



THE

AFCON

SENTINEL



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Purpose:

To promote academic freedom, defined as intellectual freedom in educational and research contexts. This includes freedoms of belief and expression and access to information and ideas.

MESSAGE FROM THE PRESIDENT—Frank Edler

In my report to the board at our April 13 meeting, I mentioned Dr. Loretta Capeheart, associate professor in the Department of Justice Studies at Northeastern Illinois University (NEIU). She is an example of how faculty in higher education are being targeted by administrations who want to run universities more like corporations rather than on the model of shared governance. In order to suppress faculty criticisms of administrative decisions, some universities have attempted to use the Supreme Court's ruling in *Garcetti v. Ceballos* (2006) as a way of muzzling academic freedom. As Stephen Aby and Dave Witt point out in their article "Negotiating Academic Freedom: A Cautionary Tale" (2012), although *Garcetti* did not directly involve higher education, the decision did assert that "public employees have no right to free speech in their employment" and "privileged the employer or the institution and its rights over those of its employees" (Stephen Aby and Dave Witt, "Negotiating Academic Freedom: A Cautionary Tale," *AAUP Journal of Academic Freedom*, Vol. 3, 2012, 19).

In the Supreme Court case, Richard Ceballos, "a California deputy district attorney," believed that a deputy sheriff had given false statements and he "complained to his supervisors" (Rachel Levinson, "Academic Freedom, Shared Governance, and the First Amendment after *Garcetti v. Ceballos*", Stetson University College of Law, 31st Annual National Conference on Law and Higher Education, February 2011, 15). When he was demoted in retaliation for his claim that the sheriff was making false statements, Ceballos sued because he believed his speech was protected by the First Amendment and that he could not be demoted in retaliation for that speech. The Court ruled that Ceballos's speech was carried out in the course

of his public duties, and, thus, was not protected by the First Amendment (Ibid). The question that immediately arose is whether *Garcetti* was also applicable to faculty members of public colleges and universities. If it did, it would mean any faculty speech critical of administration made in the course of carrying out a faculty member's official duties would similarly not be protected by the First Amendment. This would eliminate for all practical purposes academic freedom in public colleges and universities.

In the 5-4 *Garcetti* decision, Justice Souter's dissent "was especially concerned about the danger in applying the official duties analysis [of public employees] to teachers" because teachers' job responsibilities could be defined in such a broad way that anything they said could be construed as being part of their public duties and thus it would "imperil First Amendment protection of academic freedom in public colleges and universities" (AAUP Amicus Brief to the Seventh Circuit Court of Appeals, No. 11-1473, 6, 10). Although the majority opinion recognized Justice Souter's point, it decided not to rule on the question of whether the analysis done in relation to public employees could apply to "speech related to scholarship or teaching" (Ibid, 10). This left the door open for lower courts to either apply *Garcetti* to the faculty of public colleges and universities or not.

The opportunity to test *Garcetti* may have come sooner than anyone expected in relation to Capeheart. The circumstances of her case actually began in the same year that *Garcetti* was decided. In April, 2006, "Capeheart and a group of students were threatened with arrest for handing out anti-war leaflets in front of Army recruiters at a university jobs fair."

(See **THE PRESIDENT**, page 2)

Upcoming Events

AFCON Board Meetings, 3 months, 3 second Saturdays
Loren Eiseley Library, 1530 Superior, Lincoln, Nebraska; 10 AM

THE PRESIDENT

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(Steve Macek, “Loretta Capeheart’s Battle: Campus Dissent Under Fire,” *Z Magazine*, September 2012). Sharon Hahs, president of NEIU, and other members of the administration such as provost Lawrence Frank and vice president Melvin Terrell apparently were not pleased with students protesting CIA and military recruiters.

A special university panel “composed of faculty and staff members and students” was created to examine the issue of student protests at career fairs. According to James Heggen’s article in *Inside Higher Ed*, Hahs said that she would be open to protesters demonstrating outside the event, but that the university needs a policy that will prevent protesters from disrupting the event itself” (James Heggen, “Speech Restrictions Draw Fire,” *Inside Higher Ed*, December 23, 2008). Prior to the establishment of the special university panel, the NEIU administration had attempted unsuccessfully to establish a “free speech zone” that would limit protest to that particular zone and nowhere else. Capeheart also in 2006 had not endeared herself to

NEIU administration, specifically, provost Lawrence Frank, when she testified before the state legislature’s Latino Caucus “about the need for more Latino faculty” which “directly contradicted the position advocated by then-provost Lawrence Frank” (Steve Macek, “Loretta Capeheart’s Battle,” *Z Magazine*, September 2012).

At the end of February, 2007, as the panel was working on a protest policy, Matthew Larson and Kenneth Barrios, two students protesting the CIA on campus who were members of the Campus Anti-War Network, were arrested by campus police and “charged with battery” (Heggen, *Inside Higher Ed*, Dec. 23, 2008). Although the two students were also members of the campus Socialist Club advised by Capeheart, “the protest was not organized or sponsored by the Socialist Club” nor was Capeheart present at the protest (AAUP amicus brief to the Seventh Circuit Court of Appeals in support of Capeheart, p. 2). The two students were blocked from entering the school sponsored meeting with the CIA. Ms. Robin Wagner,

Chief Clerk of the Placement Office, “physically tried to prevent the students from getting into the meeting” claiming that the two students had not made reservations, but the announcements about the meeting never mentioned the need for making reservations. When the two students pushed into the meeting, the campus police arrested them. Ms. Wagner claimed “that Larson hit her” but “four other witnesses there said Matt Larson never touched Ms. Wagner” (Marxist thread, “Antiwar student banned from CIA recruitment meeting,” March 1, 2007).

