



FIRE

Foundation for Individual
Rights and Expression

November 10, 2022

E. Gordon Gee
Office of the President
P.O. Box 6201
1500 University Avenue
Stewart Hall
Morgantown, West Virginia 26506

Sent via U.S. Mail and Electronic Mail (presidentsoffice@mail.wvu.edu)

Dear President Gee:

FIRE¹ is concerned by the proposed changes to West Virginia University's policies on faculty promotion, tenure, ethics, and conflicts of interest. WVU's revised faculty evaluation guidelines weaken faculty tenure protections and incorporate subjective standards into the evaluation process, potentially threatening academic freedom. And the proposed amendments to the conflicts policy interfere with faculty members' ability to serve as *pro bono* counsel, expert witnesses, and *amici* in formal legal proceedings adverse to the university or state, threatening the faculty's academic freedom and First Amendment right to speak on matters of public concern.

I. WVU Proposes Amendments to Its Conflict-of-Interest Rule and Annual Evaluation Policy

In September,² WVU issued a Second Notice of Proposed Rulemaking for BOG Governance Rule 1.4 – Ethics, Conflicts of Interest, and Outside Consulting Arrangements.³ The proposed rule, as amended, governs conflicts of commitment and conflicts of interest in outside consulting arrangements.⁴ An outside consulting arrangement for purposes of the policy is “any non-

¹ As you may recall from prior correspondence, the Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending freedom of speech. You can learn more about our recently expanded mission and activities at thefire.org.

² This narrative reflects our understanding of the pertinent facts, based on public information. We appreciate that you may have additional information to offer and invite you to share it with us.

³ *Second Notice of Proposed Rulemaking*, W. VA. UNIV., <https://policies.wvu.edu/bog-rules-under-review/second-notice-of-proposed-rulemaking> [<https://perma.cc/A3GG-DTVG>].

⁴ *Proposed Board of Governors Governance Rule 1.4 – Ethics, Conflicts of Interest, and Outside Consulting Arrangements*, W. VA. UNIV., <https://policies.wvu.edu/bog-rules-under-review/proposed-bog-governance-rule-1-4-ethics-conflicts-of-interest-and-outside-consulting-arrangements> [<https://perma.cc/U79F-RK79>].

University employment, arrangement, provision of services, or contract where a full-time Faculty or Non-Classified Staff provides their expertise to a non-University third party and in which the expertise is, directly or indirectly, related to [] their Institutional Duties.”⁵ Under the proposed rule, faculty and staff may not use any university resources or time for outside consulting, and all outside consulting requires prior approval from WVU to determine “if the request is appropriate, does not constitute a Conflict of Commitment or create a Conflict of Interest, and abides by the guidelines provided within this Rule.”⁶

The proposed rule requires faculty in positions adverse to WVU or the state in formal legal proceedings to submit to the university’s pre-approval process for outside consulting arrangements.⁷ It further states that the consulting arrangement can be disapproved if it creates either a conflict of commitment or an incurable and unmanageable conflict of interest.⁸ Activities covered by the rule include serving as *pro bono* or paid counsel, a paid expert witness, or as *pro bono* or paid counsel on an *amicus* brief for a party adverse to WVU or the state, but exclude work through WVU’s Clinical Law Program.⁹ While outside *pro bono* work not adverse to WVU may be treated as volunteering activity, with the potential to become part of faculty’s institutional duties and ability to use university resources, *pro bono* work that takes a position adverse to WVU or the state is treated the same as paid work.

Later, on October 7, WVU published a draft document outlining proposed revisions to its faculty appointment and evaluation policy that would add a process for terminating tenured faculty for unsatisfactory performance to the annual evaluation policy.¹⁰ Annual evaluations of tenured and tenure-track faculty would continue to be conducted independently by department, college, and division committees, as well as by the University Promotion and Tenure Advisory Panel, in the areas of teaching, research/creative work, and service.¹¹

But the draft guidelines mandate a recommendation of non-continuation (i.e., termination) if faculty receive an “unsatisfactory” rating in two consecutive years in the same area (teaching, research, or service) at any level, in two out of three consecutive reviews in the same area at any level, or in two out of three mission areas in an annual review at any level.¹² In contrast, the current policy does not include an option for termination due to unsatisfactory performance through annual evaluations. Rather, for tenured and tenure-track faculty they focus on professional development, assessing progress toward tenure or promotion where applicable,

⁵ *Id.* at § 7.2.

⁶ *Id.* at §§ 7.4.1, 7.4.3.

⁷ *Id.* at § 7.2.3.

