

Minutes*

Faculty Consultative Committee
Thursday, March 4, 1999
12:45 – 2:45
Room 238 Morrill Hall

Present: Sara Evans (chair), Kent Bales, Linda Brady, Mary Dempsey, Marilyn Grave, Stephen Gudeman, David Hamilton, M. Janice Hogan, Roberta Humphreys, Michael Korth, Leonard Kuhi, Judith Martin, Fred Morrison, V. Rama Murthy

Absent: Gary Davis, Marvin Marshak, Matthew Tirrell

Guests: Professor Edwin Fogelman (chair, Senate Judicial Committee); Professor Catherine French (chair, IMG Oversight Subcommittee)

Other: Jim Thielman (University Relations)

[In these minutes: Judicial Committee issues (role of the General Counsel in writing presidential opinions, support for faculty advocates); grievance advisory committee request on extension of grievance policy coverage to retired faculty; committee chair reports on teaching loads, Aramark, intellectual property, other matters; disposition of recommendations from the task force on faculty consultation; memorials in Senate agendas and minutes; change in provisions for bylaw changes; task force on the budget]

1. Judicial Committee Matters

Professor Evans convened the meeting at 12:45 and welcomed Professor Fogelman, chair of the Judicial Committee, who brought issues that concern the Judicial Committee.

Most of the issues have to do with the representation of faculty members in Judicial Committee proceedings, Professor Fogelman related. The number of cases they see has increased to 8-9 per year, and when a faculty member brings a complaint, most have no idea how the Judicial Committee works; they need advice. Faculty have two choices: they can be represented by a volunteer faculty advisor (which the Judicial Committee prefers) or they can be represented by an attorney.

The Judicial Committee is having difficulty finding faculty advocates, people who should know something about the procedures of the Committee. It is a burden on people to serve in this role. A number of complainants have gotten attorneys because they could not FIND a faculty advisor.

One suggestion, Professor Fogelman said, may be to offer nominal compensation to individual who agree to serve as faculty advisors, perhaps \$500. If a case is lengthy, it can take weeks or even months, and it can take a lot of time for the advisor. The Judicial Committee has approved this

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suggestion, and he asked if FCC would consider this as a joint proposal to the administration. The cost would be \$4000 or so per year.

Professor Evans said \$1000 would be better, and she would accept the proposal as a motion. She pointed out that the more faculty advisors who serve, the less often the General Counsel's office would have to supply attorneys for the administration.

Several points were made.

- The Judicial Committee has considered using retired faculty, but has had no money to pay them. People are unwilling to commit weeks or months, but compensation would probably help.
- The source of the funds could legitimately be the General Counsel's office.
- With respect to lawyers representing the administration, Professor Fogelman said he will write to General Counsel Mark Rotenberg to confirm the Judicial Committee rule: the University will only be represented by an attorney in proceedings if the faculty member is represented by an attorney.
- The number of hours required of a faculty advocate can vary. If there is a summary judgment, it is few. If the matter goes to a hearing, it can be many. In the worst case (which is not the norm), the hearings took 60 hours. Moreover, it is often not in the attorney's interest to expedite the hearings.
- Professor Fogelman said he was reluctant to let the compensation vary with the amount of time required, because it is not intended to be hourly pay; the role of faculty advisor may be regarded as service to the University.
- The practice of finding a faculty advisor is ad hoc and informal; the faculty complainant will seek one and/or Judicial Committee members may seek one. The Committee would like to formalize the process more. The ideal candidate is a former Judicial Committee member, but those individuals often feel they have served their time.
- There is nothing to bar a faculty member from having both an attorney and a faculty advisor. In some cases, Professor Fogelman said, a faculty member may be better served by a faculty advisor, who knows University policies and practices.
- Could the process be simplified, so it would be easier for a faculty advisor to serve in the role? They can only go so far in that direction, Professor Fogelman explained, because the Judicial Committee is a quasi-judicial body whose recommendations can be appealed to the Minnesota Court of Appeals. As a result, there must be procedural regularity, and the Committee has its own attorney to guide on procedure in the event there is a later appeal to the Court of Appeals.

It was agreed that the Faculty Consultative Committee would co-sponsor a request to the administration that faculty advisors be offered \$500 to \$1000 per case, depending on the amount of time it takes. Professor Fogelman agreed to draft language that could be acted upon.

