

UNIVERSITY OF CALIFORNIA, ACADEMIC SENATE

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SANTA BARBARA • SANTA CRUZ

Robert L. Powell
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Chair of the Assembly of the Academic Senate
Faculty Representative to the Regents
University of California
1111 Franklin Street, 12th Floor
Oakland, California 94607-5200
February 22, 2013

SUSAN CARLSON, VICE PROVOST FOR ACADEMIC PERSONNEL

Re: Proposed revision to APM 015

Dear Susan:

As you requested, I invited the Senate divisions and committees to participate in the Final Review of the proposed revisions to APM 015. five divisions and three committees responded. The Academic Council reviewed comments at its January 25, 2013 meeting.

Most respondents who submitted new comments endorsed the proposed revision. However, some respondents (UCI, UCR, UCSB, UCFW) continue to be concerned that the qualifying phrase “when acting as a faculty member” appended to the policy protection of “freedom to address any matter of institutional policy or action” is confusing, even though most prefer to accept the revision with this problematic language rather than reject it altogether. UCFW does not support the proposed revision.

Nonetheless, Council noted that the National Labor Relations Board decided on December 14, 2012 in the matter of *Hispanics United of Buffalo, Inc.* and *Carlos Ortiz* (Case 03-CA-027872), reported in the *New York Times* on January 21 (see <http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?pagewanted=all>) that a private employer may not discipline its employees for statements they make as private citizens in social media that are critical of the employer, if those statements are made in a concerted effort by the employees to address a mutual interest in relation to the conditions of their employment. In light of this ruling, Council asks that you request the Office of General Council to reconsider its recommendation that the confusing language be included in the revised policy.

Please feel free to contact me if you have any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "R.L. Powell".

Robert L. Powell

Encl. (2)

Cc: Academic Council
Provost Dorr
Executive Director Winnacker

The New York Times

January 21, 2013

Even if It Enrages Your Boss, Social Net Speech Is Protected

By **STEVEN GREENHOUSE**

As Facebook and Twitter become as central to workplace conversation as the company cafeteria, federal regulators are ordering employers to scale back policies that limit what workers can say online.

Employers often seek to discourage comments that paint them in a negative light. Don't discuss company matters publicly, a typical social media policy will say, and don't disparage managers, co-workers or the company itself. Violations can be a firing offense.

But in a series of recent rulings and advisories, labor regulators have declared many such blanket restrictions illegal. The [National Labor Relations Board](#) says workers have a right to discuss work conditions freely and without fear of retribution, whether the discussion takes place at the office or on Facebook.

In addition to ordering the reinstatement of various workers fired for their posts on social networks, the agency has pushed companies nationwide, including giants like General Motors, Target and Costco, to rewrite their social media rules.

"Many view social media as the new water cooler," said Mark G. Pearce, the board's chairman, noting that federal law has long protected the right of employees to discuss work-related matters. "All we're doing is applying traditional rules to a new technology."

The decisions come amid a broader debate over what constitutes appropriate discussion on Facebook and other social networks. Schools and universities are wrestling with online bullying and student disclosures about drug use. Governments worry about what police officers and teachers say and do online on their own time. Even corporate chieftains are finding that their online comments can run afoul of securities regulators.

The labor board's rulings, which apply to virtually all private sector employers, generally tell companies that it is illegal to adopt broad social media policies — like bans on "disrespectful" comments or posts that criticize the employer — if those policies discourage workers from exercising their right to communicate with one another with the aim of improving wages, benefits or working conditions.

But the agency has also found that it is permissible for employers to act against a lone worker ranting on the Internet.

Several cases illustrate the differing standards.

At Hispanics United of Buffalo, a nonprofit social services provider in upstate New York, a caseworker threatened to complain to the boss that others were not working hard enough. Another worker, Mariana Cole-Rivera, posted a Facebook message asking, "My fellow co-workers, how do you feel?"

Several of her colleagues posted angry, sometimes expletive-laden, responses. "Try doing my job. I have five programs," wrote one. "What the hell, we don't have a life as is," wrote another.

Hispanics United fired Ms. Cole-Rivera and four other caseworkers who responded to her, saying they had violated the company's harassment policies by going after the caseworker who complained.

