



OFFICE OF THE VICE PROVOST --
ACADEMIC PERSONNEL

OFFICE OF THE PRESIDENT
1111 Franklin Street, 11th Floor
Oakland, California 94607-5200

November 13, 2012

ACADEMIC COUNCIL CHAIR POWELL
COUNCIL OF VICE CHANCELLORS
LABORATORY DIRECTOR ALIVISATOS
ANR VICE PRESIDENT ALLEN-DIAZ

Re: Final Review of Proposed Revised APM – 015, The Faculty Code of Conduct

Dear Colleagues:

Enclosed for final review are proposed revisions to Academic Personnel Policy (APM) Section 015, The Faculty Code of Conduct.

Academic Personnel has been in consultation for two years with the President, the Provost, the Academic Senate, the Office of General Counsel and campus administration regarding proposed changes to APM – 010, Academic Freedom, APM – 015, The Faculty Code of Conduct and APM – 016, University Policy on Faculty Conduct and the Administration of Discipline.

Following distribution of proposed revised language amending these policies, Academic Personnel received a broad set of comments during both management consultation and systemwide review from campus administration and Senate committees. The attached Executive Summary provides a narrative describing the impetus for the original proposals, an analysis of the comments received during management consultation and systemwide review and a final recommendation to amend APM - 015. Proposed revisions to APM - 010 and APM - 016 are no longer under consideration.

Final review is intended to advise the results of the systemwide review and how language has been refined. We do not anticipate substantive revisions during final review. This stage of consultation is intended to resolve prior discussions and to answer remaining questions.

This letter and enclosures anticipate that you will submit comments no later than **December 21, 2012**. Please send comments on the proposed policy to ADV-VPCARLSON-SA@ucop.edu. Questions may be directed to Janet Lockwood at Janet.Lockwood@ucop.edu or (510) 987-9499.

Sincerely,

A handwritten signature in cursive script that reads "Susan Carlson".

Susan L. Carlson
Vice Provost
Academic Personnel

November 13, 2012

Page 2

Enclosure: Executive Summary

cc: President Yudof
Chancellors
Provost Dorr
Senior Vice President Vacca
Vice President and General Counsel Robinson
Vice President Duckett
Vice Provosts of Academic Personnel
Academic Personnel Directors
Executive Director Tanaka
Executive Director Winnacker
Executive Director Rodrigues
Deputy General Counsel Birnbaum
Director Chester
Manager Lockwood
Systemwide Policy Coordinator Capell
Human Resources Analyst Bello
Senior Administrative Analyst Rupert

Final EXECUTIVE SUMMARY

Proposed Revisions to APM Sections 010, Academic Freedom, 015, The Faculty Code of Conduct and 016, University Policy on Faculty Conduct and the Administration of Discipline

Background

At its meeting on January 26, 2011, the Academic Council adopted a resolution proposed by the Committee on Academic Freedom and reviewed by Senate committees to recommend revising the language of Sections 010 and 015 of the APM to include within the protections of academic freedom the freedom to speak on matters of institutional policy or action, whether or not as a member of an agency of institutional governance. Concurrently, former Provost Pitts recommended proposed revisions to Section 016 to remedy the omission of a single, clear statement in the APM with the expectation that faculty will comply with University policy.

Following extensive consultation with the President, the Office of General Counsel (Charles Robinson and David Birnbaum), the Senate (former Academic Council Chairs Daniel Simmons and Robert Anderson) and Academic Affairs (Larry Pitts and Susan Carlson), proposed revisions to Sections 010, 015, and 016 were circulated for Management Consultation and Systemwide Review.

An analysis of comments received from Management Consultation and Systemwide Review follows, along with a recommended course of action.

Academic Senate Position

The revisions proposed by the Senate to Sections 010 and 015 were believed to be required to assure faculty rights to actively participate in the shared governance of the University by incorporating within academic freedom the right to freely express opinions regarding institutional policies. Insertion of language was deemed necessary because of ambiguities in the United States Supreme Court holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and because of the University's advocacy in *Hong v. Grant et. al*, 2010 U.S. LEXIS 23504 (9th Cir. Unpublished opinion, 2010).

In *Garcetti* the Court stated that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." (547 U.S. at 421). The Majority opinion in *Garcetti* also states that, "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." (547 U.S. at 425). In *Hong*, the University of California, citing *Garcetti*, asserted that a faculty member could not assert a claim under the First Amendment by alleging that his merit increase had been denied based on comments he made in a Departmental meeting (i.e., pursuant to his official duties). Ultimately, the 9th Circuit upheld a dismissal of the faculty member's suit on Eleventh Amendment Immunity grounds without addressing the *Garcetti* issue. The position of General Counsel in *Hong* raised substantial concern among faculty, resulting in recommended revisions to APM - 010 and 015.

Office of General Counsel Review

Per President Yudof's request, the Office of General Counsel reviewed the Senate's proposal to revise APM - 010 and 015, specifically to add to the protections of academic freedom: "[the] freedom to address any matter of institutional policy or action whether or not as a member of an agency of institutional governance."

The Senate's proposal also added to the Faculty Code of Conduct, APM - 015, protection for "University service" in addition to teaching, learning, research, and public service, and a statement that the purpose of discipline is to preserve conditions hospitable to these protected pursuits, including the "freedom to address any institutional policy or action, whether or not as a member of an agency of institutional governance."

