

# Good Cause

October, 1995

What constitutes "good cause" to dismiss a tenured faculty member? What procedures should govern the process of dismissal? These questions have been occupying the Senate, the Office of the President, and the Council of UC Faculty Associations for some years, and in recent months they have come to the fore again.

## Present Policy

According to the American Association of University Professors' guidelines, to which the Regents subscribe, no tenured faculty member may be dismissed without the opportunity for a full, adversarial, evidentiary hearing.

Under Regents Standing Order 103.9 "The termination of a continuous tenure appointment or the termination of the appointment of any other member of the faculty before the expiration of the appointee's contract shall be only for good cause, after the opportunity for a hearing before the properly constituted advisory committee of the Academic Senate" Regents' Standing Order 103.10 spells out similar protection for appointees with security of employment. In 1980 Legislative Ruling 12.80 of the University Committee on Rules and Jurisdiction established formally that Divisional Committees on Privilege and Tenure (the committees that had always been empowered to hear faculty complaints) were to be the committees that should provide the opportunity for hearings under RSO 103.9. And Senate Bylaw 335 was amended in 1980 to make this explicit: "In cases of proposed termination of a Senate or non-Senate faculty member before the expiration of the faculty member's contract, the faculty member may request a hearing before a Divisional Privilege and Tenure Committee. The committee shall then conduct a hearing on the case to determine whether, in its judgment, the proposed early termination is for good cause and has been recommended in accordance with a procedure that does not violate the privileges of the faculty member." Good cause is not defined, and no procedure to be followed prior to such a hearing is prescribed.

The Faculty Code of Conduct (APM 015 Section I), originated in 1971 and approved by the Regents in 1974, does not provide much guidance; moreover, it introduces a complicating distinction-between disciplinary action for "willful misconduct" and administrative actions relating to "disability or incompetence": "Disciplinary action is to be distinguished from certain other administrative actions taken as the result, not of willful misconduct but rather, for example, of disability or incompetence. The administration naturally bears the responsibility of assuring that the University's resources are used productively and appropriately. In meeting this responsibility, administrators must occasionally take actions

which resemble certain disciplinary sanctions but which are actually of an entirely different character. These actions are subject to separate procedures with due process guarantees and should not be confused with disciplinary action with its implications of culpability and sanction." Incompetence goes un defined, although it is not seen as a disciplinary matter since it is not willful; it appears to be associated with disability as something outside the individual's control. Misconduct is defined, it does call for disciplinary action under the authority of the Regents, and one of the penalties for misconduct is early dismissal: "Authority for dismissal of a faculty member who has tenure or security of employment rests with The Regents, on recommendation of the President, following consultation with the Chancellor. In all cases, the Chancellor shall consult with the appropriate advisory committee(s) of the Division of the Academic Senate prior to dismissing or recommending for dismissal any member of the faculty."

The Faculty Code of Conduct (APM 015 Part II A), gives examples of various kinds of misconduct relating to teaching and students but does not classify them as examples of incompetence: "Failure to meet the responsibilities of instruction, including: (a) arbitrary denial of access to instruction; (b) significant intrusion of material unrelated to the course; (c) significant failure to adhere, without legitimate reason, to the rules of the faculty in the conduct of courses, to meet class, to keep office hours, or to hold examinations as scheduled; (d) evaluation of student work by criteria not directly reflective of course performance; (e) undue and unexcused delay in evaluating student work." The Faculty Code of Conduct is much briefer on the subject of misconduct in the area of scholarship, concentrating only on intellectual honesty (APM 015 Part II B) "Types of unacceptable conduct: Violation of canons of intellectual honesty, such as intentional misappropriation of the writings, research, and findings of others." The clear and comprehensive guidance provided by the Faculty Code of Conduct with respect to misconduct in teaching (examples, P&T hearing, penalties) has encouraged people to refer cases of perceived "incompetence" in this area to the disciplinary procedures outlined in the Faculty Code and governed by RSO 103.9 and 103.10.

#### Formalizing the Procedures

The current issue concerning incompetence first arose for formal debate in 1986 when UCB instituted a policy under which all tenured faculty would be reviewed for performance at least every five years (now APM 220-0). This policy may have arisen because the University was no longer requiring mandatory retirement at age 70. Whatever the immediate reason, during the 1986-87 academic year five tenured faculty members at UCB were identified as "grossly incompetent." The UCB Senate drew up a set of guidelines for dismissing grossly incompetent faculty and submitted it to the systemwide Academic Council for general adoption. The UCLA Senate disagreed with the procedure, and the debate began over how to formulate a policy and procedure to cover this special reason for breaking the tenure contract.

In 1989 the University Committee on Academic Personnel (UCAP) asked the Academic Council to appoint a Senate Taskforce to formulate a set of procedures for dealing with cases of gross incompetence among tenured faculty "as distinguished from cases of unacceptable conduct which may be subject to disciplinary action under the Faculty Code." From the beginning of this attempt to write formal policies to dismiss incompetent faculty, the Taskforce observed the distinction made in the Faculty Code and called for by UCAP between willful misconduct and behavior closer to disability, beyond an individual's control-true incompetence. In April of 1991 the six-member Senate Taskforce, chaired by Professor Charles Nash (UCD), developed a set of guidelines that resembled the tenure process but for the opposite effect, a sort of detenuring. According to their guidelines, the Chancellor would decide if a case brought for incompetence was in fact more accurately a case of misconduct addressed by the Faculty Code of Conduct which should come under the jurisdiction of P&T or a true case of "incompetence" requiring another evaluation in the personnel review process.