According to Rachel Cohen of the Socialistworker.org, the student government at NEIU retaliated against the Socialist Club because of the incident: “the Republican-led Student Government Association (SGA) had moved to decertify the club,” but when the SGA’s rules and charter committee met with Socialist Club president Keeanga Taylor, the SGA was persuaded “to demand that the administration make public its investigation of the issue and to interview the students involved—which NEIU officials
(See **The President** page 5)

MARCH 9, 2013—

Present: Peggy Adair, Dwayne Ball, Nancy Comer, Frank Edler, Bob Haller, Laurie Thomas Lee, Lora Leibbrandt, Cathi McMurtry, David Moshman, Linda Parker, Rod Wagner

MINUTES: Minutes of the AFCON board meeting held on February 9, 2013, were approved upon a motion by Moshman, second by Ball.

TREASURER’S REPORT: McMurtry presented the treasurer’s report dated March 8, 2013, with a balance on hand of \$2,982.47. The treasurer’s report will be filed for audit.

PRESIDENT’S REPORT: Edler shared with the board five articles including stories on the Edwin Mellen Press lawsuit against a university librarian; academic freedom and free speech issues in the United Arab Emirates; an Oklahoma education law that prevents teachers from downgrading students’ work if the work involves faith-based theories; students at West Liberty University barred from using Fox News as a source for a class assignment on politics; and UNL signing a contract to do research for the U.S. military.

Summaries of AFCON Board of Directors’

MEMBERSHIP: Moshman reported on his research of the AFCON Constitution and a possible new category for long-time members. Moshman reported the AFCON board can include anyone they want to in email communications, and also can send the *Sentinel* to anyone. Moshman recommended that AFCON take no action to create a formal category of life membership or other long-term designation. The board concurred.

LEGISLATION: Moshman reported on LB540, a bill introduced by Senator Ernie Chambers that forbids the Nebraska Board of Education from requiring students and/or teachers to recite the pledge of allegiance. Moshman has been communicating with Senator Chambers, who plans to file an amendment that will incorporate Moshman’s suggestions for improving the bill. Moshman will testify on behalf of ACLU-Nebraska and AFCON at the public hearing on LB540 that will be held on Monday, March 18, 2013.

Adair presented to the board an updated list of the status of legislative bills

that have some connection with academic freedom. (LB540, LB547, LB619, LB512, LB363 and LB485)

ANNUAL MEETING: Moshman reported ReLeah Lent, co-author of “*Keep Them Reading: An Anti-Censorship Handbook for Educators*,” is willing and available to come to Nebraska either September 21 or September 28. Moshman also reported he has talked with Clark Kolterman of NELAC about a possible co-sponsorship, to help defray costs. The board discussed other potential partnerships, scheduling ideas, possible conflict with Plum Creek (September 28), and possible tie-in with Banned Book Week (September 22-28). A motion was made by Moshman, second by Comer, to invite ReLeah Lent to be our speaker for the 2013 AFCON annual
(See **Minutes**, page 3)

Summaries of AFCON Board of Directors' Meetings (Continued from Page 2)

meeting, either September 21 or 28, with the main topic of the annual meeting to be censorship. Motion carried by voice vote. The five-member "Annual Meeting/Lent Committee" (appointed by Edler via email) will continue to work on details and will report back to the AFCON board at the April meeting.

Parker distributed a draft list of organizations to contact to invite to the AFCON annual meeting.

QUOTE OF THE MONTH: "For sex, see librarian." Ask Parker for details.

NELAC JOURNAL: Clark Kolterman has received eight articles for the next issue of the *Journal*. Deadline for articles has been extended to March 16. AFCON members are encouraged to submit articles having to do with the subject of censorship, and/or the history and activities of AFCON.

INTERNET FILTERS: Parker reported on her research regarding internet filters. Parker shared with the board documents on the Children's Internet Protection Act (CIPA), a legal interpretation of CIPA, websites regarding internet filters, and discussion points on internet filtering in Nebraska. The board agreed we should gather more information on the types of filters used in school districts and in public libraries. The board agreed the issue of internet filters will be a possible topic for the 2014 AFCON annual meeting.

MEMBERSHIP ORGANIZATION REPORTS:

UNL Faculty Senate: Lee reported the faculty senate remains concerned about the "KASE" system software that is being installed on the UNL campus. The system was chosen without faculty input, and the system can access everything on faculty computers, without the knowledge or consent of faculty. Lee will draft a letter from AFCON in support of the UNL Faculty Senate's efforts to protect the academic freedom of faculty.

The next meeting of the **AFCON BOARD OF DIRECTORS** will be **Saturday, April 13, 2013**, at Eiseley Library, Lincoln, Nebraska.

VISIT OUR NEW WEBSITE!
www.academicfreedomnebraska.org

APRIL 13, 2013—

Present: Peggy Adair, Dwayne Ball, Frank Edler, Bob Haller, Laurie Thomas Lee, Lora Leibrandt, Cathi McMurtry,

David Moshman, Rod Wagner.

MINUTES: Minutes of the AFCON board meeting held on March 9, 2013, were approved upon a motion by Moshman, second by Wagner, and a voice vote.

TREASURER'S REPORT: McMurtry presented the treasurer's report dated April 12, 2013, with a balance on hand of \$3,125.89. The treasurer's report will be filed for audit.

PRESIDENT'S REPORT: Edler shared several articles with the Board regarding recent court decisions pertinent to academic freedom. Edler and the Board congratulated Lee for her selection as this year's recipient of the James A. Lake Academic Freedom Award presented by the UNL Faculty Senate. Moshman will write an article about Lee's award for the next issue of the *Sentinel*. Moshman pointed out this year's Lake Award selection committee is made up entirely of Johns. See Moshman for details.

LEGISLATION: Adair reported LB363 is on final reading. This bill was introduced to contain the cost to the public for copying public records. The bill has had a number of amendments and Adair will present the final version of the bill at the May AFCON board meeting. Adair reported none of the other legislative bills AFCON is following has moved out of committee. (The bills are LB540, LB547, LB619, LB512 and LB485.)

