

The McClelland Case at the University of Windsor

The following account of a case which was appealed to the Academic Freedom and Tenure Committee illustrates the potential for bias which can arise when a faculty member on a probationary appointment survives a formal dismissal proceeding and is later evaluated for reappointment by those who were involved in the effort to dismiss him.

In 1974 Professor Samuel McClelland received a probationary appointment to the Department of Communication Studies at the University of Windsor. In November of the following year, his department made a unanimously favorable recommendation for the renewal of that appointment. However, in the spring of 1976 during lectures on modern communication to a business administration class of 300 students, Professor McClelland attempted to use what he termed “a gallery-oriented approach to learning.” On 10 June 1976 President Francis Leddy, on the basis of complaints arising out of this course, initiated formal dismissal proceedings against him. When the fall term began, Professor McClelland was not given any teaching assignments, pending disposition of the charges against him.

The Dismissal Hearing

At the dismissal hearing President Leddy presented a list of six charges which in his view reflected “gross bad taste and a deep contempt for normal academic standards.” These were: that Professor McClelland introduced extraneous, crude and repulsive sexual references which offended women students; that his use of rock music in the classroom constituted cheap and perverse exhibitionism; that he enacted a degrading performance (dubbed the “Catharsis skit”) before the class; that he smoked marijuana with students during a class exercise in film; and that, having admitted to the chairman of his department that marijuana was smoked, he subsequently denied it and thereby forfeited his good standing in the department.

On 19 July a Faculty Hearing Committee, jointly struck by President Leddy and the Faculty Association in accordance with university regulations, began its formal consideration of the charges against Professor McClelland. President Leddy acted as prosecutor. Among those who testified at the hearing were Professor McClelland’s departmental chairman, another professor in the Communication Studies Department, and the Dean of the Faculty of Social Science.

From the outset, the case against Professor McClelland was tainted with charges and countercharges of bias. Counsel for Professor McClelland argued that a number of the charges infringed on Professor McClelland’s academic freedom. He maintained that the use of skits, rock music, and sexual references, all were integral elements of the instructor’s attempt to explain the nature of modern communication and the techniques of subliminal advertisements. He noted that his client had never sanctioned the use of marijuana among his students and indeed had warned them against it; he proposed to introduce evidence and to call witnesses to testify that marijuana had not been consumed on the film set.

Professor McClelland’s counsel reasoned that the charges represented a predisposition to accept evidence reflecting adversely upon his client. He gave evidence of a fundamental disagreement between Professor McClelland and the chairman of his department on matters of policy. He said, “(the chairman) has already indicated at the hearing that Professor McClelland has

at the most one more year in that department. He wants to get rid of him...because he is a problem.”

The Hearing Committee dismissed five of the six charges outright. It found that relatively few sexual references had been made in the classroom, and that some students may have been overly sensitive to them. The committee agreed that the sexual references, the skit, and the rock music all were appropriate materials for a course on modern communication and noted that the department of business administration viewed communications more conservatively than did Professor McClelland or his department. It concluded that the rock concert episode fell within the realm of experimental teaching and that its proscription would infringe Professor McClelland's academic freedom. Although the “Catharsis skit” was viewed by the committee as in bad taste, it accepted the chairman's undertaking that severe reprimand was sufficient penalty for this offense. It concluded that the only serious charge, that of the alleged use of marijuana in a teaching exercise was not proved and the committee further concluded that even if true, this charge was insufficient to warrant dismissal. Thus, all six charges ultimately were rejected.

On 5 November the Board of Governors approved the report of the Faculty Hearing Committee. Since classes already were underway, it was decided that Professor McClelland would not assume any teaching responsibilities until the following term.

The Non-reappointment of Professor McClelland

At the dismissal hearing, Professor McClelland's counsel noted that even if acquitted, his client's future would be in jeopardy. “This is going to affect his career no matter what”, he said. “He is either going to be finished or in the very least to be damaged.” A learned jurist, Lord Denning, once ruled that “No man can be an advocate for or against a party in one proceeding, and at the same time sit as judge of that party in another proceeding”. Nevertheless, three weeks after the decision of the dismissal hearing was handed down, it came as a shock to Professor McClelland to discover that three of the six persons who were to sit on the departmental promotion and tenure committee which was to consider the renewal of his probationary appointment, (the chairman, a colleague and the Dean) had testified against him at the hearing to consider his dismissal for cause. Therefore, at a meeting of the departmental council on 29 October, Professor McClelland moved that these three individuals not be allowed to sit on the committee which was to decide whether or not he was to be recommended for reappointment. The chairman ruled the motion out of order. On 5 November, however, Professor McClelland, in a letter to his chairman, noted the potential bias of these three persons, and, in a departmental meeting on the same day, the council voted in favour of Professor McClelland's motion. Three days later, the department rescinded this motion.

On November 18, Professor McClelland formally protested to the chairman against the participation of potentially prejudiced persons in the evaluation of his appointment renewal. He wrote “I wish to re-emphasize that I do not consider this Committee to be unbiased towards me. In fact, you three are clearly compromised by your present situation and certainly cannot be expected to judge my case impartially. Every professor is surely entitled to an impartial view. I therefore must insist that the above three people withdraw from this Committee.”

