Faculty Time Allocation: A Study of Change Over Twenty Years," *The Journal of Higher Education*, Vol. 71, No. 4, at 472 (July/Aug. 2000) (hereafter "Faculty Time Allocation") (reviewing literature over a 20-year period (1972-1992) and finding that "faculty actually have less discretionary time now than they did in 1972").

Despite public perceptions, most instructional faculty continue to spend the bulk of their time teaching. What may be "suffering," however, is the amount of time faculty spend "interacting with students in more informal settings." *Faculty Time Allocation*. That may be due, in part, because such interaction is not rewarded in the current academic structure:

Although we state publicly that we want to create educational environments that contribute to better outcomes for students, we do not reward faculty in ways that promote these better outcomes. Specifically, out-of-class contact does not appear to be rewarded in higher education institutions.

Id.

D. State Laws on Workload

A 1996 AAUP report found that 21 states in 1994 had some kind of mandate related to faculty workload. "The Politics of Intervention: External Regulation of Academic Activities and Workloads in Public Higher Education," *Academe: Bulletin of the American Association of University*

Professors (hereafter Academe) 46 (Jan.-Feb 1996). The report faulted outside attempts to regulate the manner and hours that faculty work in public institutions because: 1) few states advanced standards according to type of institution, preferring a "one-size-fits-all" approach, and 2) little evidence indicated that regulation by the outside community results in "better" teaching, research, or service.

Probably the most attention was garnered by the Ohio legislature in its 1993 enactment of Section 3345.45 of the Ohio Education Code, which provides:

[T]he Ohio board of regents jointly with all state universities . . . shall develop standards for instructional workloads for full-time and part-time faculty in keeping with the universities' missions and with special emphasis on the undergraduate learning experience. The standards shall contain clear guidelines for institutions to determine a range of acceptable undergraduate teaching by faculty. . . .

[T]he board of trustees of each state university shall take formal action to adopt a faculty workload policy consistent with the standards developed under this section. [T]he policies adopted under this section are not appropriate subjects for collective bargaining. . . . [A]ny policy adopted under this section by a board of trustees prevails over any conflicting provisions of any collective bargaining agreement between an employee organization and that board of trustees.

This state law led to protracted litigation, described below, and the courts ultimately upheld the constitutionality of the law.

While the AAUP is currently unaware of any pending bills seeking to regulate faculty workload, administrators and faculty should be alert to legislative attempts to address this issue.

E. Some Case Law on Faculty Workload

American Association of University Professors, Central State University Chapter v. Central State University: In this case, which was twice considered by the Ohio Supreme Court with two different outcomes, the court ultimately upheld the Ohio law declaring faculty workloads to be outside collective bargaining. The court reasoned that a 1993 statute was "rationally related" to the state's interest in enhancing the undergraduate student learning experience by making

sure professors spend more time in the classroom. 717 N.E.2d 286 (Ohio 1999).

As noted above, the state law, Ohio Rev. Code Ann. Sec. 3345.45, provides for state universities to establish instructional workloads for faculty and further provides that "the policies adopted under this section are not appropriate for collective bargaining." The state legislature enacted the law in response to a legislative study that found a 10 percent decline in the amount of faculty teaching hours at public universities in Ohio. It directed the administrations of public universities in Ohio to increase professors' teaching time by 10 percent. In 1994 the administration at Central State University unilaterally imposed a new workload policy, increasing the amount of classroom time required of professors from 12 hours per quarter to 15. The local AAUP chapter sued, arguing that the law violated the federal and state constitutions, because other state employees are free to bargain over their workloads.

When the state supreme court first reviewed the constitutionality of the law, the court determined in a 4-to-3 decision that the Ohio law was unconstitutional, because the state failed to provide a "shred of evidence" connecting collective bargaining and decreased teaching time. 699 N.E.2d 463 (Ohio 1998). It reasoned that it could not "find any rational basis for singling out university faculty members as the only public employees precluded from bargaining."

The U.S. Supreme Court then reversed that state court decision as to the federal equal protection argument, concluding that Ohio's supreme court had misapplied the rational basis test: the state was not required to present evidence linking the statute with its objective. The Court opined: "One of the statute's objectives was to increase the time spent by faculty in the classroom; the imposition of a faculty workload policy not subject to collective bargaining was an entirely rational step to accomplish this objective." 526 U.S. 124 (1999).

On second review and in light of the U.S. Supreme Court's directive, the Ohio supreme court found that the state law on workload was rationally related to its objective. The court ruled that the state legislature could have rationally decided that collective bargaining might undermine the policy behind the workload adjustment and that getting professors to spend more time teaching was more important than collective bargaining: "Here the state identified a disturbing trend in faculty workload at public universities . . . [and] considered this to be a situation where the public interest necessitated legislative intervention." 717 N.E.2d 286 (Ohio 1999).

