

2023 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1446

2023 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee Pioneer Room, State Capitol

HB 1446
2/3/2023

Relating to a pilot program for tenured faculty review at institutions of higher education; and to declare an emergency.
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Chairman Schauer called the meeting to order at 8:34 AM.

Chairman Austen Schauer, Vice Chairman Bernie Satrom, Reps. Landon Bahl, Claire Cory, Jorin Johnson, Karen Karls, Scott Louser, Carrie McLeod, Karen M. Rohr, Vicky Steiner, Steve Vetter, Mary Schneider. Rep. Jeff A. Hoverson not present.

Discussion Topics:

- Compensation costs
- Student recruitment
- Tenure of faculty members
- Competition with out of state institutions
- Tenured faculty track
- Presidents of higher education institutions
- Accelerating workforce development
- Freedom of speech
- Faculty roles and responsibilities
- Decision making process of tenure.
- Competitive market for recruiting students
- Accelerated development

Rep. Lefor introduced HB 1446 with supportive testimony (#19028).

Steve Easton, citizen from Dickinson, North Dakota, support testimony (#19041).

Rep. Murphy, opposing testimony (#18987).

Nick Archuleta, President of North Dakota United, opposing testimony (#18876).

Adelyn Emter, Chief of Staff for the North Dakota Student Association, opposing testimony (#18832).

David Terry, on behalf of the Faculty Senate of Bismarck State College, opposing testimony (#18921).

Paul J. Johanson, North Dakota citizen, opposing testimony (#18919).

Mark Hagerott, Chancellor of the North Dakota University System, provided neutral testimony and proposed an amendment (#18895).

Additional written testimony:

Daniel Rice, (#17529) (#17824). Holly Hassel, (#17536). Edwin Mwanza, (#17707). Karen Hale Lewis, (#18004) (#18005). Jessica Santini, (#18146). Erin Price, (#18480). Billy Harris, (#18492). Alexander Wagner, (#18511). Shannon Meier, (#18518). Mark Strand, (#18605). Robert Kibler, (#18609). Anastassiya Andrianova (#18739) (#18740). Lisa Montplaisir, (#18812). Kelsey Menge, (#18820). Uwe Burghaus, (#18842). Greg Gonzalez, (#18867). Irene Mulvey, (#18868). Andrew Alexis Varvel, (#18904). Liz Legerski, (#18914). Robert Newman, (#18920). Derek VanderMolen, (#18922). Birgit Pruess, (#18923). Amy Phillips, (#18924). Chris Argenziano, (#18928). Melissa Moser, (#18929). Colt Iseminger, (#18932). Chris Colbert, (#18950). Sangita Sinha, (#18955). Eric Grabowsky, (#18982) (#18983) (#18984) (#18985). Lee Kruger, (#19007). Florin Salajan, (#18164).

Chairman Schauer adjourned the meeting at 10:47 AM.

Phillip Jacobs, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee Pioneer Room, State Capitol

HB 1446
2/9/2023

Relating to a pilot program for tenured faculty review at institutions of higher education; and to declare an emergency.

Chairman Schauer called the meeting to order at 10:52 AM.

Chairman Austen Schauer, Vice Chairman Bernie Satrom, Reps. Landon Bahl, Claire Cory, Jeff A. Hoverson, Jorin Johnson, Karen Karls, Scott Louser, Carrie McLeod, Karen M. Rohr, Vicky Steiner, Steve Vetter, and Mary Schneider. All present.

Discussion Topics:

- Committee work
- Amendment (23.0083.04005) (23.0083.04004)
- Faculty tenure
- Job description

Chairman Schauer proposed amendment (23.0083.04004).

Representative Vetter moved amendment 23.0883.04004.

Seconded by Representative Bahl.

Roll Call Vote:

Representatives	Vote
Representative Austen Schauer	Y
Representative Bernie Satrom	Y
Representative Landon Bahl	Y
Representative Claire Cory	Y
Representative Jeff A. Hoverson	Y
Representative Jorin Johnson	Y
Representative Karen Karls	Y
Representative Scott Louser	Y
Representative Carrie McLeod	Y
Representative Karen M. Rohr	Y
Representative Mary Schneider	Y
Representative Vicky Steiner	Y
Representative Steve Vetter	Y

Motion carries 13-0-0.

Representative Rohr moved to further amend HB 1446. (23.0083.04005) (Line 12 adjustment) Seconded by Representative Vetter.

Roll Call Vote:

Representatives	Vote
Representative Austen Schauer	Y
Representative Bernie Satrom	Y
Representative Landon Bahl	Y
Representative Claire Cory	Y
Representative Jeff A. Hoverson	Y
Representative Jorin Johnson	Y
Representative Karen Karls	Y
Representative Scott Louser	Y
Representative Carrie McLeod	Y
Representative Karen M. Rohr	Y
Representative Mary Schneider	Y
Representative Vicky Steiner	Y
Representative Steve Vetter	Y

Motion carries 13-0-0.

Representative McLeod moved to further amend HB 1446. (remove #1 under section 1 all together)

Seconded by Representative Hoverson

Representative McLeod withdrew the motion.

Chairman Schauer adjourned the meeting at 11:17 AM.

Phillip Jacobs, Committee Clerk By: Leah Kuball

2023 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee Pioneer Room, State Capitol

HB 1446
2/16/2023

Relating to a pilot program for tenured faculty review at institutions of higher education; and to declare an emergency.
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Chairman Schauer called the meeting to order at 9:15 AM.

Chairman Austen Schauer, Vice Chairman Bernie Satrom, Reps. Landon Bahl, Claire Cory, Jeff A. Hoverson, Jorin Johnson, Karen Karls, Scott Louser, Carrie McLeod, Karen M. Rohr, Vicky Steiner, Steve Vetter, and Mary Schneider. All present.

Discussion Topics:

- Committee work

Committee discussion on HB 1446 as amended.

Chairman Schauer adjourned the meeting at 9:17 AM.

Phillip Jacobs, Committee Clerk By: Leah Kuball

2023 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee Pioneer Room, State Capitol

HB 1446
2/17/2023

Relating to a pilot program for tenured faculty review at institutions of higher education; and to declare an emergency.
--

Chairman Schauer called the meeting to order at 9:04 AM.

Chairman Austen Schauer, Vice Chairman Bernie Satrom, Reps. Landon Bahl, Claire Cory, Jorin Johnson, Karen Karls, Scott Louser, Carrie McLeod, Vicky Steiner, Steve Vetter, and Mary Schneider present. Reps. Karen M. Rohr and Jeff A. Hoverson not present.

Discussion Topics:

- Committee work
- Amendment (23.0083.04007) (23.0083.04008)
- Faculty tenure
- Job description

Lisa Johnson, Vice Chancellor of the North Dakota University System, answered questions from the committee.

Representative Vetter moved to adopt amendment (23.0083.04007) (#22164) to HB 1446 along with removing additional language (Pg.1 Line 9 remove “two” Pg. 1 Line 10 remove a new polytechnic college.)

Seconded by Representative Bahl.

Roll Call Vote:

Representatives	Vote
Representative Austen Schauer	Y
Representative Bernie Satrom	Y
Representative Landon Bahl	Y
Representative Claire Cory	Y
Representative Jeff A. Hoverson	AB
Representative Jorin Johnson	Y
Representative Karen Karls	Y
Representative Scott Louser	Y
Representative Carrie McLeod	Y
Representative Karen M. Rohr	AB
Representative Mary Schneider	Y
Representative Vicky Steiner	Y
Representative Steve Vetter	Y

Motion carries: 11-0-2.

Representative Steiner moved a DO PASS as amended on HB 1446. (23.0083.04008).

Seconded by Vice Chairman Satrom.

Roll Call Vote:

Representatives	Vote
Representative Austen Schauer	N
Representative Bernie Satrom	Y
Representative Landon Bahl	Y
Representative Claire Cory	N
Representative Jeff A. Hoverson	AB
Representative Jorin Johnson	Y
Representative Karen Karls	Y
Representative Scott Louser	Y
Representative Carrie McLeod	Y
Representative Karen M. Rohr	AB
Representative Mary Schneider	N
Representative Vicky Steiner	Y
Representative Steve Vetter	Y

Motion carries 8-3-2.

Bill carrier: Representative Steiner.

Chairman Schauer adjourned the meeting at 9:25 AM.

Phillip Jacobs, Committee Clerk By: Leah Kuball

AG
2-17-23
(1-2)

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1446

Page 1, line 3, after the semicolon insert "to provide for a legislative management report;"

Page 1, line 7, after "**program**" insert "**- Report to legislative management**"

Page 1, after line 7, insert:

"1."

Page 1, line 8 replace "In response to the urgent need to accelerate workforce development,
the" with "The"

Page 1, line 9 remove "two"

Page 1, line 10 remove ", a new polytechnic college."

Page 1, line 10, remove the third underscored comma

Page 1, line 11 remove "now a dual mission university."

Page 1, line 12, after the underscored period insert:

"2."

Page 1, remove lines 14 through 19

Page 1, line 20, replace "2." with "a."

Page 1, line 23, replace "3." with "b."

Page 2, line 1, replace "4." with "c."

Page 2, line 2, replace "a." with "(1)"

Page 2, line 2, remove "recruit and"

Page 2, line 3, replace "b." with "(2)"

Page 2, remove lines 4 through 8

Page 2, line 9, replace "5." with "d."

Page 2, line 9, after the underscored period insert:

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

Page 2, line 13, remove "under the control of the state"

Page 2, line 14, replace "board of higher education" with "designated under section 1 of this Act"

Page 2, line 17, replace "may" with "must"

Page 2, line 30, remove "appealable or"

Page 2, line 31, after the underscored period insert "A faculty member whose contract is not renewed or whose employment is terminated or suspended as a result of a review under this section may appeal the review to the commissioner of the state board of higher education."

Page 2, line 31, remove "state"

Page 3, line 1, remove "of higher education"

Page 3, line 6, after the underscored period insert "The state shall indemnify the members of the state board of higher education, the president of an institution of higher education, or an administrator of an institution of higher education for all reasonable costs, including attorney's fees, incurred in defending any actions taken pursuant to this Act."

Renumber accordingly

Ala
2-17-23
(2-2)

REPORT OF STANDING COMMITTEE

HB 1446: Government and Veterans Affairs Committee (Rep. Schauer, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (8 YEAS, 3 NAYS, 2 ABSENT AND NOT VOTING). HB 1446 was placed on the Sixth order on the calendar.

Page 1, line 3, after the semicolon insert "to provide for a legislative management report;"

Page 1, line 7, after "**program**" insert "**- Report to legislative management**"

Page 1, after line 7, insert:

"1."

Page 1, line 8 replace "In response to the urgent need to accelerate workforce development, the" with "The"

Page 1, line 9 remove "two"

Page 1, line 10 remove ", a new polytechnic college."

Page 1, line 10, remove the third underscored comma

Page 1, line 11 remove "now a dual mission university."

Page 1, line 12, after the underscored period insert:

"2."

Page 1, remove lines 14 through 19

Page 1, line 20, replace "2." with "a."

Page 1, line 23, replace "3." with "b."

Page 2, line 1, replace "4." with "c."

Page 2, line 2, replace "a." with "(1)"

Page 2, line 2, remove "recruit and"

Page 2, line 3, replace "b." with "(2)"

Page 2, remove lines 4 through 8

Page 2, line 9, replace "5." with "d."

Page 2, line 9, after the underscored period insert:

"3. An institution involved in the pilot program under this section:

- a. May adopt policies and procedures requiring tenured faculty to promote advancement of and further the mission of the institution.
- b. Shall provide a progressive report of the pilot program to the legislative management no later than December 31, 2025.
- c. Shall provide a final report of the pilot program to the legislative management no later than December 31, 2026."

Page 2, line 13, remove "under the control of the state"

Page 2, line 14, replace "board of higher education" with "designated under section 1 of this Act"

Page 2, line 17, replace "may" with "must"

Page 2, line 30, remove "appealable or"

Page 2, line 31, after the underscored period insert "A faculty member whose contract is not renewed or whose employment is terminated or suspended as a result of a review under this section may appeal the review to the commissioner of the state board of higher education."

Page 2, line 31, remove "state"

Page 3, line 1, remove "of higher education"

Page 3, line 6, after the underscored period insert "The state shall indemnify the members of the state board of higher education, the president of an institution of higher education, or an administrator of an institution of higher education for all reasonable costs, including attorney's fees, incurred in defending any actions taken pursuant to this Act."

Renumber accordingly

2023 SENATE EDUCATION

HB 1446

2023 SENATE STANDING COMMITTEE MINUTES

Education Committee
Room JW216, State Capitol

HB 1446
3/13/2023

Relating to a pilot program for tenured faculty review at institutions of higher education; provide for a legislative management report; declare an emergency.
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11:00 AM Chair Elkin opened the hearing. Present: Chair Elkin, Vice Chair Beard, Sen Axtman, Sen Conley, Sen Lemm, and Sen Wobbema.

Discussion Topics:

- University president's authority
- Dual missions process
- Competitive marketplace
- State board authority

Rep Lefor, Dist 37, bill sponsor, testified in support. #24303.

Nick Archuleta, ND United, testified opposed #24304.

Rep Murphy, Dist 43 testified opposed #24122, #24309.

Paul Johanson, Dickinson University faculty testified opposed #23724.

Mark Hagerott, Chancellor ND University System testified opposed #24160.

Dr Robert Newman, University North Dakota testified opposed #23765

Katrina Eberhart, Bismarck State, testified opposed #24083.

Larry Isaak, citizen, former chancellor, testified via TEAMS opposed #23693.

Joe Cohn, Foundation Individual Rights/Expression, testified neutral via TEAMS #23722.

Additional written testimony:

David Terry, Bismarck State College, opposed #24190, #24191.

Eric Grabowsky, Dickinson, ND, opposed #24188, #24187, #24186, #24185, #24184.

Stephanie Schendel, Dickinson State, opposed #24141.

Liz Legerski, UND United, Grand Forks, ND, opposed #24131.

Laura Aldrich-Wolfe, Fargo, ND opposed #23743.

Ernst Pijning, Minot, ND opposed #23780.

Derek VanderMolen, ND Council College Facilities, opposed #23830.

Amanda Davis, Williston State, opposed #23832.

Olivia Johnson, Jamestown, ND, opposed #24048.

Birgit Pruess, Fargo, ND, opposed #23821.

Anastasiya Andrianova, ND State University, opposed #23523, #23524.

Keith E. Whittington, Academic Freedom Alliance, opposed #23617.

Jynette Larshus, Minot State University, opposed #23643.

Faith Wahl, University of ND, opposed #24111, #24112.

Andy Armacost, University of ND, opposed #24518.

12:20 PM Chair Elkin closed the hearing.

Pam Dever, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Education Committee Room JW216, State Capitol

HB 1446
3/27/2023

Relating to a pilot program for tenure faculty review at institutions of higher education; provide for a legislative management report; declare an emergency.

2:47 PM Chair Elkin opened committee work. Present: Chair Elkin, Vice Chair Beard, Sen Axtman, Sen Conley, Sen Lemm, and Sen Wobbema.

Discussion Topics:

- Committee action
- Bismarck State and Dickinson State only two universities in bill

Sen Conley moved Sen Axtman's amendment 23.0083.06001 #26836.
Sen Wobbema seconded.

Senators	Vote
Senator Jay Elkin	Y
Senator Todd Beard	Y
Senator Michelle Axtman	Y
Senator Cole Conley	Y
Senator Randy D. Lemm	Y
Senator Michael A. Wobbema	Y

VOTE: YES – 6 NO – 0 Absent – 0 Motion PASSED

Sen Wobbema moved a DO PASS as Amended. Sen Conley seconded.

Lisa Johnson, ND University System answered a question.

Senators	Vote
Senator Jay Elkin	Y
Senator Todd Beard	Y
YSenator Michelle Axtman	Y
Senator Cole Conley	Y
Senator Randy D. Lemm	Y
Senator Michael A. Wobbema	Y

VOTE: YES – 6 NO – 0 Absent – 0 Motion PASSED

Chair Elkin will carry the bill.

3:13 PM Chair Elkin adjourned the meeting.
Pam Dever, Committee Clerk

March 16, 2023

OK

121

3-27-23

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1446

Page 1, line 2, remove "pilot"

Page 1, line 7, replace "**Pilot program**" with "**Program**"

Page 1, line 9, remove "pilot"

Page 1, line 11, remove "pilot"

Page 1, line 14, after "education" insert "as listed in subsection 1"

Page 2, line 1, remove "pilot"

Page 2, line 4, remove "pilot"

Page 2, line 6, remove "pilot"

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1446, as engrossed: Education Committee (Sen. Elkin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1446 was placed on the Sixth order on the calendar. This bill does not affect workforce development.

Page 1, line 2, remove "pilot"

Page 1, line 7, replace "**Pilot program**" with "**Program**"

Page 1, line 9, remove "pilot"

Page 1, line 11, remove "pilot"

Page 1, line 14, after "education" insert "as listed in subsection 1"

Page 2, line 1, remove "pilot"

Page 2, line 4, remove "pilot"

Page 2, line 6, remove "pilot"

Renumber accordingly

TESTIMONY

HB 1446

Testimony in Opposition to HB 1446

January 29, 2023

My name is Daniel Rice and I am a former Dean of the College of Education and Human Development at UND and a Professor Emeritus of Educational Leadership.

I write in strong **opposition to HB 1446** for the following reasons:

1. The bill on its face is clearly **unconstitutional**. The [North Dakota State Constitution states in Article VIII, Section 6.6.b](#), “The state board of higher education shall have **full authority** over the institutions under its control...” (emphasis added). This bill usurps the power and authority granted to the State Board of Higher Education (SBHE) by the citizens of the state in the ND Constitution. The authority to make changes of this magnitude to two institutions does not belong to the Legislative Assembly. If the sponsor of this bill wishes to propose such a “pilot program” he should do so to the SBHE.
2. The sponsor claims that a purpose of the bill is to “improve the tenure process.” It is obvious that the sponsor does not understand either the purpose of academic tenure nor how it functions in practice within U.S. higher education, including within the North Dakota University System (NDUS). The passage of this bill would essentially eliminate tenure at the two institutions. As a brief indication of the misunderstandings embodied in the bill, I offer the following facts about academic tenure within the NDUS.
 - a. The purpose of academic tenure is to protect the academic freedom of faculty to teach and conduct research **for the benefit of society**, not to protect the individual faculty member. (<https://www.aaup.org/issues/tenure>)
 - b. Tenure is granted after a lengthy probationary period of 6-7 years of full-time, satisfactory performance and only if the applicant meets the standards set by the campus and approved by the SBHE.
 - c. Contrary to what some believe, tenure is not a “guarantee” of lifetime employment. Tenured faculty are subject to periodic performance review and may be terminated for “cause” and for other valid reasons as outlined in policy approved by the SBHE.
3. This bill would **eliminate the due process rights** of faculty at the two campuses by permitting random, unannounced performance reviews by the campus president that could be arbitrary and retaliatory. The present SBHE policies provide for periodic, multilayered performance reviews of the performance of tenured faculty after the probationary period. This bill would eliminate that orderly and legally sanctioned policy.
4. The bill would **strip tenured faculty of the right to appeal** administrative decisions and **the right to seek legal redress for wrongful termination**.
5. An assumption of the sponsor seems to be that tenured faculty are somehow preventing these two campuses from achieving the campus mission. The sponsor has an obligation to explain this assumption and provide evidence that it is valid.

6. The sponsor is attempting to impose a business management system on two campuses within the NDUS. The bill would grant campus presidents absolute authority to terminate tenured faculty members at will. Higher education is not a business. The purpose of a business is to make a profit for its owner(s) or shareholders. The purpose of higher education is to teach and discover knowledge for the service of society. The purpose of tenured faculty is not to make a profit for the institution as proposed in this bill. Both types of institutions are necessary for our society but they are different and are not compatible. Business practices are applicable to the administration and management of the financial side of higher education but are separate from the academic processes and purposes of higher education. This bill confuses these two different and distinct purposes.

7. The NDUS already faces serious challenges with recruiting and retaining talented faculty to our state. The passage of this bill will actually increase that problem significantly and add to the workforce shortage in North Dakota.

I strongly urge the Education Committee to **give HB 1446 a Do Not Pass** recommendation. I thank the committee for its service and for its attention to my testimony.

If members of the committee have questions or seek further information, I would be happy to respond.

Dear Government and Veterans Affairs Committee:

I am writing to express opposition to the proposed HB 1446 which implements new models of evaluation of and expectations for tenure-line faculty at NDUS institutions. I believe this bill would have an overall negative ability to attract and retain faculty to our campuses and would create an overall chill on our campus cultures.

Having read a number of the stories published in trade and popular venues on this topic (see this [Forbes](#) article and this [InsideHigherEd](#) article), I know that the sponsors and supporters of this bill have heard and rejected many of the rational arguments that have been marshaled against the bill. For example, representative Lefor and bill supporter and Dickinson State University president Steve Easton seem enamored of the free market principle that “It makes tenured professors accountable, just like anyone else,” he said. “You take the private sector—you’re accountable to a boss.” The bill’s proposal that enacts “firing powers of “the president of *each* [emphasis added] institution of higher education under the control of the State Board of Higher Education,” an approach modeled on capitalist economic system that includes the new expectation that “Under the bill, presidents would be able to conduct these faculty reviews at any time.”

However, the bill overlooks another key principles of the free market, which is competition. What the sponsors of this bill fail to recognize is that higher education is a national market, and college faculty have opportunities to seek positions throughout the US. Faculty members (perceived as “productive” or not) consider a variety of factors as they make decisions about whether to accept a position at a college or university. I encourage the bill sponsor to consider the decision process of a prospective candidate for a position at Dickinson State, Williston, Mayfield, or NDSU (which is currently unaddressed by the bill even though Lefor expresses in the Inside Higher Ed column a strong desire to include all the campuses). This hypothetical candidate—a potential professor of English, Biology, Engineering, Chemistry, Hospitality, Economics, Business—take your pick—considers an offer for a position in ND, where they will labor under the constant potential threat that the university president may decide to spontaneously engage in an ‘unappealable’ review that will lead to their hiring.

By contrast, over the border, the positions in Chemistry, Biology, etc., at Minnesota schools come with the promise of employment protections, including a clear and transparent mechanism for faculty review and appeals processes. These are made apparent to the candidate who knows that they will be able to pursue their research, teaching, and service interests without the potential threat of spontaneous, unappealable termination. Likewise, if their performance evaluation is negative, they’ll be provided with an avenue to contest that judgment and to correct any perceived or actual deficiencies before they are unceremoniously fired.

In other words, this policy which seems to be a solution in search of a problem, chases away potential faculty before they even apply or accept a position. Oftentimes, the threat of an action has the same consequence as the action itself. As the bill authors invoke the ethos of “the private sector,” it would benefit them to think about how faculty hiring and recruitment are also a free market—and this bill will make ND (which already struggles with faculty recruitment and retention) an even less desirable location in what is already a highly competitive market for faculty talent. This legislation brings the state so far out of line with what other, peer institutions and states are doing that the effect on recruitment and retention will be felt not just at Dickinson State but throughout the ND University System.

I encourage the members of the ND House Government and Veterans Affairs Committee to categorically reject this ill-conceived bill.

Holly Hassel

Fargo, ND

This bill is a clear and present danger to the independence and impartiality of the academe. It is a threat to the freedom of thought and expression – the very core of academic discourse. It is the elevation of politics over principle, an act that would create demigods on a power-high all across our university systems. What does that help? What problem does that solve? Nothing! Rather, it creates opportunities for the abuse of power by those appointed to be the heads of these institutions. With unlimited, Godlike power in the hands of individuals like that, there is no accountability, and that creates an incentive to abuse that power in pursuit of settling scores and targeting perceived political opponents, rather than focusing on promoting the good of the institution. This is a step in the wrong direction, on a very dangerous slope. Why is there a need to create dictators and dictators whose decisions cannot be questioned or subjected to the demands of accountability? Why do we need despots leading our Universities and Colleges? Let's vote this bill down. Let us defend democracy and say "No" to authoritarianism.

Testimony in Opposition to HB 1446

January 29, 2023

My name is Daniel Rice and I am a former Dean of the College of Education and Human Development at UND and a Professor Emeritus of Educational Leadership.

I write in strong **opposition to HB 1446** for the following reasons:

1. The bill on its face is clearly **unconstitutional**. The [North Dakota State Constitution states in Article VIII, Section 6.6.b](#), “The state board of higher education shall have **full authority** over the institutions under its control...” (emphasis added). This bill usurps the power and authority granted to the State Board of Higher Education (SBHE) by the citizens of the state in the ND Constitution. The authority to make changes of this magnitude to two institutions does not belong to the Legislative Assembly. If the sponsor of this bill wishes to propose such a “pilot program” he should do so to the SBHE.
2. The sponsor claims that a purpose of the bill is to “improve the tenure process.” It is obvious that the sponsor does not understand either the purpose of academic tenure nor how it functions in practice within U.S. higher education, including within the North Dakota University System (NDUS). The passage of this bill would essentially eliminate tenure at the two institutions. As a brief indication of the misunderstandings embodied in the bill, I offer the following facts about academic tenure within the NDUS.
 - a. The purpose of academic tenure is to protect the academic freedom of faculty to teach and conduct research **for the benefit of society**, not to protect the individual faculty member. (<https://www.aaup.org/issues/tenure>)
 - b. Tenure is granted after a lengthy probationary period of 6-7 years of full-time, satisfactory performance and only if the applicant meets the standards set by the campus and approved by the SBHE.
 - c. Contrary to what some believe, tenure is not a “guarantee” of lifetime employment. Tenured faculty are subject to periodic performance review and may be terminated for “cause” and for other valid reasons as outlined in policy approved by the SBHE.
3. This bill would **eliminate the due process rights** of faculty at the two campuses by permitting random, unannounced performance reviews by the campus president that could be arbitrary and retaliatory. The present SBHE policies provide for periodic, multilayered performance reviews of the performance of tenured faculty after the probationary period. This bill would eliminate that orderly and legally sanctioned policy.
4. The bill would **strip tenured faculty of the right to appeal** administrative decisions and **the right to seek legal redress for wrongful termination**.
5. An assumption of the sponsor seems to be that tenured faculty are somehow preventing these two campuses from achieving the campus mission. The sponsor has an obligation to explain this assumption and provide evidence that it is valid.

6. The sponsor is attempting to impose a business management system on two campuses within the NDUS. The bill would grant campus presidents absolute authority to terminate tenured faculty members at will. Higher education is not a business. The purpose of a business is to make a profit for its owner(s) or shareholders. The purpose of higher education is to teach and discover knowledge for the service of society. The purpose of tenured faculty is not to make a profit for the institution as proposed in this bill. Both types of institutions are necessary for our society but they are different and are not compatible. Business practices are applicable to the administration and management of the financial side of higher education but are separate from the academic processes and purposes of higher education. This bill confuses these two different and distinct purposes.

7. The NDUS already faces serious challenges with recruiting and retaining talented faculty to our state. The passage of this bill will actually increase that problem significantly and add to the workforce shortage in North Dakota.

I strongly urge the Government and Veterans Affairs Committee to **give HB 1446 a Do Not Pass** recommendation. I thank the committee for its service and for its attention to my testimony.

If members of the committee have questions or seek further information, I would be happy to respond.

Testimony in Opposition to HB 1446

January 30, 2023

To the House Government and Veterans Affairs Committee

My Name is Karen Hale Lewis, and I am an Associate Professor of Sociology at Dickinson State University. I teach Sociology and Criminal Justice at Dickinson State. I am a tenured professor, since 2017, and currently under Promotion Review. I write in strong opposition of HB 1446.

From the beginning of the bill, the faculty policies outline responsibilities. Faculty are reviewed annually and can be placed on performance improvement plan reviews or PIPs. The current administration, under the direction of President Stephen Easton and former VPAA Dr. Debora Dragseth, has been found allegedly by a compliance report of the NDUS, as support evidence, to abuse PIPs on faculty who are outspoken or critical of the administration. Deans and selected Department Chairs were chosen to oversee faculty outside their department and even outside their college using fake PIPs. These PIPs enforced on faculty, included actions like having them complete requirements, some even violating HIPPA and other federal guidelines. One Department Chair was actively working to remove another faculty member for having rigor in the classroom work and accountability of students, going as far as violating FERPA and Student Records Privacy. Please see the attached supporting evidence Case Investigation Report from April 25, 2022.

Additional issues are the measurable ways this law if passed can be implemented, solely at the discretion and will of the president. In addition, giving one person almost complete authority without review, due process, or appeal diminishes the values we stand for as organizations with shared governance. Shared governance is an important factor for education institutions in a process that governs staff, faculty, and student senates and is part of the foundation of checks and balances in Higher Education. For example, I am a faculty Senator and represent my Social Science Department on campus. This is also an important factor for the accreditation of an educational institution in higher education. Another problem with implementation is many faculty that teach higher-level courses have smaller classes and would not be able to justify singular classes. Teaching Criminal Justice and Sociology, my upper-level courses are composed of mostly majors in that area not university wide students.

Dickinson State University used to have a 2 to 1 ratio of faculty to staff, but now we have less than a 1 to 1 ratio of faculty to staff. My question is how can we have institutions of learning with only administration and staff, yet blame faculty or only hold faculty accountable for the problems? Previously the administration has also highlighted the numbers of tenured faculty compared to adjuncts, but in the past years while Stephen Easton has been president, we have seen some of the best, tenured faculty leave for more competitive positions and desirable work environments. We have seen an increase in annual contracts and these positions have either gone unfilled or have high turnover. We cannot attract talented faculty to teach at our institution without competitive compensation, so a tenure position is a deciding

difference to relocate to North Dakota, as most faculty members have. In addition, DSU had the best Science program in the state just two years ago, with all qualified PhD's, but all of those faculty have been run off by S. Easton's administration. Please read the evidence provided in the Compliance report and related to the bill in question under Moving a faculty Tenure Line, Performance Improvement Plan Violations, and Separations also mentioned earlier.

This administration has spent the past two years divesting general education (lower-level courses) and the College of Arts and Sciences to invest in Business, Education, and Athletics. Again, I should point out that programs like Psychology, Criminal Justice, Addiction Studies, and Pre Law are all in the Department of Social Science and in the College of Arts and Sciences. These are the fastest growing majors on campus at DSU and this department is the second largest, serving strongly in general education courses and foundational knowledge, yet it has been significantly reduced. These general education programs are important to any student of any major, teaching fundamental skills like English, Math, Science, and Arts.

This bill is an attack on faculty at DSU and I feel a form of retaliation, specifically for me as I filed an EEOC complaint for ADA accommodations last year, adding the institution created a larger toxic and hostile work environment with intimidation, lack of clear procedures, and systemic problems in communication. I terminated my employment after over 11 years because it took over 6 months after a request of accommodation, all these records would be open records. This includes some of my health records as well becoming open records. This complaint was also made to the NDUS compliance auditor. After working with Karol Riedman, I wrote a letter to have my job reinstated and full benefits returned to me. My position was reinstated completely and fully after state legal counsel made the determination; accommodations were provided upon my immediate return (as if I had never left). This information is not listed in the compliance report because it was resolved to remove my cause and complaint.

Additionally, I feel this bill is retribution to other tenured faculty who have been outspoken against illegal and unethical practices in hiring and promotions, requisitions of open records, and procurement. Please also keep in mind it was faculty and staff who were unafraid to speak out about previous issues including the former foundation and diploma mill scandal of overcounting student enrollment in the Business Department. This bill is a way to bypass state policy to remove tenured faculty at DSU. Why is this significant? Tenured faculty are in a more protected position from retaliation and harassment allowing for critical oversight, than untenured faculty and staff. Under this bill new faculty and staff will have more rights and protections than tenured faculty.

Aside from the lack of merit, this bill would impact the accountability of the administration and create a free environment to discipline or fire faculty at will. This bill is not about financial issues, tenured faculty not completing their job responsibilities, or about education really at all. Please let me be clear, this bill is an abuse of power by Stephen Easton and the friendship and support of a powerful position that Representative Lefor holds in North Dakota.

It is with great fear, that I too feel a need to speak my truth for the values I hold dear like accountability, integrity, transparency, justice, respect for others, and for the communities I continue to educate and support. I truly feel there are two main purposes of the tenure bill: the first goal is to create enough stress that tenured faculty leave voluntarily, and the second goal is personal retaliation. I hope you will look at this legislation carefully.

<https://www.insidehighered.com/news/2023/01/26/bill-north-dakota-presidents-could-fire-tenured-faculty>

<https://www.forbes.com/sites/michaelnietzel/2023/01/24/north-dakota-is-about-to-consider-a-really-bad-faculty-tenure-bill>

Attached are policies and procedures that already exist in place from the NDUS system and SBHE that grant tenure in the State of ND and oversee processes of nonrenewal and termination of faculty contracts.

<https://dickinsonstate.edu/about/policies/index.html>

Policies

Policies



*North Dakota University System
Office of Compliance and Ethics*

CASE INVESTIGATION REPORT

April 25, 2022

DICKINSON STATE UNIVERSITY
Dickinson, ND

Combined Report Including Summary Case Investigations of Concerns
Submitted to the NDUS Office of Compliance and Ethics

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April 25, 2022

North Dakota State Board of Higher Education – Audit Committee
Dr. Steven Easton, President, Dickinson State University

The NDUS Office of Compliance and Ethics has received a large number of reported concerns regarding DSU over the last 18 months. The concerns were reported through the Eide Bailly Fraud Hotline, through the ndus.edu compliance webpage and through various direct reporting methods. Investigation and reporting on these concerns have been in process for over a year, because of the volume of cases and because the Chief Compliance Officer was diverted to system-wide Covid-19 activities during most of this time. Some concerns were either duplicates or similar to others in process; these were combined where appropriate. The following compilation addresses specific concerns and topics combined into 22 summary investigation reports.

Inquiries or comments relating to this engagement may be directed to me at (701) 224-2504. I wish to thank President Easton and numerous members of the DSU administration, faculty and staff for their assistance with this project

Respectfully submitted,

Karol K Riedman, CPA, CIA
NDUS Chief Compliance Officer

CC: Dr. Mark Hagerott, Chancellor, NDUS
Eric D Olson, AAG, NDUS and SBHE
Christopher Pieske, AAG, DSU

Executive Summary

The NDUS Office of Compliance and Ethics received a large number of reported concerns regarding DSU over the last 18 months. The concerns were reported through the Eide Bailly Fraud Hotline, through the ndus.edu compliance webpage and through various direct reporting methods. Investigation and reporting on these concerns have been in process for over a year, because of the volume of cases and because the Chief Compliance Officer was diverted to system-wide Covid-19 activities during most of this time. Some concerns were either duplicates or similar to others under investigation; these were combined where appropriate. The following compilation addresses specific concerns and topics combined into 22 summary investigation reports.

In several of the reports, the Office concluded that there either was no violation, the investigation did not support the allegations, or there was inadequate information to investigate the allegations, however some of these reports did include generalized process recommendations. For the remaining reports, the allegations are supported by the investigation and recommendations are made to correct and prevent similar issues. Frequently the investigations have highlighted a need for improved communication, as well as to improve relationships and culture among administration, faculty and staff. These topics are outside the Office's investigatory scope but are noted here because improving communication, culture and relationships would have a significant positive effect on the workplace environment and may also decrease the frequency of hotline complaints filed with the Office.

While many different topics and themes are presented in the following reports, there are three themes that occurred regularly, regardless of the specific topic of the report:

1. DSU should make better use of its resources including the Director of Human Resources and Legal Counsel. Consulting these or other experts at the start of a potential action will reduce the likelihood of potential problems in the execution of the action as well as avoiding potential legal liability.
2. Policies, procedures, regulations and laws exist to make actions defensible. It should always be our goal to do the right thing in every situation, but if guidelines are followed in every action, there is a defensible position if needed to manage challenges. If guidelines are not followed, institutions lose the presumption of validity of actions, which then leads to increased risk and lowered defensibility.
3. DSU and all NDUS institutions need to follow SBHE Policy 306.1(4) in complying with requests from the Office. Providing vague, minimal or unhelpful responses weakens the position of the respondent and may lead to prolonged investigations and incomplete conclusions, including those which may have supported the institution's actions.

I appreciate the cooperation of DSU administration, faculty, and staff, along with others consulted related to these matters, including but not limited to those in the NDUS Office.

CASE INVESTIGATION REPORTS



Office of Compliance and Ethics

Karol Riedman MPA CPA CIA CCEP
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 Bismarck, ND 58501

Summary Investigative Report Inaccurate Press Release April 25, 2022

Source of Complaint	Direct Complaint form (ndus.edu/compliance-and-ethics)
Date of Complaint	01/09/2021
Topic of Allegation	Code of Conduct
Institution	Dickinson State University
Policy referenced/related	Policy 308.1 Code of Conduct
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Compliance and Ethics webpage reporting link on the ndus.edu website. The anonymous reporter categorized the concern as an ethics violation. The reporter referred to a January 8, 2021 press release regarding a national business exam where the Chair of the School of Business and Entrepreneurship said the students spend hours studying for the exam. The reporter stated that there are no preparation materials for this exam and provided links to an article and another PSA in support of that statement. The reporter was concerned about ethics, honesty and imprecise talking points with the media.

Policy References

SBHE Policy 308.1 Officer and Employee Code of Conduct states in part:

In all matters involving communication with NDUS students, customers, suppliers, government authorities, the public and others, SBHE members, officers and employees shall endeavor to make complete, accurate, and timely communications and respond promptly and courteously to all proper requests for information and complaints.

Investigation and Findings

Reviewing the press release revealed that the story centered around the DSU students' achievement on the national test. A fair reading of the press release reveals that the comment the reporter focused on regarding student preparation was not the main point of the press release. Press releases are not intended to provide complete details and contextual references but should be free of material errors or intentional misstatements.

Additional details were not provided, and because the source of the report was anonymous, it was not possible to gather additional information to determine if there was specific evidence of a materially inaccurate statement intended to mislead the public through the media. However, even assuming the press release in question was inaccurate, the Office did not substantiate the allegation that the inaccuracy was material or intended to mislead the public.

Conclusion

The investigation was limited by lack of specific details and the anonymity of the reporter. An inaccurate statement regarding test preparation, whether intentional or not, does not materially affect or invalidate the purpose of the press release in question: to announce DSU students' success on a national test. Thus, the results of the investigation cannot support the allegation of a code of conduct policy or ethics violation.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

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 Bismarck, ND 58501

Summary Investigative Report Course Delivery Requirements April 25, 2022

Source of Complaint	Direct Complaint form (ndus.edu/compliance-and-ethics) and other direct sources
Date of Complaint	04/16/2021 and others
Topic of Allegation	Administrative and Academic Authority, Code of Conduct
Institution	Dickinson State University
Policy referenced/related	Policy 305.1 Institution President Authority and Responsibilities; Contract Terms Policy 308.1 Code of Conduct
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received numerous reports through the Compliance and Ethics webpage reporting link on the ndus.edu website and via direct email regarding a change in DSU faculty contracts which addresses multiple modalities. The reporters objected to faculty being required to teach using additional/online-based delivery modalities and to actively recruit students, and that merit-based pay raises would be unfairly based on those two requirements.

Policy References

SBHE Policy 308.1 Officer and Employee Code of Conduct (summary):

The Code of Conduct in general requires all NDUS officer and employees to uphold the highest ethical and professional standards, conduct themselves in a businesslike manner, and to perform their duties conscientiously, honestly, and in accordance with the best interests of the NDUS.

SBHE Policy 305.1 Institutional President Authority and Responsibilities; Contract Terms (summary and relevant excerpts):

The SBHE delegates to the president of each institution full authority and responsibility to administer the affairs of the institution in accordance with SBHE policies, plans, budgets, and standards, including the management and expenditure of all institutional funds, within budgetary

and other limitations imposed by law or by the SBHE. Subject to SBHE policies, NDUS procedures, and SBHE and Chancellor directives, presidents:

- *Have primary responsibility for the internal organization of the institution's administration, including academic, administrative, and student affairs.*
- *Are responsible for consensus building; facilitation of quality scholarship; careful management of resources; recruitment and retention of outstanding faculty, staff, and students; problem solving; and promoting the intellectual, physical, and fiscal health of the institution.*
- *Ensure excellence in the institution's teaching, research, and service missions while maintaining the strength of the institution's academic and co-curricular programs and furthering the recruitment and retention of outstanding teachers, scholars, staff, and students.*
- *Maintain a productive relationship with faculty, students, staff, and alumni.*

Investigation and Findings

The report alleged that, for the upcoming 2021-2022 faculty contracts, DSU would require all instructors to use online/internet delivery methods and would base merit pay increases on this requirement. Various complainants questioned the wisdom of requiring online modalities for certain types of courses, which they stated were more effective with face-to-face delivery. On April 16, 2021, a document was sent to DSU faculty by DSU Administration providing FAQ communications about the proposed changes in faculty contracts addressing multiple modalities. The additional/revised statement in the contract was as follows:

Teaching assignments may involve teaching from all university sites (i.e., Bismarck, Williston, Dickinson), via interactive video conferencing classrooms, online, DSUlive™, or other modality classifications.

The FAQ document addressed the question of merit-based raises as follows:

Faculty should not expect a merit-based raise unless they are engaged in increasing access via dual mode delivery and/or other activities that they can demonstrate have resulted in 1) retaining current students at, or 2) recruiting new students to, Dickinson State University.

The above items represent the chief complaints among the various reporters, as well as the authority or reasonableness of the administration to make these decisions without input and guidance from the faculty affected by the contract change.

After reviewing the reports and requesting information from the DSU Administration, the Office concludes that the reports do not allege a violation within the scope of the Office to investigate. The reports assert disagreement with the DSU Administration's proposed contract change, and question the wisdom of those changes. However, the Office is not equipped to second-guess decisions committed to campus administration, including the President, by SBHE Policy, unless the exercise of that authority violates a policy or procedure that the Office has authority to review.

Conclusion

Notwithstanding the requirements of Policy 305.1 regarding consensus building and productive relationships, the president has primary responsibility for the programs and activities of the institution. While the president may delegate certain decisions to members of Cabinet, all decisions, including the use of alternate teaching delivery methods/modalities and the basis on which institutions award merit-based raises (unless patently in violation of SBHE policy or NDUS or institution policy) is ultimately the decision of the president. In this case there is no violation of policy or law. Concerns regarding relationships and other culture aspects are not within the scope of this report.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.

A handwritten signature in blue ink that reads "Karol K. Riedman". The signature is written in a cursive style.

Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

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Summary Investigative Report Failure to Investigate, Move of Tenure Line April 25, 2022

Sources of Complaint	Eide Bailly Fraud Hotline Numerous Direct Reports
Date(s) of Complaint	First Report 5/5/2021, most recent received 4/12/2022
Allegation	Failure to Investigate; Move of tenured faculty; Improper decision
Institution	Dickinson State University
Policy referenced	SBHE Policy 308.1(3), (13) Officer and Employee Code of Conduct SBHE Policy 605.1(3) Academic Freedom and Tenure SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty SBHE Policy 605.4(11)-(12) Hearings and Appeals SBHE Policy 612 Faculty Grievances
Conclusion	Results of investigation support the allegations.
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received multiple direct reports of an alleged improper process of moving Faculty Member A’s tenured faculty line from the department of social science to the school of business and entrepreneurship and retaliation. Additionally, a related report was received regarding an alleged informal harassment complaint filed by Faculty Member A against Dean B, that was, according to the reporter, never investigated or resolved. These reports were received from anonymous sources, or the person reporting the concern requested anonymity. Subsequently, the Office received a direct report via the concern reporting form on the Compliance website, located at ndus.edu, asserting that the resolution of the Standing Committee on Faculty Rights (SCoFR) process related to the tenured faculty line did not comply with SBHE Policy.

Policies Referenced:

SBHE Policy 308.1(3), (13) Officer and Employee Code of Conduct (in relevant part):

3. The SBHE supports an environment that is free of discrimination and harassment. [. . .] Likewise, sexual or other harassment (including actions contributing to a hostile work environment) in violation of federal or state law or SBHE Policy 603.1 is prohibited[.]

13. Alleged violations of this code involving NDUS officers or employees shall be investigated by the appropriate NDUS officer. All officers and employees shall cooperate in investigations of alleged violations. A violation of this code is cause for dismissal or other disciplinary action, in addition to any criminal or other civil sanctions that apply.

SBHE Policy 605.1(3) Academic Freedom and Tenure; Academic Appointments (in relevant part):

3. Tenure is awarded by the SBHE upon recommendation of the Chancellor, following review and recommendations made pursuant to the procedures at the institution and a recommendation by the institution's president to the Chancellor. [. . .] Tenure is limited to the academic unit or program area in the institution in which tenure is granted and shall not extend to an administrative or coaching position.

SBHE Policy 612 Faculty Grievances (in relevant part):

1. Each institution, in consultation with its faculty governance structure, shall establish policies and procedures to attempt mediation or resolution of faculty grievances and to define the procedures for filing a grievance in accordance with principles of shared governance.

2. "Grievance" means an allegation of a violation of a specific SBHE or institutional policy, procedure or practice pertaining to the employment relationship, including the terms of the grievant's employment contract[.]

SBHE Policy 605.4(11)-(12) Hearings and Appeals (in relevant part):

11. The committee shall provide written findings of fact, conclusions, and recommendations, with supporting reasons, to the institution's president and the faculty member or the faculty member's representative. If the institution's action was a notice of dismissal and if the committee concludes that adequate cause for dismissal has been established, but that a lesser penalty would be more appropriate, it may so recommend with supporting reasons. The president shall decide and provide written notice of the decision, including findings of fact and reasons or conclusions based on the hearing record, to the committee and the faculty member within twenty calendar days of receiving the report, unless the president determines that more time is required due to unforeseen circumstances, in which case the president may extend the period by 10 calendar days on notice to the parties and committee. The faculty member or committee may, within ten calendar days of the decision, submit a written response to the decision, to which the president may, but is not required to, reply.

12. The decision of the president is final.

Investigation and Findings

The following statement of facts is based on the Office’s review of documentary evidence and interviews regarding the foregoing reports, along with the record of the SCoFR hearing related to this matter. This report is not intended to address the underlying merits of the administrative actions in question; instead, the investigation and report are intended to examine the process used and determine whether applicable policies and procedures were followed.

In late 2019 or early 2020, Faculty Member A was a tenured professor of Political Science and Economics, and their faculty line was located in the Department of Social Sciences. Despite having received tenure as a professor of Political Science, Faculty Member A taught primarily economics courses. Economics was at the time located in the Department of Social Sciences. DSU was in the process of restructuring its economics department to change certain requirements, and this change would have resulted in a change to the courses taught by Faculty Member A. During this time, Faculty Member A was experiencing health-related challenges, and objected to the change to the courses, resulting in Faculty Member A filing first an informal email harassment complaint against the then-chair of the School of Business and Entrepreneurship (“SoBE”), followed by a formal harassment complaint.

The DSU administration assigned the complaint to a department Chair (Chair B) for investigation and review. However, prior to Chair B's completion of the investigation, Chair B left DSU. The complaints were then re-assigned to a different department chair, who also failed to investigate the complaints before leaving the institution. DSU administration did not reassign the complaints to a new investigator; based on the information obtained during the Office’s investigation, it appears this failure was inadvertent due to the onset of the Covid-19 pandemic and the institution’s shift to remote course delivery.

Subsequently, the DSU administration determined that economics would be moved from the Department of Social Sciences to SoBE, where it had previously been located. The former chair of SoBE had since been promoted to Dean of the College of Education, Business, and Applied Sciences (Dean C). Initially, it appears that the discussion regarded moving the economics courses back to SoBE was not focused on Faculty Member A’s tenured faculty line, but at some point during early 2021, the decision was made that, because Faculty Member A taught primarily economics courses, Faculty Member A’s faculty line should move to SoBE as well. Faculty Member A vehemently objected to moving their faculty line, and at one point the Dean of the College of Arts and Sciences (Dean D) offered Faculty Member A the option to retain their position in the Department of Social Sciences but stated that the option would not be tenured.

Based on testimony at the subsequent SCoFR hearing, when DSU administration began considering moving the faculty line, neither the Provost nor Dean C was aware of the existence of the uninvestigated harassment complaints. However, it appears that during the discussion regarding moving Faculty Member A’s faculty line, both the Provost and Dean C became aware of the complaints, but both asserted they had never reviewed the contents of the complaints, and no contrary testimony or evidence was introduced. The asserted primary reason for the move was to make coordinating scheduling easier for business majors, although all witnesses at the

subsequent SCoFR hearing agreed, under questioning, that schedule coordination would not require the faculty line to move.

Notwithstanding, DSU administration continued with the intended move of Faculty Member A's faculty line to SoBE, and Faculty Member A filed a grievance against the move, asserting that it violated SBHE Policy 605.1(3) and constituted retaliation for the prior complaints; while the grievance was pending, Faculty Member A's contract was renewed, and the renewal reflected the department change, but noted that a grievance was pending. Mediation of the grievance failed, and the grievance moved to a full SCoFR hearing pursuant to DSU policy and SBHE Policy 605.4 on February 25, 2022. After a roughly five-and-a-half hour hearing, the SCoFR determined that moving the faculty line violated SBHE Policy 605.1(3), that the decision to place Faculty Member A in the reporting chain of Dean C constituted retaliation, and that the communication from Dean D offering Faculty Member A a non-tenured position if they wanted to remain in the Department of Social Sciences also constituted retaliation. The majority of the SCoFR (as one member did not join the recommendations) recommended that the unresolved complaints be resolved and that the faculty line be restored to the Department of Social Sciences. On March 21, 2022, this recommendation was forwarded to the President of DSU, as set out in SBHE Policy 605.4(11).

Ten days later, the President of DSU issued his final decision, rejecting the SCoFR's conclusions and upholding the decision to move Faculty Member A's faculty line to SoBE. The decision also determined that there was no retaliation pursuant to SBHE Policy. On April 8 and 9, 2022, Faculty Member A and the SCoFR responded to the President's decision, as permitted by SBHE Policy 605.4 (11).

The purpose of this investigation and report is to evaluate whether Faculty Member A's rights were violated by the failure to investigate their formal complaint, by the decision to move the faculty line, by Dean D's email offering Faculty Member A a non-tenured position, or the allegations of retaliation. Additionally, the Office has been asked to review whether the President's decision violated SBHE Policy 605.4(11). The investigation revealed the following areas of potential risk and improvement. These findings or recommendations should not be viewed as taking a position of the substance of the reasons for the actions taken in this matter, and instead a review of the process that led to the actions.

1. Faculty Member A filed first an informal, then a formal harassment complaint against Dean C in late 2019 or early 2020. After both Chair B and the second investigator assigned by DSU failed to investigate the complaints, DSU administration failed to assign the complaint to a new investigator, and the complaints remain unresolved. Pursuant to SBHE Policy 308.1(13), all complaints, including those for harassment must be investigated by the appropriate NDUS officer.

Recommendation: The Office has learned that DSU's administration has assigned Faculty Member A's complaints to a new investigator, so the Office does not make a recommendation on that point. DSU should also consider evaluating the training provided to its designated investigators to ensure that complaints are effectively and timely investigated.

2. The language of SBHE Policy 605.1(3) related to tenure is vague at best. The most that can be clearly and unequivocally determined from the language of the policy is that the SBHE is responsible for awarding tenure “limited to the academic unit or program area in the institution in which tenure is granted[.]” The section does not include any delegation of authority to reorganize or relocate tenured faculty lines from the “academic unit or program area” where the tenure was granted to the president of an institution, but it also does not explicitly prohibit relocating a tenured faculty line. Based on the language of the section, the context, and the asserted purpose of tenure in SBHE Policy 605.1(2)—“to assure academic freedom”—the Office cannot find with full certainty that the actions of DSU relocating the tenured faculty line violated any rights held by Faculty Member A.

Notwithstanding, the Office believes that the best reading of the Policy, in consultation with legal counsel, is that because the SBHE grants tenure in an “academic unit or program area”, the institution likely lacks authority to change that academic unit or program area, at least without the tenured faculty member’s consent to the change and without making a request that is approved by the SBHE, the entity responsible for granting tenure. However, the DSU administration’s interpretation that such authority does exist is also not implausible. As a result, the Office does not issue a recommendation to DSU on this point.

Recommendation: The Chancellor, in consultation with the Vice Chancellor of Academic and Student Affairs and the institutions, should propose a revision to the language of SBHE Policy 605.1(3) to make clear where the authority to move, transfer, surrender, and/or revoke tenure resides: with the SBHE or with the institutions, with or without the consent of the tenured faculty member.

3. In response to Faculty Member A’s objections to the transfer of her faculty line, Dean D offered, it appears as an informal compromise, Faculty Member A an untenured position in the Department of Social Sciences. Faculty Member A interpreted this offer as an instance of retaliation. At the SCoFR hearing, Dean D admitted at the time that they did not realize that tenure was a personal grant and could not be removed or transferred. This testimony was not meaningfully challenged. As a result, the Office cannot substantiate the required retaliatory intent in Dean D’s email to create a violation of SBHE Policy 308.2. However, DSU administration should consider providing education to both administration and faculty about the role and requirements of tenure, along with the process by which it is awarded and the rules governing its treatment by the institution.

Recommendation: DSU should provide additional information on the role, requirements, and process of tenure to its administration, including that the institution does not have the authority to separate a faculty member from their tenure, as tenure is personal to an individual.

4. The Reports to the Office also asserted that the decision to move Faculty Member A’s faculty line to SoBE constituted retaliation for Faculty Member A’s filing of the complaints. The SCoFR agreed that, while the particular decisionmakers may not have been aware of the existence or substance of those complaints for some or all of the process, DSU as a whole was culpable for retaliation, as the decision to move the faculty line would have placed

Faculty Member A under the indirect supervision of Dean C. However, Policy 308.2(4) requires that the allegedly retaliatory act must be “motivated by, in response to, or because of” an employee’s good faith report of a violation or suspected violation. This intent requirement is crucial because institutions could not function if filing a formal complaint functionally immunized an employee or faculty member from future potentially adverse or unfavorable personnel actions. Here, the Office’s review of the documents and the testimony during the SCoFR hearing did not substantiate the presence of the necessary retaliatory intent to create a violation of SBHE Policy 308.2.

Notwithstanding, DSU should continue to avoid actions which create the appearance of retaliation. Here, the unresolved complaints potentially give rise to an appearance of retaliation even where the decisionmakers were unaware of the complaints until after the process had begun. To avoid unnecessary litigation risk, involving decisionmakers who were not involved in the unresolved complaints would have been advisable.

Recommendation: DSU should avoid unnecessary litigation risk by avoiding the appearance of retaliation, such as by involving decisionmakers who were not involved in the underlying complaints or reports.

5. On April 12, 2022, the Office received an additional report related to the final decision of the President rejecting the findings of the SCoFR, which largely paralleled several of the arguments raised in the responses from Faculty Member A and the SCoFR itself.

First, the report alleged that the President’s final decision violated SBHE Policy 605.4(11)’s requirement that “[t]he president shall decide and provide written notice of the decision, including findings of fact and reasons or conclusions based on the hearing record[. . .]” The report is arguably substantiated by the Office’s investigation. The President’s report indirectly refers to the record, but arguably does not provide specific findings of fact or reasons or conclusions based on that record.

Second, the report functionally alleged that the President’s final decision was predetermined (i.e. the decision would have been to move the faculty line and to find no retaliation regardless of the grievance/appeal process). The Office has no practical way to substantiate this allegation, though it is plausible that the final decision’s lack of engagement with the hearing record gives observers the impression that the outcome of the hearing did not factor into the final decision.

Recommendation: The Office recommends that, even if the ultimate decisionmaker in a grievance or appeals process determines to take the action proposed before the process began, the decisionmaker engage with the arguments made by the faculty member or employee and respond to the recommendations of the SCoFR (or Staff Personnel Board, for an employee). Additionally, the Office recommends that DSU’s administration ensure that any final decisions on an appeal or grievance follow the requirements of Policy 605.1(11), including specific findings of fact and conclusions based on the hearing record. While this can be a time-intensive process, it will build cross-campus trust and demonstrate respect for considerations of shared governance.

Conclusion

The purpose of this investigation and report was to evaluate the process related to Faculty Member A's complaints, the moving of the faculty line, the grievance process, and the reports regarding the final decision. The Office did not consider whether the actions taken were the correct ones or whether the substantive basis for actions were sufficient.

The allegations of failing to investigate Faculty Member A's complaints and deficiencies related to the final decision were substantiated. While the remaining reports were not substantiated, DSU administrators should be aware of the potential for an appearance of retaliation and should provide additional training on how to avoid such an appearance. The Office also recommends that the Chancellor and SBHE clarify SBHE Policy 605.1(3) to make clear where the authority to move, transfer, surrender, and/or revoke tenure resides.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer



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Summary Investigative Report Proposing to Lower Graduation Standards April 25, 2022

Source of Complaint	Eide Bailly Fraud Hotline Report
Date of Complaint	10/23/2021
Topic of Allegation	Proposing to Lower Standards to Improve Graduation Rates
Institution	Dickinson State University
Policy referenced/related	SBHE Policy 401.1
Conclusion	No Violation.
Investigator	Karol Riedman

Background Information

The Office of Compliance and Ethics received an anonymous Eide Bailly Fraud Hotline report on October 23, 2021. The report alleged that Dr. Joan Aus, Chair of the DSU School of Teacher Education, sought to lower graduation standards and waive the 2.75 cumulative GPA requirement for graduation in violation of standards.

Policy References

SBHE Policy 401.1(2) provides in relevant part:

Academic freedom is the freedom, without institutional, political, or other outside pressure or restraint, to explore any avenues of scholarship, research, and creative expression, and to speak or write on matters of public concern, as well as on matters related to professional duties and the functioning of the NDUS and the institution.

Investigation and Findings

Upon receiving the report referenced above, the Office of Compliance and Ethics referred the matter to President Steve Easton, as the compliance contact for DSU. President Easton assigned the Dean of the College of Education, Business, and Applied Sciences, Dr. Holly Gruhlke, to

conduct an investigation on October 25, 2021. Dr. Gruhlke investigated the hotline report and issued a comprehensive three-page report finding no violation, which was then shared with the Office of Compliance and Ethics as required by SBHE Policy 306.1.

Conclusion

After reviewing the investigation and report issued by Dr. Gruhlke, the Office concluded that there was no violation of applicable SBHE or DSU policy or procedure and has adopted Dr. Gruhlke's finding of no violation. Dr. Aus does not have sole discretion to change admission or graduation standards or to grant provisional admission to the program. Instead, such actions are governed by policy and processes in place at DSU. To the extent that the complaint asserted that Dr. Aus's advocacy for one position or another during Teacher Education Council meetings, such advocacy for institutional change falls within Dr. Aus's job duties and is protected by core academic freedom pursuant to SBHE policy 401.1(2).

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Faculty Group Negative/Bullying April 25, 2022

Sources of Complaint	Direct Complaint form (ndus.edu/compliance-and-ethics)
Date(s) of Complaint	10/29/2021
Allegation	Code of Conduct
Institution	Dickinson State University
Policy referenced/related	Policy 308.1 Code of Conduct
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Compliance and Ethics webpage reporting link on the ndus.edu website. The anonymous reporter categorized the concern as a Code of Conduct violation, stating that a group of faculty members was making negative comments about DSU administration and faculty department chairs and seeking to get the reporter to agree with their comments. When the reporter did not do so, the group made comments about the reporter’s department being part of the problem and that the reporter’s position was vulnerable. The reporter stated they felt bullied.

Policy References

SBHE Policy 308.1 Officer and Employee Code of Conduct states:

The SBHE supports an environment that is free of discrimination or harassment. All SBHE members, officers and employees are expected to conduct themselves in a businesslike manner.

SBHE Policy 401.1(2) Academic Freedom, in part:

Academic freedom is the freedom, without institutional, political, or other outside pressure or restraint, to explore, any avenues of scholarship, research, and creative expression, and to speak

or write on matters of public concern, as well as on matters related to professional duties and the functioning of the NDUS and the institution.

Investigation and Findings

Because the source of the report was anonymous, it was not possible to gather additional information to determine if there was specific evidence of a policy violation. However, the following general statements apply:

- It is not a violation of policy for faculty members to assemble and discuss topics that may be negative or offensive to others, particularly those topics which may be negative or offensive to the institution.
- Personal attacks and bullying may be a violation of policy in certain circumstances, but the allegations set forth in the report do not meet any reasonable definition of bullying, and further evidence could not be collected to support this or any related allegation.

Based on the foregoing, the Office does not find a violation of policy or procedure, and no recommendations are issued.

Conclusion

The investigation was limited by the anonymity of the reporter. The results of the investigation did not substantiate the allegation of a code of conduct policy violation.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
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Summary Investigative Report Faculty Assisting with Student Petition April 25, 2022

Sources of Complaint	Direct Complaint form (ndus.edu/compliance-and-ethics)
Date(s) of Complaint	10/29/2021
Allegation	Code of Conduct
Institution	Dickinson State University
Policy referenced/related	Policy 308.1 Code of Conduct Policy 308.3 Political Activities Policy 503.1 Student Free Speech and Expression Policy 503.3 Student Political Rights
Conclusion	No Violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Compliance and Ethics webpage reporting link on the ndus.edu website. The anonymous reporter categorized the concern as an Inappropriate Relationship, although the details of the concern allude to additional concerns regarding political activities and/or free speech. The reporter expressed concern that a faculty member assisted a student in writing a petition regarding removing DSU administrators and that some students were feeling pressured to sign the petition.

Policy References

SBHE Policy 308.1(3) Officer and Employee Code of Conduct (in relevant part):

SBHE members, officers and employees may not unlawfully use their position, or the knowledge gained because of their position for private or personal advantage.

SBHE Policy 308.3 Political Activities:

Policy 308.3 encourages NDUS employees' participation in off-duty political activities and prohibits discipline or retaliation of any kind due to participation in any activities which comply with the terms of the policy. The policy prohibits use of NDUS resources for political purposes

or for any representation that might give the appearance of representing the views of NDUS or any institution.

SBHE Policy 401.1(2) Academic Freedom, in part:

Academic freedom is the freedom, without institutional, political, or other outside pressure or restraint, to explore, any avenues of scholarship, research, and creative expression, and to speak or write on matters of public concern, as well as on matters related to professional duties and the functioning of the NDUS and the institution.

SBHE Policy 503.1(1) Student Free Speech and Expression:

The SBHE recognizes that students have a fundamental right to free speech and expression, and as a result the SBHE and institutions under its control shall ensure that students have the freedom to speak, write, listen, challenge, learn and discuss any issue, subject to reasonable and constitutionally recognized limitations. The SBHE and its institution shall not engage in viewpoint- or content-based discrimination or suppression of speech and shall permit and facilitate the open discussion and debate of ideas and issues, regardless of the content of those issues.

SBHE Policy 503.3(1) Student Political Rights

The SBHE supports the rights of students to participate in political activities and as above, prohibits use of NDUS resources for political purposes or for any representation that might give the appearance of representing the view of the NDUS or any institution.

Investigation and Findings

Because the source of the report was anonymous, it was not possible to gather additional information to determine if there was specific evidence of a policy violation. However, as general principles:

- It is not a violation of policy for a faculty member to advise or assist a student in the preparation of a petition or for a faculty member to engage in speech or conduct critical of the institution.
- The political activities, academic freedom, and free speech policies protect the petition activity and the content of the petition.
- There was no evidence presented that the petition or petition sponsors used institutional resources or presented themselves as representing the views of DSU or NDUS.
- There is no evidence that the faculty member coerced or used their position to influence the student in preparing the petition, nor is there documentary evidence that students were coerced or bullied into signing the petition by a faculty member or a student.

Conclusion

The investigation was limited by the anonymity of the reporter. The results of the investigation do not support the allegation of an inappropriate relationship, or any related political activity or free speech policy violations.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.

A handwritten signature in blue ink that reads "Karol K. Riedman". The signature is written in a cursive style with a clear, legible font.

Karol K Riedman
NDUS Chief Compliance Officer



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Summary Investigative Report Research Database Cancelled Without Notice April 25, 2022

Source of Complaint	Direct Complaint
Date of Complaint	03/10/2022
Topic of Allegation	Administrative and Academic Authority, Code of Conduct
Institution	Dickinson State University
Policy referenced/related	SBHE Policy 308.1 Officer and Employee Code of Conduct
Conclusion	No violation, recommendation made
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a direct report (phone call) alleging that one or more data bases used by students for science research had been cancelled without notice, after the academic term had started. The anonymous reporter expressed concern that abruptly losing access to the data base(s) would negatively impact the students’ research already in progress using those sources.

Policy References

SBHE Policy 308.1(10):

In all matters involving communication with NDUS students, customers, suppliers, government authorities, the public and others, SBHE members, officers and employees shall endeavor to make complete, accurate, and timely communications and respond promptly and courteously to all proper requests for information and complaints.

Investigation and Findings

The Office of Compliance and Ethics investigated the direct complaint in this matter because the anonymous reporter alleged that the purported decision to cancel the database was made by senior DSU administration. While the Office acknowledges the importance of access to data bases for student research, cancelling or not renewing a data base subscription is an institutional budget decision. However, given the myriad accounts received by the Office during the

investigation, it appears that communication regarding these budgetary decisions could be communicated more clearly to the campus community and the database users.

In addition to the original reporter, the Office interviewed several DSU personnel, all of whom provided somewhat different accounts of the situation:

- A former science department chair said his understanding was that DSU administration attempted to cancel the SciFinder database but the controller stopped the cancellation.
- The former controller did not recall the situation but said that a request to cancel a subscription or a pending payment would have been executed unless the payment had already been made.
- The former Head of Library Operations said DSU administration attempted to cancel the SciFinder database without warning and referred to this situation as an example of DSU administration's inadequate communications of considerations and decisions that directly affect students and faculty.
- The current interim Head of Library Operations confirmed that no science databases had been cancelled; both SciFinder and AccessScience databases are currently active but shared that it was possible that one of them would not be renewed at the end of its subscription after the Spring 2022 academic semester.
- DSU administration stated that reviews of database subscriptions are routinely done to determine usage and benefit to students and firmly stated that the cancellation of a science database subscription did not occur.

While it is difficult to parse the different accounts received by the Office, it appears that the database remains available to students, so the reporter's concerns were not substantiated.

Conclusion:

While we acknowledge the importance of access to data bases for student research, continuing or cancelling a data base subscription is an institutional budget decision and generally out of scope of this Office. Each person interviewed had a different understanding of the situation, so it appears whatever discussions or communications were attempted did not produce broad understanding. Whatever decision is made on database subscriptions, clear communication of the decision (ideally after consulting with the database users and/or discussing potential changes in advance) would be helpful in reducing concerns, especially from stakeholders primarily affected by the decision.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer



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Summary Investigative Report Invalid Student Grade Appeal Process April 25, 2022

Sources of Complaint	Direct Complaint
Date(s) of Complaint	3/10/2022
Allegation	Invalid grade appeal process/faculty interference
Institution	Dickinson State University
Policy referenced/related	DSU Grade Appeal Procedure
Conclusion	Investigation results support the allegation
Investigator	Karol Riedman

Background Information

On March 10, 2022, the NDUS Office of Compliance and Ethics (“Office”) received a direct report regarding a student grade appeal for the Fall 2021 academic period. An additional direct report was received on March 11, 2022. The student, an education major, was appealing a grade received in a science course which was part of course requirements for elementary education majors. The reporter alleged the DSU Procedure was not followed, and that unreasonable exceptions were granted at the request of the Education Department Chair (“Chair A”) which did not follow procedure.

On March 28, the Office received a direct report from Chair A through the NDUS website alleging that the student’s grade appeal was unreasonably delayed and thus was mistreated by a faculty member and the administration.

Ordinarily, issues regarding student grading would be outside the scope of the Office. However, as the investigation regards whether a campus procedure was followed, not the merits of an assigned grade, the Office has authority to investigate.

