

Minutes*

**Academic Freedom and Tenure Committee
Friday, October 11, 2013
10:00 – 12:00
238A Morrill Hall**

Present: Carl Flink, Karen Miksch (co-chairs), David Born, Arlene Carney, Jerry Cohen, Teresa Kimberley, Jessica Larson, Gary Peter, Scott Petty, Nathan Shippee

Absent: Phil Buhlmann, William Craig, Barbara Elliott, Brad Karkkinen, Paula Rabinowitz, Nicole Scott

Guests: Joseph Shultz (Office of the Provost)

[In these minutes: (1) the definition of programmatic change; (2) tenure policy section 12 procedures (programmatic change); (3) philosophical statement on tenured/tenure-track versus non-tenured/tenure-track faculty; (4) tenure policy section 10 procedures (unrequested leaves of absence for disability)]

1. The Definition of Programmatic Change

Professor Flink convened the meeting at 10:00 and welcomed Dr. Shultz to talk about programmatic change; he noted that Dr. Shultz had provided a copy of the September 12, 2013, Annual Report on Undergraduate, Graduate, and Professional Academic Program Changes, the annual report to the Board of Regents.

Dr. Shultz provided a brief overview of the process of academic program change. He said that there are many academic programs at the University, so when one talks about programmatic change, it could be one of a multitude of different kinds of changes, everything from renaming to creating to discontinuing programs, and it is the most major events that rise to the level of requiring Board of Regents approval.

There are multiple levels of approval for academic program change, Dr. Shultz said, and he identified them: faculty, departments, colleges, campus, (Academic Health Center), (Graduate School), Senior Vice President for Academic Affairs and Provost, Board of Regents, (Higher Learning Commission), with the units in parentheses involved sometimes but not always. The Higher Learning Commission would be involved, for example, with off-campus delivery, out-of-state delivery, or another physical site located internationally). The process is faculty-driven, by design, Dr. Shultz said, because the expertise lies with the faculty and that is the locus that the provost wants. Fortunately for the University, it need not send programmatic changes through any state-level body (in New York, for example, changes have to go to Albany, which can add another 6 months to a year to the process).

Professor Cohen recalled that before the changes in the Graduate School took place, there was a series of committees that evaluated proposals for graduate programs. Is there still a process at the Graduate School level or are proposals now reviewed only at the college level? Dr. Shultz said that the

* These minutes reflect discussion and debate at a meeting of a committee of the University of Minnesota Senate; none of the comments, conclusions, or actions reported in these minutes represents the views of, nor are they binding on, the Senate, the Administration, or the Board of Regents.

question is balance between the two most important forces of academic agility and program quality. The provost wants to encourage agility and excitement but also wants to be sure that anything she brings to the Board of Regents for approval is of high quality. It was determined that the Graduate School process could be more responsive or agile; all Ph.D. programs must still be approved by the Vice Provost and Dean of Graduate Education and they go through the Graduate Education Council for recommendation; after that they go to the provost. For other programs, there may not be a formal approval responsibility but the provost would seek advice from that unit.

What about program discontinuance, Professor Miksch asked? Is the same process used? Does it always start with the faculty? Dr. Shultz said that in his eight years in his position, it does. Unit or college leadership may talk with faculty members if, for example, there has been no student in a program for a number of years, but the question goes to the faculty. The provost would receive a proposal from the college, she would look for evidence of consultation and whether college procedures were followed and the affected parties consulted, and whether the process was transparent and if there were conflicts about the proposal. Professor Miksch said that the Committee is looking at what "consultation" means and what the provost would look for. If a program is discontinued, Dr. Shultz noted, it is usually because it is dormant and a college is cleaning up its books. The provost's office will always check to see if there are students in the program and make sure that they are taken care of before a program is discontinued—but often there are none or very few affected students.

Professor Cohen raised a question about creating a curriculum in one unit that could "fence off" a topic that should be more broadly offered, and bar faculty in other units from creating it as well. Dr. Shultz said that is one reason approvals go to the provost: she wants to ensure consultation across units. When they receive a proposal, they evaluate who should have been consulted. The provost is considering posting program proposals for a period to allow campus comment. Professor Cohen urged that the faculty governance system be brought into the process as well.