Vermont State Colleges Faculty Federation v. Vermont State Colleges: The Vermont supreme court upheld the state board's ruling that a technical college president committed an unfair labor practice by unilaterally issuing workload guidelines for faculty who were unionized. The workload guidelines set requirements for faculty "contact hours," "credit hours," and "student load." The state board found that work based on "student loads," which refers to the total number of students in a given semester or year assigned to an instructor, increased faculty work "to an excessive extent: in some cases resulting in instructors teaching an additional lecture course without compensation, and resulting in cases where faculty were no longer given 'overload' pay for carrying a contact hour in a particular department." Accordingly, the board ruled that the guidelines constituted "a change in conditions of employment" in violation of the controlling collective bargaining agreement. The court deferred to the board's findings and upheld its order. 566 A.2d 555 (Vt. 1989).

F. Some "Hot" Faculty Workload Issues

Some recent developments that have affected traditional workload issues include the increase in distance education courses, the increase in use of contingent faculty, and the move toward "legislating" the particulars of faculty work hours.

1. Distance Education: On-Line Workload Issues

a. AAUP Policy

No examination of teaching loads today would be complete without consideration of how distance education has affected the work of faculty members who engage in it. . . . The increased time in course preparation and the demands of interactive electronic communication with individual students call for a reduction in the maximum classroom hour assignment.

AAUP Faculty Workload Statement.

Significant resources are required to develop and maintain distance-education programs. Faculty members must give thought to how materials will be presented and how students will be evaluated, and they must also become familiar with the technologies of instruction involved in the delivery of distance-education courses. Accordingly, faculty members charged with these responsibilities may need significant release time from ordinary teaching duties when they are

developing such courses. See AAUP "Report on Distance Education and Intellectual Property Issues," *Academe* 41 (May-June 1999). Once a course has been developed, a faculty member also needs to determine how best to maintain contact with his or her students.

Anecdotal evidence

suggests that investment of faculty time involved in teaching a distance education course is substantially greater than that required for a comparable traditional course. The time spent on-line answering student inquiries is reported as being more than double the amount of time required in interacting with students in comparable traditional classes.

AAUP, "Special Committee on Distance Education and Intellectual Property Issues: Sample Language for Institutional Policies and Contract Language" (Dec. 3, 1999) (hereafter "AAUP Special Committee Report on Distance Education"); see also Jeffrey R. Young, "Online Teaching Redefines Faculty Members' Schedules, Duties and Relationships with Students," *The Chronicle of Higher Education* (May 31, 2002) ("Is technology turning college teaching into a 24-hour job?") (hereafter "Online Teaching").

In addition, discussions should occur and agreement should be reached on how, when, and where the faculty member teaching a distance education course will hold office hours for the distance education students. Regular in-the-office hours may not be helpful for distance education students.

b. Some Suggestions

- In terms of enrollment, class size should be based on pedagogical considerations, and large sections should be compensated by additional credit in load assignment in the same manner as traditional classes.
- The extra time required by faculty to prepare distance education courses should be additionally compensated either financially or in the form of a credit toward load assignment.
- Distance-education offerings should not reduce on-campus offerings to the point where a faculty member must teach distance-education courses to teach a full load.
- Regular faculty "in-the-office" hours for those teaching on-line courses may not be helpful to

students; accordingly, faculty members may determine whether some of the expected office hours may be held on-line.

AAUP Special Committee Report on Distance Education.

2. Increase in Contingent Labor

a. Some Numbers

Another trend in higher education that affects faculty workload is the proliferation of non-tenure track positions. Together the categories of part-time and full-time non-tenure-track faculty represent a rapidly growing segment of "contingent faculty" whose appointments are frequently subject to changes in course load, and whose responsibilities tend not to include the entire scope of faculty activities, such as governance, research and service.

Tenure-track and tenured positions are slowly eroding:

- A majority of new appointments among full-time faculty in 1993, 1995, and 1997 were off the tenure-track. Martin J. Finkelstein and Jack H. Schuster, "Assessing the Silent Revolution: How Changing Demographics are Reshaping the Academic Profession," AAHE Bulletin (Oct. 2002).
- In 1970, approximately 22 percent of faculty members were in part-time positions; by 1999 that proportion had grown to 43 percent. U.S. Department of Education, Digest of Education Statistics 271 (Table 228) (2001).

b. AAUP Policy

AAUP recommends that "part-time faculty appointments not be based, as they commonly are, solely on course or teaching hours. Activities that extend well beyond classroom time—including maintaining office hours, participating in collegial curricular discussions, preparing courses, and grading examinations and essays—should be recognized." AAUP Faculty Workload Statement.

Relatedly, AAUP recommends that the additional governance responsibilities assumed by tenured faculty, because of the increased use of contingent faculty, need to be recognized in institutional workload policies for full-time faculty: "[t]he increased reliance on various types of

non-tenure-track faculty has added to the workload of tenured and tenure-track faculty, who must assume additional administrative and governance responsibilities." Id.

c. Some Recent Developments

Most part-time professors (or adjuncts) generally are not compensated for their non-classroom time.

