

Minutes*

Academic Freedom and Tenure Committee
Friday, February 13, 2009
2:00 – 4:00
238A Morrill Hall

Present: Tom Clayton (chair), Yusuf Abul-Hajj, Arlene Carney, Kathleen Ganley, Karen Miksch, Gary Peter, Terry Simon, Carol Wells

Absent: None counted for a meeting held at a different time

Guests: General Counsel Mark Rotenberg

[In these minutes: (1) Academic Freedom and Responsibility policy; (2) post-tenure review]

1. Academic Freedom and Responsibility Policy

Professor Clayton convened the meeting at 2:00 and welcomed General Counsel Mark Rotenberg to discuss proposed changes to the Regents' Academic Freedom and Responsibility policy.

Mr. Rotenberg said he was glad to join the Committee to help it understand the meaning of terms. He reviewed briefly the reason the Committee had originally suggested amending the policy (federal case law beginning with the Garcetti decision). The result of Garcetti and its progeny is that First Amendment protection for professional speech by public employees is ambiguous. He noted that for teachers and faculty, who are hired to teach and write, the traditions of academic freedom could be endangered by developing case law. He noted that academic freedom, as it grew out of European and American universities, is not the same as First Amendment law, although they overlap and are related to the same fact situations. The amendment the Committee proposed ensures that irrespective of the evolution of First Amendment case law, the Regents policy on academic freedom will protect discussions and speech related to the functioning of the University. There is no disagreement about that recommendation and the policy should be clarified as the Committee has suggested.

The academic-freedom language reads as follows (current and proposed):

Current: Academic freedom is the freedom to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write as a public citizen without institutional discipline or restraint.

Proposed: Academic Freedom is the freedom to discuss all relevant matters in the classroom; to explore all avenues of scholarship, research, and creative expression; and to speak or write without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties and the functioning of the University.

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The other suggestions offered by the Provost are intended to align the phraseology of the academic-freedom and academic-responsibility language in the policy.

Current: Academic responsibility implies the faithful performance of academic duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that the individual is not speaking for the institution in matters of public interest.

Proposed: Academic Responsibility comprises the faithful performance of assigned professional duties and University obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that the individual is not speaking for the institution in matters of public interest.

Mr. Rotenberg said that he and the Provost believe that the language should be parallel and duties should be parallel to freedoms, something that is a commonplace observation in a number of areas of the law. Another concern the Provost expressed is that the responsibilities of those covered by the policy are not solely defined by the academic requirements of a faculty member. There are other duties, equally important as "academic duties," such as those embodied in University policies governing conflict of interest, conflict of commitment, use of human subjects, and so on. Initially the impetus for changing the policy came from Garcetti, and from that followed the idea of the need for parallelism between freedom and responsibility, the latter now identified in a more fulsome sense than only "academic duties."

Professor Clayton inquired about the word "assigned" in the proposed language. Mr. Rotenberg explained that the Provost believes it captures, for example, a particular assignment arranged between a department head or dean and a faculty member on teaching. For instance, it may not be part of one's overall academic duties to teach Calculus 1001, but it could be an assigned duty for a particular semester. Mr. Rotenberg cautioned that he had not discussed the particular word "assigned" with the Provost but said he believes that is the Provost's general view.

Vice Provost Carney observed that there is a section of the tenure code (10.2) and interpretation (#8) that specifically addresses the assignment of teaching duties and fairness. Professor Clayton said that "assigned" seems redundant in light of the tenure-code provisions. Moreover, there is an open-ended quality about the language of "assigned," given the passive voice in the proposed language.

Mr. Rotenberg agreed that the language is open-textured and that may be intended. The Board of Regents expects that deans or department heads will have the authority to decide that someone must be the Director of Graduate Studies or that someone will teach a particular course on an emergency basis.

The Committee and Mr. Rotenberg spent considerable time discussing the proposed language and the meaning and implication of certain words in the proposal.

-- Professor Clayton suggested that "reasonably" could be inserted before assigned. Mr. Rotenberg concurred and said that "reasonableness" is the standard legal construction of policy language. Any judge or panel evaluating a dispute would use a "reasonableness" standard.

