



North Dakota House of Representatives

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Chairman Schauer and members of the GVA committee. For the record, Mike Motschenbacher representing District 47 which consists of most of NW Bismarck. Today I bring before you HB 1437

I'm first going to give you some reasons of why I brought the bill, and then will go into specifics of what the bill does.

HB 1437 addresses tenure at North Dakota colleges. I've spent a good part of the past year researching tenure and why it's so widely implemented. One article that I read explained it best. The article starts out "Of all the things a university professor can achieve in their career, few are as desirable as academic tenure. Academic tenure is a system of strong job protections, that virtually guarantees a university professor will never be fired or let go except in the most extreme of circumstances. A key idea is to allow faculty to speak freely – whether on campus or in public – without fear of reprisal." To me, this explains the problem. Why does any employee at any level in any industry deserve this type of protection?

As you can imagine, I've had an enormous amount of feedback from many in our university system regarding this bill. Many have asked "Why are you trying to get rid of tenure" and I've asked many of them back "Why do we need it". The only answer I've received back so far that I'm somewhat in agreement with is that it may put us at a disadvantage versus other states that do offer tenure. However, bills that remove tenure are not unique to North Dakota. Texas and Ohio are both considering similar bills as we speak. In recent years, North Carolina, Iowa, Georgia, Wisconsin and Florida have also had legislation in front of them that would greatly curb tenure in one way or another. Some universities themselves, most recently in Kansas and Florida, have gone out on their own and eliminated tenure or denied tenure to employees. This is not a new idea, but the reasoning behind why they are doing it is similar in all these cases.

I understand that some instructors need some sort of "academic freedom" when teaching courses especially in science and medical fields as many of those subjects can maintain a level of opinions needed to effectively instruct students. But a much larger portion of fields of study do not require this protection, and in my opinion should not qualify to be a tenured position.

Having said all that, the amendments I've brought before you do not eliminate tenure as the original bill would have. The amendments are the result of me working in conjunction with several in the NDUS to come up with a solution that will address the issue of tenure, but without the unintended consequences that may have resulted from the original bill. It provides clear guidelines of what colleges must do should they choose to continue offering tenure. This clearly defines how they must conduct tenure, post tenure review, and also makes it clear that institutions of higher education can take action even on tenured faculty should they receive sub par performance reviews. It addresses who conducts reviews, and also makes it clear that institutions must make it clear of what type of position they are hiring for.

If you look in your packet, you will see a page describing attempts to address tenure during the last legislative session specifically HB 1003 and HB 1446. You will also find some details regarding the constitutionality of this bill, as I've been made aware that some who speak behind me may question it. The attached sheet gives some clear examples that this bill is indeed constitutional, but I'd like to point out specifically that in the ND Constitution Article VIII section 6, subsection 6b it clearly states " The said state board of higher education shall have full authority to organize or reorganize within constitutional and statutory limitations, the work of each institution under its control, and do each and everything necessary and proper for the efficient and economic administration of said state educational institutions" I'm not a lawyer, but this is clear to me that it is completely within our power to create statutory limitations on institutions.

To conclude, I know the SBHE and/or NDUS have some suggested edits that they will present. I'm going to let them address those with you, and I'm asking that after the hearing, chairman Schauer you and I and can get together with them to discuss those proposed changes.

This completes my testimony, and I would happily stand for any questions.

Summary of recent history of tenure and post tenure review.

During the 2023 legislative session, Representative Lefor brought forth HB 1446 that would have addressed tenure related issues. (copy attached) This bill passed the house 66-27 but failed in the Senate by a vote of 21-23. While HB1446 did not pass, Representative Lefor added a provision to HB 1003 (copy attached) that grants NDUS presidents specific authority to manage the SBHE Tenure and Post-Tenure Review processes, policies, and procedures.

Here is the relevant portion of NDCC 15-10-73:

“The president of an institution under the control of the state board of higher education may adopt policies, procedures, and directives for the institution, with input—but no authoritative control—from faculty and others through shared governance. The commissioner of higher education and the state board of higher education may overturn or amend the president's policies, procedures, and directives.”

This gave specific abilities for presidents to adopt policies and procedures regarding tenure, however, it seems as if they are not following these directives.

Over the interim, there have been many conversations at SBHE meetings addressing tenure, but to date, there have not been additional policies officially put into place. If this bill is passed, this will simply move the process along faster.