Mr. Petty said that while the number one factor for program discontinuance may be dormancy, dormancy can be induced. A dean may say that a program can have no new graduate students and then five years later declare the program dormant. How is that protected against? Dr. Shultz said that if a proposal comes to the provost, she would want the opportunity to discuss it, including the academic reasons for the proposal. Professor Cohen pointed out that there should be a paper trail in those kinds of cases; Professor Miksch asked if such a decision would go through the same process, and Dr. Shultz said it would.

Professor Born commented that the question is, "when does change become change?" Professor Flink agreed. When is the tipping point reached? When the dean bars or sharply reduces the number of graduate students in a program? That may not appear to be large programmatic change but the decision would have a big impact on a program. Dr. Shultz said that those are strategic and management decisions that are delegated to the colleges, not the provost; it is only when a program is actually discontinued does it reach the provost.

Professor Born said the issue then comes back to the tenure policy: when programmatic change is mentioned in the tenure policy, as laid out by Dr. Shultz, does it or does it not include strategic decisions? Dr. Carney said that programmatic change is not defined in the tenure policy—which is the reason for this discussion. When that language came into the tenure policy, it was in response to a major event, the closing of the Waseca campus, and did not address anything college-specific. It is now 2013

and the Committee is trying to write procedures about programmatic change, and the lack of definition means the discussion has extended to decanal and degree changes, which she said she did not believe the tenure policy was intended to include. There were changes in the Wave One mergers and dissolutions, but those were not like Waseca; in the latter case, people were dispersed to other units. The more she has looked at section 12, and the provision about providing retraining to faculty members, the more she concludes it was about the Waseca closing. When colleges were closed a few years ago, people were not dispersed because entire departments were moved to other colleges.

Professor Miksch noted that section 12.1 calls for consultation when there is programmatic change; that is clear in the case of new or discontinued programs, but "change" is different and not synonymous with discontinuance. Is a merger of colleges or programs considered programmatic change? It is change; is it also discontinuation? When Ms. Smith, from the General Counsel's office, joined the Committee, she suggested that mergers could rise to the level of discontinuation.

Dr. Shultz said that the provost's office would define some change as academic and draw a distinction between it and administrative changes. The latter would include, for example, the grouping of degrees or programs.

Dr. Carney said she has thought a lot about these issues. If a faculty member does not like a decision about a degree closing, he or she could take the dispute to the Senate Judicial Committee (SJC)—if programmatic change refers to degree discontinuance. One critical point is that there will be degree changes all the time; does the Committee want to say that any faculty member can bring such changes to the SJC, even if the change has been initiated and endorsed by the faculty? There may be similar decisions by the faculty; should those also be subject to appeal to the SJC? It would be possible for the Committee to adopt an Interpretation for the tenure policy.

Professor Born said that consultation as mentioned in section 12 is critical, but some faculty members may believe their approval is needed before plans can move forward.

The question is what to add to section 12, through procedures, so that all these discussions can be avoided in the future, Dr. Carney said.

Where discontinuance can be bad is when one junior faculty member is brought in, and is the only junior faculty member in the program, and the senior faculty in the department then vote to discontinue the program, Professor Cohen said. That could be bad for the junior faculty member and could be a case for the SJC. Dr. Carney demurred and said not necessarily; the decision could reflect bad faculty judgment about a program with one faculty member.

Professor Flink pointed out that the Committee has had a three-year discussion of programmatic change; is the definition layered? Yes. Must there be consultation? Yes. Where should the definition(s) be put in the procedures? He asked if Committee members had additional questions for Dr. Shultz.

Professor Miksch suggested providing examples in the procedures of programmatic change that delineates between change, new, or discontinued programs. In addition, Professor Kimberley said, identify what is NOT programmatic change.

