

Senate Faculty Caucus Minutes
January 26, 2005
(Approved)

Call to Order

Chairperson Lane Crothers called the meeting to order immediately following the Academic Senate meeting.

Approval of Faculty Caucus Minutes of December 8, 2004

Motion: By Senator Borg, seconded by Senator Wylie, to approve the Faculty Caucus Minutes of December 8, 2004. The minutes were unanimously approved.

SCERB University Hearing Panel Faculty Election

The caucus unanimously elected Allan Lessoff of the History Department to the Student Code Enforcement Review Board's University Hearing Panel. His term of service is Spring 2005 through Spring 2007.

01.18.05.01 ASPT Calendar

Senator Crothers: We need to have a brief discussion of the ASPT calendar and a legal opinion that the Provost has received. We need to discuss some short-term adjustments that we are making in the appeals process procedurally.

Provost Presley: The substance of what I am going to talk about is contained in a memo that the University Review Committee sent to the Faculty Review Committee on December 17th. This was to answer a query that the 2004 Chair of the FRC sent to the URC. I am reporting in my role as a member of the URC and my role as Provost. Cal McLean, who was the Chair of the FRC of 2004, asked the URC to issue a clarification of the "temporal ordering", which is the time sequence, of the appeal process for promotion and tenure. In 2004, I was told that that was the first time that this version of the FRC had dealt with appeals when I was asked to provide an explanation of the reasons why I made the recommendations that I had made about various candidates who wished to appeal. I was told by the Board of Trustees' legal counsel that under no circumstances could I do that. So, in fact, the only thing that I could provide in my office as Provost was what I had provided the candidates—a yes or no recommendation for promotion or tenure. The FRC was a little nonplused by that and did not know what to do. Frankly, a couple of them complained to URC members and to me that some of what they had done, no matter how hard they had worked, was a waste of time. That is undoubtedly so because without an explanation of my thinking, how can they possibly appeal my decision?

The URC dealt with this at some length. Obviously they consider it a serious issue and I will just read their memo (document #12.20.04.01) to you:

“The URC wishes to convey the following findings:

- Due to advice provided by the Board of Trustees' legal counsel, neither the provost nor his/her representative can appear before, or provide information to, the FRC regarding personnel recommendations made by the provost.”
- The administrative recommendations of the provost, in effect then, are not subject to review or appeal by a faculty committee.
- In view of the information above, the URC suggests that the FRC may wish to review or hear appeals responding to the recommendations of the DFSC/SFSC, CFSC or provost and notify the DFSC/SFSC, CFSC and provost of the filing of an appeal prior to the issuance of the provost's recommendations. The URC recommends that the FRC forward its findings simultaneously to the president, provost, CFSC, DFSC/SFSC, and appellant in advance of the date required in the current calendar. This would allow time for the provost to consider the FRC findings as he/she formulates his/her final recommendations to the president.

The URC believes that the current ASPT wording and procedures regarding the FRC are not workable, are time-consuming, and—most critically—do not fully protect faculty status concerns. Ensuring that faculty members have appropriate safeguards within the faculty-review process is the University Review Committee's highest priority."

They intend to follow up this finding by appointing a working subgroup to develop proposed enhancements to the ASPT policies and then, as required of course, the URC will make a recommendation for changes in the ASPT policies to the Faculty Affairs Committee and the Academic Senate. That is their correspondence with the Faculty Review Committee.

Senator Crothers: For clarification, they are saying that, as a practical matter, the FRC appeal that anyone might make of their promotion and tenure documents needs to happen no later than after the college level but before it goes to the Provost's office. If there is no information coming from the Provost, there is no basis for an appeal. That is, I think, the simplest way to say it.

Provost Presley: You are exactly right. They think that that it is not only logically required, but that it is, in fact, an improvement. Here are the reasons why. First, it does not present the logical conundrum to the FRC—how do you appeal something that you don't know the basis for? It does not "waste their time". Frankly, they felt that the appeal process last year, with no information from my office, was sort of perpetuating a sham. The fourth reason, and this is where it gets important for me, is if the appeal directly follows the department/school and college decisions, it allows for complex issues of appeals to be settled by the faculty governance system before it goes to the administration. I think that that is very important. It allows for AFEGC involvement before it goes to the administration, if that is appropriate. It allows the candidate to add, clarify or update material as might be required by those committees.

If there are disagreements at the department or at the college level, I would prefer to see them settled. I would prefer to see the faculty governance system express itself on those issues. Without going into detail, there is an example last October of where unethical and unprofessional behavior was alleged. I have a week to read 50 dossiers. I can't possibly adjudicate a case like that nor am I empowered by anything here to become an investigative office. That is the role of the FRC and the AFEGC in this matter. So, I would very much prefer, with those sorts of issues, if not settled, to hear the faculty through its elected representative bodies express itself on these things. Then, I think I can make a much better recommendation to the President.