Policy References

The Dickinson State University Grade Grievance Procedure states (in relevant part, emphasis added):

Students have the opportunity to resolve any academic grading concern through an informal resolution process and if that fails to resolve the concern, a formal resolution process.

Informal Resolution Process

*A. Instructor level ...the student should first contact the instructor and arrange for a conference. The academic appeal (either oral or written) must be filed with the instructor within ten University business days after the incident or, **when the appeal involves final course grades, within ten University business days after the start of the next semester.***

B. Chair Level - If the student is not satisfied with the clarification or action resulting from the instructor conference, the student then has the option to carry the appeal to the department chair. The student must notify the department chair either verbally or in writing within ten University business days after the instructor conference. After reviewing pertinent documents and interviewing the student and instructor, the chair must issue a recommendation within ten University business days after receiving a request for review of the action from the student. The recommendation is not binding; the instructor still has the authority to change the grade or allow it to stand, but the weight of the recommendation would indicate one course of action over the other.

If the student is not satisfied, the student may carry the appeal to the formal level through a written appeal to the Dean of the college in which the academic department is located. The “Formal Grade Appeal Application Form” must include specific reasons why the initial appeal was submitted and refer to previous attempts at the instructor and chair level to resolve the issue informally. The Dean will determine whether the request for formal resolution is valid or not. If determined that the appeal is not valid, the Dean will inform the students and cite specific reasons. The appeal will not go forward to the formal phase and the decision will be considered final.

Formal Resolution Process

If the Dean approves the appeal to enter the formal resolution process, the Dean will convene a review committee, examine the pertinent evidence and render a written opinion to the Provost/VPAA for concurrence and implementation within ten University business days of receiving the written appeal requesting formal resolution. This ten-day timeline may be extended by the Provost/VPAA because of extenuating circumstances.

Within ten University business days of receiving the written opinion from the Dean and review committee, the Provost/VPAA will provide a written rationale for concurrence or non-concurrence. If the Provost/VPAA does not concur with the committee’s opinion where the procedure is perceived as being flawed, the Provost/VPAA may order the appeal reviewed again by another review committee with the chair designated by the Provost/VPAA.

The decision of the review committee with concurrence by the Provost/VPAA is binding on both parties and is final. The President of DSU does not serve as a “Court of Final Appeals” in academic matters; the Provost/VPAA has final authority.

Investigation and Findings

A review of relevant emails and documents revealed that in early November, Professor B asked for guidance from Dean C regarding a possible upcoming grade appeal. Dean C advised Professor B that the process begins informally between the instructor and the student. On December 10, 2021, Chair A sent an email to Dean C and Chair A's Dean ("Dean D") stating that the student (one of Chair A's advisees) intended to dispute their grade in the course. A written statement from the student was attached. The grade being appealed was the final grade of the Fall 2021 semester, which had not yet been completed. Per procedure, the appeal cannot be submitted until the final grade is recorded at semester's end, and the deadline for requesting an informal appeal to the instructor was ten business days after the start of the Spring 2022 semester (January 10, 2022). Therefore, January 21, 2022 was the deadline for requesting an informal appeal.

Neither the instructor nor the department chair received a request for an informal appeal from the student within the ten-day period that expired on January 21, 2022. As there is no extension provision under the grade grievance procedure, the grade should have been final at that point. There is no indication in the procedure that its provisions are not binding on campus officials and students.

On Friday, January 28, 2022, Chair A sent a completed "Formal Grade Application Form" to Dean D, who sent it on to Dean C, stating that the student sought to file a formal appeal. Per procedure, a formal appeal may only be requested after the informal appeal process has been completed. Even though the deadline had passed a full week earlier, Dean C allowed the student ten additional days to seek informal resolution, by February 11, 2022. Again, the student did not contact the instructor or the department chair during that time.

On or about March 4, 2022, Chair A informed Dean C again that the student wanted to pursue the formal appeal. There had still been no attempt to follow the required informal appeal process. Despite this, pursuant to Chair A's request, Dean C advised the student that they had one week—until March 11, 2022—to contact either the instructor or the department chair (or the chair's designee) for an informal appeal meeting. This time, a meeting was arranged with the department chair's designee, Faculty E, and the student requested that Chair A be allowed to attend. The DSU Grade Grievance Procedure does not allow for another faculty member or advisor to attend, represent or advocate for the student during this phase of the informal process, so the request was denied. The student told Faculty E that they were comfortable meeting with him alone.

Faculty E met with the student on March 10, 2022. Professor F also arrived, representing the School of Education on behalf of the student. As there is no provision in the informal process for additional faculty or representatives to be present during the informal review meeting, Faculty E requested that Professor F leave the meeting. Faculty E had previously talked to Professor A, who stated that they were unwilling to change the student's grade unless there was a grading mistake. The student stated they were not objecting to any individual homework or exam grade but thought the overall course grade did not reflect the effort they had put into the course. Faculty E asked the student if they would accept an informal resolution that did not involve a

grade change, which the student declined. As a result, Faculty E determined that an informal resolution was not possible.

Dean C accepted Faculty E's recommendation and started the formal grade appeal process. The procedure requires the student to file the request for a formal appeal with the Dean after the conclusion of the informal phase; upon Chair A's inquiry, DSU Administration stated that the original formal request could be used, rather than re-submitting the information. Dean C appointed a grade appeal committee, which had 10 business days from the date of the start of the formal appeal—March 11, 2022 for the purpose of this report—making the deadline April 1, 2022 (accounting for DSU's March 14-18, 2022 spring break).¹ The deadline was communicated to the student and Chair A.

The grade appeal committee was chaired by Dean C. The committee recommended that the student's final grade should not be adjusted on March 31, 2022. Per procedure, the DSU Provost had ten days to provide a written report of concurrence or non-concurrence with the committee's recommendation. The Provost submitted a letter of concurrence with the committee decision on April 1, 2022. The decision of the provost is final.

Conclusion

The results of the investigation support the allegation that the DSU Grade Grievance Procedure was not followed in this particular case, by extending required deadlines for informal appeals by seven weeks, by not completing the first required step of the informal review procedures (appeal to the instructor) at all, and by filing a formal appeal before the informal process was completed. The student's grade appeal was not in compliance with the mandatory deadlines of the procedure and should not have been accepted.

Similarly, Chair A's allegation that the student's grade appeal was unreasonably delayed by the formal review committee is technically plausible, provided that the days of spring break are considered "University business days" under the procedure. Based on that interpretation, the formal review committee's ten-day deadline could have been extended by the Provost, but that does not appear to have occurred.

However, no part of the original filing of the appeal was in compliance with the procedure, and without a provision for exceptions or extensions during the informal phase of the procedure, there was no basis to accept the appeal. As a result, despite the foregoing, the allegation that due to delays the student was mistreated by a faculty member and the administration is not supported. The grade appeal procedure outlines a student-led process; it is the student's responsibility to initiate the informal process before the deadline, to participate in that process, and to complete all steps within the procedure's deadlines and structure.

¹ For the purposes of this report, the Office will assume (without deciding) that spring break is not comprised of "University business days," as faculty members are generally not on campus during spring break.

Recommendation:

All Dickinson State University published procedures should be followed consistently, including the DSU Grade Grievance Procedure. Here, the mandatory informal phase of the procedure was largely ignored. Faculty and faculty advisors should become familiar with these procedures, so students are aware of their options under the procedure, particularly since the informal phase does not include provisions for deadline extensions. If such extensions are an appropriate part of the process, the procedure should be revised to reflect that flexibility and how such flexibility is to be exercised.

Informal Suggestion:

Faculty members, in their role as advisors and instructors, should advocate for their students and ensure that they are aware of any possible options. All errors in this process were for the student's benefit. However, care should be taken to ensure that the process remains student-led, without the potential appearance of a faculty member influencing the process or those involved in it. Students at NDUS institutions are largely adults, and advisors should support students as they advocate for themselves without taking over the process on the student's behalf. Situations where faculty members act on behalf of a student in such a process should be infrequent and due to unusual circumstances.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Academic Freedom/Instructional Interference April 25, 2022

Sources of Complaint	Direct Report to the Office of Compliance and Ethics
Date(s) of Complaint	3/10/2022
Allegation	Violations of Academic Freedom, Data Privacy and FERPA
Institution	Dickinson State University
Policy referenced/related	DSU Student Handbook - Class Attendance Policy DSU Student Code of Conduct SBHE Policy 401.1 Academic Freedom DSU Policy 401.1 Faculty Rights and Responsibilities/Academic Freedom and Community Welfare NDUS Procedure 1912.2 Student Records – Directory Information
Conclusion	Investigation results support the allegations
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics (“Office”) received a direct report regarding a faculty member (Professor A) who was replaced with another instructor (Instructor B) to teach a course without due process and in violation of Academic Freedom. The initial report was not made by Professor A. The report alleged that a Department Chair (Chair C) who advised some or all of the students in the class encouraged students to drop the course and take a summer online course, and also pushed for DSU Administration to replace Professor A as instructor of the class. Chair C’s department is located in a different college from Professor A and the course in question but is the “home” department for the students enrolled in the class.

Professor A’s course fulfills a requirement for elementary education majors. All students enrolled in the course for Spring 2022 were elementary education majors. Midway through the semester, some of the students were struggling in the class. Tutoring was available to all students and Professor A was willing to meet with students individually for extra help. Poor attendance and failure to turn in assignments contributed to the situation.

Chair C believed the poor grades were due to Professor A’s failure to teach the course effectively. Education majors have GPA requirements for student teaching so a low grade in

Professor A's class could delay their progress toward student teaching and graduation and could impact retention in Chair C's department. To avoid these negative outcomes, Chair C allegedly encouraged students to withdraw from the class and take a similar online class from another NDUS institution and ultimately sought to have Professor A removed from teaching the class. In the process, Chair C allegedly violated policies relating to Academic Freedom and FERPA and caused students to violate the DSU Student Code of Conduct and Class Attendance Policy. Students did withdraw from the class and, following a meeting with DSU administration and college deans, Professor A was replaced as instructor of the course by Instructor B, a DSU administrative employee who possessed appropriate credentials to teach the class, but who had not recently taught courses at DSU.

Policy References

DSU Student Handbook - Class Attendance Policy (in relevant part):

Students are expected to attend scheduled classes and labs as published in the official class schedule. Deviation from this general policy must be approved by the instructor and respective dean.

DSU Student Code of Conduct 2.2 Academic Freedoms and Responsibilities (in relevant part):

Students have the right to be informed of the content and objectives of a course, the methods and types of evaluations, and the relative importance of each test, paper, and assignment, comprising the total evaluation. Students are responsible for meeting the requirements of a course of study according to the standards of performance established by the instructor. This includes regular class attendance when established as an essential element of course content.

SBHE Policy 401.1(2) (and DSU Policy, substantially similarly) states, in part:

2. Academic Freedom. [. . .] *Faculty are entitled [to] freedom in designing and teaching their assigned courses.*

NDUS Procedure 503.2 Student Records – Directory Information

SBHE Policies 311 and 503.2 require that each institution adopt a policy as required by the Family Educational Rights and Privacy Act (FERPA). Such policies must include a definition of "directory information." All or a portion of directory information may be released publicly in printed, electronic, or other forms at the discretion of the colleges or universities on a case-by-case basis.

Investigation and Findings

The objectives of the investigation were to determine whether it was a reasonable conclusion that Professor A's teaching was primarily responsible for the students' grades, whether replacing Professor A with Instructor B followed due process and/or stated policies and procedures and

whether Chair C's involvement in Professor A's class and students was reasonable and appropriate.

Please note that many details in this report are provided at a high level of generality as a result of privacy obligations related to FERPA.

1. Professor A was aware that the students in this class were elementary education majors and were not pursuing degrees in the department of the course. To increase accessibility the teaching methods were modified as follows:
 - a. Lecture and presentation of the topic using PowerPoint slides for examples.
 - b. In-class exercise using identical examples as in the PowerPoint, with slightly different numbers.
 - c. Homework assignment identical to PowerPoint and in-class exercise, using slightly different numbers.
 - d. Exam questions identical to the PowerPoint, in-class exercise, and homework, using slightly different numbers.

Professor A provided the Office with materials for one topic, and the Office's review of these materials supported the above description of the teaching method for this class. Professor A also noted that they had also curved student grades in the past and was considering doing the same for this semester.

Department Chair D (Professor A's supervisor) observed the class in response to the concerns related by Chair C and reported that they found no deficits in Professor A's teaching. Chair D also noted that historically the students have earned lower grades during the first half of the semester in this class, but by the end of the semester the grade distribution is "fairly typical." Instructor B also observed Professor A's class and reported to the Office that the class was "structurally set up for student success." In addition, Instructor B reported that the strategies planned for teaching the class after the transition were not significantly different than the methods used by Professor A. Noting the low attendance in the class, Instructor B did mention that it is typically difficult for students to succeed if they don't attend class.

A review of attendance records and scores for the first part of the semester showed a clear correlation between student success in the course and attendance and homework completion rates. Those students who had regularly attended class generally had much higher overall grades than those students who did not attend, did not turn in homework, or who did neither.

In response to questions from the Office, DSU Administration suggested that once the students got to mid-semester, if their grades were so low it appeared they may not pass, they may give up and quit coming to class. However, many of the students who were not experiencing success missed class frequently from the onset of the term. Only one of the students not experiencing success attended more than half of the classes. Of note, both the DSU Student Handbook and DSU Student Code of Conduct support and/or require regular attendance and meeting the requirements (such as completing assigned homework) of a course that are established by the instructor.

Instructor B reported that after about four weeks teaching the class after replacing Professor A, there had not been a significant improvement in grades, even after dedicating three class periods for review before a recent exam. Instructor B also did not observe an increased use of tutoring services and felt the students' apathy toward homework was disappointing.

Recommendation

The comments from Chair D and Instructor B, as well as the attendance records that correlate with the grades indicate that it is not a reasonable conclusion that Professor A's teaching was primarily responsible for the students' low grades. Because there was no significant improvement seen after Instructor B began teaching the class, the Office recommends pursuing a collaborative solution between the Departments to determine joint reasonable expectations for the course and to strategize additional student supports if needed. Motivating students to attend class, submit graded homework, and use tutoring services could be re-emphasized by the students' advisors, or creative study solutions might be organized. However, DSU Administration and faculty should remember that students are adults and should take the lead in ensuring their own success in their educational program. Under the circumstances, the solution to the lagging student success was not to change the instructor of the course.

2. Chair C, as an advisor to education majors, became aware that some students were not having academic success in Professor A's class. On February 23, 2022, Chair C expressed concerns to Dean E (Chair C's supervising Dean), who then communicated with Dean F (Professor A's supervising Dean). Dean F said he would discuss with Chair D and Professor A and report back to Dean E. Within the department, various strategies were said to have been considered, including arranging for a teaching assistant, increasing tutoring opportunities and providing additional study materials. Chair C rejected these considerations, responding that in order to preserve the retention of Chair C's department's majors, a pathway would need to be created through which they could be successful. Chair C stated that they intended to encourage students to withdraw from Professor A's class and enroll in a similar class offered online during the summer by another NDUS institution.

In the meantime, Chair C sent a group email to all students enrolled in Professor A's class. The email identified them all as elementary education majors enrolled in Professor A's class and said that Chair C had met with students who were struggling, and that she understood that they were also struggling. Various exchanges occurred where Chair C suggested the students could drop the class and take a similar online class (from a different university) over the summer. Some of these emails occurred in side emails without other students copied; others copied other students on the chains. Chair C at various points encouraged students to attend class so that poor attendance could not be blamed for some students' lack of success.

On or about March 3, 2022 Chair C met with Dean E and DSU Administration to request a teaching replacement for Professor A in that class. On March 4, Instructor B was asked to take over teaching the class. The same day, Chair C sent another group email to all enrolled students stating that Chair C was assured by DSU administration that changes will be made which will allow them to succeed in the class with a passing grade that won't make them ineligible for teacher education.

On Monday March 7, Instructor B observed Professor A's class and did not identify any deficits in teaching methods. Instructor B was uncomfortable with the request but agreed to take over teaching the class for the remainder of the semester because they felt they had no choice or viable alternative based on discussions with DSU Administration.

Chair C emailed the students in the class, informing them that the instructor would be changed and not to attend Professor A's class anymore. The following day, March 8, no students attended class. Professor A contacted Chair D and Dean F to complain about Chair C's interference. Chair D and Dean F shared that DSU administration had determined that Instructor B would teach the rest of the semester. Chair D and Dean F also indicated they were not necessarily in agreement with the decision. Under the circumstances, Professor A felt he had no choice but to step back from the class.

It is highly unusual that Chair C, who was from a different college and department from Professor A, would have standing to request that Professor A be replaced in the middle of a semester without regard to any internal review or discussion within the department. Chair D and Instructor B both observed Professor A's teaching and supported the strategy and methods used. That the students were not regularly attending class (or attending class at all) and were not turning in homework apparently was not considered by DSU Administration or Chair C. Professor A and the department were not provided an opportunity to try additional support strategies; less than two weeks after Chair C reached out to Dean E with the grade concerns, Professor A had been replaced by Instructor B.

Recommendation:

DSU Administration should either reinstate Professor A as instructor of the course or ensure that they suffer no consequences for the removal of the course, as they were not provided any measure of due process prior to the DSU Administration acting. Moreover, where student success is a concern, DSU Administration should carefully employ strategies that do not infringe on faculty academic freedom. Here, Professor A was entitled to freedom to design and teach the course pursuant to SBHE Policy 401.1. The decision to remove the instructor from the class, rather than engage in mitigation or other support strategies was likely made in derogation of academic freedom, particularly where both Chair D and Instructor B did not find fault with the manner in which the course was taught.

Moreover, as a matter of shared governance, DSU Administration should be careful to include relevant stakeholders in this type of decision-making process. Here, the discussions were largely between DSU Administration, Dean E, and Chair C, without meaningful participation by Dean F, Chair D, or Professor A. As a result, Professor A learned that the course had been effectively taken away after students told them that Chair C told the elementary education majors to stop attending (and when no students were in attendance). The department was not given the opportunity to attempt its own faculty- and student-focused solutions, or to work with Professor A to develop additional strategies, and the decision was made without consideration of any cause for the lack of student success other than alleged inadequate teaching. Instead, DSU Administration gave the students a new instructor and a promise from Chair C that they would

succeed, rather than allowing the students to be accountable to the requirements of the class and take advantage of the resources provided. As a result, four weeks later few students have improved their success level.

3. The Office also received several complaints regarding Chair C's interference with Professor A's course. These included numerous allegations that Chair C encouraged the students to withdraw from this class, to stop attending class, and take an online course over the summer from a different NDUS institution. A review of documents showed numerous instances of Chair C encouraging students to drop Professor A's class, and several times recommended taking the online class, as well as informing Dean F of those intentions.

Moreover, the Office also has significant concerns about Chair C writing group emails (with all students clearly identified) which revealed to each of them that they were struggling in the class. There is no indication that the students had provided a written waiver of their FERPA rights to permit Chair C to discuss their success in Professor A's course with their classmates. Moreover, the information that was shared was not designated as student directory information and so may not be released without student consent pursuant to NDUS Procedure 1912.2 (currently pending renumbering to NDUS Procedure 502.1). This may also be a violation of FERPA regulations, which prohibit releasing student educational information without a signed release from the student. However, violations of FERPA are delegated to the Student Privacy Protection Office at the United States Department of Education, and this Office is not equipped to make such a finding.

During the process of requesting an instructor change, Chair C told the students in Professor A's class to continue attending class so it wouldn't seem like attendance was the problem rather than the instruction. Chair C also shared with the students their hope that Professor A wouldn't be teaching the class in the future. Chair C encouraged students to drop the class because Chair C didn't want there to be a D or F on the students' transcripts, but recommended they continue attending the class until they drop it so that Chair C could make the case to DSU Administration that the students were trying hard, but instruction was the problem.

Further, Chair C promised students that based on the DSU Administration's changes, they would receive a passing grade that would make them eligible for teacher education, without regard for student effort. Chair C also told the students that Instructor B wanted them to know they would begin with a clean slate so it would still be possible to do well in the class, while Instructor B stated this was incorrect and there was no intention to entirely disregard the existing grades.

The communications reviewed by the Office demonstrate that Chair C acted to directly undermine the teaching of her colleague, Professor A, which had met the approval of Professor A's own department. Instead, Chair C repeatedly suggested that students drop the class, encouraged students to take an alternate online class from another institution (without informing students that they would have to become collaboratively enrolled), made disparaging comments about Professor A, and seemed to be attempting to ensure that students in Professor A's course would receive a grade of C or higher, even though many students had not been attending class, turning in graded homework, or using tutors or other resources to assist in learning the concepts.

With these comments and actions, Chair C intentionally interfered with Professor A's class. This, along with successfully seeking to remove Professor A from his assigned class constitutes a potential violation of SBHE Policy 401.1 and creates a chilling effect on principles of academic freedom. It sends a message that faculty may not be allowed to teach their courses with the methods and strategies deemed effective by their department because DSU Administration may allow faculty from outside the department to interfere with the class up to and including removing them from teaching the course, with all the attendant personal and professional consequences that may bring.

Recommendation

Good faculty advisors can be valuable resources for the students. However, their role is to advise students on options and resources to help them succeed, without becoming so invested in the student that professional judgement and perspective may become clouded. Under DSU Student Code of Conduct Section 2.2, students are responsible for meeting the requirements of a course of study according to the standards of performance established by the instructor, not the chair of a different department. Appropriate avenues to improve student success include encouraging students to attend class, completing assignments, being aware of resources such as tutoring, study groups, working with their professor, or requesting additional help and support. This does not include interfering with the professor's teaching or seeking to remove them from the class. Performance issues or instructional disagreements should be addressed within the department's supervisory chain, not by seeking to overrule the processes in place.

Conclusion

Student success is crucially important and DSU is known for going the extra mile to assist students in achieving their goals. While retaining students and successful graduation rates are an important institutional goal, interfering with the rights and academic freedom of the faculty is not the right path to reach that goal. DSU Administration should consider educating its leadership, along with that of the departments and colleges, on the importance and role of academic freedom, along with the resources available to department chairs and advisors to help their students reach the expected level of success.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

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Summary Investigative Report Hiring Process Irregularities/Violations April 25, 2022

Source of Complaint	Eide Bailly hotline, various sources of Direct Reports
Date of Complaint	12/14/2020, 5/2/2021, 6/5/2021 and others
Topic of Allegation	Violations of policy, procedure and law relative to employee hiring processes
Institution	Dickinson State University
Policy referenced/related	NDUS Procedure 601.0 Veterans' Preference N.D.C.C. 44-04-18.27 Applications for Public Employment
Conclusion	Investigation supports the majority of allegations, recommendations given
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received multiple reports through the Eide Bailly Fraud Hotline and through various direct venues regarding irregularities or violations in hiring practices. Some of the reports were anonymous and did not provide sufficient details to investigate. The Office did investigate five specific examples that had similar issues in process, so those are included in this collective report. When hiring processes are not followed, the search and hire can come under scrutiny and result in legal risk to the institution.

The investigations and recommendations in the following report are focused on policy, procedure and process, not as an analysis of the wisdom of the final hiring decisions themselves.

Policy References

NDUS Procedure 601.0 Veterans' Preference

*1. **Employment Requirements** North Dakota Century Code chapter 37-19.1 requires that qualifying veterans and spouses of qualifying veterans be granted preference in any state institution authorized to employ individuals either temporarily or permanently when hiring through an external recruitment process. Veterans' preference does not apply to internal recruitment and selection provided the candidate was originally hired through a competitive search process.*

[...]

3. Vacancy Announcements: *Vacancy announcements for externally recruited positions which are eligible for preference must state veterans claiming preference must submit all proof of eligibility by the closing date. Proof of eligibility includes a DD-214 and if claiming disabled status, a current letter of disability. If an exempt position is advertised, the advertisement must state that veterans' preference does not apply to the position being advertised.*

N.D.C.C. 44-04-18.27 Applications for Public Employment

If a public entity or any person delegated authority by a public entity to review applications or make hiring decisions receives applications from three or more applicants who meet the minimum qualifications for a vacant position, the public entity or other person shall designate three or more of the qualified applicants as finalists for further consideration before the public entity or other person may issue an offer of employment to fill the position.

Investigation and Findings

Staff Position hired January 2021

One direct report was received regarding the search for a staff position. The report alleged bias and favoritism toward a certain applicant (Applicant A) who was not qualified for the position, by the search committee chairman (Member B). Per the position announcement, the sole minimum qualification was a Bachelor's degree, with required competencies including MS Office Suite, and strong organization, time management, communication skills and student service. Preferred qualifications included experience in a Higher Education setting and knowledge of/familiarity with various student-related services. Five applications were received during the initial period, while a sixth was received after the first five had already been sent to the search committee and had been ranked. The ranking sheets were updated to include the sixth applicant. All six applicants were deemed to be qualified and were ranked by the search committee.

Three of the six applicants that were deemed "qualified" (including Applicant A) did not have a Bachelor's degree, thus did not meet the required minimum qualification as stated in the position description. Applicants received 5-10 points on a scale of 10 for qualifications and competencies such as time management and organizational skills, with no objective way to evaluate these attributes. Some of the applicants referred to these "required competencies" in their application materials but offered no evidence to assist in accurate evaluation. Applicant A included a Member B as a personal reference in the application materials.

The three members of the search committee ranked the applicants' materials, and the scores were combined to create the totals used to select finalists to be interviewed. Scoring was done using standard Excel spreadsheets for most search committee members, but one committee member apparently added scores manually (and incorrectly) and entered the total as a value, rather than using provided formulas for the computation. This resulted in addition errors which could have changed the outcome of the search. Fortunately, the Director of Human Resources corrected

these incorrect scores while compiling the final ranking. The final candidates to be interviewed were initially not selected strictly based on rank order, but the Director of Human Resources recognized the potential concern and brought it to the attention of the search committee chair, who adjusted the interview selection decision. Due to the withdrawal of two applicants during the search process, two candidates were interviewed and Applicant A was the successful candidate.

Recommendations:

- DSU must designate finalists where more than three qualified applicants submit applications. Pursuant to N.D.C.C. § 44-04-18.27, “[i]f a public entity [. . .] receives applications from three or more applicants who meet the minimum qualifications for a vacant position, the public entity *shall* designate three or more of the qualified applicants as finalists for further consideration before the public entity [. . .] may issue an offer of employment to fill the position.” Here, only two applicants were interviewed, and three finalists were not designated prior to an offer of employment. DSU search committees and hiring authorities should ensure that three finalists are designated prior to making an offer of employment.
- Applicants who lack a minimum required qualification should not advance in the process. In this case, if a Bachelor’s degree was a minimum qualification, but could be excused in favor of having a degree in process or relevant experience, this should be included in the position announcement to provide notice to potential applicants. As written, with no exception language, three applicants should not have been in consideration. Moreover, other potential applicants may have applied if the exceptions made to the required qualification would have been stated. While position postings may be revised, an offer of employment should not be made to an applicant who does not meet minimum qualifications as set forth in the position description.
- Generally, applicants should be ranked based on objective criteria that is apparent from a resume, curricula vitae, or other application materials. If applicants are to be ranked based on subjective criteria or “competencies” such as organization, time management, communication, etc., evidence of these competencies should be required, either by inclusion in application materials or by other means. These competencies are difficult to impossible to fairly determine based only on a resume, unless the cover letter explains how the applicant meets the required competency.
- Ranking sheet scores on an excel spreadsheet should be calculated via formula rather than added manually and entered in the spreadsheet as a value to avoid potentially significant errors. The Director of Human Resources should continue to check formulas and totals in the compilation and verification process.
- Final candidates for interview should be selected in rank order starting at the highest rank. Any exceptions should be documented. For example, best practices would not support selecting the applicants ranked 1, 2, and 4 instead of 1, 2, and 3 without documented extenuating circumstances.
- Members of the search committee who are also listed as a reference for an applicant should not participate as a member of the committee. Agreeing to provide a reference for an applicant while serving on the search committee creates an appearance of or actual

bias which is not appropriate for a search committee member, especially the chair of the committee.

Faculty position hired May 2021

Three Eide Bailly hotline reports and several additional direct reports were received regarding a hiring process for a faculty member. The allegations, summarized from all reports, were that “Applicant C” was recruited for the position before it was opened, that the position was opened while the incumbent’s separation was still under appeal, and that Applicant C was allegedly the neighbor or friend of a search committee member (“Member D”) and bias was alleged.

Faculty Member E was in the midst of a complicated separation process beginning about March 8, 2021 which was not fully resolved until after this hire was complete. When the Office questioned Member D about the propriety of hiring for a position whose vacancy was under appeal, Member D responded that there were two potentially similar open positions, and they were not interviewing for Faculty Member E’s position. However, notes from a March 10, 2021 meeting revealed that even though there was an additional unfilled faculty position in the department, “we will only be moving forward with replacing [Faculty E’s] position at this time,” and the other position would no longer be needed. The position was posted March 15, 2021.

The required minimum qualifications for this position listed in the job posting included the appropriate ND license, either holding or in the process of completing a Master’s degree in a related field, two years of experience in practice and specific knowledge and experience. Required competencies included excellent computer/internet skills, ability to safely operate relevant supplies and equipment, ability to organize/prioritize, strong interpersonal/oral/written communication skills and detail oriented. Preferred qualifications included holding a doctoral degree, knowledge and experience in specific areas and experience teaching undergraduate courses.

Four applications were received for the position and routed to the search committee for scoring and ranking. Subsequently, a fifth application was received from Applicant C, and Applicant C was added to the bottom of the scoring sheets. All five applicants were deemed to have met the required qualifications. However, three of the five search committee members scored one or more applicants as not meeting the Master’s degree requirement, affecting three applicants including Applicant C.

The final compiled ranking showed that all five met the Master’s degree requirement despite committee members’ individual scores. The required competencies were scored, though evaluating the five skills would be difficult or impossible based on written application materials. Moreover, a sixth competency, “strong customer service skills,” was included in the ranking sheets and scored despite not being part of the job posting.

The five members of the search committee ranked the applicants, and the scores were combined for the totals used to select finalists to be interviewed. Rankings were done using standard Excel spreadsheets, but two committee members apparently added scores manually and entered the total as a value, rather than using formulas for this computation. This resulted in addition errors

which could have changed the outcome of the ranking and overall search. Fortunately, the Director of Human Resources corrected these scores while compiling the final ranking. All five candidates were selected to be interviewed, while three participated in a second interview. No finalists were formally designated.

Moreover, the Office received reports alleging that Applicant C was a neighbor or friend of Member D. Member D confirmed that they knew Applicant C as a community member but also noted that they were acquainted with or knew all but one of the candidates. Another hotline report alleged that when Applicant C's interview began, Member D greeted the candidate by saying "Hi Neighbor!" This was corroborated by another search committee member.

Recommendation:

- DSU Administration should provide additional training or instructions to its administrators and employees regarding providing full, frank, and non-misleading responses to the Office's requests for information. Here, Member D misled the Office, intentionally or not, by informing the Office that the position to be filled was not Faculty Member E's position. *See* SBHE Policy 306.1(4); SBHE Policy 308.1(13).
- As noted above, DSU must designate finalists where more than three qualified applicants submit applications. Here, while all five applicants were interviewed, and three received a second interview, DSU did not formally designate finalists. DSU search committees and hiring authorities should ensure that three finalists are designated prior to making an offer of employment.
- Applicants who lack a minimum required qualification should not advance in the process. In this case, if three committee members noted that one or more applicants did not meet the Master's degree earned or in process, there should be notes or explanation clarifying why the applicants were moved forward in the process, whether there was a misunderstanding, an error or an exception. If there is a basis for an exception for a minimum qualification, it must be included in the job posting.
- Generally, applicants should be ranked based on objective criteria that is apparent from a resume, curricula vitae, or other application materials. If applicants are to be ranked based on competencies such as ability to organize/prioritize, strong communication skills, and being detail oriented, evidence of these competencies should be required, either by inclusion in application materials or by other means. These competencies are difficult to impossible to fairly determine based only on a resume, unless the cover letter explains how the applicant meets the required competency.
- Committee members rank applicants based only on application materials and whether they meet the requirements of the job posting, therefore adding scored competencies or qualifications that were not included in the job posting is prohibited. Applicants cannot be scored on a qualification or competency which they were not required to substantiate by the job posting.
- Ranking sheet scores on an excel spreadsheet should be calculated via formula rather than added manually and entered in the spreadsheet as a value to avoid potentially significant errors. The Director of Human Resources should continue to check formulas and totals in the compilation and verification process.

- Individuals who are members of the search committee and are acquainted with applicants should disclose that relationship and should recuse themselves if a personal bias is unavoidable. While it is likely that search committee members may know applicants, particularly in a smaller community like Dickinson, search committee members must endeavor to avoid the appearance of bias in hiring. For example, greeting Applicant C with “Hi, Neighbor!” while greeting other applicants professionally creates an appearance of bias. In every case, interviewees should be treated in an identical manner to the extent possible, regardless of any pre-existing relationships.
- Faculty Member E’s separation process was more complex than the typical situation and is not addressed in this document. However, where possible, care should be taken to ensure open positions are not posted until after the position to be filled is open to avoid a situation where DSU may have to terminate a newly hired employee to make space for a successful appellant.

Dean Positions hired August 2020

On July 10, 2020, DSU Administration announced new Dean positions for both the College of Arts and Sciences (CAS) and College of Education, Business & Applied Sciences (CEBAS). It was noted that the positions would be filled internally and that application materials would be accepted until July 24, 2020, with a start date of August 1, 2020. The position announcements were substantially identical. The minimum qualifications included a terminal degree, five years of higher education teaching experience, prior higher education supervisory experience, and demonstrated superior communication skills. Preferred qualifications included tenure and experience as Department Chair or other leadership experience within the College.

Direct reports received by the Office alleged incomplete and biased hiring processes. The Office’s investigation revealed that both searches were conducted by a single DSU administrator without a search committee. According to the DSU Administration, two reviewers assisted with the process, but no records were provided to the Office documenting their duties or results of their reviews. DSU Administration declined to provide additional or contemporaneous information regarding the role of these reviewers. According to the DSU Administration, there were three internal applicants for one dean position, and a single internal applicant for the other.

After the applications were received, the sole DSU Administrator conducting the search selected Dean F and Dean G without conducting interviews or other ordinary vetting procedures. Dean F and Dean G allegedly met all the listed qualifications at the time of their hire.

Recommendations:

- DSU Administration should provide additional training or instructions to its administrators and employees regarding the requirement to respond to all reasonable requests for information and documents from the Office, as set forth in SBHE Policy 306.1(4).
- DSU should follow all applicable hiring practices for leadership roles, such as these Dean positions, including a search committee and interviews, to avoid the appearance of bias.
- Though employees who have been through a competitive search at the institution may be internally promoted by appointment, after announcing a formal position opportunity and

application process a full search and hiring process should be completed. Generally, competitive internal hiring processes (as opposed to promotion or appointment) should be limited, as if a search is to be conducted, permitting outside applicants does not add to the requirements.

- DSU Administration should ensure that search committees or hiring committees are appointed for the hiring of administrators, rather than limiting the review of applications and hiring decision to a single administrator. This is particularly true where a single administrator would be supervising the position and conducting the hiring process, which opens the door to allegations of favoritism and bias, which would be difficult to defend against without a committee.

Dean position hired November 2020

One Eide Bailly hotline report and several direct reports made numerous allegations regarding improper hiring processes related to filling an open Dean position in November 2020. These allegations included that:

1. The search committee did not follow prescribed procedures, such as failing to designate or interview finalists.
2. Ranking sheets were falsified, or committee members were persuaded to change their rankings to agree with the majority opinion.
3. Applicants considered for the position, potentially including the eventual hire, did not meet the minimum qualifications.
4. Search committee members were biased for and against applicants due to non-academic and personal factors including an applicant's past disagreement with administration actions and decisions.

The search for an open Dean position was announced October 27, 2020. It was noted that the position would be filled internally and that application materials would be accepted until November 3, 2020, with a start date of January 1, 2021. The minimum qualifications were a terminal degree, five years of higher education teaching experience, prior supervisory experience of faculty and/or staff in higher education and demonstrated superior communication skills. Preferred qualifications included tenure and experience as Department Chair or other leadership experience within the College. Four applicants were screened and determined to have met the required qualifications. These four were brought forward to be ranked by the search committee.

The search committee members ranked the applicants, and a meeting was convened to consider the results. The recommendation to hire Applicant H came directly from that meeting; there were no interviews. Per N.D.C.C. 44-04-18.27, since there were three or more applicants who met minimum qualifications, three or more applicants were required to be designated finalists for further consideration before issuing an offer of employment. No finalists were designated.

Reports also alleged that ranking sheets were changed, revised, or falsified to favor the recommended Applicant. Search committee Member I confirmed that the original ranking sheets at the beginning of the meeting were revised by the end of the meeting to show consensus and no longer reflected the original scoring by the members. Committee Member J stated that the search

committee was not really a search committee, but more of a “review team,” and since the previous Dean search (see August 2020 above) did not include interviews, it would be inconsistent if they interviewed for the position when it was reopened. In response to questions from the Office, Committee Member K provided decision factors not included in the position opportunity or ranking sheets (including references to prior experience and interactions between applicants and DSU administration) to explain how the decision was made without interviewing.

The ranking sheets included the four minimum qualifications and preferred qualifications listed above. The job posting indicated that the third requirement was prior **supervisory experience** of faculty and/or staff in higher education, and that was reflected on the ranking sheets. However, the scores provided on the ranking sheets by Committee Member J and Committee Member K cannot be squared with the written requirement. Instead, the recommendation for hire and all related communication only referred to “potential for leadership” and “leadership” in other areas. These two concepts are not equivalent. If the desire was for applicants to show “potential leadership” and “leadership” in other areas, the job posting should have been revised to reflect the true qualifications for the position.

Allegations of bias or favoritism of committee members toward and against applicants could not be reliably investigated, as are other intent-based allegations. However, one Committee Member told the Office that it felt like the decision had been made prior to the meeting to evaluate the ranking sheets filled out by the search committee. The inconsistencies pointed out above do not assist in dispelling concerns regarding bias or favoritism.

Recommendations:

- DSU should follow a standard hiring process that includes finalists being selected for interviews after completing ranking sheets. DSU should defer to HR best practices, which include interviews when there are multiple qualified applicants ranked by the search committee.
- Though it is allowable for an employee who has been through a competitive search at the institution to be internally promoted by appointment, after announcing a formal position opportunity and application process, the full search and hiring process should be completed. Generally, competitive internal hiring processes (as opposed to promotion or appointment) should be limited, as if a search is to be conducted, permitting outside applicants does not add to the requirements.
- Once applications have been submitted, DSU should be careful not to change the advertised qualifications for any reason without re-posting the job position, as changes to the qualifications may encourage additional qualified applicants to apply.
- Because there were three or more qualified applicants, making an offer of employment without designating finalists violates N.D.C.C. 44-04-18.27.

Conclusion

The search and hiring process at DSU is clearly set out in the hiring checklist and instructions provided by the Director of Human Resources in each of these examples, yet in none of these situations were these instructions followed. Deviating from this process can make the institution

vulnerable to reviews, appeals and legal action. The errors and inconsistencies identified above could have been avoided or mitigated by involving the Director of Human Resources at each step, following their instructions and relying on their recommendations. Instead, the records reviewed by the office indicated that the Director of Human Resources was either not consulted at all, consulted too late in the process to address shortcomings, or the Director's recommendations were ignored. Similar issues were present in other hiring processes which were not the subject of reports to the Office. Additional training and certification are available if DSU Administration seeks to further enhance the Director of Human Resources' credentials. Additionally, resources such as HR professionals at other NDUS institutions and assigned legal counsel should be consulted and relied on for complex issues.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.

A handwritten signature in blue ink that reads "Karol K. Riedman". The signature is written in a cursive style.

Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

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Summary Investigative Report Improper Demotion/ PIP/Separation April 25, 2022

Sources of Complaint	Direct Complaints
Date(s) of Complaint	3/12/2021, 7/9/2021
Allegation	Unsupported Demotion and Inappropriate PIP
Institution	Dickinson State University
Policy referenced/related	SBHE Policy 306.1 Compliance Charter SBHE Policy 308.1 Officer and Employee Code of Conduct SBHE HR Policy 25 Job Discipline/Dismissal
Conclusion	Investigation results support the allegation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received an anonymous direct report through the ndus.edu compliance website alleging that an employee (“Employee A”) was terminated from employment due to his involvement in a prior procurement that was found to have multiple irregularities and violations of process. A second direct report alleged that the employee was unjustly blamed for the irregularities and was subsequently demoted. The report further alleged that three months later, Employee A was further demoted, took a substantial reduction in salary without just cause, and placed on a performance improvement plan that violated HR Policy 25, which led to his resignation.

Policy References

SBHE Policy 306.1(4) provides, in part:

The Office shall be afforded unrestricted access to any and all NDUS and its institutions’ records, physical properties, and personnel pertinent to carrying out any engagement, subject to the requirements of state and federal privacy laws such as FERPA and HIPAA. All NDUS employees shall assist the Office in fulfilling its roles and responsibilities by complying with the Office’s reasonable requests.

SBHE Policy 308.1(13) provides, in part:

All officers and employees shall cooperate in investigations of alleged violations.

SBHE HR Policy 25 states (in relevant part):

1. A regular staff employee may be dismissed from employment, suspended without pay, or changed to a lower pay rate for just cause. Just cause includes conduct related to the employee's job duties, job performance, job abandonment, or working relationships which is detrimental to the discipline or efficiency of the institution or office in which the employee is or was engaged.

2. The employing department or office shall notify the employee and the appropriate campus official of the proposed action in writing. The written notice must include:

a. a statement that the supervision intends to dismiss, suspend, or demote the employee;

b. a statement identifying any policies violated by the employee;

c. a statement of the specific charges against the employee; citing the employee's behavior, dates and/or occurrences, witnesses, and other evidence against the employee;

d. notice that the employee may provide the supervisor with evidence, explanation, or other information in writing which contradicts the allegations and evidence; and

e. notice of the employee's status until the final decision is made (i.e. whether the employee is to continue working or be placed on leave of absence with pay).

3. A regular staff employee who is being suspended without pay, dismissed, or changed to lower pay rate for disciplinary reasons shall be entitled to a pre-action review. This review may be limited to the written record including the employee's written response to the allegations, or at the option of the institution or office, may be conducted in person. The pre-action review shall be held no sooner than three working days from the time notice was provided to the employee.

Investigation and Findings

The following recitation of findings is based on the Office's review of documentary evidence and interviews regarding the reports referenced above. This report is not intended to address the merits of the decisions in question; instead, the investigation and report are intended to examine the process used and determine whether applicable policies and procedures were followed.

Employee A was a 16-year employee of DSU and the Director of the TREC office, which supported distance learning and instructional design, reporting to the VPAA's office. Their performance reviews were extremely positive; the Office's review did not reveal any areas where Employee A was rated as "does not meet expectations" or a similar rating for at least the past five performance evaluations. In or around December 2020, DSU's administration reorganized

the institution's information technology resources, resulting in the TREC office moving under Supervisor B, the institution's CIO, who reported to the VPFA. As a result, Employee A's job title changed from Director of TREC to "Distance Learning Specialist." However, Employee A continued to supervise two employees within the former TREC team, and their salary remained the same (\$69,800).

Three months later, on March 1, 2021, Employee A was called into Supervisor B's office for a meeting, at which Employee A was presented with a document titled "Notice of job responsibility and subsequent pay rate change and performance issues" (the "Notice"). Attached to the document was a revised job description with the same title, "Distance Learning Specialist." The primary change in the job description was the removal of supervisory duties, though there were also some reductions in other task areas. The Notice stated that these changes would result in the reduction of Employee A's salary. The notice indicates that Employee A would be entitled to appeal the reduction.

Notably, a few days earlier, the Director of Human Resources had been asked to look into the salary rate for a "Course Designer" position, and recommended a range of \$50,000-\$64,000, depending on experience. Both prior and subsequent emails in the same chain made clear that this request was for Employee A's position. Despite this range, the Notice set Employee A's new salary at \$40,000 per year, a 42% reduction, which resulted in Employee A being paid less than one of the employees they had supervised until the March 1, 2021 meeting and only marginally more than the other, despite having more experience and a Master's Degree.

The Notice also included a number of critiques of Employee A's job performance and placed him on a Performance Improvement Plan ("PIP"). Two of the specific concerns raised in that letter were that Employee A had been late to a Dual Mission meeting on February 14, 2021 and that prompt responses were not received to an instant message and two emails over the prior three months. Records provided to the Office indicated that Employee A signed into the 1:00 pm meeting at 12:57 pm, but it was not possible to determine exactly which instant message and emails were referred to in the letter. The Notice also stated that Supervisor B had received "passing" complaints regarding Employee A "remaining in meetings as an observer" and not showing up, or showing up late, to IVN classes. No examples were provided of the latter two issues. The Notice also included a few other "general observations," including that "[a]rrival to work is after 7:45 am," "Progress is not being made or reported on Remote Course Delivery or Microsoft Teams," "Ability to multitask is a skill that needs significant improvement," and "[a]n inability to leave personal emotions or beliefs out of situations. No concrete examples were provided of these "general observations."

The Notice concluded: "If you are unable to fill this position, then I will need to search to fill it as it is a crucial position for our unit. Because time is of the essence, if I do not see rapid improvement in the next couple of weeks, this position will end on 3/12/2021. If progress is being made, then it may continue longer."

The attached PIP stated, as the sole criteria for improvement, that Employee A "must exhibit initiative, drive, motivation, and feeling that you want this position. Requesting assistance and resources to help you perform the duties required of this position when necessary." The PIP

further indicated that Employee A would meet with either Supervisor B or another employee every other weekday at 7:45 am. However, these meetings were never scheduled or conducted, though the record is unclear as to whether it was Employee A or Supervisor B's responsibility.

Prior to the imposition of this PIP, Employee A had never received a written warning, or been made aware of the performance issues set out in the PIP. On March 8, 2021, Employee A appealed the reduction in salary pursuant to SBHE HR Policy. In their appeal, they noted that the new salary level would be far less than those performing similar roles with similar education or experience. Employee A also responded to the specific job performance allegations in the Notice.

The DSU president responded to the appeal after close of business on March 10, 2021, stating that due to other obligations, he would not be able to appoint a Staff Personnel Board to hear the appeal until the week of March 15, 2021.

Similarly, on March 10, 2021, Employee A asked Supervisor B if there was even any point in trying to meet the requirements of the PIP, or if the decision had already been made to terminate his employment. Supervisor B indicated that the decision had been made. The next day at 12:36 p.m., Employee A sent a farewell email to DSU employees, stating that DSU had made the decision to terminate his employment, and letting them know how to contact him if they wanted to stay in touch.²

Approximately an hour later, Supervisor B determined to move forward with the termination of Employee A; according to some accounts, the decision was made due to the farewell email, and/or at the direction of DSU Administration. At the request of DSU Administration, Supervisor B terminated access to Employee A's DSU accounts at approximately 1:45 pm, to become effective at 3:30 p.m.; and the notice of intent to terminate was provided to Employee A at his home at 4:32 pm. The Notice of Intent to Terminate indicated that DSU "ha[d] made the decision to either accept your resignation or terminate your employment with Dickinson State University." The Notice of Intent indicated that if Employee A resigned he would receive retirement benefits, while if Employee A was terminated he would receive payment for two weeks. The Notice of Intent included notice of Employee A's right to a pre-action review.

In light of the Notice of Intent, the appointment of a Staff Personnel Board to hear Employee A's appeal was suspended.

Over the next two weeks, Employee A and DSU Administration negotiated a separation agreement, by which Employee A's children would be permitted to receive tuition waivers as severance, in exchange for a resignation, waiver of rights, and non-disparagement provision. The

² The accounts vary on this point. DSU administration officials asserted that the email was sent to a broad listserv, possibly all employees. Employee A stated, when asked, that he had only sent it to certain DSU employees who he had worked with over his career at DSU. The Office was able to confirm that three "farewell" emails were sent by Employee A, each to specific individual recipients. The emails were not sent to a listserv or an "All Employee" group email.

agreement was reached on March 25, 2021, and Employee A's resignation letter was dated the same day.

The Office of Compliance and Ethics received two reports regarding this series of events: one on March 12, 2021, and a second complaint on July 9, 2021. Neither of these reports were made by Employee A.

1. One of the reports asserted that the reduction in pay, removal of duties, and constructive termination was the result of (or retaliation for) Employee A's involvement in a prior DSU procurement violation. The Office's investigation did not obtain any documents or other evidence to substantiate this allegation as a part of this investigation, though it appears that this opinion may continue to be held within the DSU administration.
2. When DSU presented Employee A with the Notice on March 1, 2021, the notice included a revised job description, a 42% reduction in pay, and a Performance Improvement Plan. As a result, it is unclear from the record to what extent the revised job description and the pay reduction are tied to the Performance Improvement Plan, and there is no explanation for the inclusion of all three items in the same document. Similarly, the documents received by the Office indicate that the reason for the revised position description may have had elements of both job performance and the continuing reorganization.

Pay reductions due to changes in job description are appealable pursuant to SBHE HR Policy 5 and 27. However, if a pay reduction is imposed as a disciplinary measure based on poor job performance or discipline, the employee is entitled to not only an appeal, but also a pre-action review. *See* SBHE HR Policy 25(1). Due to the lack of clarity around the specific reasons for the change (as relevant decisionmakers either refused to discuss this situation with the Office or were reluctant to provide details), the Office was unable to substantiate whether the reduction in pay was due solely to reorganization or was at least partially the result of disciplinary action or poor performance, which would have entitled Employee A to a pre-action review.

Recommendation: DSU should separate personnel actions based on performance issues and disciplinary action from those related to reorganization or changes in job title or duties to make clear what rights the employee has related to each personnel action.

3. One of the reports submitted to the Office implied that the reduction in pay was intended to force Employee A to resign, rather than taking the revised position. This allegation is plausible but could not be wholly substantiated due to the relevant decisionmaker(s) refusing to discuss this matter with the Office.

Employee A was provided with a 42% pay cut from his prior pay rate as the result of a changed position description. This would have reduced his pay below that of one of his supervisees and others in the institution with similar experience and education.

Recommendation: When an employee's job description and responsibilities change, resulting in a pay reduction, DSU should ensure that the new pay rate is reasonable and

commensurate with the position, the employee's experience and education, and similar employee pay in the department or at the institution.

4. The second report to the Office effectively asserted that Employee A was constructively terminated due to two position changes, a substantial pay cut, and the threat that Employee A would lose their retirement benefits if they did not resign. In North Dakota, a constructive discharge occurs when "an employer deliberately makes or allows an employee's working conditions to become so intolerable that the employee has no other choice but to quit." *Hummel v. Mid Dakota Clinic, P.C.*, 526 N.W.2d 704, 710 (N.D. 1995). A party asserting constructive discharge "must show that a reasonable person in that party's position would not have returned to work."

As a result of the pay cut, the PIP, and the Notice of Intent, it is plausible that Employee A was constructively discharged by DSU, even though he signed a letter of resignation and separation agreement. However, as Employee A agreed to waive any rights related to his separation from DSU, any question regarding this issue is moot at this time.

Recommendation: NDUS entities should be careful to follow applicable procedures related to termination and pay reductions to ensure that the proper procedures are followed for each type of personnel action.

5. The March 2021 Notice listed several alleged specific performance deficiencies as a basis for imposing the PIP. However, other examples given to support the PIP were complaints made "in passing" or "general observations." When Employee A asked the source of the complaints and observations, Supervisor B would rather not say. When Employee A asked the Director of Human Resources, who was present at the meeting, whether they were entitled to ask, the response was in the affirmative. However, when asked a second time, Employee A's supervisor again repeated that they would "rather not say" and was "not comfortable sharing that information."

The refusal to reveal the basis of the PIP constitutes a potential violation of SBHE HR Policy 27(4)(h) and constitutional and statutory due process requirements. State employees are entitled to due process in discipline, and state entities should not base employee disciplinary action on anonymous complaints unless those complaints have been corroborated by available witnesses or documentary or other evidence which may be made available to the employee. Had Employee A appealed or grieved the imposition of the PIP, he would not have known what documents to request or what witnesses to seek to interview, depriving him of his rights under HR Policy 27(4)(h).

Recommendation: DSU should avoid basing disciplinary action on anonymous complaints or concerns absent documentary evidence or other witnesses who are not anonymous.

6. The Notice listed various concerns and new expectations for Employee A's position and stated that if rapid improvement was not seen "in the next couple of weeks" the position would end on March 12, 2021. This deadline was ten working days from the date of the

notice. However, the written Performance Improvement Plan required only that “[y]ou must exhibit initiative, drive, motivation and feeling that you want this position. Requesting assistance and resources to help you perform the duties required of the position when necessary,” as well as requiring a meeting every other weekday. The requirements of the PIP are entirely subjective, rather than concrete, achievable, and measurable, and a 10-day window of time is unreasonably short to demonstrate “rapid improvement” in such general areas without an objective basis for measurement.

Recommendation: DSU should ensure that PIPs are based on “SMART” goals: **S**pecific and **M**easurable objectives that are **A**chievable, **R**elevant, and **T**ime-bound. SMART goals, as identified by SHRM, help to ensure that PIPs are used only when there is a commitment to help an employee improve, to give the employee fair notice of what improvements are required, and to provide sufficient time for the employee to bring their conduct and/or performance into alignment with institutional expectations. NDUS institutions should not utilize PIPs solely to establish a document trail that can later be used to justify a personnel action.

DSU should not issue PIPs except in a genuine attempt to assist an employee to bring their conduct or behavior into alignment with SBHE or DSU policies or procedures and workplace expectations.

7. Despite the Notice indicating that Employee A would have until March 12, 2021 to complete his PIP, Employee A was hand delivered the Notice of Intent to Terminate on March 11, 2021. While there is little specific documentary evidence on this point, it appears that the decision to terminate early (and to terminate Employee A’s access to his DSU accounts) was catalyzed by the farewell email sent by Employee A, as several witnesses told the Office that the DSU administration was upset or angered by the farewell email.

However, the Notice of Intent to Terminate did not identify the farewell email as the basis for termination prior to the deadline set forth in the Notice. In fact, the Notice of Intent to Terminate does not identify *any* actions taken (or not taken) by Employee A after the Notice to support the determination to issue the Notice of Intent to Terminate: it does not state that Employee A did not meet the requirements of the PIP or violated any other DSU or SBHE Policy and does not identify the witnesses or evidence against Employee A, among other missing information.

This violates SBHE Policy 25(2)(b)-(c), which provide that the written notice must include “a statement identifying any policies violated by the employee” and “a statement of the specific charges against the employee, citing the employee’s behavior, dates and/or occurrences, witnesses, and other evidence against the employee[.]” Instead, the Notice of Intent to Terminate only repeats the contents of the PIP, without giving the required information regarding the events in question.

Recommendation: Notices of Intent to Terminate should clearly set forth all elements of SBHE HR Policy 25(2).

8. After Employee A indicated that they would resign rather than face termination, Employee A and the President of DSU negotiated a separation agreement. The separation agreement includes the following provision:

Employee agrees [they] will not act in any manner that might damage Dickinson State University, the State, or the North Dakota University System. Employee agrees that [they] will not counsel or assist any attorneys or their clients in the presentation or prosecution of any disputes, differences, grievances, claims, charges, or complaints by any third party against Dickinson State University, the State, the North Dakota University System, or any other released person or entity, unless under a subpoena or other court order to do so. Employee agrees to refrain from any defamation, libel, or slander of Dickinson State University, the State, or the North Dakota University System or any other released person or entity or their respective officers, directors, employees, investors, shareholders, administrators, administrators, affiliates, divisions, subsidiaries, predecessor and successor entities and assigns.

This provision of the separation agreement likely violates the First Amendment to the United States Constitution, as incorporated against the states by the Fourteenth Amendment, Article I, Section 4 of the North Dakota Constitution, and SBHE Policies 306.1(4) and 308.1(13).

This clause constitutes the sort of “government-defined and government-enforced restriction on government-critical speech”³ which are generally prohibited by the First Amendment as against the public’s well-established First Amendment interest in “uninhibited, robust, and wide-open debate on public issues.”⁴ As a Federal Appeals Court recently noted, “[i]t is well-established that ‘vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials’ can play a valuable role in civic life, and thereby enjoy the protections of the First Amendment.” *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 226 (4th Cir 2019) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). As in *Overbey*, the non-disparagement clause here is likely “contrary to the citizenry’s First Amendment interest in limiting the government’s ability to target and remove speech critical of the government from the public discourse.” *Id.*, at 224-225.

Additionally, the Supreme Court has repeatedly held that it is not possible to commit defamation, libel, or slander against a government entity or a government official by

³ *E.g. Overbey v. Mayor of Baltimore*, 930 F.3d 215, 224 (4th Cir. 2019) (determining that the city’s interests in enforcing a waiver of First Amendment rights in a settlement agreement are outweighed by strong policy interests rooted in the First Amendment).

⁴ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *See also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010) (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. [. . .] Premised on mistrust of government power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”)

criticizing their official acts. *See, e.g., Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (“The Constitution does not tolerate in any form . . . prosecutions for libel on government.”) “[S]uch a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations.” *Id.* (quoting *N.Y. Times Co.*, 376 U.S. at 292) (cleaned up). As such, it is difficult to see this clause as anything other than an impermissible attempt to limit criticism of DSU—a government entity.

Moreover, as written, this clause would even prohibit Employee A from participating in this Office’s investigation into complaints regarding Employee A’s separation or from providing information to the Office related to this investigation. This is contrary to the language and intent of Policy 306.1(4) – particularly where, as here, Employee A was hired by another NDUS entity shortly after their resignation from DSU. This contractual restriction would force Employee A to make the Hobson’s choice between violating the settlement agreement or violating Policy 308.1(13) (“[a]ll officers and employees shall cooperate in investigations of alleged violations”) and Policy 306.1 (“[a]ll NDUS employees shall assist the Office in fulfilling its roles and responsibilities by complying with the Office’s reasonable requests”). DSU lacks the authority to so constrain this Office.

Notwithstanding, it is important to note that Employee A did not file a hotline or direct complaint resulting in this investigation. In fact, the Office would be remiss not to note that, when contacted as part of this investigation, Employee A was reluctant to provide information or respond to requests, stating that they were happy with their current position and didn’t want to revisit the past.

Recommendation: NDUS entities should not include non-disparagement clauses in separation agreements which function as a prior restraint under the First Amendment or which would impair the ability of the Office to conduct investigations within the scope of its authority. DSU should release Employee A from this portion of the separation agreement.

9. During the investigation, the Office made or sent requests for information or records to DSU employees and officers that were necessary for the investigation. However, one key individual, Employee A’s supervisor at the time of the separation, refused to meet with or provide information to the Office and other members of DSU’s administration provided minimal, vague, or unhelpful responses. The Office also experienced reluctance or refusal to provide information without an attorney present related to this and other investigations. The purpose of the Office’s investigations is not disciplinary, it is to determine the facts surrounding the allegations in a report, and determine whether the actions in question were in compliance with law, regulation, and policy. The refusal of DSU’s officials to provide their view of these facts means that the investigation not only took substantially longer, but that this report may be missing the point of view of DSU’s administration. Finally, this refusal to participate violates both SBHE Policy 306.1(4) and SBHE Policy 308.1(13).

Recommendation: DSU should provide its administration and employees with additional training or information regarding their obligation to participate in the Office's investigations as reasonably requested and to provide requested information to the Office. Further, DSU should enforce SBHE Policy 306.1(4) and 308.1(13) and ensure that its employees comply at all times with requests for information and assistance from the Office.

Conclusion

This investigation revealed numerous potentially significant violations in the process by which DSU managed Employee A's demotion, change in responsibilities, reduction in salary, PIP, and separation. These violations could have exposed DSU, the NDUS, and the SBHE to legal or reputational risk had the employee sought legal recourse. I suggest that DSU evaluate its disciplinary process to ensure that employees receive the due process to which they are entitled to under applicable SBHE policy, DSU policy, and applicable constitutional and statutory requirements.

The DSU Director of Human Resources is the authority and resource for the process involved in all employee actions, including demotions and salary reductions. The Director should receive advanced education, training or certifications, if needed, to become highly knowledgeable on these topics and processes. DSU supervisors should consult the Director and follow any applicable instructions before taking any such HR actions. Additional HR resources are available at the other NDUS institutions and/or the NDUS System Office.

Additionally, this matter is one of several examples where the DSU administration officials contacted during the course of an investigation were unwilling or reluctant to cooperate with the investigation by either refusing to provide information or providing minimal, vague, or unhelpful responses.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

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Summary Investigative Report Improper Separation Process April 25, 2022

Sources of Complaint	Direct Reports Eide Bailly Fraud Hotline
Date(s) of Complaint	Direct - 5/4/2021, 5/5/2021, others EBFH - 6/7/2021
Allegation	Improper termination, administrative leave, separation
Institution	Dickinson State University
Policy referenced	SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty
Conclusion	Results of investigation support the allegation.
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics (“Office”) received multiple reports of an alleged improper process of non-renewal or termination of a faculty member, referred to in this report as Faculty Member A. These reports were received from anonymous sources, or the person reporting the concern requested anonymity. The reports asserted that the DSU administration had forced Faculty Member A to resign, reduced their duties and placed them in a terminal contract contrary to policy, inappropriately terminated Faculty Member A’s contract and employment without complying with SBHE Policy, and ultimately placed Faculty Member A on administrative leave through the end of the terminal contract.

Policies Referenced:

SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty (relevant excerpts):

1. A probationary appointment may be terminated, without cause, with notice to the faculty member that the appointment will not be renewed.

(a) Notice shall be given:

i. at least 90 days prior to termination during the first year of probationary employment at the institution.

8. A faculty member may be dismissed at any time for adequate cause. Adequate cause means: (a) demonstrated incompetence or dishonesty in teaching, research, or other professional activity related to institutional responsibilities, (b) continued or repeated unsatisfactory performance evaluations and failure to respond in a satisfactory manner to a recommended plan for improvement; (c) substantial and manifest neglect of duty, (d) conduct which substantially impairs the individual's fulfillment of his or her institutional responsibilities or the institutional responsibilities of others, (e) a physical or mental inability to perform assigned duties, provided that such action is consistent with laws prohibiting discrimination based upon disability, or (f) significant or continued violations of Board policy or institutional policy, provided that for violations of institutional policy the institution must notify the faculty member in advance in writing that violation would constitute grounds for dismissal, or the institutional policy must provide specifically for dismissal as a sanction.

a. An authorized institution officer shall give written notice of intent to dismiss and specify the reasons for the action. The notice shall state that the officer will forward to the institution president a recommendation to dismiss **unless the faculty member, within twenty calendar days of receipt of the notice, requests a hearing before the Standing Committee on Faculty Rights.** If the faculty member does not make a timely request for a hearing, the president, upon receipt of a recommendation to dismiss, shall make a decision and provide written notice and reasons for the action to the faculty member within ten business days of receipt of the recommendation.

Investigation and Findings

The following statement of facts is based on the Office's review of documentary evidence and interviews regarding the foregoing reports. This report is not intended to address the underlying merits of the personnel actions in question; instead, the investigation and report are intended to examine the process used and determine whether applicable policies and procedures were followed.

Faculty Member A was a first-year tenure track nursing faculty member at DSU, teaching junior-level nursing students in classroom and clinical courses relating to critical care. Faculty Member A did not have a history of poor performance evaluations, did not have any formal complaints filed against them, and had never been subject to prior disciplinary action. Interviews with Faculty Member A's team teacher (Faculty Member B) and the Nursing Department Chair (Chair D) revealed that Faculty Member A had similar weaknesses to other first-year professors (i.e. difficulty with the didactic (classroom teaching) aspects of the position), but had strong performance in the clinical portion of instruction.

However, on March 5, 2021, Faculty Member A was called into a meeting with Chair D and the Dean of the College of Education, Business, and Applied Sciences (Dean C). At that meeting, Faculty Member A was told that a number of her students (as many as 10 out of 14) had come to Dean C and reported that they were going to transfer out of the department because of Faculty Member A's teaching. Faculty Member A was informed that they would not be permitted to continue teaching the didactic portion of her courses. Faculty Member A commented that they would resign effective immediately. However, the meeting continued, and Faculty Member A asked for information about which students had complained. Dean C refused to share that

information. After further discussion, Faculty Member A agreed to continue teaching the clinical portion of the course.

Notes obtained from Chair D indicated that Chair D and Dean C had agreed prior to the meeting that Faculty Member A would not be permitted to continue teaching the didactic portion of the course regardless of the outcome of the meeting. Despite this, Faculty Member A was not informed in writing of their rights to appeal the changes to their role during or after the meeting, as required by SBHE Policy 605.3(9).

After the meeting, Chair D contacted Faculty Member A to request their resignation in writing. During their interview with the Office, Faculty Member A reported that they felt they had no choice but to resign or they would be terminated, based on the tenor of the meeting on March 5 and the follow-up email from Chair D. Subsequently, a terminal contract was prepared and executed limiting Faculty Member A's teaching assignment to the clinical portion of the courses.

On April 15, 2021, Dean C sent Faculty Member A Notice of Intent to Terminate by email indicating that DSU intended to terminate Faculty member A's employment for cause, effective immediately. Faculty Member A's access to Campus Connection, Blackboard LMS, DSU buildings, office space, and email were discontinued at that time. The Notice of Intent to Terminate listed the "adequate cause" for the termination as "a persistent behavior of job abandonment by consistently ignoring the prompts to complete [their] accreditation reporting requirements. Additionally, actions within [their] clinical rotations have resulted in extreme dissatisfaction of the students [they have] served." The letter did not advise Faculty Member A of their right to appeal within twenty days of the receipt of the letter.

Faculty Member A responded to the letter by disputing and requesting clarification of the reasons for termination. The DSU Administration did not respond to Faculty Member A's dispute in any way; Dean C stated in an email that "I am not responding to [their] list of inaccuracies. I believe we can leave it alone unless I am prompted otherwise by [Provost] or [President]." Subsequently, when DSU's Director of Human Resources became aware of the letter, she informed DSU's administration that they could not sustain the Notice of Intent to Terminate, as it lacked the required notice of appeal rights, based on legal review.

On April 21, 2021, DSU's President sent a Notice of Administrative Leave to Faculty Member A advising them that they would be placed on administrative leave with pay and benefits until May 15, 2021, at which time their previous resignation would take effect. This notice included Faculty Member A's right to appeal within twenty days of receipt of the notice. Faculty Member A appealed by requesting a hearing by the Standing Committee on Faculty Rights (SCoFR).

Subsequently, the SCoFR determined that Faculty Member A's resignation letter, the fact that Faculty Member A did not appeal the terminal contract, and that Faculty Member A's appeal of administration leave was ineffective (as their contract had since concluded), deprived the SCoFR of jurisdiction.

The purpose of this investigation and report is to evaluate the process that resulted in the separation of Faculty Member A from their employment at DSU. The investigation revealed the

following areas of potential risk and improvement. As Faculty Member A is no longer employed by DSU and this office has no authority to recommend reinstating an employee, the following recommendations should be viewed as forward-looking, rather than as recommending changes to the process involving Faculty Member A.

6. Pursuant to SBHE Policy 605.3(a), a probationary (i.e. non-tenured) appointment may be terminated, without cause, with notice to the faculty member that the appointment will not be renewed. Based on the reasons set forth in the documents reviewed by the Office, the most appropriate method of separating Faculty Member A from their employment would have been through a termination without cause. However, to impose a termination without cause, DSU would have been required to provide notice at least 90 days prior to the termination date. As Faculty Member A's original appointment went through May 15, 2021, the last date to provide notice of termination or non-renewal without cause was February 15, 2021 during the first term – and the notice period would have extended to 180 days the following year.

Recommendation: DSU's administration should ensure that decisions to terminate or non-renew probationary faculty members are taken under the correct section of the applicable SBHE Policy, and that all applicable processes and procedures are completed within the timetable set by the Policy.

