IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, CHANCERY DIVISION

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YOHMA GRAY                           )
ELVIRA FERNANDFZ HASTY, and          )  No. 91 CH 12300
JUDITH R.  MYERS                     )  No. 91 CH 12540
          Plaintiffs,                )  No. 96 CH 1100
     -vs-                            )
LOYOLA UNIVERSITY OF CHICAGO         )  Consolidated before
an Illinois not-for-profit           )  Hon. Michael B. Getty
corporation, and MUNDELEIN           )
College an Illinois corporation.     )
          Defendants.                )
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MEMORANDUM OF OPINION

I. BACKGROUND

Plaintiffs Yohma Gray,Elvira Hasty, and Judith Myers were tenured professors onthe faculty of Mundelein College prior to 1991. Each had a contract as tenured faculty, which contract incorporated thefaculty manual and defined tenure as:

> APPOINTMENTS WITH CONTINUOUS TENURE Tenure refersto a commitment of the college to offer continued employmentsubject to satisfactory conduct and effective teaching and,upon making application and upon recommendation, is thestatus granted to faculty members after probationary period,protecting them from dismissal except for reasons andaccording to procedure stated by the American Association of University Professors . . . Renewed appointment and tenure status are confirmed in writing. When faculty members acquire tenure, this fact will be so stated in the contract for the ensuing year and thereafter in each year's contract.

Pursuant to the terms of the faculty manual in effect at the time in question tenure could be terminated on only fourgrounds: 1) financial exigency; 2) a discontinued program or department; 3) health; and 4) cause. For each of the four groundsthere are specific provisions which could be invoked by Mundelein, and in some cases required action by the faculty. The faculty manual unequivocally required that the Board of Trustees make a formaldeclaration of a financial exigency.

For many years Mundelein had financial difficulties. Finally in January of 1991 Mundelein met with representatives of Loyola to discuss a possible solution. Mundelein and Loyola signed a "Memorandum of Agreement" on April 15, 1991 wherein they agreed that:

> "Loyola will establish the Mundelein College of Loyola University which will be governed and administered as a separate college of the university. It is Loyola's intention to continue the new Mundelein College in existence on a permanent basis."

On June 14, 1991, Mundelein and Loyola signed the formal agreement. The agreement provided that at least 26 members of the tenured faculty at Mundelein would be offered tenured appointments at Loyola. The agreement provided that at least 11 members of the tenured faculty at Mundelein would be offered a five-year appointment at Loyola. The agreement further provided that up to 3 members of the tenured faculty at Mundelein would not be offered a position at Loyola but instead would receive apayment in an amount equal to two years of their current salary.

Plaintiffs Gray and Hasty were two of the three tenured faculty members who were not offered a position at Loyola. Gray and Hasty refused to accept the payment of two years' salary and brought suit against Mundelein and Loyola. This Court granted summary judgement for defendants on Count III of plaintiffs' Complaint finding that the financial distress of Mundelein which led to the affiliation with Loyola extinguished Mundelein's obligations under the faculty manual. This Court also granted summary judgement on Counts I and IV as the disposition of Count III made it unnecessary to address them.

The Appellate Court reversed the summary judgment in favor of defendants Mundelein and Loyola and returned the case for trial. *Gray v. Loyola University*, 274 Ill. App. 3d 259 (1st Dist. 1995). Following the remand from the Appellate Court plaintiff Myers, who had accepted a five-year appointment at Loyola, filed her suit which has been consolidated with the previously filed cases. This court has bifurcated the issues and in the opinion that follows does not address, except as is indirectly necessary by reason of a recitation of the evidence, any issue with respect to the liability of Loyola University.

The question squarely put by the Appellate Court which is presently before this Court is whether the parties intended that tenure be extinguished if Mundelein affiliated with another college or university. The Appellate Court has said this is not a question of law but one of fact. This Court has now heard approximately five days of testimony and received over one hundred exhibits in evidence. The Court finds that the parties did not intend that tenure be extinguished if Mundelein affiliated with another college or university.

