Minutes*

Faculty Consultative Committee
October 19, 1989

Present: Warren Ibele (chair), W. Andrew Collins, Norman Kerr, Lynnette Mullins, J. Bruce Overmier, Burton Shapiro, Michael Steffes, Charlotte Striebel

SCFA: Richard Christiansen, David Dittman, Stephen Scallen, George Selzer, Donald Spring, Constance Sullivan

Guests: James Borgestad (General Counsel's Office), Professor Shirley Clark, Amos Deinard (chair, Judicial Committee), Acting Vice President William Donohue, Vice President Leonard Kuhi, Professor Fred Morrison, Barbara Muesing (Regents' Office), Maureen Smith (Brief), Maureen Venters (Faculty Assistance Officer)

1. Report of the Chair

Professor Ibele announced that Professor Burton Shapiro had been selected by the Committee on Committees to serve as the chair of the Senate Committee on Finance and Planning (SFPC), and thus he rejoins the Consultative Committee because the SFPC chair serves ex-officio on FCC and SCC. He welcomed Professor Shapiro back to the Committee.

Professor Ibele then reminded Committee members that he would be making a report to the Board of Regents at their November meeting and that he would welcome suggestions on what he should include in the report.

2. Discussion with Professor Stephen Scallen, chair, Task Force on the Elimination of Mandatory Retirement

Professor Ibele welcomed Professor Scallen and the members of the Senate Committee on Faculty Affairs (SCFA) to the meeting to discuss the progress of the Task Force.

Professor Scallen opened his remarks by saying that the Task Force sought comments from both FCC and SCFA on the issues being confronted by the Task Force; they had no interest in engaging in an exercise but wished instead to be sure they are thinking along lines that are relevant to the academic community.

Professor Scallen began by informing the Committees that the exemption for higher education from the ban on mandatory retirement provisions expires on 12/31/93 and there is virtually no sentiment to retain it. Institutions will be able to retain mandatory retirement provisions for senior administrators and, depending on their responsibilities, perhaps department heads--albeit the "retirement" could be required only from the administrative appointment, not the faculty position.

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

If an institution violates the provisions of the law, the liability can be substantial--and Professor Scallen warned that plaintiffs are winning the cases.

The Task Force decided not to explore the "age and productivity" data. Some think there is no relationship, some think the law is so clear it doesn't matter, and some think both points are applicable. Each case will have to be dealt with individually.

In terms of the probable effect of the legislation on retirement behavior, Professor Scallen reported that six states have already uncapped the retirement age--and it was his estimate that the average age of retirement increases somewhere between 1 and 3 years. Asked how many faculty at Minnesota wait until age 70 to retire, Professor Scallen explained that MPIS had been so busy it had been unable to provide the Task Force with this datum but that it would do so soon. Provost Kuhi interjected that at California there was approximately a 3:1 ratio between those who decided to retire early and those who stayed until 70. Professor Scallen suggested that same behavior will probably characterize Minnesota; the risk is that the wrong people will decided to stay for "a long, long time."

The solution is not to do away with tenure; such a move would not help in any trial and employment at will is disappearing anyway, Professor Scallen observed. If, in addition, the institution can be shown to be engaging in practices which have a statistically disproportionate impact on a protected class (such as older faculty), a plaintiff can go to court and win in front of a jury unless the employer can explain away the impact. These same difficulties inhere in such proposals to terminate tenure for everyone at age 65, to switch to 5-year renewable appointments, or to 20-year renewable appointments.

In response to a question about whether or not the numbers of people involved made it worth considering drastic revisions in tenure, Professor Scallen said he was certain that the number of faculty who are shirking their responsibilities is less than 10% and that that proportion would likely be the same for older faculty.

Possible solutions are, first, to do nothing. The University would remain in business and muddle along. There would, however, be a cost to enduring the presence of the unproductive; those who work hard would resent them and there is a political and social cost to keeping the unproductive on the staff. One Committee member pointed out that tenure is not a sinecure; people should be reviewed for non-performance. That, however, takes a long time; if there are only a small number of cases to decide, but it takes five years, most of them will solve themselves. Another argued that left unresolved was the matter of standards of academic performance: If the University does nothing, it will still have no standards in 1994 and will have to wait for death to resolve the problems.

One possible solution suggested was removal of graduate faculty status; most faculty would be so chagrined at being unable to teach graduate courses or have graduate advisees and would retire. Professor Scallen retorted jokingly that there would be some who would not and would come and collect their paycheck without any embarrassment at all.

