

Minutes*

Academic Freedom and Tenure Committee
Friday, May 11, 2007
9:30 – 11:00
300 Morrill Hall

Present: Tom Clayton (chair), Yusuf Abul-Hajj, Tracey Anderson, Arlene Carney, William Doherty, James Farr, Joseph Gaugler, Candace Kruttschnitt, Karen Miksch, Paul Porter, Terry Simon

Absent: John Mowitt

Guests: Professor Carol Wells

[In these minutes: (1) course design, academic freedom, and copyright; (2) Senate Judicial Committee Rules; (3) Procedures for Reviewing the Performance of Tenure-Track Probationary Faculty]

1. Course Design, Academic Freedom, and Copyright

Professor Clayton convened the meeting at 9:30 and welcomed Professor Carol Wells to discuss issues raised in her unit.

Professor Wells said she wished advice from the Committee on a copyright-denial document that the faculty in her unit have been given and directed to sign. She is the interim director of Clinical Laboratory Sciences (CLS, formerly Medical Technology), one of two program in the Center for Allied Health Programs. Her unit is very small, with only two tenured faculty; the rest of the faculty are on contracts. There was a shortage of medical technologists in the state but the Academic Health Center had considered closing the Medical Technology program. This proposal raised questions in the legislature, which decided to fund the CLS program by state grant to the newly formed Center for Allied Health Programs. The charge to CLS is to develop a state-wide program, so much of its instruction will be online.

An instructional design team was appointed and the faculty in CLS were asked to put much of their course work online. The question is who owns the copyright. Professor Wells said she asked the administration about her course, which includes a number of extremely good images that belong to her predecessor. She was told her that if the University cannot get the copyright to her course materials, they can always license a course from another institution.

Another question arose when an instructional design team member inserted materials in an online course and then asked her supervisor (not the instructor) to approve the change; the instructional designer has no scientific training. The instructor challenged this insertion and was told that failure to seek instructor approval was an oversight. But this incident begs the question, who has the right to insert course materials?

* 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.

Several weeks ago a document concerning copyright was distributed and the faculty were told to sign it and that it was the wave of the future. She brought it to this Committee, Professor Wells said, because it requires the faculty member to surrender all rights to copyright in course materials. She said she is familiar with copyright law and policy, and the University's policy is liberal to faculty members. The goal of her unit is to develop online courses and it's not clear what happens to the faculty after they're developed. One faculty member was told to consider her course like a book, something that will be revised every three years by a "content expert." That goes against the tenets of her field, Professor Wells said, because medicine is very dynamic and changes continually; a course cannot be revised only once every three years.

Her questions to the Committee are these, she said:

- "1. Can faculty/staff be asked to sign a document that is in conflict with another University document?
2. The document appears to apply to projects with external funding. We have been told that the entire funding for our program comes from a state grant. Because we are a land grant institution, can state funds be considered external funds?
3. Can faculty/staff be forced to teach an on-line course licensed from another institution?
4. How does this document affect our ability to develop course work jointly with faculty from other institutions?
5. We have a faculty member who gives her course at other institutions. Our program receives financial compensation for this activity. This faculty member asked how this document might affect these activities and she was told she would no longer be able to teach her course at other institutions. Is this situation compatible with the tenets of academic freedom?
6. How does this document affect our ability to offer continuing education to hospital laboratory workers?
7. Some of our courses have guest lecturers who give one or two lectures. And, one two credit course is offered completely by two persons who are full time employees of the Minnesota Department of Health. These two persons have been appointed as Adjunct Assistant Professors and they receive some financial compensation. How does this document affect the ownership of course content presented by guest lecturers and adjunct faculty?"

Vice Provost Carney said that several of Professor Wells's questions will be answered by the answer to the first question. University Librarian Wendy Lougee spoke with this Committee last week about a new Regents' policy on copyright. Once adopted, it will be the official policy of the University and no college or department may adopt a policy that contradicts the Regents' policy. Some of the questions she raises will be answered by the new policy. A number of items in the document that the faculty in her unit have been asked to sign appear to be in conflict with the policy. When there was no copyright policy (when copyright was dealt with in the intellectual-property policy), colleges adopted their own policies. The questions Professor Wells raised were raised also by the Senate Research Committee. Once in place, Regents' policies are overarching; the next step for the copyright policy, after the Board adopts it, will be preparation of an administrative implementing (procedures) policy.