The then Chair of the Academic Council Professor Carlton Bovell (UCR) forwarded the Taskforce's Report to the Academic Council to distribute to faculty and the Senate standing committees for review. On May 15, 1991, the Academic Council approved the Taskforce's Report; subsequently, with some changes suggested in the review process, the Report was reduced to APM language, and the first version of APM 075 "General University Policy Regarding Academic Appointees: Incompetent Performance" was distributed for informal review on 4/13/92. Despite earlier protests of members of the University Committee on Academic Freedom that in excluding the opportunity for a formal adversarial hearing the policy conflicted with historic AAUP standards, the version vested all review power in CAP and reduced the role of P&T solely to judging whether proper procedures had been followed or whether impermissible judgmental criteria had been used. In this the Taskforce and the Academic Council were guided in part by APM 160-20-d-2, which covers access to confidential documents and appears to contradict SB 335: "The Privilege and Tenure committee's jurisdiction and procedures are described by Academic Senate Bylaws 195 and 335 and do not extend to evaluation of academic qualifications or professional competence." In this light they proposed a revised version of SB 335 which withdrew from faculty the previously guaranteed right to the adversarial and evidentiary hearing before P&T on the grounds that the procedures themselves guaranteed sufficient safeguards; the right to judge "good cause" was to lie solely with the CAP Committees.

As a result of the informal review of the April 1992 draft, and despite objections from UP&T to the removal of the right to a full evidentiary hearing, the proposed APM 075 was revised, and on 4/16/93 a new version was distributed for formal review (19 pages), including the proposed revision to SB 335 and a revised version of SB 55. Here are only the highlights:

APM 075 (4/16/93)

1. Policy: Demonstrably incompetent performance constitutes "good cause" for dismissal. (RSO 103.9 and RSO 103.10. ) The finding of demonstrably incompetent performance is a judgment of the academic and professional competence of the individual faculty member based on the written record.

2. Purpose: The Univ. has a primary obligation to the students and the public to protect the quality of teaching and research.

3. Applicability: Both tenured and untenured faculty charged with demonstrably incompetent performance have the right to a hearing before the appropriate Senate Committee (RSO 103.9 and 103.10 respectively).

4. Definitions: A "demonstrably incompetent performance" by a faculty member is unacceptable and therefore substantially different from an acceptable performance that has not been sufficiently strong to warrant recent merit advancement. "Demonstrably" means that the written record must contain compelling evidence of incompetence; "incompetent means unacceptably deficient, a level of performance which cannot be allowed to continue. Non performance, the failure to carry out any of the basic responsibilities of a faculty member [teaching and research] is considered one form of incompetence." And "performance" means that the review focuses on a documented record of activity and/or inactivity and need not address the potential capability of the indiv. to perform duties.

5. Criteria: The policy focuses on tenured regular rank faculty and uses the specific criteria of teaching and re-search which apply to personnel reviews in prof. series.

6. Identification: Charges of incompetence can come from a variety of sources; the most likely would be dept. chairs, annual and the 5-year review (CAP).

7. Period of Counseling and Assistance: The faculty member charged with incompetence would be notified of the charge, counseled, and assisted for at least a year to try to bring about change or improvement. These efforts would be documented.

8. Choice/Notification: The Chancellor decides first whether the case is a disciplinary matter that falls under the Faculty Code of Conduct or demonstrates possible incompetence [CAP]. Notification of Faculty Member

9. Formal Review

A Informal resolution

B Dept. review:

a) personnel file assembled,

b) letters from depts, colleagues, students

c) the file is reviewed by the faculty member

d) departmental vote-by secret ballot

e) informal resolution attempted,  
C Dean D Ad Hoc review committee  
E CAP F Chancellor  
G Rebuttal process: further review by parties  
H Chancellor's final decision on incompetence  
I Grievance Procedures: P&T Hearing if requested (RSO 103.9, 103.10, SB 335)

10. Executive Review: The Chancellor reviews the file; President reviews the file; Regents decide.

Changes to SB 335: limited the power of P&T in the final step hearing: "however, in cases involving a recommendation for termination based on demonstrably incompetent performance, the matter shall be heard by the Committee as a grievance of a personnel action, and the Committee shall be empowered only to determine whether the procedures were not in consonance with the applicable rules and requirements of the University or any of its Divisions, and/or whether the challenged decision was reached on the basis of impermissible criteria, including (but not limited to) race, sex, or political conviction, and the Committee shall not be empowered to reevaluate the performance of the complainant."

Changes to SB 55: required the secret ballot by the department by adding this statement: "and that for questions of demonstrably incompetent performance and a possible recommendation for dismissal (APM 075), there shall be a secret ballot."