7. As Chair D and Dean C had determined to remove Faculty Member A's didactic teaching responsibilities prior to the March 5, 2021 meeting, they should have provided Faculty Member A with written notice of intent pursuant to SBHE Policy 605.3(9), including notice of appeal rights. While Faculty Member A tendered their resignation after the meeting, resolving some issues related to the required notices, following applicable policies and procedures would have provided a clearer process and procedure to the events that would follow.

Recommendation: Where an NDUS institution determines that the conduct of a faculty member provides reasonable cause for imposition of a sanction, such as the removal of certain obligations or privileges, the NDUS institution should follow applicable policies and procedures regardless of the reaction of the faculty member.

8. On April 15, 2021, the DSU Administration served Notice of Intent to Dismiss Faculty Member A for adequate cause. Pursuant to SBHE Policy 605.3(8), a faculty member may be dismissed at any time for adequate cause as set forth in the policy. An authorized institution officer shall give written notice of intent to dismiss and specify the reasons for the action.

Dean C's April 15, 2021 letter informing Faculty Member A of her intent to recommend dismissal for adequate cause gave the following cognizable reasons for dismissal:

- a. You have displayed a persistent behavior of job abandonment by consistently ignoring the prompts to complete your accreditation reporting requirements; and
- b. Your actions within your clinical rotations have resulted in extreme dissatisfaction of the students you have served.

The term “job abandonment” is not defined in SBHE Policy 603. While it does not apply to non-broadbanded positions per Policy 607.0, SBHE HR Policy 25(1)(a) defines “job abandonment” as “when an employee has not reported to their scheduled work shift for three consecutive working days without approval or contacting the employer.” This definition, while not binding, is persuasive here, and it is impossible to conclude from the record that Faculty Member A committed “job abandonment.” Failure to complete reporting requirements, while potentially a disciplinary issue, is not job abandonment. While failure to complete reporting requirements may fall under another of the elements of SBHE Policy 605.3(8), the Notice of Intent to Dismiss needs to make clear which option the DSU Administration seeks to exercise.

Similarly, actionable student dissatisfaction is typically communicated via course evaluations or through formal complaints. DSU was unable to provide any formal student complaints, nor any formal steps taken to respond to informal student complaints or to bring issues to the attention of Faculty Member A prior to the issuance of the Notice of Intent to Terminate. Relying on this basis would typically implicate SBHE Policy 605.3(8)(a) or (b): “(a) demonstrated incompetence . . . in teaching, research, or other professional activity related to institutional responsibilities, [or] (b) continued or repeated unsatisfactory performance evaluations and failure to respond in a satisfactory manner to a recommended plan for improvement.” However, neither were named in the Notice of Intent to Terminate.

Recommendation: To the extent that the DSU seeks to dismiss a faculty member for adequate cause, it should be clear that the adequacy of the stated cause meets one or more of the requirements of SBHE Policy 605.3(8), and that the requirement is stated in the Notice of Intent to Dismiss.

9. When the DSU Administration provided the Notice of Intent to Dismiss to Faculty Member A, it stated that student dissatisfaction or complaints were one of the bases for the termination. A similar reason was given for removing Faculty Member A’s responsibilities for the didactic portion of her course. However, both in the March 5, 2021 meeting and under query from this office, neither Dean C nor any other member of the DSU administration could provide specific, non-anonymous examples of student complaints to support the actions against Faculty Member A. SBHE Policy 605.4(10) provides that the “faculty member shall be afforded an opportunity to obtain necessary witnesses and documentary or other evidence. [. . .] The faculty member and the institution shall have the right to confront and cross-examine all witnesses.” As a result, DSU may not rely on anonymous witnesses or reports to support disciplinary action against a faculty member.

Recommendation: DSU should not base disciplinary action on anonymous complaints or concerns absent documentary evidence or other non-anonymous witnesses in order to avoid violating SBHE Policy or due process requirements.

10. When giving written notice of intent to dismiss pursuant to SBHE Policy 605.3(8), the notice “shall state that the officer will forward to the institution president a recommendation to dismiss unless the faculty member, within twenty calendar days of receipt of the notice, requests a hearing before the Standing Committee on Faculty Rights.” Without this notice of

appeal rights, a notice of intent to dismiss is not effective, even if all other required elements of such a notice are present. This notice of appeal rights was absent in Dean C's April 15, 2021 letter to Faculty Member A.

Recommendation: DSU should ensure that all notices of intent to dismiss or terminate include required notices of appeal rights. In order to assist with the process and to avoid, DSU should require such notices be prepared on standard forms prepared by Human Resources which include all required appeals language.

11. On April 21, 2021, after DSU's Director of Human Resources raised concerns about the absence of the notice of appeal rights in the Notice of Intent to Dismiss, DSU's President issued the Notice of Administrative Leave, relieving Faculty Member A of their duties through the end of their terminal contract. While Administrative Leave is authorized by SBHE HR Policy 20(8), it should be sparingly used, as administrative leave is not authorized by North Dakota Century Code except pending the resolution of the investigation of a disciplinary action, complaint, or allegation. Using administrative leave more broadly creates potential conflicts with the North Dakota Constitution's anti-gifting clause (Article 10, Section 18), as it functionally results in the paying of an employee or faculty member while the employee or faculty member is not performing their job duties.

Recommendation: Removal of job duties of a faculty member during the term of their contract should either be taken under SBHE Policy 605.3(9) or through the suspension/reassignment provisions of SBHE Policy 605.3(8)(c) while an appeal of dismissal for adequate cause is pending. Here, rather than placing Faculty Member A on administrative leave, DSU Administration could have re-issued the Notice of Intent to Dismiss for adequate cause, then suspended Faculty Member A pursuant to Policy 605.3(8)(c).

Conclusion

The purpose of this investigation and report was to evaluate the process that resulted in the separation of Faculty Member A from her employment at DSU. This investigation did not consider the validity or necessity for the separation.

The allegations of an improper process of non-renewal or termination of Faculty Member A's employment were substantiated by the investigation. DSU administrators should be aware of separation requirements under SBHE and institution policies and should consult the Director of Human Resources before taking termination actions to ensure all policies are followed. Legal counsel may also be consulted in these instances.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

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Summary Investigative Report Inappropriate Performance Improvement Plan April 25, 2022

Source of Complaint	Direct Report
Date of Complaint	02/07/2022
Topic of Allegation	Inappropriate Performance Improvement Plan (Report Withdrawn)
Institution	Dickinson State University
Policy referenced/related	SBHE Policy 605.4(10)
Conclusion	Potential violations found.
Investigator	Karol Riedman

Background Information

A faculty member at DSU submitted a direct report to the Office of Compliance and Ethics (OCE) alleging myriad policy and due process violations. However, before an investigation could be completed, the faculty member accepted an early retirement package and withdrew their report. As a result, the substance of the faculty member’s report is no longer before the OCE. However, the investigation prior to the withdrawal of the report revealed significant weaknesses in DSU’s processes which would have led to a policy violation had the faculty member not taken early retirement.

Policy References

SBHE Policy 605.4(10) provides, in relevant part:

The faculty member shall be afforded an opportunity to obtain necessary witnesses and documentary or other evidence. The institution shall cooperate with the committee in securing witnesses and making available documentary and other evidence. The faculty member and the institution shall have the right to confront and cross-examine all witnesses.

Investigation and Findings

The Office of Compliance and Ethics received a direct report from a faculty member at DSU and began an investigation. While the investigation was not completed due to the withdrawal of the report, the following potential violations were revealed and should be addressed by DSU:

1. The faculty member was issued a Performance Improvement Plan (“PIP”) based in large part on reports from students which alleged a number of purported concerns regarding the faculty member’s advising style, classroom interactions, and communications with students. When the faculty member sought information regarding the students who had raised concerns and asked to see the complaints, the faculty member was advised by DSU Administration that the students had come to the Dean of the College of Education, Business, and Applied Sciences in confidence, and there were no signed complaints and that the names of the students who made the reports were not documented (or would not be made available to the faculty member).

While the faculty member did not file a SCoFR appeal due to their acceptance of an early retirement package, the faculty member would have been unable to contest the complaints that formed the basis of the PIP because the student complaints were made anonymously, and records of the students’ names were not kept. This is a potential or likely violation of SBHE Policy 605.4(10) and constitutional and statutory due process requirements. State entities cannot base employee disciplinary action on anonymous complaints unless those complaints have been corroborated by documentary or other evidence which may be made available to the employee.

Recommendation: DSU should not base disciplinary action on anonymous complaints or concerns absent documentary evidence or other witnesses who are not anonymous.

2. The faculty member’s PIP cites, as an example of poor communication with colleagues, a co-worker who previously made a complaint against the faculty member approximately a year earlier. However, when DSU appointed an unrelated faculty member to investigate the complaint, the complainant withdrew the complaint and stated that they did not want to move forward. As a result, no investigation was completed, no findings were made, and no disciplinary action was taken at the time.

Recommendation: DSU should not base disciplinary action on complaints which were not investigated and upon which findings were not issued, as the subject of the complaint does not have the opportunity to respond to or appeal from any such investigation or findings.

Conclusion

The investigation, while not completed, revealed two potentially significant violations in the process by which DSU implemented the PIP against the faculty member. These violations could have exposed DSU, the NDUS, and the SBHE to legal or reputational risk had the faculty member sought legal recourse if the PIP resulted in termination or if the faculty member sought an appeal from the PIP. I suggest that DSU evaluate its disciplinary process to ensure that faculty members and employees alike receive the due process to which they are entitled to under applicable SBHE policy, DSU policy, and applicable constitutional and statutory requirements.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
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Summary Investigative Report Performance Improvement Plan Violations April 25, 2022

Sources of Complaint	Direct Complaint
Date(s) of Complaint	2/11/2022
Allegation	Inappropriate Comments by Faculty Member Performance Improvement Plan Violation
Institution	Dickinson State University
Policy referenced/related	SBHE Policy 306.1 Compliance Charter SBHE Policy 308.1 Officer and Employee Code of Conduct SBHE Policy 401.1 Academic Freedom DSU Policy 401.1 Faculty Rights and Responsibilities/Academic Freedom and Community Welfare SBHE Policy 520 Title IX – Sexual Harassment The North Dakota Human Rights Act (N.D.C.C. § 14-02.4-02(6)) North Dakota Century Code § 15-10.4-02(3) Americans With Disabilities Act (ADA) Regulations
Conclusion	Investigation results support the allegation
Investigator	Karol Riedman

Background Information

On October 29, 2021, the NDUS Office of Compliance and Ethics (“Office”) received a report through the Compliance and Ethics webpage reporting link on the ndus.edu website. The anonymous report alleged that a faculty member made inappropriate comments during class that made students uncomfortable. The Office referred the matter to the institution to investigate on November 3, 2021, and the institution’s president referred the matter to the Title IX Coordinator for investigation. The Office did not immediately hear back from the institution on the results of the investigation.

Subsequently, on February 11, 2022, the Office received a direct report from a third party (not the accused faculty member), alleging that a faculty member had been placed on an unreasonable/illegal Performance Improvement Plan (PIP). As a result, the Office contacted DSU to determine the results of the prior investigation of the October 29, 2021 report. The Office learned that the institution investigated the matter and found the allegations were

supported by the investigation. The matter resulted in the faculty member receiving a Performance Improvement Plan (PIP). This investigation followed.

Policy References

SBHE Policy 306.1(10)(c) provides as follows:

Routine complaints [. . .] concerning a particular institution will be forwarded to the institution's designated investigator(s). Campus investigation reports shall be forwarded to the institution president and to the Officer. Additional investigation or action may be recommended by the Officer.

SBHE Policy 308.1(2)-(3), (13) states:

2. The SBHE supports an environment that is free of discrimination or harassment.... Likewise, sexual or other harassment (including actions contributing to a hostile work environment) in violation of federal or state law or SBHE Policy 603.1, is prohibited. Policy 520 governs sexual harassment which violates Title IX of the Education Amendments of 1972.

3. All SBHE members, officers, and employees are expected to perform their duties conscientiously, honestly, and in accordance with the best interests of the NDUS. All SBHE members, officers, and employees shall comply with applicable federal and state laws.

13. Alleged violations of this code involving NDUS officers or employees shall be investigated by the appropriate NDUS officer. All officers and employees shall cooperate in investigations of alleged violations. A violation of this code is cause for dismissal or other disciplinary action, in addition to any criminal or other civil sanctions that apply.

North Dakota Century Code § 15-10.4-02(3) requires the adoption of SBHE and institution policies which, at a minimum:

Protect[] the academic freedom and free speech rights of faculty by guaranteeing, at a minimum, no faculty member will face adverse employment action for classroom speech, unless the speech is not reasonably germane to the subject matter of the class as broadly construed and comprises a substantial portion of classroom instruction.

SBHE Policy 401.1(2) & (4) (and DSU Policy, substantially similarly) states, in part:

2. Academic Freedom. *[. . .] Faculty are entitled [to] freedom in designing and teaching their assigned courses.*

4. Classroom Speech and Expression. *Faculty at institutions under the control of the SBHE shall generally adhere to the 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments adopted by the American Association of University Professors, which provides that "Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter*

which has no relation to their subject.” As a result, no faculty member may face adverse employment action for classroom speech unless the speech is not reasonably germane to the subject matter of the class as broadly construed and comprises a substantial portion of classroom instruction. As a general rule, faculty shall not face discipline or adverse employment action based on classroom speech unless such speech violates other institutional policies or procedures. Institutions may provide additional protections for classroom speech and the speech of faculty in instruction-related activities, such as office hours, mentoring, advising, and other similar situations.

SBHE Policy 605.4(10) provides, in relevant part:

The faculty member shall be afforded an opportunity to obtain necessary witnesses and documentary or other evidence. The institution shall cooperate with the committee in securing witnesses and making available documentary and other evidence. The faculty member and the institution shall have the right to confront and cross-examine all witnesses.

SBHE Policy 520(2)(m) defines sexual harassment as related to the classroom:

Sexual Harassment. Conduct, on the basis of sex, constituting one (or more) of the following:

- i. An employee of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct;*
- ii. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution’s education program or activity.*

The North Dakota Human Rights Act (N.D.C.C. § 14-02.4-02(6)) provides in part that:

Sexual harassment includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct, or other verbal or physical conduct or communication of a sexual nature when:

- a. Submission to that conduct is made a term or condition, either explicitly or implicitly, of obtaining [. . .] education;*
- b. Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual’s [. . .] education[;] or*
- c. That conduct or communication has the purpose or effect of substantially interfering with an individual’s [. . .] educational environment[.]*

The Americans with Disabilities Act (ADA) (42 U.S.C. § 12112) states:

- (a) No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.*

(d) Medical Examinations and Inquiries

1. In General. The prohibition against discrimination as referred to in Subsection (a) shall include medical examinations and inquiries.

4. Examination and Study

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination [. . .] unless such examination or inquiry is shown to be job-related and consistent with business necessity.

Investigation and Findings

The initial report of inappropriate comments made by a tenured faculty member in class was referred to DSU for investigation and resolution. The President assigned the report to the Title IX Coordinator, who later referred the investigation to the Director of Human Resources. Because the report was from an anonymous source, no interviews were possible. No formal Title IX or other harassment complaints had been made by students in reference to this allegation.

The initial report stated that the instructor “made a really sexist comment about how a man in history ‘must really like them stacked’ and then proceeded to talk about how men liked women with big breasts. This was super embarrassing for me and the other girls.”

DSU investigators reviewed student evaluations and comments for the Fall 2015 through Fall 2021 semesters for all courses taught by this instructor. A total of 496 students were enrolled in these classes. Eighteen student evaluations were submitted during this period with three comments that were interpreted as describing concerning or offensive comments. Of these, one review stated “[a]lthough [they] may not have meant a lot of things literally, I took a lot of [their] sayings to offence,” while another described “condescending” and “not okay” remarks. Neither of these explicitly referred to sexual or sexist comments. Only one of the reviews mentioned “sexual jokes and/or references in class that made me uncomfortable.” As a result, only one student review mentioned analogous comments to those described by the initial report. This represents less than 0.2 percent of the faculty member’s total students during that time period (or less than 6% of recorded student reviews).

DSU’s Provost and Director of Human Resources also reviewed selected class recordings and noted several comments they interpreted as concerning or offensive. These comments included several references to the consumption of alcohol, some of which were obvious hyperbole, and “riffing” on the subject matter of the course, including some comments which were arguably sexual in nature. None of these comments were directed to or purporting to describe students. Each of these comments were brief and did not result in a substantial portion of the day’s instruction. The comment described in the initial report was not discovered during the review.

Based on the reports and the finding, the faculty member was placed on a Performance Improvement Plan (PIP) which required the completion of a sexual harassment prevention training immediately and eight counseling sessions to be completed by the end of the Spring

2022 semester. The PIP also required that student evaluations be completed for all classes and should show no issues of this nature through the end of academic year 2022-2023.

After the PIP was entered, the Office of Compliance and Ethics received a direct report from a different faculty member asserting that the PIP was unreasonable or illegal and violated SBHE Policy. The Office requested the results of the DSU investigation and then learned that the faculty member had been placed on a PIP. This investigation followed.

The investigation of the alleged unreasonable or illegal PIP was done by the Office in consultation with legal counsel, given the complexity of the legal issues presented by the reports. The investigation included a review of the PIP itself, the cited student evaluations and class recordings, as well as interviewing the faculty member and selected DSU administrators. The goal of this investigation was to answer these questions:

1. Did the institution violate SBHE Policy 306.1?
 2. Did the comments in question constitute sexual harassment under the Title IX or the North Dakota Human Rights Act?
 3. Did the investigation conducted by DSU and the resultant disciplinary decision infringe on rights protected by Policy 401.1 Academic Freedom, due process, and state law?
 4. Were the proposed corrective actions in the PIP reasonable, permissible, and appropriate?
1. Under SBHE Policy 306.1, when the Office of Compliance and Ethics refers an investigation to a campus for investigation, the campus is responsible for reporting to the Office the results of the investigation and providing any report that was prepared. Here, the campus completed an extensive investigation that concluded that the report was substantiated, and the faculty member was placed on a PIP based on this conclusion. However, the results of the investigation were never reported to the Office as required by the policy.

Recommendation: DSU should train its designated investigators on the process of conducting a referred investigation, including the final step of reporting the outcome of the investigation to the Office of Compliance and Ethics.

2. The statement in the initial report potentially raises concerns related to sexual harassment. The definition of sexual harassment is set out in SBHE Policy 520 (for Title IX harassment) and the North Dakota Human Rights Act, N.D.C.C. 14-02.4-02(6). Neither the comments alleged in the initial complaint (and not substantiated by DSU's investigation) nor the additional statements located by DSU during the investigation constitute sexual harassment under SBHE Policy. In coming to this conclusion, the Office reviewed the student comments in evaluations and class recordings relied upon by DSU in imposing the PIP.

Policy 520 requires, among other things, that the conduct in question must be so severe, pervasive, and objectively offensive that they effectively deny the students access to their educational program. The comments in question do not meet applicable requirements for severity or pervasiveness, even if they arguably meet the definition of objective offensiveness (though even that is unlikely). Similarly, the conduct of the faculty member does not constitute sexual harassment under the NDHRA, as submission to the conduct was

not term or condition of receiving education, and there are no allegations by any complainant, named or unnamed, that a response to the conduct was a factor in grading or that the conduct substantially interfered with the educational environment.

Recommendations: Prior to conducting an extensive investigation into alleged sexual harassment (such as the one in this case), DSU should consider whether the alleged conduct, if it occurred, would suffice to meet the definition of sexual harassment under state law or SBHE Policy. DSU should also consider additional training into the definitions of harassment, including sexual harassment, for all individuals designated to investigate such allegations. To the extent that the PIP is based wholly or partially on a finding of sexual harassment, it should be terminated.

3. DSU's investigation into (and subsequent imposition of a PIP against) the faculty member based on the initial report and the subsequently-discovered classroom statements likely violated principles of academic freedom as adopted by N.D.C.C. § 15-10.4-02(3), SBHE Policy 401.1, and the analogous DSU policy. Each of these policies specifically protects the classroom speech of faculty members unless the speech is *both* "not reasonably germane to the subject matter of the class as broadly construed" *and* "comprises a substantial portion of classroom instruction." Here, there is no reasonable argument that these elements are met.

DSU attached a list of eight out-of-context statements extracted from the faculty member's lectures in POLS 115 on October 4 and 15, 2021 to support the imposition of the PIP. Five of these statements included arguably sexual content, two were hyperbolic references to alcohol consumption, and one was a reference to a serial killer. Perhaps ironically, several of the statements DSU used as the basis for imposing the PIP came from a lecture with the topic "Freedom of Speech/Censorship," which included an eight-minute discussion on the definition of obscenity and when it is protected. Throughout both lectures, the faculty member sprinkled side comments, informal chatter, and attempts at humor. However, most of these comments, while perhaps not always in good taste, were at least indirectly related to the subject matter being discussed, and none consumed a substantial amount of class time, even when combined. As a result, the comments may not serve as a basis for faculty discipline pursuant to SBHE Policy 401.1 and broader First Amendment principles.

Moreover, the imposition of discipline also likely violated the faculty member's due process rights. DSU rested its decision to impose the PIP on "[c]omplaints from student(s) regarding frequent sexual references/innuendos and other inappropriate comments during class lectures[.]" However, there are no student complaints which may properly form the basis for disciplinary action. The only complaints available to the campus investigators include the anonymous student evaluation comments and the anonymous initial report, none of which were substantiated by the investigation. Had the faculty member filed a SCoFR appeal, the faculty member would have been unable to contest the complaints which formed the basis of the PIP because these student complaints were not substantiated by the investigation. This is a likely violation of SBHE Policy 605.4(10) and statutory and constitutional due process requirements. State entities cannot base employee disciplinary action on anonymous complaints unless they have been corroborated by documentary or other evidence which has

been made available to the employee. As a result, neither the anonymous initial complaint nor the evaluation comments may constitute the basis for the PIP.

Even leaving aside the question of the imposition of the PIP, the mere investigation of purely classroom speech without a clear allegation of speech which would violate applicable policies has a chilling effect on academic freedom. This is particularly true where, as here, the investigation of a single anonymous allegation resulted in DSU investigating six years of student evaluations and reviewing several lectures to extract out-of-context remarks. DSU should take care to ensure that investigations are reasonably related to the instigating report, both in subject matter and in scope, to ensure that an investigation does not unreasonably intrude into matters of academic freedom.

Similarly, the faculty member's college dean ("Dean A") sent an email dated April 1, 2022 which indicated that DSU intended to continue monitoring the faculty member's classes "from time to time through the 2022-2023 academic year to ensure that everything continues in a positive direction." If carried out, this would also constitute a potential violation of SBHE Policy 401.1 (2) ("Faculty are entitled [to] freedom in designing and teaching their assigned courses."), as it explicitly seeks to influence the way in which the faculty member teaches.

Recommendations: The faculty member's PIP should be immediately terminated (to the extent it has not already been terminated) and not used as any basis for future performance evaluations, contractual decisions, or reviews. DSU should consider providing additional training to its investigators and administrators to ensure that the proper weight is provided to academic freedom during the investigative process. DSU should not base disciplinary action on classroom speech unless the applicable policies and laws are plainly met and in consultation with legal counsel. Moreover, DSU should not base disciplinary action on anonymous complaints or concerns absent documentary evidence or other non-anonymous witnesses.

4. A PIP should be used when there is a commitment to help an employee succeed, not as a way for a manager to begin a termination process. As a result, the PIP needs to clearly set out the performance issue and set feasible goals which are reasonably within the control of the employee (and which can be accurately and objectively assessed at the conclusion of the PIP). Here, the corrective action in the PIP required the instructor to watch a training video, complete eight counseling sessions through EAP and receive a significant number of student evaluations over the next three semesters, with no comments similar to the offensive comments cited by the complainant.

First and foremost, as discussed above, the PIP was issued in likely violation of academic freedom and due process and as a result no element of the PIP should be maintained. Notwithstanding, the requirement to complete a training session is the least objectionable of the PIP's requirements, and DSU may have been permitted to ask the faculty member to complete the training even in the absence of a PIP or any other stepped discipline. Based on the investigation, it appears that the faculty member did complete the assigned training, so while the PIP should not have been entered, it appears a portion of DSU's goals were met.

Recommendation: DSU should consider structuring its contracts with faculty members to permit DSU to require training as assigned, to the extent that it does not already. This would cover not only such common training requirements as IT security training, but also refresher courses on harassment or appropriate workplace conduct, without involving a PIP or a stepped disciplinary process.

Second, DSU likely lacked the authority under the circumstances to require the faculty member to attend counseling sessions with the Employee Assistance Program (EAP). The Americans with Disabilities Act prohibits employers from discriminating against qualified individuals based on a disability and protects both individuals with a disability and individuals who are treated as if they have a disability. In 2000, the EEOC stated in an informal guidance letter that requiring an employee to use an EAP may violate the prohibition on treating an employee as if they have a disability without medical information to support that position.⁵ Here, for example, the most serious allegation substantiated was that the faculty member made arguably inappropriate comments during the course of several lectures. Nothing about this allegation would indicate the presence of a disability.

Additionally, the ADA prohibits an employer from “[requiring] a medical examination [. . .] unless such examination is shown to be job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A). For these purposes, “job-related” means that the disability requiring the examination raises concerns regarding the ability of the employee to perform their job duties, while “business necessity” is a more exacting standard than mere consistency with legitimate business goals.⁶ A federal appellate court recently stated that employers can violate this portion of the ADA by requiring an employee to use an EAP. The court held that mandatory psychological counseling constitutes a “medical examination” and therefore violates the ADA if it is not “consistent with business necessity.” Here, there is no indication that a medical or psychological condition impacted the faculty member’s performance of their job duties. Therefore, the counseling requirement was neither “job-related” nor “consistent with business necessity,” and potentially violated the ADA.

When the Office became aware of this requirement and obtained a copy of the PIP, the Office immediately contacted legal counsel due to the legal risk it posed to DSU, the NDUS, and the SBHE. NDUS legal counsel shared the concern with DSU’s attorney on March 8, 2022. DSU’s counsel subsequently informed NDUS legal counsel that he had contacted DSU and that DSU represented to him that the counseling requirement would be converted to a training requirement.

This representation from DSU was false. On April 13, 2022, the Office obtained an email sent to the faculty member by Dean A on April 1, 2022, copying the Director of Human Resources. In the email, Dean A stated that after the faculty member attended their next

⁵ Letter, Christopher J. Kuczynski, Assistant Legal Counsel, ADA Policy Division, Equal Employment Opportunity Commission (July 19, 2000).

⁶ *Kroll v. White Lake Ambulance Auth.*, 691 F.3d 809, 815 n.8 (6th Cir. 2012).

appointment and if the provider “concur[s] that everything appears to be in order,” the faculty member would not be required to attend further appointments.

The individuals involved in the imposition and administration of the faculty member’s PIP, including, but not limited to, the Provost, the Dean of the College of Arts and Sciences, and the Director of Human Resources were placed on notice that the requirement to attend counseling violated the ADA on or about March 8, 2022. Despite this, the faculty member was required to attend one or more additional counseling sessions. Pursuant to SBHE Policy 308.1(3), “[a]ll SBHE members, officers, and employees shall comply with applicable federal and state laws.” Here, the DSU administration was put on notice of a violation of the ADA on or about March 8th, 2022 yet maintained that violation.

To be clear, the ADA permits employers to recommend that employees seek assistance from the EAP, and the EAP can be invaluable when used on a voluntary basis for employees suffering from issues related to finances, stress, work conflicts, chemical dependency, and other life concerns. However, there must be a level of trust between the EAP counselor and the employee, so it is not a best practice to require EAP participation even where appropriate, because employees who are uncooperative or resentful of having to attend sessions may not be receptive or receive little benefit from the EAP sessions.

That notwithstanding, for the EAP to be successful, the employee must be confident that the discussions and treatment received from the EAP will remain protected from the employer and not used in personnel actions. Here, based on Dean A’s email dated April 1, 2022, the DSU administration has directly involved itself in the patient-provider relationship between the faculty member and their provider, which it should avoid unless it is part of the interactive process related to a specific accommodation request.

Recommendation: DSU should ensure that any stepped disciplinary processes do not require an employee to seek counseling from the EAP. Instead, the EAP can be offered as a resource to employees but should not be required unless part of the interactive process related to an employee’s disability, in consultation with legal counsel. DSU should also avoid becoming directly involved in the EAP process in order to respect the medical privacy of participants.

Finally, DSU included requirements as part of the PIP which are not within the employee’s ability to control. A PIP is meant to provide an employee with performance issues the opportunity to succeed and not simply as part of a document trail to justify future personnel actions. As a result, the goals set in the PIP must be feasible, measurable and within the reasonable control of the employee. Here, the PIP requires the faculty member to ensure that there are evaluations completed for all classes through the end of the 2022-23 academic year by a “significant number of students and should show no issues of this nature.” However, a faculty member has little or no control over the number of students who fill out evaluations, and even less control over any comments that might be made.

Recommendation: DSU should ensure that PIPs are based on “SMART” goals: **S**pecific and **M**easurable objectives that are **A**chievable, **R**elevant, and **T**ime-bound. SMART goals, as

identified by SHRM, help to ensure that PIPs are used only when there is a commitment to help an employee improve, to give the employee fair notice of what improvements are required, and to provide sufficient time for the employee to bring their conduct and/or performance into alignment with institutional expectations.

Conclusion

The original concern reported the faculty member made sexist comments that were embarrassing to students. Neither the complainant nor the specific comments were substantiated in any of the investigation done by DSU. That should have ended the investigation. Instead, DSU conducted a detailed review of six years of student evaluations and several class recordings and found several comments which DSU's investigators subjectively found inappropriate or offensive. The comments do not fulfill the definition of sexual harassment and, despite being arguably unnecessary or in poor taste, also do not represent controversial matter entirely unrelated to the subject matter or a substantial portion of classroom instruction. The comments were thereby protected by academic freedom, and the instructor should not face a PIP or an adverse employment action. Additionally, the corrective action required in the PIP included outcomes that were not under the instructor's control, as well as unallowable requirements for medical examination and treatment in likely violation of the ADA. Finally, the results of DSU's investigation were not reported to the Office.

Recommendation:

The faculty member's PIP should be immediately terminated (to the extent that it has not been terminated already), and the instructor should be reimbursed for any additional costs incurred or leave used to comply with the requirements. I recommend DSU administration and investigators receive additional training in the relevant policies and law including Academic Freedom, disciplinary processes, and the American Disabilities Act. DSU should consider having future proposed PIPs involving sensitive matters reviewed by experienced NDUS colleagues or legal counsel.

Informal Suggestion:

Since neither the complainant nor the alleged comments that began this action could be verified, a reasonable solution might have been an informal discussion with the faculty member regarding sensitivity to informal side comments or attempted humor that may not be perceived favorably by the class, rather than escalating to a full-scale investigation that threatens academic freedom. In fact, it appears this suggestion was made at several stages of the investigation but was not adopted by DSU.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Department Chair Replacement April 25, 2022

Source of Complaint	Direct Complaint
Date of Complaint	03/10/2022
Topic of Allegation	Inappropriate process for replacing Department Chair
Institution	Dickinson State University
Policy referenced/related	DSU Policy 602.2.001 Department Chair Appointment
Conclusion	No violation, recommendation made
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a direct report in regard to filling a vacant psychology faculty position in the Social Sciences Department. The report alleged that the department advocated strongly for a tenured PhD position, as it had been in the past, but DSU Administration intended to post the position as a non-tenured/non-tenure track one-year contract. The report further alleges that the Dean of the College of Arts and Science stated the DSU Administration would consider posting a tenure-track position if the current Department Chair would step down; then the new position would consist of a combination of Department Chair and part time teaching duties.

Policy References

DSU Policy 602.2.001 provides:

Department Chairs are appointed to an annual term by the Provost/Vice President for Academic Affairs (VPAA) upon the recommendation of the College Dean and notification of the President. Department Chairs serve at the pleasure of the College Dean and Provost/VPAA and the appointment may be revoked at any time based on job performance. The Chair is evaluated annually by the Department Faculty, College Dean and Provost/VPAA. The appointment may be renewed for successive years upon the recommendation of the College Dean and approval of the Provost/VPAA.

Investigation and Findings

The Office of Compliance and Ethics investigated the direct complaint in this matter because the complaint alleged wrongdoing by senior DSU administrators. The report set out two main concerns: the decision by DSU administration to replace a tenured position with a non-tenured term position and the alleged attempt to remove an existing department chair as the requirement for agreement to the first request.

1. Preliminarily, the reporter and current faculty members interviewed by the Office asserted that the demand for psychologists in the Dickinson area is extremely high due to expansion of area behavioral health centers. As a result, when a tenured faculty member left the department, faculty members advocated that the position be either a tenured or tenure-track position that would require a Ph.D. The faculty members asserted that this would attract highly qualified and experienced candidates, and that a non-tenured/non-tenure track appointment under an annual or two-year contract would be more likely to produce less experienced candidates with less motivation to stay in the position. This viewpoint was confirmed by three current faculty members.

While the information provided by the reporter was substantiated by the investigation, the allegation does not violate any policy or procedure which may be reviewed by the Office. While it is certainly best practices for an institution's administration to solicit feedback and input from the department prior to posting a vacant position, the administration has no obligation to defer to the department's preferences regarding the qualifications or structure of the posted position.

2. When the office interviewed the Dean of the College of Arts and Sciences regarding the allegation that a tenure track position would be posted only if the current Department Chair stepped down, the Dean stated that he was misunderstood. Instead, the Dean stated that he had intended to communicate that DSU administration seems to prefer using tenured faculty in a leadership role and thus may be more likely to post a tenure/tenure-track position if being Department Chair was part of the position description. He also asserted that there was no intent on the part of DSU administration to communicate a desire for the current Department Chair to step down, or to offer a bargain to that effect.

The appointment or removal of a Department Chair is at the discretion of the College Dean and the Provost/VPAA, subject to DSU Policy 602.2.001. Unless the decision to remove a Department Chair is made for a reason that violates policy, procedure, or law, there is nothing for the Office to investigate. Here, the Department Chair remains unchanged. As a result, while it may be advisable for DSU Administration to consider how communication may be improved, the allegations in the report were not substantiated.

Conclusion:

Communication issues have often been at the root of hotline and direct reports, particularly those regarding DSU. Care should be taken by both parties, but the administration in particular, to ensure the message is both given and received clearly so that misunderstandings do not complicate an otherwise innocent conversation. Similarly, it would be helpful for DSU community members to seek clarification and continued discussion rather than assuming the worst, and DSU administration should be clear that it is open to that feedback (if it intends to be). In the end, the position in question was advertised as an 18- month (two year) contract with potential to convert to tenure-track. There has been no change in the Department Chair of Social Sciences. There was no violation of policy or procedure.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.

A handwritten signature in blue ink that reads "Karol K. Riedman". The signature is written in a cursive, flowing style.

Karol K Riedman
NDUS Chief Compliance Officer



Office of Compliance and Ethics

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Summary Investigative Report Incomplete Response to Compliance Request April 25, 2022

Source of Complaint	Eide Bailly Fraud Hotline
Date of Complaint	03/07/2021
Topic of Allegation	Failing to provide requested information to the NDUS Office of Compliance and Ethics
Institution	Dickinson State University
Policy referenced/related	Policy 306.1 Compliance Office
Conclusion	Investigation supports the allegation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Eide Bailly Fraud Hotline alleging that in reference to the initial hotline report regarding Conflict of Interest and improper procurement process in the Learning Core instructional design contract, DSU Administration did not provide the Office with complete information about this request. The report also alleged that the request for information, when shared among members of DSU Administration, Administrator A responded saying “No problem. Will get “Karol with a K” all the information she needs. She is easy to work with.”

Policy References

SBHE Policy 306.1(4) Compliance Office Charter states in part:

The Office shall be afforded unrestricted access to any and all NDUS and its institutions’ records, physical properties, and personnel pertinent to carrying out any engagement, subject to the requirements of state and federal privacy laws such as FERPA and HIPAA. All NDUS employees shall assist the Office in fulfilling its roles and responsibilities by complying with the Office’s reasonable requests.

SBHE Policy 308.1(13) provides in part:

Alleged violations of this code involving NDUS officers or employees shall be investigated by the appropriate NDUS officer. All officers and employees shall cooperate in investigations of alleged violations. A violation of this code is cause for dismissal or other disciplinary action, in addition to any criminal or other civil sanctions that apply.

Investigation and Findings

On Thursday, August 20, 2020, the NDUS Office of Compliance and Ethics received a hotline report alleging that DSU Administration ordered or recommended DSU staff to give preferential treatment to Learning Corps LLC because of their past association with the owners of the company, which was a conflict of interest. The Office asked DSU Administration to submit information on any potential/actual/perceived conflicts of interest relating to the Learning Corps/Instructional Design procurement. Administrator B responded that they had all the backup in regard to this contract and would send the information when they were back in the office on the following Monday August 24, 2022. However, Administrator A replied to the Office on Friday August 21, 2022, by providing the relevant contract and assuring the Office that the proper procurement process was followed. Regarding potential conflict of interest, they stated, “Yes, (Administrator C) did know one of the four principals of the LLC. They had worked together at the one university in Wyoming. However, we don’t believe this was a relevant point at any juncture of the decision making.” Because it is not a violation to be acquainted with vendors due to prior association, after confirming the prior professional relationship between Administrator C and one of the principals of Learning Corps, the hotline report was not investigated further.

Reports of a conflict of interest by Administrator C and improper procurement related to Learning Corps continued to be received, so a full investigation began in March 2021. During this investigation, volumes of email communications were reviewed and DSU administrators were interviewed. A Summary Investigation Report regarding the allegation of Conflict of Interest was issued in June 2021, with a conclusion that there was no actual conflict of interest, as that term is defined by NDUS policy, but additional steps were recommended to avoid the appearance of a conflict of interest.

During the full investigation, the emails referred to were obtained and confirmed. Many additional relevant emails and documents that related to the conflict of interest question were also obtained and reviewed. The report from the fraud hotline was substantiated.

Recommendation:

All relevant information should be produced in response to a request from the Office. If the request produces excessively numerous responses, clarifying questions should be asked of the Office, rather than administration officials substituting their judgment for that of the Office.

Conclusion

All NDUS employees are required to fully respond to reasonable requests from the Office. DSU Administration was assured that the Office would receive “all the information she needs.” However, documents and emails that were used in the 2021 full investigation were also available in August 2020 but were not provided. This delayed the formal investigation 6-8 months, and exacerbated the existing issues of trust on campus, resulting in the filing of numerous additional hotline and direct reports to the Office. If DSU Administration had fully responded to the Office’s request, the Office’s report may have been issued much earlier.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.

A handwritten signature in blue ink that reads "Karol K. Riedman". The signature is written in a cursive, flowing style.

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Summary Investigative Report Conflict of Interest: Grant Writing April 25, 2022

Source of Complaint	Eide Bailly Fraud Hotline, multiple direct reports
Date of Complaint	04/01/2021 and additional reports
Topic of Allegation	Conflict of Interest: Procurement
Institution	Dickinson State University
Policy referenced/related	Policy 308.4 Conflict of Interest
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics initially received a report through the Eide Bailly Fraud Hotline regarding a conflict of interest related to the Governor’s Emergency Education Relief Fund (GEER) Grant. Subsequently, so many similar direct reports were received regarding the same matter that the Office stopped accepting additional reports regarding the same subject matter. The anonymous reporter(s) stated that DSU asked Learning Corps (LC), an existing contractor, to write the grant proposal that was ultimately submitted for GEER Grant consideration. The reporter(s) alleged that DSU Administration provided information and examples to LC, who then wrote the grant proposal specifically tailored for activities LC would be interested in performing, with information that would give LC an unfair advantage in the bidding process.

Policy References

SBHE Policy 308.4 Conflict of Interest states in part:

A conflict of interest arises when an individual is knowingly in a position to derive personal benefit from actions or decisions made in their official capacity. In the event of an actual conflict of interest, or the appearance of a conflict of interest, the conflicted individual must not be involved in the activity or decision giving rise to the conflict of interest.

Investigation and Findings

LC was engaged to provide instructional design-related services for DSU under a July 2020 contract. Emails and other documents support the allegation that LC was involved in preparing the grant proposal for GEER funding, and that DSU Administration provided information and consulted with LC in the grant-writing process. The proposal was submitted by DSU but was not funded.

However, even if DSU was awarded a GEER grant, LC would have been required to submit a proposal to receive any work under the grant. Due to the fact that LC had been involved in preparing the proposal, this could have been a plausible conflict of interest and would have raised questions regarding the fairness of the procurement process. However, DSU's proposal was not successful, so these concerns are speculative. The Office does not investigate hypothetical situations.

Conclusion

Generally, there is no inherent conflict of interest in engaging a vendor to assist with the preparation of a grant application. Moreover, because DSU did not receive the grant, questions about what may have happened had the grant been awarded are speculative and cannot be investigated. The reports were not substantiated.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Delayed Open Record Request Fulfillment April 25, 2022

Source of Complaint	Eide Bailly Fraud Hotline
Date of Complaint	04/28/2021
Topic of Allegation	Unreasonable Delay in Fulfilling Open Records Request
Institution	Dickinson State University
Policy referenced/related	Policy 308.1 Code of Conduct N.D.C.C. Section 44-04-18
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Compliance Office received a report through the Eide Bailly Fraud Hotline. The anonymous reporter stated that DSU was unreasonably delaying the release of open records in response to a legal open records request in violation of guidance provided by the Attorney General’s office.

Policy References

SBHE Policy 308.1 Officer and Employee Code of Conduct states in part:

In all matters involving communication with NDUS students, customers, suppliers, government authorities, the public and others, SBHE members, officers and employees shall endeavor to make complete, accurate, and timely communications and respond promptly and courteously to all proper requests for information and complaints.

N.D.C.C. Section 44-04-18 (8) states:

This section is violated when a person's right to review or receive a copy of a record that is not exempt or confidential is denied or unreasonably delayed or when a fee is charged in excess of the amount authorized in subsections 2 and 3.

SBHE Policy 311(9) Public Records (as in effect as of the date of this report):

Copies of records that are not confidential or exempt from public disclosure shall be provided upon request.

Investigation and Findings

The concern report did not specify the exact records requested nor the applicable dates that would indicate an unreasonable delay but did refer to “survey results to evaluate administrators.” When the Office contacted DSU representatives, the office was informed that the report related to the survey had not been finalized but would be provided to the requestor when the Faculty Senate’s Executive Committee finalized it. Based on communications from the DSU Administration, the report was not considered finalized until roughly July 2021.

However, the DSU Administration could not find records reflecting the date the open records request was submitted, nor the date the record request was fulfilled. When the Office made a request for other similar requests, the DSU Administration was unable to locate other open records requests in process relating to “survey results to evaluate administrators.” The above records have been provided to the requestor. However, due to the anonymous and vague nature of the report, the Office cannot substantiate that this request was the same one referred to in the report.

The North Dakota Century Code provides a specific procedure for those who contend that their rights have been violated by a state agency not properly responding to an open records request. *See* N.D.C.C. § 44-04-21.1(1); N.D.C.C. § 44-04-21.2(1). Because the Century Code designates the Office of Attorney General and the civil court system as the sole avenues for seeking review of a violation of the Open Records law, the Office is not equipped to provide an opinion as to whether DSU’s actions violated the Open Records law.

Notwithstanding, while the Public Records policy in effect at the time has now been substantially revised, the thrust of the requirement to provide records upon public request has not changed. Notably, there is no exception in the current Public Records policy for draft documents or documents which have not been finalized. As a result, under the policy, the DSU administration would have been required to provide a draft report to the requestor if requested, even though it had not been finalized. However, due to the lack of detail in the report, the Office cannot affirmatively determine that the report was the one DSU Administration referred to, so the report cannot be substantiated.

Recommendation: DSU should consider establishing a uniform system for tracking and resolving open records requests to avoid situations where the date a request was received or fulfilled cannot be located.

Conclusion

The reporter did not specifically identify the records requested, so the Office is unable to substantiate the concerns made in the report. Notwithstanding, DSU Administration should consider more carefully tracking, or providing training in responding to, open records requests. Moreover, this Office is not equipped to evaluate alleged violations of the open records law, as the administrative review process and authority is exclusively vested in the Attorney General's Office and the civil court system. However, the Office may determine whether a response violated the SBHE Policy governing open records requests.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Multiple Separations: Code of Conduct April 25, 2022

Source of Complaint	Eide Bailly Fraud Hotline
Date of Complaint	06/03/2021
Topic of Allegation	Code of Conduct
Institution	Dickinson State University
Policy referenced/related	Policy 308.1 Code of Conduct
Conclusion	Culture/communication issue; Cannot be sufficiently investigated
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Eide Bailly Fraud Hotline. The anonymous reporter listed numerous academic, administrative and technology employees that have left employment at DSU “since (President Steve) Easton appointed (Debra) Dragseth Provost. These included Vice President of Finance and Administration, Vice President of Student Affairs and University Relations, Director of Technology Resources and Education Center and Distance Learning Specialist, Information Services Technician, Education and Programming Specialist, Director of University Relations, University Communications Specialist, Tenured Full Professor of History, Tenured Full Professor of Geology and Tenure-track Assistant Professor of Nursing.” The reporter stated that “this exodus of talent and institutional memory reflects the failure of current DSU administrators. The president, provost and deans have rejected the leadership values and the standards of conduct that are promised in and required by the DSU Code of Conduct; this is the outcome.”

Policy References

SBHE Policy 308.1 Officer and Employee Code of Conduct states in part:

The SBHE supports an environment that is free of discrimination or harassment. All SBHE members, officers and employees are expected to conduct themselves in a businesslike manner.

Investigation and Findings

The concern report is very general, connecting multiple employee voluntary and involuntary separations to the actions of DSU Administration. Additional details were not provided, and because the source of the report was anonymous, it was not possible to gather additional information to determine if there was specific evidence of a policy violation.

The content of the report suggests culture and/or communication issues between administration and faculty/staff, which are beyond the Office's investigatory scope.

Conclusion

The investigation was limited by lack of specific details and the anonymity of the reporter. The results of the investigation do not substantiate the allegation of a code of conduct policy violation.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Preferential Use of Riding Arena April 25, 2022

Source of Complaint	Direct Complaint form (ndus.edu/compliance-and-ethics)
Date of Complaint	09/18/2021
Topic of Allegation	Administrative and Academic Authority, Code of Conduct
Institution	Dickinson State University
Policy referenced/related	SBHE Policy 308.1 Code of Conduct N.D.C.C. Article X Section 18 (anti-gifting clause) DSU Arena Use Forms and Regulations
Conclusion	No violation; informal suggestion provided
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Compliance and Ethics webpage reporting link on the ndus.edu website regarding the use of DSU riding facilities by a DSU Administrator (“Administrator A”) for personal use. The reporter expressed concerns about private use of DSU facilities which is not part of an employee benefits package, providing a state-funded benefit to an individual, and concerns of liability risk to DSU because a child was part of the activity. The reporter said the event was posted on Administrator A’s personal social media.

Policy References

SBHE Policy 308.1 (1a), (3) Officer and Employee Code of Conduct:

- This officer and employee code of conduct governs the SBHE and its members and establishes minimum standards for all NDUS officers and employees. The SBHE and entire NDUS are committed to uphold the highest ethical and professional standards. All SBHE members and NDUS officers and employees shall comply with all applicable laws, regulations, policies and procedures. Activities that achieve results unlawfully or in violation of applicable policies or procedures or by unethical behavior – including payments for illegal acts, indirect contributions, rebates, or bribery - are not tolerated*

and must be reported. All conduct must meet or exceed minimum standards established by law.

- 3. All SBHE members, officers and employees are expected to perform their duties conscientiously, honestly, and in accordance with the best interests of the NDUS. All SBHE members, officers and employees shall comply with applicable federal and state laws. SBHE members, officers and employees may not unlawfully use their position or the knowledge gained because of their position for private or personal advantage. All SBHE members, officers and employees are responsible for their own actions. Any individual who has concerns or questions regarding a perceived or potential conflict or regarding application or interpretation of federal or state law or SBHE policy is encouraged to communicate with a superior or with legal counsel.*

N.D.C.C. Article X Section 18 (excerpt) :

Neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

DSU Arena Use Forms and Regulations:

The process for public use of the indoor/outdoor arena – horseback riding is published on the DSU website. The Operating Procedures provide a general schedule of use for the arena, as well as required forms for participants which provide a roster/contact information, a waiver of liability (for adults and for parent/guardians of minors), acknowledgement of receiving a copy of N.D.C.C .53-10-01 ND Equine Law and receipt of a \$5.00 fee per horse per day.

Investigation and Findings

The Office of Compliance and Ethics investigated the direct complaint in this matter. When contacted, Administrator A confirmed that while three of the five persons present at this activity were DSU/NDUS employees, it was not a DSU activity as well as confirmed the understanding that the facility is open to the community, with permission from or notification to the Chair of the Department of Agriculture “Chair B.” Administrator A was not aware of a liability waiver and noted that the typical practice is to send Chair B a text message notifying of upcoming use of the arena. Administrator A did not make any reference to the \$5.00 fee.

The Office also contacted Chair B, who generally confirmed Administrator A’s description of the process. The use of this facility is open to the public, except during DSU sponsored activities. There is a process to acknowledge who is using the facility (with permission) but is not reserved; all users at a given time are expected to accommodate all other users. There is a liability waiver that must be completed (one for adults and one for minors) and records are kept in Chair B’s office. According to Chair B, some first-time users may be a bit lagging in getting paperwork filled out but DSU works with all public users to get this done as soon as possible. Chair A noted that some follow up could be made to ensure that all forms were current and on file with the office, but because the anonymous report did not provide a date and time, it was not possible to

verify if notifications and waivers were in place for the activity in question or if the required nominal fee was received.

Conclusion:

After an investigation, the Office was not able to substantiate the specific allegations in the report due to its anonymous nature and lack of time/date information. DSU allows public use of the arena and has a process in place that requires a contact/roster, liability waivers, providing a copy of N.D.C.C. 53-10-01 and collecting a nominal fee. Per the procedure, all forms and the use fee must be received by DSU's Department of Agriculture and Technical Studies office prior to use of the arena. Similarly, there is no violation of the anti-gift clause of the North Dakota Constitution (Article X, Sec. 18), as DSU charges a fee for use of the facility, the facility is made available for the public benefit, and use is not contingent on DSU employment. However, based on the information received during the investigation, DSU could convey information to the community and potential users of the riding facilities more clearly.

Informal Suggestion:

DSU should consider the effectiveness of the current system of notification and documentation prior to public use of the facility and make any appropriate improvements in communication and compliance that may be needed. One possible solution would be to create an electronic form and payment process accessible via QR code or web link set out in signage at the riding facility.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



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Summary Investigative Report Disclosure of Exempt Hotline Report April 25, 2022

Source of Complaint	Eide Bailly Fraud Hotline
Date of Complaint	12/09/2021; 12/13/2021
Topic of Allegation	Disclosure of Exempt Report; Campus Climate/Code of Conduct
Institution	Dickinson State University
Policy referenced/related	N.D.C.C. § 44-04-18.1(6); SBHE Policy 311 (Not in effect at time); SBHE Policy 308.1(2)
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics (“Office”) received two anonymous reports through the Eide Bailly fraud hotline, as well as a direct report. The reporters, who may be the same or different individuals, alleged that a report had been disclosed to the DSU Faculty Senate President “Faculty A” during the process of an investigation. Faculty A is then alleged to have discussed the report in detail during a public forum on December 2, 2021, followed by an email to a faculty listserv on December 7, 2021. The reporter alleged that this constituted “intimidate[ion], bully[ing], and isolat[ion to] faculty.”

Policy References

N.D.C.C. § 44-04-18.1(6) provides:

Records relating to a public entity’s internal investigation of a complaint against a public entity or employee for misconduct are exempt until the investigation of the complaint is complete, but no longer than seventy-five calendar days from the date of the complaint.

SBHE Policy 311(8)(f) Public Records (subsequently adopted on February 23, 2022) states as follows:

Other Exempt or Confidential Records. Additional records exempt from disclosure or confidential under the open records law include [. . .] Complaints submitted to the NDUS Office of Compliance and Ethics or an institution official, for the shorter of 75 days from the date of submission, or the conclusion of the investigation into the Complaint (N.D.C.C. § 44-04-18.1(6)).

SBHE Policy 308.1(2) Officer and Employee Code of Conduct provides in relevant part:

The SBHE supports an environment that is free of discrimination or harassment. All SBHE members, officers and employees are expected to conduct themselves in a businesslike manner.

Investigation and Findings

The Office received a direct report through the Compliance and Ethics webpage reporting link on the ndus.edu website on October 29, 2021.⁷ In order to investigate this report, the Office sought information about the matter from Administrator B, one of the designated compliance contacts at DSU. During the course of his investigation, Administrator B shared some or all of the details of the report with Faculty A, as is appropriate to gather information during an investigation. Faculty A then allegedly described the report in detail during the faculty forum on December 2, 2021, and sent an email, which was reviewed by the Office, to the same effect. To the extent that Faculty A is alleged to have violated N.D.C.C. § 44-04-18.1(6), which makes complaints and materials related to an internal investigation exempt for the shorter of 75 days or until a final report is issued, the investigation did not reveal any indication that Faculty A was informed of the exempt status of the report or investigation, or that Faculty A intended to violate the statute. As a result, no violation is found on this point.

The Office additionally noted that since the date of these events, this exemption was added to SBHE Policy 311. As a result, all NDUS employees, including those at DSU, are urged to ensure that information related to reports or investigations of the Office or institution officials is properly protected for the statutory period.

With respect to the allegation that Faculty A engaged in activity constituting “intimidate[ion], bully[ing], and isolate[ing to] faculty,” this allegation is subject to review and resolution by the “appropriate NDUS officer” pursuant to SBHE Policy 308.1(13). Given that the underlying communications and substance are related to a campus climate issue, this Office is not the appropriate NDUS officer, and DSU may conduct further investigations as it deems appropriate.

Conclusion

The investigation did not reveal an intentional violation of Century Code, SBHE Policy, or DSU Policy. However, the Office suggests that all NDUS institutions, including DSU, are aware of the exempt status of complaints and investigations under N.D.C.C. § 44-04-18.1(6) and SBHE Policy 311(8)(f) to avoid future incidents of this nature.

⁷ This report is addressed by a separate investigation report issued on the same day as this one.

The remaining allegations related to campus climate and potential code of conduct violations either could not be investigated due to the anonymous nature of the reports or are best resolved at the campus level.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.

A handwritten signature in blue ink that reads "Karol K. Riedman". The signature is written in a cursive style.

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Summary Investigative Report Gift Card Incentives April 25, 2022

Source of Complaint	Direct Complaint form (ndus.edu/compliance-and-ethics)
Date of Complaint	03/17/2022
Topic of Allegation	Gift cards given in violation of purchasing, “anti-gift” clause
Institution	Dickinson State University
Policy referenced/related	NDUS Procedure 803.1 ND Constitution Article X Section 18
Conclusion	No violation
Investigator	Karol Riedman

Background Information

The NDUS Office of Compliance and Ethics received a report through the Compliance and Ethics webpage reporting link on the ndus.edu website. The anonymous reporter provided a link to a DSU page that offered students an entry in a drawing to win gift cards if they participated in a survey. <https://dickinsonstatenews.com/freshmen-seniors-complete-the-nsse-survey/> The reporter questioned whether DSU funds could be used to give students gift cards to incentivize participation.

Policy References

ND Constitution Article X Section 18:

Section 18. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

NDUS Procedure 803.1(8) Purchasing (in relevant part):

An amendment was recently added to this procedure to clarify application of the above section of the ND Constitution to the NDUS purchasing procedures. The amendment was approved April 13, 2022.

The North Dakota Constitution prohibits the use of public funds to provide gifts or donations in aid of any individual, association, or corporation. As a result, no NDUS entity or institution may use public funds in any amount or of any kind, including state and local funds, to provide gifts or donations to employees, students, constituents, or any individual, association, or corporation, except as provided in this procedure.

For the purposes of this section, a gift or donation means the provision of a benefit without a reciprocal exchange for value.

- *NDUS entities or institutions may use public funds to provide reasonable awards to employees in support of retention pursuant to an institution policy or procedure, including, but not limited to, retention awards, service awards, or retirement awards. Notwithstanding, such awards shall constitute a taxable event for the employee, and the amount of any cash award or gift certificate or gift card shall be reported as taxable income. Similarly, the fair market value of any tangible item provided as part of such an award shall be reported as taxable income.*
- *NDUS entities or institutions may provide branded items to members of the public as part of a student recruitment, marketing, or athletics strategy or program using non-appropriated funds. For the purposes of this section, non-appropriated funds include those funds allocated by the legislature but for which the funding source is not the state general fund.*
- *Grant funds received from entities other than the State of North Dakota are not subject to this section provided that the terms of the grant agreement are followed and the grant funds are not commingled with public funds.*

Investigation and Findings

The report referenced an entry in the DSU News page of the DSU website:

<https://dickinsonstatenews.com/freshmen-seniors-complete-the-nsse-survey/>

The announcement included this passage:

 ATTENTION, freshmen & seniors  Complete the NSSE survey by April 4 to be entered in a drawing for 1 of 4 Starbucks \$25 gift cards!  Check your email for the link.

The state constitution generally prohibits using state funds (including as expended via p-card) for gifts or donations to employees, members of the public, or any other entity. ND Constitution Article X, Section 18 (the “anti-gifting clause”). Therefore, the crucial element in this investigation is the source of the funds used for the gift cards.

The Office of Compliance and Ethics referred the report to DSU for investigation. DSU Administration stated that the survey process is covered by the National Survey of Student Engagement's blanket IRB, which allows an institution to provide a student participation incentive, but it must be approved by NSSE to ensure compliance with IRB requirements. DSU provided documentation of the above statements as well as the official approval from NSSE for the use of incentives. In addition, DSU noted that the cost of the gift cards was provided by the Dickinson State University Heritage Foundation.

Conclusion

The topic of gift cards and their allowed and prohibited uses have been discussed throughout the NDUS in recent months, and this report is positive evidence that awareness of potential anti-gifting issues is growing at the campus level. In this case, offering the incentive of a drawing for gift cards for students completing a survey has followed all relevant guidelines and is permissible, including the use of non-public funds for the gift cards. Thus, the results of the investigation do not substantiate the allegation of a violation of law or procedure.

I appreciate the opportunity to be of assistance to DSU, NDUS and the SBHE regarding this matter.



Karol K Riedman
NDUS Chief Compliance Officer

Dear Chairman Schauer and members of the Government and Veterans Affairs Committee,

We write to you on behalf of the Council of College Faculty (CCF), which represents faculty from all 11 North Dakota University System (NDUS) campuses.

We have serious concerns about HB 1446 and encourage your committee to not pass this bill.

This legislation is unnecessary and based on misconceptions about the post-tenure review of faculty. Current SBHE [Policy 605.1](#) outlines the purpose of tenure and requires each campus to establish procedures for the *continued* evaluation of faculty after receiving tenure. Tenure is not an entitlement and does not confer unconditional employment.

While HB 1446 is written as a pilot program, the bill's authors have made it clear in public statements that they would like to see the bill's provisions expanded to all NDUS campuses.

By mandating each faculty member meet a certain level of tuition generation and teach/advise a certain number of students, this legislation would undermine important small programs and classes, such as graduate programs and labs, that are vital to meeting the workforce development needs of our state. This mandate may also result in the loss of accreditation and closure of key programs (e.g., nursing and healthcare; aviation; and others).

Some campuses have experienced significant faculty turnover in recent years, and this legislation, which has already resulted in negative national press, would undermine our efforts to recruit and retain the most competitive faculty.

These, and other concerns, are elaborated on in the following resolution, which was discussed and approved by the Council of College Faculty (CCF) on January 31, 2023.

This is a bill that would have long-term negative impacts on our university system. We urge your committee to not pass HB 1446.

We would be happy to answer any questions you might have about current post-tenure review processes and the potential impact of this legislation.

Sincerely,

The Council of College Faculties Executive Committee

Derek VanderMolen (Williston State College) - CCF President

Daphne Pedersen (University of North Dakota) - CCF Vice President and AAC representative

Jessica Santini (Lake Region State College) – CCF Secretary and Blackboard Governance rep

Rachelle Hunt (Valley City State University) – Parliamentarian and SAC representative

Lisa Montplaisir (North Dakota State University) – Faculty Representative to the SBHE

Andy Bertsch (Minot State University) - Immediate past CCF President

Jeff Hart (North Dakota State College of Science) – Immediate past SAC Rep and CCF Parliamentarian

Richard Millspaugh (University of North Dakota) - Immediate past CCF Secretary

Elizabeth Legerski (University of North Dakota) – Immediate past Faculty Rep to the SBHE

North Dakota University System Council of College Faculties

Resolution in Opposition to HB 1446

RATIONALE:

WHEREAS SBHE [Policy 605.1](#) outlines the purpose of tenure, which is to protect academic freedom, it also requires campuses to establish procedures for the continuing evaluation of faculty following tenure. These criteria include assessing faculty teaching, scholarship or creative activity, and service. How annual evaluations are conducted varies by campus due to variability in organizational missions and structures, but they generally involve review by a committee of faculty and the approval of multiple administrators such as a Department Chair, College Dean, and/or Provost or VP. Existing SBHE policy requires each NDUS institution to establish procedures and criteria for continued evaluation. Additionally, Higher Learning Commission accreditation and evaluation for re-accreditation requires regular evaluation of faculty by each institution as described in [Criterion 3D](#). While tenure provides a sense of financial stability for faculty through continuous employment, it does not prevent faculty from being dismissed with adequate cause or under extraordinary circumstances as described in SBHE [Policy 605.3](#); and

WHEREAS section 1.1 of HB 1446 imposes on several NDUS institutions requirements that individual faculty generate more tuition or grant revenue than their salary and benefits, this fails to recognize how universities operate with each unit contributing to and supporting the functioning of the whole. While some courses are large and generate a lot of tuition revenue, many specialized courses and labs are small. The costs of these courses are offset by larger classes. Graduate courses and those with more hands-on and technical training, for example, tend to have smaller class sizes, which are more costly. Faculty salaries also vary a great deal by discipline, which makes the burden of this requirement more difficult to meet in healthcare, business, and technology programs where faculty are paid more because professionals in these fields can make substantially more in private industry; and

WHEREAS accreditation standards for some programs, such as nursing, for example, require faculty-student ratios that may be lower than those of other programs, section 1.3 of the bill, which mandates that faculty “teach and advise a number of students approximately equal to the average campus faculty teaching and advising load,” may impact program accreditation from the Higher Learning Commission and/or other accrediting bodies, resulting in the loss of training programs critical to meeting the workforce needs of the state; and

WHEREAS dismissal procedures for tenured faculty members are already stipulated in [SBHE Policy 605.3](#), HB 1446 would grant the unilateral review and dismissal of faculty by campus presidents and removes guarantees for reasonable dismissal procedures, including a written assessment of the faculty member’s performance and the right to appeal a decision. Such a

policy is not only undemocratic but would likely also result in costly lawsuits. By usurping current termination processes established through campus structures of shared governance, this policy also creates greater burdens for campus presidents, the SBHE, and the Chancellor; and

WHEREAS the NDUS generates [billions of dollars in revenue for the state](#), it is vital that we maintain positive faculty morale in order to recruit and retain a vibrant workforce on our campuses, grow student enrollments, and provide the educational programming needed to meet the state's workforce needs. A tenured faculty is essential to student recruitment efforts, particularly within professional and graduate programs. If passed, HB 1446, which has already generated substantial negative press in the national media (see [Forbes](#), [Inside Higher Ed](#)), will act as a deterrent to new faculty hires, undermine faculty morale across the NDUS, and cause faculty to look for employment at other institutions of higher ed and in other states that recognize the value of tenure and shared governance.

RESOLUTION:

THEREFORE BE IT RESOLVED that the ND Council of College Faculty (CCF) opposes HB 1446 and asks the various bodies and committees of the ND Legislature to not pass this bill.

BE IT FURTHER RESOLVED that the ND CCF stands in solidarity with our colleagues at Dickinson State University and Bismarck State University, who would be most immediately and directly impacted by this legislation.

BE IT FURTHER RESOLVED that the ND CCF steadfastly upholds the values of tenure and shared governance as core principles of higher education.

BE IT FURTHER RESOLVED that the ND CCF resolutely rejects any attempts to remove tenure or undermine shared governance in the evaluation processes and grievance protections currently in place.

BE IT FURTHER RESOLVED that the ND CCF affirms the American Association of University Professors [1940 Statement of Principles on Academic Freedom and Tenure](#) (Rev. 1990), which has been endorsed [by more than 250 scholarly and education groups](#).

Adopted by the ND CCF on January 31, 2023.

January 31, 2023

Honorable Members of the House Government and Veterans Affairs Committee,

As a currently-tenured faculty member at North Dakota State University (NDSU), I served for six years as the co-chair of my department's Promotion, Tenure and Evaluation (PTE) Committee, I am a member of the College of Human Sciences and Education PTE Committee and am serving as the Faculty Senate Past-President. Consequently, I am intimately familiar with the deliberations involved in the tenure process, have had an active role in improving policies governing tenure, and have worked to strengthen shared governance at NDSU. I am invoking this background as a testament to my expertise in and knowledge about these matters, but I am writing to you as a private citizen, not as a representative of any institution or group.

I am submitting this testimony in opposition to House Bill (HB) No. 1446 purportedly intended "to improve the tenure process" at NDUS institutions "in response to the urgent need to accelerate workforce development." In fact, if enacted, HB 1446 not only will it not improve the tenure process, but it will actually undermine it, erode it and render it meaningless. Granting tenure is a multi-layered, careful, rigorous, deliberate and methodical process that evaluates a faculty member's performance over six years of professional contributions to her/his/their institution and academic discipline. Few, if any, professionals in other fields undergo a longer probationary period than faculty members in higher education. Indeed, the process is intended to ensure that faculty members demonstrate the value of their academic production in the judgment of their peers in their field of expertise. Therefore, tenure is both an acknowledgment of and a reward for the faculty member's work, coming as the culmination of years of arduous preparation and dedication to her/his/their profession.

As I noted above, the proposed HB 1446 would not only undermine the tenure process, but, more concerningly, it represents a flagrant encroachment on principles of academic freedom, and faculty and shared governance, as well as a violation of [SBHE Policy 605.1: Academic Freedom and Tenure; Academic Appointments](#), which upholds said principles in the tenure process. As a faculty governance process, tenure evaluation is devolved to the faculty level, where deference is given to tenure decisions taken in the faculty member's department. Subsequent levels of evaluation involving faculty members' tenure portfolios (e.g., College level, Provost, etc.) may or may not uphold the tenure decision, but once granted, tenure cannot be revoked on grounds incompatible with those stipulated in Policy 605.1 and institutional policies deriving from the aforementioned policy (such as [NDSU Policy 352](#), for instance). This policy does not grant university presidents the right to unilaterally rescind a faculty member's tenure and, for good reasons, tenure serves as a protection mechanism from capricious retaliatory measures on part of higher administration.

Even when granted, tenure is not guaranteed unconditionally. It does not absolve faculty members from continuing to perform according to PTE criteria and expectations, and to comply with institutional and SBHE policies. Dismissal procedures of a tenured faculty member are clearly stipulated in [SBHE Policy 605.3: Nonrenewal, Termination or Dismissal of Faculty](#), and

such a decision needs to meet the “adequate cause” threshold under limited circumstances defined in Section 8 of that policy. Even in that case, the faculty member has recourse to challenge the decision via a hearing in front of the Standing Committee on Faculty Rights, composed of faculty peers, the task of which is to review and, potentially reverse, an institutional recommendation for dismissal.

