

UNIVERSITY COMMITTEE ON PRIVILEGE & TENURE

MEETING
MAY 6, 2013

MINUTES

[Approved by 2012-13 committee over email – confirmed by 2012-13 chair 9/28/13]

Note: agenda items were erroneously numbered in formal agenda. Committee members should decide whether to correct the numbers in the agenda, to allow items in the minutes to carry numbers that do not match those in the agenda, or to use numbers in the Minutes that correspond with those in the agenda (some item numbers are duplicated)

Present: David Brundage, UCSC, Chair; San Francisco, vice chair; Robert Hillman, Merced (phone); Helen Henry, Riverside; Vern Paxson, Berkeley; Alison Butler, Santa Barbara; Phil Kass, Davis (phone); Rodrigo Lazo, Irvine (phone); Jeff Lansman, Onuttom Narayan; Santa Cruz; Cynthia Vroom, Consultant; Martha Winnacker, Staff. Absent: Stuart Banner, Los Angeles; XX, San Diego.

I. Announcements. Chair Brundage determined that a quorum was present and called the meeting order.

II. Agenda approval. The agenda was approved as noticed, with agreement to rearrange the order of business as needed to accommodate guests.

III. Consent calendar. The consent calendar (January minutes) was approved.

V. Roundtable. (Due to Vice Provost Carlson's limited availability, this item was begun out of order). Members reported on P&T activities and issues in their respective divisions. Two members reported no activity in the current year. Three members reported long-running or complex grievance cases; two reported complex discipline cases. Members reported encountering the following issues in grievance cases: (1) administration non-response after being informed that the designated P&T subcommittee has found probable cause in a grievance case and recommended a settlement, resulting in a prolonged process without resolution; when P&T committees convey settlement proposals, should they specify a deadline after which they will proceed to a hearing if the administration does not respond? (2) difficulty of determining whether reassignment of space after a faculty member files a grievance is retaliation; (3) overlap between grievance and Whistleblower protection processes; (4) multiple grievances arising in the same academic department. Members suggested that future grievances may arise from the manner in which departments and individual faculty grants are assessed for the costs of benefits and reported that some non-Senate faculty have been laid off as a consequence of these assessments. A member reported inability to conclude a protracted discipline case because APM 075 does not include enforcement mechanisms when attorneys refuse to accommodate hearing schedules.

IV. Consultation with Vice Provost Carlson.

Vice Provost Carlson informed the committee that she had been surprised by its proposal to request revision of APM 150. Thereafter, discussion focused on: explaining the APM revision process; improving communication between UCP&T and the Vice Provost for Academic Personnel; and the substantive concerns that led UCP&T to recommend the revision.

APM process: Vice Provost Carlson explained the four stages of the process, three of which occur after a revision to the APM has been proposed. After Administrators or Academic Senate committees identify problem areas in which they believe APM revision would be advantageous to the University, Vice Provost Carlson engages in Informal Consultation with relevant Administration stakeholders, including Human Resources and the Office of General Counsel, and the University committees on Academic Personnel and Faculty Welfare. At this conceptual stage, the purpose and likely results of the potential revision are discussed in conceptual terms. Draft policy language is typically developed in Vice Provost Carlson's office. The early draft is submitted for confidential Management Consultation to designated systemwide committees (usually Faculty Welfare and Academic Personnel), EVCs and Provosts, and targeted experts. Management Review usually stimulates extensive and detailed feedback which influences significant revisions in the draft. The revised draft is then submitted to a formal Systemwide Review, for which a minimum 90 days is required. Systemwide Review involves all divisions and committees of the Academic Senate, and all administrative units, including Labor Relations, and all unions representing University academic employees. Vice Provost Carlson's office reviews comments received and makes further revisions to the proposed policy if called for. Because Systemwide Review requires 90 days and must provide opportunities for substantive Senate comment, it is rarely begun after mid April. If Systemwide Review produces further changes in the proposed policy, the final version will be circulated for a 30-day Final Review before the policy revisions are issued. Changes are not expected as a result of Final Review, but it provides a window that is particularly useful for bodies that have proposed changes to indicate whether or not the revised policy language is consistent with their intent.

Improving communication: Vice Provost Carlson and members of the committee agreed that more regular and robust consultation is essential and that UCP&T could be added to the APM revision workflow by including it among the committees invited to participate in Management Review. All present agreed that it would have been useful to discuss the committee's concerns about APM 150 with Vice Provost Carlson before making a formal proposal to revise the policy. Members agreed that Vice Provost Carlson should be invited to become a consultant to the committee and, to the extent her schedule allows, attend some portion of each of its meetings to discuss matters related to the APM.

Substantive concerns with APM 150: At her request, members briefed Vice Provost Carlson on their concern that APM 150 does not provide adequate notice or time for non-Senate faculty to invoke a P&T process in early termination cases. They noted the contrast between the clear process laid out in APM 150 and the passing reference to a P&T alternative. In further discussion, it emerged that controversy is likely over some of the proposed timelines, which may affect when an individual is on or off of pay status. She noted that the Vice Chancellors for Academic Personnel are concerned that divisional P&T committees will not be able to handle the workload in a timely manner. Members assured her that 90 days is an achievable timeline for completing an early termination process, even though it may be challenging in some situations. Members noted that a 90-day period is achievable if it is synchronized with the academic year (does not include non-instructional periods). Vice Provost Carlson indicated that this discussion had been helpful. She stated that the formal review of the proposed revisions to APM 150 would not begin until next academic year. Members informed her that that the associated Bylaw change would not proceed unless the proposed APM revision is adopted.