II. EVALUATION OF WITNESSES

A. PLAINTIFFS' WITNESSES

1. Marianne Murphy, who is presently the Director of the Graduate School of DePaul University, was previously a tenured professor at Mundelein College. She holds a Masters degree in Education, a Masters degree in Mathematics and a Law degree, and is admitted to practice in the State of Illinois. She along with plaintiffs Gray and Hasty were the three persons not offered any type of employment at Loyola. She was a convincing, straightforward witness who told of her work at Mundelein as a member ofthe promotion rank and tenure committee. She admitted that she had appeared at grievance committee meetings on behalf ofstudents and faculty. Ms. Murphy testified that she accepted thetwo year salary payment and forfeited her tenure although she firmly believed she could not be dismissed without due process and a finding of either a financial exigency or disbandment of the department, or for reasons of health or cause. She freely admitted that no one had ever considered the question of whatwould happen in the context of an affiliation or merger.

2. Dr. Yohma Gray, one of the plaintiffs, holds a Bachelor degree from Syracuse University, a Masters degree from Yale and a Ph.D from Yale. She is an English professor specializing in English/American studies. She was Chairman of the English Department at Mundelein and as such, familiar with not only Mundelein's program but also Loyola's program. As Chair she was required to articulate the catalogues of both Mundelein and Loyola because they had limited reciprocity. She was a member of the committee which worked on the faculty manual, and was sometimes in disagreement with the administration. She was a convincing witness who admitted that the parties had never discussed what would happen in the face of a merger or affiliation. She firmly believed she had procedural safeguards and that her tenure could not be abrogated except in accordancewith the faculty manual.

3. Dr. Elvira Fernandez Hasty, one of the plaintiffs, escaped to the United States from Cuba in 1961. She attained aBachelor of Science in Chemistry at St. Mary's College and a Masters and later a Ph.D in Physical Inorganic Chemistry at the University of Illinois. She completed a one year post doctoral study at Argonne National Laboratories and taught part-time at both Harper Community College and the University of Illinois. She became tenured at Mundelein in 1982. Dr. Hasty was a credible, if somewhat emotional, witness who testified that she had never discussed the question of affiliation. Unlike Dr. Murphy and Dr. Gray, Dr. Hasty was on a one year leave of absence or sabbatical during the 1990-91 academic year when the problems in question arose at Mundelein. Dr. Hasty was engaged in research at Northwestern University as a result of which she

published three papers. It was not until June 10, 1991 that Dr.Hasty learned from Dr. Wiser of Loyola that she would not be tenured. At this time she complained to Wiser and asked for a meeting, and later, perhaps imprudently, demanded a meeting with Chairman Joseph Sullivan. She admitted to being very upset and went to his private office unannounced. It is unrebutted thatChairman Sullivan simply told her to call her lawyer. She was thereafter removed from the list of persons who were to be offered a five-year contract at Loyola and placed on the list ofpersons who would be severed entirely from employment.

Although this issue is not before the Court at this time as regards Loyola, Mundelein/Loyola terminated Murphy, Hasty and Gray, three extremely well qualified tenured professors, each of whom may have offended somebody through either advocacy on behalf of students and faculty, disagreement with administrative policy or, in the case of Dr. Hasty, directly approaching Chairman Sullivan.

4. Dr. Judith Myers, a plaintiff, received her Ph.D from Northwestern University in Social Psychology. She received tenure at Mundelein in 1981. She believed that she had a guarantee of lifetime employment subject only to termination for one of the four causes. Unlike Gray and Hasty, Dr. Myers accepted employment at Loyola University under a 5-year nontenured employment contract. Myers' five years has now expired and she has not been granted tenure at Loyola. Dr. joined this suit by consolidation after she filed suit against defendants Mundelein and Loyola following the termination of her five-year contract.

5. Dr. Mary Griffin holds a Ph.D in English from Fordham University. She was a former member of the Order of Sisters of Charity of the Blessed Virgin Mary and was formerly an Academic Dean. She was unbiased and credible. Dr. Griffin confirmed that while an administrator at Mundelein she had never talked about or thought about what would happen if Mundelein combined with another college. On cross-examination she admitted that she hadnever discussed what would happen if a financial exigency occurred but was not declared. She confirmed the understanding of the administration that tenure was a permanent and mutual commitment between the teacher and the college until retirement unless circumstances of financial exigency or conduct required the end of the tenure.