No such recourse would be afforded through the sweeping power of review HB 1446 would invest in the university president. In fact, it would insulate the president from any challenge to her/his/their decision, giving her/him/them absolute power over a faculty member’s employment, notwithstanding the proposed perfunctory review by a university administrator, rather than by a committee of the faculty member’s peers. HB 1446 would effectively endow university presidents with broad discretionary powers to strip a faculty member’s tenure for, essentially, any reason the president might deem appropriate. This runs counter to principles of shared governance and academic freedom enshrined in tenure policies at NDUS institutions. Furthermore, it would allow a president gone rogue to target a faculty member because of perceived or real disagreements with, resentment or enmity toward the faculty member in question, under the pretenses of a performance review on criteria so broadly defined that anything could justify the president’s decision to revoke tenure, a status granted to faculty members precisely to prevent such arbitrary behavior on part of university upper administration. It is important to point out that this would undoubtedly create a climate of instability, reprisals and fear incompatible with the environment needed for academic work to flourish.

It is patently evident that the proposed bill is of grave concern for any current or prospective faculty member at an NDUS institution. It represents a solution in search of a non-existent problem. If passed and enacted, this law is certain to accelerate the exodus of faculty members from ND higher education institutions and will make our universities less attractive as places of employment for potential faculty colleagues who may consider working in our state. This will inevitably have deleterious effects on student learning, recruitment and retention, the negative repercussions of which on workforce development and the overall economy of North Dakota cannot be understated.

Therefore, I strongly urge you to vote DO NOT PASS on HB 1446. Thank you for your consideration.

Sincerely,

Florin D. Salajan, Ed.D.

Testimony of Erin Price
against
HOUSE BILL NO. 1446
House Government and Veterans Affairs Committee
February 3, 2023

Chairman Schauer and members of the committee, thank you for taking my testimony into consideration today.

My name is Erin Price, and I am a tenured Associate Professor of English at Bismarck State College. I earned tenure in 2013, and since then I have served several terms on BSC's Tenure Committee, including 3 terms as Chair. **I strongly oppose House Bill 1446** for the following reasons:

1. This bill gives college administration, only at BSC and at DSU, the ability to review and dismiss tenured faculty at-will and review tenure based upon current course enrollments and program costs. It does not consider experimental classes (which we are encouraged to teach yet often have lower enrollments). Faculty do not set the school's tuition costs; we are hired to educate, not to turn a profit.
2. Many think tenure means an instructor is immune from removal. This is incorrect. Tenure is not a guarantee of lifetime employment. We tenured faculty are subject to performance reviews and may be terminated for "cause" and for other valid reasons as outlined in policy approved by the State Board of Higher Education. This bill will not enhance the tenure process; it will eliminate it. Further, the purpose of tenure is to protect academic freedom and this bill directly attacks it.
3. HB 1446 will eliminate faculty rights and our due process which undermines SBHE policy.
4. The bill would strip tenured faculty of the right to appeal administrative decisions and the right to seek legal recourse for wrongful termination. It eliminates our right to "due process."
5. HB 1446 will surely hinder recruitment efforts for ND colleges and universities when searching for quality instructors.

I strongly urge the Government and Veterans Affairs Committee to give HB 1446 a **Do Not Pass** recommendation. Thank you for considering my testimony today.

Erin Price
Associate Professor
Bismarck State College

Members of the Governance and Veterans Affairs Committee, I submit this document to express my opposition to HR 1446. I am a tenured Professor of Computer Science at Dickinson State University, but I would like to emphasize that I am writing this letter as a private citizen.

My first reason to oppose the bill is frankly based on self-interest. Tenure, in the abstract, represents a multi-year commitment of new faculty to persistently earn high evaluations by several metrics over many years. The promise of tenure helps in recruitment of high-quality faculty, aids in faculty retention, and provides universities with a depth of intuitional knowledge and a cadre of experienced faculty who have proven their ability and dedication. Tenure is awarded based on student evaluations of teaching performance, demonstration of scholarship by the larger outside community, several years of performance evaluations from their chair, and documentation of their commitment to service. The tenure decision is a collective one; at DSU a department committee, the department chair, the dean, a university-wide faculty committee, and the provost all make independent recommendations to the campus president, whose favorable decision must also be adopted by the State Board of Higher Education. While occasionally a professor who has received tenure at one institution can be hired with tenure at a new position, it is much more common that any change of jobs would require the re-application for tenure at the new institution. While there is the stereotype of faculty who cease contributing the instant they have a degree of job security, many (including me) continue to demonstrate a combination of ability and dedication over several additional years (using similar evidence and evaluations as the tenure process) to earn the promotion to Professor, sometimes indicated (full) Professor. While the pay increase from this promotion is nominal, the promotion recognizes a decade or more of ongoing excellence and dedication for which the tenured professor has earned the presumption that they continue to have the good-will of the University in mind, and they are given a level of autonomy, self-direction, and job security that is extraordinarily rare in the private sector. Of course anyone who has invested so much time and effort on the front half of this decades-long understanding will be unenthusiastic about a subsequent reduction in the university's obligations.

My second reason is more philosophical. As a patriotic supporter of the United States of America, I am a firm believer in the values espoused by our Founders including separation of powers, due process, equal administration of the laws, and the general idea that the only way to accomplish something is to build a consensus based on debate, deliberation, and compromise. Part of the reason I applied for an academic job, and particularly one at a state-owned institution, is because that would allow me to recognize and participate in this type of system in my work life not just as part of civic engagement. The bill allows university presidents to pick arbitrary faculty members for an extra-ordinary performance review. If the courses that were assigned to them by their chair do not provide tuition revenue to support their salary (how are tuition waivers accounted for?) then the faculty may be fired. If the faculty is among the those teaching below- "approximately average" class sizes (again, as assigned by the chair), they may be fired. Or if they are part of an overlapping but non-identical group that had a below "approximately average" advising load. Or perhaps university policy says that a particular committee will follow Robert's Rules of Order and yet the faculty member leading the committee allowed for discussion of an agenda item prior to a formal motion. Maybe the faculty member gave a student a failing grade, and by doing so failed to "help students achieve academic success." No matter how ridiculous the finding, the law does not merely allow but actually compels the President to terminate the faculty member absent a specific articulation of why the faculty should remain employed

– an articulation unlikely to be given to the person the President chose for such an exacting review. And all of this is done without any recourse or review for the impacted faculty. Putting aside the distinction between the Ivory Tower and Industry, is there a single state entity anywhere in America with so little protection for the arbitrary dismissal of state employees? This bill would create a bizarre situation where staff hires would have greater job security than allegedly valued professionals.

To explain my third reason, I would like to give additional details about my own history at DSU. I joined the campus in Fall of 2009 and was still new to Dickinson when a major crisis involving international students hit DSU. Among other issues, this caused the HLC to put DSU “on notice” that we were required to make sweeping changes in policy, procedure, and oversight to guarantee the problems from 2011 would not recur. I was a member of Faculty Senate at the time, and became the Faculty Senate representative to the Faculty Policies Council in 2012. This committee was busier during the two years of 2012-2013 than I have seen before or since; the policies (a result of enormous efforts by effectively the entire campus) led the HLC to remove the “on notice” designation – while informally warning us that our assessment efforts needed major revisions prior to the next full review. In 2014, I became a department chair and a member of the assessment committee. Like the earlier policy work, the changes to DSU’s assessment process were transformative and urgently needed. My duties as department chair included ample recruitment and retention efforts – efforts that were complicated with the failure of the old DSU Foundation. In 2017 I became co-chair of the of DSU’s Higher Learning Committees – specifically the one covering “Integrity, Ethical and Responsible Conduct.” Obviously this is one of the areas DSU had previous issues with, and this was the HLC committee most directly impacted by the collapse of the old Foundation. In 2018-2019, long-simmering budget issues became increasingly urgent. As department chair, I did everything I could to manage our resources as effectively as possible including adjusting our course rotations and greatly reducing our use of adjunct professors. Ultimately DSU had to terminate a significant number of non-tenured faculty including two from my department leaving me with the unfortunate duty of making timely adjustments to curriculum and scheduling. Shortly thereafter, the COVID crises required my engagement both as forming department policy and my participation on a committee making re-opening recommendations to the University. Although I am no longer department chair, I have tried to acclimate our new chair to DSU and NDUS to facilitate continuity of operations.

I provide this litany of service activities not to brag of my contributions (I believe my status as tenured professor is sufficient evidence) nor to present DSU as an institution lurching from crisis to crisis (though honestly it does sometimes feel that way) but rather to point out the wide variety of different tasks that were at some point the most urgent activity DSU needed to perform. I do not dispute the vital importance of having a normal budget including by having full classes and active recruiting. But I do dispute that a legislature meeting only once per two years should create a law specifically designating these activities for particular attention. It is quite possible that another unexpected crisis will hit DSU requiring collective action to overcome, and a state law explicitly mentioning recruitment, advising, and course load obligations would no longer accurately reflect DSU’s most urgent needs.

My fourth reason to oppose this bill is because I am not convinced it is compatible with HLC guidelines. I’m sure you are aware that accreditation is vitally important to DSU – our students would be unable to qualify for VA benefits, federal loan guarantees, or Pell Grants without it. To list just a few

criteria possibly impacted by HR 1446 (the complete list is viewable at <https://www.hlcommission.org/Policies/criteria-and-core-components.html>):

Criteria 2a requires the university to establish and follow policies and procedures to ensure fair and ethical behavior on the part of its administration. Does HR 1446 ensure that the administration's actions will be fair?

Criteria 2C requires that the "governing board" (SBHE for our case) is autonomous and independent of undue influence from elected officials or other "external parties." Is a law making sweeping changes to tenure and the appeal rights or faculty consistent with this standard?

Criteria 5A includes the mandate "Shared governance at the institution engages its internal constituencies—including its governing board, administration, faculty, staff and students—through planning, policies and procedures." I was particularly disappointed to hear you oppose shared governance. Implementation of HR 1446 would over-rule a substantial number of DSU and NDUS policies and procedures related to tenure, faculty rights, faculty evaluations, termination of tenured faculty, the rights and duties of the Standing Committee on Faculty Rights, appeal rights for faculty, and likely many others.

DSU's accreditation status with the HLC is absolutely vital. Since the HLC requires that DSU demonstrate commitment to shared governance and faculty involvement in policy formation, any significant changes should be made only after careful consideration of the HLC obligations.

In short, HR 1446 is a terrible bill that I oppose both in principle and in substance. I urge to committee to reject the bill.

Billy Harris
Dickinson, North Dakota

This is a private testimony on the bill "Relating to a pilot program for tenured faculty review at institutions of higher education; and to declare an emergency". I am a faculty at NDSU, but this testimony here is on my own behalf and does not represent the views of NDSU.

The bill to abolish tenure protection at North Dakota institutions appears to me to be ill conceived and lacking in understanding of the workings of higher institutions. In brief: I am a highly qualified Physicist who graduated from Oxford University with a PhD who then worked at the Massachusetts Institute of Technology and the University of Edinburgh before joining the faculty of North Dakota State University. If NDSU had offered me a faculty position without tenure protections I can state with certainty that I would not have entertained this offer.

At NDSU there is some precedent for faculty without tenure in the form of Soft Money positions for research professors. Those professors receive a salary bonus of about a factor of two. So it is reasonable to expect that to hire faculty of a similar quality it would be necessary to increase faculty salaries by about this amount. Since the bill does not propose such an adjustment of salary the simple abolishment of tenure it will inevitably lead to a significant reduction of faculty quality with significant negative impacts on higher education in North Dakota. I therefore urge the legislator to not pass this bill.

Dear Chairman Schauer and Members of the Government and Veterans Affairs Committee:

My name is Shannon Meier, and I'm an alumni of Dickinson State University and the University of North Dakota. I am asking you for a **do not pass** recommendation for HB 1446.

First, as a former student and alumni, I found great value in the tenured faculty that I had the privilege to work with. Their depth of knowledge and command of the subject matter was unmatched compared to their freshly minted counterparts. Additionally, I found better academic guidance from the tenured faculty. For example, the new, not tenured US historian on the DSU campus in 2002 strongly recommended that I take no more than **12** credits a semester. With that guidance, my four-year degree would have taken me the better part of six years to complete. The person who caught this misguided advisement was the chair of the department who was not only tenured, but he had extensive history with the university. I am grateful for his correction to the advising.

Another note on advising must be noted here. I have only ever heard from Dickinson State University and the University of North Dakota's more senior, tenured faculty about CLEP tests. It so happened that at a high school senior's graduation party, I brought this up, and it saved her an additional year of college and approximately \$10,000 in tuition and fees. I question why a greater emphasis is not placed on what is best for students in academic advising instead of what is best for the university.

Second, I am an administrator in a small town that is situated close to Dickinson State University. Yet our students often do not consider Dickinson State University an option for them. There may be a few reasons for this. This bill does not, in my opinion, address the needs of the students. Instead, it places them in amore difficult position. When DSU saw mid-year exodus of most of their science staff, I wondered about the students. Sudden changes have adverse effects, and I know – as an educator – that decisions aren't made like that unless the environment has become incredibly unbearable. Removing the ability to redress life changing, unchecked decisions is dangers *at best*. It certainly is not what is best for students. In terms of why students – and now some staff vote with their feet – I wonder if it is because the vision has been lost on working on behalf of the students instead of such a dangerous focus on the faculty.

Finally, I question the emergency need for this type of bill. I am also wondering why Bismarck State College and Dickinson State University are the sole focus of this proposed legislation. If the proposal is that the legislation is needed for these two places of higher learning, why is it not needed for them all in North Dakota? Why are these two the target?

I sincerely hope that you will consider a do not pass recommendation for HB 1446.

Sincerely,

Shannon Meier

Impact of Achieved Tenure and Promotion on Faculty Research Productivity at a School of Pharmacy

David M. Scott, BPharm, MPH, PhD; Michael P. Kelsch, PharmD; Daniel L. Friesner, PhD
School of Pharmacy, College of Health Profession, North Dakota State University

Abstract

Objective: Critics of the promotion and tenure system contend that promotion and tenure may lead to a decline in research productivity (“dead wood phenomena”) by those faculty. To assess this perception, we compiled the publications and grants at the time of application for promotion, and again through 2017 for the same faculty following promotion and/or tenure.

Methods: Promotion documents at a school of pharmacy at a public Midwestern university were assessed. Mean publication rates and grant dollars per year per faculty member were compared to the same group of faculty (n=13) pre and post-promotion.

Results: At the time of promotion to associate professor, mean numbers of total publications per year per faculty in the pharmacy practice department were 1.1, compared to 1.4 post-promotion. For pharmaceutical sciences department faculty, corresponding means were 5.0 and 4.1, respectively. At the time of promotion to full professor, mean numbers of total publications per year for pharmacy practice faculty were 7.0, compared to 7.2 post-promotion. For pharmaceutical sciences faculty, corresponding means were 3.5 and 4.7, respectively. For grant activity, both associate professors and full professors increased the mean total dollars per year from pre-promotion to post-promotion for both departments.

Conclusion: Research productivity at this school of pharmacy continues to be either maintained or increased since promotion for the collective group of faculty. This evidence runs counter to the perception that promotion and tenure may lead to decreased scholarly productivity. The study provides a roadmap for other schools/colleges to quantify research productivity and make comparisons to national mean levels reported in the literature.

Keywords: Productivity, Scholarship, Publication Rates, Promotion and Tenure, Grants

Introduction

The promotion and tenure process is one of the most prominent, outcome-oriented, aspects of faculty development. Achieving tenure and promotion is a signal that an individual has continued success in all areas of academic practice, including teaching, scholarship, and service.¹⁻³ Negative perceptions about the tenure and promotion process are prevalent in academia.⁴⁻⁷ One perception is that, once a faculty member achieves tenure and/or promotion, he/she experiences a perverse incentive to decrease his/her efforts in one or more areas of academic work.⁴⁻⁶ However, such perceptions largely anecdotal, and little systematic evidence exists to substantiate whether these assertions are pervasive or idiosyncratic. Scholarship may receive more weight than teaching and service activities in the promotion and tenure process because the outcomes of research/scholarship (grants, journal articles, etc.) are more easily quantified.⁷

Scholarship, defined as the generation, advancement, or transformation of knowledge within a discipline, is primarily, albeit not exclusively, communicated through peer-reviewed publications.¹ Within academic pharmacy, full-time faculty members (whether or not they are in tenure-track positions) are typically expected to build and maintain a continued record of scholarship for promotion and/or tenure. Given the need to balance scholarship expectations with teaching and service responsibilities, some faculty consider this to be a daunting challenge.²

Colleges and schools of pharmacy are made up of both practicing clinicians/clinical scholars, and traditional academic/basic research faculty. The former typically populate departments of pharmacy practice, while the latter typically populate departments of pharmaceutical sciences (and, departments of social and administrative pharmacy). Faculty in departments of pharmacy practice often have a workload consisting of traditional didactic teaching responsibilities, experiential teaching responsibilities, and service commitments, in addition to scholarly activities.³ Concomitantly, pharmaceutical and social/administrative sciences faculty typically have greater scholarship demands compared with those in pharmacy practice departments, with fewer, or no, experiential teaching responsibilities. Moreover, those experiential teaching responsibilities that pharmaceutical and social/administrative sciences faculty do have (i.e., mentoring masters students, Ph.D.

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students, and Pharm.D. students interested in research careers) often aligns with, and supports the creation of scholarly output.

Given these competing demands for a typical faculty member's time, a line of research exists that attempts to empirically characterize scholarly output, relative to their other duties. In 2007, Coleman and Schlesselman reported that 4.9% of pharmacy practice faculty members published an average of 2 or more publications per year, 2.3% had published an average of 3 or more; and 1.1% had averaged 4 or more.⁸ Chisholm-Burns and Spivey reported that over a 5-year study period (2006-2010), public pharmacy colleges (14.6) had more total publications per faculty member than did private institutions (5.9).⁹ Moreover, pharmacy practice faculty (who are not affiliated with social/administrative sciences positions) reported publishing an average of 0.5 articles per year.⁹ Weathers and Unni assessed the publication rates from 2011 through 2015 in non-research intensive pharmacy schools, finding that the average number of publications was 0.92 per year for social/administrative science faculty, compared to 0.82 for other pharmaceutical sciences.¹⁰ Thompson and Nahata reported much higher average faculty publication rates during the 2006-2010 time period for pharmaceutical sciences faculty members at schools they designated as research-intensive;¹¹ a finding consistent with other studies.^{12,13} Thompson and Harrison reported that 10% of pharmaceutical sciences faculty members at research-intensive schools contributed 50% of their publications.¹⁴

While the literature describes stark contrasts in scholarly output between pharmacy practice and other (pharmaceutical sciences and social/administrative pharmacy) faculty working in colleges and schools of pharmacy, it omits a crucial policy issue; namely, the unintended effects of promotion and tenure. Critics of the tenure system in higher education often assert that once faculty are tenured and/or promoted (especially to the rank of full professor), the incentives to maintain previous levels of scholarly productivity declines, called the "dead wood phenomena".⁴⁻⁶ If senior and/or tenured faculty are less research productive, but enjoy greater salaries and job security than less senior faculty, there is an inequitable redistribution of institutional resources to these faculty.⁷ Moreover, the Thompson and Harrison study suggests that department-level publication statistics may mask the dead wood phenomena, especially if the department houses a small number of prolific scholars.¹⁴ Instead, scholarship must be examined across faculty ranks within a department.

The goal of this single site study with an observational design is to empirically assess whether scholarly activity (publications, grants) increases, decreases, or remains the same following tenure and/or promotion at a school of pharmacy. The authors compiled counts of publications and grants at the time of application for promotion (starting in 2008), and the number publications and grants through the end of the 2017 calendar year for the same group of promoted faculty, and subsequently compare these counts to each other, as well as to published national estimates.

Methods

Study Site Description

This study was conducted at one school of pharmacy contained within a public university in the Midwestern U.S. from 2008-2017. This school of pharmacy is contained within a larger college of health professions, which offers a variety of professional clinical training programs. The college is not an academic health center since it does not house a medical school or a teaching hospital. The school of pharmacy is comprised of two departments: a department of pharmaceutical sciences (12 faculty spanning all basic sciences relevant to the school, including pharmaceutics, pharmacology, kinetics, etc.), and a department of pharmacy practice (24 faculty who are either clinical or social/administrative sciences faculty). Weathers and Unni criteria classified this school as a non-research intensive institution.¹⁰ The school offers both the Pharm.D. degree and a Ph.D. in pharmaceutical sciences, and enrolls approximately 340 and 50 students in each program, respectively. The school also offers a number of joint degrees, including Pharm.D./M.B.A., Pharm.D./M.P.H. and Pharm.D./Ph.D.

Conducting this assessment within a single school of pharmacy exhibits several advantages consistent with a natural experiment. Teaching loads are standardized via allocation by the school's administration; individuals have a well-defined area of practice and a workload procedural document that codifies teaching expectations (with regard to both quality and quantity) regardless of promotion and tenure. Thus, focusing solely on research productivity does not automatically bias the results should faculty become less productive post tenure and/or promotion in their teaching and service activities. Second, this school contains a relatively even mix of tenure-track and non-tenure track faculty, and a broad array of clinical and social scientists. The school of pharmacy also clearly delineates tenure and promotion as distinct processes. Tenure-eligible faculty may be hired at the associate professor rank, but without tenure (which may be earned on a compact time frame). Non-tenure-track faculty have a system that allows promotion through the assistant, associate, and full professor ranks on a timeline that approximately parallels the system available for tenure-eligible faculty. A process also exists that, given budgetary approval, allows non-tenure-track faculty to convert to tenure-eligible positions. These factors are important, because they allow a degree of comparability across different departments and faculty appointments within the school of pharmacy.

Study design

The study design is primarily descriptive in nature since this is a single site evaluation. Starting in 2008, information on the type of position, academic rank, and scholarly productivity was collected for all faculty employed in the school of pharmacy. If faculty left the school (resignation, retirement), this information was not included in the tables, as were the start dates for faculty hired after 2008. Thus, the study's design is balanced in its evaluation process, as all faculty are available for assessment over the entire study evaluation period. Information was

collected through the end of the 2017 calendar year. This provides a sufficient time span to ensure that dramatic productivity increases or decreases “average out,” thereby providing a reasonably reliable measure of scholarly output.

Scholarly output has two components: the “quantity” of output and/or productivity, and the “quality” of scholarly work. Because quality is inherently difficult to characterize, and given the paucity of research in this area, a decision was made to focus on the quantity of scholarly output, in particular refereed publications, book chapters, and non-refereed publications. The study’s authors collected the following: 1) the number of publications and grants (as PI, Co-PI or Co-I) at the time of application for promotion; 2) the number publications and grants through December 31, 2017 for the promoted faculty; and 3) the comparison of rates in #1 and #2. This information, while admittedly imperfect, is consistent with how this school of pharmacy, as well as the pharmacy literature, characterize the quantity of scholarship.¹¹ This information is reported as mean values to ensure that these metrics can be interpreted in a reliable fashion and to facilitate meaningful comparisons over time (i.e. to ensure that idiosyncrasies in the data “average out” over time and/or across faculty). Information was gleaned using the promotion and tenure documents (or “portfolios”) submitted by faculty at the school of pharmacy. As per university promotion policy requirements, the candidate prepares and submits a portfolio on August 15 of the year they submit for promotion and or tenure. Portfolios were examined from 2008 through the end of 2017 (the most recent calendar year available at the time the study was conducted) and the tabulation of publications and grants were confirmed based on portfolio assessment that was retrospective in nature. From the time of application for promotion to the end of the study period, each faculty member was also requested (by cover letter) to provide an updated list of publications and grants. This aspect of the study was prospective in nature and 100% of the faculty responded to this request. The number of faculty and each rank were compared at the time of application for promotion and since promotion for the respective years, through the end of 2017.

Because the study’s experimental design is observational and limited to a single institution, any data collected are unlikely to meet the assumptions necessary for hypothesis testing and advanced forms of statistical analysis. Hence, all results are descriptive, and focus on frequencies, means, and other relevant descriptive statistics. The procedures were approved as an exempt review by the university Institutional Review Committee.

Results

The socio-demographic characteristics of the promoted faculty sample is comprised of both pharmacy practice and pharmaceutical sciences faculty members. In 2008, in pharmacy practice there were two full professors with tenure, two associate professors with tenure, and seven assistant professors of practice (non-tenure track), and by the end of 2017, this

increased to five full professors (3 Ph.D. and 2 Pharm.D. degrees) with tenure (one in an administrative position), one associate professor with tenure in an administrative position, seven associate professors without tenure (non-tenure track, Pharm.D.), and seven assistant professors of practice (non-tenure track). In pharmaceutical sciences, there were three full professors with tenure, one associate professor with tenure, and four assistant professors (tenure track) in 2008. This increased in 2017 to three full professors with tenure (Ph.D.), five associate professors with tenure (Ph.D.), and two assistant professors (tenure track, Ph.D.).

The number of publications is reported at promotion and those post-promotion (Table 1). The average number of total publications for associate professor (non-tenure track) for pharmacy practice was 6.8 and for pharmaceutical sciences was 29.8. Since promotion to associate professors, the average number of total publications for pharmacy practice was 4.2 and for pharmaceutical sciences was 16.2. At the time of promotion to associate professor, mean numbers of total publications per year for faculty housed in the pharmacy practice department were 1.1 and 1.4 for post-promotion. For pharmaceutical sciences department faculty, corresponding means were 5.0 and 4.1, respectively. Overall, the means for associate professors (non-tenure track) increased for pharmacy practice faculty and decreased for pharmaceutical sciences faculty.

At the time of promotion, the average number of total publications for full professor for pharmacy practice was 65, and for pharmaceutical sciences was 38.5. Full professors in pharmacy practice have averaged total publications was 45.3 and for pharmaceutical sciences was 37.5. At the time of promotion to full professor, the mean numbers of total publications per year for pharmacy practice faculty were 7.0 and 7.2 for post-promotion. For pharmaceutical sciences faculty, corresponding means were 3.5 and 4.7, respectively. Overall, the means for full professors increased for pharmacy practice faculty and decreased for pharmaceutical sciences faculty.

Grant activity is also summarized at time of promotion and since the time of promotion (Table 2). At the time of promotion, the average number of funded grants for associate professor (non-tenure track) for pharmacy practice was 4.0 for a total of \$55,342 [\$13,118 (Principal Investigator or PI)] and for pharmaceutical sciences was 3.5 grants totaling \$998,039 [\$692,255].

Post-Promotion, the average number of funded grants for associate professors of pharmacy practice was 8.0, for a total of \$153,570 [\$41,715 (PI)]. For pharmaceutical sciences, the associate professor faculty the average was 2.3 grants for a total of \$755,744 [\$572,369 (PI)]. For grant activity, associate professors and full professors increased the mean total dollars per year from pre-promotion to post-promotion for both pharmacy practice and pharmaceutical sciences.

At the time of promotion for full professor for pharmacy practice, the average number of grants was 11.0 and average funding was \$718,578 [\$235,474 (PI)]. Pharmaceutical sciences faculty averaged 3 grants with \$3,536,777 in funding [\$2,619,757 (PI)]. At post-promotion, the average number of funded grants for full professors of pharmacy practice was 11.0 for a total of \$1,767,124 [\$452,148 (PI)]. Pharmaceutical sciences faculty was 7 grants, on average, for a total of \$9,474,875 [\$9,198,875 (PI)]. For grant activity, the full professors for both pharmacy practice and pharmaceutical sciences increased the mean total dollars per year from pre-promotion to post-promotion.

Discussion

A common perception in academia is that once faculty are promoted they lose their drive in pursuing scholarship as evidenced by a decrease in their pursuit of scholarship.⁴⁻⁶ This may lead to a decrease in productivity in publications and grants funded. Alternatively, the evidence from this public university school of pharmacy suggests that this perception is inaccurate. Since the time of application for promotion, for both pharmacy practice and pharmaceutical sciences, and with only two exceptions (the associate professor category in pharmaceutical sciences and one associate professor with tenure in pharmacy practice), scholarly productivity is maintained or improved since the time of promotion. This is especially true for full professors, whose productivity is maintained or improved since the time of promotion to that rank. The research productivity is particularly high for three full professors in pharmacy practice, who are in the social and administrative sciences. While this university was classified in the Weathers and Unni 2018 study as a non-intensive research university, the productivity both before and after promotion were higher than the 0.92 average publications per year national rate.¹⁰ Similarly, the publication rates for pharmaceutical sciences was substantially higher than the 0.82 national average.^{10,14} Some of this research productivity is due to increased collaboration with junior faculty. Our research supports studies in other professional fields (specifically business), suggesting that tenure and promotion may actually enhance scholarship over the course of one's career.^{5,15}

Arguments against tenure (and, to a lesser extent, promotion) are based on both an assumption and the concept of economic efficiency. The assumption is that, within the context of tenure as a means to ensure academic freedom, faculty, once tenured and assured of employment protection, reduce their research efforts. This, in turn, reduces the production of academic knowledge, and the efficiency of the institution as a whole. Conversely, faculty who are prestige-seeking, who want to maintain employment mobility, and those who align (some or all of) their personal identities with their professional responsibilities may find incentives over and above promotion and/or tenure to remain productive scholars. This study's findings are consistent with the latter.

However, the truth may lie somewhere between these two positions. At least one study found no significant differences in

research productivity by rank and tenure status; however there was an association between research productivity and length of service with an institution.¹⁵ Faculty who (regardless of rank) had been employed at the institution for more than 20 years were less productive researchers. This suggests that the literature has failed to resolve this policy issue because it has measured the wrong factors that incentivize faculty scholarly productivity. Instead, policies targeting lifelong faculty development may be more effective if they focus on these other factors (including length of service), rather than academic rank and tenure status.¹⁶ In our study, only one faculty member in pharmaceutical sciences has been employed for more than 20 years at this institution. All the other participating faculty in both departments have been employed for less than 20 years. Empowerment, training in research skills, travel funding incentives, and invitations to participate in collaborative research projects are seen as more powerful incentives to conduct, present and publish research.

We did not collect information about teaching loads, but other responsibilities significantly impact distribution of effort and regularly occur following promotion. These more senior faculty sometimes take on formal leadership/administrative roles, are tasked with leading large initiatives (e.g., curriculum re-design, policy changes, etc.), and committee leadership, among other duties. It is acknowledge that a faculty member's position responsibilities may change following promotion. In this study, two faculty (associate professor with tenure and a full professor) were affected by this, and were promoted to associate deans and this may have affected their scholarship. Inherently, these larger roles may impact scholarly productivity. It could be that maintaining a consistent publication record in light of additional leadership responsibilities actually represents more efficient and perhaps greater productivity in publishing and securing grants given their distribution of effort. These responsibilities, at least at the highest/most formal levels, must be addressed in the cohort of faculty evaluated here, and discussion of the senior faculty's changing roles is imperative. At this institution, promoted faculty are encouraged by administration to assume increased mentoring roles for new and junior level faculty. Nonetheless, faculty workload is balanced by administration to account for focused adjustments to contributions related to teaching, service, and scholarship.

Infrastructure at this school of pharmacy may contribute to continued productivity of senior and junior, level faculty. There are regularly scheduled huddles for faculty to discuss their current ideas for research projects; this provides a natural avenue for research design improvement. Additionally, there is an annual research development series conducted by senior faculty in the school. Instead of a formal mentorship program, the school uses an informal mentoring process where senior faculty are encouraged to mentor new faculty and to involve them in their research/scholarship projects. This informal mentorship process has produced collaborations that have been successful in the areas of grantsmanship and other scholarly

output. Administration has ongoing expectations for scholarly productivity. Each department conducts annual performance reviews where each faculty member completes a faculty annual evaluation form that reviews teaching activity (e.g. didactic, experiential, advising, innovative method of delivery or assessment, self-development activities for teaching); research/scholarly activities (e.g. peer-reviewed publications, book chapters, poster or podium presentations, grants proposals, IRB protocol submissions, and self-development activities for scholarship); and service activities (e.g. professional associations, departmental, college and university committees, reviewers of journal articles, service awards/recognitions, self-development activities for service). The department chair rates each of the three activities on a 4-point scale from significant improvement needed to exceeds performance standard.

Investigators have examined the publications in colleges and/or schools of pharmacy, subdivided the publications by pharmaceutical sciences and by pharmacy practice, and further by research-intensive and non-intensive universities. Additional work should be continued in these areas, but also the type of research performed in this study should be conducted to further establish benchmarks of performance for scholarship.

A researcher's publishing career is generally determined by the date of the first publication in a particular database to the time of the current literature search. Benchmarking is becoming an important tool for colleges and schools of pharmacy as they collect and evaluate assessment data.¹⁷⁻¹⁹ At research-intensive universities, in a given year, 6% of all pharmaceutical sciences faculty members had more than 10 publications and 22% had zero publications. Analogous data by academic title include assistant professor, 22%; associate professor, 26%; and professor, 20%. Overall, 15% of all faculty members published 50% of all the publications. Average author productivity was highest for pharmaceuticals at 10.9 [(95% confidence level (CI), 8.0-13.8)], pharmacology at 6.0 (95% CI, 4.8-7.3), and social and administrative sciences at 2.6 (95% CI, 1.5-3.7). About two thirds (67%) of total publications were articles, and 19% were abstracts, 6% reviews, 4% proceedings, 2% editorials, 1% letters, and 1% other publications).¹² Despite the increase in number of publications, this contribution was at a rate of less than one publication per faculty member per year suggesting that a limited number of faculty members produced the majority of publications. Using the findings of our study as a benchmark, and continuing to update the findings periodically, may facilitate the development and assessment of strategies to engage more pharmacy faculty members in the publication process.¹⁴

This study presumes that the PTE process is both transparent and implemented appropriately and consistently. In the short-run, faculty should be aware of the formal and informal requirements to be tenure and/or promoted, and they may choose to direct their efforts towards what they perceive those requirements to be, and away from activities that do not "count" favorably or meaningfully towards tenure and/or promotion. In

the long-run, faculty at this institution may choose to revise promotion and tenure documents, as well as to develop a comprehensive set of benchmarks, to ensure that what should be "counted," counts appropriately towards promotion and tenure. While the focus of this research is on scholarship, the authors emphasize that such activities should also be conducted for other areas of evaluation (including teaching, service and clinical practice). The authors acknowledge that service and teaching responsibilities may impact scholarly productivity, especially if they do not remain static or not allocated consistently across faculty, and were not quantified in this study. Indeed, some faculty (post promotion and/or tenure) intentionally shift the relative balance of their time towards teaching or service (or both) at the expense of research. Some of these shifts may be a direct reflection of the faculty's interests, while others may reflect a faculty member's sense of obligation to protect junior faculty from higher teaching and service loads. Other institutions intentionally ask faculty to undertake greater teaching and service activities while maintaining expectations for scholarship. In such cases, faculty are expected to offset these additional time commitments by gaining efficiencies in research and/or teaching, or by pursuing different areas of scholarly inquiry. In any of these cases, if the PTE process is not transparent, or if faculty are unaware of certain requirements, the information that they report will be less relevant to the actual rationale for the awarding of tenure and/or promotion. In such cases, the results of this study (which are drawn from faculty PTE portfolios) will be biased.

Limitations

One important limitation of this study is the self-reported nature of the data. The number of publications and grants are compiled by the faculty member seeking tenure and/or promotion, then are rigorously reviewed by each level of the PTE process. If requested, the faculty member was asked to provide more information concerning their stated documents. Most faculty members include representative publications in their submitted supplementary materials. However, the actual number of publications or grants since promotion was not verified by the investigators and may be subjected to self-reporting errors. We note in passing that, while inaccurate self-reported information may exist in the data, these types of biases are likely to be limited in nature. All promotion and tenure packets and annual review information in this school of pharmacy are a part of open records. Thus, faculty are aware that self-reported data could be verified, and interested parties could question discrepancies in self-reported data.

A second limitation is the use of mean publications, mean grants, and mean grant dollars, as key indicators of the quantity of scholarly output. The number of scholarly publications may be confounded by faculty who wait different lengths of time before pursuing promotion. Scholarly publications may also be confounded in instances where faculty submit manuscripts during the promotion and tenure process, but which are accepted and/or published after the promotion and/or tenure

process is complete. The quantity of grants, as well as the amount of grant funding, is especially problematic as a measure of the quantity of scholarly output. There are two major confounding issues with grants. The first is that grants are used to fund research, and are actually inputs, not outputs, of the research process. Because inflows of funds do not automatically and obviously translate into specific outputs, they are imperfect measures of long-term research productivity. Second, a single grant application may lead to multiple years of funding. Some grants may be disbursed over multiple years, but may front or back load payments, depending on the research team's capital equipment needs, or research design considerations. Some grants have "train the trainer," infrastructure development, or outreach components. In all of these scenarios, it is difficult to disentangle those funds directed towards scholarship in a given year and those to other purposes, or in other years. More insidiously, acceptance rates of major funding agencies (i.e., the NIH) are typically around 10%. So while a grant may be awarded in one year, it might take more than five years of previous scholarly productivity to amass the expertise to attain a major grant. Cumulatively, while our measures of the quantity of scholarly output are consistent with both the literature and this school of pharmacy's promotion and tenure process, they are inherently flawed. Future research is necessary to accurately define the quantity of scholarly output, as well as define valid and reliable empirical indicators of the quantity of scholarly output.

A third limitation is that this study is a small, retrospective, observational study over a fixed period of time at a public university school of pharmacy. It is unwise to generalize the study results to other geographic regions, or to colleges and/or schools of pharmacy whose institutional characteristics may differ widely from the one in this case study.

A final limitation is that the current study examines only the quantity of two main types of scholarly output. The quality of scholarly output is not addressed in this manuscript. Two aspects of the "quality" of scholarship are particularly important because they are used (whether explicitly or implicitly) in the promotion and/or tenure process. The first is a characterization of faculty's role in a scholarly work (whether measured as author seniority, author contribution to the manuscript, or the number of co-authors), or a grant application (principal investigator, co-principal investigator, co-investigator, etc.). The second aspect of "quality" is the prestige of the output or funding source, whether measured as a journal ranking, impact factor, or inclusion in a major database (i.e., Web of Science). The characterizations are crucial, because they create incentives governing how faculty spend their time, and by extension characterize the body of a faculty's scholarly work at every stage of her/his career. Moreover, while various indicators of "quality" exist, little consensus exists in the literature about how these indicators are used in the promotion and tenure process. This, in turn, frames any future empirical evaluations of whether faculty scholarship is improved, maintained, or declined after

promotion and/or tenure occurs. Once a more comprehensive measure of scholarly output (inclusive of quantity, quality, and secondary outputs) spillovers between scholarly output and other faculty duties, most notably didactic and experiential instruction must also be characterized.

Conclusion

The research productivity of the faculty at this school of pharmacy continues to be either maintained or increased since their promotion date for this group of faculty. This evidence runs counter to the prevailing belief that promotion and tenure leads to inactivity ("dead wood phenomena") that is typically considered prevalent at many universities. This is a small pilot study and is not considered generalizable to other universities. However, the methods described here may be used as a roadmap for other schools to assess their own productivity and subsequently make comparisons to national benchmarks. This type of assessment should be replicated by other schools of pharmacy to validate continued productivity of promoted/tenured faculty compared to benchmark expectations.

Acknowledgments: A presentation was made at the MBAA International Conference in Chicago, Illinois, April 18, 2018. The authors acknowledge and appreciate the support of the pharmacy faculty who participated in this study.

Conflict of interest: The authors report no conflict of interest in the conduction of this study or the preparation of this manuscript.

Financial Disclosures: The authors did not receive any funding to conduct this study.

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Table 1: Mean publications pre- and post-promotion

Position applied to:	Gender		Publications/faculty member/per year	Publications/faculty member/per year
	# male	# female	Pre-promotion (mean)	Post-promotion (mean)
Panel A: Department of Pharmacy Practice				
Full Professor (tenure) (n=3)	3		7	7.2
Associate (tenure) (n=1)		1	2.2	0.4
Associate (non-tenure) (n=6)	2	4	1.1	1.4
Panel B: Department of Pharmaceutical Sciences				
Full Professor (tenure) (n=2)	2		3.5	4.7
Associate (tenure) (n=4)	3	1	5	4.1

Table 2: Mean grant dollars awarded pre- and post-promotion

Position applied to:	Gender		Grants/faculty member/per year	Grants/faculty member/per year
	# male	# female	Pre-promotion (mean)	Post-promotion (mean)
Panel A: Department of Pharmacy Practice				
Full Professor (tenure) (n=3)	3		718,578	1,767,124
Associate (tenure) (n=1)		1	7,000	73,500
Associate (non-tenure) (n=6)	2	4	55,342	153,570
Panel B: Department of Pharmaceutical Sciences				
Full Professor (tenure) (n=2)	2		3,536,777	9,424,375
Associate (tenure) (n=4)	3	1	692,255	755,744

Against HB 1446

House Bill 1446 seeks to destroy higher education in North Dakota, and with it, freedom of speech, freedom of enquiry, and the ability to innovate, create, adjust to changing circumstance. Indirectly then, it also helps destroy the state by making it static. Without freedom of thought provided by tenure, and without the ability to keep a job at a university, the following are likely to happen and why:

- Higher Education has long been touted an engine of economic growth for the state. This is because it generates a tremendous amount of income itself, but also because it is an idea factory. Those ideas come from an educational environment that introduces students to the latest ideas, across the disciplines, and affords them both the skills and the space to work with those ideas for themselves. Take away the free play of ideas, you limit student ability to work conceptually with ideas, think creatively, go boldly. You hurt innovation across disciplines.
- Like all business models, NDUS must showcase itself as a good place to work. That is a challenge, given our traditionally low salaries. But tenure has allowed us to continue recruiting top flight faculty, because that is often more important to them than a high salary, a big city, lots of flash. Faculty spend many years of their lives dedicated to study in their disciplines, and so what they most want to do is settle down, use their study, work in their disciplines. Money, lots of things to do—these are almost always secondary considerations for faculty. And what is primary? The ability to work in a field, think in a field, have colleagues in a field, and communicate ideas in a field, and work with students also interested in their disciplines. Anything that delimits a faculty member's ability to work in their field turns them way away, quickly away. If not, they are not the right kind of faculty member to begin with, because they do not consider their fields important. HB 1446 delimits a faculty's ability to freely work in their disciplines.
- Like any business model, NDUS needs to be able to show young professionals seeking work within the institution that they can have a future within the institution. They need to know they can grow old in the job, develop prestige with a sense of place, become respected, contribute, know and be known in a world of work. HB 1446 will lop off the imagined stable future our young faculty hope to have, because it will definitely show them that there is no future, that at a certain point in their careers, right when they are settling, they can be arbitrarily fired through no fault of their own—perhaps only to balance the budget. Who would devote 10 years of graduate study to then settle in to an unsettling place? No one worthy hiring.

I urge you to stand up for North Dakota, Democracy, Freedom, and Innovation, and for respect, by voting against HB 1446. Sincerely, Robert Kibler

Written Testimony
Submitted in Opposition to House Bill 1446
by Dr. Anastassiya Andrianova

Honorable Chairman Schauer, Vice Chairman Strom, and Members of the Government and Veterans Committee:

My name is Anastassiya Andrianova, and I am submitting this testimony **in opposition to House Bill 1446, relating to tenure review**. I am a tenured associate professor at North Dakota State University (NDSU) in the Department of English. I started at NDSU in 2014 and was granted tenure in 2020. I served for 2 years on my department's Promotion, Tenure, and Evaluation (PTE) Committee. I also currently serve as the President of the Faculty Senate, which strongly endorses the principles of shared governance. As someone who has knowledge and experience with the tenure process, I write on my own behalf and *not* on behalf of NDSU. In addition to my personal testimony, I am also submitting the statement in opposition to this bill approved by the Executive Committee of the NDSU Faculty Senate, which I chair.

I understand that there is some concern among North Dakota taxpayers about the academic tenure process at institutions under the control of the State Board of Higher Education (SBHE), as well as the financial accountability of post-tenure faculty. I truly appreciate you taking the time to inquire into this matter. However, I am opposed to HB 1446 that would grant university presidents unilateral power to review and fire tenured faculty without appeal. Below I provide four reasons:

1. Academic tenure is different from the private sector and is tied to academic freedom, a fundamental faculty right and one of the criteria for accreditation.

According to SBHE [Policy 605.1](#), "The purpose of tenure is to assure academic freedom." The duties and rights related to academic freedom are set forth in SBHE [Policy 401.1](#), and the [1940 Statement of Principles on Academic Freedom and Tenure](#) (Rev. 1990), adopted by the American Association of University Professors and the Association of American Colleges. It is precisely due to tenure that faculty can weigh in on matters of management and finance that are of vested interest to ND taxpayers, even if it places them at odds with upper administration. Making tenured faculty feel vulnerable and fear retaliation will result in them becoming less willing to hold their institutions accountable. Because it would grant NDUS presidents the unilateral power to fire tenured faculty without appeal, HB 1446 can be seen as targeting whistleblowers.

Academic freedom is, moreover, one of the criteria for accreditation by the Higher Learning Commission (HLC), NDSU's accreditation body. As per HLC [Criterion 2: Integrity: Ethical and Responsible Conduct](#), an accredited "institution is committed to academic freedom and freedom of expression in the pursuit of truth in teaching and learning" (Section D), and its "governing board preserves its independence from undue influence on the part of donors, elected officials, ownership interests, or other external

parties” (Section C, item 4). HB 1446 can be seen as infringing on academic tenure by “external parties” (i.e., the state legislature) and therefore puts NDUS institutions of higher education at risk of losing their accreditation.

2. The existing policies and procedures for faculty promotion, tenure, and review ensure ethical review, rigorous screening, and multiple checks and balances.

These policies, which include post-tenure review, are: SBHE [Policy 605.1: Academic Freedom and Tenure; Academic Appointments](#) and NDSU [Policy 352: Promotion, Tenure and Evaluation](#).

HB 1446 is meant “to improve the tenure process,” but this process is not broken. Academic tenure takes 6 years, including an intradepartmental third-year review, and it requires a series of independent reviews of a faculty member’s teaching, research, and service at multiple levels: the department PTE committee; the department chair; the college PTE committee; the college dean; and the university provost. At a minimum, that involves 12 individuals. Although specific criteria vary by academic department and discipline, some also involve external reviewers to ensure rigorous, fair, and ethical review. In English, that means 3 other external individuals weigh in on a faculty member’s research. The tenure process is not finalized until the SBHE confers tenure.

3. The proposed bill infringes on shared governance by granting a university president the unilateral power to terminate tenured faculty without appeal or review. There already exist fair policies for tenured faculty termination/dismissal.

The NDSU Faculty Senate upholds the [principles of shared governance](#), which are articulated in SBHE [Policy 305.1: Institution President Authority and Responsibilities; Contract Terms](#), that “each President shall ensure effective and broad-based participation in the decision-making process from faculty, staff, students, and others in those areas in which their interests are affected” (Section 4.a). Faculty work collaboratively and democratically with staff and students on matters of mutual interest for the betterment of the university.

What’s more, there already are policies for tenured faculty termination under SBHE [Policy 605.1](#) due to financial exigency, “upon discontinuance of the program in which the faculty member is employed” (Section 7). Under NDSU [Policy 350.3: Board Regulations of Nonrenewal, Termination or Dismissal of Faculty](#), the appointments of tenured faculty may be terminated “following a determination by the Board that a financial exigency exists which requires such an action at an institution or institutions,” which may include loss of appropriated funds, loss of programs, or elimination of courses (Section 6). Further, according to the same NDSU [Policy 350.3](#), “A faculty member may be dismissed at any time for adequate cause,” which includes inadequate teaching, unsatisfactory performance reviews, neglect of duty, and other failures to perform responsibilities (not covered under disability protections), as well as significant violations of Board policy (Section 8). However, faculty also maintain the

right to appeal the recommendation for dismissal to the Standing Committee on Faculty Rights within 21 calendar days of the dismissal recommendation.

The right to appeal is written into policy to safeguard against unfair treatment. The absence of the faculty's right to review or appeal makes HB 1446 undemocratic, unfair, and will likely result in costly lawsuits.

If there exists a perception that faculty are not held accountable post-tenure, let me assure you that there are mechanisms already in place—all the way up to the dismissal procedure described above. Universities have a number of administrators: chairs, deans, and other chief academic officers (vice provosts, provosts) who regularly evaluate faculty, pre- and post-tenure, and in cases where it is warranted, academic contracts may be renegotiated to adjust workloads (research, teaching, and service) to better reflect faculty productivity. Faculty and their supervisors can be trusted, and again, if such adjustments do not produce satisfactory results and “adequate cause” for termination is found, there are already policies and procedures for dismissal.

- 4. If enacted and extended to all 11 campuses in the system, this bill would have a devastating impact on faculty well-being, recruitment, and retention; the prestige of the university system; the well-being, recruitment, and retention of students; and, in effect, on workforce development and the overall economy of North Dakota.**

Simply put, this bill will be a serious blow to our state's workforce.

Although, in its current form, HB 1446 enacts a “four-year pilot program” that is “focused on” Dickinson State University and Bismarck State College, and says that the pilot “may not apply to a research university” like NDSU, the bill also references the new review and firing powers of *each* university president under the control of the SBHE.

Making tenure vulnerable to the whims of a university president would deter prospective researchers and teachers from coming to our state and would also have a chilling effect on current faculty and students. I suspect that faculty will leave in droves. This legislation has already made national news, shining a negative light on the NDUS system in an *Inside Higher Education* [article](#) and in *Forbes*, among others. If enacted, it would result in wide-ranging economic losses to the university system and to the state as a whole, with faculty lines lost and/or not filled, and with a related hit to the quality of teaching and learning deeply impacting our students. The effects of low morale will likely spread to staff, as well. Without faculty, staff, and students, we cannot run universities.

Therefore, I strongly urge you to vote **DO NOT PASS on HB 1446**.

Thank you for your consideration.

Dr. Anastassiya Andrianova, PhD



FACULTY SENATE
EXECUTIVE COMMITTEE

February 1, 2023

**Statement Against the Proposed Emergency-Measure House Bill 1446
Relating to a Pilot Program for Tenured Faculty Review
at Institutions of Higher Education**

The proposed House Bill 1446 ([HB 1446](#)) stipulates that the president of each institution of higher education under the control of the State Board of Higher Education (SBHE) “may review performance of any or all of the duties and responsibilities [...] of any faculty member holding tenure at any time the president deems a review is in the institution’s best interest” (Section 2.1), and that a university president “may not renew the contract of the tenured faculty member, unless the president specifically articulates why it is in the interest of the institution to continue to employ the faculty member” (Section 2.3). HB 1446 further stipulates that a university president’s review of tenured faculty under the control of the SBHE “is not appealable or reviewable by a faculty member or faculty committee” (Section 2.6).

If enacted, HB 1446 will have negative consequences on faculty retention and recruitment and on the quality of teaching and learning. By targeting tenure and academic freedom, it places an institution of higher learning at risk of losing its accreditation. The overall impact of HB 1446 will be detrimental to workforce development and the overall economy of North Dakota.

Therefore, the Executive Committee of the Faculty Senate (FSEC) of North Dakota State University (NDSU) fully supports the North Dakota University System Council of College Faculties’ (CCF) Resolution in Opposition to HB 1446, approved on January 31, 2023, and urges Chairman Shauer and Members of the Committee on Government and Veterans Affairs to vote “do not pass” on HB 1446.

Rationale

The process of acquiring tenure takes six years. It is conducted ethically, with multiple checks and balances, including at the level of the President, and in accordance with SBHE [Policy 605.1: Academic Freedom and Tenure; Academic Appointments](#) and NDSU [Policy 352: Promotion, Tenure and Evaluation](#). These policies also specify procedures for post-tenure review that ensure accountability for tenured faculty’s performance of contractual duties and responsibilities, and the general terms and conditions for faculty termination and appeal.

The FSEC upholds SBHE [Policy 605.1](#), according to which “[t]he purpose of tenure is to assure academic freedom.” The duties and rights related to academic freedom are set forth in [SBHE](#)

[Policy 401.1](#) and the [1940 Statement of Principles on Academic Freedom and Tenure](#) (Rev. 1990), adopted by the American Association of University Professors and the Association of American Colleges.

Academic freedom is one of the criteria for accreditation by the Higher Learning Commission (HLC), NDSU's accreditation body. According to HLC [Criterion 2: Integrity: Ethical and Responsible Conduct](#), an accredited "institution is committed to academic freedom and freedom of expression in the pursuit of truth in teaching and learning" (Section D), and its "governing board preserves its independence from undue influence on the part of donors, elected officials, ownership interests, or other external parties" (Section C, item 4).

Finally, the FSEC upholds the NDSU Faculty Senate's [guiding principles for shared governance](#), which reiterate SBHE [Policy 305.1: Institution President Authority and Responsibilities; Contract Terms](#) that "each President shall ensure effective and broad-based participation in the decision-making process from faculty, staff, students, and others in those areas in which their interests are affected" (Section 4.a).

Approved by the Voting Members of the Faculty Senate Executive Committee

Dr. Anastassiya Andrianova, *Faculty Senate President*

Dr. Florin Salajan, *Faculty Senate Past President*

Dr. Warren Christensen, *Faculty Senate President-Elect*

Dr. Eric Berg, *College of Agriculture, Food Systems, and Natural Resources*

Dr. Pamela Emanuelson, *College of Arts, Humanities, and Social Sciences*

Dr. David Hong, *College of Business*

Dr. Jerry Gao, *College of Engineering*

Dr. Karla Haug, *College of Health Professions*

Dr. Ryan McGrath, *College of Human Sciences and Education*

Dr. Mila Kryjevskaja, *College of Science and Mathematics*

Dear Chairman Schauer and members of the Government and Veterans Affairs Committee,

We write to you on behalf of the Council of College Faculty (CCF), which represents faculty from all 11 North Dakota University System (NDUS) campuses.

We have serious concerns about HB 1446 and encourage your committee to not pass this bill.

This legislation is unnecessary and based on misconceptions about the post-tenure review of faculty. Current SBHE [Policy 605.1](#) outlines the purpose of tenure and requires each campus to establish procedures for the *continued* evaluation of faculty after receiving tenure. Tenure is not an entitlement and does not confer unconditional employment.

While HB 1446 is written as a pilot program, the bill's authors have made it clear in public statements that they would like to see the bill's provisions expanded to all NDUS campuses.

By mandating each faculty member meet a certain level of tuition generation and teach/advise a certain number of students, this legislation would undermine important small programs and classes, such as graduate programs and labs, that are vital to meeting the workforce development needs of our state. This mandate may also result in the loss of accreditation and closure of key programs (e.g., nursing and healthcare; aviation; and others).

Some campuses have experienced significant faculty turnover in recent years, and this legislation, which has already resulted in negative national press, would undermine our efforts to recruit and retain the most competitive faculty.

These, and other concerns, are elaborated on in the following resolution, which was discussed and approved by the Council of College Faculty (CCF) on January 31, 2023.

This is a bill that would have long-term negative impacts on our university system. We urge your committee to not pass HB 1446.

We would be happy to answer any questions you might have about current post-tenure review processes and the potential impact of this legislation.

Sincerely,

The Council of College Faculties Executive Committee

Derek VanderMolen (Williston State College) - CCF President

Daphne Pedersen (University of North Dakota) - CCF Vice President and AAC representative

Jessica Santini (Lake Region State College) – CCF Secretary and Blackboard Governance rep

Rachelle Hunt (Valley City State University) – Parliamentarian and SAC representative

Lisa Montplaisir (North Dakota State University) – Faculty Representative to the SBHE

Andy Bertsch (Minot State University) - Immediate past CCF President

Jeff Hart (North Dakota State College of Science) – Immediate past SAC Rep and CCF Parliamentarian

Richard Millspaugh (University of North Dakota) - Immediate past CCF Secretary

Elizabeth Legerski (University of North Dakota) – Immediate past Faculty Rep to the SBHE

North Dakota University System Council of College Faculties

Resolution in Opposition to HB 1446

RATIONALE:

WHEREAS SBHE [Policy 605.1](#) outlines the purpose of tenure, which is to protect academic freedom, it also requires campuses to establish procedures for the continuing evaluation of faculty following tenure. These criteria include assessing faculty teaching, scholarship or creative activity, and service. How annual evaluations are conducted varies by campus due to variability in organizational missions and structures, but they generally involve review by a committee of faculty and the approval of multiple administrators such as a Department Chair, College Dean, and/or Provost or VP. Existing SBHE policy requires each NDUS institution to establish procedures and criteria for continued evaluation. Additionally, Higher Learning Commission accreditation and evaluation for re-accreditation requires regular evaluation of faculty by each institution as described in [Criterion 3D](#). While tenure provides a sense of financial stability for faculty through continuous employment, it does not prevent faculty from being dismissed with adequate cause or under extraordinary circumstances as described in SBHE [Policy 605.3](#); and

WHEREAS section 1.1 of HB 1446 imposes on several NDUS institutions requirements that individual faculty generate more tuition or grant revenue than their salary and benefits, this fails to recognize how universities operate with each unit contributing to and supporting the functioning of the whole. While some courses are large and generate a lot of tuition revenue, many specialized courses and labs are small. The costs of these courses are offset by larger classes. Graduate courses and those with more hands-on and technical training, for example, tend to have smaller class sizes, which are more costly. Faculty salaries also vary a great deal by discipline, which makes the burden of this requirement more difficult to meet in healthcare, business, and technology programs where faculty are paid more because professionals in these fields can make substantially more in private industry; and

WHEREAS accreditation standards for some programs, such as nursing, for example, require faculty-student ratios that may be lower than those of other programs, section 1.3 of the bill, which mandates that faculty “teach and advise a number of students approximately equal to the average campus faculty teaching and advising load,” may impact program accreditation from the Higher Learning Commission and/or other accrediting bodies, resulting in the loss of training programs critical to meeting the workforce needs of the state; and

WHEREAS dismissal procedures for tenured faculty members are already stipulated in [SBHE Policy 605.3](#), HB 1446 would grant the unilateral review and dismissal of faculty by campus presidents and removes guarantees for reasonable dismissal procedures, including a written assessment of the faculty member’s performance and the right to appeal a decision. Such a

policy is not only undemocratic but would likely also result in costly lawsuits. By usurping current termination processes established through campus structures of shared governance, this policy also creates greater burdens for campus presidents, the SBHE, and the Chancellor; and

WHEREAS the NDUS generates [billions of dollars in revenue for the state](#), it is vital that we maintain positive faculty morale in order to recruit and retain a vibrant workforce on our campuses, grow student enrollments, and provide the educational programming needed to meet the state's workforce needs. A tenured faculty is essential to student recruitment efforts, particularly within professional and graduate programs. If passed, HB 1446, which has already generated substantial negative press in the national media (see [Forbes](#), [Inside Higher Ed](#)), will act as a deterrent to new faculty hires, undermine faculty morale across the NDUS, and cause faculty to look for employment at other institutions of higher ed and in other states that recognize the value of tenure and shared governance.

RESOLUTION:

THEREFORE BE IT RESOLVED that the ND Council of College Faculty (CCF) opposes HB 1446 and asks the various bodies and committees of the ND Legislature to not pass this bill.

BE IT FURTHER RESOLVED that the ND CCF stands in solidarity with our colleagues at Dickinson State University and Bismarck State University, who would be most immediately and directly impacted by this legislation.

BE IT FURTHER RESOLVED that the ND CCF steadfastly upholds the values of tenure and shared governance as core principles of higher education.

BE IT FURTHER RESOLVED that the ND CCF resolutely rejects any attempts to remove tenure or undermine shared governance in the evaluation processes and grievance protections currently in place.

BE IT FURTHER RESOLVED that the ND CCF affirms the American Association of University Professors [1940 Statement of Principles on Academic Freedom and Tenure](#) (Rev. 1990), which has been endorsed [by more than 250 scholarly and education groups](#).

Adopted by the ND CCF on January 31, 2023.

February 2nd, 2023

My name is Kelsey Menge and I serve as an Assistant Professor of Speech Communication at Bismarck State College.

I write in **opposition** to **House Bill 1446** for the following reasons:

1. H.B. 1446 eliminates due process rights of faculty members in the NDUS system and gives total control to an institution's president to terminate a tenured faculty member without an appeal process, and the president and/or administrator can do so with fear of reprisal or retaliation.
2. Currently, all tenured faculty are still subject to yearly performance reviews and additional teaching observations, through the channels of Assistant Deans, and require the signature approval of Academic Deans, and the Vice President of Academic Affairs. No faculty member goes without an evaluation each academic year.
3. Not only does this violate due process rights, but a factor of **shared governance** is also eliminated. In higher education, shared governance is defined as "structures and processes through which faculty, professional staff, administration, governing boards, and sometimes students and staff, participate in development of policies and in decision-making that affect the institution." It is clear the sponsor of this bill, Representative Lefor, does not understand shared governance in higher education. Rep. Lefor stated on January 21st, 2023 in "Coffee with Legislators" that he does not believe in "shared governance." This proves to be concerning as shared governance is a factor for accreditation.

The NDUS system is accredited through the Higher Learning Commission. The Higher Learning Commission (HLC) is an independent corporation that was founded in 1895 as one of six regional accreditors in the United States. HLC accredits degree-granting post-secondary educational institutions in the United States. HLC is as an institutional accreditor, accrediting the institution as a whole.

One of the criteria components for accreditation through the HLC is **shared governance**:

5.A. Through its administrative structures and collaborative processes, the institution's leadership demonstrates that it is effective and enables the institution to fulfill its mission.

Shared governance at the institution engages its internal constituencies—including its governing board, administration, faculty, staff and students—through planning, policies and procedures.

The institution's administration uses data to reach informed decisions in the best interests of the institution and its constituents.

The institution's administration ensures that faculty and, when appropriate, staff and students are involved in setting academic requirements, policy and processes through effective collaborative structures.

<https://www.hlcommission.org/About-HLC/about-hlc.html>

If an institution does not meet the requirements of the Higher Learning Commission, the institution can lose federal financial aid, students cannot transfer credits to another school, and students may not obtain professional licensure in their field.

4. The institutions of Dickinson State University and Bismarck State College were chosen as pilot schools due to the nature of new mission statements. HLC evaluates an educational institution in terms of its mission. There is no evidence to support the new mission statement has an impact on the effective teaching and performance of tenured faculty.
5. The emergency nature of the bill is concerning. If Rep. Lefor considers this an emergency, we need evidence to determine *why* it is an emergency.

In sum:

H.B. 1446 is unconstitutional, unnecessary, and flawed. If Rep. Lefor wants to aid in the improvement of the tenure process, he should do so by:

- A. Addressing the State Board of Higher Education with concerns
- B. Seeking out feedback from faculty members of NDUS institutions
- C. Research accreditation policies and shared governance
- D. Provide evidence supporting the claims that this bill is needed for the mission change of the two pilot schools, in addition to the emergency measure

I strongly recommend the Education Committee give **H.B. 1446 a do not pass** recommendation.

Please do not hesitate to contact me with any questions or concerns.

Thank you for your time and service to the state of North Dakota.

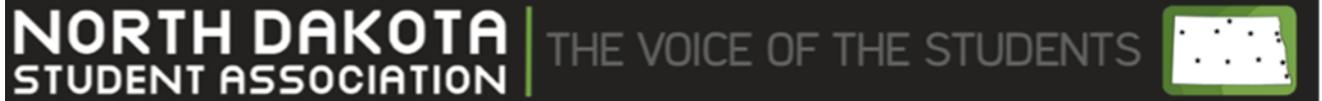
Sincerely,

Kelsey Menge

Assistant Professor of Speech Communication

Bismarck State College

kelsey.menge@bismarckstate.edu



HB 1446

February 3rd, 2023

Adelyn Emter, North Dakota Student Association

(701)260-6246 | adelyn.emter@ndus.edu

Chair Kasper and Members of the Committee: My name is Adelyn Emter, and I am the Chief of Staff for the North Dakota Student Association (NDSA). I am here today in opposition of HB 1446.

The North Dakota Student Association is dedicated to ensuring that students have a voice at the table in policy that affects higher education. We consist of delegates from each of the 11 public North Dakota University System (NDUS) institutions, meeting monthly to engage students in discussions about North Dakota higher education policy. Since 1969, our mission has been to empower students, create collaboration between the student bodies of the North Dakota public universities, and to give a student perspective on higher education policy. In addition to representing the NDSA, I have collaborated with the Student Senate of Dickinson State University (DSU) in an effort to ensure the impacted university's voices are heard.

One prominent concern we have is the impact [HB 1446](#) would have on NDUS schools' institutional accreditation status. All universities are required to be accredited under North Dakota Century Code 15-18.1-05, and there are two core components enumerated under this statute put at risk by this legislation. First, institutional governance must engage its internal constituencies, including its governing board, administration, faculty, staff, and students. Second, the institution's administration must ensure that faculty are involved in setting academic requirements, policy, and processes through effective collaborative structures. The institution's accreditation through the Higher Learning Commission requires institutions to meet and demonstrate these core components. If the bill takes faculty decision making away from the

process of tenure, these components are in jeopardy under Section 2 of [HB 1446](#). If institutions cannot meet these standards, they could lose accreditation, and risk closure.

As written in [Article VIII of the North Dakota State Constitution](#), the State Board of Higher Education (SBHE) is to have full authority over the institutions it controls. [HB 1446](#) ignores and encroaches on the authority constitutionally granted to the SBHE, setting a dangerous precedent for the legislature to have unchecked control over higher education. Currently, individual institutions and the SBHE uphold a set of standards and only approve tenure after a 6-to-7-year probationary period of full-time work and satisfactory performance. As mentioned in Daniel Rice's testimony, after tenure is granted, faculty are still subject to periodic performance review and may be terminated for valid reasons as outlined in policy approved by the SBHE.

This bill would not "improve tenure," but rather would severely restrict tenure opportunities at Bismarck State College and Dickinson State University. According to the [American Association of University Professors](#), the purpose of academic tenure is to protect the academic freedom of faculty to teach and conduct research for the benefit of society. This bill is modeled on a corporatized system; however, the purpose of tenured faculty is not to generate profit for an institution but rather to teach and discover knowledge for the service of society. [HB 1446](#) would strip tenured faculty of the right to appeal administrative decisions and the right to seek legal redress for wrongful termination, granting campus presidents absolute authority to unilaterally terminate tenured faculty members at will. All state employees, including faculty at NDUS institutions, must have the right to due process when facing a change in contract or employment termination.

The passage of this [HB 1446](#) will also significantly increase the severe challenges the North Dakota University System (NDUS) is facing with recruiting and retaining talented faculty to our state and will add to the workforce shortage in North Dakota. The NDSA has historically supported a variety of initiatives focused on staff and faculty retention, including in [NDSA-12-2223](#) discussing the Higher Education Budget Allocation for the 23-25 Biennium, and [NDSA-15-2223](#) in opposition to the removal of the civil service defined benefit system. [HB 1446](#) may force institutions to find new faculty members who are willing to accept an unsure fate where tenure is concerned. The significant negative impact on faculty retention would critically disadvantage North Dakota institutions by failing to provide faculty with competitive career

opportunities in the American workforce. Not only does this put institutions at risk where “profit” is concerned, but it also negatively affects students. As students, we should have the right to education and should not fear whether or not there will be faculty around to teach our classes and help us receive our degrees. If this decision is meant to be “for profit” the affected institutions will lose income from students who withdraw and choose to enroll at a more secure institution instead. Prospective students whose department of study is no longer available because there are not enough faculty will also be deterred, reducing the overall student population, and harming surrounding communities as well.

On behalf of the North Dakota Student Association and students across the NDUS, I urge the committee to provide a Do Not Pass recommendation on [HB 1446](#).

I (writing on my own behalf) have serious concerns about HB 1446 and encourage your committee to NOT pass this bill. This legislation is unnecessary and based on misconceptions.
NDSU/tenured faculty



February 2, 2023

House Government and Veterans Affairs Committee
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

RE: FIRE's concerns regarding HB 1446

Dear Chairman Schauer & Members of the Committee,

My name is Greg Gonzalez and I am Legislative Counsel for the Foundation for Individual Rights and Expression (FIRE), a nonpartisan, nonprofit organization dedicated to protecting the free speech and due process rights of students and faculty at our nation's institutions of higher education. FIRE's Joe Cohn previously worked closely with the North Dakota legislature on the state's [campus free speech](#) and [campus due process](#) legislation – two bills that have made North Dakota a national leader in campus civil liberties. We write today to express our concerns with a bill before the House Government and Veterans Affairs Committee, [HB 1446](#).