In a 3-to-1 [decision last month](#), the labor board concluded that the caseworkers had been unlawfully terminated. It found that the posts in 2010 were the type of "concerted activity" for "mutual aid" that is expressly protected by the National Labor Relations Act.

"The board's decision felt like vindication," said Ms. Cole-Rivera, who has since found another social work job.

The N.L.R.B. had far less sympathy for a police reporter at The Arizona Daily Star.

Frustrated by a lack of news, the reporter posted several Twitter comments. One said, "What?!?!?! No overnight homicide. ... You're slacking, Tucson." Another began, "You stay homicidal, Tucson."

The newspaper fired the reporter, and board officials found the dismissal legal, saying the posts were offensive, not concerted activity and not about working conditions.

The agency also affirmed the firing of a bartender in Illinois. Unhappy about not receiving a raise for five years, the bartender posted on Facebook, calling his customers "rednecks" and saying he hoped they choked on glass as they drove home drunk.

Labor board officials found that his comments were personal venting, not the "concerted activity" aimed at improving wages and working conditions that is protected by federal law.

N.L.R.B. officials did not name the reporter or the bartender.

The board's moves have upset some companies, particularly because it is taking a law enacted in the industrial era, principally to protect workers' right to unionize, and applying it to the digital activities of nearly all private-sector workers, union and nonunion alike.

Brian E. Hayes, the lone dissenter in the Hispanics United case, wrote that "the five employees were simply venting," not engaged in concerted activity, and therefore were not protected from termination. Rafael O. Gomez, Hispanics United's lawyer, said the nonprofit would appeal the board's decision, maintaining that the Facebook posts were harassment.

Some corporate officials say the N.L.R.B. is intervening in the social media scene in an effort to remain relevant as private-sector unions dwindle in size and power.

"The board is using new legal theories to expand its power in the workplace," said Randel K. Johnson, senior vice president for labor policy at the United States Chamber of Commerce. "It's causing concern and confusion."

But board officials say they are merely adapting the provisions of the National Labor Relations Act, enacted in 1935, to the 21st century workplace.

The N.L.R.B. is not the only government entity setting new rules about corporations and social media. On Jan. 1, California and Illinois became the fifth and sixth states to bar companies from asking employees or job applicants for their social network passwords.

Lewis L. Maltby, president of the National Workrights Institute, said social media rights were looming larger in the workplace.

He said he was disturbed by a case in which a Michigan advertising agency fired a Web site trainer who also wrote fiction after several employees voiced discomfort about racy short stories he had posted on the Web.

"No one should be fired for anything they post that's legal, off-duty and not job-related," Mr. Maltby said.

As part of the labor board's stepped-up role, its general counsel [has issued three reports](#) concluding that many companies' social media policies illegally hinder workers' exercise of their rights.

The general counsel's office gave high marks to Wal-Mart's social policy, which had been revised after consultations with the agency. It approved Wal-Mart's prohibition of "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct."

But in assessing General Motors's policy, the office wrote, "We found unlawful the instruction that 'offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline.'" It added, "This provision proscribes a broad spectrum of communications that would include protected criticisms of the employer's labor policies or treatment of employees." A G.M. official said the company has asked the board to reconsider.

In a ruling last September, the board also rejected as overly broad Costco's blanket prohibition against employees' posting things that "damage the company" or "any person's reputation." Costco declined to comment.

Denise M. Keyser, a labor lawyer who advises many companies, said employers should adopt social media policies that are specific rather than impose across-the-board prohibitions.

Do not just tell workers not to post confidential information, Ms. Keyser said. Instead, tell them not to disclose, for example, trade secrets, product introduction dates or private health details.

But placing clear limits on social media posts without crossing the legal line remains difficult, said Steven M. Swirsky, another labor lawyer. "Even when you review the N.L.R.B. rules and think you're following the mandates," he said, "there's still a good deal of uncertainty."



320 STEPHENS HALL
UNIVERSITY OF CALIFORNIA

December 4, 2012

MARTHA WINNACKER
Executive Director, Academic Senate

Subject: Final Review of Proposed Revised APM - 015, The Faculty Code of Conduct

Dear Martha,

I write on behalf of Christina Maslach, chair of the Berkeley Division of the Academic Senate, to inform you that the Division has no further comments on the proposed revision of the Faculty Code of Conduct (APM 015).