6. Joseph Sullivan was Chairman of the Board of Trustees of Mundelein College until June of 1991 and a member of the board from 1980 until 1991. Chairman Sullivan testified that upon thesigning of the agreement with Loyola his position as Chairman ofthe Board of Mundelein *terminated*. Chairman Sullivan testified that his family has supported Loyola University in the past. He recounted some of the efforts made between 1981 and 1991 to rejuvenate Mundelein. He related that after obtaining a guarantee from the Sisters of the Blessed Virgin Mary for the $4 million loan Mundelein continued to have cash flow problems. The

trustees then knowingly borrowed against the endowment funds in order to pay current bills, therefore intentionally breaking the covenant. At this point he recounted how he began to look for an affiliation, a major restructuring, or a close down of the institution. Mr. Sullivan testified that the only candidate he sought was Loyola. He stated that if Loyola had not worked out "we would have restructured or sought other affiliations." He further stated that he did not contact DePaul and had only a fleeting conversation one day with the Provost of the University of Chicago. He testified he was aware of the four causes for termination of tenure and listed them as health, cause, financial exigency, and program change.

This Court has no doubt as to the concern and goodintentions that Chairman Sullivan had for both Mundelein College and Loyola University. It is regrettable that he did not have as much concern for either the tenure contracts or all those who had given much of their life to teaching at Mundelein.

7. Jean Sweat is the Vice President of Administrative Affairs at Mount Mercy College, a position she assumed in July of 1983. Prior to that time she had been at Mundelein where she served as Dean and Vice President for Academic Affairs. She obtained her doctorate from Oregon State University. She testified that during her years at Mundelein the subjects of affiliation and merger were never discussed. She further testified that during her tenure she would consider the recommendations of faculty and then make recommendations to the President regarding tenure.

8. Jerry Goldman, Professor of Mathematical Science at DePaul University, holds a Ph.D in Mathematics from the Illinois Institute of Technology and is the Chairman of the Department of Mathematics at DePaul. He has done statistical, economic, operational and actuarial consulting for government, industry andthe legal profession in both state and federal litigation. He has an impressive list of publications and is the recipient ofawards and other recognition. Dr. Goldman provided the analysis of the loss sustained by both Dr. Hasty and Dr. Gray. They are contained in plaintiffs' Exhibits Nos. 33 and 34 in evidence, respectively. His opinion is both convincing and unrebutted.

B. DEFENDANT'S WITNESSES

1. Dr. Ronald Walker testified that he is the Executive Vice President and Chief of Operations for Loyola University. He holds a doctorate in Psychology and reports directly to the President of the University. He testified that in January of 1991 he was Executive Vice President for Loyola and became aware of the Mundelein College dilemma during a Mallinckrodt College affiliation ceremony. Dr. Walker was clear and convincing andperhaps the best witness . . . but for the plaintiffs. He testified that he and his chief counsel, Mr. Jim Serritella, were the

negotiators on behalf of Loyola. He testified that in February Chairman Sullivan raised the issue that Loyola hire all Mundelein staff, faculty, and administrators. He further testified that Sullivan wanted to protect as many people as hecould from the 90 staff positions. Chairman Sullivan also wanted to protect the continuing education of the students.

He recounted the negotiations and that they finally agreed upon a formula. Dr. Walker was aware that there were 16 nontenured faculty and 40 tenured faculty at Mundelein. He testified that he himself is tenured at Loyola as Chairman of the Department of Physiology and that "tenure is forever". Dr.Walker could not recall anyone from Mundelein saying that it had a legal right to abrogate faculty tenure. The subject was not discussed at any length. He was involved in all negotiations but could not remember the participation of any faculty member or dean from Mundelein in the discussions as all of the participants were administrators.

Dr. Walker could not recall Chairman Sullivan ever saying that he wanted the fullest possible amount of Mundelein faculty involvement. He testified that Loyola never indicated that if Mundelein required that Loyola accept all 40 tenured faculty it would be a deal breaker. However, Loyola never said that they would accept 40. It just was never an issue that they be required to take all 40 tenured Mundelein faculty. He testified that Dr. Wiser of Loyola, the deans of the colleges, and the chairs of the departments made the ultimate determination of who from the Mundelein faculty would fit into the Loyola faculty. He testified that the parties' negotiations eventually resulted in Loyola accepting 26 tenured faculty members.