The Task Force is considering recommending enforcement of a minimum standard of productivity. It is not expected that there would be a lot of cases engendered for the Judicial Committee but it should not be the aim to have zero cases. Professor Scallen said that the deans could win these cases if there

were reasonable standards and defined duties. He agreed with an observation that the University should adopt and enforce such standards now--and enforce them with 45-year-old faculty rather than waiting until 1994 and then going after the oldest faculty.

Professor Scallen then explained that some factors influencing retirement decisions are beyond the University's control, such as health, geographical preference, and a spouse's health or job. Others can be controlled; one is retirement pay (where the University does very well). (This pulls both ways: There is a big pot of dollars which faculty members can get at when they retire--but staying a few extra years has a significant impact on the size of that pot.)

It is clear that one factor which affects the retirement decision is post-retirement health insurance. Retiring at age 62 or 63 means the retiree will have to pay perhaps $3500 per year in post-tax dollars for health coverage for a spouse; even waiting until age 65 can mean $2000 or more in health insurance expenses. The University could provide such coverage but it would be costly. One way would be to take the money out of legislative salary increments--but that isn't popular, Professor Scallen said; there are intergenerational problems. Another way would be to fund the cost directly from the line item from which the person retired; the department or college would recover the line item minus the cost of the health coverage. It could be done on an actuarial basis, one Committee member pointed out: set up as an endowment, it would become, over time, a steady-state fund. Private sector employers, it was explained, provided post-retirement health coverage as a negotiated union benefit but did not fund it--and now face a huge liability. If funded on an actuarial basis the University would be prepared for it--and the benefit should not vest but remain with the University, not the employee.

Professor Scallen added that there are several ways the University could provide the coverage (such as paying 80%, not with a spouse covered separately, etc.) and concluded the coverage should probably be offered because health insurance is such a big factor in the retirement decision.

Provost Kuhi asked if the faculty would be willing to reduce the University's contribution to their retirement plan by some small fraction in order to fund post-retirement health coverage; it was suggested that such a step would be taking away something the faculty already have (as well as having a significant impact because of the multiplier effect of reducing dollars over many years) rather than reducing a nebulous salary increase.

There are different ways individuals can "be retired" from a department; they can be booted and the door slammed or they can be provided an office, secretarial support, parking, and invited to department functions. The University has both extremes, and this, Professor Scallen observed, is perhaps one place where less diversity might be desirable. There is no reason to make faculty face retirement thinking they have no place to go; it should be a happy transition, he said, not something to be dreaded.

Phased retirement should also be used--and the Task Force means straight pro-rata arrangements with nothing special added.

Compensation and merit pay are also part of what the Task Force is considering. An issue is whether there should be zero % increases for some faculty, and perhaps salary decreases after a zero increase and with due notice. This practice would deliver the message to a faculty member and provide him or her an opportunity to respond--at a lower cost than proceedings for termination for cause. Further,

all economic decisions should be disclosed to the department for purposes of providing information to the faculty and reviewing the unit head's decisions.

The measurement of productivity, for the purposes of salary-setting, is a problem; each department would have to work out its standards in agreement with the Provost. It is argued that some faculty are productive in ways not traditionally measured; others contend that as a research university, any measure of productivity must include a research component.

Professor Scallen observed that there are those who say that with the likely faculty shortage in upcoming years, the problem will not be getting people to retire, it will be getting them to stay. That problem, he commented, can be solved by treating the faculty nicely.

One conclusion the Task Force has tentatively reached is that early retirement inducements should be eliminated. There appears to be adverse selection and a waste of money. The University has had this option since 1982; although it is supposedly not available to everyone, anyone who knows the ropes can take advantage of it. The administrators who have run this program really like it, because they can recall that they got rid of professor "X" but the Task Force believes they are wrong about who generally uses it. The Task Force does, however, Professor Scallen said, recognize that occasionally administrators need to have available a "buy-out" option; they should have it, but it should not be an announced program and should be used sparingly--but it is an appropriate use of funds.

One Committee member asked that the Task Force look explicitly at recommending mandatory retirement for administrators at age 65.

Professor Scallen inquired if the University should consider uncapping the retirement age in advance of the 1994 statutory provision. It was suggested to him that the Task Force do a survey of department heads to find out what they believe the impact of early uncapping would be; part of such a survey should include an analysis of the impact of uncapping by college (because some colleges were "badly deaned" 20 years ago and many faculty are just waiting for the mandatory retirement of some of their colleagues--and would be unhappy at the prospect of early uncapping of retirement.)

Professor Ibele thanked Professor Scallen and the members of SCFA for joining the meeting. He suggested that another meeting such as this one would be necessary in the near future; in the meantime, members of both Committees could digest what had been presented today and think about what advice might be tendered to the Task Force.