Professor Abul-Hajj said he thought the new copyright policy would not be adopted this year. Dr. Carney said the intent is that it not be delayed long and that the authors are at work revising the draft in response to comments from the Committees. Professor Clayton emphasized that the Committee should be allowed time to review any redraft until it is in a final version for the Board of Regents.

Is there an existing University policy that those who create courses own the materials, Professor Wells asked? There is, Dr. Carney said, and it appears that the document the faculty in her unit were asked to sign violates current Board policy.

Professor Wells said she has not raised these questions in the Academic Health Center because she was told by the director of the instructional-design team that if copyright ownership is an issue with her course, they will simply license a course from another institution. Professor Abul-Hajj said that in his view a course-design person has no authority to affect materials in a course. Professor Doherty declared he would not sign the document. Professor Wells said she came to the Committee because she is tenured, but the other faculty, on contracts, are vulnerable and afraid of what will happen to them if they do not sign.

Vice Provost Carney said there are two issues involved: (1) the copyright policy, and (2) personnel issues in the unit. Professor Wells agreed; the online course materials raise questions that apply University-wide and on how to deal with faculty who leave. Dr. Carney said the Regents' policy establishes principles while the procedures document is more specific and can specify who can make changes to course materials. It is clear, she concluded, there needs to be a good procedures document.

Professor Clayton asked what Professor Wells wished from the Committee. She asked the Committee to find out if the copyright document was a mistake and whether the faculty hold the rights to their course materials. Beyond that, it would help if it made recommendations about who owns online course materials: if there is a change from what obtained in the past, it would help faculty to know that. She also asked that the Committee ascertain whether faculty can be forced to teach an online course from another institution. She said she believes her own course is the best and students would be receiving second-rate materials if she is required to teach a course offered by another institution because she would not give up the copyright to her own course materials. Professor Abul-Hajj said that Senior Vice President Cerra and Assistant Vice President Brandt must address these issues in this case because it is unacceptable to go over the heads of the faculty on course materials and instruction.

Professor Clayton thanked Professor Wells for joining the Committee, and then asked Committee members what the next step should be. Professor Doherty said the Committee should make it clear that these are extremely important issues for faculty and the University must look carefully at the draft policy and the procedures that are yet to be written. Professor Farr suggested that Professor Clayton call attention to the copyright-surrender document and ask that no faculty member be required to sign it. Professor Miksch agreed; she said that if one thinks about textbooks and images, faculty own them. The way the document is written, faculty would not own them. After additional discussion, the Committee voted unanimously that Professor Clayton should write to (1) Senior Vice President Cerra and Assistant Vice President Brandt to ask them to hold up in implementing the copyright document that faculty are being asked to sign because it appears the document may violate both the existing intellectual property policy as well as the draft copyright policy, and (2) Provost Sullivan to ask that the Committee be given the opportunity to review any subsequent drafts of the copyright policy before a final document is submitted to the Regents for approval. Professor Clayton noted that summer is not a good time for

faculty to be reviewing policy, since many are gone, and that any final action should be postponed until September.

2. Senate Judicial Committee Rules

The Committee turned next to the revised Rules of the Senate Judicial Committee (SJC), which, Professor Farr explained, must be approved by this Committee jointly with the Provost. The Rules govern how the SJC handles cases. He noted that this Committee is the policy-making body while the SJC hears individual cases. SJC reviewed its Rules in concert with the changes in the tenure code. There is a long history to the Rules and they had accumulated a lot of revisions and additions; SJC this time did a thoroughgoing review. They stripped down the language, eliminated comments, expanded the definitions, and cut the number of words by half.

Professor Farr referred to his cover letter transmitting the revised Rules to the Committee to note the major changes proposed by SJC:

-- "The time periods for or between each step in the process have been reduced to expedite cases. (We are aiming for quicker overall cases, from the filing of a complaint to the President's Findings and Action)." They do not wish cases to be handled hastily but believe the current process takes too long and the changes should help the President and Office of the General Counsel come to action more quickly.

