

**ACADEMIC COUNCIL
MEETING of FEBRUARY 16, 2009
McKenna Auditorium
3:30 p.m. – 6:00 p.m.**

Members present: Rev. John Jenkins, C.S.C., John Affleck-Graves, Panos Antsaklis, A.J. Bellia, Robert Bernhard, Seth Brown, Tom Burish, Michelle Byrne, Laura Carlson, James Collins, Greg Crawford, Sarah de Groot, Neil Delaney, Steve Fallon, Umesh Garg, Nicole Garnett, Nasir Ghiaseddin, Tom Gresik, Paul Huber, Dennis Jacobs, Lionel Jensen, Peter Kilpatrick, Daniel Lapsley, Kristin Lewis, Sean Lyttle, Chris Maziar, John McGreevy, Scott Monroe, William Nichols, Patricia O'Hara, Susan Ohmer, Hugh Page, Rev. Mark Poorman, C.S.C., Don Pope-Davis, Joseph Powers, Ava Preacher, Bob Reish, Jim Seida, Cheri Smith, Greg Sterling, Kasey Swanke, Joe Venturini, Carolyn Woo

Members absent: Michael Lykoudis, Ann Tenbrunsel, John Welle, Bill Westfall

Members excused: Michael Jenuwine, John LoSecco, Julian Velasco, Jennifer Younger

Observers present: Kevin Barry, Kathryn Lam, Dale Nees, Harold Pace, Brandon Roach

Observers absent: Daniel Saracino

Guests: Jill Bodensteiner, Associate Vice-President and Senior Counsel; Marianne Corr, Vice President and General Counsel

After calling the meeting to order, Fr. Jenkins invited Sara de Groot to offer the opening prayer.

1. Approval of Minutes: The minutes of the January 20, 2009 meeting were unanimously approved as amended.

2. Proposal to Amend the Procedure for Appointment, Reappointment, Promotion and Tenure and the Appeals Process: Fr. Jenkins explained that Prof. Garnett, on behalf of the Faculty Affairs Subcommittee, would lead the discussion and present the proposed changes to the *Procedure for Appointment, Reappointment, Promotion and Tenure* and the related appeals process. He continued by saying that at the end of each section under review, he will call for an advisory vote.

Prof. Garnett reminded members that the Academic Council reviewed the amendments to the Academic Articles in Spring 2008, however the review of the two aforementioned policies was postponed in order for these important policies to receive ample attention and to give the Academic Articles Working Group time to address them in more detail. She explained that the Working Group drafted a proposal and shared it during Fall 2008 with various individuals and groups, including: President, Provost, Provost's Advisory Committee (PAC), Faculty Senate, all college councils, Deans and chairs groups. Based on feedback from those groups, the Working

Group subsequently made amendments to the proposal and posted it on-line. With the responses received during the on-line comment period [which were distributed to the Council during the current meeting], additional amendments were made to the proposal. Finally, the proposal was presented to and reviewed by the Faculty Affairs Committee who recommended adopting the amendments with a couple of caveats.

[In advance of the meeting, on behalf of the Faculty Affairs Committee, Prof. Garnett sent a memo to all Council members which outlined the Committee's recommendations.] Prof. Garnett reminded the Council that the purpose of today's votes is to make a recommendation to the President who will then make a recommendation to the Board of Trustees. She said her presentation will highlight the major themes that arose through discussion with the aforementioned individuals and groups. The changes to the appeals process were presented first, followed by changes to the tenure process.

Appeals Process

Prof. Garnett briefly explained the current appeals process and the changes recommended by both the Academic Articles Working Group and the Faculty Affairs Committee. She said the goals in the suggested changes were:

- 1) to make filing an appeal easier and more timely, by allowing 60 days in which to file an appeal;
- 2) to streamline the process by eliminating the faculty member's burden of establishing a *prima facie* case as a prerequisite to receiving full appellate review and instead guarantee that all appeals are investigated;
- 3) to provide the faculty member with an appeals committee that is diverse, untainted (i.e., has not seen the case before) and that includes faculty members familiar with the reappointment/promotion/tenure process; and
- 4) to expand the range of remedial options when the appeals committee finds for an appellant.

Article III

Section 6/Appeals from Negative Decisions Concerning Reappointment, Promotion and Tenure

Subsection (a) By a member of the teaching and research faculty

Prof. Fallon asked about the grounds for an appeal. Prof. Garnett expressed the interest for the Office of the Provost to develop a template for faculty appealing negative decisions. It will be suggested that the template allow a faculty member to simply check a box indicating the grounds for appeal (i.e., personal bias, discrimination, etc.) and concisely explain his/her case; no lengthy explanation of his/her case will be required.

Prof. Fallon asked if the review committee would consider a case if the findings supported grounds for an appeal other than those asserted by the appellant (e.g., the appellant asserted discrimination, but the investigation found personal bias). Prof. Garnett said that all of the findings of an investigation, regardless of whether they supported the grounds asserted by the appellant, are to be submitted to the President and Provost, and that they then have discretion to act on any findings. Later in the discussion

Prof. Fallon expressed interest in including language in the policy that gave latitude to the review committee to consider these other factors in their investigations. The Working Group revised the language as follows:

...The review committee shall investigate the appeal, and shall have confidential access to all necessary information. **The review committee's investigation need not be limited to the grounds raised by the candidate.** The Provost or his or her designee resolves any dispute concerning access to confidential information....

