

Minutes*

Faculty Consultative Committee
Thursday, October 5, 2006
1:15 – 3:00
238A Morrill Hall

Present: Carol Chomsky, (chair), Gary Balas, Jean Bauer, Nancy Carpenter, Barbara Elliott, Emily Hoover, Mary Jo Kane, Judith Martin, Richard McCormick, Nelson Rhodus, Steven Ruggles, Martin Sampson, Geoffrey Sirc, John Sullivan

Absent: William Durfee, Megan Gunnar, Kathleen Krichbaum, Scott Lanyon, Jennifer Windsor

Guests: Senior Vice President Robert Jones, Vice President Richard Pfutzenreuter; Provost E. Thomas Sullivan; General Counsel Mark Rotenberg

Other: Kathryn Stuckert (Office of the Chief of Staff); Sharon Reich Paulsen (Office of the Provost)

[In these minutes: (1) the biennial and capital requests; (2) discussion with Provost Sullivan (Section 7.11 of the tenure code, faculty mobility with merged departments, other topics; (3) potential False Claims Act threats against universities]

1. Biennial and Capital Requests

Professor Chomsky convened the meeting at 1:25 and welcomed Senior Vice President Jones and Vice President Pfutzenreuter to discuss the capital and biennial requests.

Vice President Pfutzenreuter started with the 2007 capital request, composed of two elements: the Biomedical Sciences Research Facilities Authority (BSRFA) and HEAPR funds. The BSRFA, a separate bonding authority for University biomedical buildings, received strong support in the legislature last year but was blocked by one committee chair who is not running for re-election. It was approved in the Senate 53-19 and both Governor Pawlenty and DFL candidate Mike Hatch have endorsed it. Although the legislature did not approve the BSRFA last session, it did approve one of the five buildings that are to be funded through the Authority, so the renewed request this year is adjusted down to reflect last year's action.

The \$22 million for HEAPR (Higher Education Asset Preservation and Replacement) funds are for emergency repairs to buildings (life safety, water infiltration, building systems). This is not a normal capital budget session of the legislature but it typically identifies about \$150 million in the off years for emergency capital items. Professor Martin said it was a good idea to break down the proposed HEAPR expenditures so that legislators can see what they will be used for. Professor Balas asked if each of the items on each campus is tied to a particular building; they are, Mr. Pfutzenreuter confirmed, and said he would provide the list to the Committee.

* 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.

Senior Vice President Jones continued by discussing the biennial request. He said that each biennial request is important to the University; each one tries to establish the best framing principles so it is likely to be successful. That is true this year as well; the one main principle this year is that the request is to support strategic positioning—and NOT to think of it as a two-year increment, but rather as the first installment of a 10-year strategic positioning effort.

The biennial request docket sheet for the Board of Regents' meeting is short, Mr. Pfutzenreuter observed. Tuition is a topic in the gubernatorial race and a political issue this year, so the President wanted to hold back on the recommendation until he has actually spoken with the Board at their meeting. Mr. Pfutzenreuter reviewed the two umbrella components of the biennial request: (1) "Assuring Quality and Competitiveness" and (2) "Creating Minnesota's Future."

Under (1) there is general compensation (the assumption is that for faculty and staff on O&M funds, there will be a pooled 3.25% salary increase each year of the biennium plus an additional .5% for increased fringe benefit costs, for a total of about \$35 million each year, distributed not across-the-board but on market and merit; this item dominates (1)); advancing education (strategic positioning initiatives—writing, honors, UROP, etc., for a total of about \$13 million per year); technology and related infrastructure (a series of initiatives such as the graduation portfolio, technology improvements, classroom technology, etc., for a total of about \$3.5 million per year); and facilities operations and maintenance (expenses for new buildings, utility bills, lease and debt costs, for a total of about \$15.5 million each year).

