To: The University of Arkansas Board of Trustees and President Donald R. Bobbitt
From:

University attorneys have offered no explanation at all to date.

FAQ § II, pp. 2-3 & Page 6. The Counsel's Office asserts on pages 2-3 that the proposed changes to 405.1 are designed "to add precision and specificity, thereby providing more explicit guidance to faculty and removing ambiguity as to the requirements of the policy." Then, on page 6, they contend that the "proposed amendment ***merely*** provides greater clarity on what constitutes 'cause' rather than leaving the matter to inference." (Emphasis added.) In other words, the Counsel's Office maintains that the proposal does not actually expand the grounds for termination. The primary basis for this assertion is presented on page 2 of the FAQ: "It is important to note that under the current policy only a few examples of conduct constituting 'cause' are provided, ***but the policy very specifically states that the conduct is not limited to those specific examples***." (Emphasis added.)

Response: The Counsel's Office's analysis here reflects a critical misunderstanding of how statutory rules and contractual language are interpreted in the American legal system.

Both the current and proposed versions of 405.1 set forth the same general standard for cause. The current policy states that cause is "conduct which demonstrates that the faculty member lacks the ability or willingness to perform his or her duties or to fulfill his or her responsibilities to the University." The proposal states that cause is "conduct that demonstrates the faculty member lacks the willingness or ability to perform duties or responsibilities to the university." Those are identical in every substantive respect. The current policy then offers a non-exclusive list of four examples. The proposal, by contrast, offers a non-exclusive list of at least ***sixteen*** examples. Moreover, the four examples in the current policy all reflect extreme problems—e.g., "incompetence" and "moral turpitude." By contrast, several of the examples in the proposed version fall well short of constituting extreme problems—e.g., "unsatisfactory performance" and "unwillingness to work productively with colleagues."

It is a fundamental principle of interpretation that when a general term is coupled with specific examples, the specific examples play a central role in defining the scope of the general term. This principle is so well-established that it is often referred to by its Latin description: *Ejusdem generis*. *See Edwards v. Campbell*, 2010 Ark. 398, *5, 370 S.W.3d 250, 253 (Ark. 2010) ("[W]e recognized in *Oldner* the doctrine of *ejusdem generis*, which provides that when general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.) (internal quotation marks omitted). This means that a general word or phrase ***changes meaning*** depending on the specific examples included with the general word or phrase.

The proposal makes quantitative changes to the definition of cause by dramatically expanding the list of examples that justify termination. It also makes qualitative changes by including new types of examples that constitute less serious grounds for dismissal. Accordingly, the general cause standard—"lacks the willingness or ability to perform duties or responsibilities"—plainly has a much broader meaning under the proposal than under the current rule. This analysis demonstrates that even if the proposal adds clarity—which is dubious—it unquestionably expands greatly the grounds over which a tenured member of the faculty can be fired. This helps to explain why faculty within the UA System are all but unanimous in their opposition to the

Section 2.3.5 of the Regents' Policy Manual contains the rules governing abrogation of tenure and termination at the University of Oklahoma (OU). The section begins by noting that "severe sanctions such as a dismissal proceeding involving a tenured faculty member . . . should be an exceptional event." It then contains a sub-section entitled "Grounds for Abrogation of Tenure, Dismissal, and Other Severe Sanctions" which contains OU's cause standard. The sub-section provides as follows:

> A faculty member against whom the imposition of a severe sanction is to be brought or whose dismissal is to be required must have given such cause for the action as related directly and substantially to his or her professional capabilities or performance. It is not possible to specify all proper grounds for these drastic measures. Proper reasons for dismissal of a faculty member who has tenure or whose tenure-track or renewable terms/consecutive term appointment has not expired include the following:
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> (a) Professional incompetence or dishonesty;
> (b) Substantial, manifest, or repeated failure to fulfill professional duties or responsibilities;
> (c) Personal behavior preventing the faculty member from satisfactory fulfillment of professional duties or responsibilities;
> (d) Substantial, manifest, or repeated failure to adhere to University policies; including, for example, the University's Compliance Program;
> (e) Serious violations of law that are admitted or proved before a court of competent jurisdiction or the administrative hearing body established to hear such matters, preventing the faculty member from satisfactory fulfillment of professional duties or responsibilities, or violations of a court order, when such order relates to the faculty member's proper performance of professional responsibilities;[4]
> (f) [Provision that applies only to the school's Health Sciences Center.]
> (g) [Elimination of academic units.]
> (h) [Financial emergencies.]

This too is precisely the type of strong language that appropriately protects academic freedom at an institution.[5] And we welcome the adoption of such a rule at the University of Arkansas.

