THE ESSENTIAL ELEMENTS OF A FACULTY COLLECTIVE BARGAINING AGREEMENT IN HIGHER EDUCATION

INTRODUCTION

There is no single, specific definition of the "essential elements" of a university faculty collective bargaining agreement. Then add the wide range of faculty collective bargaining issues and specific contract terms across the diverse landscape of American higher education—reflecting particular institutional and historical contexts, legal regimes, political and economic factors, and even personal relationships—and identifying those essential elements is a serious challenge, with very real implications for the negotiator. In this chapter, I will both suggest a practical approach to identifying the essential elements of faculty collective bargaining agreements and propose a reasonably comprehensive collection of those elements.

Approaching the Question

In the absence of a single source or definition of the essential elements of a university faculty collective bargaining agreement, how are we to identify them?

One approach would be to review all the contracts across the country for their common terms, the most common being in some sense essential. Another would be to explore the legal requirements for the terms of contract, for what the law requires must be essential. A third approach would be to examine the standards for collective agreements set out by such faculty labor organizations as the American Association of University Professors.
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(AAUP), the National Education Association (NEA), and the American Federation of Teachers (AFT).

Unfortunately, while each of these three approaches has its merits, each is flawed. Reviewing the vast array of contracts across the country reveals more what is common than what is essential. Investigating the legal requirements for collective agreements is complicated by the fact that bargaining in the private sector is governed by federal law and in the public sector by more than thirty different state bargaining statutes. And relying solely on the standards promulgated by the labor organizations requires reliance on only that perspective on the process.

A fourth approach—which incorporates the strengths of all three of the above while minimizing the weaknesses—would be to examine the topic through the process of the first contract negotiation between two parties. For it is precisely in that process—in the planning, preparation, negotiation, and implementation of the first contract—that the parties examine other contracts, research the legal requirements as to both the negotiation process and the substantive terms of the agreement, and consult the standards established by the major academic labor organizations as they seek to pursue their respective organizational goals.
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The contract negotiation I will use as a lens to identify the essential elements of a faculty contract was bargained for the first time in 1996. The author represented the University of Alaska System and its three university campuses in Anchorage, Fairbanks, and Juneau. The union—United Academics, representing approximately 1,000 full-time faculty members—was formed in 1995, a time of strained finances and declining enrollments, resulting in small if any salary increases and a general sense of insecurity among the faculty. Affiliated jointly with the American Federation of Teachers and the American Association of University Professors, United Academics was the university’s second faculty group. The first, representing about 300 community college and vocational technical faculty, was formed in the early 1970s. This group, the Alaska Community Colleges’ Federation of Teachers (ACCFT), had a very contentious relationship with the administration and was successful at securing annual salary increases despite declining budgets. I mention ACCFT here because its contract and its relationship with the university impacted the negotiation process with United Academics in fundamental ways. Briefly, from the university perspective, to the extent certain terms of the ACCFT agreement were vague or in some way problematic, it was essential that those terms be clarified or altered in the United Academics contract. From the United Academics’ perspective, there was a strong interest in differentiation between the two unions as a means to achieve a less contentious relationship and, on that foundation, more generous contract terms.
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There was extensive preparation for the negotiation. In addition to researching other contracts, surveying stakeholders, and understanding our legal obligations, university and union negotiators met numerous times prior to the outset of the negotiation to share information, discuss processes, and build relationships. As noted above, the author represented the university along with a small team of administrators.

Preparing to Negotiate

First contracts are an opportunity to get it right, from both university and union perspectives. As the university side prepared, I collected and reviewed over forty faculty contracts from across the United States. These contracts came from very large university systems (e.g., California State University System, State University of New York System), large single campuses (e.g., Kent State University), and western state universities (e.g., Montana). The purpose of this review was three-fold. First, it was to determine what was essential? What bargaining subjects were in every contract? Second, it was to explore what language, or approach to an issue, did I want to include in the Alaska contract. Third, what language did I want to avoid?