Sincerely,

A handwritten signature in cursive script that reads "Andrea Green Rush".

Andrea Green Rush
Executive Director, Berkeley Division of the Academic Senate

Cc: Christina Maslach, Chair, Berkeley Division of the Academic Senate

January 9, 2013

Robert Powell, Chair, Academic Council
1111 Franklin Street, 12th Floor
Oakland, CA 94607-5200

RE: Systemwide Review of Proposed Revisions to APM-015, Faculty Code of Conduct

At its meeting of January 8, 2013, the Irvine Division Academic Senate reviewed the proposed revisions to APM-015, Faculty Code of Conduct. The Council on Academic Personnel (CAP) and the Council on Faculty Welfare, Diversity and Academic Freedom (CFW) were asked to comment on behalf of the division.

Council on Academic Personnel

Our understanding from the Executive Summary is that based on management consultation and comments from last year's systemwide Senate review, UCOP is now proposing no changes to APM-010 and APM-016 and is seeking endorsement of the original proposed revision of APM-015 (draft dated 3/23/12). CAP members were pleased that the concerns expressed last year regarding APM-010 and APM-016 were heeded, and had no objections to the proposed revisions of APM-015.

Council on Faculty Welfare, Diversity, and Academic Freedom (CFW)

The proposed revisions reviewed the recommendations to revise language to include within the protections of academic freedom the freedom to speak on matters of institutional policy.

The Academic Council's proposal was to specifically add protections of the 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". But the General Counsel required an amendment to the proposal, to read "freedom to address any matter of institutional policy or action when acting as a member of the faculty." The CFW, when reviewing this proposal May 8, 2012, had concerns about the qualifying condition "when acting as a faculty member". First, it was not clear when a faculty member would not be a faculty member. Second, the condition would restrict the freedom of faculty administrators who, in spite of being aware that their administrative positions are not protected, may want to speak on matters of institutional policy, and in doing so, their basic faculty position might be in danger.

The current proposal is unchanged from the earlier amended proposal by the General Counsel. One may argue in favor of this compromise proposal that since a faculty member is always a faculty member, arguably “when acting as a faculty member” clause can be interpreted to protect the faculty member’s faculty position under this right even if he/she is an administrator. Members found the recommendations to accomplish the primary goal of assuring faculty rights to actively participate in shared governance of the University by incorporating within the academic freedom the right to freely express opinions regarding institutional policy.

The Irvine Division appreciates the opportunity to comment.

A handwritten signature in black ink that reads "Mary C. Gilly". The signature is written in a cursive, flowing style.

Mary C. Gilly, Senate Chair

C: Martha Kendall Winnacker, Executive Director, Academic Senate

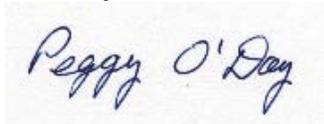
January 4, 2013

ACADEMIC COUNCIL CHAIR POWELL

RE: Merced Division Comments on proposed revision of APM-015 -- Faculty Code of Conduct

The Committee on Academic Personnel (CAP) and the Faculty Welfare Committee (FWC) of the Merced Division were asked to review the proposed final revisions to [APM-015](#). Members of the Division Council were also asked to comment. The members of CAP did not find it necessary to comment, and the FWC reviewed and approved the changes without comment. The Division Council likewise has no further comment on the proposed revision.

Sincerely,

A handwritten signature in blue ink that reads "Peggy O'Day". The signature is written in a cursive style and is positioned above the typed name and title.

Peggy O'Day
Chair, Merced Division of the Academic Senate

cc: Systemwide Academic Senate Executive Director Winnacker
Division Council
Senate Office

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CHAIR, ACADEMIC SENATE
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JOSE WUDKA
PROFESSOR OF PHYSICS AND ASTRONOMY
RIVERSIDE, CA 92521-0217
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E-MAIL: JOSE.WUDKA@UCR.EDU

January 18, 2013

Robert Powell, Chair, Academic Council
1111 Franklin Street, 12th Floor
Oakland, CA 94607-5200

Dear Bob:

RE: Final Systemwide Review of Proposed Revisions to APM 015 - The Faculty Code of Conduct

During its January 14 meeting the Executive Council reviewed the proposed changes to APM 015. Despite some misgivings about the specific wording, Council supports the changes.