Action: Committee members voted to request that Vice Provost be made a consultant to the committee.

VI. Consultation with Attorney Advisor to Privilege & Tenure Committees

Attorney Advisor Cynthia Vroom, who is a consultant to UCP&T, discussed current issues with members.

Evidence issues in Whistleblower retaliation cases. Vroom noted that an individual may use either Senate P&T procedures or a complaint to the LDO to charge that he or she has been retaliated against for making a protected disclosure under the Whistleblower Policy. She described the complexity of P&T's handling of whistleblower retaliation grievances because they are governed by different evidentiary standards than ordinary grievances. In whistleblower retaliation cases, once a complainant has demonstrated by the preponderance of the evidence (more likely than not) that he or she (1) engaged in an activity protected under the Whistleblower policy and that (2) this activity was a contributing factor to a subsequent action alleged to be retaliatory, the administration must prove by clear and convincing evidence that the manager or supervisor would have undertaken the subsequent action even if the individual had not engaged in the protected action. If a P&T committee does not make the required findings the LDO must request further findings. If the P&T committee has not considered sufficient evidence, it may need to reopen the hearing. Otherwise, the LDO may make its own recommendations. Vroom confirmed that a claim of whistleblower retaliation is a grievance for purposes of Bylaw 335. A member questioned whether the Senate had been consulted when the Policy for Protection of Whistleblowers was adopted [in 2002].

Other issues.

In cases alleging research misconduct, P&T committees may feel that they need subject matter experts to assist in determining what happened but do not have funds to pay for experts such as those who would be called to testify in court. Vroom noted that P&T committees do not have authority to adjudicate alleged violations of federal law and that determining whether the Faculty Code of Conduct has been violated may not require as definitive a scientific inquiry as a legal proceeding would. (2) Vroom reported the retirement of the long-serving Deputy General Counsel for Educational Affairs and appointment of a successor with lengthy UC service, including as a campus counsel. Vroom reminded the committee that she does not communicate with attorneys who represent the administration in cases for which she is the advisor to P&T committees but that she does talk to the Deputy General Counsel. However, absent unusual circumstances she will not discuss UCP&T matters with the Deputy General Counsel without the committee's permission.

VII. Procedural issues in research integrity cases.

Issue: What authority and resources do divisional committees on Privilege & Tenure have to engage their own experts to assist in evaluating conflicting testimony of experts brought by the parties to a case?

Discussion: Riverside representative Helen Henry reported on a case in which both sides have engaged experts to support their version of the facts in a case alleging research misconduct. She reported that the divisional committee does not have the expert knowledge to assess the claims of the dueling experts. Although P&T committees are not prohibited from hiring impartial experts, they do not have resources to do so, particularly in cases where the relevant knowledge is in an applied field in which University researchers are not likely to work and where the amount of work may be large. A member noted the similarity to the challenge of making factual determinations in cases claiming patterns of discrimination on gender or racial grounds when data is inadequate or lacking.

Conclusion: Members commented that the committees have the responsibility to ask rigorous questions and that the parties' experts have the burden of making their claims understandable, and that when

committees do not believe they have adequate information/insight to evaluate expert claims they should document this in their findings. Vroom advised that committees should listen very closely, ask questions until they understand, and make the best judgment they can.

VIII. Consultation with Senate leadership.

Academic Council Chair and Vice Chair Bob Powell and Bill Jacob reported on systemwide issues. The searches for a Chancellor at Riverside and a President are progressing on schedule. Council issued a statement in support of increasing employee contributions to UCRP to continue progress toward fully funding the retirement system. The recommendation is coupled with support for an across-the-board salary increase of at least 3% that would backfill the cumulative effect of increased contributions in FY 2013 and 2014. Powell reported that Assembly ratified Council's election of Irvine Divisional Chair Mary Gilly as the 2013-14 vice chair. Jacob reported on the latest developments in negotiations over Composite Benefit Rates as they apply rates charged against grants for summer salaries. Jacob reported on UC's Innovative Learning Technologies Initiative (ILTI) and the systemwide Senate's heavy involvement in lobbying against SB 520, which would require UC faculty to partner with outside providers to develop online courses offered to UC and outside students. Both have taken large amounts of time and effort. The Legislature and the Department of Finance are looking closely at ILTI, and UC programmatic options may be constrained. ILTI will require departmental agreements to ensure courses are offered for several years. Expect an RFP in June with response dates in June and November. In the future, UCP&T may be asked to deal with issues related to intellectual property and faculty workload in relation to online courses.