If two departments merge, the administrative staffs are merged, Professor Flink observed; some faculty might call that programmatic change but the administration would say that the merger does not affect academic work and is not programmatic change. If two departments with discrete administrative staffs merge, so the merged department has two-thirds of the number of staff but there is no change in academic programs, that seems clean and is not programmatic change.

Dr. Shultz said there are three types of proposals: new, discontinuance, and changed. He has laid out the instances of the last, changed, that rise to the level of the Board of Regents, and those include title, the addition of subplans (usually anything that would result in a change on a transcript), as well as changes in delivery such as on line or at a new (off campus) location. There are hundreds of changes that occur at the curricular level that do not rise to the level of regental approval, and the provost may delegate responsibility for review to the vice provost and his or her staff.

Professor Flink summarized: the provost wants change to bubble up from the faculty and wants the dean to go to the faculty. The CLA 2015 report suggests a smaller college, so implies shrinkage, which implies a college dialogue. What he has heard from Dr. Shultz is that the dean cannot declare a program to be gone, but must go to the faculty and say that a program is dormant or not of high quality and should be reconsidered. Dr. Shultz reaffirmed that with any proposal to the provost, she will want to see evidence of consultation with the appropriate parties and will want to know of any conflicts.

Professor Larson wondered if section 12 might have more to do with the other campuses than with the Twin Cities campus. Dr. Carney said the original authors thought about that; change will happen in any large organization because it cannot always be adding; sometimes it must be consolidating. That is the visionary part of section 12.

Professor Flink inquired if Dr. Carney believed a more layered and nuanced interpretation would be appropriate. Dr. Carney noted that the Senate Committee on Educational Policy talks about new programs and degrees, areas this Committee does not want to get into. She suggested that the definition be kept at a high level for the purposes of the tenure policy. Perhaps it should be defined to mean programmatic change at the college level or above, and not in degree programs. The definition will have implications for SJC complaints; if there is an Interpretation added to the policy providing that individual faculty members may not bring complaints about degree changes, that would help. She agreed that it would be a good idea to have a clarification of what programmatic change includes; she will not tell the Committee what that should be, but whatever the Committee recommends will be reviewed by the provost, and an Interpretation might be a reasonable way to approach the problem. Professor Larson said it would also make sense to anchor the definition in the history of the Waseca closing, that the language entered the policy at the college/campus level.

Professor Shippee inquired if, in the case of a dispute about a degree, there might be other grounds on which a faculty member could bring a complaint to the SJC. There are, Dr. Carney said. Professor Born said the SJC looks carefully at the basis for a complaint. Professor Shippee commented that section 12 appears to work better for adding than subtracting and is more about the latter; perhaps it need not speak to adding programs.

Professor Miksch asked Professor Born if, under the language of section 12, a faculty member would have a complaint that the SJC would have the authority to hear if a program were discontinued and the faculty member were offered retraining that he or she did not believe to be reasonable. Professor Born

thought SJC could hear such a case. Or there could be a question of academic freedom if it is related to a curriculum or research agenda, Professor Miksch said. Professor Born agreed.

Professor Shippee said that faculty members might add a program in a department that is then not adequately staffed, and it ends up being discontinued at the department level. He said that he thought section 12 might be more about larger administrative actions than about such changes at the department level.

Professor Flink agreed that an Interpretation to the tenure policy would be appropriate; the Committee can develop language but stay away from instructions on how it is to be implemented by the administration. Dr. Carney noted that an Interpretation would be separate from any procedures document the Committee may recommend. Professor Miksch said that the Interpretation should require adequate consultation with the affected faculty members, should follow college constitutions, and should include any dissents. She also suggested that it incorporate the idea that purely administrative mergers are not what section 12 is about—but repositioning faculty members is.

Professor Cohen said that in research fields, curriculum is not the driving force and it is more difficult to make the distinction between academic and administrative changes. His concern is about graduate education, indirect-cost funds, and interdisciplinary programs, things that have more to do with the research structure.

Professor Shippee proposed that section 12 is more about the EFFECTS of change. Part of figuring out what it means is identifying when it affects one's department home and ability to teach and do research. The Committee needs to think about the impact of the programmatic change.