The amendment passed with a final advisory vote of 38 affirmative, 0 negative and 6 abstentions.

Article IV

Section 3/Committees of the University

Subsection (n) University Committee on Appeals

A robust discussion ensued regarding reconstituting the composition of the University Committee on Appeals. Specifically, the discussion centered on the desire for diversity and experience in the members of the University Committee on Appeals. Following various comments, Prof. O'Hara suggested including a clause that the members of the tenured faculty eligible to serve on the University Committee on Appeals would need to have previously served on a departmental Committee on Appointments and Promotions (CAP). The policy was revised with the language below replacing the existing language in Subsection (n) in its entirety.

[Note: All Academic Article language documented below is stated as originally proposed by the Working Group, unless otherwise noted. Underlined parts are additions to the language that were proposed by the Faculty Affairs Committee in advance of the meeting; ~~strikethrough~~ parts are proposed deletions; **bold** parts are amendments proposed during the current meeting].

The University Committee on Appeals considers appeals from members of the teaching and research faculty who have been denied reappointment, promotion, or ~~promotion to~~ tenure. The University Committee on Appeals shall consist of: (1) those elected members of the Provost's Advisory Committee and those former elected members of the Provost's Advisory Committee who agree to serve for a three-year term; and (2) 12 members from the tenured faculty **who have served on a departmental CAP elected** to staggered three-year terms by simple majority vote by and from the Colleges and Schools: four from the College of Arts and Letters, two each from the Colleges of Business, Engineering, and Science, one from the Law School, and one from the School of Architecture. No member of the University Committee on Appeals will be required to serve on more than one review committee at a time, or to serve on more than two review committees during a three-year term.

The amendment passed with a final advisory vote of 40 affirmative, 0 negative and 3 abstentions.

Tenure Process

Article III

Section 4/Procedure for Appointment, Reappointment, Promotion and Tenure

Subsection (a) Teaching and Research Faculty

The first issue addressed regarding Subsection (a) was the cases that are unlikely to succeed. Prof. Garnett shared two options developed by the Working Group:

Option a): A case should be terminated if recommendations of 1) the Dean and 2) the CAP and/or department chair are negative.

Option b): A case should be terminated if recommendations of 1) the Dean, 2) the CAP, and 3) the chair are negative.

Prof. Garnett said that the Faculty Affairs Committee voted strongly in favor of Option b). There was a strong sense that the CAP is closer to the candidate and closer to the scholarship. Furthermore, weak cases in PAC serve a calibration function and an oversight function which helps PAC learn about what is a good case and what is a bad case.

Discussions followed debating the pros and cons of each option and which approach would offer the candidate the fairest consideration of his/her case. It was acknowledged that cases that are ultimately positive infrequently receive a negative decision from a CAP. Profs. Sterling and Kilpatrick noted that if the number of cases that receive negative votes from the Dean, CAP and departmental chair are so rare then the net effect of Option b) is that all cases go to PAC. Prof. Garnett also acknowledged that in Option b) there is potential for the CAP to feel that it is the deciding vote on whether a case goes to PAC; this tremendous pressure may make them inclined to vote positively. Prof. Brown pointed out that if all cases do go to PAC then all appeals will go directly to the President, which he said is a reason to favor Option a). Prof. Garnett added that she thinks it is unfair to the candidates to tell them that their cases are going forward, if they are not going to get tenure at the end of the year.

Prof. Gresik supported Option b) saying that there is a concern for procedural fairness and the goal is to come up with a system that makes the best decision as often as possible. He said that given that Deans and chairs are likely to work closely and agree on cases, and that they may disagree with the CAP, under Option a) that close collaboration between the Dean and chair would end a case and also leave a question in the minds of candidates as to whether their case was sufficiently well vetted. He said that he believes that Option b) will create the greatest confidence in faculty candidates that their case is going to be well heard.

The second issue related to Subsection (a) centered on the finality of the Provost's negative vote in reappointment, tenure and promotion cases. Prof. Garnett explained that there was much contention regarding ending negative cases with the Provost's negative

vote and although issue has been discussed at length, the Faculty Affairs Committee did not reach a consensus on this issue.

Discussion followed expressing the advantages and disadvantages of ending cases with the Provost as opposed to allowing the President to review all cases. Prof. O'Hara felt that allowing the Provost to have this authority alters the allocation of power of the President as first officer of the University. She also said this change would mean the only way the President could intervene or weigh in on a negative decision is if the candidate chooses to file an appeal, and even then the President can only intervene if it falls into one of the four circumstances specified as grounds for appeal. She said because of the importance of powers the University invests in the President as first officer, the President should be an academic officer and have that first power on these critical matters of appointment, promotion, and tenure. She recommends that all recommendations – positive and negative – continue to go to the President so that he has the opportunity to weigh in (in some kind of interplay between the President and the Provost) on the most complicated cases. Prof. Woo added that negative cases which do go through to PAC are the most complicated cases and that the President has a strong awareness of all the dimensions of the University's mission which are important in the consideration of these difficult cases.