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Another issue he wished to mention, Professor Fogelman said, has to do with attorney's fees. The Judicial Committee has sought reimbursement for attorney's fees for complainants, but the President has been very reluctant to do so. The Committee met with him about this, and he had reasons for his position, so reimbursement will not occur.

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One issue about which General Counsel Rotenberg spoke with the Faculty Consultative Committee is one that the Judicial Committee has also spoken with the President about: the General Counsel drafts the President's response to Judicial Committee findings while the General Counsel's office represents the administration in Judicial Committee proceedings. The Judicial Committee feels there is a perception of conflict of interest, even though the Court of Appeals has ruled that there is no LEGAL problem with this practice. The Judicial Committee nonetheless believes something should be done. One possibility might be to have one person in the General Counsel's office responsible for drafting decisions. There used to be someone in the President's office who performed this role, but that practice has ended.

Professor Evans recalled that FCC had suggested there be WRITTEN rules to be followed in the General Counsel's office. They apparently have rules, but they are not written down. Such a document could be something the Judicial Committee could consider and understand how the presidential advisor is insulated from contact with Judicial Committee cases.

The crux of the matter is that the President is supposed to be independent, Professor Fogelman observed. If the President's response is written by the office that was advocating the dean's or department's position, that causes worry. Mr. Rotenberg's explanation to FCC did not get to this point.

Professor Morrison said that the current practice of the General Counsel's office is not up to the standards of a well-run law firm in terms of documenting protection against possible conflicts. A well-run law firm would have written standards to cover the situation of potential conflicts. The lawyers would have to certify that they did not discuss the underlying facts or strategy with the other person, and even the secretaries would have to sign them, saying they will never show a file to anyone. There is nothing like this in the General Counsel's office now. Even if the practice were well-documented, he added, the University would be better served by having the function of writing the President's response performed by someone else. Justice must not only be done, it must manifestly be seen to be done. When the prosecutor's supervisor advises the appeal tribunal (President Yudof) on whether the prosecutor should prevail, and then drafts the President's decision, one cannot be confident there was no undue influence on the decision. It would be less costly to have this drafting done by someone else than what it costs to spend fighting the result and it would also eliminate doubt about the integrity of the decision. FCC should recommend that the President retain separate counsel for this function, as was the case under Presidents Hasselmo and Keller. It does not have to be done because the law requires it, but because it is common sense. Professor Morrison observed that the General Counsel had argued that his practice was not illegal, according to a recent Minnesota Court of Appeals decision. But he also observed that some things that are not illegal are extremely unwise. For example, it was perfectly legal for President Nixon to fire Archibald Cox; it was, however, very unwise, because it totally destroyed confidence in Nixon.

Professor Fogelman said that while this suggestion went beyond what he had talked about, he approved it. SOMETHING needs to be done, he said, and the issue has been brought to the President, so he is aware of it. In response to a question, Professor Morrison said that ONLY the General Counsel himself may write the President's response; Professor Fogelman said that this may have caused serious delays in concluding Judicial Committee cases, because the General Counsel is busy.

Professor Evans suggested the FCC raise this with the President, and have another meeting with Professor Fogelman. Professor Fogelman said he would bring Professor Morrison's suggestion to the Judicial Committee. Rather than act on any specific proposal today, it was unanimously agreed that Professor Fogelman would sound out the Judicial Committee on its preferences and that the President should also be asked for suggestions, and that the two committees would then recommend steps be taken, including the possibility that outside counsel be retained or that the Dean of the Law School fill this role.

Professor Murthy inquired if it would be possible for the Judicial Committee to have a pool of people willing to serve as faculty advisors, to exercise some "quality control" over the selections, and to make the process more regular. Professor Fogelman said they would like to have a roster.

What if a faculty member picks a Law School faculty member as an advisor, Professor Humphreys asked; is that individual seen as an attorney? That is a tricky question, Professor Fogelman said; in one case, the Committee ruled that an individual with a law degree was not acting as an attorney. His presumption is that if the individual receives fees, he or she is acting as an attorney. If not, he or she is a faculty advisor. Professor Morrison pointed out that it is the position of the General Counsel's office that if one is trained in the law, one is a lawyer for this purpose.

Professor Evans thanked Professor Fogelman for joining the Committee, and said they would await proposals from him.