-- "An error has been corrected regarding burden of proof (in old Rule 17 [i]) in cases of 'reasonableness of a reassignment pursuant to Section 12 of the Tenure Code.' New Rule 15 (i) places the burden on the Complainant not the Respondent (University), consistent with final Senate action on 5 June 1997." The assumption is that the University would make "reasonable" reassignments and the complainant needs to demonstrate that it did not.

-- "A Complainant may elect to have one 'advisor' (new Rule 5 [b]), not two (old Rule 6 [c]). (We are aiming to make cases and hearings more manageable. Informal advice, beyond that of the official advisor, is still possible.)" They are trying to reduce the number of people involved in the actual hearings but the change does not bar informal advice.

-- "An 'attorney' is defined (in new Rule 2, clarifying old Rule 6 [b, c, and comment]) as 'an individual who is currently licensed to practice law in any jurisdiction in the United States.' This has implications for new Rule 5 (b, c, d). (We are aiming to clarify some long-standing issues, cognizant of different levels of legal preparation of a potential faculty 'advisor' and of the forms of involvement by the Office of General Counsel in assisting Respondents.)"

The last item is the major issue, Professor Farr said. The SJC was formed in 1941 but had few cases before the 1970s and the procedures were entirely informal. There was a huge spike in cases in the 1970s and the process turned more litigious; people began hiring outside attorneys. It became the practice that the General Counsel had the right to defend the University if the complainant hired an outside attorney. This practice was incorporated in a Rule change about 10 years ago. Attorney was defined as someone licensed to practice law in Minnesota offering paid or pro bono service in an SJC case. President Yudof approved the change but said the definition of "attorney" must be left open. In the last couple of years the issue has come to a head because of different possible definitions of an "attorney." There are members of the faculty licensed to practice law in Minnesota or in other states, there are law professors, and there are faculty with law degrees who have not practiced. The Office of the General

Counsel has recently taken the position that it may bring in an attorney for the respondent even if the complainant's advisor only has a law degree but has never practiced. In the absence of a clear Rule or definition, the SJC informally allowed this position if the complainant also agreed. But SJC is unanimous, Professor Farr said: an "attorney" should be someone licensed to practice law in any U.S. jurisdiction. The reasons are that SJC wants to keep its proceedings informal and to ensure fairness to complainants since the General Counsel often helps the respondent prepare documents for the case (which is allowed and leads to cleaner documents), It is also a question of faculty governance (since advisors are colleagues and it is not relevant whether a colleague has studied law).

Vice Provost Carney observed that although she is not an attorney, she usually serves as the respondent in SJC cases, on behalf of the Provost. (In the past deans were named as respondents; having one person always serve brings more regularity to the process.) Professor Farr added that the new Rules now require the Provost to be named as respondent; he may delegate the responsibility to serve as respondent, which he has done.) Dr. Carney raised a hypothetical case where the complainant has a law professor who is not licensed to practice in Minnesota; that would be uneven because she (the respondent) has no training in the law. The system works acceptably well now, she said, but what if her successor is a law professor? The person would not be defined as an attorney, but how would the faculty member feel? The SJC proposal says nothing about the Vice Provost's background. If she were a licensed attorney, that would give every faculty member the right to retain an attorney (Professor Farr pointed out that they already have that right) and they would NEED to have one if she were an attorney.

Professor Farr said the Rules also say nothing about the case where the complainant is a Law faculty member who might handle his or her own case. In that instance, the General Counsel would probably send a lawyer to the hearing. If the next Vice Provost is an attorney, the complainant could get an attorney, or not, as he or she wished. The goal is to keep the proceedings as un-litigious as possible. If the Vice Provost is an attorney, the faculty member would almost be required to hire an attorney, Professor Clayton suggested. Professor Farr said that that is likely to be a rare case and it can't be readily incorporated in the Rules. In any case, if SJC sees something that seems unfair, it will make a ruling and try to get the parties to agree. That has been done in the past.

Professor Porter said that the SJC deals with tenure cases and the Office for Conflict Resolution deals with non-tenure issues; does the faculty choose which venue to use? The situation dictates where the faculty member goes, Professor Farr said. The Senate recently approved tenure-code changes about original and appellate jurisdiction for SJC. Conditions of employment cases go to the Office for Conflict Resolution; SJC sees as part of its original jurisdiction tenure and promotion denials, reassignment, termination, suspension, and alleged violations of academic freedom. In complex cases the SJC and Conflict Resolution try to work out and route correctly.

