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University of New Mexico Board of Regents Minutes for July 11, 1991

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THE MINUTES OF THE MEETING OF
THE REGENTS OF THE UNIVERSITY OF NEW MEXICO

July 11, 1991

The Regents of the University met at 10:00 a.m. on Thursday, July 11, 1991 in the Roberts Room of Scholes Hall. Affidavits concerning the public notice of this meeting are on file in the Office of the Secretary of the University.

Present:

Roberta Cooper Ramo, President
Siegfried Hecker, Vice President
Arthur Melendres
C. Gene Samberson
Connie Thorson, President, Faculty Senate, Advisor
Karen Brownfield, President, ASUNM, Advisor
Ann Waters, GSA President's Designee, Advisor

Absent:

Frank Borman, Regent
Gene Gallegos, Regent
Ken Johns, Regent
Steve Malnar, President, UNM Alumni Association
Mimi Swanson, President, UNM Staff Council

Also Present:

Richard E. Peck, President of the University
Leonard Napolitano, Director of the Medical Center
Orcilia Zuniga Forbes, Vice President for Student Affairs
Richard Holder, Associate Vice President for Academic Affairs
Anne J. Brown, University Secretary
Judy K. Jones, Executive Assistant to the President
Nick Estes, University Counsel
Cathryn Keller Nestor, Director, Public Affairs

It was moved by Regent Siegfried Hecker, seconded by Regent Arthur Melendres, that the Regents adopt the agenda as printed. Carried.

It was moved by Regent Melendres, seconded by Regent Gene Samberson that the minutes of June 11, 1991 be approved as distributed. Carried.

Regent Siegfried Hecker said that before the Regents discussed President Peck's salary for fiscal year 1991-91, they conducted an informal appraisal with President Peck of his performance during his first year as UNM's President. An informal appraisal will be conducted each year until the fifth year of President Peck's tenure and then a formal review will be held. On the basis of the appraisal and the amount of money available a decision has been made concerning the salary increase.

1991-92 Salary for
President Peck

Regent Hecker stated that the Regents are extremely pleased with President Peck's performance during his first year in office. He has provided intellectual leadership for the institution by embracing the UNM 2000 Plan as a working document for the future. He has also done a very good job in providing the people leadership that it takes to run the University. He has pulled together a good leadership team of top administrators. He has made some difficult decisions and has shown a sensitivity to making the campus more diverse. Along with Vice President for Business and Finance David Mc Kinney he has done an excellent job of running a half-billion dollar business. In accordance with the Regents' wishes, Dr. Peck has paid special attention to the University's external constituencies by reaching out to communities all over the state of New Mexico. He has done an exceptional job in this regard.

This year is a very difficult one in regard to overall salary adjustments because of scarcity of resources. The Regents, as well as Dr. Peck, were disappointed that faculty and staff salaries could not be increased to a higher level. The University has set aside enough money for a 2.5% merit increase for faculty and staff, and some monies have been reserved for market adjustment for certain salaries. The Regents have decided to give President Peck the 2.5% increase which is the increase given to administrators. When President Peck was hired his salary was adjusted to consider the market.

It was moved by Regent Hecker, seconded by Regent Samberson, that the Regents approve a 2.5% increase in President Peck's current salary. The motion carried.

Regent Roberta Ramo said that Regent Hecker spoke for all the Regents when he said that President Peck has done an excellent job for the University during his first year. She also said that she would like to mention the outstanding job that Mrs. Donna Peck has done in representing the University with her tireless effort.

Regent Siegfried Hecker said that Professor Andrzej Zabłudowski and President Richard Peck had sent an appeal to the Regents asking for a review of both a decision of the Academic Freedom and Tenure Committee, which recommended that the negative tenure decision

Tenure Appeal of
Professor Andrzej
zabłudowski

regarding Dr. Zabłudowski be reversed and President Peck's subsequent rejection of the Committee's decision.

He explained that prior to the June 11, 1991 Regents' meeting a hearing was held and the Regents listened to Dr. Zabłudowski's case presented by his attorney. The Regents also heard some discussion from the administration. There is sufficient confusion in the case to make a decision difficult. The Regents agree with the Academic Freedom and Tenure Committee that there was confusion in the procedure followed in the case. However, they cannot agree with the remedy suggested by the Committee, which is to give Dr. Zabłudowski tenure.

