

University Of Washington  
Faculty Council on Faculty Affairs  
9:00 a.m. – 10:30 a.m., April 2, 2013  
142 Gerberding Hall

**Meeting Synopsis:**

1. Call to Order
  2. Review of minutes from March 5<sup>th</sup> and 19<sup>th</sup>
  3. Class A Legislation on Openness in Promotion and Tenure
  4. Class A Legislation of Academic Freedom
  5. Adjourn
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**1) Call to Order**

The meeting was called to order by Chair Stygall at 9:05 a.m.

**2) Review of minutes from March 5<sup>th</sup> and 19<sup>th</sup>**

The review of minutes from March 5<sup>th</sup> and 19<sup>th</sup> was put on hold to discuss the Class A Legislation. The minutes were eventually not reviewed and were continued until next meeting.

**3) Class A Legislation on Openness in Promotion and Tenure**

Chair Stygall began the meeting providing an introduction and background of Class A Legislation on Openness in Promotion and Tenure. She had spoken with the provost and tried to come up with a compromise that would be agreeable between faculty members, department chairs and the University. The deans have been adamantly opposed to requiring department chairs to discuss their recommendations with candidates. However, the deans are not opposed to discussing their recommendations with the candidates and feel that this could be a good alternative for a compromise. The provost did express concern about how this would impact smaller and medium-sized departments; when a candidate gets tenure but there was a negative report during the process it could create friction within the department. Not all the deans are happy with the compromise, but there has been some who would support the alternative including Bob Stacey.

Chari Stygall clarified that there are two proposals to vote on. One proposal would have the deans be the only party who discusses their recommendation with candidates, and one proposal that would have both the deans and the department chairs discuss the recommendation with the candidates. Questions arose about the specifics of the second proposal which were clarified by Marcia Killien. The proposed legislation (Version 1) was introduced at SEC and there was a great deal of discussion about changing the legislation, resulting in it being sent back to FCFA for further review. One topic of discussion during the SEC meeting was whether the faculty members should vote during or following the meeting in which they review the candidate's record. There was also discussion about specific edits to the legislation (underlining and crossing-out) to determine if the language was accurate.

Additional questions arose to clarify the process of passing this legislation. Killien explained that if Version 1 goes forward the president will not likely sign it. FCAS has two choices: recommend that Version 1 goes forward and keep the current language, or recommend Version 2 with the compromise. Killien went into detail between the differences between both versions. Questions were raised about the different ways Version 2 could be interpreted. Killien explained that Version 2 has two changes from

Version 1: the candidate has a second opportunity to send a response and the dean has to explain why the decision was made.

One question arose asking if the title of the legislation conflicts with “truth to labeling” issues. The concern is that Version 2 may not actually contribute to more openness as the title states. The answer is that Version 2 does open up communication for the candidate and provides an avenue to explain what is currently happening throughout the process. From a study on current promotion standards at other universities, over half already require the deans to disclose this information to candidates. Also, the universities require disclosure of council votes and the department chairs’ recommendations. At this moment there are three options the Council can take to decide the matter: decide to vote on a recommendation today, allow Chair Stygall to report to SEC that there is no vote but explain what was discussed during this meeting, or have an electronic vote after the meeting.

One statement was made explaining that Version 2 appears to require less openness than Version 1. A follow up question asked if the legislation would create a perverse consequence where some units will change their bylaws. It was explained that several units already have increased openness based on the ongoing discussions throughout the University. However, some units have no procedures at all and only rely on rules from Human Resources and not by the university code.

Cameron proposed revisions to Version 2 that would be in keeping with the Deans’ recommendation and clarify that the candidate would be provided the dean’s recommendation – not the college council’s – if not favorable. The revision would allow the candidate to respond back to dean instead of the president in order for it to be considered by the dean before a decision is made. Discussion ensued on the language in Versions 1 and 2 and how the deans may be impacted, as well as possible objections.

Chair Stygall set aside the discussion on openness to allow time for the presentation on academic freedom. It was suggested to have an electronic vote on openness because FCAS does not want to push something forward that the president will not sign.

A statement was made to look into changing the name of the legislation. A question was also raised asking that while FCAS understands the department chairs’ position on the legislation, it may also be important to protect the advisory councils as well. It was explained that it is unavoidable to keep advisory councils out of the feedback loop and difficult to protect them during the review process.

During the presentation on academic freedom, several members left prompting Chair Stygall to state that the Council will have an online vote.