#### Reactions to the Proposed APM 075

At its October 1993 meeting UCAP reviewed and endorsed the policy with this change in the criteria for incompetence: "Demonstrably incompetent performance in teaching or research plus a finding of poor performance in the other area constitutes grounds for dismissal." The proposal continued to be challenged on the grounds that it removed the faculty member's right to appeal to P&T for a full evidentiary hearing to establish good cause for breaking the tenure contract.

Other versions of APM 075 were issued that incorporated suggestions for revisions. Eventually, in the version issued on June 3, 1994, the limitation on the P&T hearing to passing judgment on procedural correctness alone was dropped, and the right to a full evidentiary hearing before P& T was incorporated as the final step after the personnel review process and before executive review. The Chancellor's decision about whether a case of unsatisfactory performance was a disciplinary issue of misconduct or an academic judgment concerning incompetence was moved up to step 1.

Back to First Base

This 6/3/94 version was approved by the Academic Council and UCAP, but it

was not incorporated into the Academic Personnel Manual by the Office of the President. Instead, in July 1995 the Office of the President sent -with no warning- a severely modified version (only two pages) to the Academic Senate for review. The Council of UC FAs, which had not received the 6/3/94 version, received a copy of the new document for its comment. The first paragraph of the covering letter, dated July 20, 1995, indicates the Office of the President's abandonment of the previously proposed procedures: "For your information, after extensive discussion over the last few years, the University has concluded that the current procedures for dismissal contained in The Regents' Standing Orders 103.9 and 103.10 plus the Academic Senate By-Laws are sufficient to provide due process for appointees with tenure or security of employment and for any faculty member who is terminated before the expiration of his or her appointment."

The new shortened version of APM 075 "Incompetent Performance" dated July 12, 1995, defines the nature of incompetent performance as in the earlier versions of APM 075, and it still incorporates a period of counseling, but the newest version omits all reference to any personnel process involving CAP. There is also no reference to the opportunity for the faculty member to appeal for a hearing to the P&T; however, while the proposed APM 075 does not make the link, the right of appeal still stands under RSO 103.9 and 103.10, and under SB 335 and UCR&J ruling 12.80.

The Council of UC Faculty Associations has received no official explanation for the Office of the President's change of policy. The Council is aware that the June 1994 state of the proposed APM 075 presented a very elaborate process of review in which finally one Senate committee, P&T, was authorized to pass judgment upon the professional judgment of another Senate committee, CAP. The Chancellor's recommendation might be perceived as choosing between the two different committee recommendations. Furthermore, it was not clear what cases of misconduct somehow close enough to incompetence to come under the initial charge of incompetence were to be separated out by the Chancellor from true incompetence requiring the more elaborate procedures of evaluation through the personnel review process outlined in the APM 075 4/16/93 and 6/3/94. Because incompetence is not clearly defined in the Faculty Code of Conduct, this initial decision by the Chancellor could have been challenged later on. A faculty member charged with incompetence but dismissed through the P&T "misconduct" process could later have appealed the decision on the grounds that the case should have been heard by CAP through the incompetence process.

Even though the Academic Council approved the 6/3/94 version of APM 075, there appear to have been lingering doubts about the adequacy of due process safeguards in the personnel process. In a disciplinary process, each successive step must be taken independently. Otherwise there could be the appearance if not the reality of conflicts of interest as reviewers are tempted later to revalidate their own earlier decisions. In the 4/16/93 version of APM noted above and in the 6/3/94 version, both CAP and the Chancellor enter into the process more than

once.

It is also the understanding of the Council that no faculty member has ever been dismissed under the process authorized under RSO 103.9 and SB 335 for incompetence. But the process proposed in APM 075 over the last ten years, much more elaborate and lengthy, whatever its merits and theoretical drawbacks, appears to make it even more unlikely that anyone would ever get to the end of it and be dismissed. The University has relied on informal negotiations and settlement to solve the problem, not procedures. However, the threat of the formal process and not the process itself is what makes the negotiations even possible and successful.

The Council responded to the UC-OP letter by noting the conclusion that had been reached, observing that the new document had still to be reviewed by the Academic Senate, and expressing its expectation that the Council would be consulted again about any revised state of APM 075 that might be the consequence of further review. The Council understands that the document arrived too late for full consideration at the July meeting of the Academic Council. However, in a letter to President Peltason dated August 15, 1995, Professor Daniel Simmons, then Chair of the Academic Council, noted the omission from the document of reference to the right to appeal for a hearing before a committee of the Academic Senate, and made clear the need for further review by the Senate. The new proposed version of APM 075 has now been sent for that review, we understand, to UCAP but not to UP&T or to the UC on Academic Freedom. The issue has come full circle.

The Council of UC FAs will continue to monitor the situation carefully. We welcome the input of faculty on this issue and encourage anyone who would like to register an opinion to give us a call (818 341-8664) or contact the Council by email ([ucfa@pacbell.net](mailto:ucfa@pacbell.net)). The UC FAs would like to take the pulse of the faculty on this issue before formulating our response to the next version of APM 075.

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