I also reviewed very closely the state’s collective bargaining law—and the associated agency and court decisions—which alternatively prescribes, permits, and prohibits various terms and conditions of employment and negotiation practices. Examples of these issues include dispute resolution, agency fee, unit definition, and the scope of bargaining.

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Third, I consulted the key sources on the union side, knowing full well that the AAUP's *Red Book*, for example, would be used as a key source for determining essential terms for the new agreement from the union perspective. Examples of such terms included academic freedom, promotion and tenure, non-retention, and fiscal exigency.

Finally, I surveyed institutional leaders, using both written questionnaires and focus groups, to ascertain their views of what terms were essential. Examples included merit pay, non-retention, defined contribution health benefits plan, and non-tenured term appointments.

On the basis of this preparation, I applied a standard "scope of bargaining" framework for determining what was essential—and what was not—for the new contract. If it was a "mandatory" subject of bargaining as prescribed by law, it was considered essential and the university would bargain over that issue and would subject disputes that might arise over it to the grievance/arbitration process. If it was a "permissive" subject of bargaining under the law, it was not considered essential, though we would negotiate over the issue and if acceptable terms were included in the contract, disputes would not be subject to the formal grievance/arbitration process but rather to a complaint process that would not be appealable to a third party. Last, if it was a "prohibited" subject of bargaining under the law, we would not negotiate over it.

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Once the framework was set, I went through the many potential contract provisions to determine which were mandatory, permissive, or prohibited. The following were considered mandatory, or in terms of this chapter, essential elements of the faculty collective bargaining agreement.

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A wide variety of topics was identified in our negotiation preparation as essential. Some had to do with the union and how it conducted its business with the university. Then came the set of issues dealing with the faculty’s professional responsibilities, evaluations, salary, benefits, working conditions, tenure, and intellectual property. And, as with all labor agreements, the parties needed to include in the contract terms covering discipline of faculty members, termination and non-retention (including layoff), and dispute resolution. Managements rights also needed to be specified, as did a clause addressing labor interruptions during the term of the contract. Finally, the term of the contract—how long it was in effect—needed to be set.

The Union

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The agreement must identify and recognize the duly designated union, or association, as the sole and exclusive representative, or agent, of the bargaining unit in the negotiation and administration of the terms and conditions of employment. Typically, the manner of selecting or electing the union is not a term of the agreement but, rather, the result of a process carried out under the labor-management relations statute—federal or state—that applies to the type and location of the institution. In the Alaska contract negotiation, the bargaining agent—United Academics, AFT/AAUP—was elected by the majority of the faculty members voting in an election administered by the Alaska Labor Relations Agency pursuant to the state’s collective bargaining law and regulation.

The question of bargaining unit composition often arises during the election/selection process preceding contract negotiations, in negotiations, and subsequently as the agreement is renegotiated over a period in which conditions at the institution may change. The unit definition clause may simply reference a legal definition of the bargaining unit—whether in statute or by judicial or regulatory agency decision—or it may be provide a quite detailed list including such characteristics as classification, rank, title, location, professional assignment, and status. In the Alaska case, this was—and continues to be at the time of this writing—a hotly contested issue, not only between the union and the university but even more so between the two faculty unions. The unit definition originally provided by the Alaska Labor Relations Agency clearly distinguished between the two bargaining units, but in practice over the years—especially at the campus where the two groups of faculty work side by side—the differences have eroded and, as a result,
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the parties are in unfair labor practice and unit clarification proceedings. This experience emphasizes the importance of both a clear unit definition and consistent practice, particularly with the recent rise of collective bargaining activity among graduate students, adjuncts, and other employees with academic functions.

The rights of the union are also to be included in the agreement. Even though they are generally provided in law, it is common to provide expressly for such rights as access to the workplace for union business, space for union offices, time for union meetings, paid time for employee representatives to prepare and present grievances or engage in negotiations, consultation on issues that may not legally require negotiation, and use of the institution’s mail system, facilities, telephones, and electronic mail for the union’s business. Our experience in Alaska with United Academics once again was informed by our history with the other faculty union, which included university paid release time for union representatives, university provided office space, and access to other university facilities. As a result, United Academics’ representatives reimbursed the university for their office space and for faculty members’ time performing union business.