However, the three challenged persons declined to withdraw. In a meeting later that day, the Promotions and Tenure Committee heard the chairman argue vigorously in favour of his negative recommendation, referring in passing to the “Catharsis skit”. Professor McClelland appeared before the committee and once again asked the three persons to absent themselves from discussion. After

he left, the committee reassured itself of their right to decide the matter and, a day later, voted 6-0 against reappointment.

Internal procedures at the University of Windsor

According to Senate By-Law 17 which was then in effect at the University of Windsor, the chairman or head of the department was to chair the Promotions and Tenure Committee (P&T) of the Basic Administrative Unit (BAU). The chairman also was to be responsible for reviewing the work of each faculty member to determine whether to recommend reappointment to the P&T Committee. The Departmental P&T Committee was to consist of: the chairman of the department, the Dean, three members elected by the department — two of whom were to be tenured — and one student. The President could be called upon to fill any positions left vacant by insufficient departmental manpower.

The P&T Committee was required to forward its recommendation to the University Committee on Academic Promotion and Tenure (UCAPT) by 30 November. Adverse decisions of the departmental P&T Committee could be appealed to UCAPT on both procedure and substance. If an appeal on procedure was successful, UCAPT was to return the case to the P&T Committee for reconsideration (provided it was satisfied that the irregularities did not prejudice a fair hearing); if successful on substantive matters, UCAPT could either remit the case for reconsideration or forward its own recommendation to the President.

Matters of both substance and procedure also could be appealed ultimately to the President. If, in exceptional cases, the President overruled UCAPT, he was required to remit the case for reconsideration if it involved a matter of procedure, but on issues of substance, his decision was to be final and beyond further appeal.

Subsequent Appeals to UCAPT and the President

Professor McClelland appealed the negative decision of the P&T Committee to UCAPT. Prior to its hearing, he was provided with a written summary of the reasons for the adverse decision of the departmental P&T committee. These did not refer directly to the charges made at his earlier dismissal hearing, but specified inadequacies in teaching, research and participation in the administrative affairs of the department. However, the wording used to describe these shortcomings raised some question as to their objectivity. Thus his teaching was described as unsatisfactory in terms of its “long term congruence with departmental aims,” and he was said to have obstructed the work of the department on occasion “with his widely different views put forth with unnecessary vehemence.” In its presentation, the departmental P&T committee reported that it found his “approach was precisely the approach the department had sought to become dissociated from,” and that it “stressed the fundamental differences between Professor McClelland and the department.”

Professor McClelland also was charged with wrongdoing in that he had accused his colleagues of “a lack of integrity and honesty in both the department and the Media Centre”, and that he had “violated University procedures in attempting to influence the outcome of his teaching evaluation.” The basis for these charges was not specified, although the first might have been related to the disputed account of the conversation concerning the alleged use of marijuana which was part of the dismissal hearing. The onus to disprove these charges was left to be borne by

Professor McClelland without his being informed of the specific evidence which was being offered in their support.

Thus, although lacking specificity, the expressions used in the departmental P&T summary do suggest at least disciplinary bias. Moreover, in replying to this summary at the appeal hearing, an unreasonable burden was placed upon Professor McClelland to disprove unspecified charges of dishonesty and impropriety. He was not allowed to be present when the department subsequently made its case against him, and therefore had no meaningful opportunity for rebuttal.

At its hearing on 17 December, the UCAPT upheld the departmental recommendation by a vote of 6 to 2, with its chairman (a Vice President) and the Dean (who had sat on the departmental committee) abstaining. President Leddy subsequently maintained that the composition of the departmental P&T committee was mandated in the agreement with the faculty association, and that he was powerless to vary it. He also claimed that the question of bias was eliminated at the UCAPT hearings because none of the members of that committee who cast votes had been involved in the earlier dismissal proceeding. It is important to note that the appeal hearing did involve a “*de novo*” consideration of the substantive issues, but simply ruled on whether or not it regarded the departmental decision as reasonable. Hence, if bias did intrude at the departmental level, it was rendered largely inaccessible to challenge at the appeal hearing. Professor McClelland did argue at UCAPT that the recommendation of the department P&T was flawed with bias because of the committee’s composition, but he was not allowed to refer to the issues raised during the move to dismiss him in order to illustrate the potential which they implied for bias on the part of the departmental P&T, these matters being officially excluded from the appeal hearing as no longer germane.

On 31 December Professor McClelland appealed the adverse decision of the UCAPT to President Leddy, who rejected his appeal as being without substance; on 8 February 1977 the Board of Governors confirmed the President’s decision.