FIRE understands the desire to ensure that public dollars spent on higher education are utilized wisely to the benefit of the students enrolled and the state. However, it is important to remember that higher education loses its value when faculty do not have the academic freedom necessary to teach and conduct research that enriches our understanding of the world, free from political interference. Similarly, American society as a whole suffers when faculty do not enjoy the First Amendment right to criticize campus bureaucracies.

Unfortunately, Section 1(4)(c) of the proposed legislation would impose upon tenured faculty the obligation to “exercis[e] mature judgment to avoid inadvertently harming the institution, especially in avoiding the use of social media or third-party internet platforms to disparage campus personnel or the institution.” This requirement would effectively empower institutions to take adverse action against tenured faculty for their protected expression online, including criticizing campus administrators or commenting as private citizens

on matters of public concern. Section 1(4)(c) runs afoul of the First Amendment and must be removed if the bill is to pass constitutional muster.

The bill also weakens tenure. FIRE does not take a position on specific tenure policies or on whether it should be guaranteed under state law. However, we recognize that tenure has historically played a central role in protecting the academic freedom of faculty members across our nation.

For decades, the Supreme Court of the United States has recognized the vital importance of academic freedom for faculty members at public institutions of higher education. In [*Sweezy v. New Hampshire*](#), 354 U.S. 234, 250 (1957), a landmark case protecting academic freedom, the Court wrote:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. 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.

Ten years later, in [*Keyishian v. Board of Regents*](#), 385 U.S. 589, 603 (1967), the Court again underscored our national interest in protecting academic freedom:

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.

In light of the essentiality of academic freedom for the proper functioning of our public colleges and universities and the society they serve, FIRE has defended the academic freedom of faculty at institutions nationwide since our founding in 1999.

Accordingly, we are concerned by Section 2(1) of the bill, which would weaken tenure protections. In relevant part, Section 2(1) provides:

The president of each institution of higher education under the control of the state board of higher education may review performance of any or all of the duties and responsibilities under section 1 of this Act of any faculty member holding tenure at any time the president deems a review is in the institution's best interest.

While the contours of post-tenure review processes can and do vary among institutions, it is vital for academic freedom that such reviews do not become a vehicle for the intrusion of politics into the academic process. Under the proposed legislation, however, the president of each institution of higher education in the state, who are appointed by the State Board of Higher Education — who are themselves political appointees of the governor — will wield significant authority over each member institution's post-tenure review policies. Such a process invites political considerations into post-tenure review and threatens to subject faculty to the “pall of orthodoxy” about which the Supreme Court warned in *Keyishian*.

Compounding the threat, Section 2(6) denies faculty the ability to appeal the president's decision: “A review under this section is not appealable or reviewable by a faculty member or faculty committee.”

It is unjust to accord total deference to a president's determinations even when the factual conclusions are erroneous. Any statute or policy that allows for the removal of a tenured professor must allow for a meaningful appeal. To protect faculty from unjust termination and to avoid costly litigation, the legislation must be amended to provide some mechanism for tenured faculty members to appeal the decision to revoke their tenure and terminate their contracts.

Additionally, if there is concern amongst the Legislative Assembly that the academy is lacking in viewpoint diversity, weakening tenure will not solve this problem and may even exacerbate it. After all, it is those who hold minority or dissenting viewpoints who are often most in need of tenure's protections.

In a noteworthy 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. Citing “standards of personal and professional excellence,” Marquette suspended the professor and revoked his tenure. After nearly three years of litigation, the [Wisconsin Supreme Court ruled](#) that the university had violated the professor's academic

freedom rights, in a manner that would effectively nullify tenure, and ordered him reinstated. *McAdams v. Marquette Univ.*, 383 Wis. 2d 358 (Wis. 2018).

As the Marquette University example illustrates, diluting tenure empowers administrators to target faculty holding disfavored views. Unfortunately, the Marquette case is not an isolated example. FIRE's archives and our [Scholars Under FIRE database](#) demonstrate that threats to faculty rights are a persistent problem affecting faculty of every political persuasion. Because tenure has proven crucial to protecting the rights of faculty with dissenting positions, we urge the Committee to reject language that would reduce its effectiveness in safeguarding academic freedom.

For these reasons, FIRE urges the committee to make substantial revisions to HB 1446 to safeguard academic freedom. If our concerns remain unaddressed and the bill advances, we will oppose its passage. Thank you for your time and consideration.

Best regards,

A handwritten signature in black ink, appearing to read "Greg Y. Gonzalez", with a long horizontal flourish extending to the right.

Greg Y. Gonzalez
Legislative Counsel

cc: Majority Leader Mike Lefor



555 New Jersey Ave., NW, Suite 600, Washington, DC 20001
PHONE: 202.737.5900 • www.aaup.org

HB 1446:

Testimony in opposition to a pilot program for tenured faculty review at institutions of higher education

Irene Mulvey, Ph.D.

President, American Association of University Professors

Dear chairman and members of the House Government and Veterans Affairs committee:

We submit testimony today in opposition of HB 1446 and urge you not to pass this bill, which would undermine tenure and academic freedom in North Dakota higher education. Founded in 1915, the American Association of University Professors, a non-profit membership association, has helped to shape American higher education in service of the common good by developing principles and standards on academic freedom, tenure, and governance. Many of the AAUP's key recommended principles and standards, often formulated in cooperation with other higher education organizations, have become widely accepted at both public and private colleges and universities. Many institutions of higher education, for example, incorporate into their regulations the [1940 Statement of Principles on Academic Freedom and Tenure](#), which the AAUP formulated in cooperation with what is now the American Association of Colleges and Universities, an organization of presidents and which more than 250 scholarly societies and higher-education organizations have endorsed.

We note that North Dakota State Board of Higher Education policies include the following references to the 1940 *Statement*: "The State Board of Higher Education recognizes, as set forth in the 1940 *Statement of Principles on Academic Freedom* adopted by the American Association of University Professors with 1970 Interpretive Comments, the essential nature of academic freedom and responsibility to the institutions under its control, and reaffirms its commitment to ensuring that the institutions of the NDUS shall foster a free and open academic community for faculty members, students, and all other NDUS employees who engage in scholarly work" (SBHE 401.1) and "The purpose of tenure is to assure academic freedom. Academic freedom applies to all scholarly pursuits. Freedom in scholarship is fundamental to the advancement of knowledge and for the protection of the rights of the faculty members and students. It carries with it duties and responsibilities correlative with rights. These duties and rights are set forth in SBHE Policy 401.1, relating to academic freedom, and the 1940 *Statement of Principles on Academic Freedom and Tenure* with 1970 Interpretive Comments, adopted by the American Association of University Professors and the Association of American Colleges" (SBHE 605.1)

The 1940 *Statement* asserts that "institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole" and that the common good "depends upon the free search for truth and its free exposition." Academic freedom is therefore "essential to these purposes and applies to both teaching and research" and "carries with it duties correlative with rights."

The AAUP has thus long recognized that

- The central purposes of higher education are the pursuit of truth, the discovery of new knowledge, the study and reasoned criticism of intellectual and cultural traditions, the teaching and general development of students to help them become creative individuals and productive citizens of a constitutional republic, and transmission of knowledge and learning to society at large.
- Free inquiry and free speech with the academic community are indispensable to achieving these central purposes

Under the 1940 *Statement*, the purpose of tenure—which the AAUP understands as an indefinite appointment that can be terminated only for adequate cause or under extraordinary circumstances on grounds of financial exigency or program discontinuance—is to protect academic freedom. It is thus “indispensable to the success of an institution in fulfilling its obligations to its students and to society.”

In practical terms, tenured faculty members, unlike faculty members serving on renewable term appointments, do not have to undergo reappointment every year but have some assurance of continued employment as long as they continue to perform their responsibilities competently and ethically. This security allows them to follow their best professional judgment and the standards of their discipline in conducting their research and teaching their students without having to fear they will lose their jobs for reasons that have nothing to do with the quality of their work. In our 108 years, our Association has investigated and issued reports on hundreds of cases in which faculty members were summarily dismissed for reasons that had nothing to do with the quality of their teaching or research but frequently because someone with power over them found their words or ideas offensive.

Contrary to myth, however, tenure is not a guarantee of lifetime employment. A tenured appointment can be terminated for the reasons mentioned above, and tenure assuredly does not protect incompetence or misconduct. As SBHE 605.3 states, before enumerating six general grounds for dismissal, “A faculty member may be dismissed at any time for adequate cause.”

Under the 1940 *Statement* and derivative AAUP policy documents, dismissal for cause requires a procedure that depends on peer review, based on the assumption that professional peers are best suited to pass judgment on their fellow faculty members and to appreciate the meaning and importance of academic freedom. It also requires the administration to bring charges and to bear the burden of demonstrating in a hearing before a faculty body that the faculty member is professionally unfit. Most colleges and universities have incorporated dismissal procedures that are based on AAUP standards. In North Dakota public higher education, those procedures are set forth in Section 605.3 of the SBHE policy manual.

* * * * *

The provisions of Section 2 of proposed House Bill No. 1446 afford “the president of each institution of higher education under the control of the state board of higher education” the right to review all tenured faculty members within his or her institution, to determine whether “a tenured faculty member has failed to comply with a duty or responsibility,” and unilaterally to “not renew the contract” of such a faculty member. Such a review “is not appealable or reviewable by a faculty member or faculty committee.”

Under this proposed bill, a president would have the power to dismiss any tenured faculty member and that faculty member would be denied any right to appeal to a faculty body, much less the right to the sort of dismissal hearing that makes tenure a reality. Thus, if this bill were to be adopted, it would nullify Section 605.3 of the SBHE policy manual and would eradicate tenure in the covered institutions. In our long history, we have never witnessed a state legislature abolish tenure in its system of higher education.

Since we believe that academic freedom and the benefits it brings to society require the protections of tenure, we would view the eradication of tenure in all or some of North Dakota's public colleges and universities as a fatal blow to academic freedom, with unfortunate consequences for the quality of teaching and research in those institutions, their reputation and competitiveness, their contributions to the state's economy, and their ability to cultivate an educated citizenry. We strongly urge you to not pass this bill.



Great Public Schools

Great Public Service

**Testimony Before the House GVA Committee
HB 1446
February 3, 2023**

Chairman Schauer and members of the House Government and Veterans Affairs Committee, for the record my name is Nick Archuleta, and I am the president of North Dakota United. Respectfully, I rise today to urge a **do not pass** recommendation for HB 1446.

To begin, Mr. Chairman, I find it valuable to cite, in part, the North Dakota State Board of Higher Education's policy on Academic Freedom and Tenure:

"The purpose of tenure is to assure academic freedom. Academic freedom applies to all scholarly pursuits. Freedom in scholarship is fundamental to the advancement of knowledge and for the protection of the rights of the faculty members and students. It carries with it duties and responsibilities correlative with rights..." (605.1 Academic Freedom and Tenure; Academic Appointments, Section 2)

Academic freedom allows our campuses to thrive as centers for free thought and expression, to pursue and debate conflicting ideas openly, and to give students and faculty opportunities to engage in innovative research and scholarship that advances our understanding of the world around us and our ability to address the complex challenges we face. By undermining tenure, HB 1446 would infringe upon this freedom, impacting faculty, students, and our institutions of higher education.

Chairman Schauer and members of the Committee, to be considered for tenure, a faculty member must first complete six years of probationary service to their institution. During these six years, that faculty member's performance is evaluated at least annually by the institution. When a faculty member wishes to apply for tenure status, they must follow a lengthy, thorough process that has been established by their institution to evaluate their scholarship in teaching, contribution to a discipline or profession through research, other scholarly or professional activities, service to the institution and society, and additional criteria as that institution may seem fit. It is important to note that Bismarck State College (BSC), Dickinson State University (DSU), and every other institution in the state is required to design their tenure evaluation and recommendation process in a way that is consistent with the nature and mission of that individual institution. Thus, BSC and DSU already have the ability to match their tenure process with their unique needs and evolving missions. Only after successfully receiving a recommendation from the institution's individual tenure process, a recommendation from the institution's president, and a recommendation from

the Chancellor, may the State Board of Higher Education (SBHE) award a faculty member with tenure.

Mr. Chairman, it is important to note that tenure as it exists in the North Dakota University System (NDUS) today is not an unchecked privilege. Even after being granted tenure, all full-time faculty are required to be evaluated annually, and, if there are unsatisfactory evaluations, institutions are required to take appropriate remedial action. Generally speaking, if an institution is suffering from certain financial issues or if a tenured faculty member is not meeting the responsibilities and duties of their job, they can be terminated. That is the reality under current state law and current SBHE policy. Institutions and the SBHE already have flexibility if they are experiencing financial distress. Accountability for faculty—tenured or not—is already baked into the system. There is no need to further complicate the employee evaluation process. In doing so, unfortunately, this would mean faculty and administrators will have to take even more time out of their regular duties to prepare paperwork, participate in meetings, and more, which will have the effect of minimizing the time faculty will spend educating and supporting their students.

Chairman Schauer and members of the Committee, HB 1446 claims to address the need for accelerating workforce development; however, its approach is misguided. High quality educators are attracted to institutions with reasonable tenure policies because it allows them to engage in research and scholarly pursuits that tackle big issues without fear of retribution. Focusing on solutions to today's biggest problems is made all the more difficult if we restrict free thought and expression. It is difficult to do one's work when one is constantly concerned with the unchecked power of an institution's president.

Members of the Committee, HB 1446 has already attracted national attention that has cast a negative light on North Dakota's institutions of higher learning. If we cannot assure current and prospective faculty that academic freedom is valued and respected in North Dakota, they will look elsewhere for employment. And when that happens, the quality of education will decline, and we will not be able to compete with institutions in other states that do prioritize academic freedom. We must not fail to provide competitive, high-quality education to our students if are to effectively address current and future workforce development issues.

Chairman Schauer, a glaring deficiency of this bill is that it eliminates a meaningful appeals process. The lack of basic due process rights further erodes the confidence of faculty that the important work they do is respected. A proposed amendment to the bill would allow a faculty member to appeal to the Chancellor of the NDUS, but the Chancellor and the SBHE rarely, if ever, override the broad autonomy that campus presidents already hold. If the SBHE is not overturning college presidents' decisions now, how can we be confident that meaningful review of those actions is happening? This so-called appeal would come after a

process that must include a written assessment but contains no guidance on how the faculty member will be assessed besides the vague criteria of Section 1. Faculty will certainly lack understanding and confidence in a process that may produce no clear evidence of how they are falling short, but so will North Dakota citizens. How are we to trust that our institution presidents are using this power appropriately? The SBHE oversees the campus presidents, but how can it oversee a nonrenewal conducted with flimsy documentation and based on a host of vague criteria, including the vague catchall “other relevant factors?” So, I have to ask, if there are already policies and procedures in place to give institutions flexibility in times of financial distress or to address a tenured faculty member who is neglecting their duties and responsibilities, why is HB 1446 even necessary? Could this bill be used to go after faculty who challenge the status quo in the best interests of their students and their institution? Could it have a chilling effect on a faculty member’s willingness to shine a light on fraud or misuse of taxpayer dollars at an institution if they know they could be subject to an abrupt non-renewal of their contract?

Mr. Chairman, I understand there is an amendment to eliminate the language about restricting the online speech of a tenured faculty member. I hope that language is removed, but it points to the overall nature of this bill damaging the free flow of ideas that make our campuses thrive.

Chairman Schauer and members of the Committee, to summarize:

- Tenure in North Dakota already comes with responsibilities and duties that tenured faculty must follow, and SBHE policy provides institutions with flexibility if they are experiencing financial distress.
- All faculty, tenured or not, must be accountable to their students and their school, and SBHE policy already requires that accountability. If BSC, DSU, or other institutions need to adjust their tenure process to better fit their missions, they can already do so.
- There is no need to further complicate the tenure process.
- HB 1446, if enacted, will cloud the reputations of our great North Dakota institutions of higher education, threaten academic freedom, and deter high quality educators from coming to and staying in North Dakota, ultimately preventing our students from receiving the quality of education and opportunities they deserve.

For these reasons, Chairman Schauer and members of the House Government and Veterans Affairs Committee, I respectfully ask for a ***do not pass*** recommendation for HB 1446. This concludes my testimony, and I am happy to stand for questions.

References:

- SBHE Policy 604.3 Performance Evaluations: Benefited Employees
 - o <https://ndusbpos.sharepoint.com/:w:/s/NDUSPoliciesandProcedures/EZndAqyyp0tNqaTsL1IwUugBkgEF1yJqsht4NJQb619Qkw?e=WZBrLg>
- SBHE Policy 605.1 Academic Freedom and Tenure; Academic Appointments
 - o <https://ndusbpos.sharepoint.com/:w:/s/NDUSPoliciesandProcedures/EUaO9faOJShNo04DUaFS3icBPTeEsuTyamvD7nkYCznjsw?e=anHtr2>
- SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty
 - o <https://ndusbpos.sharepoint.com/:w:/s/NDUSPoliciesandProcedures/ERHiZFLrsWNBvnqnYkIDu8EBqqeViwX98aslbJmcAZab6g?e=OpABxB>
- Forbes article
 - o <https://www.forbes.com/sites/michaeltmietzel/2023/01/24/north-dakota-is-about-to-consider-a-really-bad-faculty-tenure-bill/?sh=28f1df891558>

**HB 1446**

Government and Veterans Affairs Committee

February 3, 2023

Dr. Mark Hagerott, Chancellor, NDUS

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Chair Schauer and members of the Government and Veterans Affairs Committee. My name is Mark Hagerott, and I serve as the Chancellor of the North Dakota University System (NDUS). I am here today on behalf of the North Dakota University System and to testify neutral on HB1446. The SBHE met last week and discussed the Bill and did not take a position nor authorized me to take a position at this time. The SBHE leadership had already begun discussions, as early as the May 2022 meeting, on the need to study post-tenure review and did so again at the most recent Board meeting. That said, I would suggest some amendments to the Bill.

While my testimony is neutral and before I suggest amendments, I want to recognize the importance of several of issues Representative Lefor has identified and thank him for beginning this conversation in North Dakota in a thoughtful, open, and constructive manner. I understand that Representative Lefor has already met with faculty of several campuses, spoken to college administrators, and responded to media queries as he has sought to address what he sees as need for reform.

Representative Lefor is not alone on this issue. Multiple states have embarked on a review of the tenure process, and in some cases large states of tens of millions of residents, as well as presidential candidates, governors, and some state legislatures, have taken action on tenure. In contrast to some of these states, Representative Lefor has not denigrated faculty or campus leadership and has not included provisions on what can or cannot be taught. He has focused narrowly on the issues of the financial and human metrics of faculty productivity: how much tuition or grant revenue are associated with their work, and more importantly, how many humans, how many students, has each faculty member taught, mentored, or inspired to action in beginning or continuing their education. Representative Lefor's openness, accessibility, and civility are most appreciated in time of cyber bullying, fake news, and half-truths, which now plague so much of public discourse.

As for suggested amendments. First would be to amend language to give discretion to the SBHE whether or not to conduct a pilot study of post-tenure review at the two colleges in question. As mentioned above, the SBHE has already begun discussions of this subject, so the need for directive legislative language is thus not necessary.

Second, it appears that Representative Lefor has already addressed some of my early concerns through recent amendments. In my role as Chancellor, I believe post-tenure decisions that affect a faculty member should be subject to appeal. I believe an amendment is already in draft, to make faculty decisions subject to appeal at the NDUS office of the Chancellor. I support that amendment.

A third concern relates to perceived infringements of faculty rights to academic freedom and free speech. I understand Representative Lefor's concern with cyber bullying of staff, faculty, and administrators. I have seen first-hand evidence of dedicated faculty and administrators professionally damaged by groundless accusations or half-truths that were shared not with the person in question, but purposely posted online and are now permanent entries affecting innocent faculty, staff, or administrators, on internet platforms, forever. While this Bill is not the place to propose such solutions, and thus I support amendment to remove such language, I believe the Faculty Senates of all institutions and the Council of College Faculty (CCF), should convene a collaborative effort to propose language to the SBHE and update their respective faculty handbooks to address this growing problem. But not in this Bill.

Next, I believe it would be helpful to add an amendment that would provide additional financial support to the institutions, should they be selected for this pilot program. The legislation focuses on faculty productivity. Some faculty or entire departments may be able to enhance their productivity if given additional financial resources to accelerate program startup, buy needed equipment, or hire support staff.

Lastly, I return to my original position: my testimony is neutral in that the SBHE has not authorized me to take a position and did not do so at the most recent SBHE meeting. I would, however, support an amendment to HB1446 that provides discretion to the SBHE to conduct the pilot and a



study of the tenure policy as roughly outlined in the HB1446 and the NDUS would routinely provide progress and results of that work to the legislative assembly.

This concludes my testimony related to HB1446.

House Government & Veterans Affairs Committee

House Bill 1446

Andrew Alexis Varvel

Written Testimony

February 3, 2023

Chairman Schauer and Members of the Committee:

My name is Andrew Alexis Varvel. I live in Bismarck.

One thing I like about the North Dakota Legislature is how every bill receives a hearing and every bill receives a vote on the floor. One of the unavoidable side effects of this policy is that bills such as House Bill 1446 wind up on the agenda.

In colleges and universities, some of their highest salaries get paid to the coaches of successful sports teams. These high salaries come at the expense of job security. Fans are not known for tolerating losing coaches. For similar reasons, the cost of hiring and retaining teaching staff in North Dakota state colleges and universities would skyrocket. Is North Dakota really prepared to massively increase the salaries of professors simply to retain them without job security?

This bill's proposed loss of job security would massively reduce the appeal of North Dakota unless it comes with a massive increase in salaries. Indeed, it is puzzling that House Bill 1446 has not come with a fiscal note appended to it to show just how expensive its effects would become on our state budget.

HB 1446 would put North Dakota on the map, and not in a good way.

There are many other people with more skin in the game, more facts and figures, and more eloquence than yours truly. And yet, I still join their chorus against this piece of legislation. Please provide a DO NOT PASS recommendation for HB 1446.

Andrew Alexis Varvel
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February 2, 2023

Dear Chairman Schauer and members of the Government and Veterans Affairs Committee,

We write to you as the Executive Committee of UND United, the local of ND United (AFT Local #6942) which represents faculty and staff at UND, to express our **opposition to HB 1446**. We have many concerns about HB 1446 and ask your committee to **not pass** this bill.

First, this legislation is unnecessary and based on a number of misconceptions about faculty work. The bill's authors have suggested tenured faculty are not accountable to a supervisor. This is simply false. Tenure may be granted to a faculty member following a probationary period of about 6 years after the faculty member has demonstrated a record of outstanding teaching, research/creative activity, and/or service. Once a faculty member has tenure they are assured continuous employment, but only as long as they continue to meet the duties and responsibilities outlined in their annual contract and only if the resources to support their position remain available. It is in this way that tenure supports academic freedom and ingenuity in research, creative activity, and teaching. If a tenured faculty member fails to meet their obligations or follow policies and procedures they can be dismissed with cause as described in SBHE Policy 605.3.

In addition, current SBHE Policy 605.1 requires each campus to establish procedures for the continued evaluation of faculty after receiving tenure. Higher Learning Commission (HLC) (re)accreditation also requires regular evaluation of faculty by their institution as described in Criterion 3D. Within the university system, all faculty, including tenured faculty, are held accountable to several levels of supervisors, who are responsible for working with their faculty to engage in annual goal setting, contract negotiation, and performance evaluation. These supervisors include a faculty member's department or unit Chair, their college or school Dean, and the Provost or VP who oversees faculty. HB 1446 removes guarantees for reasonable dismissal procedures, including a written assessment of the faculty member's performance and the right to appeal a decision. This consolidates the power to evaluate faculty in the hands of one person who makes a unilateral decision and would likely result in costly lawsuits to our university system.

Second, HB 1446 is written as a pilot program, which implies that after a time the bill's provisions might be expanded to other NDUS campuses. This would have significant negative impacts on our university system. The opportunity to earn tenure acts as an important recruitment tool to attract the best and brightest professionals across the country and provides a level of stability across our university system. While all faculty, including contingent faculty, are an important part of our campus communities, sustaining a vibrant tenured faculty is viewed very positively in the national marketplace of universities, making institutions with more tenured faculty more competitive for research and grant funding opportunities.

Third, HB 1446 includes a number of concerning stipulations that would impact our institutions in detrimental ways. For example, section 1.1 of HB 1446 imposes requirements that

individual faculty generate more tuition or grant revenue than their salary and benefits, and section 1.3 of the bill mandates all faculty “teach and advise a number of students approximately equal to the average campus faculty teaching and advising load.” These requirements do not reflect how universities operate. While some courses are large and generate a lot of tuition revenue, many specialized courses and labs, such as graduate courses and those with more hands-on and technical training, are intentionally small. In fact, accreditation standards for some programs require faculty-student ratios that may be lower than those of other programs. The costs of these smaller courses are offset by larger classes. Faculty salaries also vary a great deal by discipline, which makes the burden of this requirement more difficult to meet in healthcare, business, and technology programs where faculty are paid more because professionals in these fields can make substantially more in private industry. Including such provisions may impact accreditation for some programs and undermines our ability to offer the classes and training needed to meet the workforce development needs of our state.

Finally, the NDUS generates billions of dollars in revenue for our state each year. It is vital that we stabilize faculty turnover and support employee morale in order to recruit and retain the people needed to provide the educational programming required for our students and graduates to meet the state’s workforce needs. A tenured faculty is essential to student recruitment efforts, particularly within professional and graduate programs. HB 1446 has already generated substantial negative press in the national media (see Forbes, Inside Higher Ed, etc.), and if passed, this legislation will deter new faculty hires, undermine faculty morale across the NDUS, and cause faculty to look for new employment in states that value tenure and shared governance.

As a result, we ask your committee to **not pass HB 1446**.

Sincerely,

UND United Executive Committee

Liz Legerski, UND United President
Melissa Gjellstad, Vice President
Daphne Pedersen, Secretary-Treasurer
Kristin Borysewicz, Member-at-Large

Hello. I am Paul Johanson, tenured Dickinson State University faculty member and current Faculty Senate President. Although many faculty members at DSU agree with what I am about to say, I speak only for myself and do not have permission to speak on behalf of DSU.

As is pointed out in other written testimony, the North Dakota State Constitution states the authority over institutions in the university system belongs to the State Board of Higher Education. There is good reason for this, one of which is that the accreditation organization covering this part of the country, the Higher Learning Commission, looks for this hierarchy. In addition, the Higher Learning Commission looks for shared governance (see Criteria 5a in HLC's Criteria for Accreditation), which is something Representative Lefor has stated he is against, and this bill erodes, as it specifically stated that the decision of the university president is not reviewable by any faculty board. Thus, it appears that if this bill becomes law, it threatens our accreditation, which in turn makes it difficult for our students to get grants and loans.

Another concern I have with this bill is its effect on the recruitment and retention of well-qualified faculty. Many of our current faculty have told me that without the ability to gain tenure, they would not have applied to work at DSU. If this bill becomes law, with all of the ways a university president can use to not renew a faculty member's a contract, it threatens what tenure means.

To read this and listen to Representative Lefor, as well as read articles about this bill that DSU President Easton has written, it sounds like we have dozens of tenured faculty sitting around not doing their jobs. This is certainly not the case. The vast majority of the faculty are working hard to help their students learn, serving on committees, and meeting with potential students. Our faculty are already evaluated annually by students and our department chairs, and our deans review these. There are other procedures to remove a tenured faculty member from their position if their behavior warrants it.

In addition, if this bill becomes law, every time you esteemed legislators provide money for raises, you would threaten my job, especially if the institution does not raise tuition, because I would have to make sure I have more students in my classes to cover my salary and benefits. That goes for every time health insurance goes up in cost too. I have heard Representative Lefor say we need to provide raises to attract and retain state employees, as regional average pay in many positions has gone up. Yet those raises threaten my job.

Grade inflation could also go rampant as professors try to fill their courses by giving easy A's. But does that encourage good teaching and learning?

This bill has no provisions for high need areas, such as K-12 educators in mathematics, science and English. Some of the best qualified and experienced professors teach courses designed for majors in those areas. These classes tend to be small in size, which could result in that professor having difficulty showing that their salary and expenses are covered by tuition. Thus, we would either lose those faculty members and that major could be eliminated because that professor would be hard to replace, or the professor would ask their department chair to not assign them

those classes, and again the major may be cut. Then, the local school districts will find it even harder to attract teachers in these areas.

One of the requirements listed for a faculty member to maintain tenure is to have at least the average number of advisees. I will point out this seems to indicate a serious misunderstanding of the word "average". Garrison Keillor used to joke that at Lake Wobegon, "all of the children are above average". It just is not going to happen. This indicates that Representative Lefor wants to get rid of approximately half the tenured faculty every year if this bill is enacted. Furthermore, just a few years ago, our administration removed advising from the faculty in several departments to give it to professional advisors, and now they are going to judge faculty on advising!

Thank you for listening.

University Senate

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HB 1446

ND House Government and Veterans Committee

Feb. 3, 2023

Robert Newman, Chair, University Senate, University of North Dakota

Chairman Schauer, Vice Chairman Satrom, and Members of the Government and Veterans Committee:

My name is Robert Newman, I am a professor in the Biology Department at the University of North Dakota and the Chair of UND's University Senate. On behalf of the UND University Senate I submit this **testimony in opposition to HB 1446.**

I. The bill as currently written would directly harm the state of North Dakota, its citizens and students by significantly degrading a meaningful and impactful tenure system in the NDUS, thereby dramatically reducing the ability of the eleven schools of the NDUS to meet their missions.

The maintenance of a meaningful tenure system in North Dakota is vital, for it provides a number of benefits to the state. A meaningful tenure system,

1. Undergirds principles of **academic freedom**.
2. Supports the advancement of **freedom of speech**.
3. Provides **standing and a positive reputation** for universities on the national stage, which allow institutions to compete at a national level for attracting and retaining world-class faculty.
4. Provides **stability in the academic enterprise** of a university through the building of a highly qualified and productive faculty, which is the very basis of the higher education system.
5. Supports **innovation and enterprise** within a community, state, and a region, which advances the economic, intellectual, social, and cultural interests of the citizenry. It does this by allowing faculty the freedom to create, innovate, and advance knowledge without being subject to special interest groups and other outside pressures.

II. The bill as written does not reflect the fact that policies and procedures already exist across the NDUS system to respond decisively to performance- or fiscally-related faculty workload adjustments and/or terminations. The University of North Dakota and other schools in the NDUS already have rigorous and fair

Today, the University of North Dakota rests on the ancestral lands of the Pembina and Red Lake Bands of Ojibwe and the Dakota Oyate — presently existing as composite parts of the Red Lake, Turtle Mountain, White Earth Bands, and the Dakota Tribes of Minnesota and North Dakota. We acknowledge the people who resided here for generations and recognize that the spirit of the Ojibwe and Oyate people permeates this land. As a university community, we will continue to build upon our relations with the First Nations of the State of North Dakota — the Mandan, Hidatsa, and Arikara Nation, Sisseton-Wahpeton Oyate Nation, Spirit Lake Nation, Standing Rock Sioux Tribe, and Turtle Mountain Band of Chippewa Indians.

policies and standards for hiring, evaluation, and tenure / promotion decisions, including review of faculty performance in relation to fulfilling the mission of the universities.

The bill has three sections. **Section 1** states that each tenured faculty member must bring in enough revenue to cover the costs to the university of employing them. This requirement is inconsistent with the mission and operation of any of our institutions and would set an ill-advised precedent even as a limited pilot.

- Faculty are not hired to generate revenue individually. Students chose schools because those schools offer programs that students see as pathways to future employment opportunities and careers. Faculty collectively constitute a team that delivers those programs.
- **Section 1.3**, expecting everyone to teach the same number of students is unrealistic. We teach different courses with different ways of engaging students appropriate to the course objectives. The nature of the course, the academic discipline, and accreditation requirements dictates maximum enrollment for effective pedagogy. Departments balance work load among faculty, not student credit hours.

III. As written (section 1.4 of the proposed legislation) the bill would compromise freedom of speech.

IV. In Section 2 of the proposed legislation, the process of review (and subsequent termination of tenured faculty by presidential declaration) outlined contains no provisions for redress for the dismissed faculty member. Thus, the proposed legislation would enact a law, if passed, that would seem to violate due process, undermine fundamental principles of shared governance and simply be unfair.

At UND we have a Standing Committee on Faculty Rights to allow the hearing of grievances and appeals. Tenured faculty may be terminated in the case of a financial exigency or for cause. In all instances, faculty must be notified and have the opportunity to appeal. The “faculty governance structure shall... [involve] faculty participation” in the termination proceedings. All of these policies are in accordance with SBHE Policy (Manual 11-16-01, section 605.3). Moreover, the UND Faculty Handbook unambiguously identifies shared governance and due process as fundamental values that underlie the integrity of the faculty experience in higher education and underwrite institutional standing at the national level. It is vital to the reputation of our universities in North Dakota that the tenure system maintain due process and rights of redress, in accord with the principles of shared governance.

Granting university presidents—or their designees—the unilateral power to terminate faculty without due process, puts **academic freedom is at risk**, inhibits freedom of speech, degrades institutional standing and reputation, disrupts stability in the academic enterprise which affects the ability of NDUS institutions from meeting their missions on behalf of students and the citizens of the state, and runs counter to the principles of innovation and entrepreneurship which are essential components of the North Dakota value system

- **Finally, we fully support the testimony from the Council of College Faculty opposing HB 1446.**
- **We urge the committee to oppose HB 1446 and vote Do Not Pass.**

Respectfully,

Robert Newman, PhD. / Chair, University Senate, UND



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Information regarding HB1446 was disseminated among faculty at Bismarck State College. The following testimony was compiled from faculty feedback, which was passed as a resolution by the Faculty Senate at our meeting on February 2, 2023, to be delivered orally at the House Government and Veterans Affairs Committee hearing on February 3, 2023.

1. The Faculty Senate of Bismarck State College opposes HB1446. The language of the bill would allow the circumvention of established processes for reviewing and holding tenured faculty accountable, could eliminate accountability and checks and balances in making programming decisions, and threatens the quality of instruction in the classroom.
2. Tenured faculty at BSC and other NDUS institutions are not untouchable, permanent employees. The NDUS, the SBHE, and individual institutions have policies and procedures in place that provide for regular review and potential dismissal of a tenured faculty member under certain circumstances. These include: financial exigency; loss of legislative funding for a position or program; loss of enrollment or elimination of courses. Tenured faculty are held to rigorous academic and ethical standards and can be dismissed for demonstrated incompetence, continued unsatisfactory performance evaluations, neglect of duty, neglecting institutional responsibilities, and violation of policies. These are outlined in SBHE 605.1 and 605.3 and referenced by the BSC Faculty Handbook that we all signed on to.
3. Thus Section 1 of HB1446 seems redundant and unnecessary insofar as it holds nobody accountable in any new way. Section 2, however, seemingly removes the processes, procedures, and accountability already in-place in reviewing tenured faculty. It forgoes established checks and balances on college presidents and their administrations, giving them broad abilities to review and potentially dismiss tenured faculty *without* accountability. Additionally, very few, if any, public employees are subject to the type of at-will re-evaluations and no-recourse dismissal that this bill lays out uniquely for already-tenured college faculty.
4. By giving broad criteria for review with no checks and balances, as laid out in the language of Section 2, this bill also potentially exposes college presidents to undue political or financial influences. If a politician or a wealthy donor were to have a personal problem with a faculty member or a program at a college, they could pressure the administration to review them. The Tenure system was put in place to shield both teachers and administrators from such pressures.
5. Further, we are particularly concerned with Section 1.1, which seemingly defines teacher-scholars as revenue generating employees, contradicting the dual missions of public service (which encompasses all state employees) as well as public education, both of which are *not* for-profit ventures, but instead public investments in state and local economies, and in the greater civic and social good.
6. This redesignation, laid out in Section 1.1, seems to create a new class of public employee, different from any other administrator, civil servant, legislator, in that few, if any, other state employees are required to generate enough cash for their own salary. While it is true that some research faculty positions are grant-funded, most faculty at BSC have no say over appropriations or budgets in their areas.

7. HB 1446 does not acknowledge or lay out broader responsibilities for revenue generation. Currently there are about two administrators and support staff for every one full-time faculty member at BSC. Administrators and staff are not held accountable to the same revenue-generating standard, are not required to demonstrate the economic justification for their specific position and are not held accountable by the Legislature, NDUS, or SBHE by those standards. According to the language of Section 1.1, professors generate their own salaries, and it is supposed that state appropriations cover administrative and staffing costs, whether or not that is the intention.

8. Furthermore, the broad and vague scope of Section 1.1, with its undue emphasis on the revenue generated by individual faculty members, has the potential to place all faculty, and all programs, under review at any time. Very few college faculty in the NDUS, or even nationwide, would not be under threat from something like Section 1.1 at some point, due to fluctuating enrollments, innovating and piloting new programs or classes, etc., thus opening nearly all faculty to dismissal if the administration decides they are up for review. For a school like BSC, this is not limited programs that provide public support for the arts and humanities, like Theater, and Music, but most certainly includes STEM and especially industry workforce-related programs that tend to have higher program costs, for facilities, for equipment, for industry-competitive faculty salaries, that are hardly ever "paid back" by the tuition generated by enrollment. This includes our Ag, Energy, and Power Plant programs, all of which could be placed under review at any time under the language in this bill.

9. Faculty have no say in the cost of tuition or the funding model and cannot adjust the amount of cash they generate in this way. Thus a program running a surplus could be adjusted and put in the red through no action or fault of the faculty that helped to build that program.

10. Section 1.1, by placing undue emphasis on a faculty member's solvency, is problematic because it could endanger academic integrity by, for example, potentially corrupting something as fundamental as the grading process. The state funding model for BSC subsidizes the school for credit hour production, which means the school receives less money for students who fail courses than for those who pass. If this bill were to go into effect, it is possible to see the pressure that could be put on professors to pass students who have low marks, or might have demonstrated incompetence, in order to generate their revenue quotas. By holding students to the rigorous standards our future workforce demands, a faculty member could be in danger of falling "into the red."

11. In closing, BSC's polytechnic mission is endangered by this bill, by the reasons stated above, but also because it would make us less competitive for the talent we need to prepare tomorrow's workforce. North Dakota is currently experiencing an economic boom, but we are not the only ones. BSC's polytechnic mission was created to prepare North Dakotans now, and prepare a new generation, to continue this workforce growth in industries like manufacturing and petroleum, but also spearhead growth in industries like in AI, Cybersecurity, Automation and Robotics, where North Dakota is primed to soar—if we have the support. BSC needs to compete with lucrative industry and educational positions elsewhere so that we can attract not just people who can teach, but leaders in industry, leaders in their fields. And by weakening and endangering Tenure, this bill wouldn't just hurt our ability to do this, it could effectively hamstring it.

12. The Faculty Senate of Bismarck State College ask you to vote DO NOT PASS on HB1446.



February 2, 2023

The Williston State College Faculty Senate stands in support of our fellow faculty members across the state of North Dakota and in full support of the North Dakota Council of College Faculties' Resolution in Opposition to House Bill 1446.

-Derek VanderMolen, WSC Faculty Senate President

Birgit Pruess, Ph.D.
3696 Harrison St. S
Fargo ND 58104

February 2, 2023

68th Legislative Assembly
House Government and Veterans Affairs Committee

Dear Chair Schauer and Members of the House Government and Veterans Affairs Committee,

I am resident of Fargo, North Dakota and testify as a private citizen, not as a member or representative of any group. Having been Faculty President at my institution and the faculty advisory board member on the State Board of Higher Education (SBHE), I am certainly very knowledgeable about the 11 institutions in our State University system.

I am testifying in opposition to HB1446 which would allow University and College Presidents to single handedly fire tenured faculty. I recommend a 'do not pass' vote on this bill.

I am starting with a positive. I do actually appreciate the attempt at making workloads more equitable. But there must be better ways for doing this. Ideally, between the faculty member and their respective department Head/Chair. Especially at the larger institutions, the president can't be personally responsible for 700 or more faculty. We have a hierarchy for that reason and a reporting line. This starts at the department with the Head or Chair, moving on to college level headed by a Dean, and then further up to Provost and President level. We usually start at the bottom and work our way up when conflict arises. Then, there is always the choice between support and punishment. If a senior faculty loses their grant, it may be more worthwhile to support the faculty with bridge funding, which will increase the probability of future grants. In contrast, firing the faculty for lack of productivity will lead to a search process that takes at least a year, which is costly already, plus a pretty decent start up package.

Section I

- 1) *Generate more tuition or grant revenue than the expenses for the faculty.* This is unfair. Some faculty teach an introductory level class that is required for a large number of students. Others teach upper level classes that are very specific in their topic and of interest to a much smaller number of students. These specialized classes are not any easier or less work to teach. Departments are a team, not a group of individuals. Faculty generate revenue as a team, not as individuals. Also note that not everybody gets to chose and pick their courses. In some departments, the Head or Chair makes this determination. Do you wanna punish the faculty for a decision their direct supervisor makes? Likewise, some faculty's research is rather cheap and does not need as much of funding. Someone else's research be more expensive and needs larger grants. We can't punish people for having a research project that they can still do in low budget times. Besides, our institutions are non-for profit, not private businesses.
- 2) *Comply with policies etc up to the State Board of Higher Education.* This is written into job offer letters and a requirement by the institutions. The point is not needed.

- 3) *Teach and advise students equal to the average across the institution.* Much what I said about the tuition generation applies here as well. Entry level courses are larger than higher level specialized courses. Likewise, not every program has the same number of advisees. Or faculty, as a matter of fact. The important point is not that everybody has the same number of students or advisees, but that within the unit every student gets taught and advised. By somebody. In fact, some departments have professional advisors who advise all students. Some departments have lecturers who teach the bulk of the classes. Do you wanna punish tenured faculty for that? Note that faculty appointments are spelled out (in the job offer letter and annually updated job descriptions) in % teaching and % research. Sometimes also % service. Or % outreach. A faculty with a 20% teaching appointment can't be required to have the same teaching load as a faculty with a 90% teaching appointment. Job descriptions are very specific and every individual faculty is hired for a specific purpose. In the end, everybody needs to do what is written in their own job description.
- 4) *Measurable and effective activities.* Points a, b, and c until about half way through are covered by most people's job descriptions already. Helping students achieve academic success is not anything a faculty needs to be told. That is why people are in that job. The second half of point c about the social media is more tricky. The first amendment applies to all of us, including faculty in universities and colleges. Note that institutions have a harassment policy. If things get too wild on social media and a person is under series attack, there is a process in place. I think this whole section including a, b, and c is not needed.

Section II

The North Dakota constitution very clearly states in Article VIII Education, Section 6, that the State Board of Higher Education (SBHE) is responsible for the control and administration of our state higher education institutions (<https://ndlegis.gov/constit/a08.pdf>). The SBHE, not the North Dakota State Legislature. If I can make a recommendation here, I recommend checking whether these proposed changes are in line with North Dakota State law.

President reviews faculty. This is not in agreement with institutional hierarchy. Every faculty, tenured or not, currently gets reviewed by their department Head/Chair. Annually. The report goes to the college. If any problem arises, the case can go up the reporting line. But it will get initiated at department level. Why on earth would the President of a large institution who has millions of other things to do (including frequent trips to Bismarck) even know when a faculty member is no longer up to speed with their job responsibilities. The best thing to do is a discussion between Head or Chair and the respective faculty to figure out the cause for the inactivity. Sometimes, the job description can be rewritten to better match a person's changing abilities and interests, while still fulfilling the needs of the department. After all, job descriptions change frequently anyways. Keep in mind that the tenure process is very meticulous and involves some 15 to 20 people between Department and President level, and takes about ¾ of a year. For details, please, see policy 352 at NDSU as an example (<https://www.ndsu.edu/fileadmin/policy/352.pdf>). Faculty who pass this extensive 6 year long

‘test’, are among the most highly qualified individuals in the country and the world. Most of these like their career and would not intentionally damage their own career. Most faculty also like their students and would not intentionally harm students either.

- 1) *Written assessment.* The written assessment is already provided annually by the department Heads or Chairs. For every faculty, tenured, tenure track, or non-tenure track.
- 2) *Failure to comply.* This whole section sounds like the author assumes there is no process to fire a tenured faculty. Actually, there is. For an example, please, see policy 350.3 at NDSU (https://www.ndsu.edu/fileadmin/policy/350_3.pdf). This faculty termination policy is built upon SBHE policies 605.1, 605.2, 605.3, 605.4, which means the other 10 institutions have similar policies. In summary, tenure just means the faculty cannot be fired WITHOUT CAUSE. Tenured faculty can be fired WITH CAUSE. Or because of an institutional financial exigency, as declared by the SBHE. Tenure is about academic freedom, which is a form of free speech and covered by the first amendment. A tenured faculty cannot be fired because someone (*e.g.* President) does not like their research project. Or their teaching content. That is not a lack of compliance.
- 3) *Delegation to administrator.* Seeing as every faculty is already reviewed annually by their department Head/Chair, one could consider this the delegation. After all, delegation of responsibility is part of why we have a reporting line.
- 4) *Other factors.* I have to admit that this paragraph makes me suspicious. Factors that are not mentioned in the job description? What could those be? The job description should be in alignment with the institutional goals. Of course, if a President closes a program or department, this may mean that faculty will be laid off. This is not firing, though. And it can be done already. So, what is the point here?
- 5) *Review is not viewable and not appealable.* This is getting downright scary here. Why not? To hide something? If the faculty really has not done their job duties, there is no need to deprive them of the opportunity to review and appeal. Unless the reason for the firing is unspeakable, there should not be a need to hide the justification. If the faculty needs to be held accountable, so does the President. And who is the commissioner of higher education? I know of a State Board of Higher Education, which has a Chair. And the North Dakota University System, which has a Chancellor.
- 6) *No retaliation.* Of course not. That is why institutions have retaliation policies. For an example, please see policy 156 at NDSU (<https://www.ndsu.edu/fileadmin/policy/156.pdf>). However, an appeal or a lawsuit is not retaliation. Retaliation is a counterattack with the intent to hurt the other person. An appeal does not hurt anybody. Neither does the lawsuit. Note that the lawsuit would probably not be against the person but the institution anyways.

Section 3

What is the emergency? Does the author of this bill think there are hundreds of faculty that need to be fired? If so, where is the evidence for this? We are happy about every faculty we can keep in town.

My primary concern with all of the above is recruitment and retention of faculty to North Dakota. It is already difficult to recruit people to North Dakota and I am talking about qualified faculty. People with a Ph.D., especially in the STEM sciences, have many opportunities, among

them positions in the private sector which pay much better than academia can match. Tenure and the academic freedom that it provides rank high among the reasons why people decide for the academic career. Still, there are plenty Universities and Colleges nationwide and worldwide that recruit faculty. This includes OUR faculty. If tenure in essence gets disabled, there is concern that people won't come here anymore. Likewise, faculty already in the system are permanently facing the question whether they want to stay here or move on. Other institutions are poaching, and it is easy to figure out which faculty they will target. It is not the unqualified ones. And their research dollars will go with the faculty, at least to other academic institutions in the US. Many faculty have moved on in the past years thanks to budget cuts and political climate. I can see how someone could say, well every faculty less is one person less on our payroll. However, these are not targeted budget cuts of units that no longer meet the institutions goals. These are random losses that can hit any department and potentially cripple a successful and much needed department. To keep our institutions functional, we need faculty to teach our students. And we owe our students that these faculty are the most qualified ones we can get. Tenure is needed for this.

I realize that HB1446 at this point in time only applies to two of North Dakota's Colleges and not any of the two Research Universities. My personal experience is with three Research Universities across the US, I have never been at a 2 or 4 year College. However, 2 years at the SBHE have instilled in me an appreciation for all 11 of our institutions, including the ones I may not be able to understand quite as well. I hope I was able to give you an overview of faculty concerns that I think may apply to colleagues at other institutions in the system. With the understanding that I can no longer represent them, but I still appreciate them as a private citizen.

I like to conclude with a short note of thank you everybody on the House Government and Veterans Affairs Committee, as well as the author of bill HB1446. Your service to the State is much appreciated.

Sincerely and respectfully

Birgit Pruess

February 1, 2023

Dear Chair Schauer and Member of the House Government and Veterans Affairs Committee:

I am writing to urge you to vote **Do Not Pass on HB 1446**.

This bill is based on the odd, and false, premise that “the urgent need to accelerate workforce development” can be addressed by “improving the tenure process” at Dickinson State University and Bismarck State College.

Representative LeFor seems to believe that a public university should be run like a business, but he clearly does not want to hold the university “CEO” (the president) accountable for any actual or potential failings of the university. Dickinson State University has been plagued by numerous problems over the past several years that have inhibited its ability to retain a positive reputation, attract students, and serve North Dakota. These problems (*some* of which are listed below) have resulted from **incompetent leadership** -- not the tenure process.

- a DSU president misrepresented enrollment numbers and pressured staff into engaging in unethical activities
- the Dickinson State University Foundation was placed into receivership and dissolved
- DSU leadership did not follow the policies in the Faculty and Adjunct Faculty Handbooks and evaluations of adjunct faculty were not being consistently completed
- DSU failed to properly review an eight-year contract for their bookstore services
- 8 out of 30 (26.7%) of university purchase card transactions tested by the ND State Auditor were made by someone other than the cardholder
- DSU lacks a policy for identifying, documenting, monitoring, and resolving conflicts of interest and nepotism issues
- procurement documentation has not been retained
- an NDUS investigation found that DSU was improper in its president-approved informal procurement process for instructional design with Wyoming-based Learning Corps
- hundreds of DSU students demanded the resignation of a DSU president and other top leadership alleging overreach of administrative authority, incompetence, and fraud.

These, and other, issues are not the result of problems with tenure, they are the result of **leadership incompetence**. HB 1446 is a smokescreen designed to blame faculty for the failings of university leadership.

Please uphold the integrity of higher education in North Dakota and recommend DO NOT PASS on HB 1446.

Amy Phillips, Fargo ND

In regard to HB 1446, it seems to me to be incredibly shortsighted and lacking any thought as to what the unintended consequences of its passing may be. The requirement that tenured faculty generate revenue equal or greater to their cost or risk losing their tenure status does not take into account valuable classes, particularly upper level course, and programs that may have smaller enrollment. Nor does it take into account how much time and effort actually goes into the recruitment and advising processes. However, the most concerning part of this bill is the incredibly vague language throughout, especially the portions that state “exercising mature judgement to avoid inadvertently harming the institution, especially in avoiding the use of social media or third-party internet platforms to disparage campus personnel or the institution”, and “A review under this section is not appealable or reviewable by a faculty member or faculty committee. The president is subject to review and assessment by the state commissioner of higher education and the state board of higher education for the reviews the president conducts under this section.” as well as “The president and any administrators delegated to assist the president shall fulfill these duties without fear of reprisal or retaliation. No complaint, lawsuit, or other allegation is allowed against a president or other administrator for actions taken pursuant to these provisions.” Who determines what is harmful or disparaging to the institution? This bill grants far too much power to the university president and leads to a slippery slope in which tenure can be revoked for merely expressing an opinion that runs counter to the university’s current administration. Furthermore, in order to attract high quality students and keep enrollment in our universities high, we need high quality faculty at our institutions. The proposed bill will make it harder to attract and retain the faculty our institutions need and our students deserve. I strongly recommend not passing this bill.



February 2, 2023

Dear Chairman Schauer and members of the Government and Veterans Affairs Committee:

The faculty Senate of Lake Region State College opposes the proposed emergency-measure House Bill [1446](#) relating to a pilot program for tenured faculty review at institutions of higher education.

The faculty at Lake Region State College collectively believes that HB 1446 would have significant long-term negative effects on their college and the entire university system. They strongly request that the committee not pass the bill due to the reasons outlined in the following rationale.

1. HB 1446 proposes to give the president of each institution of higher education under the State Board of Higher Education (SBHE) the power to review the performance of any tenured faculty member at any time the president sees fit, without the possibility of appeal or review by the faculty member or committee. The university president would have the discretion to not renew the contract of a tenured faculty member if they do not believe it is in the institution's best interest and must provide a specific explanation for their decision. The bill would remove the possibility of appeal or review for these decisions.

2. This bill proposes to replace the policy [SBHE 605.1](#) performance review process for tenured faculty at two campuses with a new system that allows for random and unannounced evaluations by the campus president, removing due process rights and raising concerns of arbitrariness and retaliation. The current policies provide for structured and regular performance evaluations, but the proposed changes would eliminate this.

3. This bill would eliminate the rights of tenured faculty to appeal administrative decisions and to seek legal remedies for wrongful termination, limiting their ability to protect their rights and interests.

4. The bill would negatively impact the efforts of some campuses to recruit and retain high-quality faculty. The recent high faculty turnover at some campuses combined with the potential for negative national press resulting from the passage of this bill would make it more difficult to attract and retain competitive faculty.

5. This bill is potentially unconstitutional according to the North Dakota State Constitution, which grants the State Board of Higher Education (SBHE) full authority over the institutions it controls. The bill would infringe upon this authority and is therefore not within



the authority of the Legislative Assembly to pass. If a pilot program of this nature is desired, it should be proposed to the SBHE instead.

6. This bill would harm small programs and classes, labs, and clinicals that are essential for meeting the workforce development needs of the state. The requirement for faculty members to generate a certain level of tuition and teach a minimum number of students may negatively impact these programs, potentially leading to the loss of accreditation and closure of programs in areas such as nursing, wind technology, agriculture, and simulation technology.

Lake Region State College faculty strongly encourage the members of the ND House Government and Veterans Affairs Committee to reject this bill as it is detrimental and ill-conceived.

Sincerely,

Lake Region State College Faculty Senate

Submitted by Melissa Moser, MSN, RN, CNEcl. Associate Professor of Nursing, Faculty Senate President AY 2022-23

Colt Iseminger
Grand Forks, ND 58201

RE: TESTIMONY IN OPPOSITION TO HB 1446

Dear Chairman Schauer and members of the House Government and Veterans Affairs Committee:

The following is my personal opinion as a private Citizen of North Dakota. I am a non-tenure-track faculty member at the University of North Dakota (UND), however the testimony following is on my own behalf and does not represent the views of UND.

I am writing in opposition to HB 1446. The North Dakota University System currently has policies in place to allow for fair, balanced, review of Faculty members, including Tenured Faculty. Those policies also list recourse for Faculty that disagree with the outcome of those reviews. One person should not have the sole authority to terminate Faculty, at will, without cause, due process, or recourse.

I ask for a "DO NOT PASS" recommendation on HB 1446.

Sincerely,

Colt Iseminger

Statement against HB 1446:

I encourage the committee and legislature to vote NO for HB 1446. This bill is an ill-conceived effort to decrease accountability and academic freedom in the ND state university system (NDUS). While the stated intent is to install accountability in the tenure process, it has the opposite effect in that it removes accountability in a University President. Each university and college within the NDUS has defined policies and procedures for evaluating tenured professors. There are multiple levels at which the final evaluations of all faculty are reviewed, including at the University Presidential level. If these policies are not being followed currently, then removing them will not solve the issue of accountability, but rather disguise a sitting President's ability to competently do their job in evaluating their faculty in a fair and unbiased way. Therefore, it is imperative that HB 1446 not be support and a vote "in opposition to" this bill be delivered. The far reaching legal and educational implications that would result from this bill are not worth the hassle and effort the state and its limited resources would need to endure.

Bill HB1446 is a prime example of government overreach. It is not only unnecessary, but goes against principles of academic freedom and assigns authoritarian powers to University Presidents. The bill displays a disappointing understanding of how faculty get tenure, and the fact that faculty performance is reviewed periodically post-tenure. There are systems of checks and balances built into the University, and even tenured faculty who do not perform adequately post tenure (or show evidence of malpractice) are removed after due process. While there may be issues in the implementation of policy by specific Universities, the recourse should be to find a way to enforce pre-existing policies that have long-standing, wide-spread acceptance in the US and developed societies around the world, rather than make arbitrary laws that will essentially subvert academic freedom.

Is there a legislative agenda to silence whistleblowers at Dickinson State University?

Efforts to shut up whistleblowers will only make it harder to fix higher ed and attract/retain talent.



Dustin Gawrylow
Jan 21



Previously, I wrote about House Bill 1198 would “require an individual who requests an open record to provide the individual's name and contact information,” and how this is a huge departure from current law and policy. That bill is sponsored by Representative Mike Lefor, Representative Vicky Steiner, and Senator Dean Rummel - the entire District 37 delegation from Dickinson.

North Dakota's Watchdog Update

Bill Would End Anonymous Open Record Requests

Last night, we released our first tracking list of the 2023 Legislative session. One bill posted today that is sure to raise some eyebrows among journalists and advocates of government transparency is House Bill 1198. This bill would “require an individual who requests an open record to provide the individual's name and contact information...”

[Read more](#)

12 days ago · Dustin Gawrylow

The Grand Forks Herald editorial board wrote an opinion agreeing that this is a bad bill:

When any person walks into a public office – some city hall or school headquarters, for instance – they are entitled to see any public record they wish. That person doesn't have to explain, give their name or why they have an interest in that public record.

They don't even have to be from that town.

That is not only the law, it's just common sense. State law even spells it out, saying a public entity or its representatives "may not ask for the motive or reason for requesting the records or for the identity of the person requesting records."

Not everybody sees it that way. A proposal in the North Dakota Legislature seeks to change the law so that a person requesting a public record must give their name and provide personal contact information." It's [House Bill 1198](#), introduced by Rep. Mike Lefor, R-Dickinson.

Our advice to lawmakers: Don't do this. Just wad it up and toss it.

But now comes the interesting part. Representative Mike Lefor, who is also the House majority leader, [has introduced House Bill 1446](#) which on the surface level sort of sounds like a good idea - requiring tenured professors to do more to attract students to colleges. But then when you dig deeper into the bill, you see some strange language, specifically Item 4c in Section 1 of the bill:

- c. Further the best interests of the institution including providing advice and shared governance to campus leaders, and exercising mature judgment to avoid inadvertently harming the institution, especially in avoiding the use of social media or third-party internet platforms to disparage campus personnel or the institution.

This sounds like an attempt to muzzle anyone who might have the inclination to act as a whistleblower. Given the history of scandals at Dickinson State University (which is my alma mater, by the way), and the fact that [the Diploma Mill scandal](#) was eventually uncovered due to DSU faculty acting as whistleblowers making reports to

members of the media and myself - this has a strong perception of being an effort to shut down dissent and silence those who do not want to go along with bad policies and behaviors.

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In fact, one such faculty member is not remaining silent and secret, [according to this Dickinson Press article](#):

The bill, introduced by House Majority Leader Representative Mike Lefor, (R-Dickinson), seeks to create a pilot program focused on campus models currently in practice at Bismarck State College and Dickinson State University, with the goal of improving the tenure process across the state system by refocusing on the responsibilities of tenured faculty members.

According to the bill, tenured faculty members would be evaluated based on their ability to generate tuition or grant revenue, adherence to current and future policies and procedures, and effectiveness in teaching and advising students. The bill prohibits tenured faculty members from engaging in activities that do not align with the institution's best interests.

However, the bill has received backlash from the academic community, with some calling it an “anti-whistleblower bill in disguise” and raising concerns over the potential infringement on academic freedom and the legal rights of tenured faculty.

The article goes on to quote Dr. Eric Grabowsky, a professor at the university, and the current advisor for the campus College Republicans group.

Dr. Eric Grabowsky, an Associate Professor of Communication at Dickinson State University, in speaking with The Dickinson Press said he believes that House Bill 1446 is a very real threat to the freedoms and responsibilities that come with tenured professorship and could be used by centers of higher learning to silence whistleblowers and remove inconvenient checks and balances on the governance of higher education.

“From my point of view as a citizen, I encourage the public not to fall for House Bill 1446. Debates about tenure and the scope of tenure are legitimate. Colleges and universities need to be good stewards of resources,” he said. “People in North Dakota should know that there

are sometimes circumstances in which tenured faculty are uniquely situated to highlight and discuss problems involving academic integrity, overall management, retaliatory behavior or faulty procurement. Over the years, tenured faculty have raised important concerns regarding these types of areas across the North Dakota University System, including at Dickinson State University.”

Why does Dr. Grabowsky take issue with this? Because he’s been a whistleblower on yet another scandal at DSU that has gotten little to no coverage (I was not aware of it until he brought it to me.)

In 2021, internal documents, email communication and other records obtained through open records raised concerns with Dickinson State University’s procurement of a Wyoming-based company for instructional design.

A subsequent series of complaints forwarded to the Eide Bailly Fraud Hotline, between Feb. 26 and May 4, 2021, prompted an investigation into the allegations of improper procurement by Dickinson State University by the North Dakota University System. Their conclusions found that DSU’s procurement “was in violation of at least seven laws...” and “the allegations regarding improper procurement for Instructional Design were supported by the investigation.”

Grabowsky goes on to say:

“With the privileges of tenure, a person who is tenured is involved in the proper stewardship of public resources. The freedom that goes with tenure extends into proactive communication about the quality of the management and direction of a college or university, which can necessarily involve criticism of university administrators. Persons from across the political spectrum should oppose House Bill 1446,” Grabowsky said. “Workforce development and resource allocation are certainly important matters. Scrutinize tenure, for sure. Discuss and debate policies, guided by sound principles. However, we should not let such legitimate areas of focus provide legislative cover for a quick route out the door for tenured faculty who might inconveniently help to provide important checks and balances on the overall governance of higher education.”

Grabowsky added, “Through my conversations about House Bill 1446, I can say that some people are getting the sense that this bill is an anti-whistleblower bill in disguise.”

Over the last two years, several cases of academic freedom violations, including the firing of two faculty members at Collin College in McKinney, TX, for speaking out against their institution's COVID-19 reopening plans have shined new light on how university's handle dissenting voices coming from within. At the University of Mississippi, a well-respected history professor was dismissed for speaking out against powerful donors with “racist beliefs.” Another case at Pacific University in Forest Grove, OR, involved a tenured professor, Richard J. Paxton, who was suspended without proper procedure.

These incidents have been closely monitored by organizations such as the American Association of University Professors, which works to protect the academic freedom rights of educators.

“Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition,” a statement from the AAUP reads. “Tenure is a means to certain ends; specifically freedom of teaching and research and of extramural activities, and a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.”

According to the AAUP's Statement of Principles on Academic Freedom and Tenure, “College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations.”

House Bill 1446, according to Lefor, will move to the next phase of the legislative process in a hearing in three weeks at a date and time yet to be determined.

There is clearly yet another problem at DSU, and instead of remedying those problems, legislators from that district are bringing forth legislation that was silence

those who would help the public and taxpayers know what is going on.

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Republicans talk about “academic freedom” a lot.

In 2017, **State Representative Rick Becker** introduced an “academic freedom” bill, which was **House Bill 1329** in the 2017 session. It passed the House by a vote of 65-25, but only got 7 yes votes in the Senate.

Perhaps if we want to retain good talent and staff, we should not make laws telling them to shut their mouths when there are problems. We should be encouraging public employees to speak up and then address the problems.

(Note: in the name of transparency, I would mention I have personally submitted my name for consideration for the openings on the State Board of Higher Education.)

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Comments



Write a comment...

Thank you for this opportunity to make this submission in opposition to HB 1446.

HB 1446 should be rejected.

I write here as a citizen of the United States and as a resident of North Dakota. I do not speak for Dickinson State University (DSU) or the North Dakota University System (NDUS).

Like with HB 1198 (to get rid of anonymous open records requests), from my point of view, there is good reason to believe that HB 1446 reflects efforts to avoid facing trouble and accountability within the NDUS. This has been my own viewpoint from the start (when learning about HB 1198, and then learning about HB 1446). Dustin Gawrylow has provided some big picture connections to consider that pertain to HB 1198 and HB 1446. As part of my testimony submission, and referenced below, I include his article.

Referenced below, I also include two additional sources as part of my testimony submission, which include my strong perspectives on HB 1446. I have communicated openly within these sources (and elsewhere) about the problems with this bill. I will continue with this open communication against what is, in my judgment, a larger anti-whistleblowing endeavor with respect to DSU and the NDUS. Interestingly, as I see it, with the submission of *and* reaction to HB 1446, Representative Lefor and President Easton have opened some windows to potential levels of sunshine that are needed for both DSU and the NDUS.

Don't fall for HB 1446. If you are interested in the good governance of the NDUS, then don't take off of the table the latitude that tenured faculty have for necessary discussions of faulty procurement, retaliatory behavior, academic integrity, and overall management. Please read closely the three sources that I have submitted as part of this written testimony.

Dr. Eric Grabowsky, Associate Professor of Communication (tenured), Dickinson State University, Dickinson, North Dakota, (701) 306-5982

“House Majority Leader’s new bill aims to overhaul university tenure process”
James B. Miller, Jr., January 20, 2023, The Dickinson Press

<https://www.thedickinsonpress.com/news/north-dakota/house-majority-leaders-new-bill-aims-to-overhaul-university-tenure-process>

“Is there a legislative agenda to silence whistleblowers at Dickinson State University?”
Dustin Gawrylow, January 21, 2023
North Dakota’s Watchdog Update (North Dakota Watchdog Network)

<https://watchingnd.substack.com/p/is-there-a-legislative-agenda-to>

“Letter to the Editor: Don't Fall for House Bill 1446”
Dr. Eric Grabowsky, February 1, 2023, The Dickinson Press

<https://www.thedickinsonpress.com/opinion/letters/letter-to-the-editor-1>

OPINION | LETTERS | Opinion

Letter to the Editor

Don't Fall for House Bill 1446



Vintage typewriter keys. gesrey/Getty Images/iStockphoto

By Dr. Eric Grabowsky

February 01, 2023 12:44 PM

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Dear Editor,

Herein, I do not speak for Dickinson State University (DSU) or the North Dakota University System (NDUS). Tenure can be a delicate subject. It is a politically and financially charged topic. House Bill 1446 is not a legitimate way to begin a substantive conversation in North Dakota on tenure reform. Across the NDUS, tenured faculty assist with transparency and accountability toward the good governance of higher education.

For a pilot program, if this bill is the way to go forward for DSU, Bismarck State College (BSC), and eventually the entire NDUS, as Representative Lefor and President Easton have indicated, then why was there no announcement or discussion of the bill at DSU before its legislative submission? How did a number of people learn about HB 1446 not long after it was submitted? I can speak to one major element of these communicative circumstances.

I was “tipped off” about the submission of HB 1446 by a knowledgeable person, which of course led to my sharing information about the bill with various people. Regardless of your view of tenure, please keep in mind that if this bill passes, an accelerated revision of policies and procedures pertaining to tenured faculty will be necessary at DSU and BSC (and at the NDUS level for these two institutions). Along with the obvious controversy of HB 1446 on campus, would it not be helpful for employees to know that such substantial work would be a possibility during 2023?

There are times when only tenured faculty can speak out about problems of management in and for North Dakota's public universities and colleges. Overall, in terms of the expansive scope of HB 1446 (and it being rushed forward as it is for implementation), in my estimation, it won't be good for students or for student enrollment at DSU and BSC. And, considering past problems with enrollment practices at DSU, should there not be more caution when thinking about incentivizing enrollment to such an extent, especially if the incentivization is tied to the job security of tenured faculty?

We seem to get the idea from Representative Lefor and President Easton that apart from something like the initiation of a bar fight in town, it would be almost impossible to terminate someone who is tenured. For faculty at DSU (tenured or not), there is a chain of management that typically goes to a department chair, to a dean, to the provost, and to the president. As a tenured faculty member, I am annually reviewed by my department chair. Part of that process involves establishing a plan for the academic year to follow. That plan should inform the next annual review.

For significant reasons, with specific protections in the mix, it is more difficult to terminate a tenured faculty member. However, it is not as difficult as some people might think. Tenured faculty can be put on a performance improvement plan, which does open a door for potential termination. And, in financially problematic circumstances, with university system and campus policies and procedures, someone who is tenured can be terminated at a pace.