Clawson v. Grays Harbor College District No. 2: The Washington State Supreme Court ruled that part-time faculty at community colleges in the state were "exempt" employees under the state minimum wage law, and therefore were not entitled to overtime wages. The part-time faculty argued that they were not "salaried," but "hourly," employees because, in part, the "colleges' compensation arrangement did not pay them for their non-classroom work," such as office hours, but for credit (in-class) hours only. Under the collective bargaining agreement, they are paid based on the number of credits or contact hours multiplied by the bargained-for monetary rate. The agreement further provided that compensation includes payment for work outside the classroom, including office hours. The court ruled that the "compensation arrangement voluntarily entered into by each part-time community college instructor" qualified them as professional employees exempt from overtime pay under state law. 61 P.3d 1130 (Wash. 2003).

But see CUNY-PSC Collective Bargaining Agreement: Adjunct professors who teach two three-credit courses or more will be paid for an additional "professional hour." The hour can be spent "to engage in professional assignments related to their academic responsibilities, such as office hours, professional development, participation in campus activities and training." There are approximately 7,250 adjuncts in CUNY, who earn between \$53 and \$63 a credit hour; it is estimated that salaries will increase for some 24 percent of adjunct faculty. The university system's chancellor stated that the pay raise will encourage adjuncts to spend more time with students outside the classroom. Thomas Bartlett, "CUNY Adjuncts Win an Extra Hour's Pay for Work Outside the Classroom," The Chronicle of Higher Education (July 2, 2002). < HYPERLINK "http://www.psc-cuny.org/contract96.htm" www.psc-cuny.org/contract96.htm >

3. Office Hours

The issue of faculty office hours, or the perceived lack thereof, has recently captured public

attention.

Boston University: In the late 1990s the administration of Boston University established a faculty "Tenure Discussion Group," which recommended a number of policy changes, including that faculty members spend at least four days a week on campus. The recommendation reportedly engendered much "rancor" on campus. Robin Wilson, "It's 10:00 a.m. Do You Know Where Your Professors Are?," *The Chronicle of Higher Education* (Feb. 2, 2001). Such a "one size fits all" policy may be insensitive to differences among disciplines in the academy. English professors often work at home or late at night—because they need uninterrupted time to write. History professors often work in research libraries. Professors in the sciences are often in the lab—not their campus offices—working with graduate students.

Some examples of institutional policies on faculty office hours include:

Northwestern University: "Faculty members should hold regular office hours. For students whose schedules conflict with the instructor's posted office hours, opportunity for consultation by appointment should be provided." < HYPERLINK "http://www.northwestern.edu/provost/faculty/handbook.pdf" www.northwestern.edu/provost/faculty/handbook.pdf>

James Madison University: "Each faculty member is responsible for maintaining office hours. These hours should be staggered from day to day to accommodate students and other faculty members. A schedule of office hours shall be posted and carefully followed to avoid confusing and discouraging students who may desire conferences. Each full-time faculty member shall post a minimum of five regular office hours per week and should be available during other hours by appointment."

New River Community College: "In order to promote the availability of faculty to work with individual students, each full-time faculty member is required to post on or near his/her office door a minimum of 10 hours per week as office hours to be available to work with students on their individual academic and occupational problems. Office hours should be posted for each day of the week." < HYPERLINK "http://www.nr.vccs.edu/nrccfamily/handbook/secfbook.htm" www.nr.vccs.edu/nrccfamily/handbook/secfbook.htm>

Some administrations have mandated faculty "virtual" office hours:

Stevens Institute of Technology: Professors are required to respond to all online student e-mail within 48 hours. < HYPERLINK "http://www.stevens.edu/main/home/" www.stevens.edu/main/home/>

Cleary College: All professors are asked to "electronically acknowledge all student questions and assignments within 24 hours." < HYPERLINK "http://www.cleary.edu/" www.cleary.edu/>

See Young, Online Teaching.

Scholars who have studied asynchronous learning argue that such time requirements for faculty responses to student e-mail can be "counterproductive": "[S]ome of the best professors will avoid virtual teaching if they think it will chain them to their computers seven days a week." Id.

II. Faculty Compensation

Faculty compensation subsumes a myriad of legal and policy issues, including merit pay, external grant support, salary reductions, and market forces (salary compression and salary equity).

A. Merit Pay

"[M]erit pay . . . has played an increasingly important role in academic life since the 1980s." Denise Marie Tanguay, "Inefficient Efficiency: A Critique of Merit Pay," in *Steal This University* 49 (Benjamin Johnson et al., eds.) (2003) (hereafter "Inefficient Efficiency"). A recent survey by the College and University Professional Association for Human Resources indicates that approximately 34 percent of administrations use merit pay systems. CUPA-HR, 2000-2001 National Faculty Salary Survey (Washington, D.C.: CUPA-HR, 2001).