ANNUAL MEETING/ReLEAH LENT: Moshman reported ReLeah Lent, author of *Keep them Reading*, has agreed to come to Nebraska to be the keynote speaker at AFCON's annual meeting on September 28. NELAC (Nebraska English Language Arts Council) has agreed to co-sponsor the event. The National Council of Teachers of English (NCTE), of which NELAC is an affiliate, will pay for Ms. Lent's airfare since she is on their approved list of NCTE speakers. AFCON will pay Ms. Lent's meal and lodging expenses, and will offer an honorarium.

The board discussed other possible co-sponsors, such as ACLU-Nebraska, Lincoln Public Schools, the Nebraska Library Association, and Moshman's College. The board also discussed dollar amounts for the honorarium and co-sponsorships but did not make final decisions.

An Event Committee has been cobbled together to work out the details of Ms. Lent's Nebraska adventure. Members of the Event Committee are: Laurie Lee, Lora Leibrandt, Bob Haller, Dave Moshman and Rod Wagner. The AFCON board expressed their desire to include Nancy Comer on the

committee if she is willing, and to designate Clark Kolterman as the NELAC contact person if he is willing.

McMurtry noted annual meeting registration forms need to include the city of the registrant. Last year the forms only asked for zip codes, leaving the treasurer to interpolate, interpret, and exasperate.

ELECTION COMMITTEE: Lee reported, "Who needs a vice president?" Moshman noted sotto voce he will possibly be available in 2014 to preside over the AFCON board.

2013 AFCON ACADEMIC FREEDOM AWARDS: Edler suggested ReLeah Lent as a recipient of the AFCON Academic Freedom Award for 2013. Bob Haller moved to nominate Lent, with a second by McMurtry. Motion carried by voice vote. Edler suggested Peggy Adair as a recipient of the AFCON Academic Freedom Award for 2013. McMurtry moved to nominate Adair, with a second by Edler. Motion carried by voice vote.

MEMBERSHIP ORGANIZATION REPORTS:

Nebraska Center for the Book: Wagner reported the Nebraska Book Festival was held at the UNO Thompson Alumni Center on April 5-6.

AAUP: Haller reported Dick Voeltz still has an AAUP checkbook and used it to pay this year's AFCON dues, although Julia Schleck reports that, since there is no local AAUP Chapter, there is no account to use for this purpose. Haller further reported a fairly healthy Legal Defense Fund exists at the no-local-Chapter, for which Voeltz also has a checkbook. Haller will find out if the State-Conference AAUP plans to renew its AFCON membership. All that, and Haller also provided the Board with very excellent blueberry coffee cake.

Nebraska State Library Association: Leibrandt reported the Association has been holding virtual meetings but will hold an actual human meeting in Papillion in April.

UNL Faculty Senate: Lee reported concerns about "KACE" system software continue.

NEXT MEETING: AFCON BOARD OF DIRECTORS; Saturday, May 11, 2013, at Eiseley Library, Lincoln, Nebraska.

VISIT OUR NEW WEBSITE!
www.academicfreedomnebraska.org

**MAY 11,
2013**

Present: Peggy Adair, Nancy Comer, Frank Edler, Bob Haller, Laurie Thomas Lee, Cathi McMurtry, David Moshman, Linda Parker, Rod Wagner.

MINUTES: Minutes of the AFCON board meeting held on April 13, 2013, were approved as amended upon a motion by Moshman, second by Parker, and a voice vote.

TREASURER'S REPORT: McMurtry presented the treasurer's report dated May 7, 2013, with a balance on hand of \$3,018.59. The treasurer's report will be filed for audit.

PRESIDENT'S REPORT: Edler shared an article regarding Florida Polytechnic University. The University administration plans to offer multi-year contracts to prospective faculty rather than tenure tracks. (see: www.insidehighered.com/print/news/2013/05/09/)

Edler also voiced concerns about the University of Montana-Missoula being contacted by the Office of Civil Rights within the Department of Education. Policy Coordinator Moshman also discussed this issue. An Office of Civil Rights letter to the University re-defined sexual harassment as occurring whenever a person takes offense; whether or not the perceived offense was defined, intended, fleeting, ongoing, spoken in English or Pig Latin. Moshman made a motion to send an official letter from AFCON and/or take other appropriate action in opposition to the Office of Civil Rights' new definition of sexual harassment. The motion was seconded by Adair and passed on a voice vote. Moshman will draft a letter and will work with Edler to take action. The Board discussed the negative consequences of such a subjective definition of sexual harassment, and also discussed sending a copy of the AFCON policy on sexual harassment to pertinent parties.

LEGISLATION: Adair reported LB363, which will better protect the public's right to view and copy public records, remains on final reading. Adair reported none of the other legislative bills AFCON is following has moved out of committee. (The bills are LB540, LB547, LB619, LB512 and LB485.)

ANNUAL MEETING/ReLEAH LENT: Lee reported she reserved a meeting room at the new Haymarket-area Courtyard by Marriott for the September 28 annual meeting. Moshman made a motion, second by Haller, to confirm the Courtyard by Marriott as the venue for the AFCON annual meeting. Motion carried by voice vote.

Moshman will work on a save-the-date flier that AFCON board members can distribute to their organizations, and Moshman will send a copy of the flier to Tom Black to be placed in the next issue of the *Sentinel*.

Lee will email menu selections to the AFCON board for their review.

Edler will check into getting a podium-size AFCON sign made that we can use for the annual meeting and future events.

Lee reported ACLU Nebraska does want to co-sponsor or otherwise donate money to ReLeah Lent's appearance as keynote speaker on September 28.