It was agreed that Professors Flink and Miksch would work with Vice Provost Carney to develop language for an Interpretation to the policy.

2. Tenure Policy Section 12 Procedures

Professor Kimberley put up on a screen suggested revisions to the most recent draft of the proposed procedures to accompany section 12 of the tenure policy.

Committee members spent time discussing the extent to which the procedures might smooth out the process for faculty members—primarily probationary faculty—who face programmatic change and who may wish to look for employment elsewhere rather than accept retraining or an administrative post. Some may wish to skip the step of reassignment and/or retraining and request support while seeking another position. The Committee recognized that any procedures must align with the provisions of the tenure policy and agreed that any exposition of the options available to faculty members should be clear and simple. The Committee also agreed that a distinction can be made between probationary and tenured faculty, given the language in the tenure policy about options being subject to the conditions of employment of the faculty member (which are not the same for probationary and tenured faculty). The Committee agreed that any procedures language should not appear threatening to faculty members (implying that the University is cutting them loose without protection of their probationary appointment) but instead making it clear that the person has options, but reasonable reassignment must be retained as part of the picture. A faculty member may decline reassignment, even if reasonable, and make use of other options. Some may argue that a reassignment is not reasonable if they cannot continue to do what

they were doing before, but if there is large-scale programmatic change, what they were doing before may have disappeared; the University is committed to finding a spot so that those individuals can continue to be paid, Dr. Carney observed.

Professor Flink suggested that a small group have a discussion with Provost Hanson and then draft language for Committee consideration (and that the SJC could also review). It was agreed that Professors Flink and Kimberley and Vice Provost Carney would meet with Provost Hanson, and that Professor Miksch would attend if she is able.

3. Philosophical Statement on Tenured/Tenure-Track Versus Non-Tenured/Tenure-Track Faculty

Professor Flink noted that the Faculty Consultative Committee had asked this Committee to develop a philosophical statement on tenured/tenure-track faculty versus non-tenured/tenure-track (contract) faculty. At present the policy on academic appointments with teaching function establishes a ratio that colleges are to meet, but some are unable to meet it; what does that mean? Professor Cohen earlier brought up the point that it is a slippery slope if the University begins approving more widespread use of contract faculty, so the Committee has been asked to develop a philosophical statement to capture the problem that would also allow the University to operate in the real world.

Professor Miksch asked if there are materials the Committee could read. This is an issue that is being discussed all over the country. Professor Cohen said it is important to understand the historical context.

The Committee agreed that it would continue the discussion and look at the possibility and utility of creating a system that takes into account actual practice rather than requiring a one-size-fits-all approach that is currently in place. The discussion will be continued at a future meeting.

4. Tenure Policy Section 10 Procedures

Professor Miksch reported that she had reviewed the 2012 AAUP report that addresses how to deal with faculty members with disabilities and recalled that the Committee had had a conversation with staff from the Disabilities Services office. Section 10 of the policy is about leaves for both disciplinary (section 10.21) and disabilities-related (section 10.1) reasons; the Committee concluded it would develop procedures for the cases of faculty members with disabilities. [The AAUP report, *Accommodating Faculty Members Who Have Disabilities*, can be found here: <http://www.aaup.org/file/Accommodating-faculty-with-Disabilities.pdf>]

Professor Miksch distributed copies of draft procedures for unrequested leaves of absence for disabled faculty members. [The draft is appended to these minutes and includes changes made as a result of discussion at this meeting.]

Professor Miksch emphasized a few points.

-- Faculty members with a disability, if provided with appropriate accommodations, may perform equally as well or better than faculty members without one.

-- The definition of a disabled faculty member is someone who has registered with the office of disability services—and it is up to the faculty member to decide whether to register. No one can be forced to do so.

-- While it may be humane to do so, it would probably violate federal law to have a mandatory process related to dismissal of a faculty member for reasons of disability, but it would be appropriate to provide an optional process.