Under (2) there is competitive compensation (targeted funds for faculty and faculty-like staff, all merit-based, to increase compensation by an additional 2% per year, so for faculty the total increase for the two years will be 5.75% each year, including fringe benefit costs); health workforce and clinical sciences (learning platforms, health education initiatives); science and engineering (medical devices, nanotechnology, neuroscience, and others); and agriculture, renewable energy, and the environment (the Institute on the Environment, biofuels, food safety, etc.).

Professor Martin reported that the Committee on Finance and Planning had heard this presentation two days earlier, and as she thought about it, she wondered what the University is saying to the legislature with the "Creating Minnesota's Future" initiatives. There is no mention of critical thinking or analytical skills, which the University does say it teaches to undergraduates. Dr. Jones said the administration has had long discussions about this and they recognize that they do not capture these elements of education in "Creating Minnesota's Future"—but the intent is to do so in "Assuring Quality and Competitiveness." It has not been forgotten, Mr. Pfutzenreuter agreed. Professor Martin responded that it better be highlighted or a lot of people will believe it has been forgotten.

The overall cost of the request is about \$192 million for the two years, to be funded by a 1% reallocation, tuition (a modest increase, by recent standards), and the state appropriation. Of that, \$134 million will go into (1) and \$58 million into (2). In response to a question from Professor Chomsky, Mr. Pfutzenreuter said that sponsored research and private funds are not included in the biennial request.

When the final appropriation is set, what directions does the University receive from the state on how to spend the money, Professor Balas asked. Mr. Pfutzenreuter said the legislative staff creates a spreadsheet to track legislative decisions. There are more line items in (2), but there are not specific

dollar amounts in (1) for items such as UROP, the libraries, and so on. The University pays attention to legislative intent, although is not bound by it.

Professor Sullivan asked how things like analytic skills and liberal arts education fit in (1). There are initiatives in Advancing Education to help the liberal arts, Mr. Pfutzenreuter said. The elements of (1) seem to be more education than research, Professor Sullivan commented, while those in (2), "Creating Minnesota's Future," seem to be more research-oriented. Professor Martin added that while one can talk about new initiatives, if one believes there are good things already going on at the University, how will they be maintained? The elements of (1), "Assuring Quality and Competitiveness," are about maintaining the core, Dr. Jones said. Then that needs to be more explicit, at least for internal audiences, Professor Martin recommended.

How does one get something on the (2) list, Professor Hoover inquired? If one wanted to support the views of Professors Martin and Sullivan about education, how would one influence adding something to (2)? Through these discussions, Mr. Pfutzenreuter said, or through a conversation with the Provost, the President, or one of the deans.

At one point Mr. Pfutzenreuter said the "Creating Minnesota's Future" is the "sizzle" portion of the request. Professor Sullivan said he had a hunch that there is a lot of social science sizzle that isn't captured in this request, sizzle that might actually be harder work than science and engineering, such as how to create a stable and growing democracy in countries that have not had them before.

Professor Sampson shared the concern about internal communications. The request is not a message about internal priorities. The budget request is a statement of the partnership the University needs with the state for its part of its funding, not an overall proclamation of the University's entire agenda. Senior Vice President Jones said that is not the message they are trying to send; people will be able to see more clearly the intent after the Board of Regents has its discussion. The goal is to keep that part of the University strong and growing. Professor Martin asked that the request be returned to the Committee on Finance and Planning after the regental discussion.

Professor Rhodus said he did not disagree with the views of Professors Martin and Sullivan; the social sciences and humanities are important, essential to the University, but what are the political realities? What is the chance of convincing legislators about the value of these fields? Must the University have the sizzle items in order to receive funding for its core operations? That varies with the legislator, Mr. Pfutzenreuter said. Has there been any attempt to capture the effects of work in the social sciences, Professor Sullivan asked? Professor McCormick said this Committee is more concerned about internal priorities because packaging the biennial request will always have to include political considerations. But this discussion reflects discontent, the sense that some parts of the University are not valued as highly as other parts.