The Board discussed working with Indigo Bridge bookstore to do a possible Banned Book Week event with ReLeah Lent on Friday, September 27, or on Saturday, September 28 after the AFCON annual meeting. Edler will contact Indigo Bridge. Members of the Event Committee are: Laurie Lee, Lora Leibbrandt, Bob Haller, Dave Moshman Rod Wagner and Nancy Comer.

JUNE AFCON MEETING: Due to the large number of board members who have other obligations on June 8, a motion was made by Comer, second by Wagner, to cancel the June 8 AFCON board meeting. Motion carried on a voice vote. Adair will send out a notice to all AFCON board members about the cancellation.

PRESIDENT-ELECT: Edler appointed Dave Moshman to fill the position of president-elect. Congrats, Dave!

NOMINATING COMMITTEE: The AFCON board will appoint a nominating committee for 2014 elections at the July 13, 2013 board meeting.

WEBSITE: Edler discussed the need to affirm who is doing what on the website, who will update the website, and other website issues. Edler will contact Leibbrandt, once she recovers from (ugh!) bronchitis to see how she wants to proceed.

SENTINEL: Articles for the next issue of the *Sentinel* are due by **Monday**,

May 27, 2013.

NATIONAL ISSUES: Edler expressed his thoughts on linking AFCON more closely with national issues such as the recent Montana University versus the Office of Civil Rights event. Parker suggested we use the AFCON website as a networking device, incorporating RSS feeds and/or links to other organizations. Parker also suggested adding a "suggested reads" button that links to books pertinent to current Academic Freedom issues.

MEMBERSHIP ORGANIZATION REPORTS: **Nebraska Center for the Book:** Wagner reported the Center had a peaceful and uneventful month.

UNL Faculty Senate: Lee reported concerns about "KACE" system software continue, and continue, and...

UNO Faculty Senate: Parker reported the UNO Faculty Senate had on their agenda a resolution to not renew their membership in AFCON. Parker used her persuasive public speaking skills to outline the many benefits of AFCON membership, and was assisted in her oration by Carol Mitchell, a former AFCON board member. Parker was able to convince the Senate to amend the resolution to *continue*

AFCON membership, which resolution was soundly approved. The AFCON Board congratulated Parker for her heroic effort in defense of academic freedom for all. The Board discussed the need to assure both UNL and UNO Faculty Senates receive electronic copies of the *Sentinel*, to keep them up-to-date with the many fine activities they support through their annual dues. Parker, Lee, and McMurtry will coordinate efforts to assure the *Sentinel* goes to the appropriate addresses.

The next meeting of the **AFCON BOARD OF DIRECTORS** will be **Saturday, July 13, 2013**, at Eiseley Library, Lincoln, Nebraska.

NOTE

THE JUNE 8, 2013, BOARD MEETING of the Academic Freedom Coalition of Nebraska IS CANCELLED

THE PRESIDENT

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still have yet to do” (Rachel Cohen, “NEIU Witchhunt Collapses,” Socialist-worker.org, March 30, 2007). Capeheart was concerned about the two students arrested by the campus police because in her own words ““The campus cops said they were going to turn them over to the Chicago Police Department” (Steve Macek, “Loretta Capeheart’s Battle,” Z Magazine, September 2012). She called and sent emails to administrators; she solicited “support from the faculty union, and, along with other members of the Justice Studies faculty,” sent an email to the university community “expressing deep concern about the arrests” (AAUP, amicus brief, p.2). As it turned out, the students were turned over to the Chicago Police Department and later released.

In the aftermath of her advocacy on behalf of the two arrested students, NEIU administration began retaliating. On March 12, 2007, approximately two weeks after the arrest of the two students, Capeheart, an elected member of the Faculty Council for Student Affairs, voiced concerns at a council meeting about how campus police were being used against students who were protesting peacefully. NEIU vice president Melvin Terrell who also attended the meeting “stated that he had received a report from campus police that Capeheart had been stalking a student” (Steve Macek, “Loretta Capeheart’s Battle,” Z Magazine, September 2012). This was shocking not only because the allegation was completely false and thus slanderous, but also because it violated the privacy of an official complaint to the campus police, a complaint which should never have been made public in the first place. As it turned out, the student, “a student aide working in Terrell’s office,” not only misidentified Capeheart but also never stated that she was stalking (Ibid).

Capeheart took up Terrell’s slanderous accusation with NEIU’s Affirmative Action Office which took no action because it was not a case of discrimination and did not involve sexual harassment; nevertheless, the office did make a statement that “Terrell did not act ap-

propriately” by making public the student complaint at a faculty meeting [Capeheart v. Hahs, No. 08 CV 1423 (2011)]. Capeheart also pursued the university’s grievance procedure in the fall of 2007 “in order to get an apology from the Administration for Terrell’s slanderous statements,” but Terrell never apologized publicly nor did he retract his assertions [Steve Macek, “Loretta Capeheart’s Battle,” Z Magazine, September 2012)].

Having exhausted all possible avenues for redress within the university, Capeheart in March of 2008 went to the district federal court to file a defamation suit against Terrell. Besides Terrell, other NEIU administrators (Sharon K. Hahs and Lawrence P. Frank) were also named for retaliating against her use of free speech in advocating for the two arrested students, for her anti-war protests, and for her support of the Socialist Club. Capeheart claimed she was being retaliated against because although she was elected as chair of the Department of Justice Studies by members of the department, Lawrence Frank, the provost at the time, “announced that he had filled the position with someone from outside the department instead” [Capeheart v. Hahs, No. 08 CV 1423 (2008)]. She was also denied the position of department coordinator as well as a 2007 Faculty Excellence Award (Ibid).

Judge Blanche Manning, the district federal judge, ruled on October 21, 2008, denying Capeheart’s motion for summary judgment on the basis that the Eleventh Amendment prevented anyone from suing a state agency (NEIU) in a federal court. One month later, Judge Manning vacated her own decision and allowed Capeheart’s lawsuit to continue. This put the suit into what is called “discovery” described by Capeheart’s lawyer, Thomas Rosenwein, as “that part of a lawsuit where both sides get to find out the other’s position by posing written questions, requesting documents, and taking depositions....” (email from Rosenwein to Edler, April 22, 2013, 5:01 PM).