1. What is Merit Pay?

[Merit pay] refers to the practice of allocating annual salary increases to individual faculty members based on the quality of their performance. The practice, ideally, encourages faculty members to devote their efforts to some combination of teaching, research, and service activities, in accordance with the institution's mission, thereby strengthening the institution and enhancing the benefits gained by students and society. . . . A fundamental difficulty arises

from the unquantifiable nature of the quality of teaching, research, and service.

Lee Hansen, "Merit Pay in Structured and Unstructured Salary Systems," *Academe* 10 (Nov.-Dec. 1988); see generally November-December 1988 issue of *Academe* (the theme of which is merit pay).

Designing merit pay systems in higher education is a challenge.

[There are] difficulties with the use of systems like merit pay in higher education. First, to be effective, outcomes and established performance standards must be identified, yet in knowledge-based institutions like colleges . . . it is often quite difficult to specify the desired product. . . . For instance, what is an appropriate performance standard for teaching . . . that can be established in advance to allow for the implementation of an effective merit system? A percentage of students receiving a certain grade? A specified rating based on student evaluations? Should the measures vary depending on whether the course is required, a new offering, . . . or a large introductory lecture? Unlike a widget factory, some educational results can resist the level of specificity required in a true merit pay system, which can result in a greater reliance on more quantifiable products . . . but ignores arguably equally important matters like quality of impact.

Kathryn M. Moore & Marilyn J. Arney, *Making Sense Of The Dollars: The Costs And Uses Of Faculty Compensation*³⁵ (ASHE-ERIC Higher Education Report 5, 1993).

Professor Tanguay raises a number of questions about the efficiency and perceived effectiveness of merit pay at colleges and universities, including:

- Does the merit pay system "distort" the mission of colleges and universities because "[m]erit pay . . . reward[s] a narrow set of goals, particularly those that are measurable: number of journal articles published, external dollars brought into the institution in grants, and perhaps student evaluations of the faculty member's courses . . .?"
- Does the "very nature of academic work make[] the design and implementation of a successful merit pay system difficult if not impossible"?
- Especially when facing draconian state budget cuts, do the "economics" of merit pay work in

higher education, when merit pay systems are often imposed while cutting across-the-board cost-of-living increases or merit pools are often so small as to fail in really rewarding professors whose work is rated above satisfactory?

She concludes that "there is very little evidence that the [merit] system can be implemented within most colleges or universities with fairness and positive outcomes for the institution."
Tanguay, Inefficient Efficiency.

Some questions to be addressed in designing a merit pay system include:

What are the criteria and who sets them?

Who applies the criteria to individual cases?

What is the size of the merit pool, and what is the range of individual merit increases?

What portion of compensation is merit (as opposed to other components, such as cost-of-living adjustments)?

Are merit pay decisions appealable and, if so, to whom?

2. Some Case Law on Merit Pay

Merit pay is not only a contentious policy issue on campus, but often fodder for litigation.

Claims challenging merit payments, or lack thereof, arise in a variety of legal contexts, including First Amendment, discrimination, and breach-of-contract law.

a. First Amendment

Hollister v. Tuttle (Portland State University): Michael Hollister, a tenured professor of English, successfully sued his university for violating his First Amendment rights when it denied him merit pay increases. Hollister asserted that he was denied such increases because he spoke out publicly against feminist criticism of male writers in American literature and against feminist courses in the English Department. The federal appellate court found that the professor's speaking out on educational policy was protected speech, and that to deny him merit increases in retaliation for that speech was unconstitutional. 210 F.3d 1033 (9th Cir. 2000).

Power v. Summers (Vincennes University): In 1997 another federal appellate court allowed a

case to proceed to trial on whether Vincennes University, a two-year public university in Indiana, violated the First Amendment rights of three professors by awarding them low merit increases. The faculty members asserted that they were awarded merit increases of only \$400, compared to an average increase of \$1,000, because they were outspoken on issues of faculty salaries. The professors sought a judicial injunction commanding the university to raise their base salaries to reflect the merit increases they would otherwise have been awarded. The university "concede[d] that these so-called 'merit' raises were actually used to reward faculty who were combating 'dissension' and 'divisiveness,'" according to the court. The court observed that the lower merit increase "not only reduced the fringe benefits [the professors] would have received had they gotten a higher raise, but will reduce their future salaries; for by being added to the base salary the amount of the merit raise will be paid in all future years to those faculty who were granted it." In allowing the case to proceed to trial, the court concluded that the professors' claims survived because, in part, it could not say "that denying a raise of several hundred dollars as punishment for speaking out is unlikely to deter the exercise of free speech." 226 F.3d 815 (7th Cir. 2000).