Unions, while typically reliant on extensive volunteer effort, are like other organizations in that they require revenue to cover expenses. The agreement will specify whether union dues and/or agency fees (dues minus the amount used for political activities) will be deducted from faculty members’ paychecks, the amount of the dues and/or fees, the employer’s obligations with respect to administering the process, including changing the

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dues/fee amount, setting when the dues/fees are withheld and sent to the union, and
potential action against faculty members (up to and including termination) for failure or
refusal to pay dues and/or fees. Alaska’s collective bargaining law requires the public
employer to deduct—with the employee’s written authorization—union dues or agency
fees from employees’ earnings and transmit them to the union, so the only real
negotiation point here was the consequences if an employee refused to authorize a payroll
deduction or pay dues or agency fee directly to the union.

During the negotiation process, the parties sometimes defer issues that either cannot be
resolved or are more susceptible to resolution in other venues. Labor-management
committees often are used to build relationships between the parties away from the
pressure cooker of negotiations. They also can be very effective venues for the creative
exploration of alternatives not available within the constrained atmosphere of traditional
negotiations. As well, issues that are particularly complex and perhaps involve other
employee groups are well suited to work in a labor-management committee setting.
Another helpful technique often used to address issues that are in the interest of the
parties to discuss but may not rise to the status of “mandatory” bargaining issues is the
“meet and confer” session. Here the parties are free to raise and discuss issues of mutual
concern, seeking mutually acceptable resolution without invoking the legal obligations of
the more formal negotiation process. In the Alaska negotiations, we created several
committees that would work on particularly challenging issues not easily addressed in the

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main contract negotiation. Examples include the process for analyzing faculty market
salary issues, health benefits, distance education, and intellectual property.

Another key element of the agreement is how union officers are treated with respect to
their professional assignment and compensation while serving in that role. Union officers
generally have the legal right to serve, but the question of released time from their
academic responsibilities and compensation require resolution. In the Alaska case, union
officers were provided time within the service portion of their three part workload
(research, teaching, and service) to serve on various activities and committees that were
expressly created by the agreement, e.g., labor-management committees. Other union
officer activity that required a release from the faculty member’s workload were
purchased by the union at the full rate of the faculty member’s salary.

The union and its faculty representatives have the legal right to communicate with
bargaining unit members in order to carry out their agency responsibilities. The union
often will seek access to faculty through the university’s campus mail system, email
system, web sites, break rooms, and other facilities. In the Alaska case, as long as the
university was not incurring an unreimbursed cost by providing a certain form of access
to the union, we agreed to inclusion of that provision in the contract. So, the university
agreed to provide office space for the union on two campuses in exchange for a
reasonable payment. Email access was allowed, for there was no measurable increase in
cost and it enabled communication between union representatives and university
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administrators. And university facilities were available for use by the union on the same basis as the public according to the room use policies set by the various campuses.

The relationship between the union—as the faculty’s representative in the negotiation of wages, hours, and terms and conditions of employment—and faculty governance requires clarification and differentiation. A confused relationship can result in the union capturing control of governance, resulting in an alignment of power that eliminates the key distinction between the university’s mission and purpose—which generally are not subject to negotiation with the union—and the terms and conditions of employment offered by the university, very much within the scope of negotiations. In Alaska, we drew a bright line between the two faculty processes, with collective bargaining operating within its legally defined scope, and governance attending to academic issues outside the scope of bargaining.