Senator Crothers: I think that the other piece of the puzzle here is that Faculty Affairs is going to be working on language to change our existing policies to reflect that reality. I think that there is a desire to promulgate this to people who are going through the process this year.

Provost Presley: That was what the URC suggested. What we would have to do to make this fair is tell every applicant for promotion and tenure right now that this would be the way it would be done and to give them one new date. Only one date really has to be changed, in essence, for applicants who wish to appeal negative decisions of the department, school or college. That deadline should change so that it would be a week after they are notified by the college what recommendation is. Everyone who is not appealing would go through the process as currently laid out in the calendar. People who are appealing would go directly to the appeal process. What would happen for them would be that the May 15th deadline for the President to communicate his decision would become the last day. There is a date for the completion of the FRC review. That doesn't have to change and, therefore, the date for the President's notification does not have to change either.

The reason that the URC wanted this to go to the current applicants for promotion and tenure is that, frankly, anyone who is appealing should have that extra week to focus on the things that they can appeal—the school/department and

college decisions—rather than continue with the sham that they are also appealing a decision that I have made.

Senator Reid: Just a clarification—under the present system, if a case in which you rejected someone went to the FRC let's say without any information on your decision, the FRC could, nonetheless, decide that they knew better and reject your decision. Would it then just come back to you to re-decide?

Senator Crothers: No, it goes to the President.

Senator Reid: Oh, so the President would consider their opinion, your opinion and make a final determination?

Provost Presley: The FRC can't do what they are charged to do. Candidates may posit any reasons whatsoever that believe that the Provost decided whatever he or she decided and appeal it, but that is a rather silly state of affairs.

Senator Reid: I am not disagreeing with any of this. A candidate could also argue, 'I have no idea why he decided it but look how strong my case is.' Then it would go to the President.

Senator Crothers: I think that that is an excellent point. The additional layer is that if we accept this new calendar, what you are really saying is that, when it comes to promotion and tenure matters, there is a faculty process and an administrative process. Therefore, once it gets out of the faculty process and goes to the administrative process, if it turns out that everyone said yes and the Provost says no, you sue him.

Provost Presley: The obvious question in your mind is, 'what is my protection against a capricious Provost?' This appeals committee was never that protection. The actual protection is a subpoena. Anything short of that is, frankly, misleading the candidates. Please believe me; that does not make me particularly happy. It would be a far simpler matter for me to say that it is on the basis of this or that and hand it to the appeals committee, but I cannot do that.

Senator Reid: Do you want to put that in the ASPT document—what their final option is?

Provost Presley: If you don't, I still can't do it; I won't do it. When I wind up in federal court, I want to have follow the Board of Trustees' lawyer's directions.

Senator Holland: If I understand this correctly, under the current ASPT process, effectively every decision at every point along the line is advisory until it reaches the President's office.

Provost Presley: Yes, that is correct.

Senator Holland: It sounds like what we are doing now is making all the decisions advisory until it reaches the Provost's office.

Provost Presley: No, I am still advising the President; I make a recommendation. The fact is that no one can give you promotion or tenure but the Board of Trustees and they have delegated that power to the President.

Senator Thompson: I understand that and I guess I am confused as well. Several years back, there was a concern that the Provost had sort of been a loose cannon and had reversed decisions made at the department and college levels. I had thought that the FRC was actually a check and balance against a Provost making a bad decision. Any Provost can make a bad call, as well as any department or college committee. So, you are saying that, in fact, the FRC wasn't a check and balance against a Provost's decision?

Provost Presley: The people on the committee felt that it wasn't. They felt that they were wasting their time because the entire dossier had to be rehearsed in front of them because they all adopted exactly the tactic that Senator Reid just

suggested. In fact, I cannot participate in the review process.

Senator Crothers: It may have been the case several years ago that the Provost and the FRC actually did engage in what we are trying to respond to in a legal context now, which says that that cannot happen.

Senator Borg: I think that Senator Thompson is quite correct in saying that that was meant to be that very sort of ch and balance, but in light of this legal opinion, that process is rendered moot at this point. Therefore, as a matter of practicality, you are suggesting the changes.

Provost Presley: I absolutely respect that point of view and that concern, but it has been rendered ineffective by this opinion. You might make an analogy to the fact that before certain dates of employment are reached, department chairs/ASPT committees are told that they cannot give reasons why a decision to non-reappoint has been made. This the same thing. I am not a star chamber; I am subject to review, obviously, but not by the governance system, not by faculty, is the argument that is has been made.

Senator Reid: Can you give your reasons to the President?

Provost Presley: Yes.

Senator Reid: There is an alternate structure. One possibility is a two-tiered structure recommending to the President. The CFSC decisions would go to the FRC and to you at the same time and then both of you would make your recommendations to the President.

Senator Crothers: That is in the proposed recommendation—that the FRC would send its recommendations to the President.

Senator Reid: The FRC would?