#### **4) Class A Legislation of Academic Freedom**

Helen Arntson, Assistant Attorney General, began her PowerPoint presentation on academic freedom. Chari Stygall explained that this presentation is a primer for FCAS to get background on this issue in order to make future changes.

Academic freedom is defined by many sources from a variety of places, including professional standards, contract/expectations with institutions, and case law. Arntson went into further detail explaining the history of case law that impacts academic freedom, including:

- Tennessee Code Ann. Title 49, Section 1922 (1925)
- Kay v. Board of Higher Education of City of New York (1940)

- Sweezy v. New Hampshire (1957)
- Keyishian v. Board of Regents (1967)
- Regents of the University of California v. Bakke (1978)

Academic freedom is not just a matter that is determined institution by institution, but is entitled to first amendment protections. The examples address difficult issues that influence what decisions a university can make on academic grounds without court intervention, such as who is allowed to teach, what it taught, how lessons are to be taught, and who may be admitted.

The legal analysis of academic freedom is defined by case law as situations arise and is susceptible by courts with specific facts that are introduced before them. Cases on academic freedom turn on these specific facts that are introduced which is why the details of a particular case are very important.

Protected speech is speech that advances academic messages, and is not protected if the speech is disruptive to the institution's functioning or academic environment. This somewhat parallels issues of speech in high schools, such as "offensive" t-shirts and disruptive speech. Other examples were provided and Arntson went into detail of how the courts interpret "speech" in academia.

Another question to consider is whose freedom is being protected: institutions, faculty, or students. One example used was a university which ruled that permission is required to look at pornography as part of a professor's academic studies, resulting in a lawsuit because the ruling limits academic freedom. Another example was a lawsuit involving a theater student who did not want to read nasty words in a play which she was required to recite, arguing that she had the freedom to not say those words. So the big question arises: Whose academic freedom is actually being protected?

The setting of these legal questions matter greatly. For example, the "rules" for higher education are different from primary of secondary education. In addition, there have been renewed legislation efforts including an "Academic Bill of Rights" and California HR 35.

The U.S. Constitution First Amendment is another source for protecting speech, along with Washington Constitution Article 1, Section 5. Arntson went into detail of historical events that has influenced speech over the decades, including:

- Alien and Sedition acts of 1798
- Civil War
- Espionage Act of 1917
- Schenck v. US (1919) – "Clear and Present danger" (better known as shouting "fire" in a theatre and causing a panic)
- Dennis v. U.S. (1952)
- Scopes v. State of Tennessee (1927)

A very influential ruling that has influenced the modern rules of speech was Pickering v. Board of Education (1968) in which the Supreme Court clarified that there is a "balancing test" when deciding on protected speech. This "test" is to balance the interests of employees in commenting as citizens on matters of public concern with the interests of the state as an employer in promoting efficiency of the public services it performs through its employees. Another case, Connick v. Meyers (1983), was also used to address the "balance test". The influence of these cases requires the courts to consider the

content, form and context of the speech and determine if the employee was speaking as a citizens on a matter of public concern. If not, then the speech is not protected. If the speech is protected, then the decision has to balance the employer's interest in effectively and efficiently fulfilling its responsibilities to the public with the employee's rights. The decision also takes into consideration if the employer took adverse action against the employee and if the employee's speech was a substantial or motivating factor in the employer's adverse action.

Additional examples of cases were presented including:

- Garcetti v. Ceballos (2006)
- Posey v. Lake Pond Oreille School District No. 82 (2008)
- Clairmont v. Sound Mental Health, 632 F.3d 1091 (2011)
- Renken v. Gregory (2008) -
- Gorum v. Sessions (2009)
- Kerr v. Hurd (2010)
- Adams v. Trustees of UNCW (2011)

Chair Stygall stated that this presentation will be useful and this is a lot of information to think about when making future changes.

## 5) Adjourn

The meeting was adjourned by Chair Stygall at 10:40 a.m.

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*Minutes by Grayson Court, Faculty Council Support Analyst. gcourt@uw.edu*

**Present:**           **Faculty:** Stygall (Chair), Buck, Vaughn, O'Brien, Huber  
**President's Designee:** Cameron  
**Ex-Officio Reps:** Mc Nerney, Sukol, Rees  
**Guests:** Helen Arntson

**Absent:**           **Faculty:** Landis, Johnson, Watts  
**Ex-Officio Reps:** Henchy, Tyl