Professional Responsibilities

A critical element of the faculty collective bargaining agreement addresses the types of appointments available to faculty members under the agreement. Typically, these include appointment with tenure, appointment on the tenure track, and appointment to a term position without tenure. For very important reasons going to the fundamental rights and obligations of faculty members and the university, it is critical that the types of appointment—including the specific titles and ranks available for each appointment

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type—be precisely expressed. Further, the options with respect to the percentage time of appointments (e.g., 50%, 75%, or 100%) as well as their duration (e.g., nine months or twelve months) should be set out in the agreement. For purposes of clarity and ease of contract administration, additional issues related to faculty appointment that are in the interest of the parties to incorporate in the agreement include: changes to the appointment (whether they can be made, who can make them, with what notice period), notification required for mandatory reviews, notification and grounds required for termination, and rights to challenge appointment decisions. In the Alaska case, the three basic types of appointment noted above were provided for, each with specific titles and related terms. Additional aspects and associated rights of each appointment type—e.g., evaluation, promotion, and specific notice periods for non-retention—were addressed in other articles. Notable here, though, was a clear reservation by the university of the right to make appointments at its sole discretion and clarification that the initial appointment of faculty members to one of the appointment types was not subject to the dispute resolution provisions of the agreement.

The workload provisions of the agreement are of critical importance, for it is the creative and productive effort of the faculty that contributes more than any other factor to the institution’s effectiveness is performing its mission. Workload issues that need to be addressed include

- how the workload is set (negotiated, set by the faculty member, or determined by an administrator),
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• the composition of the workload,
• how much credit is given to the variety of activities performed by faculty members,
• how the workload is tied to compensation,
• how a workload gets changed,
• how excess effort is compensated, and
• how workload challenges are handled.

In some jurisdictions, workload standards are set in state statute, but in most cases they are set by the terms of the collective bargaining agreement. The workload terms of the Alaska negotiation were among the most complex. Early in the process the parties worked to develop rather precise workload measures across the many varied disciplines—and their associated variations in teaching practice—present on the university’s campuses. Should the workload of performance art faculty be measured in the same manner as a classroom based class such as English or a lab based course in Physics? After much detailed consideration, the Alaska parties agreed to very general approach linking credit hours to workload units, which could be modified by the university after consultation with the faculty. The key element of the workload article in Alaska is the distinction between the substance of the workload—its composition in terms of portions assigned to research, teaching, and/or service, and in terms of the specific courses that comprise the teaching portion—and the process followed to set it. The substance is included in “academic” issues considered to be within the discretion of the university and, therefore, not subject to the grievance/arbitration process. However,
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the process, as specified in the agreement, is to be followed and allegations of failure to
do so are subject to the grievance/arbitration process.

Evaluation

The academic culture is one of measurement. Whether it is in response to requirements of
financial audit standards, federal research regulations, accrediting bodies, state statutes,
or even the much-maligned U.S. News and World Report, faculty effort is evaluated
regularly by students, peers, and administrators.

Evaluation can be both summative and formative, to summarize and document or to serve
as an aide to future faculty development. Faculty are evaluated to determine whether they
should be retained during their early years, whether they should be tenured and promoted,
and how much they should be paid in institutions where it is a factor in setting
compensation. In recent years, agreements more often include requirements for post-
tenure review. In Alaska, for instance, post-tenure review is conducted according to a
schedule set forth in the agreement and, at the discretion of the employer, in the event
there is a performance concern. Evaluation, like workload to which evaluation is
inextricably linked, can be bifurcated between the substantive and the procedural. As
noted above, this is a key element of the Alaska agreement, because challenges to
substantive issues (the terms of the evaluation) are not subject to grievance/arbitration
whereas challenges to procedural issues (the steps followed, the timeline, and the linkage to workload) are subject to the grievance/arbitration process.

Compensation

Salary is an essential element of the agreement. How much are faculty members paid? Are faculty of a similar rank all paid the same? What terms are there for changes to salary? Do they take place annually? What are the bases for those adjustments? What roles in the salary setting and adjustment process are played by such factors as market, academic discipline, rank, merit, equity, cost of living, and the university's ability to pay? What are faculty members paid for working an excess workload? What are they paid for teaching courses in the summertime? And how about income from special programs—executive education and distance education, for example—that might be able to generate extra tuition income or, on the other hand, be constrained by restrictions on the tuition and fees that might be charged?

