



May 18, 2022

Dr. Alfred Rankins Jr.
Commissioner of Higher Education
Board of Trustees of State Institutions of Higher Learning
3825 Ridgewood Road
Jackson, Mississippi 39211

Sent via U.S. Mail and Electronic Mail (commissioner@ihl.state.ms.us)

Dear Dr. Rankins:

The Foundation for Individual Rights in Education (FIRE) and PEN America are in receipt of your letter dated May 9, 2022. Unfortunately, your letter only heightens our concern that the new Institutions of Higher Learning (IHL) tenure policy will lead to the infringement of faculty members' academic freedom at public institutions in Mississippi.

We agree with your contention that “effectiveness, accuracy, and integrity in communications” *in the classroom* are appropriate considerations during the tenure process. However, the new policy does not state that this evaluation applies only to classroom communications; instead, it quotes at length from an American Association of University Professors (AAUP) statement that applies only to *extramural* speech—a statement designed as guidance for individual faculty members and that the AAUP has said should not be considered by administrators except in cases of “weighty evidence of unfitness.”¹

A revision limiting the criterion to classroom speech and removing the reference to the AAUP statement would address our concern. As written, however, the policy unquestionably chills faculty members' extramural speech in a manner that violates the principle of academic freedom. Especially considering that, just three years ago, the IHL Board of Governors considered using the old policy to deny a professor tenure based on extramural utterances,² faculty would be justified in interpreting the new policy as more than an idle threat.

¹ See AM. ASS'N OF UNIV. PROFS., 1940 Statement of Principles on Academic Freedom and Tenure, *available at* <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>; Committee A Statement on Extramural Utterances (1964), *available at* <https://handbook.unm.edu/section-b/appendices/appendix-vii-committee-a-statement-on-extramural-utterances>.

² We refer here to the debate surrounding the awarding of tenure at the University of Mississippi to sociologist James M. Thomas. See Colleen Flaherty, *Last-Minute Tenure Threat*, INSIDE HIGHER ED (May 17,

Although our letter did not reference the term “contumacious conduct,” you stated “there is no prior evidence to suggest these terms have quashed academic freedom or faculty individual rights within our system of universities.” But that is disproven by recent reporting demonstrating that this term has been used to violate faculty rights since the days of Jim Crow (and indeed, originated there). Examples of historical uses of this clause include the attempted firing of a University of Mississippi professor for speaking against white supremacy and the actual firing of two Alcorn State University professors for being members of the AAUP.³ These cases are *prima facie* evidence that the clause violates the academic freedom of faculty members—again for engaging in extramural activities that should not be considered as part of the tenure process—and that expanding its application to the entire IHL will only expand the potential for abuse of faculty prerogatives.

But we are perhaps most alarmed by the following statement in your letter:

Almost any criterion commonly used in evaluating faculty for tenure could be used by a bad actor as a pretext for denying tenure for impermissible reasons. However, that does not mean that the criterion is not an appropriate and valuable point of consideration as part of the tenure attainment process.

This strikes us as missing the entire point of academic freedom protections, which ensure that criteria too easily abused by a bad actor as a pretext for termination should not be considered as part of the tenure or retention process. If such subjective criteria become part of the process, academic freedom for faculty may simply cease to exist.

On this point, you are incorrect that “courts have continued to support the legality and even the responsibility of universities’ use of collegiality as a criterion in making tenure and other employment decisions.” To the contrary, courts have held expressive rights may not be curtailed on the basis that others find them offensive or outrageous, and certainly not on the basis that others find them “uncivil” or insufficiently “collegial.” The Supreme Court has held “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”⁴ And, because “governmental officials cannot make principled distinctions” between what speech is sufficiently inoffensive, the “state has no right to cleanse public debate to the point where it is . . . palatable to the most squeamish among us.”⁵ Federal courts have also held the “desire to maintain a sedate academic environment does not justify limitations” on a professor’s protected speech, even when they express themselves in “vigorous, argumentative, unmeasured, and even distinctly unpleasant terms.”⁶

2019), <https://www.insidehighered.com/news/2019/05/17/governing-board-university-mississippi-debates-professors-tweets>.

³ See Molly Minta, *What Does ‘Contumacious’ Mean? The History Behind IHL’s ‘Vague’ Tenure Policies*, MISS. TODAY (May 5, 2022), <https://mississippitoday.org/2022/05/05/mississippi-ihl-tenure-policies>. ⁴ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

⁵ *Cohen v. California*, 403 U.S. 15, 25 (1971).

⁶ *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2009) (quoting, in part, *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975)).

IHL’s new policy not only permits—but directs—university presidents to consider denying tenure to faculty who may express views others dislike or fail to hew to popular viewpoints. This is unacceptable on a public university campus bound by the First Amendment.

Your response assuages none of the academic freedom or free expression concerns in our original letter, and in fact strongly suggests the IHL Board of Governors neither understands the concept of academic freedom nor recognizes its central importance to the health of higher education. In order to comport with your constitutional obligations, IHL must reconsider this ill-conceived policy and restore

the academic freedom protections severely weakened by its adoption.

Sincerely,



Jeremy C. Young

Senior Manager, Free Expression and Education, PEN America



Alex Morey

Director, Individual Rights Defense Program, FIRE