In the fall of 2008, President Hahs

revealed her new policy regarding student protests based on the recommendations of the special university panel created in 2006 to examine the issue. The title of the policy was monstrous – Policy Concerning Demonstrations on Campus, Distribution and Display of Visual Communications and Solicitation of Signatures on Campus (shortened to DDS). According to Z Magazine reporter Steve Macek, the policy was so draconian that it “would have required anyone to planning to hold a demonstration, distribute literature, put up posters or gather signatures on a petition, to get permission from the administration at least one week in advance....” This included the submission of any and all visual material to be used at the event from posters to protest signs. In addition, any outdoor demonstrations had a curfew of sunset, and amplification systems could only be used on “Tuesday and Thursday between 1:40 PM and 2:55 PM.” Faculty opposition was so strong that Hahs had to back away from instituting the proposal (Steve Macek, “Loretta Capeheart’s Battle,” Z Magazine, September 2012).

In 2009, NEIU administration decided to change lawyers from the State Attorney General who was providing their defense to a private, Chicago-based law firm Franczek Radelet PC known to be high-powered, expensive, and “notoriously anti-union” (Ibid, see also the website “Justice for Loretta Capeheart” which contains the piece “NEIU Loses *Garcetti* Decision in Federal Court, demand \$88K payment in state court”). Radelet pursued a defense based on the 2006 Supreme Court *Garcetti* decision. The defendants (the university administrators named in the case) contended that Capeheart’s speech as an employee of a public university was not protected by the First Amendment because all her speech “related to her responsibilities as a faculty member, researcher, and club advisor” [Capeheart v. Hahs, No. 08 CV 1423 (2011)].

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In her ruling on February 14, 2011, Judge Manning agreed with the defendants that *Garcetti* applied to Capeheart. According to the ruling, her “involvement in protests over recruiting and her advocacy on behalf of student protesters were part of her role as advisor of the Socialist Club” and, thus, as a public employee in the process of carrying out her official duties, Capeheart was not protected by the First Amendment [*Capeheart v. Hahs*, No. 08 CV 1423 (2011)]. In other words, NEIU was perfectly within its rights to retaliate against her speech by denying her the chair of her department and the faculty excellence award.

Although Judge Manning mentioned the fact that Capeheart cited Justice Souter’s dissent in *Garcetti*, Manning failed even to acknowledge the footnote that the majority opinion had made in relation to academic freedom. As Joan DeFattore has indicated, the majority responded to Justice Souter’s deep concern that *Garcetti* could “imperil First Amendment protection of academic freedom in public colleges and universities” by recognizing that “academic scholarship or classroom instruction” might not fit with what the Court considered to be “customary employee-speech jurisprudence” (Joan DeFattore, “Defending Academic Freedom in the Age of *Garcetti*,” *Academe*, Vol. 97, No. 1, p. 1). In *Garcetti*, however, the Court decided not to rule on that issue: “We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching” (Ibid).

Judge Manning after noting Justice Souter’s dissent, cited as evidence the fact that “since *Garcetti*, courts have routinely held that even the speech of faculty members of public universities is not protected when made pursuant to their professional duties” [*Capeheart v. Hahs*, No. 08 CV 1423 (2011)]. She cited *Abcarian v. McDonald* (617 F. 3d. 931.937, 7th Cir. 2010) and *Gorum v. Sessums* (561 F.3d.179, 3rd Cir.2009). What Judge Manning failed to acknowledge was the fact that courts were

also routinely invoking the reservation *Garcetti* seemed to allow for scholarship and teaching such as *Sheldon v. Dhillon*, 2009 U.S. Dist. LEXIS 110275 (N.D. Cal. Nov.25,2009) and *Kerr v. Hurd*, 694 F.Supp.2d.817(S. D. Ohio 2010). (For these cases, see Rachel Levinson, “Academic Freedom, Shared Governance, and the First Amendment after *Garcetti v. Ceballos*,” *Stetson University College of Law*, 31st Annual National Conference on Law and Higher Education, February 2011, pp. 16-18, 20-21.)

Capeheart appealed the district federal court ruling to the Seventh Circuit Federal Court of Appeals. The American Association of University Professors sent an amicus curiae brief to the Seventh Circuit Court in support of her appeal and provided \$5,000 for legal funds. Oral arguments on the appeal began on December 8, 2011 (Peter N. Kirstein, “Professor Loretta Capeheart Resists the New McCarthyism at Northeast Illinois University,” November 9, 2011). During the previous month, the faculty at NEIU held a vote of no confidence in President Sharon Hahs and “68 percent of the faculty voted no confidence” (Steve Macek, “Loretta Capeheart’s Battle,” *Z Magazine*, September 2012). In addition, the Fourth Circuit Federal Court of Appeals provided some good news in early April of 2011 when it ruled unanimously that *Garcetti* in the case of *Adams v. University of North Carolina-Wilmington* did not apply to the speech of Michael S. Adams, associate professor of criminology (Peter Schmidt, “Appeals Court Hands Big Win to Advocates of Free Faculty Speech in Ruling on Pundit-Professor,” *The Chronicle of Higher Education*, April 6, 2011).

In March, 2011, Capeheart continued to pursue her defamation suit against Terrell by suing in state court. NEIU lawyers files a counterclaim “that demanded that Prof. Capeheart’s defamation case be dismissed for violating Terrell’s (and thus NEIU’s) ‘right to participate in government,’ under the protection of the Citizen Participation Act (CPA)” (website, “Justice for Loretta Capeheart” which

contains the piece “NEIU Loses *Garcetti* Decision in Federal Court, demand \$88K payment in state court”). The purpose of the CPA was to safeguard the speech of individual citizens from being muzzled by “lawsuits frivolously brought by corporations and powerful institutions” (Ibid). NEIU’s counterclaim turned the intent of the CPA upside down by making Capeheart the powerful interest trying to muzzle vice president (now retired) Terrell.