The Regents' Academic Affairs Committee suggests that the case be sent back to the Academic Freedom and Tenure Committee and that the Committee return the case to the Regents who will conduct a full hearing of the case. Since Dr. Zabłudowski's counsel has asked that this matter be expedited in order to settle Dr. Zabłudowski's status as soon as possible, Dr. Zabłudowski may at his option waive in writing within seven (7) days of this meeting the provision in the Faculty Handbook providing for the Academic Freedom and Tenure Committee to review and reconsider this matter. Likewise, the Administration may waive the provision in the same manner. Upon receipt of waivers from Dr. Zabłudowski and the administration or a report from the Academic Freedom and Tenure Committee, the Regents will proceed to hear this appeal directly and as soon as practicable.

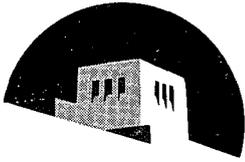
Regent Hecker moved that the Regents return the matter to the Academic Freedom and Tenure Committee with the provisions stated above. The motion was seconded by Regent Melendres and carried.

(Note: The complete Decision of the Board of Regents is filed with the official minutes of this meeting.)

The meeting adjourned at 11:50 a.m.


Secretary


President



The University of New Mexico

Regents of the University

Scholes Hall

Albuquerque, NM 87131

**DECISION OF THE
UNIVERSITY OF NEW MEXICO BOARD OF REGENTS**

This appeal comes before the Board of Regents (Regents) at the request of Dr. Andrzej Zabłudowski and President Richard Peck seeking review of both a decision of the Academic Freedom and Tenure Committee (AFT), which recommended that the negative tenure decision regarding Dr. Zabłudowski's be reversed, and President Peck's subsequent rejection of the AFT decision.

I. Procedures Under The Faculty Handbook

The Faculty Handbook provides dual procedures for bringing a tenure matter before the Regents. One procedure is found in Section 3(g)(iii) on page B-3. It sets forth the Tenure Review process and requires that, in the final year of a faculty member's probationary period, the chairperson of a department conducts an evaluation of the faculty member and recommends to the dean that the faculty member be given tenure or not. If the chairperson does not recommend tenure, the chairperson so states in writing and the faculty member then has ten (10) days to present a case for retention to the dean. If the dean disagrees with the recommendation, he must notify the faculty member and the chairperson in writing and state the reasons for his decision. The faculty member or the chairperson has 10 working days to appeal to the Associate Vice President, (now Associate Provost) (AVP). If the AVP disagrees with the dean's recommendation the AVP must state the reasons therefor in writing to the faculty member, the chairperson and the dean. The AVP recommends tenure or not to the Vice President for Academic Affairs (now Provost) (VPAA) who makes the final decision. If the VPAA does not follow the recommendation of the AVP or there is a conflict in the recommendations, the VPAA must state the reasons for his decision and convey them to the faculty member and all

those who made recommendations so that all may have 10 working days to initiate an appeal to the President and finally to the Regents.

The other procedure is found in Section 15 on pages B-7-8 and provides that, if a faculty member alleges a decision to deny tenure was based upon "considerations violating academic freedom," the faculty member may bring the matter before the Academic Freedom and Tenure Committee ("AFT"). Section 15 also incorporates the procedures of Sections 12, 13 and 14 on page B-6-7, which primarily deal with the method by which a tenured faculty member is terminated. Certain exceptions to these procedures are provided so that a faculty member who is denied tenure and brings the matter for hearing before the AFT bears the burden to state the grounds and present the case to the AFT. By contrast, in the case of the termination of a tenured faculty member, the President must state the grounds and bear the burden to prove the case.

Section 15 also provides that, when tenure is denied, the AFT decides whether tenure should have been granted, but only if it is shown that "improper considerations clearly affected the decision not to retain the faculty member."

Section 14 provides 120 days for an appeal to be taken to the Regents from AFT's decision by either the faculty member or the President. This section was obviously written to apply to the circumstances of the termination of a tenured faculty member where the President is a required party to the proceedings. Therefore, in such proceedings it is appropriate that either the President or the faculty member may request review of AFT's decision directly to the Regents. However, in the case of the denial of tenure, the incorporation of the procedures of sections 12, 13 and 14 creates confusion as to whether the President has any authority over the matter other than to appeal the AFT decision to the Regents. These procedures present a further question concerning the President's authority when a faculty member brings a matter to the AFT before the faculty member exhausts any appeals provided under the Tenure Review process of Section 3(g)(iii). The confusion is exacerbated by the absence of any provision in the Faculty Handbook which states at what point in the Tenure Review process a faculty member may bring a matter before the AFT.

II. Factual Background

The relevant facts to these issues appear in the record of the hearing before the AFT.