Representative Lefor has said that he will remove the disparagement aspect of the bill. However, for both administrators and tenured faculty, the bill contains the notion of alignment with the best interest(s) of the institution. Properly understood, such alignment is quite important for administrators and faculty, both proactively and reactively. For those situations in which tenured faculty are ringing the bell about faulty procurement, academic integrity, overall management, or retaliatory behavior, who will grapple with what is in the best interest(s) of the university? Whose approach to those best interest(s) in specific cases, objectively and subjectively, are best aligned with the necessities of transparency and accountability?

It is interesting that the bill would take off the table (for tenured faculty) the normative process of termination review for all faculty (tenured or not). Presently, that process involves a faculty committee. Generally speaking, faculty termination appeal decisions are currently made by the president. One could say that faculty terminations often don't directly get initiated by the university president, even if a president is somehow involved in such considerations. In my view, a reason for this exclusion

in HB 1446 is to avoid paper trails of concerns and claims, regardless of the outcomes of appeal committee recommendations and presidential appeal decisions. With no paper trails along these lines, there are fewer problems to talk about at the campus and system levels.

The narrative across North Dakota since about the later part of 2020 has been that President Easton and certain members of his leadership team are doing bold and transformative work at DSU, yet, there are troublemakers getting in their way. As I see the big picture, HB 1446 is Representative Lefor's rescue plan to accomplish what current policies and procedures won't allow President Easton to do, especially with the troublemakers. Again folks, don't fall for House Bill 1446.

To the general public (across the political spectrum): Please oppose HB 1446. Communicate your opposition to HB 1446 to our state government officials. Pass or fail (and it should fail), the atmospherics of this bill put DSU at risk in terms of the recruiting and retention of both students and faculty. Regardless of one's views on this or that campus controversy, without an adequate number of faculty to cover the courses as listed, student enrollment will unfortunately go down.

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NEWS | NORTH DAKOTA | News reporting

House Majority Leader's new bill aims to overhaul university tenure process

Critics raise concerns with HB 1446's potential infringement on academic freedom and the legal rights of tenured faculty.



A new emergency bill, House Bill 1446, has been introduced in the North Dakota State legislature which aims to overhaul the tenure process at two centers for higher learning within the state's university system.

Jeremy Turley / Forum News Service

By [James B. Miller, Jr.](#)

January 20, 2023 04:27 PM

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BISMARCK — The North Dakota State legislature is considering a new emergency bill, House Bill 1446, which was introduced on Jan. 18 and aims to overhaul the tenure process at two centers for higher learning within the state's university system.

The bill, introduced by House Majority Leader Representative Mike Lefor, (R-Dickinson), seeks to create a pilot program focused on campus models currently in practice at Bismarck State College and Dickinson State University, with the goal of improving the tenure process across the state system by refocusing on the responsibilities of tenured faculty members.

According to the bill, tenured faculty members would be evaluated based on their ability to generate tuition or grant revenue, adherence to current and future policies and procedures, and effectiveness in teaching and advising students. The bill prohibits tenured faculty members from engaging in activities that do not align with the institution's best interests.

However, the bill has received backlash from the academic community, with some calling it an “anti-whistleblower bill in disguise” and raising concerns over the potential infringement on academic freedom and the legal rights of tenured faculty.

The bill empowers university presidents or their delegated administrators to review the performance of tenured faculty members at any time, and allows them to not renew contracts based on failures to meet expectations outlined by the university, in accordance with the bill.

The bill does not allow for secondary reviews or appeals for non-renewed tenured contracts and expressly prohibits complaints, lawsuits or other allegations to be raised against a president or other administrator for actions taken pursuant to the bill.

[HOUSE BILL 1446 — CLICK TO READ\(https://ndlegis.gov/assembly/68-2023/regular/documents/23-0083-04000.pdf\)](https://ndlegis.gov/assembly/68-2023/regular/documents/23-0083-04000.pdf)

SUPPORT FOR HB 1446

Lefor defended the bill, stating that its primary aim is to ensure accountability and efficiency within the North Dakota University System and that the bill's requirements on tenured professors are what the vast majority are already doing at their universities.

“What I’m naming as the Tenure with Responsibilities Act has 11 main points and if there are tenured professors who are concerned about it, I would ask why,” Lefor said. “We as legislators quiz the university presidents on cost and represent the taxpayers, and we want, just like in the private sector, highly motivated and productive employees. We demand accountability and want the best for our institutions.”

Considerations for the idea of changing the tenure process in the state has been one that Lefor said he and others inside and outside of the university system have discussed for many years. He said that he had originally wanted to implement the changes to be system-wide, but on request from various stakeholders, opted instead for a limited implementation as a trial run.

“Some in higher education asked me to consider a pilot program and so I said alright,” he said. “There shouldn’t be any agency in state government that shouldn’t have accountability for job performance, without including different committees and so forth to determine whether or not they should improve their performance. This isn’t about firing people, it’s about accountability...and that’s reasonable.”

Lefor added, “If that is the major issue, that is something I’m willing to discuss to get everyone on the same page, working hard, developing the university and moving it forward...if there are issues then I’m willing to meet with people and amend the bill.”

Addressing the first amendment concerns raised with the bill's imposed restrictions, Lefor said that he would be open to further discussion and amendments to address any serious concerns, but confirmed that he would make an amendment to remove the portion that addresses

"avoiding the use of social media or third-party internet platforms to disparage campus personnel or the institution."

Dickinson State University President Steve Easton said he personally supports the bill and believes that the bill is necessary to enforce the duties and responsibilities for tenured faculty and university presidents.

Dickinson State University President Steve Easton.
Dickinson Press file photo

“Overall, I am supportive of the bill. I believe that it is important to turn tenure from what it has unfortunately become as a practical matter, a lifetime appointment absent outrageous behavior, to a job that, like almost all other jobs, carries with it certain duties and responsibilities that are enforceable by supervisors,” he said. “The bill makes the duties and responsibilities enforceable by permitting the president and the administration of a higher education institution the authority to ensure that tenured faculty are meeting their duties and responsibilities. It also provides, as it should, that a president will be reviewed by the

president's supervisors, the Chancellor and the State Board of Higher Education, for the president's actions under the statute. Thus, it provides accountability both for tenured faculty and for the president.”

While supportive, Easton highlighted some provisions in the bill that he disagreed with, noting that he is a staunch advocate for protecting the free speech rights of faculty.

“First, I would remove the provision referring to ‘especially in avoiding the use of social media or third-party internet platforms to disparage campus personnel or the institution.’ I understand the sentiment behind this provision, because these mediums can be deployed by those seeking to harm the people trying to make a university better. But I believe ‘campus personnel,’ as public employees, including the president, should be subject to legitimate criticism,” he said.

Another contention raised by Easton related to the narrow scope of the bill, noting that it names only two centers for higher learning in the state as part of the pilot program.

“My own preference would be for this statute to apply to the entirety of the North Dakota University System, not just to two campuses. Indeed, when I provided my draft, that was my proposal. But I am not a member of the North Dakota Legislature,” he said. “Rep. Lefor asked for my views, but he is by no means bound by them. I do understand that the bill represents a significant change and that pilot projects are sometimes a way to test a significant change.”

Easton noted that Dickinson State and Bismarck State are the two campuses within the North Dakota University System that have recently been granted the opportunity to change their missions substantially, and that the opportunity to use resources, including faculty positions, efficiently is a major boost to future change and success.

“I understand the pilot project idea at our two campuses, even though my personal preference would have been for a systemwide change,” he said.

In summation of the bill, Easton said he believed that the bill, if passed, would not negatively impact the majority of tenured faculty members and would change the tenure review process by giving the presidents of institutions the ability to enforce the duties and responsibilities of tenured faculty, which is difficult to do under the current system.

“If this bill passes, it will have no practical effect on the many tenured faculty members who do a great job of changing students’ lives through efficient, effective teaching. Those wonderful faculty members, including many at Dickinson State, have nothing to fear from this bill, in my opinion,” he said. “This bill would change the tenure review process, by allowing the president of an institution to require tenured faculty members to meet their duties and responsibilities. As a practical matter, it is almost impossible for that to occur under the current system absent awful conduct, due to the faculty’s control of the process of review and other provisions protecting unproductive faculty members.”

OPPOSITION AND RECENT ACADEMIC FREEDOM ISSUES

The bill has raised some serious concerns among members of the academic and legal community, who are calling the bill an attack on first amendment protected freedoms.

Dr. Eric Grabowsky, an Associate Professor of Communication at Dickinson State University, in speaking with The Dickinson Press said he believes that House Bill 1446 is a very real threat to the freedoms and responsibilities that come with tenured professorship and could be used by centers of higher learning to silence whistleblowers and remove inconvenient checks and balances on the governance of higher education.

“From my point of view as a citizen, I encourage the public not to fall for House Bill 1446. Debates about tenure and the scope of tenure are legitimate. Colleges and universities need to be good stewards of resources,” he said. “People in North Dakota should know that there are sometimes circumstances in which tenured faculty are uniquely situated

to highlight and discuss problems involving academic integrity, overall management, retaliatory behavior or faulty procurement. Over the years, tenured faculty have raised important concerns regarding these types of areas across the North Dakota University System, including at Dickinson State University.”

In 2021, internal documents, email communication and other records obtained through open records raised concerns with Dickinson State University’s procurement of a Wyoming-based company for instructional design.

A subsequent series of complaints forwarded to the Eide Bailly Fraud Hotline, between Feb. 26 and May 4, 2021, prompted an investigation into the allegations of improper procurement by Dickinson State University by the North Dakota University System. Their conclusions found that DSU’s procurement “was in violation of at least seven laws...” and “the allegations regarding improper procurement for Instructional Design were supported by the investigation.”

“With the privileges of tenure, a person who is tenured is involved in the proper stewardship of public resources. The freedom that goes with tenure extends into proactive communication about the quality of the management and direction of a college or university, which can necessarily involve criticism of university administrators. Persons from across the political spectrum should oppose House Bill 1446,” Grabowsky said. “Workforce development and resource allocation are certainly important matters. Scrutinize tenure, for sure. Discuss and debate policies, guided by sound principles. However, we should not let such legitimate areas of focus provide legislative cover for a quick route out the door for tenured faculty who might inconveniently help to provide important checks and balances on the overall governance of higher education.”

Grabowsky added, “Through my conversations about House Bill 1446, I can say that some people are getting the sense that this bill is an anti-whistleblower bill in disguise.”

Over the last two years, several cases of academic freedom violations, including the firing of two faculty members at Collin College in McKinney, TX, for speaking out against their institution's COVID-19 reopening plans have shined new light on how university's handle dissenting voices coming from within. At the University of Mississippi, a well-respected history professor was dismissed for speaking out against powerful donors with “racist beliefs.” Another case at Pacific University in Forest Grove, OR, involved a tenured professor, Richard J. Paxton, who was suspended without proper procedure.

These incidents have been closely monitored by organizations such as the American Association of University Professors, which works to protect the academic freedom rights of educators.

“Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition,” a statement from the AAUP reads. “Tenure is a means to certain ends; specifically freedom of teaching and

research and of extramural activities, and a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.”

According to the AAUP’s Statement of Principles on Academic Freedom and Tenure, “College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations.”

House Bill 1446, according to Lefor, will move to the next phase of the legislative process in a hearing in three weeks at a date and time yet to be determined.

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By [James B. Miller, Jr.](#)

James B. Miller, Jr. is the Editor of The Dickinson Press in Dickinson, North Dakota. He strives to bring community-driven, professional and hyper-local focused news coverage of southwest North Dakota.

Testimony for Hearing on HB1446

Eric J. Murphy, District 43

Thank you, Chairman Schauer and my honorable colleagues on the Government and Veterans Affairs Committee. For the record, my name is Eric James Murphy, representative from District 43, Grand Forks.

Today I will testify in opposition to HB1446, which has caused quite a stir among constituents in my district in Grand Forks. This bill is comprised of two major parts, both of which are problematic, that are proposed to be part of a four-year study at Bismarck State College (BSC) and Dickinson State University (DSU). While other institutions in the North Dakota University System (NDUS) are not included, this is the beginning of the proverbial slippery slope.

I am well qualified to testify regarding the major issues this bill raises. As a faculty member at the University of North Dakota for the past twenty-two years, I have taught medical students, graduate students, and undergraduate students. I now teach a large undergraduate section class in the area of pharmacology each fall and spring semester, including this semester. I have teach scientific ethics, lipid biochemistry, as well as Advanced Neurochemistry to graduate students. To medical students I have taught lectures in pharmacology and biochemistry. I have an active research lab and a Hirsch number of 46, which is demonstrates excellent recognition of my research prowess in my field of brain lipid neurochemistry and lipid nutrition. I have served as an editor-in-chief of a science journal for 13.5 years and am a fellow of the American Oil Chemists' Society. I have served the NDUS as a non-voting member of the State Board of Higher Education for 2 years and as President of the Council of College Faculties for one year. I think my background in higher education provides an excellent perspective on this bill.

First, this bill suggests that faculty should raise revenue, in the form of grants and/or tuition revenue in a sufficient quantity to pay for their entire compensation package. In addition, it indicates that faculty should take an active role in recruiting students.

These two points are highly problematic. **First**, it presumes that faculty are positioned to control class size and that all faculty teach high volume classes. **Second**, neither faculty at BSC or DSU are in position to compete for grants on a national scale as neither institution has a research mission imbedded in its overall mission in the NDUS. As such, this requirement is frankly not fair to those faculty at these institutions. Further, the availability of grants and the potential of a high grant award value is highly variable between disciplines, as such it is far from a level playing field. **Third**, this notion promulgates a consumer view of higher education, discounting the multitude of differences between what a faculty member does in higher education compared to an employee in an industrial or business setting. Students are not consumers and faculty are not a salesperson who can just ramp up income based upon selling more of their product, the dissemination of knowledge, to an ever-increasing pool of students. **Fourth**, both institutions have paid professionals who recruit students as their full-time position, but this bill suggests that beside the multitude of duties a faculty member must accomplish, recruiting of students should now be added to the list. **Fifth**, this entire notion ignores the value

of the faculty-student relationship that is even more essential in higher education now, than ever before.

Faculty teach a variety of subjects depending upon their area of expertise, but these classes often vary in the number of students. This variance does not impact the effort put into teaching, although it may reduce the amount of class management required. It takes the same effort to teach 10 or 100 students, although the class management, which involves activity outside of the classroom is much more onerous for a class of 100. However, the variable in the proposed equation to determine appropriate effort is based upon revenue generation, which does not account for the vast differences in class sizes in higher education.

Further, what is often not understood by those not serving as faculty member is that behind the scenes, faculty put in significant effort while striving to enhance student comprehension of the complex subjects taught in their classrooms. As we earn the trust of our students, we often take on a counseling role, one of which most of us are not trained to do. We deal with suicidal students in the middle of the night and students who may need significant help to navigate difficult situations that are overwhelming them. Nobody trains us to do this, but faculty spend a tremendous amount of time working with these students in a manner that is not quantifiable.

Second, this bill suggests that faculty, even those with tenure, can be relieved of their appointment by the President of DSU or BSC if their performance is not adequate. This is tremendously problematic as the president of an institution is the last individual in the chain of evaluation for a faculty member and they are not involved in the yearly evaluation of faculty. In addition, for a vested tenure-track faculty member or a tenured faculty member, specific processes must be followed for termination as defined by SBHE policy. For a tenure-track faculty member, they can be relieved of their duties, but must have an opportunity to grieve through a Standing Committee on Faculty Rights (SCoFR) hearing. A tenured faculty member can be relieved for cause, but again has an opportunity to a SCoFR hearing. These hearings include a hearing officer (at UND we generally use a retired judge), a court reporter, and a panel of five tenured faculty members. I have chaired these hearings and have participated in one that comprised over 40 hours of sworn testimony and some 10 hours of deliberations by the committee prior to submitting a report to the president for their final decision. The lack of a clear delineation of how this policy would be implemented in this bill is a clear violation of SBHE policy.

Further, I think it is important to understand why we have tenure in higher education. We have tenure to promote the freedom of ideas and scholarship. Tenure gives faculty the opportunity for unfettered research, despite the potential for this research to be controversial. It allows faculty the ability to interact in an environment that promotes diversity of thought and of ideas. In other words, the academy is one place in which an faculty member (employee) and vehemently disagree with their chairperson, dean, or president in a manner that respects their autonomy to do so.

In summary, this bill does not recognize these important nuances that tenure provides and does not recognize the unique nature of a faculty member in higher education.

Respectfully, for the reasons stated above, I cannot support this bill in its present form.

Dear Members of the House Government and Veteran Affairs Committee:

I write in opposition to HB 1446 for the reasons mentioned below, and feel the bill—either in its current form or with substantial revision—will do deep harm to the people and institutions it intends to help.

A note on the following: While many of the comments below may not pertain directly to the bill in discussion during your hearing today per se, they do reflect my concerns after listening in on House Majority Leader Lefor's comments in the open Zoom forum graciously afforded faculty across the state yesterday as being indicative of the stated reasons for the production and intent of the bill. Thus, though my comments originate in reaction to his comments there, the substance of the concerns I arrive at seem to me to be consistent with the aims of, if not the direct expressions within, the bill in question. In the Dickinson Press article by Robin Huebner published last night at 6:24 p.m., Representative Lefor mentioned that he would be "open to further ideas and discussion and that he would read all of the testimony received in the matter," so I thought it might be best to offer my response to his comments in the testimony phase, here. Please forgive if this approach is either unorthodox or beyond the scope of your hearing. Though I'm currently a tenured Associate Professor of English at Valley City State University, I offer this testimony as a private citizen of North Dakota, and the views espoused below are my own, though informed by 32 years of professorial experience in the NDUS system.

Of the many assertions made by House Majority Leader Lefor in the virtual forum yesterday that deserve questioning (I see that many other citizens have addressed similar concerns with the Bill proper), three in particular stood out to me. First, while Representative Lefor quoted at length in the forum from an unnamed DSU professor in support of his bill, using one piece of personally chosen testimony that resembles little or nothing of my experiences as a professor in this state—10 of which I spent at what is now Williston State College, earning tenure through a rigorous process there, and the last 22 years of which I've worked diligently at Valley City State, earning tenure again and promotion here through equally rigorous processes—seems a slender reed upon which to rest state-wide faculty opinion at best, and curious—at least for me—to boot. To position one professor's discontents as being indicative or representative of faculty across the state contrasts mightily with my 32 years of experience working in the NDUS system. I work hard to fulfill my calling, a calling, I might add, that has been almost entirely motivated from within, from my sense of duty to the over 3,000 students I've had the privilege to teach under current and past policies and agreements, and from what I feel I owe to the more than 200 colleagues I've served with in common devotion to our respective and respected professions. I am, and always have been, highly motivated, as have been the vast, vast majority of my colleagues.

Second, while Representative Lefor suggested in yesterday's forum that he knew that a "vast majority of tenured professors" performed their duties in a manner that he saw fit—and supported them all—and that he could find "only a handful" of cases where tenured professors had been fired, the vague assertions therein gave me pause. While I'm not privy to the percentages/actual numbers he might be referring to—and it might be fruitful to have those, as

well as the number of tenured professors who have been put on improvement plans by their respective chairs through the extensive review policies put in place by SBHE and mirrored on each campus—it came across as something like ‘we’re not firing enough tenured professors.’ Maybe I’m misreading that; I’m open to being wrong and often have been; but as a seemingly constant member of department faculty evaluation committees—both in my own department and others as needed—and after serving for years on our campus Evaluation, Tenure, and Promotion Committee, I can testify to the fact that in cases where faculty are not meeting expectations, both state and campus policy and procedures are already in place to rectify shortcomings—from the department/department-chair level, to the university-committee level, to the president, and those procedures are far from toothless. Faculty who do not demonstrate a clear and consistent pattern of strong teaching (as evaluated through seven distinct and well-defined criteria on our campus), concerted service to the department, the university, the community, and to the state, and a commitment to scholarship or creative activities in their respective fields are never recommended—from a jury of peers who intimately understand what good work looks like and have high motivation to weed out colleagues that don’t do their share of work and well—for tenure status to begin with. Faculty who survive that process and seek promotion after that—nearly all, in my considerable experience—need to continue to perform at an even more stringent ‘highly competent’ level in each of those three areas for at least four, and more often six, more years to earn promotion—again, at both the department and university-committee level—to even reach the university president’s desk, at which time the president can either approve or not the committees’ recommendations. At that point, again according to SBHE and campus policy, non-approved faculty can appeal through yet another policy procedure established from long experience and due consideration of the legalities involved in fair process. Additionally, even tenured and promoted faculty—at least on our campus—are on the hook for yearly evaluations that reach the VPAA level for redress if any is needed. This all constitutes a high level of shared governance which has always been the hallmark of higher education in the state and nationwide, and one we have been made to understand reflects the wishes—and demands—of the SBHE and national accrediting agencies. This is what we all signed up for, willingly and conscientiously, and this is what is now in our DNA. To suggest that all of this generational work—at the national, state, and local-campus level—is inadequate for its intended purposes suggests that the conscientious and caring work of those who came before us, and the diligent work we put in ourselves, has been for naught.

Finally, at least for now, as a member of again-countless hiring committees, our by far largest challenge—at both WSC back in the 90s and VCSU currently—has been in recruiting and then retaining high quality faculty, especially given the low salaries we could then and can now offer...though our current benefits package does help, provided we’re still afforded that as compensation. Representative Lefor’s assertion that this bill, especially if extended to all eleven campuses as both he and President Easton have repeatedly signaled was the original intent of the idea, will help universities become “lean and mean” is likely true, though any discussion with most presidents and a vast majority of faculty across the system would likely reveal that we’re already bone-scrapingly lean, with many faculty already willingly taking on duties for which we’re not expert and for which have expert professionals on staff already hired

to do, such as marketing and recruiting—I sat in, voluntarily, and just this week, on an effort to provide video marketing materials for our department knowing it was in our own best interest. I'll not touch upon the 'mean' part of the equation, except to say that we're primarily concerned with caring about the future of our faculty and the level of expertise we can offer our students. We recently hired two faculty in our department that we're incredibly happy to have; this bill would give both of them second—and third—thoughts about staying in a state that seems intent on dismantling a fulsome and healthy process to reward their decision and commitment, not to mention the impact it will have on who decides even to apply for any open faculty positions in our fine state.

As mentioned above, I am a proud and long-standing faculty member of the NDUS system, and while these are my personal views, and not reflective of either of the campuses I've served, nor of that system, I am also a citizen of this state going on 32 years, and proud to be a North Dakotan. I know House Majority Leader Lefor and supporters of this bill mean well, but please consider the relevance and potential impacts of the above concerns—as well as those expressed in this forum by citizens who have testified more directly in opposition to this bill for an even wider range of reasons—and please vote 'do not pass' on HB 1446.

Respectfully,

Lee Kruger

Good morning chair Schauer, vice chair Satrom and members of the House Government and Veterans Affairs committee, for the record, my name is Mike Lefor and I represent District 37-Dickinson in the House. I bring HB 1446 for your consideration. This bill which I call the "tenure with responsibilities act", provides a mechanism for tenured professors to be reviewed by the university president as it pertains to job performance.

In states such as Florida and Texas, they have recently introduced either by statute or policy a post tenure review process similar to what is being proposed here today. As we all know, higher education is becoming a more complex, more competitive market for our young people and adults.

If you look at available data, you will find more students taking classes on-line than ever before. This means students can literally have their pick of hundreds of universities across the country for their courses. I know of an individual in my hometown who is taking courses at a university in another state rather than North Dakota due to a lower cost.

Our taxpayer supported universities are moving forward with strategies to remain competitive in the marketplace and aligning with other groups to provide the best educational opportunities. Two of these universities are changing their business models to provide more of these opportunities right here in North Dakota.

Dickinson State University is changing to a dual mission campus and Bismarck State College is providing more polytechnic courses. They are aligning with the career and tech academies, local high schools, and adding technology to provide more access to classes online. Recognizing these challenges, the "tenure with responsibilities act" provides for a pilot program within these two institutions to mirror some of the policies being enacted in other states.

In the bill you will note this is a four-year pilot program with the following points.

1. Generate more tuition or grant revenue than the combined total of the salary, fringe benefits, compensation, and other expenses of the tenured faculty member. The compensation costs of a tenured faculty member must be adjusted to reflect the faculty members assumption of administrative responsibilities where applicable.
2. Comply with the policies and procedures and directives of the institution, the president and other administrators, the state board of higher education and the North Dakota university system.
3. Effectively teach and advise a number of students approximately equal to the average campus faculty teaching and advising load.
4. On page 2, engage in measurable and effective activities to:
 - a. Help recruit and retain students for the institution.
 - b. Help students achieve academic success.
 - c. Further the best interests of the institution including providing advice and shared governance with campus leaders and exercising mature judgment to avoid inadvertently harming the institution. (I am providing an amendment to put a period after the word "institution" and eliminating the rest of the wording contained in lines six through eight.

- d. Perform all other duties outlined in any applicable contract and position description.

In section two of the bill on page two beginning on line 12, it provides for a faculty review by presidents of these institutions as follows:

1. The president of each institution under the control of the board of higher education may review performance of any or all duties and responsibilities under Section 1 of the act.
2. A review under subsection 1 (In the amendment being provided to the committee, change number two changes the word "may" to "must" to provide for a paper trail.
3. Explains what happens when a president feels the tenured faculty member has failed to comply with a duty or responsibility, the president may not renew the contract of the tenure faculty member unless the president articulates why it is in the best interest of the institution to continue to employ the faculty member.
4. The president may enlist the assistance of an administrator of at the institution to conduct a review but may not delegate responsibility for the review to a faculty member who is not an administrator.
5. When conducting a review, the president may look at other factors including what is in the best interests of the institution or it's students. (For example, a professor teaching a few students and the university needs these courses for a bachelors program, etc. it gives the president some latitude.
6. Under number six (the amendment changes the wording to allow an appeal to the chancellor of the university system.) Additionally, the president is responsible to the chancellor and state board of higher education for the reviews conducted under this section.
7. States the presidents and administrators, shall fulfill theses duties without fear of reprisal or retaliation. (The fourth change in the amendment to be presented provides the state will indemnify the board of higher education for any action brought forward under this section.)

Provide Amendment.

Members of the Government and Veterans Affairs committee, the cost of higher education in our state continues to grow and we are the stewards of the taxpayer elected to represent them when dollars are allocated. We also need to be competitive for the future and the changing ways in which educational opportunities are offered. Other states have enacted policy to provide for similar reviews, why not North Dakota? That completes my testimony and I would be happy to answer any questions.

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 pilot program for tenured faculty review at institutions of higher
3 education; 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 - Pilot program.**

8 In response to the urgent need to accelerate workforce development, the state board of
9 higher education shall implement a four-year pilot program focused on the two new campus
10 models at Bismarck state college, now a polytechnic college, and Dickinson state university,
11 now a dual-mission university, no later than May 1, 2023, to improve the tenure process. The
12 pilot program may not apply to a research university. A tenured faculty member employed at an
13 institution of higher education under the control of the state board of higher education shall:

- 14 1. Generate more tuition or grant revenue than the combined total of the salary, fringe
15 benefits, compensation, and other expenses of the tenured faculty member plus all
16 other costs of employing the faculty member, including employment taxes. The
17 compensation costs of a tenured faculty member must be adjusted to reflect the
18 faculty member's assumption of administrative responsibilities and related lessening of
19 the faculty member's teaching responsibilities, where applicable.
- 20 2. Comply with the policies, procedures, and directives of the institution, the institution's
21 president and other administrators, the state board of higher education, and the North
22 Dakota university system.
- 23 3. Effectively teach and advise a number of students approximately equal to the average
24 campus faculty teaching and advising load.

- 1 4. Engage in measurable and effective activities to:
- 2 a. Help recruit and retain students for the institution.
- 3 b. Help students achieve academic success.
- 4 c. Further the best interests of the institution including providing advice and shared
- 5 governance to campus leaders, and exercising mature judgment to avoid
- 6 inadvertently harming the institution, especially in avoiding the use of social
- 7 media or third-party internet platforms to disparage campus personnel or the
- 8 institution.
- 9 5. Perform all other duties outlined in any applicable contract and position description.

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

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

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

1 employment is terminated or suspended as a result of a review under this section may
2 appeal the review to the North Dakota university system chancellor. The president is
3 subject to review and assessment by the state commissioner of higher education and
4 the state board of higher education for the reviews the president conducts under this
5 section.

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

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

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1446

Page 2, line 6, remove ". especially in avoiding the use of social"

Page 2, remove line 7

Page 2, line 8, remove "institution"

Page 2, line 17, replace "may" with "must"

Page 2, line 30, remove "appealable or"

Page 2, line 31, after the underscored period insert "A faculty member whose contract is not renewed or whose employment is terminated or suspended as a result of a review under this section may appeal the review to the North Dakota university system chancellor."

Page 3, line 6, after the underscored period insert "The state shall indemnify the members of the board of higher education, the president of an institution of higher education, or an administrator of an institution of higher education for all reasonable costs, including attorney's fees, incurred in defending any actions taken pursuant to these provisions."

Renumber accordingly

HB 1446: The Tenure with Responsibilities Act

Steve Easton Testimony: February 3, 2023

Basic Faculty Categories

- Adjunct faculty
- Non-Tenure Track (NTT): "special" or "annual" contract faculty
- Tenure Track (TT): "probationary" faculty
- Tenured [T] faculty

Adjunct Faculty

Mostly part-time faculty.
Often teaching only one course, but occasionally more.

These faculty have one-semester contracts.
But they can be, and often are, rehired in later semesters.

Roughly half of the faculty in a given semester at DSU.
Adjunct faculty produce roughly 20% of credits

Usual faculty compensation rate is \$700 per credit
In spring semester of 2022, 3,448 credits generated, with tuition (at \$300 per credit) of about \$1,034,400 and faculty compensation costs of \$149,394, for net gain of about \$885,000
Very low cost per credit produced: \$43.33 in spring semester of 2022 at DSU

No right to appeal non-renewal (i.e., non-offering of a contract after the semester is completed).

Non-Tenure Track [NTT]: "special" or "annual" contract faculty

Hired on a short-term basis, up to three years.

- At DSU, usually hired for one year (though occasionally 1.5 years)

Often given a new one-year contract after previous one-year contract expires.

- Can have lengthy careers at DSU.

Why not tenure track?

- No tenure track job open
- Possible lack of terminal or other advanced degree when tenure track job opens
- More recently, DSU president's default policy to hire on an annual, not tenure track, basis

No right to appeal non-renewal (i.e., non-offering of a contract after the year is completed).

SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty

3. A special appointment terminates at the end of the term stated on the contract and may be renewed at the discretion of the institution.

Tenure Track [TT]: "probationary" faculty

Faculty hired "on the tenure track," meaning they are expected to gain tenure.

Usually, faculty in the first six to seven years of their tenure track careers.

Usually, these faculty "go up" for tenure in their seventh year.

Non-renewed probationary faculty can request reconsideration of decision to not renew, but cannot appeal non-renewal.

But probationary faculty get short "teach outs" due to notice requirements.

SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty

- 1. A probationary appointment may be terminated, without cause, with notice to the faculty member that the appointment will not be renewed.
 - a. Notice shall be given:
 - i. At least 90 days prior to termination during the first year of probationary employment at the institution.
 - ii. At least 180 days prior to termination during the second year of probationary employment at the institution.
 - iii. At least one year prior to termination after two or more years of probationary employment at the institution.

Tenured [T] Faculty

Except for lateral hires, faculty start as tenure track (i.e., probationary) faculty, then are granted tenure (often in their seventh year).
 MANY tenured faculty are hardworking and productive.
 • But not all of them are.

Current Tenure System

"De Jure" v. "De Facto"

**Granting of Tenure (at DSU)
(usually in seventh year of service)**

- Department Committee
- Department Chair
- College Dean
- Promotion and Tenure Committee
- Vice President/Provost
- President
- State Board of Higher Education

SBHE Policy 605.1(5) Academic Freedom and Tenure; Academic Appointments

Because of the variety of scope and organizational structure of the institutions under the control of the SBHE, the faculty governance structure at each institution shall recommend procedural regulations to the president to implement SBHE Policies 605.1, 605.2, 605.3 and 605.4, in accordance with SBHE Policy 305.1:

- a. Institution procedural regulations must include:
 - i. Procedures for continuing evaluation of both probationary and tenured faculty members; and
 - ii. Criteria and procedures by which faculty members are evaluated and recommended for tenure.

SBHE Policy 605.1(6) Academic Freedom and Tenure; Academic Appointments

b. Tenured appointments recognize a right, subject to SBHE policy, to continuous academic year employment in an academic unit or program area as defined by an institution and stated on the contract.

Termination of Employment

- Faculty member resignation:
 - Apparently allowed at any time,
 - ... with or without a reason
 - ... with or without notice

SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty

- 5. A faculty member may terminate an appointment by giving notice in writing. Faculty are encouraged to give notice well in advance of the date of termination of employment at the end of a contract term.

Termination of Employment

- Declaration of institutional budget crisis:
 - Theoretically possible,
 - ... but practically almost impossible

SBHE Policy 605.3(6) Nonrenewal, Termination or Dismissal of Faculty

6. A tenured faculty member terminated pursuant to Board declared financial exigency shall be given written notice of termination at least 90 days prior to the date of termination.

SBHE Policy 605.3(6) Nonrenewal, Termination or Dismissal of Faculty

b. A position terminated under this section shall not be filled by a replacement within two years, unless the released faculty member has been offered appointment with tenure and a reasonable time within which to accept or decline it.

SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty

7. In accordance with principles of shared governance, the faculty governance structure at each institution shall adopt procedures by which faculty participation is solicited before notice of termination is given any tenured faculty member pursuant to section 6 [, such as financial exigency].

Faculty participation shall be solicited concerning:

- a. The extent to which there are grounds for termination of tenured appointments;
- b. Judgments determining where within the overall academic program termination of appointments may occur; and
- c. The procedure and criteria for identifying the individuals whose appointments are to be terminated.

Higher Learning Commission Policy INST.F.20.010: Special Monitoring

Circumstances Giving Rise to Special Monitoring

- Situations that may result in special monitoring include, but are not limited to:
- institutional **declaration of bankruptcy**, **financial exigency**, or intent to close

Termination of Employment

Dismissal for cause:
Theoretically possible,
. . . but practically very difficult

SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty

9. If the administration determines that the conduct of a faculty member, although not constituting ground for termination or dismissal, provides reasonable cause for imposition of a sanction, the administration shall inform the faculty member in writing of the sanction and the reasons for the sanction.

A sanction means demotion, suspension (but not including suspension pending a dismissal or termination decision), salary reduction or loss of salary, or restriction or loss of privileges imposed as a formal disciplinary measure. . . .

[T]he faculty member may request review upon filing with the institution's president and chair or senior member of the **Standing Committee on Faculty Rights** a request for review and specifications of reasons within twenty calendar days of receipt of notice of imposition of a sanction.

SBHE Policy 605.3(8) Nonrenewal, Termination or Dismissal of Faculty: Dismissal for Cause

Point 8. A faculty member may be dismissed at any time for adequate cause.
Adequate cause means:
(a) demonstrated **incompetence or dishonesty in teaching, research, or other professional activity related to institutional responsibilities,**
(b) continued or repeated **unsatisfactory performance evaluations** and failure to respond in a satisfactory manner to a recommended plan for improvement;
(c) **substantial and manifest neglect of duty,**
(d) conduct which substantially impairs the individual's fulfillment of his or her institutional responsibilities or the institutional responsibilities of others,
(e) a physical or mental inability to perform assigned duties, provided that such action is consistent with laws prohibiting discrimination based upon disability, or
(f) significant or continued violations of Board policy or institutional policy, provided that for violations of institutional policy the institution must notify the faculty member in advance in writing that violation would constitute grounds for dismissal, or the institutional policy must provide specifically for dismissal as a sanction.

SBHE Policy 605.3(8) Nonrenewal, Termination or Dismissal of Faculty: Dismissal for Cause

b. A faculty member may, within twenty calendar days of receipt of notice of intent to forward to the institution president a recommendation to dismiss, request a formal hearing before the **Standing Committee on Faculty Rights**, pursuant to section 605.4.

SBHE Policy 605.2 Standing Committee on Faculty Rights

1. Each institution shall have a standing committee on faculty rights consisting of **three, five, or seven tenured faculty members** elected for staggered terms by the faculty governance structure.

SBHE Policy 605.2 Standing Committee on Faculty Rights

2. Each Institution shall adopt procedures concerning mediation implementing SBHE Policy 605.5.

Institutions shall pay all mediation costs.

605.4 Hearings and Appeals

2. The committee shall appoint, at the expense of the institution according to institution procedures, a hearing officer with authority to conduct pre-hearing meetings, supervise exchange or collection of information, advise the committee, or preside over the hearing. . . .

The institution shall provide necessary clerical support for the committee and, upon request, for the hearing officer.

605.4 Hearings and Appeals

7. A verbatim transcript of the hearing or hearings shall be made at the institution's expense, and shall be accessible to both parties.

An electronic recording of the hearing or hearings is sufficient to meet the requirements of this paragraph.

A party shall be provided a copy of the record, or part of the record, upon request, at the institution's expense.

605.4 Hearings and Appeals

8. The findings of fact, conclusions, and recommendations shall be based solely on the evidence received by the committee.

When brought . . . pursuant to SBHE Policy 605.3(8) or (9), the burden of proof shall rest with the institution and be satisfied only by clear and convincing evidence that grounds for the institution's actions exist when the record is considered as a whole.

605.4 Hearings and Appeals

11. The committee shall provide written findings of fact, conclusions, and recommendations, with supporting reasons, to the institution's president and the faculty member or the faculty member's representative.

If the institution's action was a notice of dismissal and if the committee concludes that adequate cause for dismissal has been established, but that a lesser penalty would be more appropriate, it may so recommend with supporting reasons.

The president shall decide and provide written notice of the decision, including findings of fact and reasons or conclusions based on the hearing record, to the committee and the faculty member within twenty calendar days of receiving the report, unless the president determines that more time is required due to unforeseen circumstances, in which case the president may extend the period by 10 calendar days on notice to the parties and committee.

The faculty member or committee may, within ten calendar days of the decision, submit a written response to the decision, to which the president may, but is not required to, reply.

HB 1446: Proposed Duties and Responsibilities of Tenure

HB 1446, Section 1

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

Faculty tenure duties and responsibilities - Pilot program

In response to the urgent need to accelerate workforce development, the state board of higher education shall implement a four-year pilot program focused on the two new campus models at Bismarck state college, now a polytechnic college, and Dickinson state university, now a dual-mission university, no later than May 1, 2023, to improve the tenure process.

The pilot program may not apply to a research university.

A tenured faculty member employed at an institution of higher education under the control of the state board of higher education shall:

Faculty tenure duties and responsibilities

1. Generate more tuition or grant revenue than the combined total of the salary, fringe benefits, compensation, and other expenses of the tenured faculty member plus all other costs of employing the faculty member, including employment taxes. The compensation costs of a tenured faculty member must be adjusted to reflect the faculty member's assumption of administrative responsibilities and related lessening of the faculty member's teaching responsibilities, where applicable.

Revenue v. Expense

From: Dragseth, Debora
 Sent: Friday, January 28, 2022 11:11 AM
 To: dsufaculty@listserv.nodak.edu; DSUstaff@listserv.nodak.edu
 Subject: January 28, 2022 Provost Briefing

Provost Briefing to Faculty

***** Attendance Reporting**

Unfortunately, the faculty reporting of student attendance on Starfish is spotty. Please make sure that you are attending to this important task.

Why? It is an important piece to the retention puzzle.

If you need assistance, please contact Monica Watson.

Thank you all for your help.

-Debora

From: Dragseth, Debora
 Sent: Friday, February 4, 2022 10:43 AM
 To: dsufaculty@listserv.nodak.edu; DSUstaff@listserv.nodak.edu
 Subject: Provost Briefing February 4, 2022

Provost Briefing to Faculty

***** Attendance Reporting**

Unfortunately, the faculty reporting of student attendance on Starfish is spotty. Please make sure that you are attending to this task.

Why? It is an important piece to the retention puzzle.

Below is a list of faculty and staff who have logged attendance in Starfish at least once this semester (Spring 2022).

Thank you to everyone on the list!

I am sure that any one on this list would be happy to work with a fellow faculty member who needs a 5-10 minute tutorial on how attendance reporting works.

If you need additional assistance, our campus expert is Monica Watson.

- [List of 44 names, including several adjunct (part-time) faculty]

3. Effectively teach and advise a number of students approximately equal to the average campus faculty teaching and advising load.

Teaching and Advising

- 4. Engage in measurable and effective activities to:
 - a. Help recruit and retain students for the institution.

Recruiting and Retention

- 4. Engage in measurable and effective activities to: ...
 - b. Help students achieve academic success.

Supporting Student Success

- 4. Engage in measurable and effective activities to:
 - c. Further the best interests of the institution including providing advice and shared governance to campus leaders, and exercising mature judgment to avoid inadvertently harming the institution.

Building the Institution

5. Perform all other duties outlined in any applicable contract and position description.

Perform Contract Duties

Faculty tenure review by presidents of institutions of higher education.

HB 1446, Section 2

1. The president of each institution of higher education under the control of the state board of higher education may review performance of any or all of the duties and responsibilities under section 1 of this Act of any faculty member holding tenure at any time the president deems a review is in the institution's best interest.

Optional Presidential Review

2. A review under subsection 1 must include a written assessment of whether the faculty member is complying with the duties and responsibilities reviewed.

Written Assessment

3. If a president determines a tenured faculty member has failed to comply with a duty or responsibility of tenure, the president may not renew the contract of the tenured faculty member, unless the president specifically articulates why it is in the interest of the institution to continue to employ the faculty member despite the faculty member's failure to comply with the duties and responsibilities of tenure.

Optional Non-Renewal

4. The president of an institution may enlist the assistance of an administrator at the institution to conduct a review but may not delegate responsibility for the review to a faculty member who is not an administrator.

Administrator Assistance with Review

5. When conducting a review under this section, the president of an institution may assess and review other factors relevant to the faculty member's employment and the interests of the institution and the institution's students.

Optional Review of Other Factors

6. A review under this section is not reviewable by a faculty member or faculty committee. A faculty member whose contract is not renewed or whose employment is terminated or suspended as a result of a review under this section may appeal the review to the North Dakota university system chancellor.

Appeal to Chancellor, Not Faculty

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

Review of President

7. The president and any administrators delegated to assist the president shall fulfill these duties without fear of reprisal or retaliation. No complaint, lawsuit, or other allegation is allowed against a president or other administrator for actions taken pursuant to these provisions.

Protection Against Retaliation

7. . . . The state shall indemnify the members of the board of higher education, the president of an institution of higher education, or an administrator of an institution of higher education for all reasonable costs, including attorney's fees, incurred in defending any actions taken pursuant to these provisions

Indemnification

SBHE Policy 605.1(2) Academic Freedom and Tenure; Academic Appointments

The purpose of tenure is to assure academic freedom.
Academic freedom applies to all scholarly pursuits.
Freedom in scholarship is fundamental to the advancement of knowledge and for the protection of the rights of the faculty members and students.
It carries with it duties and responsibilities correlative with rights.
These duties and rights are set forth in SBHE Policy 401.1, relating to academic freedom, and the 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, adopted by the American Association of University Professors and the Association of American Colleges.
These policies apply to all institution faculty unless otherwise indicated.

HB 1446:
Emergency Clause

**This Act is declared to be
an emergency measure.**

SECTION 3. EMERGENCY.

Former Non-Tenured Faculty Member

"This is not right."

23.0083.04007
Title.

Prepared by the Legislative Council staff for
Representative Lefor
February 10, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1446

Page 1, line 3, after the semicolon insert "to provide for a legislative management report;"

Page 1, line 7, after "**program**" insert "**- Report to legislative management**"

Page 1, after line 7, insert:

"1."

Page 1, line 12, after the underscored period insert:

"2."

Page 1, remove lines 14 through 19

Page 1, line 20, replace "2." with "a."

Page 1, line 23, replace "3." with "b."

Page 2, line 1, replace "4." with "c."

Page 2, line 2, replace "a." with "(1)"

Page 2, line 2, remove "recruit and"

Page 2, line 3, replace "b." with "(2)"

Page 2, remove lines 4 through 8

Page 2, line 9, replace "5." with "d."

Page 2, line 9, after the second underscored period insert:

"3. An institution involved in the pilot program under this section:

a. May adopt policies and procedures requiring tenured faculty to promote advancement of and further the mission of the institution.

b. Shall provide a progressive report of the pilot program to the legislative management no later than December 31, 2025.

c. Shall provide a final report of the pilot program to the legislative management no later than December 31, 2026."

Page 2, line 13, remove "under the control of the state"

Page 2, line 14, replace "board of higher education" with "designated under section 1 of this Act"

Page 2, line 17, replace "may" with "must"

Page 2, line 30, remove "appealable or"

Page 2, line 31, after the underscored period insert "A faculty member whose contract is not renewed or whose employment is terminated or suspended as a result of a review"

under this section may appeal the review to the commissioner of the state board of higher education."

Page 2, line 31, remove "state"

Page 3, line 1, remove "of higher education"

Page 3, line 6, after the underscored period insert "The state shall indemnify the members of the state board of higher education, the president of an institution of higher education, or an administrator of an institution of higher education for all reasonable costs, including attorney's fees, incurred in defending any actions taken pursuant to this Act."

Renumber accordingly

Individual Testimony in Opposition to House Bill 1446

March 9, 2023

Dear Chairman Elkin and Senators Beard, Axtman, Conley, Lemm, and Wobbema:

My name is Dr. Anastassiya Andrianova, and I am a tenured associate professor of English at North Dakota State University (NDSU) in Fargo and the President of the NDSU Faculty Senate. In addition to my personal testimony **in opposition to House Bill 1446** (tenure review), I am also submitting a Resolution approved by the NDSU Faculty Senate on February 13, 2023. My individual testimony reflects my own ideas and *not* those of the university; the Resolution reflects the opposition to this bill by NDSU faculty whom the NDSU Faculty Senate represents.

First, I want to thank you for your work in furthering the interests of the citizens of North Dakota. The ND Legislature plays an important role in making sure those interests are met. However, this effort to review, redefine, and potentially end tenure is *not* in the best interest of North Dakota.

In fact, tenure, being an academic matter, is fully within the purview of the State Board of Higher Education (SBHE). According to Article VIII. Education, [Section 6.6.b](#) of the North Dakota Constitution, the “state board of higher education shall have full authority over the institutions under its control [...]” The SBHE has the resources and the expertise to look into tenure and make adjustments, if necessary. The SBHE now officially opposes HB 1446, and I fully support the board’s subsidiary power with respect to the 11 NDUS institutions of higher education under its control.

Further, this proposed bill will be and is already damaging to the state of North Dakota. HB 1446 is meant to solve DSU’s financial problems at the expense of the entire NDUS system. Although the first part of the bill focuses on DSU and BSC and the four-year pilot study of those two colleges, the second half attacks tenure across all 11 NDUS institutions by laying the foundation for university presidents to fire tenured faculty. HB 1446 is a slippery slope. The bill has received a lot of negative publicity already, including by the AAUP and FIRE. If passed, it will result in a brain drain of current academics and dissuade others from coming here. It will, as result, have a negative economic impact on the state and the workforce. Every time an article appears in print that mentions North Dakota and the current legislative effort to revise tenure we lose one or more prospective researchers who could make our universities and the state of North Dakota great. This is very bad.

House Bill 1446 is a threat to tenure and academic freedom, one of the key faculty rights that tenure protects. Although, in its amended form, this bill allegedly checks a university president’s unilateral power to fire tenured faculty by granting the right of appeal with the chancellor, this is not meaningful appeal, and is still taking tenure out of the hands of faculty and university administrators (chairs/heads, deans, provosts). There are already policies and procedures in place at the level of the SBHE and NDSU that ensure checks and balances in the tenure process, that provide for post-tenure review, and that also allow for suspension and dismissal of tenured faculty: due to exigency (e.g., the closure of academic programs) or “adequate cause” (e.g., dishonest teaching; violation of institutional policy; failure to fulfill duties).

House Majority Leader Lefor, the sole sponsor of HB 1446, read an email from a particularly disgruntled faculty member, suggesting that this is the rule, rather than the exception. He also cited that only a

handful of tenured faculty have been dismissed in the past 5 years. As NDU President Nick Archuleta pointed out in his testimony on February 3rd, is it not possible that the number is so low because tenured faculty are actually performing their duties? As NDUS Chancellor Mark Hagerott also noted, this number is not entirely telling because many faculty leave before the tenure review, especially if they see the writing on the wall.

So why support a bill that would effectively undermine tenure in the whole state on the basis of anecdotal evidence when the arguments in favor of tenure, academic freedom, and accreditation are so much more convincing?

I will conclude by assuring you that tenure is not a *carte blanche* to do nothing. I have never worked as hard as I have after tenure. You can ask my family – whom I've been neglecting and even now, instead of joining my spouse and young daughter at the pool, I feel compelled to write this testimony. I have had to write my other testimonies in the middle of the night after my child went to bed and after I completed my other pressing tasks – research, teaching, and other service. Whoever is telling you that tenured faculty are producing nothing is getting their accounts from ill-informed anti-intellectual social media.

If this bill passes for Dickinson and Bismarck, it is only a matter of time before another bill attempts to extend it to the two research universities. As a tenured faculty member at one of these two institutions, I assure you, this will be damaging and devastating as we will lose current researchers and scholars and we will fail to attract the best talent that we need to maintain the high quality our public universities.

I therefore urge you to VOTE RED on HB 1446.

Thank you.



Resolution Against House Bill 1446 Relating to a Pilot Program for Tenured Faculty Review at Institutions of Higher Education

Whereas proposed House Bill 1446 ([HB 1446](#)) stipulates that the president of each institution of higher education under the control of the state board of higher education (SBHE) “may review performance of any or all of the duties and responsibilities [...] of any faculty member holding tenure at any time the president deems a review is in the institution’s best interest” (Section 2.1);

Whereas HB 1446 stipulates that a university president “may not renew the contract of the tenured faculty member, unless the president specifically articulates why it is in the interest of the institution to continue to employ the faculty member” (Section 2.3);

Whereas HB 1446 (in its amended version 23.0083.04004) stipulates that a university president’s review of tenured faculty under the control of the SBHE “is not reviewable by a faculty member or faculty committee” (Section 2.6), thereby overriding existing North Dakota State University (NDSU) [Policy 350.3](#) *Board Regulations of Nonrenewal, Termination or Dismissal of Faculty*, according to which faculty maintain the right to appeal the recommendation for dismissal to the Standing Committee on Faculty Rights within 21 calendar days of the dismissal recommendation (Section 8.a);

Whereas HB 1446 (in its amended version 23.0083.04004) stipulates that “[a] faculty member whose contract is not renewed or whose employment is terminated or suspended as a result of a review [...] may appeal the review to the North Dakota university system chancellor” (Section 2.6), thereby offering an appeal that may not be meaningful as the chancellor is the direct supervisor of a university president and may be reluctant to overrule their recommendation for dismissal;

Whereas the process of acquiring tenure is conducted ethically, with multiple checks and balances, and in accordance with SBHE [Policy 605.1](#) *Academic Freedom and Tenure; Academic Appointments* and NDSU [Policy 352](#) *Promotion, Tenure and Evaluation*;

Whereas SBHE [Policy 605.1](#) and NDSU [Policy 352](#) already specify procedures for post-tenure review that ensure accountability for tenured faculty’s performance of contractual duties and responsibilities; SBHE [Policy 605.1](#) specifies the policy and procedure for faculty termination due to financial exigency, “upon discontinuance of the program in which the faculty member is

employed” (Section 7); and NDSU [Policy 350.3](#) specifies the terms and due process for the termination of faculty appointments for “financial exigency” and “adequate cause” (Sections 6 and 8); now therefore, be it

Resolved, that the NDSU Faculty Senate:

1. upholds SBHE [Policy 605.1](#), according to which “[t]he purpose of tenure is to assure academic freedom,” and the duties and rights related to academic freedom are set forth in [SBHE Policy 401.1](#), and the [1940 Statement of Principles on Academic Freedom and Tenure](#) (Rev. 1990), adopted by the American Association of University Professors and the Association of American Colleges;
2. supports academic freedom, which is not only a fundamental right afforded to faculty but also one of the criteria for accreditation by the Higher Learning Commission (HLC), NDSU’s accreditation body, according to which an accredited “institution is committed to academic freedom and freedom of expression in the pursuit of truth in teaching and learning” (Section D), and its “governing board preserves its independence from undue influence on the part of donors, elected officials, ownership interests, or other external parties” (HLC [Criterion 2 Integrity: Ethical and Responsible Conduct](#) Section C.4);
3. upholds the NDSU Faculty Senate’s [guiding principles for shared governance](#), which reiterate SBHE [Policy 305.1 Institution President Authority and Responsibilities; Contract Terms](#) that “each President shall ensure effective and broad-based participation in the decision-making process from faculty, staff, students, and others in those areas in which their interests are affected” (Section 4.a);
4. fully supports the NDSU Faculty Senate Executive Committee’s [Statement Against HB 1446](#), adopted on February 1, 2023;
5. fully supports the North Dakota University System’s Council of College Faculties’ Resolution in Opposition to HB 1446, approved on January 31, 2023; and
6. urges Chairman Shauer and Members of the Committee on Government and Veterans Affairs at the Sixty-Eighth Legislative Assembly of North Dakota **to vote DO NOT PASS on HB 1446.**

Testimony in Opposition to HB 1446

March 10, 2023

My name is Keith E. Whittington, and I am the William Nelson Cromwell Professor of Politics at Princeton University, a visiting fellow at the Hoover Institution, and the founding chair of the Academic Freedom Alliance. The Academic Freedom Alliance is a cross-ideological coalition of university faculty concerned with defending academic freedom and free speech. I write today in my individual capacity, and the views expressed here are my own.

I write to express my concerns with HB 1446.

Although I appreciate the legislature's interest in ensuring that faculty employed at state universities remain productive over the course of their careers, the provisions of the current bill would significantly undercut an effective tenure system that is essential to promoting free inquiry on college campus. I call to your attention Section 2(1) which authorizes the university president to initiate the review of any tenured faculty member at any time and Section 2(3) which empowers the university president to "not renew the contract of the tenured faculty member." Despite faculty members being awarded tenure after a suitable probationary status and systematic evaluation of their performance, these two provisions would empower the university president to act on his own initiative and with his own discretion to immediately terminate tenured members of the faculty.

Post-tenure reviews of the performance of members of the faculty can be entirely compatible with the maintenance of a meaningful system of tenure protection. There are many ways that such a system of post-tenure review can be designed, but this bill would entrust university presidents with essentially unconstrained discretion to terminate tenured members of the faculty. Such sweeping discretion to revoke tenure and terminate a faculty member would effectively subvert the very purpose of granting tenure protections in the first place. Of particular concern in this regard are Sections 2(4)-2(6).

Section 2(4) provides

The president of an institution may enlist the assistance of an administrator at the institution to conduct a review but may not delegate responsibility for the review to a faculty member who is not an administrator.

Section 2(6) provides

A review under this section is not reviewable by a faculty member or faculty committee.

Sections 2(4) and 2(6) specifically cut out members of the faculty from this post-tenure review process. Faculty involvement in systems to hire, promote, and terminate members of the university faculty are essential to preserving the quality and independence of the scholars and instructors at an institution of higher education. In the specific context of termination decisions, the body of the faculty provide critical checks and balances against the abuse of discretion by any single administrator. Shared faculty governance over such critical academic decisions helps ensure that such judgments are made on the basis of careful evaluation and appropriate professional considerations. Even if one were inclined to trust the temperament and judgment of a particular university president, long experience has amply demonstrated that the ability to terminate members of the faculty can be abused if left in the hands of a

single individual. It is a long and laborious process to hire and promote qualified members of a university faculty. The process for removing individuals from the faculty should mirror that deliberative process and not be impetuous.

The members of the faculty are also best positioned to evaluate whether a tenured member of the faculty has satisfactorily performed his or her duties. While some basic metrics of job performance are readily accessible to the senior administration of the university, the job responsibilities of instructors and scholars are not appropriately reduced to such readily transparent metrics. Whether a faculty member is carrying their weight in an academic department and whether a faculty member adds value over time to a department are judgments best made by that faculty member's immediate peers. Moreover, these are judgments that are most appropriately made based on extended observation of the workings of a department and not on a brief snapshot of a professor's activities. A tenured faculty member's immediate peers in a collegial environment know whether he or she adds value to a department or whether a faculty member is shirking his or her responsibilities and imposing burdens on colleagues. University presidents are not well positioned independently to make those judgments, and as a consequence presidents are likely to render such judgments based on either poor information or extrinsic factors, or both.

Moreover, Section 2(5) provides

When conducting a review under this section, the president of an institution may assess and review other factors relevant to the faculty member's employment and the interests of the institution and the institution's students.

This provision of HB 1446 would effectively undo any limitations on presidential discretion that might be found in Section 1 or Section 2(2) of the bill. The ability to fire tenured members of the faculty based on nothing more than a university president's individual judgment that doing so would be conducive to the "interests of the institution and the institution's students" would effectively do away with tenure protections entirely. Transitory changes in student preferences as to courses of study and momentary political firestorms could easily be used to justify removing a professor from the faculty. Individual members of the faculty who become objects of controversy or find themselves out of favor with senior university officials, prominent donors or alumni, or influential politicians could find themselves dismissed in the name of protecting the "interests of the institution." Professors who challenge or offend the sensibilities of the current cohort of students could find themselves out of a job because of a president's judgment about "other factors" that might be relevant to the interests of the institution's students. Tenure is supposed to protect the ability of professors to dissent from majority opinion and pursue arguments and evidence in directions that might be discomfiting. Section 2(5) would instead allow heterodox opinions to become the basis for firing tenured professors.

Section 2(5) also raises the specter of university presidents terminating faculty *en masse* with a view to advancing the president's own preferred plans for the university. Shared faculty governance allows a university to benefit from the scholarly expertise of the faculty when making decisions regarding core academic features of the institution. Section 2(5) would allow a university president to circumvent the faculty entirely in reorganizing its academic program. Not only could a president fire individual members of the faculty who might object to a president's plans, but a president could terminate the entire faculty of an academic department on the grounds that the existence of the department itself is no longer in the best interest of the university as the president alone understands it. The academic programming of

the university would depend entirely on the whim of an individual university president and whatever short-term incentives and concerns might motivate such a president.

Universities across the country, including those in North Dakota, have policies and procedures in place to sanction and even terminate members of the tenured faculty when they fail to perform their duties in a competent fashion or engage in misconduct. A policy such as the one embodied in HB 1446 is unnecessary to accomplish that objective.

HB 1446 in its present form is instead a dagger aimed at the heart of free inquiry at the state's universities. Just in the past few years we have seen many instances of university faculty threatened with termination or in fact fired for disagreeing with university presidents on their management of the university or on the future of an academic program, for engaging in classroom discussions that are professionally competent and germane to the subject matter but controversial to the students or members of the larger community, and for expressing scholarly or political views that are politically controversial. Serious universities should be places where professors can argue over the design of the academic program, challenge their students, and express unconventional views and advocate for controversial ideas. The enactment of HB 1446 in its present form would chill the intellectual environment of the university and enforce a rigid conformity on the faculty.

HB 1446 is incompatible with meaningful protections for academic freedom and should not be enacted in anything resembling its current form.



Faculty Senate

Date: February 2, 2023

Legislation HB 1446: Resolution in Opposition to Proposed Emergency-Measure HB 1446 Related to Pilot Program for Tenured Faculty Review at N.D. Institutions of Higher Education

Constituents: District 40, North Minot including Minot State University (MiSU); District 03, SE Minot; District 05, SW Minot; and District 38, West Minot.

Our information source: On February 2, 2023, the Minot State University (MiSU) Faculty Senate approved a resolution in full support of, and in agreement with, the statements submitted by the Faculty Senate Executive Committee (FSEC) of North Dakota State University (NDSU), and the North Dakota University System Council of College Faculties' (CCF) Resolutions in Opposition to HB 1446.

Our specific concerns: The positions and rationale included in the above statements are consistent with the MiSU's Faculties' concerns about the proposed legislation. If enacted, HB 1446 will negatively impact faculty recruitment and retention and thus have a negative impact on the quality of teaching and students' learning in the NDUS. In addition, the negative impact on workforce retention and development would extend far beyond academia. HB 1446 also directly targets tenure and academic freedom while simultaneously ignoring the existing policies and procedures in place covering tenured faculty accountability and termination, polices put in place by the SBHE and the individual institutions.

Our position: Therefore, the MiSU Faculty Senate urges Chairman Shauer and the Members of the Committee on Government and Veterans Affairs **to vote "do not pass" on HB 1446.**

Approved by: the Voting Members of the Faculty Senate (Motion approved at 2/2/2023 Procedural Meeting)

Thank you for taking the time to consider this request.

Minot State Faculty Senate

Testimony on HB1446
 Larry A. Isaak
 North Dakota University System Chancellor Emeritus
 March 13, 2023

Mr. Chairman and members of the Senate Education Committee:

First, I am testifying as a private citizen on my own behalf. So, let me introduce myself so you understand why I am testifying. I am a native North Dakotan who lived there for 52 years. I, my wife and two sons attended and/or graduated from NDUS institutions. I had a thirty-year career in North Dakota higher education and state government. I was Chancellor of the North Dakota University System (NDUS) for approximately ten years from 1994 through 2003. Prior to that I was a vice chancellor/associate commissioner for administration and student affairs, was the state Executive Budget Analyst, and Assistant Legislative Budget Analyst and Auditor. After 2003 I was employed as the president of the Midwestern Higher Education Compact until 2018 when I retired. I returned to the state at least annually and several more times to make presentations on higher education trends and governance. In 2018 I made a presentation about the history of the State Board of Higher Education (SBHE) and the NDUS to Governor Burgum's task force on higher education which is the basis for much of my testimony. I or the NDUS office can give it to you if you wish to see it.

Various legislation being considered by the 2023 legislative assembly will considerably reshape the governance and administration of the NDUS. So, today I am asking you to recommend a do not pass on HB1446. As you consider this bill and other legislation, I respectfully urge you to be keenly aware of the impact of legislation on the State Board of Higher Education's (SBHE) constitutional governance mandate, and also its impact on employees, students and citizens impacted by the institution's services. The current legislation being considered in HB1446, among others, is the most significant challenge to the Board's constitutionally mandated authority since the board was created in 1938. Specifically, I appreciate this opportunity to share with you my concerns about engrossed HB 1446 since I believe this legislation usurps the SBHE's constitutional authority and may threaten the accreditation of institutions.

1. The intent of the 1938 initiated measure that amended the state constitution creating the board of higher education was enacted to protect state colleges and universities from political interference (any political interference, whether by a governor or the legislature). The measure was enacted by a vote of the people after a governor fired the president and several employees at the state agricultural college (NDSU) over a dispute on funding for the experiment station and after the institution lost its accreditation. What is important here is that the board was created by the state's citizens in reaction to an employment issue. As a result, the legislature does not have authority to enact legislation regarding hiring, firing, evaluation and terms of employment of institutional personnel.

2. VIII, sec. 6 of the North Dakota constitution states: The SBHE is **“created for the full control and administration of (state colleges)”** and **“shall have full authority over the institutions under its control.”** In the past, it has been suggested the following sentence in subparagraph (6) of art. VIII, sec. 6 means the legislature retains ultimate authority over state colleges and universities and the SBHE: *“The said state board of higher education shall have full authority to organize or reorganize within constitutional and statutory limitations, etc.”* The words *“within constitutional and statutory limitations”* modify or restrict **only** SBHE authority to organize or reorganize the work of the institutions.

There are not similar modifiers or restrictions elsewhere in art. VIII, sec.6. Obviously, the SBHE has no authority to close institutions or change “the work” of institutions, at least insofar as such work is stated in the constitution such as state university and school of mines (engineering programs) at UND, state agricultural college and experiment station at NDSU, school of forestry at Bottineau, etc.). However, only the SBHE - not the governor or the legislature – may establish employment terms for faculty and other employees, hire or fire employees, and establish employee evaluation processes as part of the administration of the campuses, or delegate such authority to the chancellor or institutions.

The definition of administration is the process or activity of running a business, organization, etc.: “The day-to-day administration of the company”. So, what is more important in administration than establishing policies on hiring, firing, evaluation and terms of employment? Further, SBHE Policy 106.6(3) references language in the state constitution creating the SBHE and adds: “The people of North Dakota created the SBHE through the North Dakota Constitution to ensure the institutions and their employees were protected from political interference.” This a fiduciary duty explicitly recognized, not action that is discretionary.

This bill is not necessary. The issues embodied in HB1446 legally should have been brought to the SBHE. The SBHE recently approved a new mission for DSU to make it a dual mission institution, and for the BSC mission to be a polytechnic institution. Now, it is up to the SBHE to decide what tenure policies or other internal working policies should be in place to match the new missions since this is part of the board’s mandated constitutional authority: **“created for the full control and administration of (state colleges)”and “shall have full authority over the institutions under its control.”** The board’s process should include students, faculty and the broader community, and ensure that any personnel policies comply with federal and state laws. The policies for DSU and BSC decided by the board may be the same or different based on their mission.

3. The property right to employment for tenured faculty is the same right held by NDUS classified employees, other ND agency classified employees, and federal, state and local government employees appointed to classified positions in civil service systems around the country. Upon completion of a probationary period and with limited exceptions (e.g., financial exigency, elimination of position due to reorganization), all have a right to continued employment unless dismissed for good cause. Also, procedures leading to dismissal for cause must include minimum due process protections set forth in a 1985 U.S. Supreme Court opinion (including pretermination written notice and opportunity to respond and a formal evidentiary or due process hearing either before or shortly after termination). One difference between a system for tenured faculty and a civil service system is the probationary period for tenure-track faculty typically is six years compared to six months in most civil service systems. The only other real difference in ND is that the evidentiary hearing for faculty is conducted by an appointed hearing officer before a Standing Committee on Faculty Rights (SCOFR), and the SCOFR prepares recommended findings, conclusions and a recommended decision for submission to the institution president, while an appointed hearing officer conducts the hearing and submits a recommendation, with recommended findings, etc. to the president. **The president still makes the final decision.**

4. As I’ve mentioned, political interference in employment of faculty and administrators at what is now NDSU in the 1930s resulted in loss of institutional accreditation. Institution and program accrediting agencies may find HB 1446 to be unwarranted, unconstitutional interference in effective administration of NDUS institutions under the governance structure established and administered by the SBHE. It

happened before. The loss of accreditation of an institution or program will have devastating consequences to students and people of the state if an institution or program accreditation is lost.

5. Finally, I know from experience that the SBHE's action opposing this bill and other legislation will not be popular with some. The SBHE authority mandated in the constitution is also not popular with some. However, doing the right thing mandated by the state's constitution is not about being popular since protecting the campuses from elected politicians' intrusion into the administration of the institutions is perhaps the most important job the board has as required by the state's constitution.

Thank you for the opportunity to testify.



March 10, 2023

Senate Education Committee
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

RE: FIRE's concerns regarding HB 1446

Dear Chairman Elkin and Members of the Senate Education Committee,

My name is Joe Cohn and I am the Legislative and Policy Director for the Foundation for Individual Rights and Expression (FIRE), a nonpartisan, nonprofit organization dedicated to protecting the free speech and due process rights of students and faculty at our nation's institutions of higher education. You may remember FIRE from our previous work with the North Dakota legislature on the state's [campus free speech](#) and [campus due process](#) legislation – two bills that have made North Dakota a national leader in campus civil liberties.

FIRE does not take a position on specific tenure policies or on whether it should be guaranteed under state law. However, we recognize that tenure has historically played a central role in protecting the academic freedom of faculty members across our nation.