⁸ *Id.* at § 7.2.4.

⁹ *Id.* at §§ 7.2.3.1–7.2.3.2.

¹⁰ Proposed – 10/3/22 West Virginia University Procedures for Faculty Appointment, Annual Evaluation, Promotion, and Tenure 2014–15, Provost, W. VA. UNIV., <https://provost.wvu.edu/files/d/e532ef7d-7b9a-462a-8097-8d84c83af191/proposed-draft-10-7-22-university-procedures.pdf> [<https://perma.cc/N2AP-7ZUH>].

¹¹ *Id.* at 4–6.

¹² *Id.* at 5.

and eligibility for merit salary raises.¹³ The draft guidelines also incorporate WVU’s Employee Code of Conduct into the evaluation process, which contain standards such as: “Interact with others in a positive, respectful and appropriate manner,” “Treat others with fairness, kindness, civility and dignity,” and “Respect the decisions that have been made in the best interest of the University.”¹⁴

II. WVU’s Proposed Conflict-of-Interest Rule Violates Faculty’s First Amendment Rights

By singling out faculty participation in formal court proceedings adverse to WVU or the state for potentially special treatment, WVU’s proposed rule impermissibly discriminates based on viewpoint. It has long been settled law that the First Amendment binds public universities like WVU,¹⁵ such that its decisions and actions must comply with the First Amendment. And as the Supreme Court has long recognized, “[o]ur 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 to the First Amendment[.]”¹⁶

WVU has also made its own commitments to protect academic freedom and free expression that it is bound to uphold. The university has committed to “do everything it can to ensure within it the fullest degree of intellectual freedom,”¹⁷ recognizing “[t]he primary function of higher education is to discover and disseminate knowledge by means of research, teaching and public service,” but that “[t]o fulfill this function a free interchange of ideas is necessary within [the University’s] walls and within the world beyond.”¹⁸

WVU’s proposed rule is an abandonment of its constitutional obligations and its own promises of free speech and academic freedom. It discriminates on the basis of viewpoint by specifically identifying professors’ participation in court proceedings adverse to the state as a separate category to which distinct rules apply. Moreover, without narrow, objective, and definite standards guiding the approval process, the requirement subjecting faculty to pre-approval of their outside participation in adverse legal proceedings is an unconstitutional prior restraint on speech.

¹³ West Virginia University Procedures for Faculty Appointment, Annual Evaluation, Promotion, and Tenure 2014–15, W. VA. UNIV., <https://faculty.wvu.edu/files/d/81af1f5c-c61a-4954-a0db-ed7cb69b369a/final-2014-2015-p-t-document-guidelines-5-14-2018.pdf> [<https://perma.cc/MLT6-HY3H>].

¹⁴ See *Code of Conduct*, W. VA. UNIV., https://talentandculture.wvu.edu/files/d/d8b29bf4-243f-464e-8095-d690ac929ce9/wvu_code_of_conduct_final.pdf [<https://perma.cc/VY5A-TVVV>].

¹⁵ *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

¹⁶ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

¹⁷ BOG Governance Rule 1.8 – Freedom of Expression, § 2.1, W. VA. UNIV., <https://policies.wvu.edu/finalized-bog-rules/bog-governance-rule-1-8-freedom-of-expression2> [<https://perma.cc/TGJ8-PX44>].

¹⁸ *Id.*

A. Faculty Members Have a Right to Speak as Private Citizens on Matters of Public Concern.

Faculty at public colleges do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.”¹⁹ When government employees speak as private citizens about matters of public concern, “they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”²⁰ Mere disapproval of the content of a faculty member’s expression—much less anticipated expression—is insufficient.²¹

Professors participate as counsel, expert witnesses, and *amici* in their personal capacities, not as employees speaking on behalf of WVU. As Supreme Court precedent makes clear, faculty First Amendment rights include the right to testify in court: “Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.”²²

Formal court proceedings in which the state is a party inherently “relat[e] to any matter of political, social, or other concern to the community,” and are thus matters of public concern.²³ The Supreme Court has stated that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”²⁴ The actions of WVU and the state government, whether legislative, executive, or judicial in nature, are necessarily the interest and concern of the state’s citizens and voters, on whose behalf the government acts.

WVU may not regulate faculty speech on matters of public concern unless its interest “in promoting the efficiency of the public services it performs through its employees” outweighs “the interests of the [employee], as a citizen, in commenting upon matters of public concern.”²⁵ To establish its interest, WVU must show the speech “impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.”²⁶ When the speech “more substantially involve[s] matters of public concern,” a “stronger showing” of disruption to university operations may be necessary.²⁷

¹⁹ *Connick v. Myers*, 461 U.S. 138, 140 (1983).