Harrington v. Harris (Texas Southern University): Another federal appellate court considered whether a merit pay plan in the law school of Texas Southern University, a public, historically black institution, violated the legal rights of three tenured white professors. The professors claimed, in part, that they received lower than expected merit increases in retaliation for exercising their free speech rights, which included writing to various university officials seeking the dismissal of a law school dean, participating in a "no confidence" vote to remove the dean, and complaining to the American Bar Association about the university's refusal to dismiss the dean. On the one hand, the court rejected the professors' First Amendment retaliation claim, finding the case merely a "dispute over the quantum of pay increases." The court noted, however, that "[i]f Plaintiffs had received no merit pay increase at all or if the amount of such increase were so small as to be simply a token increase which was out of proportion to the merit pay increases granted to others, we might reach a different conclusion." On the other hand, the court accepted the law professors' argument that their low merit increases constituted race discrimination, because the faculty members presented evidence that the administration "failed to give white professors equal credit and consideration" for their work, which caused "black professors to receive higher merit pay increases than those received by their white

counterparts." 118 F.3d 359 (5th Cir. 1997).

b. Discrimination

In addition to *Harrington v. Harris* (race discrimination), discussed above, other courts have also examined whether merit pay systems are discriminatory.

Kovacevich v. Kent State University: Special education professor Dorothy Kovacevich sued Kent State University, claiming salary discrimination based on her gender. A jury agreed, and on appeal the federal appellate court ruled that sufficient evidence existed for a jury to have found that "her lower salary was a result of gender discrimination." The university argued that any differences in salary between Kovacevich and her male colleagues were "due to the school's merit system and across-the-board percentage increases." Kovacevich's evidence, however, persuaded the appellate court that gender discrimination was imbedded in KSU's merit-pay system. The court noted that "rather than a neutral system of merit based on anonymous peer evaluations, the merit award system was driven largely by an opaque decision-making process at the administrative level [that] did not necessarily reflect peers' assessment of applicants' performances, and rewarded men disproportionately to women." In addition, the court cited a faculty report, which stated that "it is extremely difficult to demonstrate the connection between peers' professional judgments of meritorious performance and the size of the merit awards." 224 F.3d 806 (6th Cir. 2000).

California State University: The California Faculty Association, the statewide faculty union for the CSU system, produced a study reporting that women professors are, on average, awarded 8 percent less in merit pay than their male colleagues. A fact-finding panel, made up of faculty and administration representatives, recommended in January 2001 that the CSU faculty merit increase program be suspended because it "appears to be ill conceived and poorly administered." See also Alison Schneider, "Faculty Union at California State U. Charges That Merit Pay System Favors Men," *The Chronicle of Higher Education* (July 21, 2000).

c. Breach of Contract

Meyer v. University of Akron: A tenured professor of management made a number of legal claims, including that denial of merit pay increases breached his contract, set out in the university's business college faculty manual. The manual provided that "salary adjustment . . .

may be reduced to zero," depending on the faculty member's performance. When the professor received negative evaluations, he was awarded no merit increase. The court found no breach of contract. 2002 WL 31989165 (Oh. Ct. Cl. 2002).

Sack v. North Carolina State University: A tenured history professor, Ronald Sack, filed a grievance against his department chair for failing to award him "academic enhancement" funds, which were given to 50 percent of the faculty members in the history department. Sack claimed that the chair "deliberately overlooked him" for "personal reasons." Merit increases were to be awarded based on a number of criteria, including number and quality of recent publications and the likelihood of the professor's being recruited from other schools. A faculty grievance committee ruled that the professor's request for a merit increase had been handled properly, although it suggested that if the department chair had better explained his evaluation methods, the grievance might have been avoided. The president and the board upheld the faculty committee's findings, but the state trial court vacated the board's order. It required the department chair to list all history faculty publications and assign points to each, and if Sack was in the top half of the list, then it should be determined that he had been treated unfairly. The court also ordered that the grievance committee, in its reconsideration, "not consider the age of any faculty member, or any other factor, besides publications," and that the "Chancellor shall accept the recommendations of the Grievance Committee." The university appealed, and the state appellate court reversed the trial court. The appellate court found that the grievance committee properly weighed the evidence in reaching its conclusion that the denial of merit increases to Sack was not based on personal malice. 574 S.E.2d 120 (N.C. Ct. App. 2002).

See generally Donna R. Euben, "Judicial Forays into Merit Pay," *Academe* 70 (July-Aug. 2003).

3. Some Recommendations on Merit Pay

"Merit pay as a salary strategy can be of academic benefit only if it motivates faculty to improve their performance." Harold Barnett et al., "Coping with Merit Pay," *Academe* 19, 22 (Nov.-Dec. 1988).