Clearly, salary is a most complex issue. It is also among the most public and, at the same time, most personal issues addressed in the agreement. Our approach to the issue in Alaska was based on the notion that the university competes in a labor market that is segmented by academic discipline. In reality, we compete in multiple markets and, while annual adjustments could be considered on the basis of the entire bargaining unit, we needed to reflect the disciplinary variance in the market. For without the ability to differentiate, we would not be able to recruit and retain faculty members in the diverse

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areas of our academic program offerings. Nor would we be able to set our market
position by discipline, reflecting the strategic importance of that discipline to our
academic mission. In addition to market, merit remained a priority, not so much for
deans, but with the Board of Regents and university administrators.

So, we agreed with the union that entry salaries could vary based on market but could not
be under a “floor” for each rank. We agreed that salary increases would be comprised of
three elements:

- A basic cost of living adjustment provided to all faculty members.
- A market pool made up of a certain percent of the total annual adjustment.
  Faculty members received a proportional share of a pool set aside for market
  increases according to a predictive model based on discipline, rank, and years in
  rank.
- A pool to be distributed by dean to faculty members based on performance.

Over time, the first two components of the adjustment regime have been maintained, but
under pressure from both the union and deans, the merit-based adjustments have
disappeared.

Additional grounds for salary adjustments were negotiated. Faculty members who taught
in the summer term received additional compensation, generally a fixed amount rather
than an extension to the summer term of the academic year rate. Overloads were paid
according to campus practice, with some faculty receiving an extension of their base rate
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while others received a fixed rate—typically the rate paid to adjunct faculty—for the
effort. Promotions were recognized with increases of ten percent to the base rate. Perhaps
the most innovative—and at times controversial—element of the compensation package
was the term for “preemptive retention,” which allowed the university to award a salary
increase to a highly competitive faculty member absent a formal written offer from a
competing institution. The university was required to inform the union of such an
adjustment and exercised this right very rarely, but on occasion it resulted in the retention
of a highly valued faculty member. In addition to the basic salary package, an essential
element of the agreement is the assortment of benefits faculty and universities typically
negotiate. Among the most important are health care, retirement, paid and unpaid leaves
(including sabbaticals), tuition assistance, life insurance, and dependent care. In some
jurisdictions, benefits are provided by a governmental agency and thus may or may not
be negotiable. An example in the Alaska case is retirement. The state constitution
provides that a retirement benefit “shall not be diminished” and an Attorney General’s
opinion written in the 1970s opined that as a result, retirement programs provided by the
state—or an instrumentality of the state, such as the university—were not negotiable, for
if they were, they would by necessity be subjected to the possibility of being
unconstitutionally diminished. This opinion has gone unchallenged for decades, although
in light of recent moves by the state legislature to close down its defined benefit
retirement programs in favor of defined contribution programs, the issue might come to
the fore in future negotiations.
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Working Conditions

A hallmark of the faculty workplace is academic freedom. But it is not uncontested terrain. On one hand, the federal constitution protects expression while, on the other hand, universities occasionally discipline and even terminate faculty members for the content and form of their expression. In the Alaska negotiation, we agreed to the principle of academic freedom as reflected in the AAUP’s famous and long standing statement on the subject. In my tenure at the university, the issue has been raised very rarely. And when the issues did arise, the university president’s personal commitment—represented by a thirty-one-year career in the U.S. Army “protecting Americans’ liberties”—generally resulted in quick resolution.

Intellectual Property

As faculty members increasingly produce intellectual property with market value, agreements are including specific terms to address ownership of work product, use of work product, and distribution of any proceeds that may result from marketing of the work product. In this very complex and fast changing area of university activity, the Alaska agreement—seeking to balance the interests of the university and those of the faculty member--applied a three-part framework for ownership and the right to financial reward. If the faculty member developed the product independently, all proceeds flowed to the faculty member. If the faculty received university support in the development of the product, a distribution schedule was established in which the faculty member received the first dollar—in order to incent faculty to develop new economically valuable

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products—and only after significant revenues resulted would the university see a share of the proceeds. Finally, if the product were the result of “work for hire,” that is the faculty member was paid expressly to create the specific product—for example a distance-delivered course—the university retained full ownership of the product and all proceeds that flowed from its market success.