Dr. Walker did admit that during his deposition he said thatLoyola could have taken all of the tenured faculty. He testifiedthat the " 26-11-3" formula came as a product of a discussion between himself, Dr. Wiser and one of the trustees, and that they tried to be as fair as they could to everyone at both Mundelein and Loyola. He testified that he breezed through the Mundelein faculty manual and gave it to Dr. Wiser to review. However, no discussion concerning procedures regarding the three tenured faculty who would not be retained ever came up.

Dr. Walker testified that the Mundelein property is contiguous to the north side campus of Loyola. He testified that Loyola has land but not as much as it needed, and that Loyola had tried to build out into the lake but was stopped. He further admitted that it would not have been good if another school in competition with Loyola opened next to Loyola. Dr. Walker stated that Loyola originally wanted to acquire the assets of Mundelein and the seven to eight acres involved. He testified that of the seven buildings located on Mundelein property, two have been taken down. He also stated that Loyola needed more library space by the year 2000.

Dr. Walker identified plaintiffs Exhibit No. 99 in evidence entitled "Loyola University Chicago Mundelein Merger Assessment, April 1991." The "merger assessment" reveals that "based on the Memorandum of Agreement", Loyola would acquire Mundelein College by assuming Mundelein's outstanding debt of approximately $6 million. In return, Loyola would receive the net assets of the institution with a book value of $15.6 million. The "merger assessment" valued the market value of assets at 65.7 million which included working capital of $1.5 million, land of $11.2 million, and property and equipment of $53 million. Thus, according to Loyola, the total market value of the assets acquired was approximately $65.7 million. The "merger assessment" report further stated that

> "in reality the cost of acquisition will be greater than $6 million in debt assumed, the added cost comes from two sources. First, it is expected that approximately $7.975 million in capital expenditures will be required over the next five years to bring Mundelein's facilities up to Loyola's minimum standards. Second, projections indicate that Loyola will lose over $1.240 million during the first 3 years of operations until the full value of the merger is realized. The table below shows that based on total cash out flows over the next 5 years, the actual purchase price on a present value basis is closer to $12.8 million.

2. Peter Ruger, an attorney, testified that this was the first time that he has been called as an "opinion" witness. Mr.Ruger testified that he works and practices in education law and has represented individuals but principally represents colleges and universities. He teaches at Washington and St. Louis Universities on higher education topics. He testified he had never been involved in the question of financial exigency during an affiliation or merger. He testified that tenure may be terminated if there's a financial exigency, but the financial exigency should be demonstrably bona fide. He further testified that *an affiliating or acquiring institution* has no obligation to give full tenure and that a failing institution in an acquisition or merger does not have an obligation to obtain full tenure for all of its tenured faculty. Although he had read the Mundelein faculty manual he had no knowledge of whether or not a financial exigency indeed existed at Mundelein. He testified that full faculty discussion and involvement of the faculty is very important in these circumstances and the American Association of University Professors' ("AAUP") policy states that the faculty of both institutions should be consulted. He repeated that any financial exigency must be bona fide.

3. Lawrence White, called as an expert witness, testified that he served as Assistant Secretary and Counsel of the AAUP. He then served as an Assistant Attorney General in Maryland where he oversaw the University of Maryland system. He served asDeputy General Counsel at the University of Virginia and hasserved as General Counsel at Georgetown University from 1991 topresent.

He is familiar with tenure issues and has worked onfaculty handbooks. He testified that he was familiar with fivecases of affiliation:

1) He is currently representing Georgetown in the ongoing acquisition of a women's college in Washington DC which is in financial difficulty.

2) He read in the newspapers about the acquisition by Boston College of Pine Manor Junior College in the 1970's.

3) He recalled that the University of Massachusetts system acquired Boston State College in the late 1960's which he "also read about in the newspaper".

4) He further read the materials concerning the acquisition of Clench Valley College by the University ofVirginia after he came on staff at the University of Virginia.

