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TEACHER STRIKES IN COLORADO: LAW AND REALITY

Ray Hogler



Teachers from various state school districts rallied in Denver on April 26-27, 2108, to demand increases in pay and benefits. Most affected districts chose to cancel classes on those days rather than attempting to cope with the walkouts. In Fort Collins, Poudre School District Superintendent Sandra Smyser declared that “teachers’ actions are a logical result of underfunding.” Smyser added that she supports teachers who used paid time off to lobby at the Capitol.¹

Conservative legislators immediately jumped into the fray, proposing legislation to outlaw strikes by public employees and impose a range of penalties on violators. Two Republican legislators, Senator Bob Gardner and Representative Paul Lundeen, both from El Paso County, acted swiftly to deal with the menace of striking teachers. They introduced SB 18-264, which provides for fines, imprisonment, and loss of employment for employees engaged in a work stoppage. According to the official summary of the legislation:

The bill prohibits public school teachers and teacher organizations from directly or indirectly inducing, instigating, encouraging, authorizing, ratifying, or participating in a strike against any public school employer. Public school employers are prohibited from consenting to or condoning a strike and from paying a public school teacher for any day during which the public school teacher participates in a strike.

¹ Kelly Ragan, “PSD’s Sandra Smyser voices support, apologizes for tone of letter on teacher demonstrations,” *Fort Collins Coloradoan*, April 24, 2018, p. 1.

The legislators' zeal to criminalize public workers' collective action demonstrates not only a tenuous grasp of political reality and constitutional doctrine, but also a lamentable ignorance of labor management relations in this state. Their proposals would eliminate important workers' rights in Colorado that have existed for more than a century.

Public Employees' Collective Action. In its 1991 decision in *Martin v. Montezuma-Cortez School District*, the Colorado Supreme Court upheld the right of Cortez schoolteachers to strike for union recognition. The basis of the decision was the 1915 Industrial Disputes Act, enacted in response to the Ludlow Massacre of 1914. The Ludlow incident involved the deaths of women and children at a mining camp near Trinidad; following the incident, miners armed themselves and marched on the state government in Denver. Shortly afterward, the Twentieth General Assembly passed legislation that established procedures for dealing with labor conflict. Those laws remain in effect, including a right to petition the Colorado Department of Labor for intervention and a right to strike if the issues are not resolved.²

Given the background, one conclusion is that labor relations in Colorado remain embedded in a historical context that mitigates against radical change. Legislators in 2006 attempted to change the rules to legalize the compulsory payment of union dues. Despite a strong Democratic majority in the General Assembly, they failed to accomplish their goals when House Republicans defeated efforts to repeal the Colorado Labor Peace Act's right to work provisions.³ Again in 2008, Colorado citizens voted down a ballot initiative funded by a member of the Coors dynasty to strengthen right to work in Colorado.⁴ Obviously, new approaches are needed to address an old issue.

Solving the Problem. Teacher strikes are difficult to deal with because they are unique in terms of employment. In the typical labor market setting, strikers lose wages during a strike and the pay is gone for good because the labor opportunity disappears. School districts, in contrast, have flexibility in the calendar to make up for lost instructional days by adding classes at the end of the school year. Consequently, the disciplinary effects of market forces do not apply to teachers' work stoppages. Colorado faces an additional problem in that the legislative bodies may be constrained by the so-called "Tabor" limitations on tax increases to fund budget requirements.⁵

A simple solution is to install a regime of compulsory fact-finding in educational collective bargaining followed by economic and political consequences for the parties' recalcitrance (the "Referendum Model").⁶ Under this proposal, all impasses in negotiations would be resolved by a process of mediation, which, if unsuccessful, would proceed to impartial fact-finding and a proposed settlement of the dispute.

After fact-finding, the parties would be given a short period within which to accept or reject the fact finder's recommendations. If the school board rejected the recommendations, then teachers legally could engage in a protected strike. However, if the union rejected the recommendations, the impasse would be submitted to a referendum election in the school district, with the union paying the cost of the election. Voters would choose between the fact finder's recommendation and the union's proposal. In the event both parties rejected the

²Raymond Hogler, "Public Employee Strikes in Colorado: The Supreme Court Adopts a New Rule," *Colorado Lawyer*, January 1992, pp. 1-12.