**FIRST ENGROSSMENT
with Senate Amendments
ENGROSSED HOUSE BILL NO. 1446**

Introduced by

Representative Lefor

1 A BILL for an Act to create and enact two new sections to chapter 15-10 of the North Dakota
2 Century Code, relating to a program for tenured faculty review at institutions of higher
3 education; to provide for a legislative management report; and to declare an emergency.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** A new section to chapter 15-10 of the North Dakota Century Code is created
6 and enacted as follows:

7 **Faculty tenure duties and responsibilities - Program - Report to legislative**
8 **management.**

- 9 1. The state board of higher education shall implement a four-year program focused on
10 the new campus models at Bismarck state college and Dickinson state university no
11 later than May 1, 2023, to improve the tenure process. The program may not apply to
12 a research university.
- 13 2. A tenured faculty member employed at an institution of higher education under the
14 control of the state board of higher education as listed in subsection 1 shall:
- 15 a. Comply with the policies, procedures, and directives of the institution, the
16 institution's president and other administrators, the state board of higher
17 education, and the North Dakota university system.
- 18 b. Effectively teach and advise a number of students approximately equal to the
19 average campus faculty teaching and advising load.
- 20 c. Engage in measurable and effective activities to:
- 21 (1) Help retain students for the institution.
- 22 (2) Help students achieve academic success.
- 23 d. Perform all other duties outlined in any applicable contract and position
24 description.

- 1 3. An institution involved in the program under this section:
- 2 a. May adopt policies and procedures requiring tenured faculty to promote
- 3 advancement of and further the mission of the institution.
- 4 b. Shall provide a progressive report of the program to the legislative management
- 5 no later than December 31, 2025.
- 6 c. Shall provide a final report of the program to the legislative management no later
- 7 than December 31, 2026.

8 **SECTION 2.** A new section to chapter 15-10 of the North Dakota Century Code is created
9 and enacted as follows:

10 **Faculty tenure review by presidents of institutions of higher education.**

- 11 1. The president of each institution of higher education designated under section 1 of this
- 12 Act may review performance of any or all of the duties and responsibilities under
- 13 section 1 of this Act of any faculty member holding tenure at any time the president
- 14 deems a review is in the institution's best interest.
- 15 2. A review under subsection 1 must include a written assessment of whether the faculty
- 16 member is complying with the duties and responsibilities reviewed.
- 17 3. If a president determines a tenured faculty member has failed to comply with a duty or
- 18 responsibility of tenure, the president may not renew the contract of the tenured faculty
- 19 member, unless the president specifically articulates why it is in the interest of the
- 20 institution to continue to employ the faculty member despite the faculty member's
- 21 failure to comply with the duties and responsibilities of tenure.
- 22 4. The president of an institution may enlist the assistance of an administrator at the
- 23 institution to conduct a review but may not delegate responsibility for the review to a
- 24 faculty member who is not an administrator.
- 25 5. When conducting a review under this section, the president of an institution may
- 26 assess and review other factors relevant to the faculty member's employment and the
- 27 interests of the institution and the institution's students.
- 28 6. A review under this section is not reviewable by a faculty member or faculty
- 29 committee. A faculty member whose contract is not renewed or whose employment is
- 30 terminated or suspended as a result of a review under this section may appeal the
- 31 review to the commissioner of the state board of higher education. The president is

1 subject to review and assessment by the commissioner and the state board of higher
2 education for the reviews the president conducts under this section.

3 7. The president and any administrators delegated to assist the president shall fulfill
4 these duties without fear of reprisal or retaliation. No complaint, lawsuit, or other
5 allegation is allowed against a president or other administrator for actions taken
6 pursuant to these provisions. The state shall indemnify the members of the state board
7 of higher education, the president of an institution of higher education, or an
8 administrator of an institution of higher education for all reasonable costs, including
9 attorney's fees, incurred in defending any actions taken pursuant to this Act.

10 **SECTION 3. EMERGENCY.** This Act is declared to be an emergency measure.

1 **Disclosure of financial condition.**

2 The state board of higher education shall provide a disclosure of the financial condition of
3 an institution to the qualified applicants designated as finalists pursuant to section 44-04-18.27
4 for the position of president of an institution. The disclosure of financial condition must identify
5 the institution's reserves, recent audit findings, anticipated future funding changes pursuant to
6 chapter 15-18.2, and the institution's composite financial index ratio. The state board of higher
7 education may require the qualified applicants to sign a nondisclosure agreement prior to
8 receiving the disclosure of financial condition.