5) As Assistant Attorney General he assisted in the consolidation of the University of Maryland schools with the Board of Region schools in Maryland. This was simply a merger as no financial exigency was involved.

He testified that the faculty appointments can be terminated by demonstrably bona fide financial exigency; that under the AAUP standards an institution that claims financial exigency must follow certain procedures and then declare financial exigency. He testified that defendants Exhibit No. 51 in evidence concerning the AAUP Governance Standards requires faculty inputand involvement before a decision to affiliate becomes final. He testified that there is no obligation for an acquiringinstitution to afford tenure and that a failing institution neednot insist on tenure because it would put off a "white knight". The Court noted that Mr. White displayed a strong bias against plaintiffs' counsel by his tone of voice, body language, use of language and phrases, pointing his finger, and raising his voice in exasperation. Mr. White's credibility as an expert is suspect because of his attitude but on balance the content of his testimony was more supportive of plaintiffs' position thandefendant's position notwithstanding his conclusion.

FINDINGS

1. Neither the faculty of Mundelein (including individual plaintiffs) nor Mundelein itself ever considered whatwould happen if there were an affiliation or merger.

2. The faculty handbook specifically provides theprocedure as to how tenure can be extinguished:

> "The Mundelein faculty as a body has as one of its primary responsibilities the academic quality of itsmembers. It exercises this responsibility in a variety of ways by participating in the decisions affecting appointments, reappointments, non-reappointments,promotions, tenure and dismissal.
>
> Although the College administration can and sometimes does reverse the decision of a faculty department or committee, the Board of Trustees and the President should ordinarily concur with the faculty judgement except in rare instances and for compelling reasons which militate against such appointment and which should be stated in detail to the appropriate faculty department or committee.
>
> Decisions not to reappoint or to terminate a contract are made in the interests of the College. However, the faculty is concerned that the individual faculty member affected by such decisions be assured of proper procedures and fairness. In light of such concern, the following contract procedures have been adopted.
>
> Termination of an appointment with continuous tenure,or of a probationary or special appointment before the end of the specified term, may be effected by the College only for adequate cause.
>
> If termination takes the form of a dismissal for cause,it will be pursuant to the procedure specified on p.93.
>
> Termination of a faculty appointment may occur forreasons of:
>
> Financial Exigency
> Discontinuance of Program or Department
> Health
> Cause"

3. The defendant did not follow any of the specific provisions required in the faculty handbook toextinguish tenure.

4. Although financial problems in the form of cash flow clearly existed, no financial exigency was ever declared by the board of trustees, no programmatic changes were ever declared, no health issues were ever raised concerning any of the three plaintiffs and no charges to dismiss for

cause were ever brought againstany of the plaintiffs.

5. The faculty were entitled to due process in accordance with their tenure rights, which tenure could be extinguished only under one of the four specific provisions. The only provision relevant to this case is financial "exigency".

6. The faculty handbook did not provide for different or specific procedures for terminating tenure where anaffiliation or merger was contemplated.

7. The defendant never considered tenure to be an issue in an affiliation.

8. The defendant did not attempt to have full faculty involvement and discussion as defendant's experts said were requisite.

9. Defendant's experts agreed that tenure could be terminated only if there is a demonstrably bona fide financial exigency. Yet it is clear that the Board of Trustees never declared a financial exigency, bona fide or otherwise.

10. Even if defendant Mundelein had declared a financial exigency this Court could not conclude, based on the evidence before the Court, that a bona fide financial exigency actually existed.

11. The evidence clearly indicates that Loyola valued Mundelein at $65.7 million. Loyola valued its cost of acquiring Mundelein at under $6 million in assumption of debt, $7.975 million in "cash outflow" over five years for capital expenditures, and $1.240 million during the "first three years of operation until full value of the merger (emphasis added) is realized", all for a total purchase price, on a present value basis, of $12.8 million.

12. Mundelein had cash flow problems but, based upon the valuation of $65.7 million at a cost of only $12.8 million, there is no support for the conclusion that a financial exigency existed.

13. There is absolutely no evidence in the record that the parties ever contemplated that tenure would be extinguished if Mundelein affiliated with another institution.