In the end, if merit pay plans are adopted, we need to work to make them less opaque and more transparent. Such transparency will be achieved, in part, by:

ensuring that salary enhancement programs have clear objectives,
incorporating faculty peer-review committees into the process,
developing and implementing policies by peers,
applying criteria for such increases consistently and fairly, and
ensuring that merit pay criteria are not used to squelch the speech of faculty.
See generally Tanguay, *Inefficient Efficiency*.

B. Some Medical School Experiences with Faculty Compensation

The financial pressures facing many higher education institutions have been especially acute in medical schools. Billy Goodman, "Fiscal Constraints Threaten Tenure at Medical Schools," *The Scientist*, May 11, 1998 ([HYPERLINK "http://www.the-scientist.com/yr1998/may/goodman_p1_980511.html"](http://www.the-scientist.com/yr1998/may/goodman_p1_980511.html) www.the-scientist.com/yr1998/may/goodman_p1_980511.html). Those financial pressures have triggered cost-cutting efforts that have led to litigation by professors against administrations. Thus the medical school experience provides a helpful context in which to examine litigation resulting from some cost-cutting efforts, such as reducing salaries, shortening annual contracts, and increasing pressure to garner research monies.

For a helpful overview of policy and legal issues in medical schools, see Lawrence White, "Academic Tenure: Its Historical and Legal Meanings in the United States and Its Relationship to the Compensation of Medical School Faculty Members," 44 *St. Louis Univ. L.J.* 51 (2000); see also Donna R. Euben, "Doctors in Court? Salary Reduction Litigation," *Academe* (Nov.-Dec. 1999).

Glazer v. Georgetown University: In 1997 the medical school issued a new policy for its faculty, tying compensation to "income generating" activities and grant money that, apparently, would have required researchers to raise 70 percent of their salaries through grants. In December of that year eighteen tenured faculty members filed a grievance against the medical school. One faculty panel opined:

Although always welcome by the university, research grant funds never, by themselves,

determined how much salary the university would pay basic science faculty members. This is an important consideration under tenure principles, which in the last analysis, permits a faculty member to put aside any thought or worry about the security of his salary to devote his full efforts to teaching and scholarship.

The administration rejected the findings of two faculty panels, which both found for the professors.

In 1999 a group of twelve medical school faculty sued the university in D.C. Superior Court. The professors asserted a number of claims, including breach of their tenure contracts, claiming that the new compensation policy "abrogated the core principles of tenure at the University and overturned 200 years of tradition in the treatment of Georgetown faculty." In May 1999 the parties settled the lawsuit and, according to the media, the settlement agreement provided for the withdrawal of the proposed compensation policy, payment of the professors' lawyers fees, and compensation for two professors' lost income. Case No. 0000321-99 (D.C. Sup. Ct., Nov. 14, 1999); "Georgetown U. Settles Medical Professors' Lawsuit Over Compensation," *The Chronicle of Higher Education* (July 9, 1999). According to the lead plaintiff, Professor Glazer, the settlement allowed the professors "to bypass the grievance process and go straight to court" if there is a "reincarnation" of the compensation policy. "Science Scope," *Science*, Vo. 284 (June 11, 1999).

Kirschenbaum v. Northwestern University: A tenured faculty member on a "soft-money" appointment in the medical school challenged the administration's decision to eliminate his salary. The parties agreed that Professor Kirschenbaum was tenured. The court upheld Northwestern University's right not to pay the tenured professor based on the university's faculty handbook for medical school faculty, which specifically provided for "zero-based" salaries for tenured professors. 728 N.E.2d 752 (Ill. App. Ct.), appeal denied, 729 N.E.2d 497 (2000).

Albrecht v. University of Southern California: In 1995 the USC medical school sent its basic science faculty a letter notifying them of its plan to shorten their contracts from 12 to 9 months, with a corresponding 25 percent reduction in salary, and reduction in other benefits, due to a "structural deficit." The administration then switched all 108 faculty members to the new compensation plan. In response, 23 professors sued the university for a number of claims, including breach of contract. See "Suit by 23 Tenured Faculty Members Against USC Illustrates

Changes in Biomedical Research Culture," *The Scientist*, Vol. 11, No. 3 (Feb. 3, 1997). The parties eventually settled the suit. No. BC160860 (Cal. Super. Ct., July 20, 1998).

Williams v. Texas Tech University Health Sciences Center: The medical school reduced the compensation of a tenured professor from \$68,000 to \$46,500 because he failed to generate as much grant money as had been expected. The professor sued, claiming that he should have been provided a hearing before that decision was made. The court rejected his claim, finding that the professor's interest in a specific salary level did not outweigh the administration's interest in making budget decisions for educational programs. The court also noted that the professor had received six months' notice and the opportunity to seek additional funding. 6 F. 3d 290 (5th Cir. 1993), cert. denied, 510 U.S. 1194 (1994).

C. Market Forces

Market forces often influence faculty salaries, and that influence is reflected in legal cases involving salary compression and salary equity.