³Raymond Hogler and Steven Shulman, "The Law, Economics, and Politics of Right to Work: An Analysis of Colorado's Labor Peace Act," *University of Colorado Law Review*, vol. 70, No. 3 (Summer 1999), pp. 871-952

⁴Raymond Hogler, "The 2008 Defeat of Right to Work in Colorado: Is It the End of Section 14(b)?" *Labor Law Journal*, 60, No. 1 (Spring 2009), pp. 5-15.

⁵Kelly Ragan, "What comes after teachers march in Denver," *Fort Collins Coloradoan*, April 28, 2018, p. 5A.

⁶Raymond Hogler, "Teachers, Unions, and Citizens: An Alternative Model for Collective Bargaining," *Education Week*, Nov. 1986. Online: <https://www.edweek.org/ew/articles/1986/11/12/teachers-unions-and-citizens-an-alternative-model.html>.

recommendations, the referendum election would be held, with the costs of the election shared between the parties. Voters could choose either the union's or the school board's final offer at the time of the impasse.

The Referendum Model offers one option to the distorted, disruptive, and legally contentious work actions now taking place in Colorado and several other states. It would give citizens a meaningful voice in educational affairs and the distribution of tax dollars. Colorado now ranks below the U.S. median in teacher pay.⁷ If that situation is not acceptable to us, there should be a meaningful choice between unregulated work stoppages and the punitive oppositional tactics suggested by retrograde legislators such as Gardner and Lundeen. Our legislative process has been hamstrung by con artists (and ex-cons) like Douglas Bruce and his Tabor Amendment since the 1990s. It's time to move forward with real change.

NTTF REFORM AND TENURE

Steve Mumme



It was a landmark moment when Colorado State's faculty council voted to endorse the Committee on the Responsibilities and Academic Standing of Faculty's (CoRSAF's) proposal establishing "contract" faculty appointments for non-tenure track faculty (NTTF) on campus. The new appointment type effectively brings those faculty out of the shadows and into the mainstream of faculty life on campus. They have gained greater academic freedom, new opportunities for participation in faculty governance, better chances for professional development and career pathways within the university. While the details remain to be worked out at the college and department levels it is fair to call this a sea change in how NTTF's are treated on campus. It is no exaggeration to claim this puts CSU in the vanguard of the contingent faculty reform movement among Colorado's state universities.

And yet, as may be expected of a measure that breaks new ground on faculty status at a Research I university, some grumblings persist as our tenure-track faculty face the prospect of welcoming new (old) colleagues into the fold. Practical issues ranging from status nomenclatures for contract positions to voting procedures confront departments across the campus. And, yes, some tenured faculty view the new practices of inclusion as a Trojan Horse that will disgorge an arsenal of attacks on the practice of tenure. They needn't worry. For starters, the Section E reforms affirm the status and standing of tenured and tenure-track faculty. No changes there.

⁷Madeline Will, "See How Your State's Average Teacher Salary Compares," *Education Week*, April 24, 2018. Online: http://blogs.edweek.org/edweek/teacherbeat/2018/04/teacher_pay_2017.html?intc=main-mpsmvs.

But do the reforms incentivize the hiring of “contract” faculty in lieu of tenure-track positions? Not likely. It is useful to reflect on how things have gone at Colorado State. Drawing on figures available from the Office of Institutional Research, Planning, and Effectiveness (Fast Facts and earlier reports) we see that our NTTF faculty in the last 20 years grew from a figure of 395 in 1997 to 765 in 2017, an increase of 94 percent. This is certainly not the greatest increase in an American college or university in this period, but it is substantial and indicative of nationwide trends. Figures are unavailable on the number of NTTF with doctoral or terminal degrees but anecdotal evidence suggests that a hefty majority do have Ph.D.’s, MFA’s or some other terminal degree. As a group this is a professionally accomplished and well qualified body of faculty. Unfortunately, most work under highly precarious circumstances with little assurance of sustained employment even after years of commendable service.