-- Professor Abul-Hajj inquired about the distinction between "academic" and "professional" duties. Mr. Rotenberg said that "academic" is likely to be construed more narrowly than "professional." This policy applies to P&A staff as well, he noted, some of whom may not perform academic functions, but it applies

unquestionably to them as well. There are professional responsibilities that go along with academic freedom, even if they are not "academic," strictly speaking.

-- In response to a comment from Professor Clayton, Mr. Rotenberg agreed that the changes in the academic-responsibility language do not follow from the changes in the academic-freedom language. It was not the Provost's idea to amend the academic-freedom language in the policy, but once he received the proposal, he thought it appropriate to clarify the language about academic responsibility as well. Professor Clayton said the Committee is being asked to buy another package that it may not approve in order to get what it wants; if the Committee agrees, it will need to rewrite the language to incorporate "professional" and "University" obligations into academic responsibilities.

Mr. Rotenberg said the idea was to do as little amending as possible. If academic freedom is redefined as proposed, not all of the elements included in the amendment are traditionally "academic." A University P&A staff member may participate in a political rally or write an article, and is not only protected by the First Amendment but also by the traditions of academic freedom in higher education.

The Committee discussed whether academic freedom can apply to P&A staff in the same way it does to faculty, given that most P&A staff are on annually-renewable appointments and in many cases are given responsibilities by a superior that they must carry out. In practical terms, if a P&A staff member does not agree with a dean or department head, it is easy for the unit to replace him or her. A dean or department head can tell a P&A staff member to work on a project; the staff member cannot decide not to do so and to work on something else. Mr. Rotenberg agreed that the job duties of a P&A staff member are subject to modification with more administrative flexibility than the job duties of a faculty member covered by the tenure code, but he pointed out that P&A staff cannot be fired on the whim of an administrator, either.

-- Professor Wells said that her understanding of tenure is that it is a "sacred trust" given to few people on the planet. That trust "implies" (as in the current language of academic responsibility in the policy) that the individual holding tenure will carry out all the responsibilities of the position. The proposed language changes the policy from governing the performance of an elevated trust to the performance of assigned duties. That is not what tenure and academic freedom are about. She said that the changes to the academic-responsibility language alter the policy conceptually and make the two provisions apples and oranges. Other Committee members expressed dislike for the inclusion of "assigned" in the draft. Professor Clayton said the difference in language is the difference between a professional vocation and an employee's duties.

Professor Simon observed that the Committee has the option of not recommending any change in the policy.

Professor Clayton thanked Mr. Rotenberg for joining the meeting and clarifying where everyone stands on the proposed changes to the policy.

Professor Clayton said that it appears the Committee either buys the revision to the academic-responsibility language or puts the entire proposal on the shelf. If the faculty cannot get relief from Garcetti without the considerable constraints in the proposed academic-responsibility language, it does not make sense to propose amendments. Professor Miksch commented that it was helpful, however, to hear that the changes proposed in the language of academic responsibility are not in lieu of the changes

proposed by the Committee in the academic-freedom language. She also said it was helpful to be able to understand the difference between academic and professional duties. It appears the proposed academic-responsibility language is trying to make it parallel to the new language in the academic-freedom section. That is the argument, Professor Clayton agreed, but maintained that the two are not parallel.

Committee members discussed at length the proposed academic-responsibility language. Some of the points that were made were these.

- A "sacred trust" is reduced to a series of constraints that were not there before. The contrast between "sacred trust" and assigned duties was noted several times.
- The "sacredness" comes from the language that remains intact, in the second and third clauses of the academic-responsibility language. The disagreement comes down to "implies" versus "comprises," and it is not clear why there is so much passion about the proposed changes.
- There is already language in the tenure code about teaching assignments and it is not clear why "assigned" needs to be in this policy. Most understand that if they continually refuse to teach assigned courses, there will be consequences, especially since the tenure code says as much.
- The proposed changes in the academic-responsibility language destroy the integrity of the document and add nothing. "Academic duties" comprehends all faculty responsibilities and "professional duties" does not belong here.
- The Committee added "professional duties" in the academic-freedom portion of the policy so it cannot be surprising that the same term was added to academic responsibilities.
- The changes to the language of academic freedom seriously expand the concept at the University in a way it is not defined elsewhere; the Provost's issue is what reasonably can be said about academic responsibilities as well.
- "Comprises" is nonsense and bad English. There is no need to have the two sections parallel. Moreover, "imply" is defined (*OED*) as "to involve or comprise as a necessary logical consequence"--a foregone conclusion. That is exactly the meaning that the late Regents Professor Rutherford Aris intended when he composed the language of the existing policy.