²⁰ *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

²¹ *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (“Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.”).

²² *Lane v. Franks*, 573 U.S. 228, 238 (2014).

²³ *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

²⁴ *Connick*, 461 U.S. at 140.

²⁵ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

²⁶ *Rankin*, 483 U.S. at 388.

²⁷ *Connick*, 461 U.S. at 150; *Whitney v. City of Milan*, 677 F.3d 292 298 (6th Cir. 2012).

B. WVU’s Proposed Rule Could Be an Unconstitutional Prior Restraint.

WVU’s proposed conflict-of-interest rule is remarkably similar to the rule recently used by the University of Florida to bar six professors from participating as expert witnesses in legal proceedings considered adverse to the state.²⁸ After media reports of UF’s actions, the university approved the professors’ requests to testify as experts and amended its proposed rule to provide a “strong presumption” that faculty will be allowed to serve as expert witnesses in court proceedings against the state. Despite these changes, the federal court for the Northern District of Florida preliminarily enjoined the policy, holding that it remained an unconstitutional prior restraint because it “prevents faculty and staff from speaking unless they apply for approval through the [university’s] system and UF approves their request.”²⁹ Based on “UF’s actual policies and practices,” the court concluded that UF would “continue to operate with unbridled discretion when denying faculty and staff requests to testify as expert witnesses in litigation involving the State.”³⁰

WVU’s rule requiring pre-approval of outside consulting arrangements is likewise a prior restraint.³¹ When protected speech is subjected to a prior restraint, there must be “narrow, objective, and definite standards to guide the [decisionmaker].”³² But there is no indication that WVU has crafted the objective standards necessary to ensure faculty applications to participate in outside consulting arrangements adverse to the state will not be denied on the basis of viewpoint.

FIRE appreciates that, unlike UF’s similar conflict-of-interest policy, WVU amended the draft rule here to include the proviso that it may not prohibit consulting arrangements based on the viewpoint or position advocated.³³ After all, it is a “core postulate of free speech law” that “[t]he government may not discriminate against speech based on the ideas or opinions it conveys.”³⁴ Nevertheless, proposed BOG Governance Rule 1.4 already distinguishes speech based on viewpoint by specifically identifying faculty participation in court proceedings *adverse* to the state as a separate category subject to distinct rules. WVU’s purpose for singling out participation in such court cases in its proposed rule is unclear, as are the criteria it relies on in practice when denying or approving requests.

²⁸ See *Austin v. Univ. of Fla. Bd. of Trustees*, 580 F.Supp.3d 1137 (N.D. Fla. 2022).

²⁹ *Id.* at 1162.

³⁰ *Id.* at 1163.

³¹ “[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

³² *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969)).

³³ Proposed BOG Governance Rule 1.4, at § 7.2.4.2.

³⁴ *Iancu v. Brunetti*, 588 U.S. ___, 139 S. Ct. 2294, 2299 (2019).

III. WVU's Proposed Post-Tenure Review Policy Threatens Tenure Protections and Academic Freedom

The proposed termination procedures for tenured faculty and incorporation of ill-defined and subjective standards in the Code of Conduct into the annual evaluation process undermine academic freedom and are ripe for abuse.

A. *WVU's Proposed Post-Tenure Termination Process Threatens Academic Freedom.*

Tenure exists to shield faculty from institutional repercussions for their research or views. As WVU's Board of Governors Faculty Rule 4.2 explains, "[t]enure is designed to ensure academic freedom and to provide professional stability for the experienced Faculty Member. It is a means of protection against the capricious dismissal of an individual who has served faithfully and well in the academic community."³⁵

The American Association of University Professors (AAUP) warns against post-tenure review for the purpose of dismissing faculty: "Despite assurances by proponents that they do not so intend, the substitution of managerial accountability for professional responsibility characteristic of this more intrusive form of post-tenure review alters academic practices in ways that inherently diminish academic freedom."³⁶ The result may be "a climate that discourages controversy or risk-taking, induces self-censorship, and in general interferes with the conditions that make innovative teaching and scholarship possible." Instead, annual evaluations should focus on professional development and professional responsibility.³⁷

Systems of post-tenure review that reduce tenure protections threaten academic freedom by weakening essential procedural safeguards. As the AAUP explains, these systems "ease the prevailing standards for dismissal and diminish the efficacy of those procedures that ensure that sanctions are not imposed for reasons violative of academic freedom."³⁸ Yet it is precisely the demanding procedures and standards that characterize tenure which prevent faculty from improper dismissal or reprisal violative of academic freedom. The risks are many:

When post-tenure review substitutes review procedures for adversarial hearing procedures, or diverse reappointment standards for dismissal standards, it creates conditions in which a host of plausible grounds for dismissal may cloak a violation of academic freedom. Innovative research may be dismissed as unproven, demanding teaching as discouraging, and independence of mind as lack of collegiality. The lengthy demonstration of competence that precedes the award of tenure is required precisely

³⁵ BOG Faculty Rule 4.2, at § 5.1, W. VA. UNIV., <https://policies.wvu.edu/finalized-bog-rules/bog-faculty-rule-4-2-appointment-promotion-tenure-and-dismissal-for-cause> [<https://perma.cc/7L83-NKME>].

³⁶ AM. ASS'N. OF UNIV. PROFESSORS, *Post-tenure Review: An AAUP Response* (June 1999), available at <https://www.aaup.org/report/post-tenure-review-aaup-response#1> [<https://perma.cc/RUU5-T6SQ>].

³⁷ *Id.*

³⁸ *Id.*

so that faculty are not recurrently at risk and are afforded the professional autonomy and integrity essential to academic quality.³⁹

Thus, a policy for dismissing tenured faculty based on unsatisfactory annual performance evaluations would eliminate the procedural safeguards of tenure that are most protective of academic freedom. Consequently, the policy will chill risk-taking, innovation, and controversial speech as faculty bear the burden of “recurrently ‘satisfy[ing]’ administrative officers rather than the basic standards of their profession.”⁴⁰

B. Evaluating Faculty on Civility or Collegiality Chills Academic Discourse.

While a policy calling for civility and respect may seem innocuous on its face, in practice it chills academic discourse and the free exchange of ideas. The AAUP has long criticized the use of these types of “collegiality,” “civility,” or demeanor requirements in the tenure and promotion process as a pernicious threat to academic freedom. We urge WVU to jettison this proposed addition to the faculty review process, in accordance with standards widely accepted by universities across the nation.

The AAUP’s report “On Collegiality as a Criterion for Faculty Evaluation” explains the danger of maintaining a requirement of this type for faculty evaluation, as it is too adaptable to stifling dissent and chilling speech:

[C]ollegiality may be confused with the expectation that a faculty member display “enthusiasm” or “dedication,” evince “a constructive attitude” that will “foster harmony” or display an excessive deference to administrative or faculty decisions where these may require reasoned discussion. Such expectations are flatly contrary to elementary principles of academic freedom, which protect a faculty member’s right to dissent from the judgments of colleagues and administrators.⁴¹

As the Supreme Court has held, controversial or unpopular speech needs the most protection: “[M]ere 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.’”⁴² The AAUP additionally cautions that an “absence of collegiality ought never, by itself, to constitute a basis for nonreappointment, denial of tenure, or dismissal for cause.”⁴³

Policies such as this which evaluate faculty based on “respect” for “decisions made in the best interest of the University” or on their “positive, respectful and appropriate” interactions with

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See AM. ASS’N. OF UNIV. PROFESSORS, *On Collegiality as a Criterion for Faculty Evaluation* (2016), available at <https://www.aaup.org/file/AAUP%20Collegiality%20report.pdf> [<https://perma.cc/TJS6-GPXT>].

⁴² *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973).

⁴³ *Id.*

others, are especially likely to stifle nonconformist or disagreeable speech or to be weaponized to shut down contrary viewpoints in the name of “collegiality.”

IV. Conclusion

WVU’s proposed conflict-of-interest rule offends the First Amendment, the university’s own promises to protect academic freedom, and society’s vital interest in the effective truth-determining function of both universities and the courts. And WVU’s proposed annual evaluation and termination process eliminates many of the most important protections of tenure, eroding faculty’s academic freedom. FIRE calls on WVU to clarify the purpose, standards for approval, and intended use of the proposed conflict-of-interest rule as it relates to faculty participation in legal proceedings adverse to the state or university, and to reject the proposed changes to the annual evaluation process that incorporate undefined and amorphous standards into the evaluation criteria and allow termination based on unsatisfactory ratings.

We request receipt of a response to this letter no later than the close of business on Wednesday, November 23, 2022.

Sincerely,

A handwritten signature in black ink that reads "Jessie Appleby". The signature is written in a cursive, flowing style.

Jessie Appleby
Litigation Fellow