14. The parties never agreed that the AAUP published standards (which contain disagreement and contradiction) would abrogate tenure rights upon an affiliation. The AAUP standards, however, contemplated bona fide financial exigency, faculty involvement, and due process as part of any tenure abrogation in theface of an affiliation.

15. The Mundelein Board of Trustees, chaired by Joseph Sullivan,

> intentionally triggered a breach of the loan guarantee covenant knowing it would result in a call for a $4 million loan. The breach was occasioned by borrowing the relatively small amount of $100,000.00 against its endowment in violation of its covenant.The purpose was to pay the current monthly debt at a time when it had other substantial assets. The "breach" precipitated the "crisis" which "justified" the action by Chairman Sullivan, who was already a benefactor of Loyola, entering into negotiations with Loyola, and only Loyola, regarding "ffiliation". Although the initial breach was cured, there occurred a second or subsequent breach, which was not cured.

CONCLUSION

Because there was no provision in the faculty manual and the parties never contemplated the extinguishment of tenure on affiliation, Mundelein had the power to extinguish tenure only through the four methods set forth under their contract, the faculty manual. Defendant Mundelein chose not to declare a financial exigency or otherwise invoke any grounds under the faculty manual to terminate tenure. Defendant's notion that the contradictory committee or association standards of the AAUP somehow relieve them of their obligations under the faculty manual, even though they failed to even attempt to comply with those obligations or the AAUP standards, is not persuasive. Accordingly, the tenure of the plaintiffs continued unless and until plaintiffs did something to waive such tenure rights. Clearly, plaintiffs Gray and Hasty have done nothing to waive their tenure rights. They have steadfastly refused to sign any agreement or to accept any tendered settlement of their tenure rights.

The same cannot be said, however, regarding plaintiff Myers. Rather than reject any offer from Loyola which did not include a tenure position, Myers agreed to a five-year appointment at Loyola. The letter sent by Loyola to Myers prior to her signing the first one year contract with Loyola specifically stated that her appointment would be for five academic years and would not be extended unless Loyola offered a further one-year appointment. The letter stated that if further appointment was offered, Myers *would be considered* for tenure. The letter also stated that Myers' appointment would be subject to the terms and conditions generally applicable to non-tenured faculty. Myers agreed to the five-year appointment with Loyola on these terms. While teaching at Loyola under the five-year appointment Myers requested that Loyola consider her for tenure. In her application for tenure Myers stated that she had been a tenured assistant professor at Mundelein but that she was one of the Mundelein faculty whose tenure was *replaced* with a five year contract.

These actions by Myers are completely inconsistent with a belief that her tenure

with Mundelein was never extinguished. Instead, these actions are consistent with a finding that Myers knowingly relinquished her right to tenure. *See Vaughn v. Speaker*, 126 I11.2d 150, 161, 533 N.E.2d 885 (1988). Myers was placed in a difficult position where she had to choose between giving up her tenure rights and accepting a five year contract or fighting to retain her tenure rights. Myers decided to relinquish her tenure rights and accept a five year employment contract and the benefits that went along with the contract, apparently in the belief that she might eventually receive tenure at Loyola. While Myers was not subsequently granted tenure and may now regret the decision she made, the evidence presented indicates that she waived her right to tenure in 1991 when she entered into the five year employment contract with Loyola which specifically placed her in the position of a non-tenured faculty.

Mundelein is liable for damages to plaintiff Yohma Gray in an amount equal to her annual Mundelein salary as modified by the schedule provided by plaintiffs' witness Goldman through September 30, 1996, less mitigation. Based on plaintiffs exhibits 33, 34 and 92, the Court calculates this amount to be $262,371.00. [1] Plaintiff Hasty is entitled to her annual Mundelein salary modified by the schedule provided byplaintiffs' witness Goldman through September 30, 1996, less mitigation. The Court calculates this amount to be $205,349.00. [2] The plaintiff Judith Myers is not entitled to any recovery.

ENTERED: November 7, 1996

MICHAEL BRENNAN GETTY, CIRCUIT JUDGE

[1]The Court reserves the right to adjust this figure during the continued pendency of thiscase and in the interest of both fairness and judicial economy to provide a suggestedprocedure for "future damages", if any.

[2]Id.