The Committee discussed the politics of the request. Professor Chomsky concluded by saying that when the administration speaks to the legislature and the Board of Regents in this way, it is also speaking to the faculty. Putting certain items under "Assuring Quality and Competitiveness" and other items under "Creating Minnesota's Future" sends a message. They need to communicate with the internal community as well as the legislature and Board, but not send two different messages. The faculty can be satisfied by the message that the "rest" of the University is supported and respected in this request, but much of that message is not here.

Professor Chomsky thanked Senior Vice President Jones and Vice President Pfitzenreuter for joining the meeting.

2. Discussion with Provost Sullivan

Professor Chomsky now welcomed the Provost to the meeting. She related that the issues to be discussed included revision of Sections 7.11 and 7.12 of the tenure code and faculty mobility in light of the change in college structures. With respect to the first, some of the department chairs, in recent conversations with FCC members, raised the question about how University service does or does not count in Section 7.11. The chairs also asked about support for the process of reviewing the 7.12 statements and expressed a lack of understanding of what they were supposed to do.

Provost Sullivan began with the question of the role of University service in Section 7.11 and the departmental 7.12 statements. As a result of a number of discussions earlier in the week that included Professor Chomsky, Professor Clayton (chair of Academic Freedom and Tenure), and Vice Provost Carney, there appears to be a consensus on language about departmental/collegiate/institutional service. He will meet with the Academic Freedom and Tenure Committee tomorrow; after it has completed work on Section 7.11, it will come to this Committee and then be taken to the Faculty Senate in November, assuming this Committee assents to the work of the Academic and Freedom Committee.

In terms of help for departments, they were provided in June a first draft of a possible revision of Section 7.11; as soon as this Committee discusses the most recent proposal, it will be forwarded to department heads for guidance on crafting 7.12 statements.

On the issue of faculty mobility, the Provost made two points.

-- When entire departments were moved into restructured colleges, the receiving college did not get to pick and choose individuals in the departments that were moving.

-- If an individual faculty member did not want to be in the moved department, perhaps because of a sense of misaligned expertise, the cases were handled individually and his office worked with the receiving departments—which, under the rules, have a say in whether to accept the person. There have been a number of such cases completed and a few that are not yet done. In some cases, the individual was disappointed because the receiving department declined to approve the move. In the individual cases, however, his position has been that the transfer decision should be made without respect to financial considerations; in some cases, it is possible that deans imposed financial penalties on departments if they accepted a transfer (e.g., the department had to give up its next faculty line). The Provost said he would revisit the cases where an individual was not accepted by a receiving department to be sure that financial implications did not affect the decision.

Professor Chomsky asked what recourse a faculty member has when he or she believes that budgetary factors entered the decision. If the person contacts him, Provost Sullivan said, he and Vice Provost Carney will review the conversations. If the decision was made on the merits, they will not interfere. If it was made on financial grounds, they will see what they can do if the transfer is otherwise a good fit.

Is there a time limit for faculty ask for a transfer, Professor Bauer asked? Perhaps they move with the department and only later concluded that the new arrangement is not working; may they then decide to request a transfer? The Provost said there has been no time limit set; there needs to be fluidity and a comfort level with the decision. The goal is that everyone is more effective and efficient, not that they be bound to a specific department. He emphasized that he will not micro-manage college and department decisions but that he wants to try to help unhappy faculty members.

Where does a faculty member end up if the decision about the transfer is "no," Professor Kane asked? Does the faculty member stay in the department? Yes, the Provost affirmed. Will probationary faculty be lost because of this process? They will not, the Provost said. If the faculty member is turned down for non-financial reasons, there may be a problem, because the individual is left in a department where the department knows the person did not want to stay. There could be complications in how the individual is treated by the department, Professor Chomsky observed. The head of the department will need to deal with those delicate issues, Provost Sullivan said. As will those above the department head, Professor Chomsky commented.