The concern centered on the use of the qualifying phrase "acting as a member of the faculty" in 015.4. Though council members understood that its goal is probably to cover the situation encountered in *Ceballos v. Garcetti*, the fact that there is no clear definition of when a faculty member is acting in this capacity opens the possibility of it being misused some members though might be replaced by an appropriate explicit reference to the rights of individual to free speech

Sincerely yours,
Jose Wudka
Professor of Physics & Astronomy and Chair of the Riverside Division

CC: Martha Kendall Winnacker, Executive Director of the Academic Senate
Cynthia Palmer, Director of UCR Academic Senate office



January 7, 2013

TO: Jose Wudka, Chair
Riverside Division Academic Senate

FR: Thomas Morton, Chair
Committee on Academic Freedom

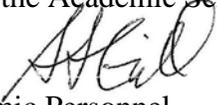
RE: APM015

UCR's CAF went over the wording this past academic year and, at that time, concurred with the position stated by UCAF in the November 25, 2011, memo from UCAF chair Rehm to Academic Council chair Anderson. There do not seem to be significant changes in the wording put forth in the present proposal. Given that the diversity of opinion has been noted and discussed, the inclination of the committee members that have contacted me is to consent to the proposed modification of APM 015. At this point, no purpose would be served by reiterating our dissent yet again.

UC RIVERSIDE UNIVERSITY OF CALIFORNIA | **Academic Senate**
COMMITTEE ON ACADEMIC PERSONNEL

December 17, 2012

To: Jose Wudka, Chair
Riverside Division of the Academic Senate

From: Sarjeet Gill, Chair 
Committee on Academic Personnel

Re: Final Systemwide Review of Proposed Revisions to APM 015 – The Faculty Code of Conduct

On December 17, 2012, CAP voted unanimously to approve APM 015 – The Faculty Code of Conduct (+9-0-0). CAP concurs with the revisions and has no further suggestions.



December 9, 2012

To: Jose Wudka, Chair
Riverside Division of the Academic Senate

From: Timothy Close, Chair
Committee on Charges

Re: Final Systemwide Review of Proposed Revisions to APM 015 – The
Faculty Code of Conduct

The Committee on Charges has no objection to the revisions of APM 015.



January 4, 2013

TO: JOSE WUDKA, CHAIR
RIVERSIDE DIVISION

FROM: BYRON ADAMS, CHAIR
COMMITTEE ON DIVERSITY AND ECONOMIC OPPORTUNITY

RE: Formal Reply to the System-wide review of Academic Personnel Policy
(APM) Section 015, The Faculty Code of Conduct

The consensus of CODEO can be stated simply and succinctly: The decision to leave APM-015 intact represents a reasonable compromise between the intentions of the UC President Yudof and the General Counsel and the concerns voiced by faculty members. We do believe, however, that this matter might well be revisited in the coming years if conditions change.



January 8, 2013

To: Jose Wudka
Chair, Riverside Division Academic Senate

From: Irving G. Hendrick
Chair, Committee on Faculty Welfare

Re: Committee on Faculty Welfare's Additional Comments on Committee's
May 31st report regarding revision of APM Section 015.

Unfortunately, it has not been feasible for the Committee to meet in time to consider further the Faculty Code of Conduct. That said, and at the risk of being presumptuous, I will give you my personal impressions. Notwithstanding that faculty conduct is a most important topic, I believe, based on previous discussions with our Committee and with members of the University Committee on Faculty Welfare, that the issues presently under consideration in the latest draft are not worrisome.

Some refinements in language are still in the works. Indeed, in a couple respects the old language is preferable to the proposed new language, but nothing of high stakes comes to mind. Beyond our own campus discussion, I know that faculty elsewhere caught a few points, perhaps the most noteworthy being the reference under Category III, Outside Professional Activity, which included "developing scholarly or creative works." With a rather broad smile, one colleague at Berkeley suggested that this was pretty much a direct example of a *regular* faculty activity. Chances are pretty good that it will be changed in the final version.