**Discipline**

While surely an uncomfortable topic, discipline is an essential element of the collective bargaining agreement. Faculty members do on occasion engage in conduct that is not consistent with the standards of the employing institution, in which case they may be subject to discipline. In my experience, discipline has been very rarely applied. However, I am aware of the termination of a tenured professor for blatant sexual harassment and of the discipline of a professor who plagiarized research.

**Termination/Nonretention**

Although many faculty members enjoy tenure, even the most secure may be subject to termination or nonretention based on a variety of factors. These factors are essential subjects of the agreement, as are the procedures applied by the university when it takes action to terminate a faculty member. In general, agreements lay out not only the standards that must be met prior to the university taking action to terminate or not retain faculty, but also prescribe the notice periods, administrative review processes, and
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grievance procedures available to faculty members affected by such a decision. In
general, the higher the status of the position a faculty member enjoys, the higher the
standard the university must meet in order to warrant disciplinary action.

Dispute Resolution

The grievance/arbitration procedure is a key element of the agreement. Bargaining
statutes frequently require agreements to include grievance procedures that conclude in
third party arbitration. These procedures typically involve the faculty member, with
assistance from the union, taking an issue to ever higher levels of administration for
resolution. In the event the issue is not resolved, the union may invoke the services of an
arbitrator who has authority provided by the express terms of the agreement to determine
a resolution. It is not uncommon, though, to limit an arbitrator’s authority to certain
issues and, within those issues, certain remedies. For example, in the Alaska agreement,
substantive academic matters—such as the content of a workload or the granting of
promotion or tenure—are specifically excluded from the grievance/arbitration process.
Thus, an arbitrator does not have the authority to substitute his/her judgment for that of
the university. The arbitrator may not grant tenure. (This contract provision has been
upheld on appeal to the courts.) However, with regard to matters that are within the scope
of bargaining, disputes may carried through the grievance procedure and may in the end
involve arbitration. The Alaska agreement also provides a forum—comprised of faculty
members and administrators—for the discussion of disputes excluded from the grievance
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procedure. On the rare instances this alternative procedure has been invoked, the more
colloquial approach to problem solving generally has resulted in improvements if not
outright resolution of the issue.

Management Rights

Agreements typically provide management rights clauses. These may be short and very
general or long and quite specific. Either way, the management rights clause, while
essential, rarely carries significant weight, for it is in the specific terms of the agreement
that management’s rights are either protected are compromised.

No Strike/No Lockout

Faculty collective bargaining agreements typically preclude unilateral economic action
by either party during the negotiated term of the agreement. While generally very rarely
invoked, these clauses sometimes come into play during the course of negotiation when
the parties are closing in on impasse and one party seeks to exert power through a strike
or a lockout. In most cases, state collective bargaining statutes regulate economic actions
during the bargaining process.

Duration

The term of the agreement is an essential term to set forth, because it limits the period for
which the parties are bound to the agreement and provides opportunities to both sides to
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describe issues that may have arisen but could not be effectively resolved through the
variety of means available under a standing agreement. These clauses often provide
procedures and calendars for negotiation of the successor agreement and sometimes even
set a date by which the parties are considered at impasse in negotiations, thus freeing both
sides to apply economic leverage to reach an agreement.

CONCLUSION

As I began this chapter, I close. There is no single, specific definition of the “essential
elements” of a university faculty collective bargaining agreement. In this chapter, I
suggested both a practical approach to identifying the essential elements of faculty
collective bargaining agreement and proposed a reasonably comprehensive collection of
those elements. I also highlighted how many of these issues were addressed in the
negotiation of a first contract between a university and a newly formed faculty union.

In the end, rather than a universally applied definition, it is the myriad other factors that
characterize the higher education collective bargaining landscape—including particular
institutional and historical contexts, legal regimes, political and economic factors, the
maturity of the union, management’s resolve, and even personal relationships—that
determine the essential elements of the agreement.