On June 19, 2012, state court Judge Randye Kogan in a stunning decision ruled in favor of NEIU and granted Terrell total immunity against Capeheart’s defamation claim and made her “Liable to pay NEIU’s legal expenses, estimated at some \$88,000” (Steve Macek, “Loretta Capeheart’s Battle,” *Z Magazine*, September 2012). The perversion of the CPA here is difficult to fathom: the state court allowed the CPA to be twisted into an instrument to help a powerful institution at the expense of an individual citizen it was intended to protect. Judge Kogan reduced the legal fees that Capeheart had to pay to \$10,000, but Capeheart found the decision so egregious that she filed an appeal with the State Court of Appeals. NEIU then cross-appealed demanding Capeheart pay the full \$88,000 again (website “Justice for Loretta Capeheart” which contains the piece “NEIU Loses *Garcetti* Decision in Federal Court, demand \$88K payment in state court”).

Not long after the Kogan decision, the Seventh Circuit Court of Appeals in August of 2012 ruled on Capeheart’s appeal of Judge Manning’s decision. The happy part of the appeals court decision is that it vacated Judge Manning’s decision that *Garcetti* applied to Capeheart. This now meant that two federal courts of appeal, the Fourth and the Seventh, had ruled that *Garcetti* did not apply to the speech of faculty members in the performance of carrying out their duties at public colleges and universities [*Capeheart v. Terrell*, No-11-1473 (7th Cir. 2012)].

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THE PRESIDENT

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Regarding the two points that Capeheart wanted the appeals court to address, namely, that (1) she wanted Hahs to refrain from instituting her protest policy, and (2) she wanted NEIU to refrain from “retaliating against her for her speech,” the appeals court decided not to rule on (1) because Hahs had refrained from instituting her protest policy. In relation to the second issue involving retaliation, the court found that two incidents (denying her the chair of the department and the faculty excellence award) were not sufficient to establish a pattern of retaliation and thus declared her case to be “unripe” although she still had the right to sue in the future if further incidents of retaliation could be demonstrated. Never-

theless, the justices recognized “that Capeheart’s retaliation claims are serious” and that their intention was “not to belittle them” [Capeheart v. Terrell, No-11-1473 (7th Cir. 2012)]. Capeheart is pursuing her case in the State Court of Appeals in order to overturn Judge Kogan’s ruling. A decision is expected sometime in the fall or winter of 2013.

Capeheart has been at the forefront of the legal battles regarding the use of *Garcetti* to restrict academic freedom. It is difficult imagining anyone sustaining a legal fight for more than five years, but she has courageously stuck it out. She deserves whatever help we are able to muster for her!

Laurie Thomas Lee winner of the James A. Lake Academic Freedom Award



L to R: Robert Haller, Award Winner Laurie Thomas Lee, David Moshman

I want to thank the Faculty Senate and the James A. Lake Academic Freedom Award Committee for this honor. I also want to thank those who nominated me and supported my nomination, such as Dave Moshman, Dwayne Ball, and Bob Haller--all of whom are past recipients of this award. This is a tremendous honor to be among you. I also want to thank Mike Goff for his support in this nomination, and friends, family and other colleagues, including John Bender, who is also a former recipient of this award, which speaks to the importance of academic freedom in our College of Journalism and Mass Communications where we have often discussed issues of academic freedom facing faculty and students.

I also owe a great amount of gratitude to the Academic Freedom Coalition of Nebraska. I'm proud to be our Faculty Senate representative to AFCON for 15 years (and feel a bit selfish for holding on to that post so long). I haven't been able to let go of the cause of academic freedom, having served as President twice.

But it's entirely due to the guidance and encouragement of everyone in AFCON--Bob Haller, Dwayne Ball, Dave Moshman and others--who have been role models, carrying the torch for academic freedom.

I am especially indebted to Dave Moshman, who is the embodiment of academic freedom. I must plug his book *Liberty & Learning: Academic Freedom of Teachers and Students*. He taught me the meaning of academic freedom, as intellectual freedom in academic contexts, consisting of five basic principles we must respect:

- 1) Freedom of belief and identity
- 2) Expression and discussion
- 3) Inquiry
- 4) Freedom from indoctrination
- 5) Rights of equality, privacy, and due process

Because of Dave, I also joined the board of ACLU-Nebraska and owe them my sincere gratitude as well. From both AFCON and ACLU-Nebraska, I must tell you that academic freedom issues are all around us in this state--particularly affecting those in K-12 institutions, which lack many of the academic freedoms common on a university campus.

Let me give you an idea of some of the types of cases where

I've seen ACLU-Nebraska intervene with letters, meetings, and in some cases, lawsuits:

1. A student at Millard High had his fliers confiscated because he was expressing his personal opinion about war. If he brought them back, he'd face suspension.

2. Students at Grand Island High School were told they couldn't distribute fliers about the National Day of Silence in honor of GLBT persons silenced in society. The school said it was a "safety issue" to allow students to bring a box into the school to carry the fliers.

3. A Nebraska senior chosen as one of the commencement speakers was threatened with having her diploma withheld if she went ahead with her speech, using a word the school considered offensive, although typical on prime-time television.

And despite the famous *Tinker v. Des Moines* case dealing with black armbands in schools protesting the war, students still face dress code issues...

4. Two high school students from Scottsbluff had an aunt with breast cancer and wanted to support her with a t-shirt and bracelet with the phrase "I Heart Boobies" on them. The message was part of a national campaign to raise awareness of breast cancer, but the students were told to turn the shirts inside out or face suspension.