There is no concrete evidence that the growth of this contingent faculty workforce has come at the expense of tenured faculty. During this same period of time the number of tenured and tenure track faculty (regular appointments) grew from 990 in 1997 to a total of 1081 faculty in 2017, an increase of 91 regular positions. In 1997 NTTF were 29 percent of CSU’s total faculty workforce; in 2017 they made up 41 percent of the faculty workforce. What is certain is that the growth of NTTF positions correlates well with the steady growth in the number of enrolled students, principally undergraduate students, since 1997, a period when CSU’s student total headcount rose from 22,344 to 33,198.

Table 1. Colorado State University NTTF facts:

	1997	2017	Percent increase
NTTF Faculty count	395	765	94%
TT Faculty count	990	1081	09%
Student enrollment	22,344	33,198	49%

Source: CSU Fast Facts (Office of Institutional Research, Planning, and Effectiveness)

While the administration could have hired more tenured track faculty to cope with student enrollment growth during this 20 year period, it seems doubtful they would have since the lion’s share of this enrollment growth came at the undergraduate level. It is difficult to argue that maintaining the status quo—or to put it another way, failing to improve the status and opportunities available to NTTF—would have improved the odds of persuading the administration to hire more tenure track faculty. Were this the case we would have surely seen greater growth in tenure-track positions over this 20 year period. The simple truth is that tenure –track appointments have been tied to the university’s research function for years. Tenured faculty may not like the idea of a two-track faculty—I don’t either. But that’s what we have and the Section E reforms help to narrow the distance between these tracks and shore up professional respect for the centrality of our pedagogical functions. That’s not bad. And affording NTTF’s contracts has the virtue of reinforcing the case for tenure.

A major strength of the Section E reforms is extending the mantle of academic freedom to cover most faculty on campus. That is no mean thing. Contractual security and the right to a faculty hearing when disputes with administrators arise is essential to any meaningful notion of academic freedom. Despite what some tenured faculty may believe, tenure is not a contractual right to lifetime employment. The concept of tenure was never justified that way.⁸ The recent boast of a shall-not-be-named professor at Fresno State University to the contrary notwithstanding,⁹ the security that tenure affords is meant to protect faculty from assault on their academic freedom. Anyone reading the higher education press today should know that speech freedom, in and out of the classroom, is a major concern these days. Thanks to the internet we live in a time with professors can be scrutinized globally, 24/7, and assigned to somebody’s Professors’ Watchlist or target group for any

⁸ . Adam Barlow, “Abusing the idea of tenure,” *Academe Blog*, April 22, 2018. At:

<https://academeblog.org/2018/04/21/abusing-the-idea-of-tenure/>

⁹ . Colleen Flaherty, Protected Speech, a ‘perfect’ political target,” *Inside Higher Ed.*, April 24, 2018. At:

<https://www.insidehighered.com/news/2018/04/24/randa-jarrar-case-fresno-state-has-attracted-national-attention-much-it-arguably>

utterance someone finds offensive, or for no reason at all. What we do in the classroom is more public today than at any time in human history. If that fact doesn't strengthen the tenured faculty's commitment to academic freedom, and shared governance, it certainly should. Extending protections to NTTF's strengthens protection for all faculty, the tenured included.

There's more. A decent argument can be made that closing the salary-occupational gap between contract faculty and tenured faculty strengthens the case for hiring tenure-track faculty where a graduate research and professional benefit can be shown. I certainly defer to the economists in our midst on this question, but where the cost differential of capturing additional values for the university from a new faculty hire is diminished, the probability of opting for such a hire should improve. At the very least this is a case of the glass half-full. There is no implicit reason to suppose that tenure-track hiring will decline on account of the Section E. reform.