Earlier this session, my colleague Greg Gonzalez wrote members of the House of Representatives' Government and Veterans Affairs Committee to express concerns FIRE had regarding the original language of [HB 1446](#). And while we are grateful to the bill sponsor and to the committee for amending the bill in response to most of our concerns, at least one of our concerns remains unaddressed. Moreover, we were persuaded by others testifying in opposition that the bill presented additional constitutional problems that we did not initially raise.

As we wrote to the Committee:

FIRE understands the desire to ensure that public dollars spent on higher education are utilized wisely to the benefit of the students enrolled and the state. However, it is important to remember that higher education loses its value when faculty do not have the academic freedom necessary to teach and conduct research that enriches our understanding of the world, free from political interference. Similarly, American society as a whole suffers when faculty do not enjoy the First Amendment right to criticize campus bureaucracies.

One unaddressed concern is that the tenure review in the proposal would change that process from one of shared governance and faculty participation to a process entirely controlled by the president of each institution. When we wrote the committee, we noted that this revision runs the risk of injecting politics into the tenure review process because the presidents of the institutions are appointed by the State Board of Higher Education – who are themselves political appointees of the governor.

An additional problem that was highlighted by others during opponent testimony was that this new procedure is entirely lacking in due process. There are no procedural protections set forth in this legislation – aside from an appeal, which was added on our request. Removing the existing procedural protections violates faculty due process rights, invites violations of academic freedom, and will predictably lead to costly litigation. Therefore, the bill should set forth that during any post tenure review, faculty will retain the procedural protections currently in place, or the bill should explicitly codify those protections.

Another problem is that Section 1(2)(a) obligates tenured faculty to “[c]omply with the policies, procedures, and directives of the institution, the institution’s president and other administrators, the state board of higher education, and the North Dakota university system.” While it is perfectly appropriate to require faculty to comply with policies and procedures, requiring compliance with unspecified “directives” introduces potential free speech problems. The term “directives” is broad and could conceivably encompass unlawful or unconstitutional demands. For instance, FIRE has seen administrators unlawfully order faculty to eliminate disfavored but protected speech from class discussions. This provision should be amended to make clear that faculty are only obligated to follow “lawful directives.”

A final problem remaining in the bill is that several of the criteria used to evaluate whether a faculty member's tenure may be revoked cover factors outside of the faculty member's control or involve variables that are nearly impossible to attribute to the faculty member. For example, Section 1(2)(b) requires faculty members to be evaluated on whether they "[e]ffectively teach and advise a number of students approximately equal to the average campus faculty teaching and advising load." Of course, faculty are oftentimes not in control of their teaching schedules, so they cannot control whether they have an average teaching load. This language must be cut to avoid due process problems.

If there is concern amongst the Legislative Assembly that the academy is lacking in viewpoint diversity, weakening tenure will not solve this problem and may even exacerbate it. After all, it is those who hold minority or dissenting viewpoints who often most need tenure's protections.

FIRE's archives and our [Scholars Under FIRE database](#) demonstrate that threats to faculty rights are a persistent problem affecting faculty of every political persuasion. **Because tenure has proven instrumental to protecting the rights of faculty with dissenting positions, we urge the Committee to reject language that would reduce its effectiveness in safeguarding academic freedom.**

The bill's current language is a vast improvement over the introduced version, but it will still fail to pass constitutional muster until the revisions described above are made. We urge you to amend the bill or vote it down outright. Thank you for your attention to our concerns.

Many thanks,

Joe Cohn
Legislative and Policy Director

Hello. I am Paul Johanson, tenured Dickinson State University faculty member and current Faculty Senate President. Since the Faculty Senate of DSU has endorsed the CCF statement on HB 1446, the views of the Faculty Senate are similar to mine. I do not have permission to speak on behalf of DSU.

As is pointed out in other written testimony, the North Dakota State Constitution states the authority over institutions in the university system belongs to the State Board of Higher Education. There is good reason for this, one of which is that the accreditation organization covering this part of the country, the Higher Learning Commission, looks for this hierarchy. In addition, the Higher Learning Commission looks for shared governance (see Criteria 5a in HLC's Criteria for Accreditation), which is something Representative Lefor has stated he is against, and this bill erodes, as it specifically stated that the decision of the university president is not reviewable by any faculty board. Thus, it appears that if this bill becomes law, it threatens our accreditation, which in turn makes it difficult for our students to get grants and loans.

At local town hall meetings in Dickinson, Representative LeFor really seemed to have a couple of particular faculty members in mind when he discussed the bill. Again, the reason the State Board of Higher Education was created was to protect faculty from being fired for political reasons, although it was the governor wanting to fire faculty at NDSU back then. I ask you not to make a law so that one legislator can see that a few people he doesn't like get fired.

Another concern I have with this bill is its effect on the recruitment and retention of well-qualified faculty. Many of our current faculty have told me that without the ability to gain tenure, they would not have applied to work at DSU. If this bill becomes law, with all of the ways a university president can use to not renew a faculty member's contract, it threatens what tenure means. I have already heard of one professor in the state, whose department is being cut due to that university budget issues, say that they would not apply at another university in the state that has an opening because of this bill.

To read this and listen to Representative Lefor, as well as read articles about this bill that DSU President Easton has written, it sounds like we have dozens of tenured faculty sitting around not doing their jobs. This is certainly not the case. The vast majority of the faculty are working hard to help their students learn, serving on committees, and meeting with potential students. Our faculty are already evaluated annually by students and our department chairs, and our deans review these. There are other procedures to remove a tenured faculty member from their position if their behavior warrants it.

Grade inflation could also go rampant as professors try to fill their courses by giving easy A's. But does that encourage good teaching and learning?

This bill has no provisions for high need areas, such as K-12 educators in mathematics, science and English. Some of the best qualified and experienced professors teach courses designed for majors in those areas. These classes tend to be small in size, which could result in that professor having difficulty reaching the institution's average. Thus, we would either lose those faculty

members and that major could be eliminated because that professor would be hard to replace, or the professor would ask their department chair to not assign them those classes, and again the major may be cut. Then, the local school districts will find it even harder to attract teachers in these areas.

One of the requirements listed in this bill is for a faculty member to maintain tenure is to have approximately the average number of advisees. I will point out this seems to indicate a serious misunderstanding of the word "average". Garrison Keillor used to joke that at Lake Wobegon, "all of the children are above average". It just is not going to happen. This indicates that Representative Lefor wants to get rid of approximately half the tenured faculty every year if this bill is enacted. Research has shown high turn-over rates of instructors is bad for the student and university. It is a "best practice" for students to be advised by a professor in their major area, but the number of students in different disciplines can vary a quite a bit. Thus, we cannot all advise the average amount. Furthermore, just a few years ago, our administration removed advising from the faculty in several departments to give it to professional advisors, and now they are going to judge faculty on advising!

I also wish to point out that the department/school chairs assign the advisees to the faculty members, and they also assign the courses to be taught to the faculty members. However, this bill states that the faculty member, not the chair, is held responsible by the president.

Even after revisions, there are many problems with this bill, so I urge a ""Do not pass"" recommendation.

Thank you for listening.

Paul

I am a tenured professor in North Dakota but I am submitting this testimony personally as a private citizen and my views in no way are meant to represent those of the university.

Becoming a professor is an extremely risky enterprise. One typically dedicates one's life to five to seven years of intensive study to earn a doctorate, having already completed an undergraduate and possibly a Master's degree. For scientists and members of other disciplines as well, the academic path is even riskier, often requiring two to four years of postdoctoral research in order to be competitive for the few tenure-track positions available. The economic opportunity costs of this career path are consequently enormous. And in my field, I could earn considerably more (twice as much in fact) by moving academia to industry.

North Dakota benefits directly from the tenure system, by being able to recruit talented applicants willing to forgo the economic opportunities offered by industry in exchange for job security. Professors work extremely hard for tenure, and continue to work hard long after. Focusing on the possible negative effects of tenure is extremely misguided. Tenure is a powerful tool that states use to attract the talent that will educate their professional employees of the future and provide the innovative research that allows states to move forward economically.

This bill presupposes that fear is a motivating factor, that the threat of job loss is what motivates strong performance. Nothing could be further from the truth. Faculty who are innovators, who provide the education and research that move us forward as a society, are not motivated by fear; they are motivated by their desire to make the world a better place and play a role in advances in knowledge. Without the job security that tenure provides, the best and brightest of your faculty will leave for industry and for university systems that recognize and maintain its value. North Dakota could then face the very real threat that this bill proposes to address, a faculty fed with fear, composed of those who know they can't succeed elsewhere, which is not a faculty prepared to take the risks that move us forward as a society and as an economy.

University Senate

Twamley Hall, Room 201
264 Centennial Dr Stop 8382
Grand Forks, ND 58202-8382
UND.edu/university-senate

HB 1446

ND Senate Education Committee

March 10, 2023

Chairman Elkin and members of the Senate Education committee:

My name is Robert Newman. I am a professor at the University of North Dakota and Chair of UND's University Senate. On behalf of the UND University Senate I submit this **testimony in opposition to HB 1446**.

1. The bill, should it become law, would directly harm the state of North Dakota, its citizens and students by significantly degrading the tenure system, thereby dramatically reducing the ability of the eleven schools of the NDUS to meet their missions.

- Tenure is an essential protection for academic freedom and thus the quality of higher education.
- Our universities compete in a national job market for the best scholars, researchers, and educators at the college/university level. The bill is already putting North Dakota in a bad light and if passed will put us at a significant disadvantage in attracting faculty who could choose employment in other states.

2. The bill misrepresents the meaning of tenure.

- Tenure protects academic freedom, it does not protect against failure to perform the duties expected of faculty. The State Board of Higher Education already has policies and procedures in place to respond decisively to performance- or fiscally-related faculty deficiencies, including termination of tenured faculty.
- Faculty undergo years of education and rigorous evaluation to earn graduate degrees, and are required to demonstrate scholarly or creative productivity before they would even be considered for faculty positions. After they are hired, tenure-track faculty are evaluated annually over a 6 year probationary period. After being awarded tenure, they continue to be evaluated annually. There are no guarantees of job permanence for anyone.

Today, the University of North Dakota rests on the ancestral lands of the Pembina and Red Lake Bands of Ojibwe and the Dakota Oyate — presently existing as composite parts of the Red Lake, Turtle Mountain, White Earth Bands, and the Dakota Tribes of Minnesota and North Dakota. We acknowledge the people who resided here for generations and recognize that the spirit of the Ojibwe and Oyate people permeates this land. As a university community, we will continue to build upon our relations with the First Nations of the State of North Dakota — the Mandan, Hidatsa, and Arikara Nation, Sisseton-Wahpeton Oyate Nation, Spirit Lake Nation, Standing Rock Sioux Tribe, and Turtle Mountain Band of Chippewa Indians.

3. Involvement of faculty is critical to a fair and effective review system.

- Effective administration of a college or university requires faculty involvement. However good a President and leadership team may be, shared governance with faculty is the best way to ensure that the collective wisdom of the people delivering all aspects of the institution's mission (the faculty) is accessed for the benefit of students, research productivity, and service.
- Faculty who have experience doing the job are the people best positioned to assess the contributions of faculty and advise administrator leaders (Deans, Provosts, Presidents) on tenure decisions and renewal. Faculty are also the first to be impacted when other faculty underperform. The final decision is already made by administrators, based on the recommendations they receive.

4. Granting university presidents—or their designees—the unilateral power to terminate faculty without due process, is NOT the solution to ANY problem.

- Even as a restricted pilot project the bill, if passed, would set a damaging precedent that would have ripple effects throughout the entire NDUS.
- Allowing appeal of a president's decision to the chancellor does not provide the same protections for academic freedom that are established by current policy. If there is cause to terminate any faculty member, that must be established through policies and procedures already in place, based on evidence, and never based on personal disagreements or whim.

We urge the committee to oppose HB 1446 and vote Do Not Pass.

Respectfully,

Robert Newman, PhD. / Chair, University Senate, UND

Dear Chair and Members of the Senate Education Committee:

My name is Ernst Pijning, I am employed as a faculty member at Minot State University, yet I am speaking for myself.

Thank you for considering this bill concerning tenure. In this testimony, I would like to explain why I oppose HB 1446.

As a former faculty advisor to the State Board of Education, I was involved in the current policy considering the termination of (tenured) faculty (601.5). I believe that this bill stems from misunderstanding of the current tenure policies, and it will be especially bad for students' education.

Tenure was and is never meant to preserve faculty positions. As has been the case at my institution last year, and currently at NDSU, when not enough students are enrolled in programs, tenured positions can be terminated. If tenured faculty are not functioning well, there is a process in place that will end the employment of this faculty member, as indeed happened last year at my institution. This process has been approved by the State Board of Higher education, it currently works well, and there is, in my opinion, no reason to change it.

The only protection that tenure offers is well-defined procedures and a one-year timeline. One of the main reasoning is that it takes long time it takes to become a tenured faculty member, and the financial consequences for the faculty are high. It takes about a decade to earn a PhD (in my case 12 years of university education) and an additional six years to earn tenure. During the years in graduate school, faculty cannot save for retirement, they are not gainfully employed, and they often accumulate debt. Indeed, while in graduate school I had to pay no taxes because I was officially below the poverty line. Our junior faculty members start their first academic employment in their late twenties or early thirties (I was 35). Tenure offers only a limited safety net. Faculty are offered one-year of employment if tenure is denied, one year to show they can improve if they are not functioning well, and a year if their position is eliminated (shorter in case of financial emergency). This reasoning stems from the academic job market: it goes in one-year cycles and faculty are unlikely to be hired mid-year.

During the house session, it was argued that HB 1446 will be good for students. My assessment is different. I anticipate that, if adopted, this will immediately lead to unrest and uncertainty on campus, and I therefore anticipate a higher-than-normal turn-over of junior faculty. This may lead to open faculty lines, and thus positions will have to be filled by less experienced faculty. Students' education will therefore suffer, and especially at an already vulnerable institution like Dickinson State University.

While being in the house when HB 1446 was voted on, I heard that several members voted in favor of the bill, just to send this to the Senate for further consideration. My hope is that you will look very closely at the consequences for students and faculty of unclear termination procedures and the chilling effect it will have on all NDUS institutions. Therefore, I hope you will give HB 1446 a "do not pass" recommendation.

Thank you for taking this testimony into consideration.

Sincerely,

Ernst Pijning

ernst@srt.com (701) 858 0514

Birgit Pruess, Ph.D.
3696 Harrison St. S
Fargo ND 58104

March 11 2, 2023

68th Legislative Assembly
Senate Education Committee

RE: HB1446

Dear Chair Elkin and Members of the Senate Education Committee,

I am resident of Fargo, North Dakota and testify as a private citizen, not as a member or representative of any group. Having been Faculty President at my institution and the faculty advisory board member on the State Board of Higher Education (SBHE), I am certainly very knowledgeable about the 11 institutions in our State University system.

I am testifying in opposition to HB1446 which would allow University and College Presidents to single handedly fire tenured faculty. I recommend a 'DO NOT PASS' vote on this bill.

The North Dakota constitution very clearly states in Article VIII Education, Section 6, that the State Board of Higher Education (SBHE) is responsible for the control and administration of our state higher education institutions (<https://ndlegis.gov/constit/a08.pdf>). The SBHE, not the North Dakota State Legislature. In this context, I appreciate the change that was made to bill since it was introduced in the House under section 1.1. It is clearly the SBHE that should conduct the pilot study. However, it is also the SBHE that should determine how they want to conduct the study. This should not be dictated by the legislature.

Section I

2a) Comply with policies etc up to the State Board of Higher Education. This is written into job offer letters and a requirement by the institutions. The point is not needed.

2b) Teach and advise students equal to the average across the institution. This is not possible. We do not get to choose which courses we teach and some courses, such as entry level courses are much larger than higher level specialized courses or courses in small programs. Likewise, not every program has the same number of advisees. Or faculty, as a matter of fact. The important point is not that everybody has the same number of students or advisees, but that within the unit every student gets taught and advised. By somebody. In fact, some departments have professional advisors who advise all students. Some departments have lecturers who teach the bulk of the classes. Do you wanna punish tenured faculty for that? Note that faculty appointments are spelled out (in the job offer letter and annually updated job descriptions) in % teaching and % research. Sometimes also % service. Or % outreach. A faculty with a 20% teaching appointment can't be required to have the same teaching load as a faculty with a 90% teaching appointment. Job descriptions are very specific and every individual faculty is hired for a specific purpose. In the college of Agriculture at NDSU, the research portion of the appointment is not even paid by the University, but by the Experiment Station, which is a

different budget and separate bill. In the end, everybody needs to do what is written in their own job description. This section is not implementable. Even if the pilot study is not for the research Universities, there is concern that it will some day be applied to those.

2c) *Measurable and effective activities.* Helping students achieve academic success is not anything a faculty needs to be told. That is why people are in that job. This automatically leads to better retention of faculty. This item is not needed.

3) *Policies.* Obviously, policies will have to be changed.

Section II

IF THE PURPOSE OF THIS BILL IS THE STUDY, WHY ARE WE CHANGING THE CENTURY CODE BEFORE WE KNOW THE DATA FROM THE STUDY?

1) *President reviews faculty.* This now applies to all institutions, even though the data from the study have not been collected yet. Overall, the section is not in agreement with institutional hierarchy. Every faculty, tenured or not, currently gets reviewed by their department Head/Chair. Annually. The report goes to the college. If any problem arises, the case can go up the reporting line. But it will get initiated at department level. Why on earth would the President of a large institution who has millions of other things to do (including frequent trips to Bismarck) even know when a faculty member is no longer up to speed with their job responsibilities. The best thing to do is a discussion between Head or Chair and the respective faculty to figure out the cause for the inactivity. Sometimes, the job description can be rewritten to better match a person's changing abilities and interests, while still fulfilling the needs of the department. After all, job descriptions change frequently anyways. Keep in mind that the tenure process is very meticulous and involves some 15 to 20 people between Department and President level, and takes about ¾ of a year. For details, please, see policy 352 at NDSU as an example (<https://www.ndsu.edu/fileadmin/policy/352.pdf>). Faculty who pass this extensive 6 year long 'test', are among the most highly qualified individuals in the country and the world. Most of these like their career and would not intentionally damage their own career. Most faculty also like their students and would not intentionally harm students either.

2) *Written assessment.* The written assessment is already provided annually by the department Heads or Chairs. For every faculty, tenured, tenure track, or non-tenure track.

3) *Failure to comply.* This whole section sounds like the author assumes there is no process to fire a tenured faculty. Actually, there is. For an example, please, see policy 350.3 at NDSU (https://www.ndsu.edu/fileadmin/policy/350_3.pdf). This faculty termination policy is built upon SBHE policies 605.1, 605.2, 605.3, 605.4, which means the other 10 institutions have similar policies. In summary, tenure just means the faculty cannot be fired WITHOUT CAUSE. Tenured faculty can be fired WITH CAUSE. Or because of an institutional financial exigency, as declared by the SBHE. Tenure is about academic freedom, which is a form of free speech and covered by the first amendment. A tenured faculty cannot be fired because someone (e.g. President) does not like their research project. Or their teaching content. That is not a lack of compliance.

- 4) *Delegation to administrator.* Seeing as every faculty is already reviewed annually by their department Head/Chair, one could consider this the delegation. After all, delegation of responsibility is part of why we have a reporting line.
- 5) *Other factors.* I have to admit that this paragraph makes me suspicious. Factors that are not mentioned in the job description? What could those be? The job description should be in alignment with the institutional goals. Of course, if a President closes a program or department, this may mean that faculty will be laid off. This is not firing, though. And it can be done already. So, what is the point here?
- 6) *Review is not viewable and not appealable.* This is getting downright scary here. Why not? To hide something? If the faculty really has not done their job duties, there is no need to deprive them of the opportunity to review and appeal. Unless the reason for the firing is unspeakable, there should not be a need to hide the justification. If the faculty needs to be held accountable, so does the President. And who is the commissioner of higher education? I know of a State Board of Higher Education, which has a Chair. And the North Dakota University System, which has a Chancellor.
- 7) *No retaliation.* Of course not. That is why institutions have retaliation policies. For an example, please see policy 156 at NDSU (<https://www.ndsu.edu/fileadmin/policy/156.pdf>). However, an appeal or a lawsuit is not retaliation. Retaliation is a counterattack with the intent to hurt the other person. An appeal does not hurt anybody. Neither does the lawsuit. Note that the lawsuit would probably not be against the person but the institution anyways.

Section 3

What is the emergency? Does the author of this bill think there are hundreds of faculty that need to be fired? If so, where is the evidence for this? We are happy about every faculty we can keep in town.

My primary concern with all of the above is recruitment and retention of faculty to North Dakota. It is already difficult to recruit people to North Dakota and I am talking about qualified faculty. People with a Ph.D., especially in the STEM sciences, have many opportunities, among them positions in the private sector which pay much better than academia can match. Tenure and the academic freedom that it provides rank high among the reasons why people decide for the academic career. Still, there are plenty Universities and Colleges nationwide and worldwide that recruit faculty. This includes OUR faculty. If tenure in essence gets disabled, there is concern that people won't come here anymore. They will just accept a job in industry for twice the salary. Likewise, faculty already in the system are permanently facing the question whether they want to stay here or move on. Other institutions are poaching, and it is easy to figure out which faculty they will target. It is not the unqualified ones. And research dollars will go with the faculty, at least to other academic institutions in the US. Many faculty have moved on in the past years thanks to budget cuts and political climate. I can see how someone could say, well every faculty less is one person less on our payroll. However, these are not targeted budget cuts of units that no longer meet the institutions goals. These are random losses that can hit any department and potentially cripple a successful and much needed department. To keep our institutions functional, we need faculty to teach our students. And we owe our students that these faculty are the most qualified ones we can get. Tenure is needed for this.

I like to conclude with a short note of thank you everybody on the Senate Education Committee, as well as the author of bill HB1446. Your service to the State is much appreciated.

Sincerely and respectfully

Birgit Pruess

Dear Chairman Elkin and members of the Senate Education Committee,

We, the Council of College Faculties (CCF) - which represents faculty from all 11 North Dakota University System (NDUS) campuses, write to you to express our serious concerns about HB 1446 and encourage your committee to recommend a “Do Not Pass” status on this bill.

This legislation is unnecessary and based on misconceptions about the post-tenure review of faculty. Current SBHE [Policy 605.1](#) outlines the purpose of tenure and requires each campus to establish procedures for the *continued* evaluation of faculty after receiving tenure. Tenure is not an entitlement and does not confer unconditional employment. As there are existing policies and procedures in place that cover tenured faculty accountability and termination, including review at multiple administrative levels, this bill is superfluous in that regard. If a campus does not engage in meaningful review of its faculty and/or fails to address poor faculty performance, the institution – not the state legislature – needs to take corrective action. Such negligence puts the campus at risk by violating Higher Learning Commission standards for accreditation (Criterion 3.C.4 & 3.C.5) and it is the responsibility of university administrators to correct. We have included a more thorough explanation of tenure, how it works, and why it is important following this letter below.

While HB 1446 is written as a pilot program, the bill’s authors have made it clear in public statements that they would like to see the bill’s provisions expanded to all NDUS campuses. Some campuses have experienced significant faculty turnover in recent years, and this legislation, which has already resulted in negative national press, would undermine our efforts to recruit and retain the most competitive faculty – particularly at research-intensive institutions. This will negatively impact the quality of teaching and student learning within the entire NDUS and ultimately may lead to declining student enrollment as potential students turn to out of state options for a quality education. Research indicates that student outcomes and retention suffer when faculty turnover is high ([Sage Journals](#), [School of Education](#), [Marco Learning](#)) and thus institutions instead must rely on adjunct and part-time instructors. Combined with more competitive tuition structures in contiguous states like Minnesota, the potential fiscal impact of HB 1446 to NDUS is concerning.

In consultation with legal counsel, we feel it is important to emphasize that HB 1446 is also legally problematic. HB 1446 is in direct violation of the state constitution. Article VIII, Section 6 of the North Dakota State Constitution states the SBHE is “created for the control and administration of (the named colleges and universities)” and “shall have full authority over the institutions under its control.” SBHE Policy 106.6(3) refers to state constitution language creating the SBHE and adds: “The people of North Dakota created the SBHE through the North Dakota Constitution to ensure the institutions and their employees were protected from political interference.” According to the North Dakota State Constitution, only the SBHE has authority to establish terms under which faculty (and other NDUS employees) are hired, employed and dismissed. The Legislative Assembly does not have the power and authority to do so.

Finally, HB 1446 threatens the accreditation status of NDUS campuses and programs. As written, the bill violates Criterion 2.C of Higher Learning Commission Accreditation

Standards which outlines that an institutional governing board must have the autonomy to make decisions in the best interest of institutions in compliance with board policies and that ensure an institution's integrity. Criterion 2.C goes on to mandate that the governing board be free from influence by and operate independently of elected officials. Furthermore, by mandating that faculty “teach and advise a number of students approximately equal to the average campus faculty teaching and advising load,” some programs may risk losing accreditation status if faculty-student ratios exceed stated guidelines. This stipulation fails to recognize that class sizes vary significantly across a campus for a variety of reasons and some classes may be significantly smaller than others for important pedagogical reasons (e.g., labs, higher level intensive courses, and graduate classes).

These, and other concerns, are elaborated on in the following resolution included below, which was discussed and approved by the Council of College Faculties (CCF) on January 31, 2023. Although the bill has since been amended and therefore some of the rationale listed may no longer apply, many serious concerns remain with this bill. This is a bill that would have long-term negative impacts on our university system. We urge your committee to recommend a **do not pass** status for HB 1446.

We would be happy to answer any questions you might have about current post-tenure review processes and the potential impact of this legislation.

Sincerely,

The North Dakota Council of College Faculties

What is Tenure & Why is it Important?

NDUS Council of College Faculties Executive Committee 2/22/2023

What do faculty contracts look like?

Faculty contracts vary greatly both across and within institutions. Most institutions of higher education have faculty with a mix of various kinds of contracts. According to Chancellor Hagerott in his [testimony to the House Government and Veterans Affairs](#) on Friday, Feb. 3, tenure status only applies to about 52% of faculty within the NDUS. Most tenured or tenure-eligible faculty are hired under 9-month contracts, and they pick up extra courses, research grants, or service and administrative responsibilities during the summer months, all of which are negotiated under a separate contract. Every spring faculty sign a new 9-month contract for the following academic year which outlines the classes they'll teach, the research they'll do, and any service or administrative responsibilities they'll have. This provides flexibility as needs change.

For faculty in positions where they are given the chance to earn tenure, the first 6 years are considered probationary. During this period "an institution may decline to renew the contract of a probationary faculty member without cause at any time....subject to procedural requirements in SBHE Policies 605.1, 605.2, 605.3, and 605.4" ([SBHE Policy 605.1](#)). If a faculty member can demonstrate they have provided exceptional service to the university during this 6-year probationary period, they may apply for tenure.

How do faculty earn tenure?

Because the organizational structures and goals of each NDUS campus varies, [SBHE Policy: 605.1](#) allows the campuses, through their faculty governance structures and presidents, to determine the specific procedures for evaluating both probationary and tenured faculty, and the criteria and procedures used to evaluate and recommend faculty for tenure. SBHE policy stipulates that the criteria for tenure "shall include scholarship in teaching, contribution to a discipline or profession through research, other scholarly or professional activities, and service to the institution and society" and requires each campus to establish "tenure plans appropriate to the diverse missions of individual institutions" ([SBHE Policy 605.1](#)).

In general, to be considered for tenure, a faculty member must create a portfolio of all their accomplishments during the probationary period. This portfolio is often extensive and may include summaries of student evaluations for all the courses they have taught, copies of all their publications and professional presentations, evidence of the kinds of service they have performed for the university, community, and state, reflective narratives describing the faculty member's work and goals over the probationary period, and even external peer evaluations of the faculty member's scholarship and/or teaching. Depending on the structure of the institution, this portfolio is then reviewed by a department committee and Chairperson, who makes a recommendation for tenure (or not). That recommendation and any required documentation are then reviewed by the Dean of their school or college, a university committee of faculty, the Provost, the campus President, and then the SBHE. If their application clears all these levels of review, then they are granted tenure.

Are tenured faculty evaluated following tenure?

Yes. Each year all faculty – including tenured faculty – undergo an evaluation as required by [SBHE Policy 605.1](#) and [604.3](#). The process for conducting these evaluations is set by each institution. In general, an annual evaluation requires faculty members to provide evidence of their accomplishments in research or creative activity, service, and teaching – including student reviews for each class they have taught. This review is conducted using a similar process as described above. Depending on the structure

of the institution, the faculty member's materials are reviewed by a department committee and Chairperson, who submits a report for approval to the Dean and/or Provost. If a faculty member isn't meeting expectations in any of the areas outlined in their contract, the department chair works with the faculty member and appropriate administrator to develop an improvement plan. If things don't get better, the faculty member may be fired with cause. The faculty member can appeal this decision to a committee, who makes a recommendation to the campus President, who makes a final decision. This appeals process is outlined in [SHBE Policy 605.4](#).

Why is tenure important?

Tenure is not an entitlement, but it does play an important role in higher education. First, the tenure process provides some assurance that faculty will have continuous employment so long as they continue to follow institutional policies and the conditions of their contract. This allows faculty to feel secure and gives them some freedom to take risks - like pursuing a new line of research, innovating with their teaching, and speaking up when things may not be right on their campus. According to [SBHE Policy 605.1](#), our institutions of higher education "cannot fulfill [their] purpose of transmitting, evaluating, and extending knowledge if it requires conformity with any orthodoxy of content and method." In this way, tenure helps to assure academic freedom, which "is fundamental to the advancement of knowledge and for the protection of the rights of the faculty members and students" ([SBHE Policy 605.1](#), see also [AAUP 1940 Statement of Principles on Academic Freedom and Tenure](#)).

Tenure also makes our campuses more competitive in the national marketplace. Tenured faculty carry a level of prestige that is perceived favorably by external funding agencies, for example. A tenured faculty also provides a level of stability within an institution, which makes them safer investments for grant dollars. Tenure also helps universities with recruitment and retention. Many faculty, due to their credentials and experience, could make significantly more in the private sector. If given a choice between an academic appointment that carries the potential to earn tenure and an appointment that is contingent, most faculty will choose the job that provides an option for tenure. In fact, recognizing the value of tenure for recruitment and retention, the NDUS SBHE has discussed in recent years the importance of including tenure as one of the benefits included in Presidential contracts.

What tenure does NOT do

Tenure does not give faculty permission to be derelict in their duties. Remember that tenure is only earned after a faculty member has demonstrated a record of exceptional performance and shows evidence of continued promise. Indeed, research shows that faculty productivity is either maintained or increases following tenure (see [Scott, Kelsch, & Friesner, 2019](#)). Tenure also does not mean a faculty member cannot be fired. As stated in [SBHE Policy 605.3](#), "a faculty member may be dismissed at any time for adequate cause," including "continued or repeated unsatisfactory performance evaluations and failure to respond in a satisfactory manner to a recommended plan for improvement," or "significant or continued violations of Board policy or institutional policy." Tenured faculty can also be dismissed under extraordinary circumstances such as financial exigency or program discontinuation. The procedures for terminating tenured faculty can be found in [SBHE Policy 605.3](#).

North Dakota University System Council of College Faculties

Resolution in Opposition to HB 1446

RATIONALE:

WHEREAS SBHE [Policy 605.1](#) outlines the purpose of tenure, which is to protect academic freedom, it also requires campuses to establish procedures for the continuing evaluation of faculty following tenure. These criteria include assessing faculty teaching, scholarship or creative activity, and service. How annual evaluations are conducted varies by campus due to variability in organizational missions and structures, but they generally involve review by a committee of faculty and the approval of multiple administrators such as a Department Chair, College Dean, and/or Provost or VP. Existing SBHE policy requires each NDUS institution to establish procedures and criteria for continued evaluation. Additionally, Higher Learning Commission accreditation and evaluation for re-accreditation requires regular evaluation of faculty by each institution as described in [Criterion 3D](#). While tenure provides a sense of financial stability for faculty through continuous employment, it does not prevent faculty from being dismissed with adequate cause or under extraordinary circumstances as described in SBHE [Policy 605.3](#); and

WHEREAS section 1.1 of HB 1446 imposes on several NDUS institutions requirements that individual faculty generate more tuition or grant revenue than their salary and benefits, this fails to recognize how universities operate with each unit contributing to and supporting the functioning of the whole. While some courses are large and generate a lot of tuition revenue, many specialized courses and labs are small. The costs of these courses are offset by larger classes. Graduate courses and those with more hands-on and technical training, for example, tend to have smaller class sizes, which are more costly. Faculty salaries also vary a great deal by discipline, which makes the burden of this requirement more difficult to meet in healthcare, business, and technology programs where faculty are paid more because professionals in these fields can make substantially more in private industry; and

WHEREAS accreditation standards for some programs, such as nursing, for example, require faculty-student ratios that may be lower than those of other programs, section 1.2b of the bill, which mandates that faculty “teach and advise a number of students approximately equal to the average campus faculty teaching and advising load,” may impact program accreditation from the Higher Learning Commission and/or other accrediting bodies, resulting in the loss of training programs critical to meeting the workforce needs of the state; and

WHEREAS dismissal procedures for tenured faculty members are already stipulated in [SBHE Policy 605.3](#), HB 1446 would grant the unilateral review and dismissal of faculty by campus presidents and removes guarantees for reasonable dismissal procedures, including a written assessment of the faculty member’s performance and the right to appeal a decision. Such a policy is not only undemocratic but would likely also result in costly lawsuits. By usurping

current termination processes established through campus structures of shared governance, this policy also creates greater burdens for campus presidents, the SBHE, and the Chancellor; and

WHEREAS the NDUS generates [billions of dollars in revenue for the state](#), it is vital that we maintain positive faculty morale in order to recruit and retain a vibrant workforce on our campuses, grow student enrollments, and provide the educational programming needed to meet the state's workforce needs. A tenured faculty is essential to student recruitment efforts, particularly within professional and graduate programs. If passed, HB 1446, which has already generated substantial negative press in the national media (see [Forbes](#), [Inside Higher Ed](#)), will act as a deterrent to new faculty hires, undermine faculty morale across the NDUS, and cause faculty to look for employment at other institutions of higher ed and in other states that recognize the value of tenure and shared governance.

RESOLUTION:

THEREFORE BE IT RESOLVED that the ND Council of College Faculty (CCF) opposes HB 1446 and asks the various bodies and committees of the ND Legislature to not pass this bill.

BE IT FURTHER RESOLVED that the ND CCF stands in solidarity with our colleagues at Dickinson State University and Bismarck State University, who would be most immediately and directly impacted by this legislation.

BE IT FURTHER RESOLVED that the ND CCF steadfastly upholds the values of tenure and shared governance as core principles of higher education.

BE IT FURTHER RESOLVED that the ND CCF resolutely rejects any attempts to remove tenure or undermine shared governance in the evaluation processes and grievance protections currently in place.

BE IT FURTHER RESOLVED that the ND CCF affirms the American Association of University Professors [1940 Statement of Principles on Academic Freedom and Tenure](#) (Rev. 1990), which has been endorsed [by more than 250 scholarly and education groups](#).

Adopted by the ND CCF on January 31, 2023.



March 11, 2023

The Williston State College Faculty Senate stands in support of our fellow faculty members across the state of North Dakota and in full support of the North Dakota Council of College Faculties' testimony and resolution in Opposition to House Bill 1446 and hereby ask the ND Senate Education Committee members to both recommend a **do not pass** status for HB 1446 and to vote against it in assembly.

- WSC Faculty Senate

March 12, 2023
District 12 Resident Opposition to HB1446

Dear Chairman Schauer & Members of the Committee,

I urge you to consider the perspectives outlined in the testimonies of numerous university faculty and higher education policy experts. Please oppose HB1446. I am writing as neither faculty nor policy expert; I am simply a resident concerned about this bill. My experience as a student in college and graduate school gave me a glimpse into the tenure process and an appreciation for the many roles a faculty member plays in an academic department. My experience as a young professional who moved to North Dakota for a job in science and natural resources means I am **hyper-aware of policies that could deter employee recruitment.**

With a spirit of dialogue not personal attack, I want to respond directly to Representative Lefor's motivation for this bill, first as quoted in an article by Ryan Quinn in Higher Ed¹, Rep. Lefor notes this bill will make "tenured professors accountable, just like anyone else." When I read this I thought, they *are accountable* to their peers and to their department and to their university academic affairs leaders, and likely others. Committee members, please consider the testimonies before you; these indicate there are already policies in place to hold tenured professors accountable. Are they perfect? Very likely not. **Should we pilot a program in which an executive (University President) essentially gets unlimited power to review and terminate an employee's (Professor's) job? Absolutely not.**

Second, in the article by Ryan Quinn in Higher Ed¹, Rep. Lefor references the private sector and how there a person is "accountable to a boss." This point always grinds my gears, once again no personal animosity toward Rep. Lefor, as I have heard this refrain from many others who say public institutions need to be more like businesses. I appreciate that public spaces are different from businesses in some ways! I value the **more "horizontal structure" of leadership and accountability that exist in many academic departments**, and I trust a **diverse group of a faculty's peers to assess the nuances and unique metrics of their "job performance."** Once again, is there room for improvement in the current system? Yes. Can the current system be taken advantage of? Likely yes. Does HB 1446 adequately offer improvements to the current system? No.

I agree with Rep. Lefor's testimony² in which he notes there are challenges our state's universities face when aligning with polytechnic academies and improving access to online courses. **I agree elected officials should be stewards of the tax dollars and that public universities will need to adapt to be competitive in a changing market of education and job training.** So it worries me this committee and senate would consider passing HB1446; This is a bill that has a high potential to deter the recruitment and retention of quality educators, caring mentors, innovative researchers, and engaged community members.

Thank you for your time and consideration,

Olivia Johnson
Jamestown, ND
District 12

¹<https://www.insidehighered.com/news/2023/01/26/bill-north-dakota-presidents-could-fire-tenured-faculty>; ²https://www.ndlegis.gov/assembly/68-2023/testimony/HGVA-1446-20230203-19028-F-LEFOR_MIKE.pdf

Dear Chair Elkin and Members of the Senate Education Committee,

I write in opposition to HB1446. I am offering my testimony as a private citizen, although it is through the lens of my years of experience as a tenured Associate Professor of Mathematics at Bismarck State College.

I was fortunate enough to sit in on Representative Lefor's Zoom forum earlier this year as well as attend the House Government and Veterans Affairs Committee hearing. My comments reflect my concerns with commentary during both of those meetings.

It seems as though the crux of Representative Lefor's argument for this bill is that meaningful review of tenured faculty isn't happening, because if it was, more tenured faculty would be dismissed. Unfortunately, no data was presented to substantiate this claim. Members of the House Government and Veterans Affairs Committee also asked those testifying about the dismissal of tenured faculty. What percentage of tenured faculty need to be fired in order to satisfy everyone? A search for statistics regarding the percentage of workers fired from the private sector after being with the same company for 6 or more years proved unsuccessful—but I would imagine that number, for comparison, is also quite low.

At BSC, we may apply for tenure in our sixth year. By that time, we have been in our positions longer than the 4.1 years the average American worker stays at one job ([Bureau of Labor Statistics](#), 2022). In applying for tenure, we show that we have invested ourselves in our students, our campus, and our university system. Receiving tenure shows that our colleagues, administration, and university system believe us to be assets to our institution. Meaningful review post-tenure does happen. Students complete evaluations every semester; additionally, faculty are evaluated annually by a supervisor (formerly department chairs; now, assistant deans). Perhaps the reason tenured faculty are not fired after meaningful review is that they are found to be doing their jobs.

I would encourage this committee to spend time as a tenured faculty member at BSC. You'll find yourself teaching classes, of course, but also skipping lunch to help students outside of office hours, replying to homework question emails after you've put your kids to bed, spending weekends recording lectures for your online courses, searching for moments to grade students' work, participating in campus service work, contributing to state-wide committees, attending professional learning opportunities, keeping up-to-date membership in professional organizations...the list goes on. Oh, and I would be remiss not to mention putting any and all other work aside when a student or advisee stops by your office.

I urge you to vote DO NOT PASS on HB1446. Thank you for your service to the state of North Dakota and your time spent reviewing this testimony.

Sincerely,
Katrina Eberhart, PhD

UND Student Senate

SR 2223-12

Senate Resolution

To: The Student Senate of the University of North Dakota

Authors: Faith Wahl – Student Body President

Sponsors: Chloe Lord – Off-Campus Senator, Luca Beretta – College of Engineering and Mines Senator, Danny Lilya – Off-Campus Senator

CC: Faith Wahl – Student Body President, Morgan Mastrud - Student Body Vice President, Cassie Gerhardt - Student Government Advisor, Kari Holter - Student Organization Funding Agency Advisor;

Date: 02/08/2023

Re: Opposing HB 1446

Whereas, HB 1446 relates to a pilot program for tenured faculty review at institutions of higher education, and

2 Whereas, HB 1446 aims to “improve tenure process” [1] by requiring tenured faculty to do the following:

- Generate more tuition or grant revenue than the total cost of employing the individual
- 4 • Teach and advise a number of students that is equal to or greater than the average campus teaching and advising load
- 6 • Measurable recruit and retain students for the intuition

Whereas, HB 1446 alters the tenure review process and moves the full responsibility to the President of the University and away from a faculty committee review, and

10 Whereas, under HB 1446, a President of a University can choose not to renew a contract of a tenured faculty member at any time, and

12 Whereas, if a tenured faculty member’s contract is not renewed, there may not be a “complaint, lawsuit, or other allegation” [1] against the President or other administrators involved in the process, and

14 Whereas, the lack of an appeal process for tenured faculty members who do not have their contract renewed is concerning for cases around potential discrimination, unjust firing, or other similar cases, and

16 Whereas, the current bill includes only Bismarck State College (BSC) and Dickinson State University (DSU) in the pilot program, and

18 Whereas, while only BSC and DSU are included in the pilot program at this time, there is no guarantee that this bill will not apply to the University of North Dakota (UND) and applicable faculty in the future, and

Whereas, the UND University Senate passed a resolution opposing HB 1446 [2] on February 2nd, 2023, and

● Page 1

[1] <https://ndlegis.gov/assembly/68-2023/regular/documents/23-0083-04000.pdf>

[2] https://ndlegis.gov/assembly/68-2023/testimony/HGVA-1446-20230203-18920-A-NEWMAN_ROBERT.pdf

- 20 Whereas, if tenure is not protected at a University, potential candidates for faculty positions may be discouraged by the lack of protection for tenure in North Dakota and look for employment outside of the state, and
- 22 Whereas, if tenure is not protected at a University, current faculty members may choose to move and teach outside of North Dakota due to lack of protection for tenure and lack of an appeal process involved, and
- 24 Whereas, a decreased number of experienced and quality faculty members has an adverse impact on the educational experience of students at UND, and
- 26 Whereas, HB 1446 may discourage future students from attending public institutions in North Dakota, negatively impacting North Dakota's educational system and the workforce in the state;
- 28 Therefore, be it resolved UND Student Government opposes HB 1446 relating to a pilot program for tenured faculty review at institutions of higher education, and
- 30 Therefore, be it further resolved UND Student Government opposes any process that will undermine a fair and equitable review process for tenure;
- 32 Therefore, be it furthest resolved UND Student Government urges the North Dakota legislature to consider the detrimental impacts that HB 1446 may have on the state and not pass HB 1446.

DocuSigned by:

Faith Wahl

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Faith Wahl, Student Body President



Faith Wahl | UND Student Body President
Faith.wahl@und.edu | 701.426.9123

Chairman Elkin and members of the Senate Education Committee,

My name is Faith Wahl, and I serve as the Student Body President at the University of North Dakota (UND). I am providing testimony opposing HB 1446, relating to a pilot program for tenured faculty review at institutions of higher education.

On Wednesday, February 22nd, 2023, UND Student Senate voted 16-1-4 to oppose HB 1446. *SR2223-12: Opposing HB 1446* was voted on by representatives of the Student Body at UND who were elected by their peers to represent their voices on campus and statewide issues. While the current version of HB 1446 does not include UND in the pilot program, students expressed concerns around the program expanding to UND in the future. They also expressed concerns the recruitment of quality faculty to teach in North Dakota and the President of a University making unilateral decisions about a faculty member's career. Furthermore, students had discussion on a University President making a decision about a faculty member who has expertise in a particular area while the President may not have an educational background related to the faculty member's work. This could result in a situation where uninformed decisions about current practices and research in a field are made as a result of HB 1446. Please read the resolution that outlines these concerns alongside others [here](#) or find it attached as a separate document in the testimony submissions.

Chairman Elkin and members of the Senate Education committee, I respectfully request a **DO NOT PASS on HB 1446**. Thank you for your time, and I am available to answer any questions that you might have.

Respectfully submitted,

Faith Wahl

UND Student Body President

Testimony for Hearing on HB1446

Eric J. Murphy, District 43

Thank you, Chairman Elkin and my honorable colleagues on the Senate Education Committee. For the record, my name is Eric James Murphy, representative from District 43, Grand Forks.

Today I will testify in opposition to HB1446, which has caused quite a stir among constituents in my district in Grand Forks. A recent article on this bill and others, was published in the Chronicle of Higher Education, which did not paint North Dakota as a faculty friendly state. In fact, this will undoubtedly make recruiting faculty to our North Dakota University System institutions much more difficult.

This amended bill provides for a three-year study at Bismarck State College (BSC) and Dickinson State University (DSU). While other institutions in the North Dakota University System (NDUS) are not included, this is the beginning of the proverbial slippery slope.

I am well qualified to testify regarding the major issues this bill raises. As a faculty member at the University of North Dakota for the past twenty-two years, I have taught medical students, graduate students, and undergraduate students. I now teach a large undergraduate section class in the area of pharmacology each fall and spring semester, including this semester. I teach scientific ethics, lipid biochemistry, as well as Advanced Neurochemistry to graduate students. To medical students I teach lectures in pharmacology and biochemistry. I have an active research lab and a Hirsch number of 46, which demonstrates excellent recognition of my research prowess in my field of brain lipid neurochemistry and lipid nutrition. I have served as an editor-in-chief of a science journal, *Lipids*, for 13.5 years and am a fellow of the American Oil Chemists' Society. I have served the NDUS as a non-voting member of the State Board of Higher Education for 2 years and as President of the Council of College Faculties for one year. I think my background in higher education provides an excellent perspective on this bill.

This bill suggests that faculty, even those with tenure, can be relieved of their appointment by the President of DSU or BSC if their performance is not adequate. This is tremendously problematic as the president of an institution is the last individual in the chain of evaluation for a faculty member and they are not involved in the yearly evaluation of faculty.

In addition, for a vested tenure-track faculty member or a tenured faculty member, specific processes must be followed for termination as defined by SBHE policy. For a tenure-track faculty member, they can be relieved of their duties, but must have an opportunity to grieve through a Standing Committee on Faculty Rights (SCoFR) hearing. A tenured faculty member can be relieved for cause, but again has an opportunity for a SCoFR hearing. These hearings include a hearing officer (at UND we generally use a retired judge), a court reporter, and a panel of five tenured faculty members.

I have chaired these hearings and have participated in one that comprised over 40 hours of sworn testimony and some 10 hours of deliberations by the committee prior to submitting a

report to the president for their final decision. The lack of a clear delineation of how this policy would be implemented in this bill is a clear violation of SBHE policy.

Interestingly, this bill proposes that the president of the institution be directly involved in evaluation and termination. This is deeply flawed. The faculty member's dean and the provost should only be involved, while the president is completely uninvolved. As the final decision maker, this is critical to avoid a potential for bias. Such a bias could impact the courts view of the proceedings if indeed a lawsuit is filed.

Further, I think it is important to understand why we have tenure in higher education. We have tenure to promote the freedom of ideas and scholarship. Tenure gives faculty the opportunity for unfettered research, despite the potential for this research to be controversial. It allows faculty the ability to interact in an environment that promotes diversity of thought and of ideas. In other words, the academy is one place in which an faculty member (employee) and vehemently disagree with their chairperson, dean, or president in a manner that respects their autonomy to do so. Tenure is not a free pass for a lifetime job.

In summary, this bill does not recognize these important nuances that tenure provides and does not recognize the unique nature of a faculty member in higher education.

Respectfully, for the reasons stated above, I cannot support this bill in its present form.

March 12, 2023

Dear Chairman Elkin and members of the Senate Education Committee,

We write to you as members of the Executive Committee of UND United, the local of ND United (AFT Local #6942) which represents faculty and staff at UND, to express our **opposition to HB 1446**. We have many concerns about HB 1446 and ask your committee to **not pass** this bill.

The bill's author claims this legislation will make Dickinson State University (DSU) and Bismarck State College (BSC) more competitive and will lead to improved student outcomes, but he has not provided any explanation for how this would be accomplished through this legislation; this bill includes no provisions related to student programming or outcomes and by undermining tenure at these institutions, HB1446 would actually reduce the competitiveness of DSU and BSC because high-performing faculty would rather work in tenure-eligible positions than in places where tenure and due process protections are lacking.

This legislation is also unnecessary and based on a number of misconceptions about faculty contracts and work. The bill's authors have suggested tenured faculty are not accountable to a supervisor. This is simply false. As described in SBHE [Policy 605.1](#), tenure-eligible faculty may apply for tenure following a probationary period of about 6 years after the faculty member has demonstrated a record of outstanding teaching, research/creative activity, and/or service. To earn tenure, a faculty member must receive approval from many levels of university administration, including the campus President and the SBHE. Faculty are employed on annual contracts, even after they earn tenure. While tenure gives faculty some financial stability, it does NOT guarantee employment indefinitely - faculty must continue to meet the duties and responsibilities outlined in their annual contract. If a tenured faculty member fails to meet their obligations or follow policies and procedures, or if the resources to support their position are eliminated, they can be dismissed with cause as described in SBHE [Policy 605.3](#).

Current SBHE [Policy 605.1](#), requires each campus to establish procedures for the continued evaluation of faculty after receiving tenure. Higher Learning Commission (HLC) (re)accreditation also requires regular evaluation of faculty by their institution as described in [Criterion 3D](#). Within the university system, all faculty, including tenured faculty, are held accountable to several levels of supervisors, who are responsible for working with their faculty to engage in annual goal setting, contract negotiation, and performance evaluation. These supervisors include a faculty member's department or unit Chair, their college or school Dean, and the Provost or VP who oversees faculty. HB 1446 consolidates the power to evaluate faculty in the hands of one person who makes a unilateral decision. This could lead to abuse of power and would likely result in costly lawsuits to our university system.

While HB 1446 is written as a pilot program, the bill's creator has made it clear in public statements that he would like to see the bill's provisions expanded to other NDUS campuses. This would have significant negative impacts on our university system. The opportunity to earn tenure acts as an important recruitment tool to attract the best and brightest professionals

across the country and provides a level of stability across our university system. While all faculty, including contingent faculty, are an important part of our campus communities, sustaining a vibrant tenured faculty is viewed very positively in the national marketplace of universities, making institutions with more tenured faculty more competitive for research and grant funding opportunities.

In addition, HB 1446 includes a number of concerning stipulations that would impact our institutions in detrimental ways. For example, section 1.3 of the bill mandates all faculty “teach and advise a number of students approximately equal to the average campus faculty teaching and advising load.” These requirements do not reflect how universities operate. While some courses are large and generate a lot of tuition revenue, many specialized courses and labs, such as graduate courses and those with more hands-on and technical training, are intentionally small. In fact, accreditation standards for some programs require faculty-student ratios that may be lower than those of other programs. The costs of these smaller courses are offset by larger classes. Including such provisions may impact accreditation for some programs and undermines our ability to offer the classes and training needed to meet the workforce development needs of our state.

Finally, the NDUS generates [billions of dollars in revenue for our state each year](#). It is vital that we stabilize faculty turnover and support employee morale in order to recruit and retain the people needed to provide the educational programming required for our students and graduates to meet the state’s workforce needs. A tenured faculty is essential to student recruitment efforts, particularly within professional and graduate programs. HB 1446 has already generated substantial negative press in the national media (see [Forbes](#), [Inside Higher Ed](#)), and if passed, this legislation will deter new faculty hires, undermine faculty morale across the NDUS, and cause faculty to look for new employment in states that value tenure and shared governance.

As a result, we ask your committee to **not pass HB 1446**.

Sincerely,

UND United Executive Committee members

Liz Legerski, UND United President
Melissa Gjellstad, Vice President
Daphne Pedersen, Secretary-Treasurer

My name is Stephanie Schendel and I was a student at Dickinson State, where I served the student body in various capacities to include but not limited to, Science Club President (3 years), Student Senate General Senator (4 years), Student Representative on the Committee to Review Tuition Cost/Structure, and was nominated by the Department of Natural Sciences for Outstanding Graduate of the Year 2022. I am writing in strong opposition to HB1446 as a steward of education, having seen firsthand the negative effects autocratic, authoritarian administration has on scholastic quality and function.

Universities, especially small ones, depend on faculty with tenure to ensure continuity of programming and that incoming students receive the same quality of education as the students that came before them. Dickinson State has had five presidents in the last ten years. The average time to earn a degree is four years and each degree has different course requirements. Students depend on tenured faculty to ensure they complete the necessary classes, which may only be offered every other year depending on the degree and course, to finish in a timely manner. Faculty form close relationships with students, many manage course loads beyond the typical 12 credits of teaching hours, while mentoring students and pushing them as individuals to reach their goals. The expectation that a tenured faculty member be required to bring enough revenue to cover the expenses associated with their own contract is preposterous and unfairly targets the most specialized areas of education. It is simply a matter of fact that classes like Organic Chemistry and Pathophysiology will have fewer students than the average course. Does that mean the faculty teaching these courses are shirking academic responsibility or are less valuable to the university? Of course not.

Shared governance is a requirement of accreditation by the Higher Learning Commission. There are already systems in place and committees responsible for tenure review. Bypassing or eliminating the authority and responsibility of these systems goes against every governing entity already in place including the State Board of Higher Education, the State of North Dakota and the Higher Learning Commission and places that authority precariously in the hands of one individual. It also jeopardizes the university's accreditation. Dickinson State has a positive economic impact on the city of Dickinson and the surrounding area. Should they lose accreditation, it would have a negative impact on the entire city, which saddens me as an alumnus and alarms me as a property owner. The property around Dickinson State has a certain amount of its value attributed to the fact that it lies in close proximity to an accredited four-year university.

If the argument for this legislation is that is purely a financial necessity to ensure the success of the university, I urge the governing authority to conduct an internal audit of university expenditures. In my time at Dickinson, I attempted to implement an on-campus daycare for students, staff and faculty. While researching the necessary requirements for such a program and associated costs, I was abhorred to find the gross mismanagement of funds on the part of administration. I can direct any interested party to the evidence of this mismanagement, as it was so plentiful there would be no way it could be disguised in its entirety.

But in truth, the former argument is fictitious and this is a shameless power grab attempt on the behalf of one individual. If you question this statement, please see the testimony of current and former university presidents on this matter. This legislation has little to do with finances, as the administration

is responsible where monies are delegated already. I have witnessed the loss of excellent tenured faculty that dedicated their careers to Dickinson State due to administrative mismanagement and the students and North Dakota University Systems learning to go on without them, are the collateral damage of this fallout.

In closing, I humbly but emphatically beseech the State of North Dakota Senate to do what I cannot as one individual. You have the authority to stand up for higher education in North Dakota and the people in the city of Dickinson. Please use the power granted to you by the constituents, take to heart the testimony of the many well-meaning over the well-connected few, and vote no on HB 1446.

**HB 1446**

Senate Education Committee

March 13, 2023

Dr. Mark Hagerott, Chancellor, NDUS
701.328.2963 | mark.hagerott@ndus.edu

Chair Elkin and members of the Senate Education Committee. My name is Mark Hagerott, and I serve as the Chancellor of the North Dakota University System (NDUS). I am here today on behalf of the North Dakota University System and the North Dakota State Board of Higher Education (SBHE) to testify in opposition to HB1446. At the February meeting of the SBHE, the Board discussed HB1446 at length and ultimately voted (8-0) to oppose HB1446 with a request to coordinate a joint study with the Legislative Interim Higher Education Committee to review and offer recommendations related to a post-tenure review process.

I want to recognize the importance of several issues Representative Lefor has identified and thank him for beginning this conversation in North Dakota in a thoughtful, open, and constructive manner. I appreciate that Representative Lefor has already met with faculty of several campuses, spoken to college administrators, and responded to media queries as he has sought to address what he sees as need for reform.

Representative Lefor is not alone on this issue. Multiple states have embarked on a review of the tenure process, and in some cases large states of tens of millions of residents, as well as presidential candidates, governors, and some state legislatures, have taken action on tenure. In contrast to some of these states, Representative Lefor has not denigrated faculty or campus leadership and has not included provisions on what can or cannot be taught as a condition of tenure. Representative Lefor's openness, accessibility, and civility are most appreciated in time of cyber bullying, fake news, and half-truths, which now plague so much of public discourse.

The SBHE was constitutionally vested with authority to control and manage its institutions in N.D. art. VIII, § 6. The Board feels strongly that the award of academic tenure is one of many operational aspects of managing its institutions within the NDUS that should remain under the constitutional

authority of the SBHE. The Board, however, understands the concerns of the bill sponsor and that of the legislature and is willing to work with ND legislators to conduct a joint study to examine the post-tenure review process during the interim and to provide a report to the Interim Higher Education Committee.

Currently the SBHE has a six-year process, a probationary period if you will, prior to the award tenure that requires applicants to be reviewed annually for continuous improvement. Applicants for tenure are recommended for approval to the SBHE by the faculty member's department, a campus tenure review committee, the campus president, and the Chancellor of the University System. Campuses have established procedures for continuing evaluation of tenured faculty members. Criteria include scholarship in teaching, contribution to a discipline or profession through research, other scholarly or professional activities, and service to the institution and society. Institutions may adopt additional criteria relative to its unique mission.

You have received testimony from campus presidents, campus faculty and faculty organizations, the student body, and many others who wish to see the academic tenure review process remain under the purview of the SBHE.

Again, I reiterate both the SBHE and NDUS opposition to HB1446. In addition, the Board formally offered a joint study of the tenure policy and that the NDUS would routinely provide progress and results of that work to the legislative assembly.

This concludes my testimony related to HB1446.

THE CHRONICLE OF HIGHER EDUCATION



Letters: Proposed Bill in N.D. to Reshape Tenure Would Discourage Whistleblowing

Correspondence from Chronicle readers.

Proposed Bill in N.D. to Reshape Tenure Would Discourage Whistleblowing

MARCH 9, 2023

To the Editor:

I'm a tenured faculty member at Dickinson State University, part of the North Dakota University System. The placement of the North Dakota situation into a larger national discussion about the future of tenure is certainly relevant for various important considerations ([“Some States Want to Reshape Tenure. This Time, They Might Succeed,”](#) *The Chronicle*, March 7). As someone who does not write from the left side of the political spectrum, I would urge cautious reflection regarding politics and

academics. For instance, in various digital spaces, people have at times recognized tenure as a framework of protection from the ideological excesses on the left at institutions of higher education. However, such a consideration is not the main focus of this letter.

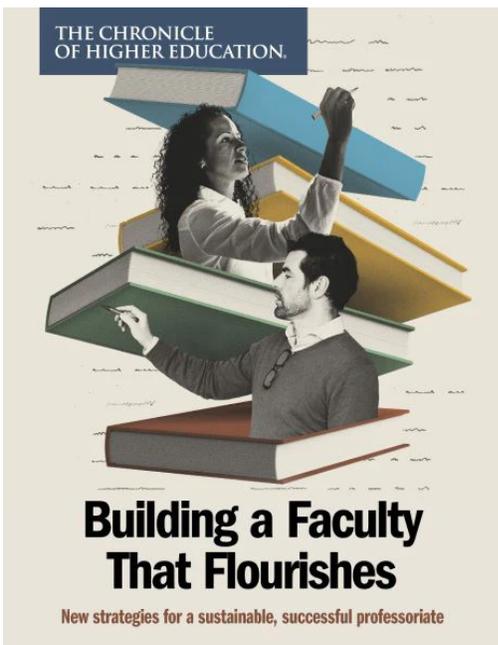
From inside North Dakota, there is a contextual reality to House Bill 1446. Within media publications and email communication, I have been “on the record” with my view of this bill as a mechanism to minimize whistleblowing at DSU and in the NDUS. The reality is that there are circumstances in which only tenured faculty can bring necessarily high attention to problems with overall management, faulty procurement, retaliatory behavior, and academic integrity. Within the NDUS (including DSU), tenured faculty have been a part of whistleblowing efforts in these areas either as whistleblowers or as supporting whistleblowers.

Promoted or embraced by certain members of the educational and political establishment in North Dakota, House Bill 1446 (even in its current version) is an onward march through and over such whistleblowing efforts. This is my informed judgment. I have seen a lot of open records. I have a lot of contacts in the state. I have been a part of such whistleblowing efforts. I probably don't have a large fan base within the aforementioned North Dakota establishment.

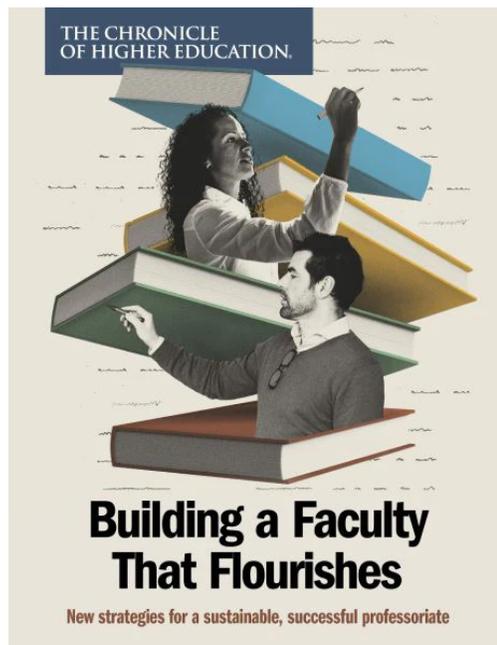
So, maybe the controversies of the North Dakota tenure bill can continue to keep the role of tenured faculty for transparency and accountability in the conversation, even nationally. However, in this letter, I have highlighted a contextual reality that should be emphasized in *The Chronicle*. I ask the members of the North Dakota Senate to protect whistleblowers by opposing House Bill 1446.

Eric Grabowsky
Associate Professor of Communication
Dickinson State University
Dickinson, N.D.

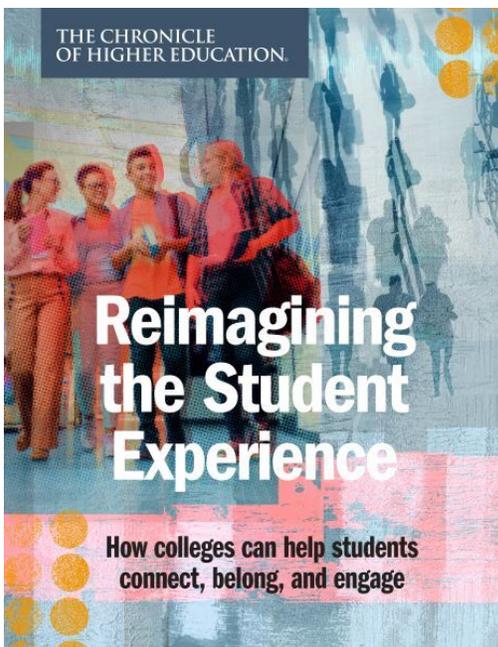
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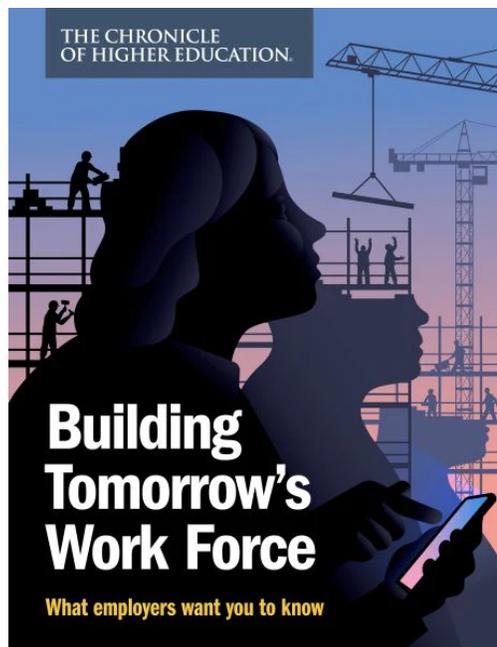
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NEWS | NORTH DAKOTA | News reporting

House Majority Leader's new bill aims to overhaul university tenure process

Critics raise concerns with HB 1446's potential infringement on academic freedom and the legal rights of tenured faculty.



A new emergency bill, House Bill 1446, has been introduced in the North Dakota State legislature which aims to overhaul the tenure process at two centers for higher learning within the state's university system.

Jeremy Turley / Forum News Service

By [James B. Miller, Jr.](#)

January 20, 2023 04:27 PM

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BISMARCK — The North Dakota State legislature is considering a new emergency bill, House Bill 1446, which was introduced on Jan. 18 and aims to overhaul the tenure process at two centers for higher learning within the state's university system.

The bill, introduced by House Majority Leader Representative Mike Lefor, (R-Dickinson), seeks to create a pilot program focused on campus models currently in practice at Bismarck State College and Dickinson State University, with the goal of improving the tenure process across the state system by refocusing on the responsibilities of tenured faculty members.

According to the bill, tenured faculty members would be evaluated based on their ability to generate tuition or grant revenue, adherence to current and future policies and procedures, and effectiveness in teaching and advising students. The bill prohibits tenured faculty members from engaging in activities that do not align with the institution's best interests.

However, the bill has received backlash from the academic community, with some calling it an “anti-whistleblower bill in disguise” and raising concerns over the potential infringement on academic freedom and the legal rights of tenured faculty.

The bill empowers university presidents or their delegated administrators to review the performance of tenured faculty members at any time, and allows them to not renew contracts based on failures to meet expectations outlined by the university, in accordance with the bill.

The bill does not allow for secondary reviews or appeals for non-renewed tenured contracts and expressly prohibits complaints, lawsuits or other allegations to be raised against a president or other administrator for actions taken pursuant to the bill.

[HOUSE BILL 1446 — CLICK TO READ\(https://ndlegis.gov/assembly/68-2023/regular/documents/23-0083-04000.pdf\)](https://ndlegis.gov/assembly/68-2023/regular/documents/23-0083-04000.pdf)

SUPPORT FOR HB 1446

Lefor defended the bill, stating that its primary aim is to ensure accountability and efficiency within the North Dakota University System and that the bill's requirements on tenured professors are what the vast majority are already doing at their universities.

“What I’m naming as the Tenure with Responsibilities Act has 11 main points and if there are tenured professors who are concerned about it, I would ask why,” Lefor said. “We as legislators quiz the university presidents on cost and represent the taxpayers, and we want, just like in the private sector, highly motivated and productive employees. We demand accountability and want the best for our institutions.”

Considerations for the idea of changing the tenure process in the state has been one that Lefor said he and others inside and outside of the university system have discussed for many years. He said that he had originally wanted to implement the changes to be system-wide, but on request from various stakeholders, opted instead for a limited implementation as a trial run.

“Some in higher education asked me to consider a pilot program and so I said alright,” he said. “There shouldn’t be any agency in state government that shouldn’t have accountability for job performance, without including different committees and so forth to determine whether or not they should improve their performance. This isn’t about firing people, it’s about accountability...and that’s reasonable.”

Lefor added, “If that is the major issue, that is something I’m willing to discuss to get everyone on the same page, working hard, developing the university and moving it forward...if there are issues then I’m willing to meet with people and amend the bill.”

Addressing the first amendment concerns raised with the bill's imposed restrictions, Lefor said that he would be open to further discussion and amendments to address any serious concerns, but confirmed that he would make an amendment to remove the portion that addresses

"avoiding the use of social media or third-party internet platforms to disparage campus personnel or the institution."

Dickinson State University President Steve Easton said he personally supports the bill and believes that the bill is necessary to enforce the duties and responsibilities for tenured faculty and university presidents.