(See **Laurie Thomas Lee** page 9)

Ernie Chambers: Not Pledging Allegiance

David Moshman

Nebraska's Defender of the Downtrodden is back.

That's not quite an official title but it's a widely recognized one. State Senator Ernie Chambers has been defending downtrodden Nebraskans against racism, sexism, homophobia, the death penalty, and government establishment of religion since he was elected to the legislature in 1970.

Then known as an outspoken Omaha civil rights activist, Chambers was perceived in the legislature and throughout the state as an angry and dangerous young black man. And for defenders of the status quo he was certainly that. But his agenda turned out to be far broader than anyone expected.

After 38 years of defending the downtrodden, Chambers was forced out of the legislature after the 2008 session by newly established term limits. Four years later, however, he became eligible to run again and was re-elected to his old seat. As of January 2013, Ernie is back.

And what's on his mind now? In 2012 the Nebraska legislature declined to pass a bill requiring a daily pledge of allegiance to the U.S. flag in all public elementary and secondary schools. The State Board of Education responded by passing a new rule requiring that students be led in such a pledge.

Even among those who oppose mandatory pledges, many consider this a relatively minor matter. But Chambers is a man who appreciates children and takes them seriously. His conception of the downtrodden includes students coerced into going along with a pledge they don't wish to say in order to avoid bullying from peers for their nonconformity.

Upon his return to the legislature,

Senator Chambers introduced a bill to ban the State Board from requiring pledges of allegiance. On March 18, he presented and defended his bill before the legislature's education committee. The United States, he argued, is not a nation of liberty and justice for all, and no one should be compelled to say that it is.

The first testimony in support of the bill came from patriotic atheists. They would happily join the pledge, they said, if it didn't claim that the United States exists "under God."

Then it was my turn. Supporting the bill as a Board member of both ACLU Nebraska and the Academic Freedom Coalition of Nebraska, I sought to draw the committee's attention to the general issue of compulsory pledges.

Imagine Nebraska in 2030. There is still a State Board of Education, I proposed, but the political tides have turned. The Board decides to replace the traditional pledge of allegiance to the flag of the United States with the following:

I pledge allegiance to the flag of the United Nations (of earth), and to the organization for which it stands, one world, green forever, indivisible, with liberty and justice for oppressed people everywhere.

Two centuries later there is still a State of Nebraska with a State Board of Education. Updating to the 23rd century, the State Board replaces the United Nations pledge with this:

I pledge allegiance to the flag of the United Federation of Planets, and to the con-

federation for which it stands, one galaxy, stars abounding, vast invisible, seeking out new life and new civilizations.

Of course there are many more possible pledges to many more flags, objects, groups, causes, and ideals. We may differ, and so may those who follow us, as to which pledge we like best. But we should all agree, I suggested to the committee, that we don't want the State Board of Education requiring that all students be led in any of them.

Nebraska students must learn about many things, including the United States and its flag. But learning about something is not the same thing as pledging allegiance to it. Leading children in oaths and pledges, I argued, is indoctrination, not education.

The State Board of Education should have no power to require that students be led in oaths or pledges of any sort to anyone or anything. I asked the committee to keep in mind the State Board of the future that wants all students led in a pledge of allegiance to the United Nations or the United Federation of Planets.

The only opposition came from veterans who supported the State Board's mandate. Students, they maintained, should pledge their allegiance to the flag and nation for which so many fought and died.

It remains to be seen what the education committee will do. But they can be sure Senator Chambers is watching.

David Moshman is policy coordinator and president-elect of AFCON. This article originally appeared in The Huffington Post on April 3, 2013. The bill remains in committee.

Laurie Thomas Lee continued from page 7.

And in a related case close to my heart ...

5. More than two dozen students were suspended at Millard South for wearing t-shirts that said "RIP Julius." Julius Robinson was a classmate who was the victim of a gang shooting. His close friend Dan Kuhr made t-shirts and other items to honor his friend and raise money to cover funeral expenses. School officials argued that "RIP" was a gang term and even a wristband with only the name of Julius on it was a danger to the security of the school. This went to court and the students hoped to remove the suspensions from their records, but the students lost. I met the Kuhr family and admire them for their courage in fighting for what they believed in. It was a great lesson. But in this day and age, security may trump academic freedom

In AFCON we have also observed, intervened in, and even encouraged legislation to address academic freedom matters across the state. For example:

1. A journalism adviser from Bellevue was reassigned and then resigned after a political cartoon ran in the paper that depicted the school systems in a tug of war over money. The administration was upset that students were allowed to project a political opinion.

2. A journalism instructor from a high school here in Lincoln was reassigned after being told that student newspapers are meant to be a "public relations tool for the school."

3. An Omaha high school stopped production of a school play after a parent complained about the content and language of the play that examined racism in the 1940s and used the "n" word.

4. A journalism teacher from Bellevue was told their school paper would require prior review because the school didn't like articles about homosexuality and teen pregnancy. The teacher was told that the articles violated the school's policy against discussing "biology" in the student newspaper.

5. A math teacher from small town was fired after refusing to raise the grade of the principal's daughter from a B to an A in math. The teacher refused and the principal decided to turn all grades in the course to P/NP.

These cases and many more show how many students in Nebraska are growing up in a world where academic freedom does not always exist. These students then come to UNL where they unfortunately may expect the same.

Thankfully, academic freedom at UNL is not in crisis.

Sure, we've had our issues, with outside and inside pressures affecting research and teaching. These issues include:

- * The purpose of tenure, which is to protect academic freedom
- * Rights of non-tenure track professors
- * Fetal tissue medical research
- * Rights of students against indoctrination by professors in the classroom
- * Rights of faculty to determine the curriculum.

This was an area I wrote about in an issue of the AFCON Sentinel last year. In this case, faculty-not administrators-are hired on the basis of their expertise in the field and must be allowed to exercise that judgment when it comes to how a class is taught, its content, etc., consistent with their professional expertise. That is a matter of academic freedom.