It is the view of the Canadian Association of University Teachers that, while not conferring the right of renewal, a probationary appointment carries with it the right to proper consideration for renewal. Our position with regards to proper consideration has been published in the Handbook (Third Edition: 1979)¹. One aspect of this matter is of particular interest in understanding the case of Professor McClelland. Proper consideration for renewal, in our view, concludes in a judgement not necessarily favourable to the candidate, but one which is free from the imputation of bias and arbitrariness. One way to prevent such imputation is to make certain that constituent members of appointment and appeal committees who have personally been involved with a particular case should step aside when the committee deals with it.² It surely follows that one who has taken a position on one level of discussion will almost certainly carry that position to another. Since discussions on appointment and appeal are held at various levels, it is indeed possible that someone who has argued against promotion or reappointment at the departmental level may be asked to confirm his own view at the university level. Indeed, it may be that a university president, having convened a dismissal proceeding — which is a delegated authority — and served as prosecutor, may find himself the court of appeal in the case of non-renewal for the same professor, and although the issue may appear to be separate, it may be exceedingly difficult, if not impossible to will away one’s

convictions. Such, it appears, was the case at the University of Windsor.

The potential for bias in the evaluation of Professor McClelland's appointment renewal seems inescapable. It would strain credibility to maintain that there was only a casual relationship between the failure of the university in its effort to dismiss Professor McClelland for cause, and its subsequent success in removing him by not renewing his probationary appointment. In circumstances such as these the importance of ensuring the use of procedures which are scrupulously fair and in accordance with the principles of natural justice seems obvious. That justice not only be done, but be manifestly seen to be done, it is necessary that a person acting in a judicial capacity must not be merely fair, but above suspicion of unfairness. The conspicuous insensitivity of those who had participated in the effort to dismiss Professor McClelland for cause, in failing to see the need to withdraw from the subsequent consideration of his reappointment, is remarkable. The chairman was both the initiator of the dismissal attempt and testified against Professor McClelland at the dismissal hearing. At that hearing, President Leddy acted as prosecutor of the charges. Nevertheless, he also became the ultimate judge of Professor McClelland's final appeal which urged him to appoint an outside arbitrator. Thus, not only had the chairman and President Leddy already been involved in the attempt to dismiss Professor McClelland, as had the Dean, but they steadfastly maintained their right to participate in considering the renewal of his probationary appointment. Hence, a cumulative source of bias developed in spite of the President's repeated denials that the move for dismissal and the decision not to reappoint had anything in common.

It is the position of the CAUT that a faculty member on a probationary appointment does not have a right to automatic renewal, but does have a right to a fair and unprejudiced consideration for renewal based upon proper academic criteria. CAUT guidelines point out that even good faith does not exclude the possibility of inadvertent negligence, or bias. Although the President has argued that he was only performing his constitutional duty in acting as the court of ultimate resort, the presence of the same three persons in the dismissal proceeding and the P&T Committee, with the President himself then reappearing as the court of appeal compounded the unfairness with which Professor McClelland was treated. The Dean too served on both the P&T Committee and UCAPT. On April 21, 1977 Professor McClelland appealed to CAUT.

The CAUT Appeal

The Academic Freedom and Tenure Committee studied the case and recommended to Dr. Leddy that Professor McClelland should be accorded simple due process. It urged that his case for renewal be heard "*de novo*" by an impartial committee of qualified academics who had not been associated in any way with the decision of the University not to renew his appointment, or the appeals arising therefrom, or with the previous attempt of the University to dismiss him for cause. No attempt was made to impute bias on the part of BAU, but, rather, as Dr. J.R. Stevens, Chairman of the Academic Freedom and Tenure Committee at that time, stated, "...we feel that, under the circumstances, judgement should have been exercised to ensure Professor McClelland an impartial hearing at all levels in the matter of his non-renewal". He also explained that, in consideration of CAUT's attempts to establish an impartial hearing, Professor McClelland had agreed to suspend a court action against the University which he was planning to pursue. Professor Stevens argued that

such disputes are most properly resolved within the academic community.

However, President Leddy rejected the argument that Professor McClelland had not had a fair hearing. He maintained that Professor McClelland had been vindictive in his attack on the university, had suffered widespread collegial disrespect, and was academically incompetent. He assured Dr. Stevens that not only had McClelland been given his day in court, but that the court itself, whether department, university or presidential, also was duly-constituted and had acted with due regard to avoid bias. He pointed out the UCAPT had been precise in differentiating the issues of dismissal and reappointment and had voluntarily decided that neither its chairman nor the Dean would participate in the discussion or in the vote on professor McClelland's appeal. The other eight members of the UCAPT had had "no prior connection, in any way with the earlier procedures". He noted that Professor McClelland has not previously seen fit to impugn the integrity or the propriety of the president's office as a court of appeal, but speculated that once the decision had been levied against him, Professor McClelland decided that the president had acted unfairly.

When all of its efforts to secure an acceptable resolution of this dispute had failed the Academic Freedom and Tenure Committee concluded that the procedures employed in the McClelland case had been inadequate to ensure fair and unbiased treatment. In view of the unwillingness of the university to agree to an appropriate review, the Committee concluded that a public rebuke of those responsible would be appropriate and authorized the publication of an account of the case.

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1. Pp. 21-23.
 2. Cf. CAUT HANDBOOK (Policy Statement on Academic Appointments and Tenure, III, AII.), p. 48