

APM 270

October/November 1994

In Residence Faculty at UC: It's Time to Clarify Some Basic Employment Rights

Issue

It's time to clarify on a systemwide basis the rights of in residence faculty, especially concerning nonrenewal of appointment at the associate and full professor ranks. The potential for abuse exists because of an omission in the Academic Policy Manual (APM 270) that outlines the rights of this faculty series. At UCLA the "Call," the campus interpretation of the APM, supplies that omission and protects its in residence faculty, but the UCLA Call is itself not a legal document and doesn't apply to in residence faculty on other campuses like UCSF, UCI, UCSD, and UCD. The Faculty Associations want in residence faculty on all UC campuses to have the same legal protections and that means revising the systemwide APM along the lines of the UCLA Call.

in residence faculty

Most but not all in residence appointments are in the health sciences because clinical programs income helps to fund these positions (about 52 percent of total funding). Funding also comes from the National Institutes of Health (NIH), the Veterans Administration, and other federal sources (about 24 percent), and endowments and other sources of income (about 10 percent). Only about 14 percent of funding for in residence positions comes from state sources (percentages based on payroll data as of April 1994 for all UC campuses). Except for the source of funding, in residence faculty are virtually the same as the regular ladder rank, professor series. In residence faculty are recruited nationally, participate fully in university life in all three areas of research, teaching, and service, advance through the steps and ranks from assistant to full professor according to performance evaluations, are full members of the Academic Senate with voting rights on appointments and promotions. But their positions are funded less than 50 percent from the state general fund. In the past fifty years, the federal government, especially the NIH, gave research grants to hospitals and University medical centers to allow them to hire more faculty, teach more students, conduct high level research, and provide better medical care to a growing population. More recently increased funding has come from the Veterans Administration, city, and county sources.

Because in residence appointments are funded from "soft" money, the University does not offer these faculty the same kind of tenure or security of employment enjoyed by the professor ranks, whose positions are state funded (FTE or full time equivalent). The "equivalent of tenure" offered to in residence faculty, particularly at UCLA by the Call, consists of fair notice of termination (usually one year), good cause, or clear reasons for termination: lack of funding, lack of work,

or programmatic change. This is not true on all UC campuses or medical schools. In addition, in residence faculty cannot expect regular sabbatical leaves, unless their departments provide paid leaves.

ending dates versus no ending dates

One might say that University policy has been to treat in residence faculty academically but not economically the same as the professor series. This economic difference has been translated into a further difference between two kinds of in residence appointments—those with specific ending dates (terminal or year-to-year appointments) and those without specific ending dates where the funding sources appear to be more long term or, in some cases, are actually state funded (primarily neuropsychiatric institute faculty at UCLA and UCSF because these facilities were once jointly funded by the state department of mental hygiene and the University. In 1973 these state operated institutes were transferred with their funding intact to the University to support in residence positions at both of these institutes).

The APM 270 20 (2) (a) clarifies the rights of in residence faculty without ending dates at the rank of associate or full professor and assistant professors facing termination not as a result of a personnel review. They can only be terminated for good cause (things like moral turpitude, not meeting classes, incompetence, etc.) or specifically for budgetary concerns, programmatic change, or lack of work. In the event of termination, there are also provisions for assigning ending dates and giving adequate notice. No such protection exists for in residence faculty with ending dates as the APM is written.

The problems today stem from variations among campuses in the assignment of ending dates or no ending dates and hence variation in the rights of in residence faculty. On some campuses nearly all in residence faculty have contracts with no specific ending date (UCSD) regardless of the funding source, whereas on other campuses (UCLA and UCSF) nearly all faculty except neuropsychiatric institute faculty have specific ending dates, a decision stemming more from administrative reasons than economic ones. The campus variation in assigning ending or no ending dates results in some anxiety for those with term appointments because their rights are less clearly defined in the APM 270 than those with ending dates.

A recent termination case at UCSF has brought out the potential for abuse that now exists with the wording of APM 270. An associate professor in residence at UCSF (where all in residence faculty except those at the neuropsychiatric facility have annual ending dates) was terminated without demonstrating good cause. He was told that since he has an appointment with an ending date, his employment ends on the date noted on his Personnel Action Form and that no further reason has to be given for lack of reappointment. An explanation would only be called for if the termination occurred before the ending date. The general counsel at Oakland is supporting the campus administration.

This action has raised concern on all campuses with a large number of in residence faculty who fear they too could be terminated without cause on short notice by the chair, division head, or administrator for personal or arbitrary reasons. It's the campus by campus flexibility in assigning ending dates or no ending dates and the omission in APM 270 of a clear statement of the rights of in residence faculty with ending dates at the rank of associate or full professor with respect to termination procedures that is now enabling the University to defend its position against this terminated professor.

legal precedents

There have been very few cases on any UC campus where faculty in any series have been terminated, but three fairly recent cases have underscored the basic employment rights of all faculty of long duration.