2. Grievance Advisory Committee

Professor Morrison now recalled for the Committee that he had distributed to FCC members an email from Professor Laura Cooper, chair of the Grievance Advisory Committee. Professor Cooper reported that the five-year review of the grievance policy and its implementation is being conducted, and that one question that has arisen is whether the grievance policy covers grievances filed by emeritus faculty. She asked that FCC provide a recommendation on this point. His recommendation is that the policy should include employee-like grievances from emeritus or volunteer faculty.

Professor Humphreys said that she had been on the advisory committee when the question had arisen, and that the University Grievance Officer had rules that emeritus faculty are technically not University employees, so could not file a grievance under the policy. The committee overruled that decision, but the President's Office overturned the committee's ruling.

Following brief discussion, the Committee voted unanimously to advise Professor Cooper that employee-like grievances filed by volunteer or retired faculty should be covered by the policy.

3. Reports from Committee Chairs

Professor Evans asked that the four ex officio committee chairs make reports.

FACULTY AFFAIRS Professor Bales reported that policies on education about the responsible conduct of research and about principal investigator responsibilities were being considered by the Faculty Affairs committee and would be reported to FCC in the near future. It is also considering taking a belated look at teaching assignments under semesters; this could be a troublesome matter over the long term and it may need a special subcommittee. The question is equity in teaching workload across the University and within units.

Has it EVER been equitable, Professor Korth inquired?

Professor Martin noted that the question of teaching load has educational policy implications, and should be taken up jointly with SCEP. Professor Bales agreed, and cautioned that Faculty Affairs is only having exploratory discussions, and has yet to decide if it will even take up the issue.

FINANCE AND PLANNING Professor Gudeman noted that Finance and Planning has had one session with Vice President Boston about the Aramark contract, which was not wholly satisfactory. It was agreed that he would convey to Aramark the concerns that had been expressed, and that he would meet again with the Committee in April. This is a larger issue than the Aramark contract, however, in that it involves the Coke contract, other contracts, when and where dollars come from, the question of common goods, and other matters. At some point they may need to be raised with President Yudof; in the meantime, after the next session with Vice President Boston, the Committee will bring a recommendation to the Senate Consultative Committee.

Professors Morrison and Kuhi urged that the Committee also talk with representatives of Aramark (if they are willing to join a public meeting to talk about their contract). They should be given the opportunity to explain their position, and having talked with them would strengthen any recommendations the Committee might choose to make.

Professor Gudeman added that the Committee is also reviewing the compact process and will have comments later.

RESEARCH Professor Kuhi announced wryly that the lives of those on the Senate Research Committee are controlled by Professor Hamilton, with all of the issues he brings concerning grants management and the University's exception status with NIH. Those are the topics with which the Research committee is dealing; they lead to a demand for new policies or changes in existing policies, some of which will soon be brought to FCC.

The intellectual property policy was drafted; the General Counsel's office then revised it and completely changed the intent. As a result, the draft was discarded and the process begun over; Professor Kuhi is sitting on a small group, including Vice President Maziar and Professor Chomsky, that is trying to review the definition of intellectual property. There is a relatively clear understanding about traditional items, such as books and papers, but the edges get fuzzy quickly when it comes to such things as computer hardware and software.

Professor Morrison asked that Professor Kuhi raise with the group the question of what is considered wrong with the present policy. It does not cover such things as computer software, Professor Kuhi explained; Professor Morrison asked if that specific question should be dealt with, rather than trying

to address the universal question. It is possible that that is where the group will end up, Professor Kuhi said.

At some point, the Senate Research Committee intends to talk about the intellectual future of the research university. Thus far, the topic has been driven off the agenda by Professor Hamilton--who promised that he would soon stop doing so.

EDUCATIONAL POLICY Professor Martin reported that SCEP will bring back the policies on reorganization and on academic progress; on the former, Provost Bruininks has promised to obtain comments from the deans in time to permit the policy to be brought back to the Senate this spring. The Twin Cities Curriculum Subcommittee has been appointed. In the future, there may be a policy on international education (depending on what Professor Allen recommends) and discussion of the peer evaluation of teaching policy (since it seems not to be honored very widely, there is a question about whether it should remain on the books).

Professor Morrison inquired if there ought to be a review of whether the University is ready for semesters. Professor Martin asked what he had in mind; the bulletins have been prepared, class schedules set, the Council on Liberal Education has handled the curriculum for the Twin Cities, SCEP has been hearing from the Registrar about the shortage of classroom space on the Twin Cities campus--everyone will step off a ledge next September and see what happens. Normally, Professor Morrison said, for a project of this magnitude, there would be a checklist kind of review. It appears that to the extent possible, that has already been done.