What happens if a faculty member gets into a hearing and discovers that his or her advisor is worthless, Professor Kruttschnitt asked. There is no provision for that, Professor Farr said, but a complainant is allowed to add an advisor. But the revised Rules cut the number of advisors to one, Professor Kruttschnitt objected. If that is a problem for this Committee, Professor Farr said, he would revisit the issue with SJC. Could someone replace an advisor, Professor Doherty asked. Professor Farr said he has not seen that happen but it is a right a faculty member has. SJC provides complainants with a list of previous SJC members, who are likely to know the procedures, but anyone can serve as an advisor. If it is obvious the advisor is not doing a good job, the hearing officer on the panel is likely to stop the case and ask for a conversation.

Professor Abul-Hajj asked for the percentage of cases where the SJC sided with the faculty member (as complainant). Over the years it has been about 50/50, Professor Farr said, although recently the University has prevailed in more of the cases. He said he believes that is a sign of the fairness of the proceedings, and everyone tries to make sure the proceeding is fair to all parties—all parties involved are colleagues in the University. SJC removed the language of "advocacy" from the Rules.

Vice Provost Carney said she has not reviewed the proposed Rule changes with the Provost; she said she wished to know the view of the Committee before she did so.

Professor Farr said the Committee must decide how to approve them; what does "jointly approve" mean? A meeting with the Provost? If so, a Committee vote at this time could be indicative. Professor Clayton said the issue is "jointly" versus "both." "Both" would not require a meeting with the Provost; "jointly" suggests there should be one. Professor Farr said he believed "jointly" would be better; after the approval, the Rules must be reported to the Faculty Senate and Board of Regents before they go into effect (according to Faculty Tenure 16.3).

The Committee voted unanimously in favor of non-binding approval of the Rules. Professor Clayton said the revisions were remarkable and every change was an improvement, and he commended Professor Farr and his colleagues on SJC.

3. Procedures for Reviewing the Performance of Tenure-Track Probationary Faculty

The Committee returned to the Procedures. Professor Clayton reported that he had spent a number of hours reviewing the entire document and all the changes the Committee has proposed and said he had a number of suggestions, none major or substantive. The document reads as if it were written by a committee and needs to be smoothed out.

Vice Provost Carney distributed copies of the Procedures with changes she proposed.

-- The title should be changed because the document should be revised because it will (if amended as recommended) cover "(1) probationary faculty, appointed at either the assistant or associate professor level, who may be eligible for indefinite tenure and promotion to the next rank; (2) probationary faculty, appointed as associate professors who may be eligible to receive tenure in rank as associate professors or professors; and (3) associate professors with tenure who may be eligible for promotion to the rank of professor with tenure."

She explained, in response to the question Professor Miksch raised at the last meeting, that there is a difference between promotion and tenure in some cases, such as probationary associate professors; these individuals do receive an annual review and ultimately there is a vote on whether to grant them tenure. There are a handful of such cases each year. The Committee concurred with the proposal.

-- She clarified the reasons why faculty from other departments may be brought in on tenure decisions (new language is underlined): "Only members of the tenured faculty of the department have the right to attend or participate in the meeting and vote on granting tenure. To be eligible to vote, a faculty member must have reviewed the candidate's file. Prior to a specific tenure decision, however, permission must be sought in writing from the Senior Vice President for Academic Affairs and Provost for tenured faculty from other departments to participate and vote. This is particularly important in cases of candidates whose

work encompasses multiple disciplines or who come from units with a small number of eligible voting tenured faculty. . . . "

The Committee concurred with this addition.

-- She proposed a new section to clarify the review procedures at coordinate campuses:

"Each of the coordinate campuses establishes its procedures for review. Just as on the Twin Cities campus, it includes initial review at the departmental or division level by eligible faculty with additional review by the unit chair or head. Each campus provides a second-level campus-wide review by eligible faculty. The campus review committee is composed of members of the tenured faculty of the campus. The membership of the committee is public. The committee is advisory to the vice chancellor and chancellor. The same rules for voting and for evaluation of candidates apply as in Sections 15 and 16 above.