-- If a faculty member chooses not to register with disabilities services, and thus not rely on section 10.1, any questions about performance may then fall under section 10.21, unrequested leaves for disciplinary reasons.

So the institution must make reasonable accommodations, Professor Flink summarized, and anything beyond that moves into section 10.21. Professor Miksch concurred.

Professor Born recalled that SJC had a case of tenure denial (due to performance) a number of years ago. At the time of the hearing, the faculty member claimed a disability, but the SJC ruled against the faculty member because the person had not registered with disabilities services and had made no earlier claim about a disability. He expressed support for the provisions of the AAUP statement.

Mr. Petty said his concern was the reverse: the instance of a faculty member with a health issue and departmental refusal to act. There are instances where departments send someone into the classroom knowing the individual cannot perform. All of the language in the draft tilts one way. Dr. Carney said that the draft gets at section 10.21, which refers to a "sustained refusal or failure to perform reasonably assigned duties adequately." These are not easy cases, she said. Mr. Petty said he was talking about instances when a department refuses to act. That is a failure of management and people doing their jobs, Professor Flink said, and the Committee cannot operationalize a policy.

Dr. Carney said there will always be people with problems, especially with cognitive abilities, which are essential for the faculty job—departments can deal with motor and visual problems, but a decline in cognitive abilities is more difficult. In the latter cases, the department faculty must take action to protect students.

Professor Flink said that he has had students talk with him about various problems and ailments, and while he will talk with them, he said he tells them that he cannot address grading questions unless they register with disabilities services. Departments may also need to take a hard line about faculty members registering with disabilities services, because otherwise the case falls under section 10.21.

Professor Cohen said there are multiple sides to this issue. Mr. Petty is referring to individuals who are not competent to perform their job. He related the case of one of his own instructors who had a brain tumor but who remained competent and insisted on completing his teaching. But individuals who are not competent are a different case. Some departments cover for faculty with cognitive disabilities to protect students, Professor Larson said.

Professor Kimberley suggested adding language to the draft pointing out that the institution also recognizes that the interests of students and the University must also be protected and it is the responsibility of the faculty of the department and those at higher levels of responsibility to judge fairly.

Professor Miksch agreed. Faculty members have a right and responsibility to register with disabilities services because she, for example, does not have the expertise to provide the appropriate accommodations. The University is fortunate to have one of the best disabilities services offices in the country to help faculty members and departments deal with disabilities, but if a faculty member declines to register with the office, then it is no longer a disabilities issue and becomes a performance issue under section 10.21 that affects students and other faculty members. And even if someone does register, there can still be a performance issue, Professor Kimberley pointed out. Professor Miksch agreed; section 10.1 reminds faculty members and the institution about rights and responsibilities for those with disabilities; section 10.21 comes into play if reasonable accommodations have been made and the performance remains unacceptable.

Professor Flink said the Committee would return to the draft procedures in the near future. Professor Miksch said she would provide material that could be shared also with SJC and the provost.

Professor Flink adjourned the meeting at 11:55.

-- Gary Engstrand

University of Minnesota

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DRAFT Procedures: Updated October 11, 2013
Unrequested Leaves of Absence for Disabled Faculty Members

The pertinent parts of the tenure regulations read as follows:

Section 10. Unrequested Leaves of Absence for Disability and Disciplinary Action

10.1 Unrequested Leave of Absence for Disability. A faculty member who is physically or mentally unable to perform reasonably assigned duties may be placed on unrequested leave of absence. The faculty member is entitled to sick pay and disability insurance payments in accordance with University policy. The faculty member has a right to return to the faculty upon termination of the disability or cessation of disability payments.

10.2 Disciplinary Action

10.21 Termination or Suspension of a Faculty Appointment Before Its Expiration. A faculty appointment may be terminated or suspended before its ordinary expiration only for one or more of the following causes:

- (a) sustained refusal or failure to perform reasonably assigned duties adequately;
- (b) unprofessional conduct which severely impairs a faculty member's fitness in a professional capacity;
- (c) egregious or repeated misuse of power of a professional position to solicit personal benefits or favors;

- (d) sexual harassment or any other egregious or repeated unreasonable conduct destructive of the human rights or academic freedom of other members of the academic community; or
- (e) other grave misconduct manifestly inconsistent with continued faculty appointment.