3. Status of the new grievance procedures

The Committee turned next to the grievance procedures which had been adopted by the Senate last Spring. Professor Ibele welcomed Acting General Counsel Bill Donohue and Dr. James Borgestad to the meeting to report on the views of the administration about the new procedures. He also welcomed Professor Fred Morrison, the third of the three faculty who had served as the ad hoc committee to draft the procedures (the other two, Professors Deinard and Striebel, were already in attendance at the meeting). Professor Ibele also distributed a letter from President Hasselmo--which he had received just prior to the beginning of the meeting--outlining the problems with the new procedures as seen by the administration.

Dr. Borgestad began by explaining that he was presenting his views as University Grievance Officer and did not intend to reflect the opinions of the President; he said that Mr. Donohue, Professor Clark, and Provost Kuhi could do that.

There are, he said, two levels of issues which need to be addressed. The first level is a series of clarifications and wordings which are necessary; these, he suggested, could best be dealt with by conversations with the drafters of the procedures. The second level of issues contains three more fundamental questions:

-- Who is the ultimate decision-maker under the procedures?
-- What limits are there in the remedies allowed?
-- What may be grieved under the new procedures?

On the first, he pointed out that the proposed procedures represent a dramatic change from existing procedures in that it seems the administration does not make the ultimate determination--that is done, instead, by the grievance committee. Responsibility should be clearly placed in the hands of the proper administrative officer, which is the Vice President for Academic Affairs. Placing responsibility in a central officer will help ensure uniformity of treatment and informed application of University policy.

A part of this issue is that the policy too often identifies the President as the final authority; he is potentially involved in every grievance. It is, Dr. Borgestad argued, inappropriate to involve the President to that degree in every grievance.

On the second point (limits to remedies), Dr. Borgestad maintained that it would be inappropriate for college committees to make decisions about awarding lawyers fees and the like. The decision on remedies should also be an administrative decision.

On the third point (what may be grieved), Dr. Borgestad said it appeared that everything covered by University policy as well as state and federal laws could be grieved. We do not want college grievance committees making judgments about state and federal laws, he said or hearing grievances and making decisions where the issue is not relevant to University policy. He recommended that grievances be limited to the employment contract.

Mr. Donohue informed the Committee that he had spoken with President Hasselmo and that Dr. Borgestad had represented his views; in particular, the grievance procedure must end with an administrator who can be held accountable for implementing the decision. He noted that the proposed procedures covered "less serious" disputes (that is, short of employment termination) and these procedures were a step in the right direction of making it possible to address those disputes quickly and efficiently. The procedures should, however, he reiterated, be related to employment and not be used as a vehicle to set University policy.

Professor Morrison remarked acidly that he was dismayed by the process which had brought them in front of the Committee. None of these questions were raised with the drafters, he pointed out. He had asked the staff to the Committee to see to it that a written document setting forth the administration's problems were provided to him so that he and Professors Deinard and Striebel could review them and

respond in a thoughtful fashion. He noted with anger that he was provided with the letter five minutes before the meeting started. It was unfair, he charged, to spring on them these substantive points for the first time and expect immediate, off-hand answers.

The draft of the procedures, Professor Morrison recalled, were circulated to the administration and all over the campus a year ago. The drafters heard very little, and what they did hear they responded to with changes in the language of the procedures. There was, he observed, "glacial silence" out of Morrill Hall on the entire matter. This is, he pointed out with some feeling, not the way to treat faculty who work on task forces like this.

Professor Morrison concluded that he was uncertain that the ad hoc committee still existed; the Senate had created it and had adopted the procedures. Any amendments proposed would have to go to the Senate and it will be incumbent on the administration to present them.

Mr. Donohue responded to Professor Morrison by pointing out that the process had started in the Fall of 1987, that his predecessor Steve Dunham had responded in April of 1988 to inquiries from Professor Morrison, and that the next his office heard was in February of 1989 informing them that objections raised by Mr. Dunham had been met and the document was going to the Senate shortly. Mr. Donohue acknowledged that there had been delays and that he was not asking for off-hand responses; these issues needed careful attention and there was no need for a rush to judgment. He also noted that part of the problem had been the transition in the central administration, which everyone knew about, and the need to attend to a multitude of problems. The document should indeed be brought back to the Senate, he agreed, and also needed to go to the Board of Regents for approval.

Professor Striebel, one of the drafters, contended that they had received comments from a lot of different sources, had "trotted all over the campus" to solicit comments, and had dealt with all of them in great detail, rewriting the document to meet the objections. Now, with a new cast of characters in Morrill Hall, she said, "we are being asked to start all over."