"The chancellor reviews each candidate's file and makes a recommendation for central review."

Professor Farr raised a question about the meaning of the sentence "The membership of the committee is public." That must not be interpreted to mean that anyone can attend the meetings, he observed. The Committee agreed with Professor Farr and concurred with the added language. Professor Anderson said this section fills a gap that has created confusion in the past. Dr. Carney said she tried to use language that would not control how a campus conducts its review.

-- She proposed clarifying the role and responsibilities of the Provost and the Board of Regents:

"The Senior Vice President for Academic Affairs and Provost presents his or her final recommendations to the Board of Regents. The Board of Regents confers tenure and promotion on recommended candidates."

Is the President involved at all in the process, Professor Abul-Hajj asked. Only in final recommendations from the SJC, Dr. Carney said; the Regents delegated responsibility for faculty appointments to the Provost as chief academic officer. Professor Miksch asked if the Board of Regents has the authority to say "no" to a candidate for tenure. It does, Dr. Carney said, although she has never seen that happen.

-- In order that the document cover other cases besides probationary assistant professors, Dr. Carney proposed a new Section III of the Procedures, as follows:

"III. Promotion Procedures

"Procedures for considering promotions either to the rank of associate professor or to the rank of professor must parallel those for considering candidates for tenure from the unit review through the central review. Promotion to the rank of associate professor from the rank of assistant professor accompanies a decision about the conferral of indefinite tenure. Promotion to the rank of professor may occur at any time after the appointment as or promotion to the rank of associate professor.

"Consideration for promotion to the rank of professor may occur whenever it is initiated by the unit head or by the faculty senior in rank to the candidate. The candidate may at any time request that a review take place, but the faculty senior in rank will decide whether to conduct it. Faculty may appeal the decision not to be reviewed to the unit head, the dean, or the Senior Vice President for Academic Affairs and Provost, if he or she believes that the decision was made unfairly.

"Departmental criteria for promotion to the rank of professor as written in the departmental 7.12 statement must be consistent with those stated in Section 9.2 of the Tenure Code, Criteria for Promotion to Professor. This section also describes eligibility for voting for such candidates.

"Heads or chairs who are associate professors are not eligible to vote in the cases of candidates for promotion to the rank of professor. As unit heads, however, they are required to write a statement as part of the promotion process." [This paragraph was added to the proposal after the Committee discussion, below.]

Professor Anderson said that one of her colleagues asked about who can participate in the meeting on promotion of an associate professor. Some division and department heads are not (full) professors. They are not permitted to vote, Dr. Carney said. May they participate in the discussion? Dr. Carney said they typically do because often they must write the unit report.

Professor Abul-Hajj asked how an associate professor who is unit head can write the report on promoting another associate professor to professor. They need to look at the department 7.12 statement to see that its requirements were followed. Will the unit head leave the meeting and allow the professors the opportunity to talk in his or her absence, Professor Clayton asked. This is a touchy issue, Dr. Carney said; in most cases, they stay for the vote. Professors Clayton and Farr said they should not. Dr. Carney said if the Committee has a strong view on this, the Procedures should reflect it. It is a secret ballot, Professor Doherty pointed out; the question is whether the professors will have an opportunity to talk about the candidate without a chair who is junior in rank, Professor Clayton rejoined. Professor Kruttschnitt agreed that an associate professor who is unit head should not stay for the discussion and vote—and that perhaps this requirement will discourage units from appointing associate professors as head or chair. Such a rule would hurt the candidate if the unit head must write the report, Professor Doherty said. Someone else can be designated to write the report, Professor Farr said. Another faculty member might not accept that responsibility, Dr. Carney pointed out. Professor Doherty suggested the head could sit in on the discussion but not participate.

The Committee concluded it would have to continue the discussion, and agreed to meet again next week (May 15).

Vice Provost Carney observed that this Procedures document does not deal with clinical faculty, research professors, and contract faculty, all of whom must go through promotion; next year the Committee will need to develop a short document to cover those cases.

Professor Clayton adjourned the meeting at 11:05.

-- Gary Engstrand