Senator Crothers: That is in the language.

Senator Reid: But I thought that the FRC would also send it to the Provost.

Senator Crothers: Sure, and to the CFSC, DFSC and to the appellant. They send it to everybody.

Senator Reid: The difference I am suggesting is that it would not go to the Provost at all. It would just go to the President so that you would have two parallel recommendations—an all-faculty decision.

Provost Presley: That is in effect what this does.

Senator Crothers: And it doesn't solve the problem of capricious administrators, it just changes the capricious administrator.

Provost Presley: Please believe me; I firmly believe that capricious administrators and people who act in the ways that you are describing should be fired—they should be sanctioned. This is a developmental process; it is an evaluation process. In many ways I agree with you, but it is also important to put this in a context. I understand why the current process was developed, but the national context was demonstrated by a survey that ASCU did about two months ago. I don't know that we are the only institution that has this sort of arrangement wherein an appeal committee deals with a group of faculty decisions and a group of administrative decisions, but it is a very rare structure. It is much more like that the sequence is what is being suggested here or the sequence that Senator Reid suggested. It is much more likely to be that way. One other way of looking at this is that for appealed dossiers, this makes the FRC and the AFEGC, which

necessary, the all-campus committee that is, in fact, in place at most institutions. The all-campus committee is usually either chaired by, or makes a recommendation to, the Provost. That is the model of the majority of institutions in AS

Senator Crothers: Can I take it from this conversation that we are comfortable acknowledging that this is the appropriate process, even though we have some big questions about what the Faculty Affairs Committee is going to have to do as they make the structural changes over time?

Senator Holland: I guess I am comfortable with making these kinds of changes, but I am less comfortable with making these kinds of changes this year. I wonder if we can actually do that.

Senator Crothers: The question is really of clarification versus change because the Provost could, in fact, get nine other legal opinions if he wanted to. Two of them might tell him that the current process we use is legal.

Provost Presley: Actually, no, since the Board gives tenure and promotion. I could get them, but they would be quite irrelevant.

Senator Crothers: Then we could say that the current process exists; however, it is a meaningless statement because the process ends because the FRC can't do anything with the Provost's opinion.

Provost Presley: I understand your misgivings about changing horses in midstream or changing the conditions of what might be seen as a contract, but what we are doing is that we are not lying to them about the ability to appeal an administrative recommendation. Currently, we are and I would argue that having had last year's FRC point out this logical conundrum to the URC and having the URC clarify the language, we would be much more in danger now if we turned our back on that finding. We would be muddling things if we did.

Senator Crothers: It strikes me that we have a couple of options; we can either do this formally or informally. We can empower the Provost to send out a memo articulating this clarification to all persons going through the promotion or tenure process this year. We can do that either by an endorsement by acclamation or we can make a formal proposal with a formal vote.

Senator Hammel: Might it be a good idea to send out this communication to all faculty?

Senator Crothers: I am happy to send it out to all faculty.

Provost Presley: The URC is assuming that some changes might have been made by next year when it would affect other people.

Senator Hammel: I understand that, but I think the concern will be that we have made significant changes in midstream and not informed the faculty about that.

Senator Crothers: I am very sensitive to that argument.

Provost Presley: That makes sense and I can certainly do that. If I may make a suggestion, I would feel more comfortable if I signed and the current Chair of the URC signed because I don't want this to look as though I am retreating behind a rock.

Senator Wang: Just a clarification—effective this year?

Senator Crothers: The argument is that we are making it effective this year because that is the real process legally, even if we don't make it effective this year, it is still what is going to happen.

Provost Presley: And we are misleading candidates.

Senator Crothers: That is the argument.

Provost Presley: The reality is if you want to appeal my recommendation or the President's decision or, conceived separately, the Board's action, you have to get a lawyer. We need to be honest about that.

Senator Crothers: Would you like this caucus, by acclamation, to empower the Provost and the URC Chair to present such a memo to everybody, or would you want to make a formal proposal that we vote on and ratify?

Senator Reid: Acclamation.

Senator Crothers: So, to clarify, we are empowering the Provost to work with the Chair of the URC to create an appropriate memo to send to all faculty clarifying the appeals process as it now exists in the law. We are also, as a side measure, insisting to Faculty Affairs that they come to us, after working with the appropriate committees, with formal changes in our ASPT process to reflect this new legal reality. I don't know if that needs to be said in that memo or not.

Senator Hammel: Would it be a preference that we not talk about this until you have a chance to send that memo out?

Provost Presley: It might be better than people getting upset before they see it in writing.

Senator Wylie: Will we make a special effort for the people who are going up for promotion that they get this and understand it?

Provost Presley: I probably am going to send them a registered letter and an e-mail to everybody else.

The Faculty Caucus unanimously agreed to Senator Crothers' summation of the URC recommendations for faculty appeals of tenure and promotions decisions.

Adjournment