The procedures, she advised Mr. Donohue and Dr. Borgestad with exasperation, met every objection they had raised; she queried how familiar they were with the document. It is very clear, she said, that the administration has the final decision, that the remedies are in the hands of the administration--the committees can only recommend--and that for an issue to be grievable there must be harm to the individual. Professor Deinard joined in by observing that when the procedures were adopted by the Senate, the only question was whether or not the Regents would need to approve them. Professor Striebel concluded by pointing out that the administration had apparently decided the Board must approve them--but was now declining to take the document to the Regents in its current form.

Mr. Donohue said they would be glad to have language pointed out which responded to the concerns and, where necessary, would work to fix it. He told the Committee he had clients--the administration--whom he had had to meet with before he could bring these issues to a faculty committee.

Professor Morrison entered the discussion again; he noted that he had not brought his files because he had not the foggiest idea what Dr. Borgestad and Mr. Donohue would want to talk about. Those files would show, he told the Committee, that Mr. Dunham had raised objections, that the ad hoc committee had redrafted the language to meet them, and that after providing the revisions to the administration in

February he had heard no expression of any further concern--so the ad hoc committee went forward with the procedures to the Senate.

Although he had intended not to do so, Professor Morrison said, he would go ahead and make some off-hand responses to the points raised by Dr. Borgestad--with the reservation that he could correct them later upon reflection. He echoed Professor Striebel: The procedures make it abundantly clear that the ultimate decision-maker is a senior University officer, either the President or his designee. On the question of accountability, he said, if the administrative decision is inconsistent with the recommendation of the grievance committee, the president should be accountable for the decision and that accountability should be public.

The ad hoc committee, he recounted, struggled with whether to name the President or the Provost as ultimate decision-maker and finally left it with the President because sometimes the responsible authority is not under the jurisdiction of the Provost (e.g., Payroll). Organizations also change in structure, and the committee decided on the President because then all lines of authority would be bound by the decision.

Since the final decision is in the hands of the administration, he observed, the remedy is one the final decision-maker sets. Committees may make inappropriate recommendations, he agreed, and the administrative officer can decide if that is so.

On the question of what can be grieved, he reflected that most of the criticism they had received had been that the procedures defined grievable issues too narrowly; now, he remarked, they were being criticized for being too broad. Like Professor Striebel, he asserted that there must be serious injury to the claimant for a grievance to be accepted; it must be limited to University policy or within legal rights under discrimination provisions of the law (e.g., sex, age, race). They had concluded that it would be better to try to address discriminatory actions in-house rather than downtown in district court. This last point had never been discussed with the ad hoc committee, he added, although it certainly could be.

Mr. Donohue informed the Committee that the University has an EEO policy which is as broad as the law allows and that statutory problems are likely beyond the competence of a faculty committee. Perhaps he could be persuaded otherwise, but insisted that there were still major problems with the procedures which needed to be addressed. He would, he said, like to get to a discussion of the three problems identified by the administration.

One of the Committee members observed with considerable irritation that he had often thought that the administration accepted faculty views only when those views are consistent with those of the administration. If the administration disagrees with the faculty view, they say a document is unacceptable--but do not take responsibility either for fixing it themselves or for changes the faculty may make at their direction. Why should the faculty bother with this sort of procedure, he inquired; if the administration will only accept or send forward that which they agree with, why not just let the administrators handle the entire project? He was not completely serious, he added, but that flavor ran through this entire episode.

Mr. Donohue replied that that had not been his experience. There had been Judicial Committee decisions which administrators had not liked but which had been affirmed and implemented. He

maintained that faculty and P/A staff needed a policy which makes clear what it is they can grieve and where the grievance would end up. Some, he said, would probably be better off pursuing their dispute outside the University, and repeated that grievances should not be seen as a way to discuss University policy.

One Committee member recalled that he had never seen a policy so widely circulated and charged that the three drafters deserved an apology for not having received the administration objections in a timely way. Professor Ibele concurred and extended his apology, saying he had been responsible for putting them in this position. He had earlier sought the written document which Professor Morrison had requested and had not received it until today.

Professor Ibele continued by advising Mr. Donohue and Dr. Borgestad that he found the memo which they had distributed to be inadequate as a basis for making improvements to the procedures; if they had problems with the existing document they should cite chapter and verse and suggest alternative language. The Committee appeared to be unanimously of the view that any statement from the administration would have to be brought to the Senate through the Consultative Committee.

Informed that the docket deadline for the Senate meeting is November 2, Mr. Donohue promised that proposed changes in language would be provided to the three drafters by the following Wednesday. Professor Ibele requested that they also be provided to the members of FCC.

4. Personnel matters

The Committee voted without objection to close its meeting in order to name the members of the Task Force on Lengthening the Probationary Period. A slate of names was developed and Professor Ibele was asked to call those who would be requested to serve.

The Committee adjourned at 3:30.

-- Gary Engstrand