Vice Provost Carney suggested the Committee have a discussion with the Provost about the proposed changes to the academic-responsibility language. Professor Clayton agreed to contact him and to explain the Committee's views.

2. Post-Tenure Review

Professor Clayton turned to Vice Provost Carney for a discussion of how "special" post-tenure review works ("special" as defined in the tenure code).

Dr. Carney related that she and Professor Clayton have talked about additional language on post-tenure review that might be added to the Procedures document that would tell departments to look at Section 7A of the tenure code. That part of the code is written more like a procedure than a policy,

reflecting the fact that it was added at a particular time (1996) and thus has more specificity than other parts of the code.

The Committee has asked about what happens to faculty who go through special post-tenure review. According to the provisions of Section 7A of the code, every year tenured faculty are to have an annual review, usually done in the context of the merit decision. Section 7A also says that every department must have an explicit statement about goals and expectations for what it takes to retain tenure. This was a new idea and the terms were used very broadly in the original goals and expectations statements. Even in the current 7.12 statement revisions in the section on post-tenure review, many units stated that the goals and expectations for post-tenure review purposes are the same as those for achieving tenure. The difficulty with this approach is that the achievement of tenure represents cumulative progress to reach or exceed a bar in the areas of research, teaching, and service. The goals and expectations should reflect what a tenured faculty member must do in these three areas over some time period to maintain his or her tenure. That is not a cumulative effort but a regular sustained effort over the given time period. That can create problems, and departments need to have a serious discussion about its expectations for retaining tenure. (One unit proposed that a faculty member can decide not to do one of the three missions—teaching, research, service. Dr. Carney said she objected, asking if a newly-tenured faculty member at age 38, for example, could decide to stop doing research. Section 7a talks about different stages of a faculty member's career and having changing expectations. Units have to be clear about what his means in their unit.)

The tenure code requires that there must be an elected faculty committee that agrees with the department head/chair about the need for post-tenure review of a faculty member. That is why the goals and expectations are important, because a department cannot hold a faculty member up to standards that it has not articulated. If both the elected committee and the chair/head agree on the need for post-tenure review, then there is to be a performance-improvement plan for the faculty member. Section 7A is vague about what such a plan would look like and the plans are not submitted to her office. The process is decentralized, and when she is asked about it she mostly advises departments on how not to violate the tenure code. She said she is concerned about due process and how chairs deal with non-performance; if there is to be language added to the Procedures about the performance-improvement plans, it should indicate the minimum elements of a plan. If a department does not follow the steps prescribed in the tenure code, it could be back to square one in dealing with non-performance.

Professor Wells asked what a faculty member is to do when confronted with a performance-improvement plan that has unrealistic expectations. One way might be to require that any plan must be approved by her office, Dr. Carney said, and must show how it fits the department's goals and expectations. If external funding is important, it might require that the faculty member apply for funding, but it cannot require that he or she receive a grant.

Dr. Carney said that faculty members must be fully and regularly advised on their duties and obligations, and chairs/heads have to be fair to them, not attempting, for example, to fire a ten-year delinquent who had not been advised of his delinquency. There should be an understanding on a minimum of scholarship for the discipline and the unit. Professor Abul-Hajj said that as chair he sat down annually with each faculty member and asked him or her about his or her plans for the following year.

Dr. Carney also said that the faculty member's goals and obligations have to be well understood. If he or she is unable to make a funding goal, for example, the head should work out an alternative with him or her. Clarity, transparency, and specificity are keynotes of mutual understanding between the unit administration and the faculty.

A faculty member who seems to a chair/head to be delinquent and deserving corrective action or even termination must be reviewed by a peer committee, whether standing or appointed ad-hoc. Even if a head has documentation of deficient performance over a period of several years, the faculty member cannot be proceeded against without the peer review.

-- Gary Engstrand

University of Minnesota