Adelson v. Regents of UC, 1982 Daniel Adelson, an in residence associate professor of psychology at UCSF, was terminated because of a programmatic change. He claimed that the programmatic change was more semantic than real: the new program included the same kind of courses that he taught under the old program. He won this lawsuit because a Privilege and Tenure committee of the academic senate agreed with him and found the evidence did not support the reason given for his termination because his courses' content was included in the revised curriculum: "The committee also found a campus practice of not terminating 'faculty members in "soft money" positions of long duration and associate professor or professor rank...except for adequate cause as long as the extra mural funds for their project continue.'" The Chancellor overruled the P&T committee forcing Adelson to take his case to civil court. Eventually the California Court of Appeals upheld the P&T findings and rejected the University's argument. This court verdict showed that the University could not terminate Adelson at will simply because he did not have tenure, for he had a legitimate claim to the "equivalent of tenure." This litigation took about ten years to resolve.

Apte v. Regents of UC, 1988 Robert Apte, who was an associate professor in the clinical series in the school of public health at UC Berkeley, was terminated for budgetary reasons: 50 percent of the grants funding his projects was withdrawn. A senate faculty committee voted to terminate his position without knowing that Apte on his own had successfully reapplied for the funding that had previously been withdrawn, proving that the committee had voted on his termination before the full facts were known. The University argued that it still had a right to terminate him because he had a year-to-year appointment (with an ending date). It came out in the proceedings that a professor who acted as principal investigator wanted to terminate Apte because he wished to reduce the number of soft-money teaching programs at UCB, but Apte prevailed citing the University policy protecting employees from "arbitrary, capricious, and unreasonable" action.

Horwitz v. Regents of UC, 1993 The lawsuits of Adelson and Apte show that the

University must clearly demonstrate programmatic change or lack of funding to terminate employees who have worked for the University for many years whether they have ending dates on a contract or not. Nevertheless, in a recent termination case involving another faculty member at UCB, Steven Horwitz, the University seemed to ignore the findings of Adelson and Apte in denying a long time employee any more rights than someone who had worked only for a year. At a hearing in 1993, Roberta Aasen, the Coordinator of Academic Personnel for the Berkeley campus, testified under oath as follows:

Q Would you agree that the university has consistently taken the position that employees on year-to-year appointments do not have any greater rights after 15 to 20 years than after one year?

A That's correct.

Q So a person who has worked for 20 years and is not reappointed is handled in the same way as someone who has worked one year, as far as you are concerned; is that correct?

A Yes.

Solution to the Problem: Revise APM 270 along the lines of UCLA's "Call" Some faculty are urging a more extreme position than suggested here and outlined in more detail below; they say that if an in residence faculty member has been employed by the University for a number of years, that person's security of employment cannot be eliminated by budgetary concerns. We cannot support this position since it affords in residence faculty protections that in theory regular, ladder rank faculty do not have. A more appropriate step in solving the problem involves clarifying what has in fact been the practice at most UC campuses: affording in residence faculty with ending dates the same rights as those without ending dates. UCLA solved the problem by adding to the Call the missing section from APM 270 explaining the rights of in residence faculty with ending dates at the rank of associate and full professor. The relevant portion of the Call is J 3 a, sections of which should be inserted into the APM 270 as section 20 a (1) (c) with the present APM 270 20 a (1) (c) shifting to the (d) position. The intent of this insertion is to ensure that in residence faculty with ending dates cannot be terminated except for cause or specifically for budgetary reasons, lack of work, or programmatic change. It would also assure fair notice of termination.

This change would include the following material:

20 a (1) (c) Non-renewal of a term appointment of an Associate Professor or Professor, or of an Assistant Professor other than as a result of a personnel review

1. [The decision to terminate an associate or full in residence professor with an ending date or an assistant professor not as a result of a personnel review can

be based on lack of funding, lack of work, or programmatic change. There should also be sufficient notice of termination.]

When non-renewal of a term appointment in this series is other than as a result of a personnel review of an Assistant Professor-due, i.e., to budgetary reasons, programmatic changes, and/or lack of work-the Chair will provide the individual with a minimum of twelve calendar months notice before the ending date of the appointment. In a case in which such twelve-months notice is not given, if the funding source(s) for the appointment so permit, the individual will be given a terminal reappointment for the number of months for which notice was not given. If the funding source(s) for the appointment are not sufficient to support a terminal reappointment for the full number of months for which notice was not given, the individual shall in any event receive such a reappointment for a minimum term of three calendar months. The Dean may determine that salary for the period of such a terminal reappointment may be paid in lieu of reappointment.