9 **SECTION 19.** A new section to chapter 15-10 of the North Dakota Century Code is created
10 and enacted as follows:

11 **Campus policies and procedures.**

12 The president of an institution under the control of the state board of higher education may
13 adopt policies, procedures, and directives for the institution, with input but no authoritative
14 control from faculty and others through shared governance. The commissioner of higher
15 education and the state board of higher education may overturn or amend the president's
16 policies, procedures, and directives.

17 **SECTION 20.** A new section to chapter 15-10 of the North Dakota Century Code is created
18 and enacted as follows:

19 **Larry C. Skogen polytechnic institute.**

20 The polytechnic center constructed on the campus of Bismarck state college is officially
21 named the Larry C. Skogen polytechnic institute.

22 **SECTION 21. AMENDMENT.** Section 15-10-38.1 of the North Dakota Century Code is
23 amended and reenacted as follows:

24 **15-10-38.1. Skilled workforce student loan repayment program - Skilled workforce**
25 **student loan repayment program fund - Continuing appropriation - Report. (~~Repealed~~**
26 **effective July 1, 2023)**

27 1. There is created in the state treasury the skilled workforce student loan repayment
28 program fund. The fund consists of moneys transferred into the fund by the legislative
29 assembly, matching funds received, and loan repayments. Moneys in the fund are
30 appropriated to the state board of higher education on a continuing basis for the
31 purpose of distributing student loan repayment grants directly to the Bank of North

Questions of constitutionality of this bill:

It has come to my attention that some may question whether this bill is constitutional. This is based on some of the testimony that you find online. Here is my response to that.

After the legislature introduced HB 1446 during the 2023 session, some asserted that only the State Board of Higher Education, not the Legislature, has the authority, under the North Dakota Constitution, to regulate tenure. I believe this is demonstrably incorrect.

Article VIII of the North Dakota Constitution creates the State Board of Higher Education. Article VIII, Section 6(6)(b) outlines the authority of the SBHE. In full, it states:

The said state board of higher education shall have full authority over the institutions under its control with the right, among its other powers, to prescribe, limit, or modify the courses offered at the several institutions. In furtherance of its powers, the state board of higher education shall have the power to delegate to its employees details of the administration of the institutions under its control.

*The said state board of higher education shall have full authority to organize or reorganize **within constitutional and statutory limitations**, the work of each institution under its control, and do each and everything necessary and proper for the efficient and economic administration of said state educational institutions.*

North Dakota Constitution, Article VIII, Section 6(6)(b); see also N.D.C.C. § 15-10-11 (equivalent). Tenure is a matter of organization of the NDUS institutions. Thus, as with other such matters (i.e., regarding all such regulation of the NDUS institutions by the SBHE), the SBHE must act “within . . . statutory limitations.” This makes it clear that statutes trump SBHE regulations, not vice versa.

The North Dakota Constitution makes it clear that the SBHE must act within “statutory limitations.” If the Legislature passes and the governor signs (or the bill becomes law without the governor’s signature) a statute regulating, limiting, or banning tenure, the SBHE must act in accordance with that statute.

Said another way, the Legislature has the authority to control the decisions of the SBHE, as it has the authority to control the decisions of other state boards and agencies. Like other state boards and agencies, the SBHE does NOT have the authority to control the decisions of the Legislature.

In the last session, it was also suggested that the Legislature has not passed statutes regulating the employment of NDUS faculty. Again, this is demonstrably incorrect. The Legislature has passed several statutes regulating the employment of NDUS faculty. For example, N.D.C.C. § 15-10-13.1, **“Faculty - English language proficiency,”** requires NDUS institutions to hire only those who “exhibit written and verbal proficiency in the English language” as faculty members. Also, N.D.C.C. § 15-10-13.2, **“Public institutions of higher education - Faculty members - Oath or affirmation,”** requires every faculty member to take a specific oath included in the statute “before entering upon the discharge of duties” as a faculty member. Furthermore, N.D.C.C. § 15-10-13.3, **“Public institutions of higher education - Alien faculty members - Oath or affirmation,”** requires any faculty member who is not a U.S. citizen to take an additional oath. In each of these instances, the Legislature passed a statute, as it is well authorized by the North Dakota Constitution to do, regulating the conditions of employment of NDUS faculty members. Once it did so, the SBHE and the NDUS institutions had to act in accordance with the statute, even if they found the statute unwise.

My bottom line analysis is: The North Dakota Constitution explicitly gives the Legislature the authority to enact a statute regulating, limiting, or eliminating tenure. If the Legislature passes such a statute and it becomes law, the SBHE and, therefore, the NDUS institutions must act within the statutory limitations, even if they disagree with the statute.