Finally, moving to shore up NTTF conditions at the university level creates a positive feedback loop to our disciplinary associations, encouraging their efforts to strengthen professional opportunities for faculty. I see this directly in my discipline, where a notoriously stodgy professional body, the American Political Science Association just recently established a standing committee to articulate the concerns of contingent faculty, something it never would have done without the steady mobilization of NTTF's across the country and on-the-ground efforts by specific universities to address their concerns.¹⁰

In sum, there is every reason to applaud this reform in full confidence that support for tenure and our tenured faculty ranks is undiminished. Breathe easy.

AAUP Colorado Conference: Recent News

- Fort Lewis College's AAUP chapter registered a victory in March when President Dene Thomas announced that no faculty no tenured or tenure-track people will be eliminated as part of proposed FLC budget reductions. Her decision followed an FLC-AAUP analysis of the proposed budget that demonstrated cuts could be achieved without sacrificing faculty positions. In justifying her position, she even said, "While I don't always agree with the AAUP, I agree with them on this issue."
- Meeting March 16, the AAUP Executive Committee agreed to release to the public its policy letter to the State Board of Community Colleges and Occupation Education. The letter, entitled "*Instructor Impermanence and the Need for Community College Adjunct Faculty Reform in Colorado*," reviews the dire working conditions of adjunct instructors in the Colorado Community College System and lays out a series of policy measures the State Board could adopt to address these conditions. The appointment of a new CCCS president, former Asst. Governor Joe Garcia, makes this a timely moment to consider needed policy reforms bettering adjunct community college faculty in Colorado. Rep. Jeni Arndt has recently proposed that the Colorado General Assembly establish a special committee to examine these issues over the summer [<https://www.coloradoan.com/story/news/2018/04/19/rep-jeni-arndt-wants-know-why-adjunct-teachers-paid-so-little/525847002/>].
- *Westword* journalist Alan Prendergast is awarded the AAUP Colorado Conference's **Randy Fischer Friend of Higher Education Award** for his series of articles last year detailing conditions among Colorado's community college adjunct faculty. Prendergast teaches journalism at Colorado College.
- Recent AAUP elections saw the Conference maintain representation in national elective positions. Conference Co-President, Jonathan Rees, was reelected to the AAUP's District 2 Executive Council seat. While 2nd Vice-President Caprice Lawless (Front Range Community College) lost her reelection bid, she retains her seat on the AAUP's Community College Committee and its Contingency and the

¹⁰ American Political Science Association. 2018. Status Committee on Contingent Faculty in the Profession. <http://www.apsanet.org/contingentfaculty>

Profession Committee. We are fortunate to have such dedicated faculty representing our conference in Washington, D.C.

- AAUP faculty at CU Boulder report that professor Kevin O’Conner, School of Education, has prevailed on CU’s Privilege and Tenure Committee for reconsideration of his tenure denial decision. This comes after AAUP delivered to the Provost a strongly worded rebuke of the rationale underlying the earlier decision.

CSU CHAPTER OF THE AAUP

Mary Meyer, President, meyer@stat.colostate.edu, 491-5762

Ross McConnell, Co-President, rmm@cs.colostate.edu, 491-7524

Natalie Barnes, V-P for Non-Tenure-Track Faculty Affairs, Natalie.Barnes@colostate.edu, 491-6774

Dimitris Stevis, Secretary and Treasurer, Dimitris.Stevis@colostate.edu, 491-6082

Steve Mumme, Colorado Conference Co-President, Stephen.Mumme@ColoState.edu, 491-7428

Bill Timpson, at large Executive Committee member, William.Timpson@colostate.edu, 491-7630

Ray Hogler, at large Executive Committee member, Raymond.Hogler@colostate.edu, 491-5221

Mary Van Buren, at large Executive Committee member, mary.vanburen@colostate.edu, 491-3781

Facebook page: <https://www.facebook.com/CSUAAUP?fref=ts>

Website: <https://aaupcsu.org>

AAUP State Conference: <http://aaupcolorado.org>

HOW TO JOIN THE AAUP

To join the AAUP and our CSU chapter, sign up at the national AAUP site: <http://aaup.org>.