Office of General Counsel asserted that participation in University activities is recognized as University service, something that is part of the role as faculty, and thus within the scope of shared governance and academic freedom. In that context, faculty may address a wide range of University policies and actions. Accordingly, the proposed changes appeared appropriate to the extent that they are limited to faculty acting within the course and scope of employment (i.e., as faculty members) and subject to "correlative duties of professional care," as stated in APM - 010 and 015.

According to Office of General Counsel, the proposal that faculty be protected when they are addressing any matter of University policy or action when they are *not* acting as faculty members goes beyond "shared governance." In effect, it encompasses the speech of faculty in their private capacity. When faculty are acting in their private capacity, they are protected by the First Amendment. The proposed amendments, to the extent that they insulate speech as an exercise of academic freedom beyond the protections of the First Amendment, are uncertain in terms of their impact, and not warranted by the Garcetti decision or other legal developments. The reasons for the amendments offered by the Senate do not require protection for speech outside the course and scope of employment. To the contrary, the Senate's concerns are focused on faculty exercising their job responsibilities in the context of shared governance.

Office of General Counsel asserted that the proposed amendments can be justified if phrasing is amended to read: "freedom to address any matter of institutional policy or action *when acting as a member of the faculty.*" This language addresses faculty concerns and makes clear that when exercising such rights, faculty are subject to the "correlative duties of professional care" spelled out in the Faculty Code of Conduct.

Analysis of Management Consultation and Systemwide Review

Following distribution of proposed language as revised by the Office of General Counsel, and reviewed with former Academic Council Chairs Simmons and Anderson, Academic Personnel received a broad set of comments from campus administration and Senate committees during both management and systemwide reviews:

- Some reviewers cited recent court cases, including *Garcetti*, as the impetus for adding the proposed language.

- One reviewer, citing *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), commented that the University should seek to strengthen APM - 010 with respect to the core of scholarship and teaching, rather than trying to develop an academic freedom notion of shared governance extending to all policy areas affecting the University.
- Other reviewers cited various publications, including Larry Spurgeon's "A Transcendent Value: The Quest to Safeguard Academic Freedom"¹ and Frederick Schaffer's "A Guide to Academic Freedom"² along with the American Association of University Professors principal founder Arthur Lovejoy's definition of Academic Freedom.³
- Some reviewers commented that the phrase "...when acting as a member of the faculty..." introduces ambiguity and should be clarified or dropped.
- Other reviewers would narrow the proposed expansions, believing that faculty have the freedom to address matters of institutional policy or action now within shared governance, and that expanding the definition of protected speech serves to *dilute* the core concept of academic freedom, and may even pose a threat to the legal status of academic freedom more broadly. These reviewers questioned the need for the revision, adding that the practical implications of the proposed new language were unclear.
- Other reviewers interpreted the language to mean that the University has a valid interest in controlling a faculty member's speech when he or she is not acting as a member of the faculty but gives no guidance for determining when that is the case.
- Some believed that the term "*institutional policy or action*" is too vague and others were supportive of the language as written for APM - 015, but not for APM - 010.
- Lastly, one reviewer questioned the appropriateness of the clause "*...whether or not as a member of an agency of institutional governance.*"

When reviewing the 016 proposal amending language to read that "faculty members are subject to the general rules and regulations *and policies* of the University; *these include, but are not limited to*, those pertaining to parking, library privileges, health and safety and use of University facilities," many reviewers commented that "policy" is an ambiguous term that is difficult to define. Some objected to the phrase "*...these include, but are not limited to...*" which they believed to be too broad. Most reviewers opposed the amendment, commenting that the revision was unnecessary. Some commented that the proposed revisions negatively impact academic freedom relative to faculty members' research, teaching, and service activities.

¹ "A Transcendent Value: The Quest to Safeguard Academic Freedom," *Journal of College and University Law* 34:209 (2007).

² "A Guide to Academic Freedom," *Trusteeship* 19:4 (July/August 2011).

³ 1940 Statement on Principles of Academic Freedom and Tenure, *AAUP*.

Recommendation

APM - 010 and 015. With no consensus among reviewers, and particularly strong concerns voiced by the Academic Senate and UCSD and UCLA administrators that the language would serve to dilute the concepts of academic freedom and shared governance, Academic Personnel and Office of General Counsel met to discuss the feedback and a recommended resolution.

The University Committee on Academic Personnel (UCAP) and the University Committee on Privilege and Tenure (UCP&T) favor inclusion of the language in APM - 015 but thought it unnecessary in APM - 010, believing that academic freedom as currently delineated in APM - 010 extends to faculty speech on matters of institutional policy or action.

With the consent of the President and the Provost, the Office of General Counsel and Academic Personnel propose that we adopt the UCAP/UCP&T recommendation as the most clear resolution, i.e., that we include the proposed language in APM - 015 but leave APM - 010 as is.

APM - 016. Most reviewers were opposed to the introduction of additional language to APM - 016, voicing significant concerns with the introduction of overly broad and vague language. The Senate believes that with no definition of the term “policy,” language places determination of sanctions for faculty non-compliance with administrative policies beyond the procedural protections provided by the Faculty Code of Conduct and the oversight of their peers. Accordingly, no changes are now recommended for APM - 016.

Attachment: Proposed Draft Revisions to APM - 015