January 4, 2013

To: Jose Wudka
Chair, Riverside Division Academic Senate

From: Helen Henry
Chair, Committee on Privilege and Tenure

Re: **Final Systemwide Review of Proposed Revisions to APM 015 – The Faculty Code of Conduct**

P&T supports the proposed revision to APM 015.



January 3, 2013

To: Jose Wudka, Chair
Riverside Division

Fr: Ziv Ran, Chair
Committee on Rules and Jurisdiction

Re: Final Systemwide Review of Proposed Revisions to APM 015 – The Faculty Code of Conduct

The Committee on Rules and Jurisdiction discussed the proposed changes to APM 015 and finds the revisions to be an excellent addition. The committee strongly supports the changes and considers them fully in line with the existing APM and Senate Bylaws.

ACADEMIC SENATE
Santa Barbara Division
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Santa Barbara, CA 93106-3050

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(805) 893-2885
<http://www.senate.ucsb.edu>

Kum-Kum Bhavnani, Chair
Deborah Karoff, Executive Director

January 15, 2013

Robert Powell, Chair
Academic Senate

RE: Proposed Revision to APM 015: Faculty Code of Conduct

Dear Bob,

Several groups in the Santa Barbara Division reviewed the proposed revisions to APM 015-Faculty Code of Conduct. Reviewing groups were: Council on Faculty Issues and Awards, Council on Planning and Budget, Council on Research and Instructional Resources, Graduate Council, Undergraduate Council, Committee on Academic Personnel, Privilege and Tenure Committee, Committee on International Education, Committee on Equity and Diversity, and the Faculty Executive Committees from: the College of Letters and Science, the College of Engineering, the College of Creative Studies, Education, and the Bren School.

With the exception of two groups, all groups either concurred with, or had no objections to, the proposed revisions to APM 015. The Council on Faculty Issues and Awards (CFIA) and Graduate Council (GC) suggest that the proposed additional language is ambiguous and ill-defined.

The Council on Faculty Issues and Awards (CFIA) does not endorse the proposed revisions, based on concerns originally expressed in May 2012 during the first review of the proposed revisions. Their main concern is based on the additional language, "when acting as a member of the faculty whether or not as a member of an agency of institutional governance." During the initial review, CFIA wrote:

"CFIA is concerned with the overly-broad qualifications which are open to a great deal of ambiguity. What distinguishes behavior that is "acting as a member of the faculty"? Would this include a faculty member's presence at a campus protest? What about off-campus activities? How would a line be drawn to distinguish when someone were "acting as a faculty member"? And what would be the significance of a finding that someone was not "acting as a faculty member?" Would that suggest a lack of protection for expression of their views, or simply reinforce that it is a matter over which the University has no jurisdiction? In sum, in the view of CFIA, simpler is better. The addition to the APM of the long-assumed privilege of the faculty, to address matters of institutional policy or governance, ought to be made without adornment and qualification."

The concern about imprecise wording was also raised by Graduate Council (GC) and the Council on Research and Instructional Resources (CRIR). GC found the language ambiguous and members were uncertain what their actual rights would be under certain circumstances. A member of CRIR suggested

that the wording from the summary of the revision process expressed their primary concern, "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."

Questions about the practical implications of the proposed language continue to raise concerns on the part of some groups on the Santa Barbara campus.

Thank you for the opportunity to comment.

Sincerely,



Kum-Kum Bhavnani, Chair
Santa Barbara Division

UNIVERSITY COMMITTEE ON ACADEMIC PERSONNEL (UCAP)
Harry Green, Chair
harry.green@ucr.edu

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1111 Franklin Street, 12th Floor
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Phone: (510) 987-9466
Fax: (510) 763-0309

January 16, 2013

BOB POWELL, CHAIR
ACADEMIC COUNCIL

RE: PROPOSED REVISIONS TO APM 015

Dear Bob,

UCAP has reviewed the proposed revisions to APM 015 and the committee has no objections to the changes.

Sincerely,

A handwritten signature in blue ink, appearing to read "Harry Green".