Professor Martin pointed out that with respect to the projected classroom problem, it may be necessary to loosen departmental control over their classrooms.

4. Task Force on Faculty Consultation Recommendations

Professor Evans next turned to Professors Hamilton and Humphreys to review for the Committee their advice on how FCC might best respond to the recommendations contained in the Task Force on Faculty Consultation, issued in December, 1997.

Committee members took up the handout that had been provided; Professor Humphreys walked the Committee through the six pages of recommendations. (The original recommendations, and the comments of Professors Hamilton and Humphreys to FCC, can be found at <http://www1.umn.edu/usenate/fcc/tffcrecommendations.html>).

After discussing some of the recommendations, it was agreed that Professor Evans would meet with the Committee staff to identify the specific actions that were needed next (e.g., bylaw or rule changes, resolutions, changes in committee practices, etc.)

5. Memorials

Professor Evans next drew the attention of Committee members to a draft protocol on who will be memorialized in the agendas and minutes of the Senate. The practice up to now has been that the names of deceased students and faculty (current or emeritus) are printed in the agenda of the Senate, and biographies of faculty members, if provided by departments, are incorporated in the minutes. The

protocol calls for listing the names of all faculty (current or emeritus), staff (current or retired), and students in agendas, and to continue the practice of including faculty biographies in the minutes. This proposal is more inclusive, because it includes all staff, many of whom give their lives to the institution.

It was noted that there needs to be a mechanism to ensure that the individuals listed are in fact deceased, inasmuch as one of the individuals listed as deceased in the last Senate docket is still alive.

The Committee approved the proposal for forwarding to the Senate Consultative Committee for action.

6. Constitutional Amendment

Professor Evans next distributed copies of a proposal from the Student Senate to revise the majorities needed to approve bylaw amendments. At present, the understanding has been that a 2/3 majority of all SEATS in the Senate, whether filled or not, are required to approve a bylaw amendment. This has often made it impossible to achieve the necessary approval, because frequently a number of the student seats are vacant. The change proposed by the students calls for requiring only a 2/3 vote of all seats currently filled.

Professor Evans reported that she had met with the Student Senate leadership on this issue, and they were sympathetic to the problem. This is a step in the right direction, she said; the students were unwilling to propose a recommendation that a bylaw change require a 2/3 vote of those present and voting at a meeting, but this loosens slightly the majority required.

Professor Morrison said the language change proposed seems to go in the opposite direction, and suggested that the amendment may not be needed at all. It may be that a ruling from the parliamentarian could settle the matter. Professor Evans agreed to speak with Professor Altholz about the proposal.

7. Task Force on the Budget

Professor Evans next recalled that at the last meeting of FCC, in the course of conversation with Executive Vice President Bruininks there had been agreement that a task force to look at the "big picture" of University budgeting. There were no specifics agreed upon, other than that it should be a joint faculty-administration task force. Since then, the Committee on Finance and Planning has also adopted a resolution calling for the appointment of such a task force. The issue is before FCC today simply to keep the ball rolling, she said. The intent, she added, is not to duplicate the work of the IMG Oversight Subcommittee. The idea is to endorse the concept at this meeting, after which she and Professor Gudeman would talk with Dr. Bruininks and with Professor French about the activities of the IMG Oversight Subcommittee and how it might inform the work of the task force.

Asked what the task force would do, Professor Gudeman said that if one looks at the budget as an instrument, one needs to examine the principles of budget management and such issues as common goods, the compact planning process, historical accretions of funding, and simply take a larger view of the budget. The impetus for the idea of the task force comes from the 4-5 iterations of a statement on IMG that has been circulating. That captures only one part of the budget. A task force would stand back and look at the larger picture, and would include knowledgeable people from the administration and the faculty. It will be a huge job, he concluded.

Professor French observed that the IMG Oversight Subcommittee has looked at a number of related issues, and would like to help draft the charge based on its discussions. The charge must be jointly constructed with the administration, Professor Evans commented, and the effort must be a collaboration. The Committee endorsed the idea in principle, with the understanding that there would be discussions with the administration on the charge and that the work of the IMG Oversight Subcommittee would be relied upon.

Professor Evans adjourned the meeting at 2:50.

-- Gary Engstrand

University of Minnesota