On the relationship between public university administrations and AAUP chapters

In recent years faculty members have reported to the Virginia Conference of the AAUP that college and university administrations have made certain claims about the status of AAUP chapters under Virginia law and about the rights of faculty members to advocate before public officials. This brief addresses these claims.

Status of AAUP chapters
The Virginia Conference has received at least two reports of administrators telling AAUP chapter leaders that Virginia law prohibits state agencies from meeting with the AAUP because the AAUP “is a union.” The state law cited is Chapter 4, Article 2.1. of the Code of Virginia on “Collective Bargaining for Governmental Employees”

§ 40.1-57.2. Prohibition against collective bargaining.
No state, county, municipal, or like governmental officer, agent or governing body is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers or employees, or to collectively bargain or enter into any collective bargaining contract with any such union or association or its agents with respect to any matter relating to them or their employment or service.

Nothing in this section of the law prohibits administrators from meeting with an AAUP chapter, because:

1. The law cited prohibits university administrations from recognizing a labor union for the purposes of collective bargaining. Even if an AAUP chapter in Virginia were a union, administrations may meet with the chapter about matters regarding the whole range of AAUP policies.

2. AAUP chapters in Virginia are not labor unions. AAUP chapter members are members of a 501(c)(6) non-profit professional association that was “formed to promote the common business interest of the academic profession by defining fundamental professional values and standards for higher education, advancing the rights of academics, particularly as those rights pertain to academic freedom and shared governance, and promoting the interests of higher education and research” (AAUP Constitution). In states where union certification is legal for public university and college employees, some AAUP chapters have sought and received certification and function as a labor union on that campus, engaging in collective bargaining. Such chapters are generally members of the AAUP-Collective Bargaining Congress (AAUP-CBC), a separate entity organized as a 501(c)(5) labor organization.

3. Refusing to meet with a Virginia AAUP chapter might even qualify as impermissible viewpoint discrimination, if the argument is that AAUP members in some general sense
support higher education unionization and administrations are prohibited by law from hearing such a viewpoint.

Administrators who cite §40.1-57.2 above do not seem to mention the other provision of Chapter 4, Article 2.1:

§ 40.1-57.3. Certain activities permitted.
Nothing in this article shall be construed to prevent employees of the Commonwealth, its political subdivisions, or of any governmental agency of any of them from forming associations for the purpose of promoting their interests before the employing agency.

This provision clearly protects the rights of AAUP chapters to exist and to promote their interests. While this provision may not create a positive responsibility of the administration to formally facilitate the activities of the chapter, refusing to meet with the AAUP on a specious reading of §40.1-57.2 does seem to in fact “prevent” employees from engaging in activities permitted by §40.1-57.3.

Rights of Faculty Members to Advocate before Public Officials
Faculty members enjoy first amendment rights and can (and should) make known their views as private citizens. The Virginia Personnel Act (Chapter 29, §2.2-2902.1 of the Code of Virginia) protects the rights of “state employees to express opinions to state or local elected officials on matters of public concern,” and protects state employees from “acts of retaliation because the employee has expressed such opinions.” Matters of public concern include matters of interest to the community as a whole, as well as whistleblowing about corruption, fraud, abuse, gross mismanagement, or violations of law.

Some public college and university administrations have sought to place certain limits on this right. These limits include:

1. Requiring faculty members to clearly distinguish their personal opinions from that of the institution.
   This is a reasonable requirement.
2. Requiring faculty members to inform the administration if they are to testify before the Virginia General Assembly or the U.S. Congress.
   There may be reason for such a policy if a faculty member is advocating for a specific benefit, such as a research grant. However, requiring a public employee to inform the employer of plans to advocate on matters of public concern, including higher education policy (something the AAUP does routinely), may inappropriately discourage citizens from exercising a constitutional right.
3. Requiring faculty members to get approval from the administration to testify before the Virginia General Assembly or the U.S. Congress.
   Apparently, the University of Virginia had such a policy before 2006. The current UVA policy on “Communicating with Government Officials” requires the faculty member to inform the administration (point 2 above), but it says nothing of needing approval to do so. Faculty members should check their campus policies to assure that the exercise of their constitutional rights are not subject to employer approval.

The analysis in this brief is for the information of faculty members and university and college administrations and should not be construed as legal advice.