1. Salary Compression

Salary compression refers to the circumstances by which more senior faculty at a particular institution are paid less than recently appointed junior faculty. This phenomenon may occur for a number of reasons, including that senior faculty tend to be less likely to move to another institution, that administrations are competing with industry for junior faculty in particular "high competition" disciplines, such as computer science and economics, and that beginning salaries for newly appointed professors are generally higher than the starting salaries of senior faculty at the time of their initial appointment. See, e.g., Jennifer Jacobsen, "The Competition for Economics Ph.D.'s," *The Chronicle of Higher Education* (June 6, 2002).

Tagatz v. Marquette University: A tenured professor of education, Glenn Tagatz, who was 54 and Episcopalian, sued the administration for violation of federal employment and age discrimination law, alleging that "he had received smaller pay raises than colleagues who were either Catholic or under 40 years of age." The district court ruled for the university, and the professor appealed to the federal appellate court. Dr. Tagatz, who served as his own expert witness, introduced numerous statistical tables comparing the faculty salaries of those under and over 40, and Catholics and non-Catholics. That court found that the "the phenomenon of

diminishing returns to years of service is well-documented in studies of academic salaries." In so reasoning, the court noted "the possibility that new faculty are more mobile than old—another reason why one might expect the new (who generally are younger) to receive higher raises." 861 F.2d 1040 (7th Cir. 1988); see also *Rosen v. Columbia University*, 1995 U.S. Dist. LEXIS 11111 (Aug. 7, 1995, S.D.N.Y.) ("While this [salary compression] pattern may seem, and in fact may be, unfair to academicians who devote substantial portions of their career to a single institution and . . . to the betterment of both the university and the community-at-large, the trend reflects market forces that universities must take into account in hiring and salary decisions.").

Fenrick v. Wichita State University: A female tenured professor of mathematics sued the administration, alleging violation of Title VII and the federal Equal Pay Act (EPA) because she was paid less than her male colleagues. The court examined salary compression, whereby "[h]igh quality candidates were demanding higher salaries, and universities seeking to fill their openings with such people were forced to compete with the higher salaries paid by other universities and the marketplace. As a result, WSU was compelled to offer salaries to new faculty already higher than those paid to some current faculty." For example, the department appointed a male professor at a starting salary that was \$1,000 more than the female professor's salary, although she had been teaching at WSU for seven years. The court found no evidence of salary discrimination under Title VII. Rather, the court found that "[s]alary compression fully and legitimately explains the disparities in salaries in the mathematics department. . . . For the most part, each of those male assistant professors also later became victims of salary compression." The court also found no violation of the EPA, because the administration "convincingly established the existence of salary compression and its positive effect on salaries of recently hired faculty and its adverse effect on salaries of tenured faculty." 1988 U.S. Dist. LEXIS 13901 (D. Kan., Nov. 10, 1988).

West Virginia University v. Decker: A male psychology professor with tenure alleged that the university's compensation system discriminated against him based on his age. He alleged that the salary system, which distinguished between "new hires" and "existing faculty," violated the state anti-discrimination law. The professor argued that the "University routinely hires young inexperienced faculty . . . at salaries at or above his salary." The state human rights commission ruled that the administration failed to show that this compensation policy, which

had a disparate impact on older professors, was "consistent with business necessity," and that "the University's dual compensation policy did adversely affect faculty members over 40 years old already employed by the University." At the same time, the court ruled that Decker was not personally affected because "no new faculty member had been hired in Dr. Decker's department since it was created." The Supreme Court of West Virginia reversed the commission, finding that the administration had properly established business necessity. The court noted that salary increases for existing faculty tended to be limited to "across-the-board salary increases," while starting salaries for new faculty members are based on the "median 'market' rate." The court noted that "[d]ue to the University's poverty, compression and inversion of incumbent faculty salaries has resulted. Compression occurs when salaries offered to new hires increase more rapidly than the average salary increase for experienced, existing faculty. Inversion occurs when the salaries offered to new faculty, based on the competitive value of the academic marketplace, are higher than the salaries for existing faculty." The court ruled that "[t]he university did not engage in age discrimination by paying new faculty hires, irrespective of age, based upon the current fair market value for their specific disciplines." 447 S.Ed.2d 259 (W. Va. 1994).

2. Market-Rate Issues in Salary Equity

a. Some Court Decisions

Courts have recently considered whether the "market rate" is a valid measure upon which to base faculty salaries, and the results have been mixed in salary equity litigation.