Termination Or Suspension Of A Faculty Appointment For Cause.

14.1 Preliminary Proceedings. Only a dean or an academic administrator specially designated by the senior vice president for academic affairs and provost or by the senior academic administrator may initiate preliminary proceedings under this section leading to unrequested leave of absence or to suspension or removal or to temporary or permanent reduction in rank. The dean must first attempt to discuss and resolve the matter with the faculty member involved.

Purpose for new procedures to govern Section 10(1): The Academic Freedom and Tenure Committee recognizes that there are differences between an unrequested leave in the case of a faculty member who is being terminated or suspended due to misconduct (for example, in cases arising under 10.21 (c), (d), or (e) of the tenure regulations) versus faculty members with a disability governed by section 10.1 of the tenure regulations. As the American Association of University (AAUP) report *Accommodating Faculty Members who Have Disabilities* (2012) notes:

In higher education, as in American society generally, one still often encounters the stereotype that disability necessarily equates with diminished professional competence. With suitable accommodations, a faculty member who has a physical or mental disability may perform equally as well as, or even better than, a colleague who does not have a disability . . . In promoting access and success for faculty members with disabilities, the AAUP highlights the significant talents of an important group, promotes a diverse professorate, and expands role models for students.

The purpose of these procedures is to recognize, as does the AAUP, the significant talents of an important group of faculty members at the same time providing due process and transparency for disabled faculty members and unit heads and deans in the event there is an unrequested leave of absence. The procedures draw from the best practices outlined in the 2012 AAUP report.

Draft Procedures:

Definitions:

Disabled faculty member: A person who has registered with the office of disability services. [provide a link to the Office: <https://diversity.umn.edu/disability/employeeservices>]

1. Registration with Disability Services Office

If a faculty member believes that a disabling condition impedes his or her discharge of professional responsibilities, it is the right and responsibility of the faculty member to raise the issue with the disability services office.

- a. If a faculty member decides to register with disability services, the office will work with the faculty member and the appropriate unit head to ensure that reasonable accommodations are put in place so that the faculty member can perform the essential job functions. These accommodations may include, but are not limited to, granting a request from the disabled faculty member for a leave of absence.

- b. A faculty member will not be retaliated against in any way for registering with disability services, nor will the office disclose the faculty member's disability without prior consent.

2. Unrequested Leaves of Absence for Disabled Faculty Members

If a unit head and the unit faculty elected to serve as the post-tenure review committee determine that a disabled faculty member who has been provided reasonable accommodations is no longer performing essential job functions, the disabled faculty member has two options. The disabled faculty member may elect to proceed

- (a) pursuant to section 10.21 and 14.1; or
- (b) under the following procedures:

- (i) The dean, a representative from disability services, and the disabled faculty member will meet and discuss whether the faculty member should take a leave of absence. If after this meeting, based on advice from the office of disability services, the dean determines that there should be a leave of absence and the disabled faculty member declines, the dean will notify the disabled faculty member of the right to appeal the decision to the Judicial Committee pursuant to section 14.1 of the tenure regulations.

3. Cases where a faculty member does not register with disability services

- a. A faculty member who decides not to register with the disability services office is not governed by section 10.1 of the tenure regulations.

NOTE TO SECTION 2 ABOVE: The AAUP 2012 report, Appendix C, notes the following:

In the context of a faculty dismissal process where there may be an issue of a disability, while it is humane to take into account the potential stigma and privacy issues of a faculty member, it would probably violate the ADA and Rehabilitation Act to have a mandatory process on a health or disability issue. While it might be appropriate to provide a faculty member an option of addressing the issue outside of the ordinary termination process, it is problematic to require it.

The AAUP also notes the need for consistent and appropriate procedures for termination and for addressing disability issues. Again, that is the purpose of drafting procedures to accompany section 10 of the tenure regulations.