Based on the discussions above, the Working Group revised the language of paragraphs two and three of Subsection (a) to reflect Option a) and the condition that the President continues to hear all positive and negative cases from the Provost:

...The chairperson of the department submits a written recommendation, along with a written report approved by the CAP of its deliberations and recommendations, to the Dean, who then evaluates the candidacy~~submits these recommendations to the Provost, along with a written personal recommendation.~~ If the Dean anticipates disagreeing with the recommendation of either a CAP or a departmental chairperson, the Dean meets with the CAP and the chairperson jointly to discuss the case before concluding his or her evaluations~~submitting the written personal recommendation to the Provost.~~ If the recommendations of (1) the Dean and (2) the CAP and/or the departmental chairperson are negative, the Dean meets with the candidate and provides written notice to him or her that the decision concerning reappointment, promotion, or tenure is negative and that the candidacy is terminated. When a candidacy is terminated at this stage, the Dean also informs the Provost in writing of the termination but does not forward to the Provost any recommendations or the results of any meeting between the Dean, the CAP, and the departmental chairperson. In all other cases, the Dean informs the candidate that his or her candidacy is proceeding to the Provost and forwards all recommendations to the Provost, including a written personal recommendation, along with the results of any meeting between the Dean, the CAP, and the departmental chairperson. The results of any such meetings are forwarded to the Provost along with the recommendations.

The Provost, after consultation with such advisers as ~~the Provost~~ or she may choose, **submits all recommendations, both positive and negative, and including a personal recommendation, to the President for final action. For reappointment, promotion, and tenure decisions, the Provost ordinarily consults with the Provost's Advisory Committee before making a recommendation to the President.** The President informs the Provost of his final determination. The Provost in turn informs the Dean of this determination. The Dean then meets with the candidate and provides written notice to him or her of the decision concerning reappointment, promotion, or tenure.

The amendment passed with a final advisory vote of 34 affirmative, 8 negative and 2 abstentions.

Prof. Garnett also raised the issue of the amount and timing of information provided to unsuccessful candidates. The Working Group recommended that a candidate be informed, upon request, of the positive or negative nature of each recommendation provided in his/her case. The Faculty Affairs Committee did not endorse this approach. Instead, the Committee recommended that all candidates learn in January whether or not their cases are advancing to PAC and that the status quo be maintained with respect to information provided to unsuccessful candidates (i.e., the Dean meets with the candidate and explains the reason for the denial). The goal in the view of Faculty Affairs Committee was to provide candidates information so that they could determine whether to appeal a negative decision. They also expressed concern that providing a small amount of information might mislead candidates.

The recommendation of the Faculty Affairs Committee was passed with an advisory vote of 32 affirmative, 7 negative and 1 abstention.

Article III

Section 5/Tenure

In response to a call for additional comments, Prof. Fallon questioned the potential consequence of the following proposed amendments circulated by the Faculty Affairs Committee:

“Because the requirements and criteria of a department may change, and because the requirements and criteria differ by academic department, each tenure decision is a separate action and independent of any other current or previous decision within or outside the department.”

Prof. Fallon's concern was that it could be interpreted in a way such that a CAP could apply different criteria to candidates who are under review at the same time. However, he understood that longitudinally, each tenure decision would be a separate and independent action. Ms. Corr explained that the intent of the language was to emphasize that each case should be judged on its own merits and that there is no precedent that one can take and apply to another case. Taking into consideration comments made at the meeting, the Working Group agreed to revise the language under review. [Subsequent to the meeting, the following wording replaced the sentence quoted above: “Each tenure decision is a separate action guided by the application of discipline-specific criteria to these standards at the time the decision is made.”]

The proposal to amend Article III, Section 5 passed with a vote of 42 affirmative, 0 negative and 2 abstentions.

Article III

Section 3/Faculty Qualifications and Periods of Service

Subsection (a) Teaching and Research Faculty

In response to Prof. Garnett's call for additional comments, Prof. Gresik noted concern for the possible misinterpretation of the following clause in Subsection (a): "If the University chooses to terminate the services of an assistant professor at the end of a contract period, the University will give 12 months' notice of such termination." An identical clause related to associate professors also appears in Subsection (a). Prof. Gresik said he would like it to be clear that a candidate receives an additional full academic year after he/she is terminated. Early termination is not intended to take time away from a candidate in his/her terminal year. If candidates are informed in January that their tenure case is negative, it is possible to interpret the statement in a way that candidates will only receive one additional semester. However, it should be noted that the 12 month period will commence at the end of the existing contract period. The Working Group agreed to make that clarification and apply it to both assistant and associate professors.

[Subsequent to the meeting, the following sentence was added to both the second and third paragraphs of Subsection (a) immediately following the quoted sentence above: "Such 12-month notice period shall commence at the end of the existing contract period."]

3. Adjournment: With no further business to discuss, Fr. Jenkins adjourned the meeting at 5:30 p.m.