The Provost also said that he and Vice Provost Carney are working on a "best practices" document to help departments revise their 7.12 statements. They cannot draft a model 7.12 because departments vary too much, but they can provide best practices they see at other universities and in departments here. The Provost expressed concern about the unevenness of standards on evaluation of teaching across departments and the potential problems that arise: a standards issue on how the University makes decisions, and clarity (or lack of it) for the candidate. The COACHE study found that the greatest anxiety among probationary faculty is about the ambiguity of standards. It appears that the greatest ambiguity in University standards may be in evaluation of teaching. Are they applied uniformly? Do they convey the message that the University puts a premium on teaching? If teaching is ignored, the University will not be where it should be in terms of the excellence expected.

The Committee has previously asked about financing the strategic positioning effort, Provost Sullivan recalled. He told the Committee that the President has begun frequent meetings with the senior officers about that very issue. The discussions are separate from the biennial request and capital request, which are important but only part of the strategy. They are looking at a 5-10-year plan for financing strategic positioning and are considering three broad categories: what are the strategic positioning investment priorities, what will it cost/what budget will be required to make the investment, and what are the revenue sources? The President has discussed resources with the Regents (e.g., tuition, state funds, sponsored research funding, private funds, auxiliary units, external sales, underdeveloped assets, interdisciplinary transfers, and reallocation). They are looking at the sources of income, where they are now and where they should be in five years, and aligning them with priorities.

Professor Kane asked about a funding pool for the "wave one" colleges (the ones that have already seen structural rearrangements). The Provost said that both last year and this year funds were set aside for those colleges. The funding will continue until the colleges are stable and faculty are comfortable with them. There is in addition the need to create a reserve because "things happen."

Provost Sullivan agreed with an observation by Professor Sampson that the discussions about financing strategic positioning are quite different from discussions of the biennial request or capital request; the latter two are derivative of the former. The University must get out of thinking in two-year increments.

Professor Hoover said one comment she has heard a number of times is that it is difficult to have strong interdisciplinary programs without core departments. People are concerned that the University will fund interdisciplinary programs but allow departments to fall apart. One example has been the description of support services that will be provided to faculty in the new institutes; the response of one faculty member is that that is what they need in the departments. Departments are being left behind. The Provost thought the point a good one and said it should be addressed in the compact process. Deans need to indicate where the strengths of the college are and make the case for departments.

FCC members heard loud and clear from department chairs, however, that the compact process is a budget process, Professor Chomsky said; the deans are involved in it but the departments don't know about it, and the departments are being starved. The department chairs do not see the compact process as a solution. They also said that the new budget model is imposing new costs but providing no sources of revenue to pay them, Professor McCormick added. Committee members and the Provost discussed the need for department chairs to have candid conversations with the deans, the use of the \$9 million provided to the colleges through the compact process last year (and the perception that the money went to interdisciplinary efforts rather than for building departments), the need, at the same time, for money for interdisciplinary efforts, and the role of the collegiate strategic positioning process in these kinds of discussions.

Professor Rhodus inquired if what is being said about the financing for strategic positioning fits with what is being said to the legislature. Provost Sullivan said it does; the message is clear that this must be a multi-year effort. There is also a linear connection between the task force reports and the biennial request. The President will emphasize that the biennial request is part of a long-term plan. Professor Sampson said it is wise to articulate the view that state funds are not the sole source for strategic positioning.

Professor Chomsky thanked the Provost for joining the meeting.

3. The False Claims Act

Professor Chomsky welcomed General Counsel Mark Rotenberg to the meeting to discuss the False Claims Act (FCA).

Mr. Rotenberg began by saying that the False Claims Act is not an emergency matter; it is more akin to a dull toothache. The FCA is an old statute; its progenitor was enacted during the Civil War to encourage individuals to partner with the Union to identify suppliers who were defrauding the army. Since that time the Act has gone through several changes, but it essentially encourages individuals to work with the Department of Justice to ferret out fraud in cases where private parties (falsely) make claims on government money. The Act assumes that the government will get ripped off unless it has help in preventing it.