XI. The "Three-year Rule" as it applies to Privilege & Tenure Hearings.

Issue: Bylaws 335 and 336 clearly prohibit initiation of a grievance or discipline case more than three years after the conduct that provoked the case. The policy does not clearly extend that prohibition to introduction of evidence more than three years old, and divisional Rules & Jurisdiction committees have taken different positions. May records of informal corrective actions, such as counseling memos, be introduced in discipline cases if they are more than three years old?

Discussion: Members agreed that the Bylaws allow introduction of records of formal disciplinary actions, as defined in APM 016, that are more than three years old; divisional policies are not consistent in relation to less formal discipline-like actions such as counseling memos. Discussion focused on what UCP&T thinks the policy should be.

Arguments in favor of interpreting the three-year rule to exclude counseling memos and similar records that are more than three years old: (1) the time limit means that evidence is clearer and that the other side has an opportunity to gather evidence that would rebut it; hence the time limit is conducive to fairness; (2) prohibiting the introduction of old evidence that does not meet the definition of "discipline" creates an incentive to proceed with disciplinary proceedings when a faculty member engages in chronic bad behavior. Arguments against interpreting the three-year rule to exclude evidence other than records of formal discipline that is more than three years old: (1) The APM recognizes a category of bad behavior that is "made serious" by repetition even if a single instance would not rise to the level of discipline. (2) Toleration of ongoing bad behavior without corrective action over a prolonged period is a problem. In discussion, members suggested some options, including the use of: counseling memos that include an express agreement that the memo will be placed in the personnel file as written censure if the behavior continues; settlement agreements in which an accused agrees to accept a letter of censure while acknowledging that he/she could have demanded a hearing. Members noted the tension between a pressure to waive the rights of the accused and the need to create a record

that can be used if a chronic pattern emerges in the future. Members agreed that the three-year rule should apply to evidence other than records of formal discipline and that settlement agreements should include options such as placing a letter of censure into a personnel file for a specified period and removing it if the bad behavior does not recur. A member noted that less bad behavior is tolerated now than in the past. A member noted that chairs may duck their responsibility for discipline if they cannot use less formal tools in the early stages of corrective action.

Action: Members agreed that UCP&T should issue a letter to division chairs for distribution to department chairs that will advise them of the three-year rule; advise the use of informal quasi-disciplinary tools when appropriate to correct bad behavior; and advise that failure to escalate to formal discipline when indicated will result in loss of evidence in future proceedings if the bad behavior becomes chronic.

X. Procedural issues related to CAP handling of letters in promotion files.

Issue: Do Privilege & Tenure committees have any authority to instruct CAPs regarding implicit bias in certain methods of handling requests for letters of recommendation in a promotion file?

Discussion: Members noted reports that some CAPs may count every “cold” request for a letter by a CAP chair against the number of letters actually received. After a brief discussion, members agreed that no action is needed at this time. Members viewed the issue as a possible indicator of reliance on impermissible criteria in personnel cases but did not have sufficient information to proceed.

XI. Non-Senate faculty access to Privilege & Tenure proceedings in grievance and discipline cases.

Issue: Last year the San Francisco division attempted to extend Senate membership to adjunct and health sciences clinical professors, but UCR&J found that the Bylaws did not permit such an action without legislation and Regental policy change. One of the privileges of Senate membership that is valued by those faculty is the right to a P&T hearing in discipline and grievance cases. What would be required to grant such a right and what would be likely consequences?

Discussion: San Francisco representative Jeff Lansman noted that Legislative Ruling 12.80 allows a Chancellor to appoint a Privilege & Tenure hearing panel for non-Senate faculty members, even though this would not be recognized as a Senate process. Members raised questions about the implications for APM 140 and asked what authority would govern a hearing process carried out by Senate representatives outside of Senate jurisdiction. Vroom recommended a consultation with the Governance group in the Office of General Counsel and suggested that divisional Bylaws might be amended to provide for such a proceeding with the Chancellor’s agreement.

Conclusion: The issue remained unresolved and may be appropriate for continued discussion next year.

XII. APM 600 review.

Issue: The many revisions to the APM 600 series were circulated for review without redline versions that allowed committees to examine precise changes in language; such versions were made available on request to UCOP. Santa Cruz representative Onuttom Narayan proposed that the committee ask for the review to start again.

Discussion: A member argued that the Senate should ask UCOP to restart the review. The member noted substantive changes, including a new requirement to obtain permission before teaching on another campus in the summer; a ceiling on summer salaries at 3/9 as opposed to the current 3/9 plus one day; and inconsistencies that may give rise to grievances.

Action: Members agreed to send a letter expressing the committee’s opinion that the format of the review was inadequate for proper comment and that it would not opine but would reference

the concerns raised by the Santa Cruz letter, which should be attached. *[Note: that letter was sent to Council Chair Powell for inclusion in the Senate's response to the APM 600 revisions.]*

XIII. New business.

Issues for next year: how does the three-year rule apply to evidence in grievance cases? How can UCP&T strengthen education, particularly for new faculty, about rights in the Privilege & Tenure context? This is pressing in light of the imbalance in resources between administrators and individual faculty. How can UCP&T create an institutional memory for general reference? Can the annual report contribute to such documentation?

The meeting adjourned at 3:00 p.m.

-Minutes prepared by Martha Winnacker