Farmer v. University of Nevada: In 1998 the Nevada Supreme Court relied on market theory to justify a salary differential between a white female professor, Yvette Farmer, and a comparably qualified black male professor at the University of Nevada. She applied for an assistant professorship in sociology, with an advertised salary range between \$28,000 and \$34,000. Under a "minority bonus policy," which allowed a department to hire an additional faculty member following the initial placement of a minority candidate, the university first appointed as an assistant professor in the sociology department a black male candidate who was comparably qualified to Farmer. He was offered \$35,000 a year, with a \$5,000 increase upon completion of his doctorate. Farmer was appointed the following year at an annual salary of \$31,000, with a \$2,000 raise after completion of her dissertation. Farmer and her colleague started with an

initial pay differential of \$7,000 upon completion of their dissertations, which continued to widen because of the male professor's additional year of teaching and differences in merit increases. At trial, Farmer won a jury verdict of \$40,000 against the university for several legal claims, including violation of the Equal Pay Act. On appeal, the university asserted that, because only 1 percent of its faculty were black and 87 percent were white, and because women made up 25 to 29 percent of the faculty, it should hire a black man before a white woman to reduce this racial imbalance. Farmer argued that the wage disparity between herself and the black male professor was impermissibly grounded in gender discrimination. The court, however, agreed with the university that "qualified minority applicants, who are in short supply, can command premium salaries on the open market." It reasoned that the search committee simply "elected to avoid an all-out bidding war with other educational institutions" by offering the male candidate a salary commensurate, in part, with his "overall marketability." The court further observed that the chemistry department had "recently hired a female chemist at a higher salary than a male with similar credentials in order to diversify its faculty. . . . Market forces dictate higher salaries for female Ph.D.'s in chemistry due to a shortage of qualified women." The court thus concluded that the pay disparity between Farmer and her black male colleague was permissible based, in part, on market factors. 930 P.2d 730 (Nov. 1997), cert. denied, 523 U.S. 1004 (1998).

Donnelly v. Rhode Island Board of Governors for Higher Education: In a complicated salary structure negotiated between the local faculty union and the administration of the University of Rhode Island, different minimum salary scales existed for different tiers of grouped disciplines, and the different tiers "reflect[ed] the varying levels of compensation commanded on the open market." Individual women professors challenged the tier structure, alleging that they were discriminated against in their salaries. Twenty-seven percent of the total faculty were women. However, women were about 31 percent of the faculty in the first two tiers, which included the disciplines of humanities, social sciences, natural sciences, and pharmacy. The third tier, which provided for higher minimum salaries, included the disciplines of accounting, engineering, computer sciences, and business and finance; women made up only 10 percent of the faculty in that tier. The women faculty sued the administration and the faculty union. The administration and union responded that the salary scales merely reflected "market rates of compensation," and that any gender-based salary disparities were therefore legitimate. In

1996 the district court accepted the market-rate argument, ruling against the women professors because their "choice of academic field and the workings of the national market . . . are basically responsible for compensatory differences . . . within the different disciplines." The federal appellate court affirmed that decision, finding that the university was "simply paying different people different salaries for different, not similar, work." 929 F. Supp. 583 (D. R.I. 1996), *aff'd*, 110 F.3d 2 (1st Cir. 1997).

For additional information, see Donna R. Euben, "Show Me the Money: Salary Equity in the Academy," *Academe* (July/Aug. 2001).

b. Some Best Practices in Salary Equity

Establish starting salaries. Setting minimum salary scales sometimes helps to mitigate disparities by limiting the pay gap, at least among the lowest-paid faculty in each rank, that often emerges between men and women faculty and leads to careers of underpayment.

Conduct periodic salary-and promotion-equity studies. Even when minimum starting salaries are established, disparities in pay tend to seep in over time. To avoid such disparities, institutions should engage in regular salary reviews, as do American University, North Carolina State University, and Tarleton State University.

Provide briefings on salary practices for new faculty. The AAUP's Committee on the Status of Women recommends that "[i]nstitutions . . . disseminate criteria for the setting of pay standards widely, both to those who determine salary and to all faculty members." A recent settlement at St. Cloud University in Minnesota provided for such information sharing.

Offer "salary-setting" seminars. Universities should brief academic decision makers, including department chairs, on internal procedures and policies as well as salary discrimination laws. Identify sources of assistance available to decision makers if questions arise during salary reviews.

Create equitable merit-pay systems. As noted above, be sure that merit-pay programs have clear and objective standards that are applied consistently. The Marquette University gender-equity task force recommended that "all departments have written policies in place for distributing merit increases . . . [and] [m]onitor the system to ensure that it does not have a disproportionately negative effect on the salaries of women."

Establish inclusive eligibility criteria for equity adjustments. Depending on the purpose of such a study on your campus, efforts should be made to include all professors-women and men-who are identified as underpaid as eligible to participate in equity-adjustment plans.

Faculty workload and compensation issues can be highly charged matters on campus. Faculty and administration need to work together to ensure that workload policies accurately reflect faculty responsibilities as shaped by the mission of the institution. Similarly, faculty and administration should work together so that compensation policies are developed jointly, that such policies provide for some level of economic security, and that faculty are aware of such policies at the time of their appointment.