Harry Green, Chair
UCAP

UNIVERSITY COMMITTEE ON FACULTY WELFARE (UCFW)
J. Daniel Hare, Chair
daniel.hare@ucr.edu

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January 15, 2013

**ROBERT POWELL, CHAIR
ACADEMIC COUNCIL**

RE: Proposed Revisions to APM 015 (Faculty Code of Conduct)

Dear Bob,

The University Committee on Faculty Welfare (UCFW) has discussed again the proposed changes APM 015 (Faculty Code of Conduct), but we still cannot endorse them. The committee considered carefully the justification in the Executive Summary of the current draft. While the committee applauds the administration efforts to guarantee faculty rights to speak critically of University policy and institutional governance, we remain unconvinced as to the necessity of the specific language included in the revision. As the previous UCFW noted, the scope and application of the standard “when acting as a member of the faculty” remain opaque. Two instances were highlighted: First, it is unclear when a faculty member becomes a private citizen: “members are concerned that they must distinguish between protected private statements that are critical of University policy and unprotected private statements putting forward an individual grievance.” Second, it is unclear when a faculty member becomes an administration agent, and would lose faculty protections: “OGC cites the hypothetical example of a faculty member who has in the past been an outspoken opponent of affirmative action and now applies to become a campus Vice Chancellor for Equity and Inclusion.” The consideration and interpretation of prior statements made “when acting as a member of the faculty” must surely occur in this instance, but the new language would preclude such due diligence. The current UCFW agrees with our predecessors: This exercise “identifies a nonproblem, and that the addition of the phrase “while acting as a member of the faculty” provides a nonsolution to this nonproblem.”

Despite our continued opposition to the proposed changes to APM 015, we do appreciate that the word “policies” has been removed from further consideration in the revision to APM 016.

For your reference, we include the committee’s previous response, submitted during management review last year.

Please let us know if you have any questions or concerns.

Sincerely,



J. Daniel Hare, UCFW Chair

Copy: UCFW
Robert Powell, Chair, Academic Council
William Jacob, Vice Chair, Academic Council
Martha Winnacker, Executive Director, Academic Senate



UNIVERSITY COMMITTEE ON FACULTY WELFARE (UCFW)
William Parker, Chair
william.parker@uci.edu

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December 12, 2011

**SUSAN CARLSON, VICE PROVOST
ACADEMIC PERSONNEL**

RE: APM 010 (Academic Freedom) Revised Suggested Language

Dear Susan:

Almost a year ago UCFW endorsed the proposed addition of language to APM 010 and 015 that would clarify that academic freedom extends to “freedom to address any matter of institutional policy or action whether or not as a member of an agency of institutional governance.” UCFW is very concerned that a new version of the proposed policy revision adds the phrase “when acting as a member of the faculty” to qualify or limit that “freedom to address any matter of institutional policy or action . . .”

The Senate’s request to add language expressly protecting “freedom to address any matter of institutional policy or action whether or not as a member of an agency of institutional governance” was a direct response to the manner in which the Office of General Counsel has used the United States Supreme Court’s ruling in *Garcetti v. Ceballos* (547 U.S. 410 (2006)) (*Garcetti*) against faculty. The Court held that a public employer could evaluate negatively or discipline a public employee for speech that is “work product” created as part of the employee’s job duties. University counsel used that reasoning to argue that the faculty member could legitimately be denied a promotion because his department disapproved of his speech in a department meeting. The insertion of the new language implies 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. In oral conversations and informal communication by email, the University’s Office of General Counsel (OGC) has advanced two arguments for inserting this language. We find neither argument persuasive:

- OGC argues that speech by a faculty member in his or role as a private citizen is protected by the First Amendment, and it is only speech offered while “acting as a member of the faculty” which potentially needs protection in the light of the *Garcetti* decision. We do not disagree with this legal analysis. However, we believe that rather than clarifying this point, the inserted language implies that the University might be permitted to impose discipline or deny a promotion on the basis of private speech unrelated to employment. The extent of this confusion and anxiety becomes clear as members of our committee attempt to parse situations in which they would need to demonstrate that they were acting as faculty members while speaking outside of the University.