Well, I know we didn't weather one academic freedom crisis so well when faced with disinviting a former, radical Vietnam War protester, Bill Ayers, as a speaker. But I know the Faculty Senate was very concerned about this incident and its effect on academic freedom.

I applaud members of the Faculty Senate and its Executive Committee for continuing to be a watchdog for academic freedom and looking out for our interests. I know, because I have been watching on behalf of AFCON.

I am pleased, for example, that they have recently considered academic freedom when dealing with the introduction of the KACE system, which is a software control program that can access faculty computers without their consent or knowledge. They have been asking questions about how this software might infringe academic freedom, potentially interfering with the freedom to conduct health or defense-related research that must remain confidential, or the freedom to discuss and debate matters in private.

Because of the attention and diligence given to academic freedom by our Senate members as well as AFCON, ACLU-Nebraska and other groups-such as the AAUP-we can be assured that academic freedom will not go unprotected.

I am proud to work along side all of you in ensuring academic freedom remains an important value and right in our state, our community, and at our university.

Thank you for that opportunity, and thank you all for this award.

Save the Date

Saturday, Sept. 28, 2013
(end of Banned Books Week)

Author and intellectual freedom activist ReLeah Lent will be the keynote speaker at the annual meeting of the Academic Freedom Coalition of Nebraska (AFCON), co-sponsored by The Nebraska English Language Arts Council (NELAC) and ACLU Nebraska. Lent has written extensively about literacy, adolescents, and secondary education, including the crucial role of academic freedom for teachers and students. Among her other books, she is the co-author, with Gloria Pipkin, of *At the Schoolhouse Gate: Lessons in Intellectual Freedom* (Heinemann, 2002) and *Keep Them Reading: An Anti-Censorship Handbook for Educators* (Teachers College Press, 2013)

The meeting will take place from 10:00 to 1:30 at the new Courtyard by Marriott in Lincoln's Haymarket area. In addition to the keynote address and subsequent discussion, it will include academic freedom awards and lunch. Registration information will be posted on the AFCON website in late July and distributed after that to all organizational and individual members of AFCON. For further information email David Moshman at dmoshman1@unl.edu.

Links

About AFCON: <http://www.academicfreedomnebraska.org/>

About ReLeah Lent: <http://releahlent.com/>

About *Keep Them Reading*: http://www.huffingtonpost.com/david-moshman/an-anticensorship-handbook_b_2594136.html

AFCON SPEAKER'S BUREAU (As of December 2007)

Peggy Adair: "Banned Books, Black Arm-bands, and School Prayer: The Evolution of Children's First Amendment Rights in America"
padair@tconl.com

Dwayne Ball: "Threats to Academic Freedom at Universities"
adball@neb.rr.com

Bob Haller: "Civics Education and the Practice of Freedom" and "How Books Can Harm You: Lessons from the Censors"
mshortt@inebraska.com

David Moshman: "Principles of Academic Freedom"
dmoshman1@unl.edu

John Bender and David Moshman: "Student Freedom of Expression/Student Rights"
jbender1@unl.edu
dmoshman1@unl.edu

Laurie Thomas Lee: "Implications of the USA Patriot Act"
llee1@unl.edu

Presentation of the Readers' Theatre production of A Tangled Web: Student Freedom of Expression.

(a cast of adults and students)

ADDRESS FOR THE AFCON WEB SITE
<http://www.academicfreedomnebraska.org>

Check it out and learn Who We Are and about Our Activities; read our Constitution; learn how to Join Us; see the where and when of our Meetings; meet our Members and Officers;

REQUEST FOR NEWS FOR FUTURE ISSUES

The editor of the AFCON SENTINEL invites all AFCON individual and organizational members to send news about academic freedom issues in Nebraska or editorial comments for inclusion in this newsletter and/or announcements of organizational meetings for the UPCOMING EVENTS column.

Due date for submissions to the **SEPTEMBER 21, 2013**, issue is **AUGUST 26, 2012**
Send to Tom Black, editor, 610 West Park, West Point, NE 68788 or wpc6296@cableone.net

AFCON

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ACADEMIC FREEDOM COALITION OF NEBRASKA

HELP AFCON PROMOTE ACADEMIC FREEDOM

As a member of AFCON, you can help us

- ◆ support applications of the First Amendment in academic contexts, including elementary and secondary schools, colleges, universities, and libraries.
- ◆ educate Nebraskans about the meaning and value of intellectual freedom, intellectual diversity, mutual respect, open communication, and uninhibited pursuit of knowledge, including the role of these ideals in academic contexts and in democratic self-government.
- ◆ assist students, teachers, librarians, and researchers confronted with censorship, indoctrination, or suppression of ideas.
- ◆ act as liaison among groups in Nebraska that support academic freedom.

MEMBERSHIP (To become a member, send dues, organization or individual name, address, and phone number to Cathi McMurtry, 515 N. Thomas Avenue, Oakland, NE 68045)

Organizational Membership (\$120) entitles the organization to one seat on the AFCON Board, one vote in the election of officers and at the annual meeting, eligibility for office and chairing standing committees, provides newsletter subscription for the board member to share with the organization's information director, and reduced rates to AFCON conferences for its members.

Individual Membership (\$15) provides newsletter subscription, eligibility for office and for chairing standing committees, reduced rates for AFCON conferences, and one vote at annual meetings.

Student Membership (\$5) entitles full-time students to the same privileges as provided by the Individual Membership.

**AFCON ORGANIZATIONAL MEMBERS, PLEASE DUPLICATE THIS NEWSLETTER FOR YOUR MEMBERS.
INDIVIDUAL MEMBERS, PLEASE PASS THIS NEWSLETTER TO A FRIEND AFTER YOU HAVE READ IT.
ENCOURAGE HIM OR HER TO JOIN AFCON**