Is it only individuals who may take action under the False Claims Act, Professor Martin asked? Mr. Rotenberg thought that generally was the case, but the federal government may also assert FCA claims.

The University has had a number of involvements with the FCA, Mr. Rotenberg said. For example, during the events surrounding Dr. John Najarian and ALG, claims were raised under the FCA and the University spent almost \$50 million related to alleged frauds and crimes. One person who became very wealthy as a result was a University employee who recited facts to the federal government about what had been done in the Department of Surgery. In these types of FCA cases there is potential for treble damages, and the individual who reports the alleged fraud and initiates the actions shares in the payments. So there is local experience, and there have been other FCA claims against the University that have not been successful.

Recently there have been two cases reported in *The Chronicle of Higher Education* in which a Court of Appeals ruled that the FCA may apply even in cases when the allegedly false statement was not made in a university's request for government funding, but was made in other representations remote in time from the request for funding. The courts ruled that the institutions are still liable if the information was false, given to a non-governmental agency, and the government relied on the information from the non-governmental source to award funds to the institution. For example, the institution makes a statement to an accrediting agency (not a federal agency) and two years later the government relies on the fact of accreditation as part of a request or application for funds. The government can look at the institutional statements to the accrediting agency and determine that it lied to the agency; the government can then sue and possibly get treble damages. In this way the Act may provide a powerful economic incentive to faculty and staff to blow the whistle. These decisions have aroused concern among Washington higher education lawyers

Based on these cases there is reason to be more concerned about the use of the FCA as an offensive weapon against universities, especially against universities like Minnesota, which are decentralized and far-flung. Some, like Johns Hopkins and MIT, have a more centralized focus on federal funding; others, like Minnesota, are larger with more disaggregated regulatory mechanisms—and the latter have reason to be concerned.

Eventually this issue will get to the Supreme Court, which may or may not resolve it. For the near future, however, it is likely universities will be subject to plaintiff (whether private individuals or Department of Justice) threats to seek redress for alleged frauds using the FCA. It may seem an obscure area of the law, Mr. Rotenberg concluded—but it is not to his office. Professor Chomsky agreed, noting that there have been "a lot of alarm bells" in *The Chronicle of Higher Education*.

Professor Balas asked what the result would be if the accrediting agency said it would have accredited the institution even with the false statement. That would be a factual issue, Mr. Rotenberg said, and many of these cases are resolved by settlement after a judgment that the suit can be brought under the Act, and so never get to the facts. But if the institution would have been accredited anyway, and the accrediting agency says so, and the federal agency relied solely on the fact of accreditation rather than on the underlying facts, the institution would be in a stronger position.

It is public knowledge whether an institution is accredited or not, Professor Martin commented; this use of the FCA seems like a "gotcha." Accreditation is public knowledge, Mr. Rotenberg agreed, but the point is that the institution represents itself as accredited and is putting itself behind the claim that it is PROPERLY accredited, and that the federal government can rely on the bona fide nature of the accreditation and that it was not based on fraud.

Professor Martin said that Mr. Rotenberg made it sound like the University is at risk because it is decentralized. Is it at risk? That is the big question, Mr. Rotenberg responded. His office is working with Mr. Schumacher's Office of Compliance to try to get a handle on the dozens of compliance units around the University—OSHA, NCAA, hazardous wastes, IACUC, IRB, stem cells, and so on—in order to do an assessment of how robust those compliance processes are. It is virtually impossible for the Regents or the President or his office to say how robust the system is as a whole, although one can get information about the various pieces of the system. It's something they're working on.

Another potential case, Professor Chomsky pointed out, is when the University affirms that it is in compliance with all applicable federal rules (e.g., when seeking a grant). One slip and there could a claim under the FCA. The Act has, she concluded, indeed veered from "false claims" to "gotcha." She thanked Mr. Rotenberg for explaining the FCA to the Committee and adjourned the meeting at 3:00.

-- Gary Engstrand

University of Minnesota