- Thus, for example, members are concerned that they must distinguish between protected private statements that are critical of University policy and unprotected private statements putting forward an individual grievance. We are concerned that the draft language implies, if it does not assert, authority to sanction faculty who claim privately that they have been unfairly treated by the University. Surely this is not what is intended.
- Members are also concerned that they must distinguish between protected statements made in their role as a faculty member and potentially unprotected statements made while performing a compensated outside activity. For example, the policy could possibly be construed as allowing the University to discipline a faculty member who, as a compensated outside activity, provides expert witness services to a client suing the University. Surely this is not what is intended.
- University counsel has also argued that the phrase “while acting as a member of the faculty” is needed to establish the University’s right to control speech by faculty members acting in administrative roles, such as Dean. OGC cites the hypothetical example of a faculty member who has in the past been an outspoken opponent of affirmative action and now applies to become a campus Vice Chancellor for Equity and Inclusion. OGC argues that, in the absence of the phrase “while acting as a member of the faculty,” the University would be obligated to ignore the faculty member’s stated opposition to affirmative action in deciding whether to appoint him or her as Vice Chancellor for Equity and Inclusion.
 - We think this last assertion is inaccurate. A faculty member has no right to be chosen for a particular administrative position, as long as he or she is not discriminated against based on a protected characteristic such as race, gender, religion or sexual orientation. Moreover, a search committee is obligated to evaluate a candidate’s qualifications for a position on multiple dimensions, including his or her enthusiasm for and commitment to the work for which the position is responsible. A search committee could reasonably be concerned that the faculty member’s stated outspoken opposition to affirmative action casts doubt on the faculty member’s ability to effectively perform the role of Vice Chancellor for Equity and Inclusion, and is free to choose someone else who appears likely to be more effective in the role. Various other sections of the APM (e.g., APM 240-20, which governs deans) allow Chancellors to terminate appointments of academic administrators at will without implicating the protections of academic freedom that apply to the administrator’s underlying faculty appointment.
 - Indeed, if OGC is correct, and in the absence of the phrase “while acting as a member of the faculty,” the University *is* obligated to ignore the faculty member’s stated opposition to affirmative action in deciding whether to appoint him or her as Vice Chancellor for Equity and Inclusion. The statements were made while he or she was “acting as a member of the faculty” and are thus protected. If the faculty member indicates he or she will refrain from expressing opposition to affirmative action while serving as Vice Chancellor for Equity and Inclusion, would the search committee evaluating the individual’s candidacy need to ignore the statements?

In other words, we think that OGC’s example identifies a nonproblem, and that the addition of the phrase “while acting as a member of the faculty” provides a nonsolution to this nonproblem. The APM provision that deans and senior managers serve at will provides adequate assurance that opinions expressed by faculty that may be protected by Academic Freedom may nonetheless be taken into account in determining whether a given individual is suited for a particular administrative appointment.

For all the reasons outlined above, UCFW urges that the policy revision revert to the originally proposed language rather than inserting the confusing phrase “when acting as a member of the faculty.”

Sincerely,

A handwritten signature in blue ink that reads "William Parker". The signature is fluid and cursive, with the first name "William" and last name "Parker" clearly legible.

William Parker, UCFW Chair

Copy: UCFW
Martha Winnacker, Executive Director, Academic Senate

UNIVERSITY COMMITTEE ON PLANNING AND BUDGET (UCPB)
Jean-Bernard Minster, Chair
jbminster@ucsd.edu

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November 27, 2012

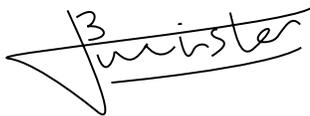
ROBERT POWELL, CHAIR
ACADEMIC COUNCIL

Re: Revisions to APM 015

Dear Bob,

The University Committee on Planning and Budget (UCPB) has reviewed the proposed revisions to Academic Personnel Manual 015 (Faculty Code of Conduct) regarding the freedom of faculty members to address matters of institutional policy or action. The committee endorsed the revisions unanimously. We believe the additions are helpful, appropriate, and meet the University Committee on Academic Freedom's original intent.

Sincerely,

A handwritten signature in black ink that reads "J B Minster". The signature is written in a cursive style with a large, stylized "J" and "B" at the beginning.

Jean-Bernard Minster
UCPB Chair

cc: UCPB
Martha Winnacker, Senate Executive Director