Florida's collective bargaining agreement, Texas's combination of statutes and Board of Regent rules, and Oklahoma's Regents' Policy Manual all provide ***far greater*** protection than the Counsel's Office's recommended version of 405.1. Among other differences, notice that Florida, Texas, and Oklahoma do not contain ***any*** language comparable to the provisions in the proposal that establish the following standalone bases for termination: (1) unsatisfactory performance, (2) pattern of disruptive conduct, or (3) unwillingness to work productively with colleagues.

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[4] Notice with (e) that Oklahoma requires that an independent, neutral, non-university judge or government agency determine that a law has been violated before a faculty member may be terminated under this provision. That contrasts with proposed 405.1, which has no such mandate.

[5] Note further that OU also follows the AAUP on the issue of post-tenure review. *See* Regents' Policy Manual, § 2.3.4 ("Bearing in mind the value and importance of academic freedom and procedural due process to the well being and success of the academic community, the University acknowledges and supports in principle the policies and procedures set forth in the AAUP' Standards for Good Practice in Post-Tenure Review.").

Before changing Board Policy 405.1, we believe that a comprehensive review of the approaches in use at other schools is one of several necessary steps. But if the University is to rely on a more limited assessment of national practices, such a review establishes that ***current*** 405.1 is the version in alignment with the approach of peer schools, not proposed 405.1.[6] Indeed, this point

FAQ § II, pp. 4-5. Counsel's Office claims: "Further, campuses have already incorporated aspects of collegiality, as germane to professional responsibilities, into their policies." The FAQ continues by offering examples from Fayetteville, and Fulbright College specifically, which "recognizes that a faculty member's annual performance rating may appropriately take into account 'an individual's demonstrated ability to work productively with colleagues in carrying out the research/creative, teaching and service missions of the department and the College.'"

Response: This is strikingly misleading. Annual review and termination are separate and dramatically different proceedings. Taking collegiality into account as ***one factor among many*** in ***annual reviews***, as is done at UAF, is a far cry from identifying collegiality as a ***standalone basis*** for ***termination***, as the Counsel's Office is proposing with 405.1. Thus, the Counsel's Office's reliance here on the UAF rules is highly deceptive.

FAQ § II, p. 5. Counsel

(1) have a pattern of engaging in disruptive conduct or (2) demonstrate an unwillingness to work productively with colleagues? A: No."

Response: This is a red herring. History has shown that employing collegiality or the like as a standalone factor in annual reviews, tenure, and other proc

In short, these alleged “protections” are not m

reason the faculties at UA-Fayetteville and UA-Little Rock consented to the employment of "unsatisfactory performance" as a basis for the termination of tenured faculty is that it is very difficult to make four or five such findings on pretextual grounds, weakening the standard's propensity for abuse. Under revised 405.1, a ***single*** finding of unsatisfactory performance is sufficient grounds for termination. The likelihood of abuse if the proposal passes should be clear to any fair observer.

FAQ § II, p. 7. Counsel's Office claims: "Faculty members will have a full year to remediate performance deficiencies."

Response: This is false. If the supervising administrators unilaterally believe that the faculty member is not being sufficiently cooperative, then the faculty member does not have even the limited one-year period, as the FAQ expressly admits: "The language does include a provision that if a faculty member simply chooses not to actively engage with improvement efforts following the unsatisfactory rating, then a termination notice could be issued more quickly, but those instances should be unusual and rare."

As we noted above, faculty at our school have improperly been found unsatisfactory in their teaching because of assessment practices—such as the spread of their final grades—

minor changes to reflect the fact that the University's representative always has the right to have counsel present at the dismissal proceedings and that the Board will not subpoena witnesses."

Response: This claim is false. Section IV.C. of 405.1 concerns the procedures for dismissing a

some others). The school argued in court that it had statutory and contractual authority to make the changes to the handbook and the professors' tenure contracts. *Id.* at 71. The Colorado courts ultimately ruled to the contrary.

The Colorado Appellate Court found that if the priority and relocation rights in the old handbook granted vested rights to the professors, then the college "did ***not*** have statutory or contractual authority to unilaterally modify those provisions." *Id.* at 74 (emphasis added). And that is so even though the handbook expressly provided that the board of trustees reserved the right to amend the handbook. *Id.*

Returning to 405.1, the standards governing dismissal for cause are even more central to the substantive right to tenure than the standards governing financial exigency or departmental changes that were at issue in *Saxe*. In addition, the three factors identified by the *Saxe* appellate court are more easily met here than in the Colorado decision, once again because termination for cause is at the core of tenure protection. Finally, both the Colorado Court of Appeals and the Alaska Supreme Court emphasized that a university's reservation of the right to unilaterally amend its rules may not be exercised to undermine vested rights, consistent with long-established principles of contract law and constitutional lavob