2. same as APM 270 20 a (2) (a) paragraphs 2, 3, 4, and 5 [clarifying budgetary reasons, programmatic changes, and lack of work]

3. same as APM 270 20 a (2) (b) [determining the order of termination for appointees with the same rank who are supported from the same funding source in the same department, unit, or project]

4. same as APM 270 20 a (2) (c) parag. 1 and APM 20 a (2) (e) [spelling out review procedures and performance evaluations]

This change doesn't give in residence faculty with ending dates exactly the same rights as those without ending dates, it doesn't afford the same kind of tenure to in residence faculty that the professor series enjoys, nor does it state explicitly that in residence faculty of long duration have more rights than those who have just come to the University. But it would standardize treatment of the in residence series on all UC campuses and medical schools and protect them from the potential for abuse that currently exists for those with ending dates. Such a change is also essential to help the University recruit new in residence faculty who often have to give up tenure in their present university to come to UC. They need to have confidence that the employment rights of the in residence series are clearly spelled out.

Concerns recruitment/retention

The University has much to lose if it can no longer recruit in residence faculty and if its present in residence faculty attempt to relocate to other medical schools and universities in search of greater job security. By changing APM 270 in the ways noted above, the University would be legitimizing practices that they have for the most part followed on their own and that the courts of law have required that they follow. It would also solve a lingering problem of some in residence faculty whose initial contracts with no specific ending dates were converted to ending dates as

a result of administrative changes in personnel procedures. These faculty feel they have lost job security as a result of these changes. If APM 270 were revised to reflect the employment rights of in residence faculty with ending dates, then these faculty would be protected on all UC campuses. New in residence faculty coming to UC would also be afforded the same level of protection, which would help in the recruitment process. If clear reasons for termination exist-lack of funding, lack of work, programmatic change-or there is other evidence of good cause, then in residence faculty must be ready to accept that decision. But those reasons must be proven as they were not for Adelson or Apte. And in residence faculty must be protected from personal animosity, arbitrary or capricious actions, or any unreasonable action by anyone that affects their employment security.

financial

Some may fear that the University cannot afford to offer this large group of faculty more security of employment than presently exists because of state budgetary problems and an uncertain future for medicine in general as managed care and HMO facilities lower patient fee income for hospitals and physicians. Such fears are unrelated to the issue of in residence faculty in the health sciences departments at UC because these faculty provide for their own salary through outside funding, research grants, and professional fees: they know that their funding comes from non state sources. The University has no financial obligation to them, except perhaps in terms of space and materials, but these grants also provide overhead. In fact, a large percentage of overhead-those indirect costs that come to the University as a result of health sciences faculty being awarded federal and extramural grants-goes back to the campuses. As a rough estimate, about 50 percent of overhead funds are allocated to the state and the Office of the President, and the other 50 percent is returned to the campus. For example, at UCLA in fiscal 92/93 there was \$325 million of total grant activity, of which about \$248 came from federal sources. From this total, about \$55 million in overhead came to the University from the federal grants with about \$24 million going to the state; \$27 million to the campus; and the balance to the Office of the President. The formulas for allocating overhead vary by campus, but a portion also goes to support general educational requirements.

At issue here is not increasing UC's financial responsibility or funding obligations to anyone but ensuring due process in employment matters to a large number of in residence faculty.

status

The University medical centers also offer the campus community as well as the larger community excellent health care. The July 1994 US News & World Report includes both UCLA and UCSF Medical Centers among the top ten in the nation according to demonstrated excellence in specific medical specialties like cardiology, endocrinology, gastroenterology, geriatrics, gynecology, neurology, and others. UCSF generates more research and grant activity than any other UC campus or medical school. The current status of all the UC medical centers

stems directly from the generosity of federal, city, county, and other extramural sources and from the UC in residence faculty positions this funding makes possible.

Presently the opportunity exists to offer greater job protection to a group of faculty who have served both the University and the University community well and who understand that their jobs depend on continued extramural funding. Since they are willing to accept that risk, the University should be willing to clarify their rights to due process in employment and termination matters. The Faculty Associations will work to this end by notifying faculty of the issue, meeting with chancellors when possible, and bringing our views to the attention of President Peltason and other UC administrators in charge of UC policy in this area.

We urge faculty on FTEs or in residence on any campus to register their views on this subject by contacting your local campus faculty association or the Council of UC Faculty Associations, P.O. Box 33336, Granada Hills, CA 91394, (818) 341-8664.

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