Dickinson State University President Steve Easton.
Dickinson Press file photo

“Overall, I am supportive of the bill. I believe that it is important to turn tenure from what it has unfortunately become as a practical matter, a lifetime appointment absent outrageous behavior, to a job that, like almost all other jobs, carries with it certain duties and responsibilities that are enforceable by supervisors,” he said. “The bill makes the duties and responsibilities enforceable by permitting the president and the administration of a higher education institution the authority to ensure that tenured faculty are meeting their duties and responsibilities. It also provides, as it should, that a president will be reviewed by the

president's supervisors, the Chancellor and the State Board of Higher Education, for the president's actions under the statute. Thus, it provides accountability both for tenured faculty and for the president.”

While supportive, Easton highlighted some provisions in the bill that he disagreed with, noting that he is a staunch advocate for protecting the free speech rights of faculty.

“First, I would remove the provision referring to ‘especially in avoiding the use of social media or third-party internet platforms to disparage campus personnel or the institution.’ I understand the sentiment behind this provision, because these mediums can be deployed by those seeking to harm the people trying to make a university better. But I believe ‘campus personnel,’ as public employees, including the president, should be subject to legitimate criticism,” he said.

Another contention raised by Easton related to the narrow scope of the bill, noting that it names only two centers for higher learning in the state as part of the pilot program.

“My own preference would be for this statute to apply to the entirety of the North Dakota University System, not just to two campuses. Indeed, when I provided my draft, that was my proposal. But I am not a member of the North Dakota Legislature,” he said. “Rep. Lefor asked for my views, but he is by no means bound by them. I do understand that the bill represents a significant change and that pilot projects are sometimes a way to test a significant change.”

Easton noted that Dickinson State and Bismarck State are the two campuses within the North Dakota University System that have recently been granted the opportunity to change their missions substantially, and that the opportunity to use resources, including faculty positions, efficiently is a major boost to future change and success.

“I understand the pilot project idea at our two campuses, even though my personal preference would have been for a systemwide change,” he said.

In summation of the bill, Easton said he believed that the bill, if passed, would not negatively impact the majority of tenured faculty members and would change the tenure review process by giving the presidents of institutions the ability to enforce the duties and responsibilities of tenured faculty, which is difficult to do under the current system.

“If this bill passes, it will have no practical effect on the many tenured faculty members who do a great job of changing students’ lives through efficient, effective teaching. Those wonderful faculty members, including many at Dickinson State, have nothing to fear from this bill, in my opinion,” he said. “This bill would change the tenure review process, by allowing the president of an institution to require tenured faculty members to meet their duties and responsibilities. As a practical matter, it is almost impossible for that to occur under the current system absent awful conduct, due to the faculty’s control of the process of review and other provisions protecting unproductive faculty members.”

OPPOSITION AND RECENT ACADEMIC FREEDOM ISSUES

The bill has raised some serious concerns among members of the academic and legal community, who are calling the bill an attack on first amendment protected freedoms.

Dr. Eric Grabowsky, an Associate Professor of Communication at Dickinson State University, in speaking with The Dickinson Press said he believes that House Bill 1446 is a very real threat to the freedoms and responsibilities that come with tenured professorship and could be used by centers of higher learning to silence whistleblowers and remove inconvenient checks and balances on the governance of higher education.

“From my point of view as a citizen, I encourage the public not to fall for House Bill 1446. Debates about tenure and the scope of tenure are legitimate. Colleges and universities need to be good stewards of resources,” he said. “People in North Dakota should know that there are sometimes circumstances in which tenured faculty are uniquely situated

to highlight and discuss problems involving academic integrity, overall management, retaliatory behavior or faulty procurement. Over the years, tenured faculty have raised important concerns regarding these types of areas across the North Dakota University System, including at Dickinson State University.”

In 2021, internal documents, email communication and other records obtained through open records raised concerns with Dickinson State University’s procurement of a Wyoming-based company for instructional design.

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“With the privileges of tenure, a person who is tenured is involved in the proper stewardship of public resources. The freedom that goes with tenure extends into proactive communication about the quality of the management and direction of a college or university, which can necessarily involve criticism of university administrators. Persons from across the political spectrum should oppose House Bill 1446,” Grabowsky said. “Workforce development and resource allocation are certainly important matters. Scrutinize tenure, for sure. Discuss and debate policies, guided by sound principles. However, we should not let such legitimate areas of focus provide legislative cover for a quick route out the door for tenured faculty who might inconveniently help to provide important checks and balances on the overall governance of higher education.”

Grabowsky added, “Through my conversations about House Bill 1446, I can say that some people are getting the sense that this bill is an anti-whistleblower bill in disguise.”

Over the last two years, several cases of academic freedom violations, including the firing of two faculty members at Collin College in McKinney, TX, for speaking out against their institution's COVID-19 reopening plans have shined new light on how university's handle dissenting voices coming from within. At the University of Mississippi, a well-respected history professor was dismissed for speaking out against powerful donors with “racist beliefs.” Another case at Pacific University in Forest Grove, OR, involved a tenured professor, Richard J. Paxton, who was suspended without proper procedure.

These incidents have been closely monitored by organizations such as the American Association of University Professors, which works to protect the academic freedom rights of educators.

“Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition,” a statement from the AAUP reads. “Tenure is a means to certain ends; specifically freedom of teaching and

research and of extramural activities, and a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.”

According to the AAUP’s Statement of Principles on Academic Freedom and Tenure, “College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations.”

House Bill 1446, according to Lefor, will move to the next phase of the legislative process in a hearing in three weeks at a date and time yet to be determined.

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By [James B. Miller, Jr.](#)

James B. Miller, Jr. is the Editor of The Dickinson Press in Dickinson, North Dakota. He strives to bring community-driven, professional and hyper-local focused news coverage of southwest North Dakota.

Is there a legislative agenda to silence whistleblowers at Dickinson State University?

Efforts to shut up whistleblowers will only make it harder to fix higher ed and attract/retain talent.



Dustin Gawrylow
Jan 21



Previously, I wrote about House Bill 1198 would “require an individual who requests an open record to provide the individual's name and contact information,” and how this is a huge departure from current law and policy. That bill is sponsored by Representative Mike Lefor, Representative Vicky Steiner, and Senator Dean Rummel - the entire District 37 delegation from Dickinson.

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North Dakota's Watchdog Update

Bill Would End Anonymous Open Record Requests

Last night, we released our first tracking list of the 2023 Legislative session. One bill posted today that is sure to raise some eyebrows among journalists and advocates of government transparency is House Bill 1198. This bill would “require an individual who requests an open record to provide the individual's name and contact information...”

[Read more](#)

12 days ago · Dustin Gawrylow

The Grand Forks Herald editorial board wrote an opinion agreeing that this is a bad bill:

When any person walks into a public office – some city hall or school headquarters, for instance – they are entitled to see any public record they wish. That person doesn't have to explain, give their name or why they have an interest in that public record.

They don't even have to be from that town.

That is not only the law, it's just common sense. State law even spells it out, saying a public entity or its representatives "may not ask for the motive or reason for requesting the records or for the identity of the person requesting records."

Not everybody sees it that way. A proposal in the North Dakota Legislature seeks to change the law so that a person requesting a public record must give their name and provide personal contact information." It's [House Bill 1198](#), introduced by Rep. Mike Lefor, R-Dickinson.

Our advice to lawmakers: Don't do this. Just wad it up and toss it.

But now comes the interesting part. Representative Mike Lefor, who is also the House majority leader, [has introduced House Bill 1446](#) which on the surface level sort of sounds like a good idea - requiring tenured professors to do more to attract students to colleges. But then when you dig deeper into the bill, you see some strange language, specifically Item 4c in Section 1 of the bill:

- c. Further the best interests of the institution including providing advice and shared governance to campus leaders, and exercising mature judgment to avoid inadvertently harming the institution, especially in avoiding the use of social media or third-party internet platforms to disparage campus personnel or the institution.

This sounds like an attempt to muzzle anyone who might have the inclination to act as a whistleblower. Given the history of scandals at Dickinson State University (which is my alma mater, by the way), and the fact that [the Diploma Mill scandal](#) was eventually uncovered due to DSU faculty acting as whistleblowers making reports to

members of the media and myself - this has a strong perception of being an effort to shut down dissent and silence those who do not want to go along with bad policies and behaviors.

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In fact, one such faculty member is not remaining silent and secret, [according to this Dickinson Press article](#):

The bill, introduced by House Majority Leader Representative Mike Lefor, (R-Dickinson), seeks to create a pilot program focused on campus models currently in practice at Bismarck State College and Dickinson State University, with the goal of improving the tenure process across the state system by refocusing on the responsibilities of tenured faculty members.

According to the bill, tenured faculty members would be evaluated based on their ability to generate tuition or grant revenue, adherence to current and future policies and procedures, and effectiveness in teaching and advising students. The bill prohibits tenured faculty members from engaging in activities that do not align with the institution's best interests.

However, the bill has received backlash from the academic community, with some calling it an “anti-whistleblower bill in disguise” and raising concerns over the potential infringement on academic freedom and the legal rights of tenured faculty.

The article goes on to quote Dr. Eric Grabowsky, a professor at the university, and the current advisor for the campus College Republicans group.

Dr. Eric Grabowsky, an Associate Professor of Communication at Dickinson State University, in speaking with The Dickinson Press said he believes that House Bill 1446 is a very real threat to the freedoms and responsibilities that come with tenured professorship and could be used by centers of higher learning to silence whistleblowers and remove inconvenient checks and balances on the governance of higher education.

“From my point of view as a citizen, I encourage the public not to fall for House Bill 1446. Debates about tenure and the scope of tenure are legitimate. Colleges and universities need to be good stewards of resources,” he said. “People in North Dakota should know that there

are sometimes circumstances in which tenured faculty are uniquely situated to highlight and discuss problems involving academic integrity, overall management, retaliatory behavior or faulty procurement. Over the years, tenured faculty have raised important concerns regarding these types of areas across the North Dakota University System, including at Dickinson State University.”

Why does Dr. Grabowsky take issue with this? Because he’s been a whistleblower on yet another scandal at DSU that has gotten little to no coverage (I was not aware of it until he brought it to me.)

In 2021, internal documents, email communication and other records obtained through open records raised concerns with Dickinson State University’s procurement of a Wyoming-based company for instructional design.

A subsequent series of complaints forwarded to the Eide Bailly Fraud Hotline, between Feb. 26 and May 4, 2021, prompted an investigation into the allegations of improper procurement by Dickinson State University by the North Dakota University System. Their conclusions found that DSU’s procurement “was in violation of at least seven laws...” and “the allegations regarding improper procurement for Instructional Design were supported by the investigation.”

Grabowsky goes on to say:

“With the privileges of tenure, a person who is tenured is involved in the proper stewardship of public resources. The freedom that goes with tenure extends into proactive communication about the quality of the management and direction of a college or university, which can necessarily involve criticism of university administrators. Persons from across the political spectrum should oppose House Bill 1446,” Grabowsky said. “Workforce development and resource allocation are certainly important matters. Scrutinize tenure, for sure. Discuss and debate policies, guided by sound principles. However, we should not let such legitimate areas of focus provide legislative cover for a quick route out the door for tenured faculty who might inconveniently help to provide important checks and balances on the overall governance of higher education.”

Grabowsky added, “Through my conversations about House Bill 1446, I can say that some people are getting the sense that this bill is an anti-whistleblower bill in disguise.”

Over the last two years, several cases of academic freedom violations, including the firing of two faculty members at Collin College in McKinney, TX, for speaking out against their institution's COVID-19 reopening plans have shined new light on how university's handle dissenting voices coming from within. At the University of Mississippi, a well-respected history professor was dismissed for speaking out against powerful donors with “racist beliefs.” Another case at Pacific University in Forest Grove, OR, involved a tenured professor, Richard J. Paxton, who was suspended without proper procedure.

These incidents have been closely monitored by organizations such as the American Association of University Professors, which works to protect the academic freedom rights of educators.

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According to the AAUP's Statement of Principles on Academic Freedom and Tenure, “College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations.”

House Bill 1446, according to Lefor, will move to the next phase of the legislative process in a hearing in three weeks at a date and time yet to be determined.

There is clearly yet another problem at DSU, and instead of remedying those problems, legislators from that district are bringing forth legislation that was silence

those who would help the public and taxpayers know what is going on.

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Republicans talk about “academic freedom” a lot.

In 2017, **State Representative Rick Becker** introduced an “academic freedom” bill, which was **House Bill 1329** in the 2017 session. It passed the House by a vote of 65-25, but only got 7 yes votes in the Senate.

Perhaps if we want to retain good talent and staff, we should not make laws telling them to shut their mouths when there are problems. We should be encouraging public employees to speak up and then address the problems.

(Note: in the name of transparency, I would mention I have personally submitted my name for consideration for the openings on the State Board of Higher Education.)

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Letter to the Editor

Don't Fall for House Bill 1446



Vintage typewriter keys. gesrey/Getty Images/iStockphoto

By Dr. Eric Grabowsky

February 01, 2023 12:44 PM

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Dear Editor,

Herein, I do not speak for Dickinson State University (DSU) or the North Dakota University System (NDUS). Tenure can be a delicate subject. It is a politically and financially charged topic. House Bill 1446 is not a legitimate way to begin a substantive conversation in North Dakota on tenure reform. Across the NDUS, tenured faculty assist with transparency and accountability toward the good governance of higher education.

For a pilot program, if this bill is the way to go forward for DSU, Bismarck State College (BSC), and eventually the entire NDUS, as Representative Lefor and President Easton have indicated, then why was there no announcement or discussion of the bill at DSU before its legislative submission? How did a number of people learn about HB 1446 not long after it was submitted? I can speak to one major element of these communicative circumstances.

I was “tipped off” about the submission of HB 1446 by a knowledgeable person, which of course led to my sharing information about the bill with various people. Regardless of your view of tenure, please keep in mind that if this bill passes, an accelerated revision of policies and procedures pertaining to tenured faculty will be necessary at DSU and BSC (and at the NDUS level for these two institutions). Along with the obvious controversy of HB 1446 on campus, would it not be helpful for employees to know that such substantial work would be a possibility during 2023?

There are times when only tenured faculty can speak out about problems of management in and for North Dakota's public universities and colleges. Overall, in terms of the expansive scope of HB 1446 (and it being rushed forward as it is for implementation), in my estimation, it won't be good for students or for student enrollment at DSU and BSC. And, considering past problems with enrollment practices at DSU, should there not be more caution when thinking about incentivizing enrollment to such an extent, especially if the incentivization is tied to the job security of tenured faculty?

We seem to get the idea from Representative Lefor and President Easton that apart from something like the initiation of a bar fight in town, it would be almost impossible to terminate someone who is tenured. For faculty at DSU (tenured or not), there is a chain of management that typically goes to a department chair, to a dean, to the provost, and to the president. As a tenured faculty member, I am annually reviewed by my department chair. Part of that process involves establishing a plan for the academic year to follow. That plan should inform the next annual review.

For significant reasons, with specific protections in the mix, it is more difficult to terminate a tenured faculty member. However, it is not as difficult as some people might think. Tenured faculty can be put on a performance improvement plan, which does open a door for potential termination. And, in financially problematic circumstances, with university system and campus policies and procedures, someone who is tenured can be terminated at a pace.

Representative Lefor has said that he will remove the disparagement aspect of the bill. However, for both administrators and tenured faculty, the bill contains the notion of alignment with the best interest(s) of the institution. Properly understood, such alignment is quite important for administrators and faculty, both proactively and reactively. For those situations in which tenured faculty are ringing the bell about faulty procurement, academic integrity, overall management, or retaliatory behavior, who will grapple with what is in the best interest(s) of the university? Whose approach to those best interest(s) in specific cases, objectively and subjectively, are best aligned with the necessities of transparency and accountability?

It is interesting that the bill would take off the table (for tenured faculty) the normative process of termination review for all faculty (tenured or not). Presently, that process involves a faculty committee. Generally speaking, faculty termination appeal decisions are currently made by the president. One could say that faculty terminations often don't directly get initiated by the university president, even if a president is somehow involved in such considerations. In my view, a reason for this exclusion

in HB 1446 is to avoid paper trails of concerns and claims, regardless of the outcomes of appeal committee recommendations and presidential appeal decisions. With no paper trails along these lines, there are fewer problems to talk about at the campus and system levels.

The narrative across North Dakota since about the later part of 2020 has been that President Easton and certain members of his leadership team are doing bold and transformative work at DSU, yet, there are troublemakers getting in their way. As I see the big picture, HB 1446 is Representative Lefor's rescue plan to accomplish what current policies and procedures won't allow President Easton to do, especially with the troublemakers. Again folks, don't fall for House Bill 1446.

To the general public (across the political spectrum): Please oppose HB 1446. Communicate your opposition to HB 1446 to our state government officials. Pass or fail (and it should fail), the atmospherics of this bill put DSU at risk in terms of the recruiting and retention of both students and faculty. Regardless of one's views on this or that campus controversy, without an adequate number of faculty to cover the courses as listed, student enrollment will unfortunately go down.

RELATED TOPICS: [DICKINSON COMMENTARY](#)

Thank you for this opportunity to make this submission in opposition to HB 1446. I write here as a citizen of the United States and as a resident of North Dakota. I do not speak for Dickinson State University (DSU) or the North Dakota University System (NDUS). HB 1446 should be rejected. Don't fall for HB 1446. This is your opportunity to make a strong statement regarding the protection of whistleblowers by giving a "do not pass" recommendation regarding HB 1446.

Like with HB 1198 (to get rid of anonymous open records requests, which failed in the North Dakota House of Representatives), from my point of view, there is good reason to believe that HB 1446 reflects efforts to avoid facing trouble and accountability within the NDUS. This has been my own viewpoint from the start (when learning about HB 1198, and then learning about HB 1446). Dustin Gawrylow has provided some big picture connections to consider that pertain to HB 1198 and HB 1446. As part of my testimony submission, and referenced below, I include his article.

Referenced below, I also include three additional sources as part of my testimony submission, which contain my strong perspectives on HB 1446. I have communicated openly within these media outlets (and elsewhere) about problems with this bill. I will continue with this open communication against what is, in my judgment, a larger anti-whistleblowing endeavor with respect to DSU and the NDUS. The current version of HB 1446 retains aspects from its initial version that could potentially be utilized for retaliation against whistleblowers.

From my informed viewpoint, HB 1446 is the "enemies list bill" for its initial phases(s) of implementation at DSU. The bill is retaliatory on the front end, with measures then put on the table to try to keep people quiet about campus problems going forward (and hence, retaliatory ongoing). Over time, such a retaliatory framework could unfortunately become an operative model for other institutions of higher education in North Dakota.

As I see it, with the submission of *and* reaction to HB 1446, Representative Lefor and President Easton have opened some windows to potential levels of sunshine that are needed for both DSU and the NDUS. In certain ways, regarding HB 1446, my written testimony to the Education Communication is a continuation of my previous email communication with the members of the North Dakota Senate (email communication that will continue after this written testimony). In my estimation, DSU has been a compliance nightmare from the summer of 2020 onward. There were (and are still) a range of issues at DSU that prompted a number of heroic campus voices. Many (though not all) of those persons are or were tenured faculty at DSU. A range of "high impact" people (faculty and staff) have left DSU during the past few years.

As a whistleblower, much (though not all) of my focus has been on the Learning Corps situation. From August 2020 through December 2020, DSU contracted with Learning Corps, LLC (based in Wyoming) for instructional design services. For these services, CARES Act funding was used by DSU, which was available from the federal government because of COVID-19. President Easton was cleared of violating conflict of interest standards by the NDUS. However, the NDUS did allege that DSU violated at least seven policies or laws with respect to procurement. Unfortunately, in my view, during 2021, the Chancellor and the State Board of Higher Education did not adequately address the Learning Corps situation. The Learning Corps situation lingers as an inconvenient reality for those persons who continue with the narrative of bold and transformative leadership at DSU.

If you are interested in the good governance of the NDUS, then don't take off of the table the latitude that tenured faculty have for necessary discussions of faulty procurement, retaliatory behavior, academic integrity, and overall management. Please read closely the four sources that I have submitted as part of this written testimony. Thank you for your work for the people of North Dakota.

Dr. Eric Grabowsky, Associate Professor of Communication (tenured), Dickinson State University, Dickinson, North Dakota, (701) 306-5982

“House Majority Leader’s new bill aims to overhaul university tenure process”
James B. Miller, Jr., January 20, 2023, The Dickinson Press

<https://www.thedickinsonpress.com/news/north-dakota/house-majority-leaders-new-bill-aims-to-overhaul-university-tenure-process>

“Is there a legislative agenda to silence whistleblowers at Dickinson State University?”
Dustin Gawrylow, January 21, 2023
North Dakota’s Watchdog Update (North Dakota Watchdog Network)

<https://watchingnd.substack.com/p/is-there-a-legislative-agenda-to>

“Letter to the Editor: Don’t Fall for House Bill 1446”
Dr. Eric Grabowsky, February 1, 2023, The Dickinson Press

<https://www.thedickinsonpress.com/opinion/letters/letter-to-the-editor-1>

“Letters: Proposed Bill in N.D. to Reshape Tenure Would Discourage Whistleblowing”
Dr. Eric Grabowsky, March 9, 2023, The Chronicle of Higher Education

<https://www.chronicle.com/blogs/letters/proposed-bill-in-n-d-to-reshape-tenure-would-discourage-whistleblowing>



1500 Edwards Ave • PO Box 5587 • Bismarck ND, 58506-5587 • 701.224.5400

Information regarding HB1446 was disseminated among faculty at Bismarck State College. The following testimony was compiled from faculty feedback, which was passed as a resolution by the Faculty Senate at our meeting on February 2, 2023, to be delivered orally at the House Government and Veterans Affairs Committee hearing on February 3, 2023.

1. The Faculty Senate of Bismarck State College opposes HB1446. The language of the bill would allow the circumvention of established processes for reviewing and holding tenured faculty accountable, could eliminate accountability and checks and balances in making programming decisions, and threatens the quality of instruction in the classroom.
2. Tenured faculty at BSC and other NDUS institutions are not untouchable, permanent employees. The NDUS, the SBHE, and individual institutions have policies and procedures in place that provide for regular review and potential dismissal of a tenured faculty member under certain circumstances. These include: financial exigency; loss of legislative funding for a position or program; loss of enrollment or elimination of courses. Tenured faculty are held to rigorous academic and ethical standards and can be dismissed for demonstrated incompetence, continued unsatisfactory performance evaluations, neglect of duty, neglecting institutional responsibilities, and violation of policies. These are outlined in SBHE 605.1 and 605.3 and referenced by the BSC Faculty Handbook that we all signed on to.
3. Thus Section 1 of HB1446 seems redundant and unnecessary insofar as it holds nobody accountable in any new way. Section 2, however, seemingly removes the processes, procedures, and accountability already in-place in reviewing tenured faculty. It forgoes established checks and balances on college presidents and their administrations, giving them broad abilities to review and potentially dismiss tenured faculty *without* accountability. Additionally, very few, if any, public employees are subject to the type of at-will re-evaluations and no-recourse dismissal that this bill lays out uniquely for already-tenured college faculty.
4. By giving broad criteria for review with no checks and balances, as laid out in the language of Section 2, this bill also potentially exposes college presidents to undue political or financial influences. If a politician or a wealthy donor were to have a personal problem with a faculty member or a program at a college, they could pressure the administration to review them. The Tenure system was put in place to shield both teachers and administrators from such pressures.
5. Further, we are particularly concerned with Section 1.1, which seemingly defines teacher-scholars as revenue generating employees, contradicting the dual missions of public service (which encompasses all state employees) as well as public education, both of which are *not* for-profit ventures, but instead public investments in state and local economies, and in the greater civic and social good.
6. This redesignation, laid out in Section 1.1, seems to create a new class of public employee, different from any other administrator, civil servant, legislator, in that few, if any, other state employees are required to generate enough cash for their own salary. While it is true that some research faculty positions are grant-funded, most faculty at BSC have no say over appropriations or budgets in their areas.

7. HB 1446 does not acknowledge or lay out broader responsibilities for revenue generation. Currently there are about two administrators and support staff for every one full-time faculty member at BSC. Administrators and staff are not held accountable to the same revenue-generating standard, are not required to demonstrate the economic justification for their specific position and are not held accountable by the Legislature, NDUS, or SBHE by those standards. According to the language of Section 1.1, professors generate their own salaries, and it is supposed that state appropriations cover administrative and staffing costs, whether or not that is the intention.

8. Furthermore, the broad and vague scope of Section 1.1, with its undue emphasis on the revenue generated by individual faculty members, has the potential to place all faculty, and all programs, under review at any time. Very few college faculty in the NDUS, or even nationwide, would not be under threat from something like Section 1.1 at some point, due to fluctuating enrollments, innovating and piloting new programs or classes, etc., thus opening nearly all faculty to dismissal if the administration decides they are up for review. For a school like BSC, this is not limited programs that provide public support for the arts and humanities, like Theater, and Music, but most certainly includes STEM and especially industry workforce-related programs that tend to have higher program costs, for facilities, for equipment, for industry-competitive faculty salaries, that are hardly ever "paid back" by the tuition generated by enrollment. This includes our Ag, Energy, and Power Plant programs, all of which could be placed under review at any time under the language in this bill.

9. Faculty have no say in the cost of tuition or the funding model and cannot adjust the amount of cash they generate in this way. Thus a program running a surplus could be adjusted and put in the red through no action or fault of the faculty that helped to build that program.

10. Section 1.1, by placing undue emphasis on a faculty member's solvency, is problematic because it could endanger academic integrity by, for example, potentially corrupting something as fundamental as the grading process. The state funding model for BSC subsidizes the school for credit hour production, which means the school receives less money for students who fail courses than for those who pass. If this bill were to go into effect, it is possible to see the pressure that could be put on professors to pass students who have low marks, or might have demonstrated incompetence, in order to generate their revenue quotas. By holding students to the rigorous standards our future workforce demands, a faculty member could be in danger of falling "into the red."

11. In closing, BSC's polytechnic mission is endangered by this bill, by the reasons stated above, but also because it would make us less competitive for the talent we need to prepare tomorrow's workforce. North Dakota is currently experiencing an economic boom, but we are not the only ones. BSC's polytechnic mission was created to prepare North Dakotans now, and prepare a new generation, to continue this workforce growth in industries like manufacturing and petroleum, but also spearhead growth in industries like in AI, Cybersecurity, Automation and Robotics, where North Dakota is primed to soar—if we have the support. BSC needs to compete with lucrative industry and educational positions elsewhere so that we can attract not just people who can teach, but leaders in industry, leaders in their fields. And by weakening and endangering Tenure, this bill wouldn't just hurt our ability to do this, it could effectively hamstring it.

12. The Faculty Senate of Bismarck State College ask you to vote DO NOT PASS on HB1446.

Testimony in Opposition to HB1446

Honorable Chairman Elkin, Vice Chairman Beard, and Members of the Senate Education Committee,

I am an Assistant Professor of History and current President of the Faculty Senate at Bismarck State College. Our faculty senate passed a statement of opposition to HB1446 in February which I delivered in-person before the House committee, but due to the timing of the hearing, today I deliver testimony on my personal behalf.

As a member of the Faculty Senate I have yet to hear from a faculty member who supports this bill and all the feedback my fellow faculty senators and I have received has been vehemently negative toward it. Both faculty and staff have also expressed some bewilderment as to why BSC was included in this pilot program, when little affected by this bill has been any point of contention on campus in recent memory. It seems as if we are unwillingly becoming part of someone else's experiment without our buy-in.

In any case, the many I have spoken with generally agree that this bill effectively strips us of tenure's main protections and would set the stage for potential overstepping of presidential power that endangers our mission as educators. Faculty understand well that our positions are not permanent and that we are not "un-fireable," as is sometimes popularly depicted, and we strive to maintain rigorous standards set by institutional and SBHE policies (See SBHE 605.1, 605.3).

Moreover, faculty are already held accountable both by college administration as well as by other faculty. In any such a case where a faculty member were not fulfilling duties as they relate to policy, teaching, or administrative tasks, it is other faculty that immediately take on the leftover burden, or deal with the fallout. It is thus in our own best interest to assure that we are all fulfilling our duties, and we do this effectively.

For example, recently at BSC it was discussed among faculty that there was disparity in the number of students assigned to different faculty for academic advising, and that some faculty were thus spending far more time on academic advising than others. At BSC, students are normally assigned faculty advisors within their declared programs, and some programs simply have more students in them. Nevertheless, many faculty--even some with small advising loads--felt this was unfair. The Faculty Senate took up the issue and revised workload policy with stated aims at more equity among faculty advising loads; we then asked administration to offer training in advising outside our immediate subject areas, so those with few advisees could take on more. This has been a faculty-led effort at accountability supported by our administrative partners.

HB1446 endangers this kind of working relationship that allows a school like BSC to thrive. Shared governance is important in building effective relationships amongst faculty, between faculty and support staff, and between faculty and administration. BSC has a wide range of programs, ranging from Industrial Automation to Art, to Energy Management, to Theater. No college president or administrator can be an expert on the needs of every program on campus, nor is the vision for the college cast by the president alone. The individual faculty members who come with extensive training, interact with students on a daily basis, and dedicate their lives to

building and expanding programs at BSC, must be able to come to the table with administration and speak freely about what students and programs need. **This bill harms this process by allowing the potential for personal quibbles or political conflicts to dominate this relationship.**

College faculty are hardworking educators, program builders, and industry experts. Tenure allows us to maximize our potential in working with our administrative partners in building programs that will assure tomorrow's North Dakota workforce is competent, innovative, and effective in a highly competitive economy. Please do not endanger it.

Thank you for your time and for the opportunity,

David Terry
Assistant Professor of History
Faculty Senate President
Bismarck State College

Good morning chair Elkin, vice chair Beard and members of the Senate Education committee, for the record, my name is Mike Lefor and I represent District 37- Dickinson in the House. I bring HB 1446 for your consideration. This bill which I call the “tenure with responsibilities act”, provides a mechanism for tenured professors to be reviewed by the university president as it pertains to job performance.

In states such as Florida and Texas, they have recently introduced either by statute or policy a post tenure review process similar to what is being proposed here today. As we all know, higher education is becoming a more complex, more competitive market for our young people and adults.

If you look at available data, you will find more students taking classes on-line than ever before. This means students can literally have their pick of hundreds of universities across the country for their courses. I know of an individual in my hometown who is taking courses at a university in another state rather than North Dakota due to a lower cost.

Our taxpayer supported universities are moving forward with strategies to remain competitive in the marketplace and aligning with other groups to provide the best educational opportunities. Two of these universities are changing their business models to provide more of these opportunities right here in North Dakota.

Dickinson State University is changing to a dual mission campus and Bismarck State College is providing more polytechnic courses. They are aligning with the career and tech academies, local high schools, and adding technology to provide more access to classes online. Recognizing these challenges, the “tenure with responsibilities act” provides for a pilot program within these two institutions to mirror some of the policies being enacted in other states.

Last year, SB 7044 was signed into law in Florida. It includes a provision stating the Florida Board of Governors is now empowered to by state statute to establish performance reviews of tenured professors. These reviews must address:

1. accomplishments and productivity.
2. Assigned duties in teaching, service, and research.
3. Performance metrics, evaluations, and ratings.
4. Improvement plans and consequences for underperformance.

Similar to the provisions contained in this bill.

In the bill you will note this is a four-year pilot program with the following points.

- a. Comply with the policies and procedures and directives of the institution, the president and other administrators, the state board of higher education and the North Dakota university system.
- b. Effectively teach and advise a number of students approximately equal to the average campus faculty teaching and advising load.
- c. On page 1, engage in measurable and effective activities to:

- (1) Help retain students for the institution.
 - (2) Help students achieve academic success.
- d. Perform all other duties outlined in any applicable contract and position description.
3. An institution involved in the pilot program under this section:
- a. May adopt policies and procedures requiring tenured faculty to promote advancement of and further the mission of the institution.
 - b. Shall provide a progressive report of the pilot program to the legislative management no later than December 31, 2025.
 - c. Shall provide a final report of the pilot program to the legislative management no later than December 31, 2026.

In section two of the bill on page two beginning on line 10, it provides for a faculty review by presidents of these institutions as follows:

1. The president of each institution of higher education under section 1 of this Act may review performance of any or all of the duties and responsibilities under Section 1 of the act.
2. A review under subsection 1 must include a written assessment of whether the faculty member is complying with the duties and responsibilities reviewed.
3. Explains what happens when a president feels the tenured faculty member has failed to comply with a duty or responsibility, the president may not renew the contract of the tenured faculty member unless the president articulates why it is in the interest of the institution to continue to employ the faculty member.
4. The president may enlist the assistance of an administrator at the institution to conduct a review but may not delegate responsibility for the review to a faculty member who is not an administrator.
5. When conducting a review, the president may look at other factors including what is in the best interests of the institution or its students. (For example, a professor teaching a few students and the university needs these courses for a bachelor's program, etc. it gives the president some latitude.
6. Under number six allows an appeal to the chancellor of the university system if a faculty member's contract is not renewed or if their employment was terminated or suspended as a result of a review under this section. Additionally, the president is responsible to the chancellor and state board of higher education for the reviews conducted under this section.
7. States the presidents and administrators, shall fulfill these duties without fear of reprisal or retaliation. The state shall indemnify the board of higher education for any action brought forward under this section.

At this time, I will have you refer to the handout I provided. If you look at the attachment it shows the higher education capital projects approved by legislature since 2013 until the end of this biennium. The total amount of general funds that were approved amounts to \$311,139,742. This does not include those dollars in the other funds category.

If you look at appropriations for higher education and compare it to our higher education enrollment, the enrollment has not really grown since 2013 but our funding certainly has.

Members of the Senate Education committee, the cost of higher education in our state continues to grow and we are the stewards of the taxpayer elected to represent them when dollars are allocated. We also need to be competitive for the future and the changing ways in which educational opportunities are offered.

Other states have enacted policy to provide for similar reviews, why not North Dakota? That completes my testimony, and I would be happy to answer any questions.

HIGHER EDUCATION CAPITAL PROJECTS APPROVED BY THE LEGISLATIVE ASSEMBLY OR BUDGET SECTION

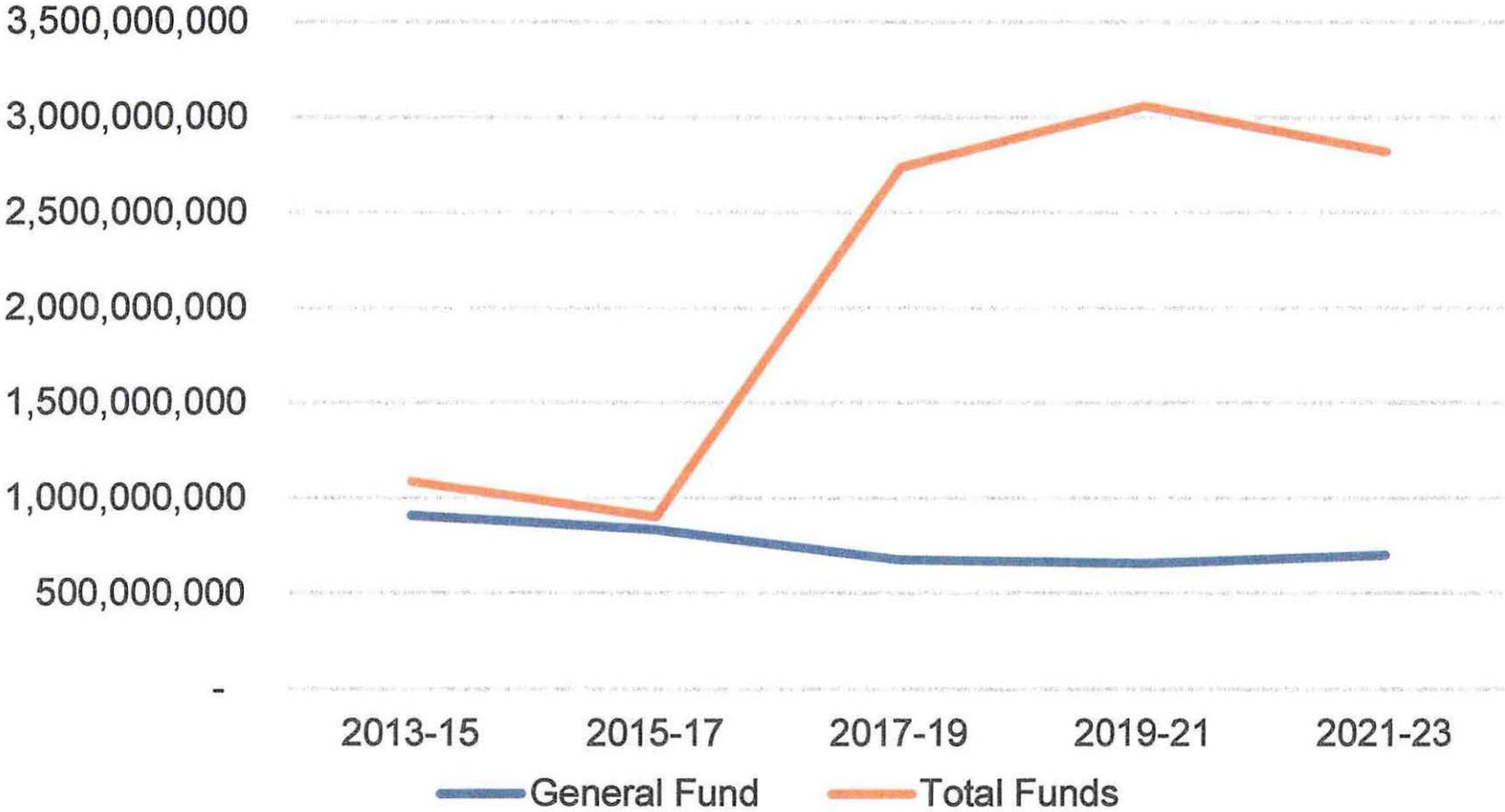
	2013-15		2015-17		2017-19		2019-21		2021-23	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
BSC										
Communications and Fine Arts Center (private and local funds)	\$12,635,000	\$6,665,000								
Campus infrastructure			\$1,575,000							
Student Union lower level renovations (local funds)				\$600,000						
Nursing building					\$8,900,000					
Polytechnic building and transition costs (federal COVID funds)										\$38,000,000
LRSC										
Erlandson Technical Center remodel and addition	5,650,184									
Switchgear, electrical, and other campus repairs			1,648,423							
Precision Agriculture Center (\$3 million private and local funds, \$363,000 SIFF)					1,000,000			\$3,363,000		
WSC										
Campus Drive project	1,710,000									
Stevens Hall renovation	11,630,354									
UND, including SMHS										
School of Medicine and Health Sciences facility project	60,450,000		62,000,000							
Law School building renovation (private funds)	11,400,000	2,507,448								
High Performance Center (private funds)		19,500,000						35,000,000		
Purchase of resident apartment building (revenue bonds)		8,300,000								
Student housing facility (revenue bonds)		19,187,262								
Wilkerson Hall project (revenue bonds)		29,000,000								
School of Medicine and Health Sciences Bismarck Family Practice Center project	750,000									
Museum of Art repairs	190,000		760,000							
Aerospace building project (private funds)		24,950,000								
Collaborative energy center (private funds)		15,500,000								
Airport apron projects (federal COVID funds)			6,000,000							5,000,000
Student engagement projects (private and local funds)				6,000,000						
Chester Fritz Library project (private and local funds)						\$21,000,000				
Deferred maintenance and parking projects (local bonding)								30,000,000		
Memorial Union replacement (revenue bonds)								80,000,000		
Gamble Hall replacement (\$55 million private and local funds, \$6 million state bonds)					9,000,000			61,000,000		
Space Command initiative									\$4,000,000	
Merrifield Hall renovation (federal COVID funds)										50,000,000

	2013-15		2015-17		2017-19		2019-21		2021-23	
	General Fund	Other Funds								
NDSU										
STEM building	28,120,000									
Low rise lavatory projects (local funds)		2,030,000								
Memorial Union food court (local funds)		975,000								
Nutrition and dietetics and hospitality laboratory (local funds)		750,000								
Sanford Health athletic complex (private funds)		41,000,000								
Center of Computationally Assisted Science facility renovation (federal funds)		4,270,000								
Aquatics center project (\$10 million revenue bonds and \$1 million local funds)				11,000,000						
Minard Hall (local funds)				600,000						
Sudro Hall renovation and addition (private and local funds)						28,000,000				
Student residence halls (revenue bonds)						39,505,000				
University Village replacement (revenue bonds)						10,000,000		37,600,000		
Barry Hall (private and local funds)								3,000,000		
Indoor practice facility (private funds)								50,000,000		
Indoor softball facility (private funds)								2,600,000		
Dunbar Hall (\$40 million state bonds)						8,000,000		43,200,000		
Agriculture products development center (\$50 million state bonds, \$15 million private and local funds)						20,000,000		40,000,000		25,000,000
Outdoor track project (private funds)								5,000,000		
NDSCS										
Old Main renovation	8,085,879									
Football complex renovation (private and local funds)		1,500,000								
Infrastructure repairs			13,298,000							
DSU										
Woods Hall renovation and purchase of student housing (\$9.6 million revenue bonds and \$1.9 million local funds)				11,500,000				4,609,000		
Pulver Hall (state bonds and local funds)										
Pulver Hall, meat processing laboratory, and other projects (federal COVID funds)									4,000,000	
MaSU										
Old gymnasium replacement	5,510,000									
Campuswide drainage improvements	2,153,650									
Natural gas boiler project (local funds)								1,600,000	398,970	

	2013-15		2015-17		2017-19		2019-21		2021-23	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
MISU										
Plant services building (local funds)	1,730,810	1,785								
Campus athletic facilities renovation (private funds)		11,800,000								
Gordon B. Olson Library art center project (private funds)						1,400,000				
Herb Parker Stadium air-supported seasonal dome project (private and local funds)						634,000				
Facilities building parking lot and project completion (local funds)						250,000				
Dome seat replacement project (private funds)						2,200,000				
Harnett Hall renovation (federal COVID funds)										25,000,000
VCSU										
Vangstad Hall renovation	3,454,643									
Hillside slope stabilization (local funds)	480,510	100,000								
W. E. Osmon Fieldhouse addition (private funds)		4,706,837								
Former president's house repairs	250,000									
Heating plant replacement			14,289,000							
Health and Wellness facility (private and local funds)				16,000,000						
Integrated carbon plant (revenue bonds)						22,500,000				
Track repair project (private funds)						1,200,000				
Communications and Fine Arts building (state bonds)					2,000,000			30,000,000		
DCB										
Thatcher Hall heating repairs	769,500									
Gross Hall updates (local funds)		732,460								
Mead Hall updates (local funds)		1,171,586								
Milligan Hall updates (local funds)		896,743								
Old Main building renovation (\$1.5 million private and local funds and \$2.5 million from SIIF)										4,000,000
Nelson Science Center			1,098,789							
Dormitory upgrades (\$2.9 million revenue bonds and \$0.9 million local funds)				3,784,076						
Allied health facility (private and local funds)				6,864,118						
Dining facility and other projects (revenue bonds)					1,000,000			2,500,000		
TOTAL	\$154,970,530	\$195,544,121	\$100,669,212	\$56,348,194	\$49,900,000	\$126,689,000	\$-	\$427,872,000	\$5,600,000	\$151,398,970

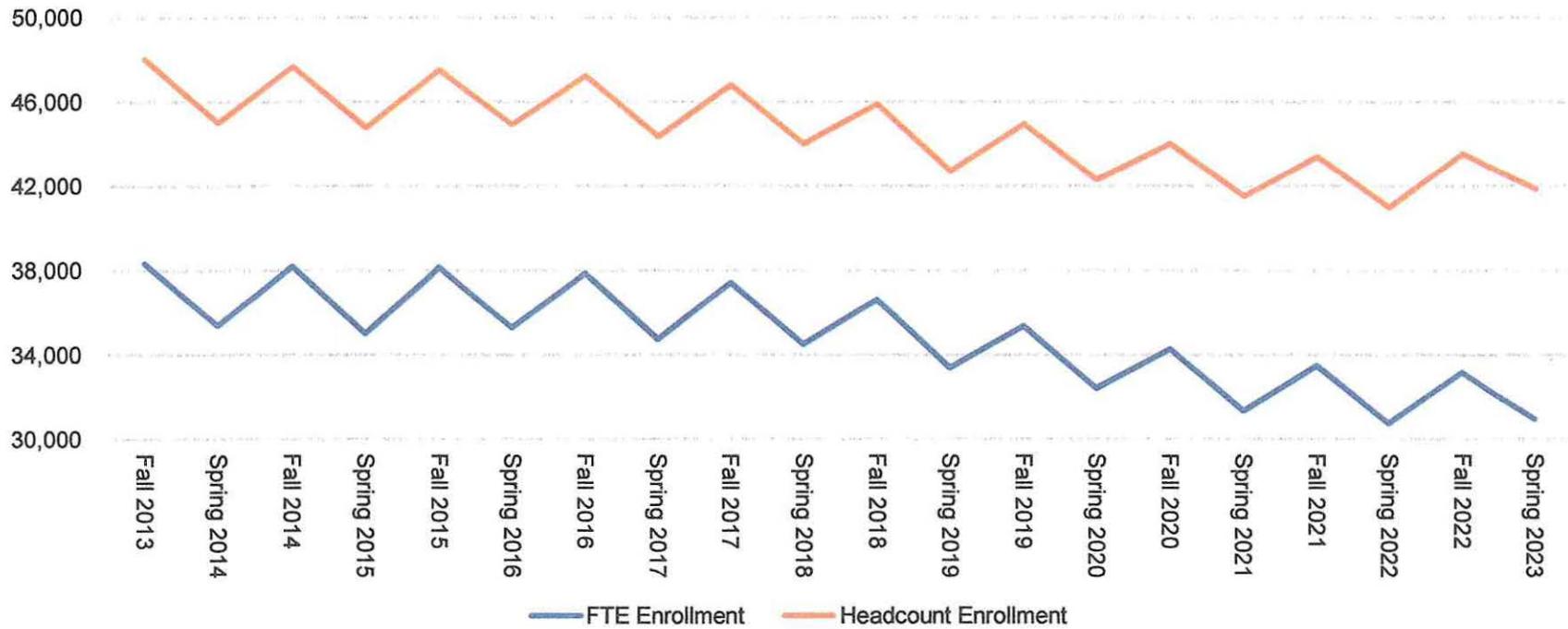
NOTE: The amounts identified represent the legislative appropriation or authorization for each project. It is possible an authorized project was not completed or completed for a lesser amount.

Higher Education Appropriations



NOTE: Beginning with the 2017-19 biennium, the total funds appropriation amount includes appropriation authority of all special funds received by the University System office and institutions. Prior to the 2017-19 biennium, special funds appropriations for the University System office and institutions were provided only for certain items, such as capital projects.

Higher Education Enrollment



Lefor, Mike

From: Aus, Joan <joan.aus@dickinsonstate.edu>
Sent: Wednesday, February 1, 2023 10:45 PM
To: Lefor, Mike
Cc: Secord, Deborah; Hoffmann, Darla; Braunagel, Jerolyn; Grinsteinner, Amy; Crossingham, Sarah
Subject: HB 1446

4

Dear Representative Lefor,

My name is Joan Aus and I'm the Chair of the School of Education (SoE) at Dickinson State University. I've been tenured for over 12 years and was just granted approval to be promoted to the rank of Full Professor. I take my tenure very seriously and consider tenure a privilege and obligation to serve my university through student-centered teaching, creation of new programs, recruiting and scholarship. In my department I have the privilege of working with like-minded and hard-working faculty all of who have been teachers in K-12 classrooms. The faculty in SoE are veteran teachers who also actively participate in recruiting, and advising for over 169 students. We have tried very hard to grow our education programs and have increased our FTE by 22%, mainly through distance learning programs.

Unfortunately there are senior tenured faculty at DSU who oppose change and perceive tenure as a means to block growth and keep their teaching load small. Some tenured faculty even think tenure is an excuse for poor teaching and allows them the right to pick and choose which students they will teach and which programs they will support. It's time to hold all faculty accountable, including tenured faculty.

I support HB 1446 and have been given permission to include the names of my faculty, who are also in support: Dr. Deborah Secord, Professor Darla Hoffman, Professor Jeri Braunagel, Professor Amy Grinsteinner and Professor Sarah Crossingham.

Sincerely,

Dr. Joan Aus

JOAN DIGAWA AUS, Ed.D.
Director of Graduate Studies
Chair



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Testimony Before the Senate Education Committee
HB 1446
March 13, 2023

Chairman Elkin and members of the Senate Education Committee, for the record my name is Nick Archuleta, and I am the president of North Dakota United. Respectfully, I rise today to urge a ***do not pass*** recommendation for HB 1446.

To begin, Mr. Chairman, I find it valuable to cite, in part, the North Dakota State Board of Higher Education's policy on Academic Freedom and Tenure:

"The purpose of tenure is to assure academic freedom. Academic freedom applies to all scholarly pursuits. Freedom in scholarship is fundamental to the advancement of knowledge and for the protection of the rights of the faculty members and students. It carries with it duties and responsibilities correlative with rights..." (605.1 Academic Freedom and Tenure; Academic Appointments, Section 2)

Academic freedom allows our campuses to thrive as centers for free thought and expression, to pursue and debate conflicting ideas openly, and to give students and faculty opportunities to engage in innovative research and scholarship that advances our understanding of the world around us and our ability to address the complex challenges we face. By undermining tenure, HB 1446 would infringe upon this freedom, impacting faculty, students, and our institutions of higher education.

Chairman Elkin and members of the Committee, to be considered for tenure, a faculty member must first complete six years of probationary service to their institution. During these six years, that faculty member's performance is evaluated at least annually by the institution. When a faculty member wishes to apply for tenure status, they must follow a lengthy, thorough process that has been established by their institution to evaluate their scholarship in teaching, contribution to a discipline or profession through research, other scholarly or professional activities, service to the institution and society, and additional criteria as that institution may seem fit. It is important to note that Bismarck State College (BSC), Dickinson State University (DSU), and every other institution in the state is required to design their tenure evaluation and recommendation process in a way that is consistent with the nature and mission of that individual institution. Thus, BSC and DSU already have the ability to match their tenure process with their unique needs and evolving missions. Only after successfully receiving a recommendation from the institution's individual tenure process, a recommendation from the institution's president, and a recommendation from the Chancellor, may the State Board of Higher Education (SBHE) award a faculty member with tenure.

Mr. Chairman, it is important to note that tenure as it exists in the North Dakota University System (NDUS) today is not an unchecked privilege. Even after being granted tenure, all full-time faculty are required to be evaluated annually, and, if there are unsatisfactory evaluations, institutions are required to take appropriate remedial action. Generally

speaking, if an institution is suffering from certain financial issues or if a tenured faculty member is not meeting the responsibilities and duties of their job, they can be terminated. That is the reality under current state law and current SBHE policy. Institutions and the SBHE already have flexibility if they are experiencing financial distress. Accountability for faculty—tenured or not—is already baked into the system. There is no need to further complicate the employee evaluation process. In doing so, unfortunately, this would mean faculty and administrators will have to take even more time out of their regular duties to prepare paperwork, participate in meetings, and more, which will have the effect of minimizing the time faculty will spend educating and supporting their students.

Chairman Elkin and members of the Committee, HB 1446 claims to address the need for accelerating workforce development; however, its approach is misguided. High quality educators are attracted to institutions with reasonable tenure policies because it allows them to engage in research and scholarly pursuits that tackle big issues without fear of retribution. Focusing on solutions to today's biggest problems is made all the more difficult if we restrict free thought and expression. It is difficult to do one's work when one is constantly concerned with the unchecked power of an institution's president.

Members of the Committee, HB 1446 has already attracted national attention that has cast a negative light on North Dakota's institutions of higher learning. If we cannot assure current and prospective faculty that academic freedom is valued and respected in North Dakota, they will look elsewhere for employment. And when that happens, the quality of education will decline, and we will not be able to compete with institutions in other states that do prioritize academic freedom. We must not fail to provide competitive, high-quality education to our students if are to effectively address current and future workforce development issues.

Chairman Elkin, a glaring deficiency of this bill is that it eliminates a meaningful appeals process. The lack of basic due process rights further erodes the confidence of faculty that the important work they do is respected. The bill would allow a faculty member to appeal to the Chancellor of the NDUS, but the Chancellor and the SBHE rarely, if ever, override the broad autonomy that campus presidents already hold. If the SBHE is not overturning college presidents' decisions now, how can we be confident that meaningful review of those actions is happening? This so-called appeal would come after a process that must include a written assessment but contains no guidance on how the faculty member will be assessed besides the vague criteria of Section 1. Faculty will certainly lack understanding and confidence in a process that may produce no clear evidence of how they are falling short, but so will North Dakota citizens. How are we to trust that our institution presidents are using this power appropriately? The SBHE oversees the campus presidents, but how can it oversee a nonrenewal conducted with flimsy documentation and based on a host of vague criteria, including the vague catchall "other relevant factors?" So, I have to ask, if there are already policies and procedures in place to give institutions flexibility in times of financial distress or to address a tenured faculty member who is neglecting their duties and responsibilities, why is HB 1446 even necessary? Could this bill be used to go after faculty who challenge the status quo in the best interests of their students and their institution? Could it have a chilling effect on a faculty member's willingness to shine a light on fraud or misuse of taxpayer dollars at an institution if they know they could be subject to an abrupt non-renewal of their contract?

Chairman Elkin and members of the Committee, to summarize:

- Tenure in North Dakota already comes with responsibilities and duties that tenured faculty must follow, and SBHE policy provides institutions with flexibility if they are experiencing financial distress.
- All faculty, tenured or not, must be accountable to their students and their school, and SBHE policy already requires that accountability. If BSC, DSU, or other institutions need to adjust their tenure process to better fit their missions, they can already do so.
- There is no need to further complicate the tenure process.
- HB 1446, if enacted, will cloud the reputations of our great North Dakota institutions of higher education, threaten academic freedom, and deter high quality educators from coming to and staying in North Dakota, ultimately preventing our students from receiving the quality of education and opportunities they deserve.

For these reasons, Chairman Elkin and members of the Senate Education Committee, I respectfully ask for a ***do not pass*** recommendation for HB 1446. This concludes my testimony, and I am happy to stand for questions.

References:

- SBHE Policy 604.3 Performance Evaluations: Benefited Employees
 - [https://ndusbpos.sharepoint.com/:w:/s/NDUSPoliciesandProcedures/EZndAqyypOtNqaTsL1lwUugBkgEF1y\[qsht4N\]Qb619Qkw?e=WZBrLg](https://ndusbpos.sharepoint.com/:w:/s/NDUSPoliciesandProcedures/EZndAqyypOtNqaTsL1lwUugBkgEF1y[qsht4N]Qb619Qkw?e=WZBrLg)
- SBHE Policy 605.1 Academic Freedom and Tenure; Academic Appointments
 - <https://ndusbpos.sharepoint.com/:w:/s/NDUSPoliciesandProcedures/EUaO9faOJShNo04DUaFS3icBPTeEsuTyamvD7nkYCznjsw?e=anHtr2>
- SBHE Policy 605.3 Nonrenewal, Termination or Dismissal of Faculty
 - <https://ndusbpos.sharepoint.com/:w:/s/NDUSPoliciesandProcedures/ERHiZFLrsWNBvnqnYkIDu8EBqqeViwX98aslBjmcAZab6g?e=OpABxB>
- Forbes article
 - <https://www.forbes.com/sites/michaelnietzel/2023/01/24/north-dakota-is-about-to-consider-a-really-bad-faculty-tenure-bill/?sh=28f1df891558>

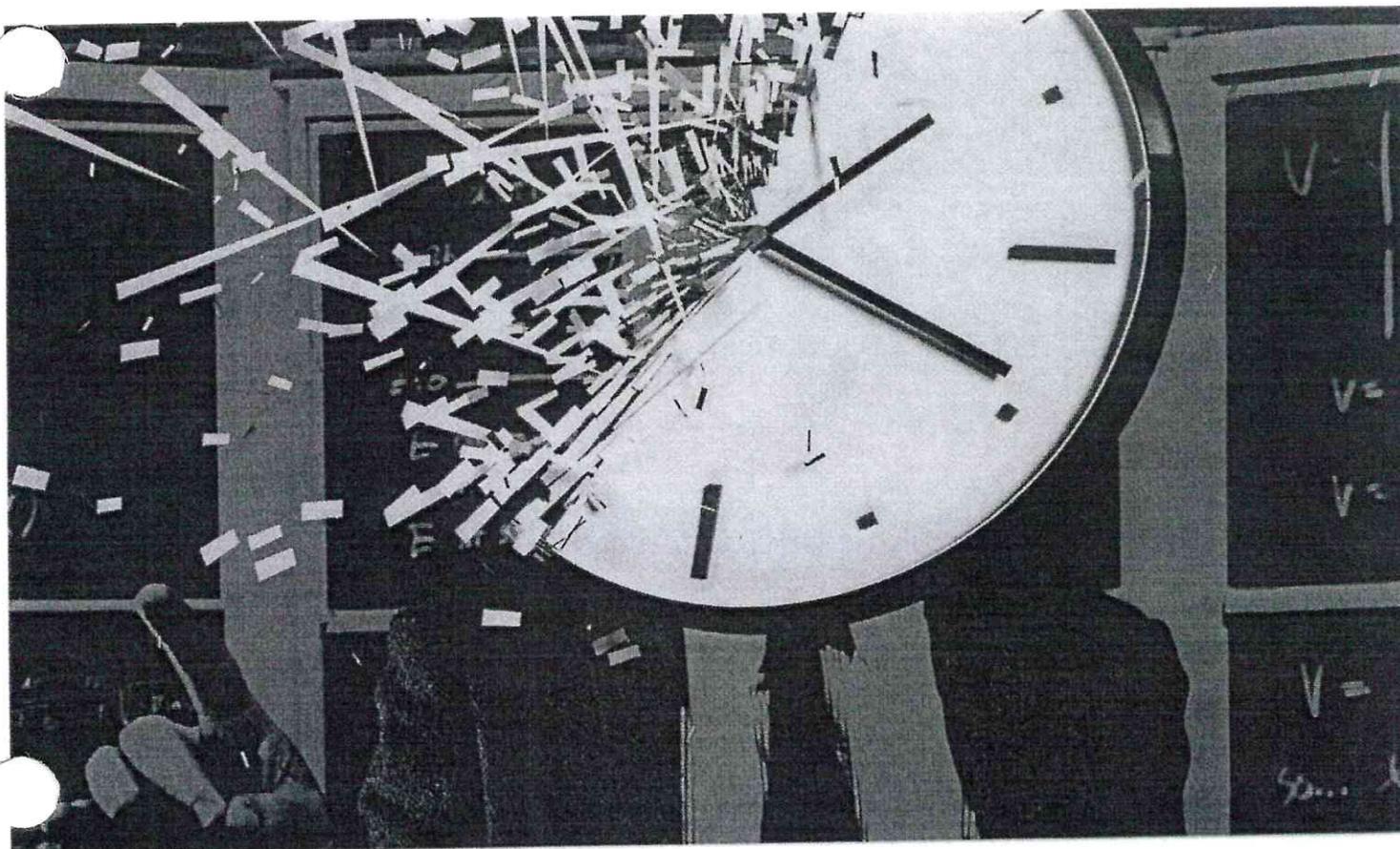
THE CHRONICLE OF HIGHER EDUCATION

'EXTRAORDINARILY DANGEROUS'

Some States Want to Reshape Tenure. This Time, They Might Succeed.

By *Eva Surovell*

MARCH 7, 2023



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A proposal in North Dakota would pilot a new vision for tenure at two public colleges giving presidents, not faculty members, the power to sign off on performance evaluations of tenured professors.

Republican state lawmakers have introduced bills that would undo or amend tenure for years, saying that faculty members shouldn't get lifetime job security with few strings attached. Typically, higher-ed leaders push back against attacks on tenure, saying that it is essential for protecting academic freedom. But there's something unusual about North Dakota's post-tenure review legislation.

A college president was involved in writing and strongly promoting the bill.

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Such an origin story is distinct from historical trends, said John K. Wilson, who was a 2019-20 fellow with the University of California National Center for Free Speech and Civic Engagement. "That's something that's really quite radical and new and makes this particular era extraordinarily dangerous for tenure and academic freedom," said Wilson, a scholar who studies academic freedom and tenure.

Texas and Florida are also looking at faculty tenure. With powerful Republican politicians leading the charge, these tenure bills could have a higher chance of

In Texas, Lt. Gov. Dan Patrick has made clear that “eliminating tenure” is one of his top priorities this legislative session. In Florida, HB 999 — the higher-ed legislation whose provisions have been championed by Gov. Ron DeSantis — would also target post-tenure review, empowering each college’s board of trustees to play a role.

In Iowa, a proposed ban on tenure stalled in January after college officials and business leaders expressed concerns. But the lawmaker who introduced it warned colleges that he and his colleagues were “paying attention” to growing criticisms of higher ed and questions about whether campuses and classrooms are hostile to conservative views.

Republican politicians targeting tenure have cited grievances with course content, such as teaching about race, and concerns that tenure permits faculty members to be less productive. Stephen D. Easton, the college president who expressed support for the North Dakota bill, meanwhile, said he wants to ensure students are satisfied with their education.

For Wilson, these legislative proposals represent a “new era” in the history of American higher education that is “unprecedented.”

“We’ve never seen anything like this before,” Wilson said.

A Push for Accountability

The pilot program reshaping post-tenure review in North Dakota would directly affect two institutions, Dickinson State University and Bismarck State College.

Easton, Dickinson State’s leader, told a legislative committee last month that changing post-tenure review to a process managed by college presidents would ensure tenured faculty members are held accountable if they are unproductive.



DICKINSON STATE U.

Stephen Easton, president of Dickinson State

Easton said the new process would also look at professors who are “non-revenue generating.” The bill proposes that tenured faculty members must bring in “more tuition or grant revenue” through teaching and research than the cost of their compensation and benefits.

“We have elevated the rights of non-productive tenured faculty members over students who pay their salaries through tuition, [and] we have elevated their rights over taxpayers who pay a significant portion of their salaries,” Easton said during his testimony. “Something needs to be done.”

Easton declined to comment further on the legislation in an interview with *The Chronicle*, citing the State Board of Higher Education's newly announced opposition to the bill. Douglas J. Jensen, Bismarck State's president, did not take a position on the bill.

State Rep. Mike Lefor, the bill's sponsor and the leader of the Republican House majority, said during testimony that he believes it is appropriate for presidents to have the opportunity to review their employees.

"Tenure should not now or ever be a lifetime appointment," Lefor said. "They should be held more accountable to administration rather than their faculty members."

The Dickinson State Faculty Senate voted last month to support a measure by the North Dakota Council of College Faculties opposing the bill, and several faculty members spoke against the legislation during testimony. Bismarck's Faculty Senate also submitted testimony critical of the bill. The resolution by the Council of College Faculties, which represents 11 North Dakota campuses, cites concerns that changes to post-tenure review would deter potential hires and undermine faculty morale.

If passed, the North Dakota bill could present a logistical issue for college presidents, said Michael Harris, a professor of higher education at Southern Methodist University. On top of their other day-to-day responsibilities, it wouldn't be feasible for college presidents to manage post-tenure review, Harris said.

Among the tenure proposals advancing in the current legislative session, North Dakota's is the furthest along. The bill passed out of committee last month and will go to the full House for a vote. In Texas, Lieutenant Governor Patrick labeled his proposal to end tenure "Senate Bill 18," but a bill hasn't yet been introduced.

Florida's proposal to alter evaluations for tenured professors, introduced in February,

charged Florida's Board of Regents, the governing body for the State University System of Florida, with developing a policy to implement the changes, which the board plans to vote on this month.

The new bill would give campus trustees the authority to review any faculty member's tenure status and allow colleges to initiate a post-tenure review at any time for cause.

'Weighing Heavily'

Even if the proposals in North Dakota, Florida, and Texas don't end up becoming law, attempts to target tenure can still do damage, higher ed experts said.

Anita Levy, a senior program officer at the American Association of University Professors, called the latest efforts more "disturbing" than in years past. The AAUP testified against the North Dakota legislation.

Public colleges are poised to suffer most, said Richard Chait, a professor of higher education in the Harvard Graduate School of Education. Private institutions will be more easily able to attract faculty and pursue research that may be perceived as controversial, Chait said.

Concerns about academic freedom and tenure are weighing heavily on the minds of faculty who are teaching in states where Republican politicians are taking on public higher education, Harris said.

"I used to say that for the most part, academic freedom is an important principle that we need to uphold, but it's not one that your average faculty on a daily basis had to think about," Harris said. "If you are a faculty member of a public university in Florida right now, you are absolutely thinking about that. You're absolutely thinking about your tenure protections."

Faculty tenure is easy prey for politicians because it is not common among other industries, Harris said. And when tenure does come under fire, it's difficult for professors to fight back.

"Faculty have tried to push back, faculty senates have tried to push back, but that's a faculty senate resolution versus a piece of legislation," Harris said. "It's not exactly a fair fight."

But the current political landscape doesn't solely demonstrate contempt for tenure on the part of legislators, Chait said. College leaders and faculty members need to stop pointing the finger at legislators and start looking at who elected them, he said.

"This is symptomatic — and dramatically so — of a disdain and contempt for colleges and universities on the part of publicly elected officials who are presumably reflecting the views of their constituents," Chait said. "If higher education needed it — and it surely doesn't — a clear signal that public universities are losing public support, this is among the most demonstrable sources of evidence that we have a problem."

We welcome your thoughts and questions about this article. Please [email the editors](#) or [submit a letter for publication](#).

AZURE MEDIA SERVICES

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Eva Surovell

Eva Surovell is a reporting intern at *The Chronicle*. You can contact her at eva.surovell@chronicle.com.

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Testimony in Opposition to Engrossed House Bill 1446
Andrew P. Armacost, President, University of North Dakota.

Senator Elkin and Members of the Senate Education Committee,

For the record, my name is Andy Armacost and I serve as the President of the University of North Dakota.

I appreciate the continuing work of the House Majority Leader to accept the thoughts of others and to modify the language in this bill. Yet, even with those changes, I urge a “Do Not Pass” vote for Engrossed House Bill 1446 for four reasons.

First, the bill is unnecessary. Presidents have sufficient powers already in place to remove faculty members for cause, including those with tenure.

Second, the bill undermines the bedrock principle of academic freedom. The granting of tenure enables academic freedom by protecting a faculty member’s research, their writing, and their speech. A well-designed tenure system rooted in the best principles of higher education governance is foundational to our system of higher education. Tenure is awarded with the advice of the faculty and should be taken away with the advice of the faculty.

Third, the bill fails to recognize the important role tenured faculty members offer in their research, their service, and their leadership. Teaching and advising loads are impacted by these other essential duties. The bill’s use of “teaching and advising load” to gauge workload is an insufficient measure, and it fails to recognize important differences across academic fields and in teaching undergraduate versus graduate students.

Finally, the bill will negatively impact our ability to attract faculty and staff members to North Dakota to serve our students. The reputational harm that will come to the NDUS system should this bill become law will make it more difficult for the eleven institutions in the system to meet their missions and deliver world-class educational experiences for their students.

For these reasons, I encourage you to vote against this bill. Thank you.

23.0083.06001

FIRST ENGROSSMENT

Sixty-eighth
Legislative Assembly
of North Dakota

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 ~~pilot~~ 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 - ~~Pilot program~~Program - Report to
8 legislative management.

- 9 1. The state board of higher education shall implement a four-year ~~pilot~~ program focused
10 on the new campus models at Bismarck state college and Dickinson state university
11 no later than May 1, 2023, to improve the tenure process. The ~~pilot~~ program may not
12 apply to 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 pilot 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 pilot program to the legislative
- 5 | management no later than December 31, 2025.
- 6 | c. Shall provide a final report of the pilot program to the legislative management no
- 7 | later 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

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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.