On November 8, 1989, the chairman of the Philosophy Department recommended to Dean Wildenthal of the College of Arts and Sciences that Dr. Zabłudowski be granted tenure. The chairman's recommendation was in part based upon the vote of the faculty of the department and their respective written evaluations of Dr. Zabłudowski. In accordance with the Tenure Review process (Section 3(g)(iii)) the chairman's recommendation was to be accompanied by a "full, written evaluation report including at least a summary of the evaluations of all faculty members consulted." The chairman testified that he appended to his report various letters from the department faculty members. The record indicates a question exists as to whether two of the faculty members who were on leave of absence from the University were consulted by the chairperson in advance of the report to the dean and whether their letters were included in the report to the dean. Therefore, a discrepancy exists as to whether the vote of the Philosophy Department faculty was, 6-1, 8-1 or 10-1 with one abstention. No one questions that only one faculty member opposed Dr. Zabłudowski's tenure in writing. However, some question does exist as to whether individual faculty members were consulted by the dean and whether letters of recommendation were the candid opinions of the faculty.

The record also presents a question concerning whether the report of the chairman to the dean was substituted with another version which was requested by some of the faculty members and whether the proposed revisions were accepted by the department chairman.

Whether the dean received or considered the respective faculty recommendations is also questioned. The Faculty Handbook requires that the report must include "at least a summary" of faculty evaluations. In this instance the report of the chairman apparently did not include a summary of the department faculty evaluations. Instead the chairperson indicated that the letters themselves were supposed to have been included. At the time of the AFT hearing the original letters had disappeared, and the dean testified that he did not remember whether he considered them in the Tenure Review process. The AFT was "unable to

resolve whether or not Dean Wildenthal considered individual department letters as part of the record when making his negative tenure determination." (AFT Decision p.3).

On February 9, 1990, Dean Wildenthal rejected the department chairman's recommendation stating reasons to the effect that Dr. Zabludowski was deficient in the frequency of his publication and had demonstrated poor teaching and service. Dr. Zabludowski then appealed to the AVP, Richard Holder, who subsequently concurred in the dean's decision. The record raises the question of whether the AVP complied with the Faculty Handbook and provided a written statement of reasons to Dr. Zabludowski and whether he had available to him the department faculty evaluations. In any event, the AVP then forwarded his negative recommendation to the VPAA, Paul Risser.

On June 19, 1990, the VPAA decided to deny tenure to Dr. Zabludowski stating that he was in agreement with the dean's negative recommendation. Testimony provided by the VPAA indicated that he did not have at his disposal the letters of evaluation from department faculty members in making his final decision.

Dr. Zabludowski did not appeal the VPAA's decision to the President which is provided for in Section 3(g)(iii). Instead he at this point in the process alleged that his academic freedom had been violated because of improper considerations by the dean, and brought the matter before the AFT.

The AFT then heard his case on November 28, 1990, and decided on December 14, 1990, that the tenure decision "should be reversed because improper considerations violating academic freedom affected the dean's decision not to retain Dr. Zabludowski." (AFT Decision pp.1 and 2). The AFT further decided that the "full report of Dr. Zabludowski's fitness for tenure (as required in Section B 1-4 of the Faculty Handbook) does not support Dean Wildenthal's conclusions." (Id. at 2.) Although the AFT was "unable to resolve whether or not Dean Wildenthal considered the individual department letters as part of the record when making his negative tenure determination," the AFT went on to state that "resolution of this fact question is unnecessary to support the committee's

decision" because, if he did consider them they were favorable to Dr. Zabłudowski, and if he did not, the decision was based upon an inadequate record. (Id at 3).

By letter dated December 19, 1990, the AFT conveyed its decision to Dr. Zabłudowski. The AFT also sent its decision to President Peck by letter dated December 19, 1990, stating "[t]he Faculty Handbook (B.3-4) presumes review by the President before action, appropriate or relevant to our decision." On February 20, 1991, President Peck responded to the AFT and rejected its decision and recommendation. Neither President Peck nor Dr. Zabłudowski appealed AFT's decision within 120 days as provided in Section 14 of the Faculty Handbook. Subsequently, however, by letter dated May 8, 1991, Dr. Zabłudowski requested the Regents to review this matter to clarify his tenure status. President Peck requested our review of this matter through counsel's responsive memorandum dated May 30, 1991, to the Academic Affairs Committee of the Regent's in which he asks that we extend the 120 day deadline and that we treat this as an appeal from the decision of the AFT.

III. Is The Matter Properly Before The Regents?

Dr. Zabłudowski asks that we address first the threshold question of whether the matter is properly before the Regents. Dr. Zabłudowski asserts that President Peck did not request the Regents to review the AFT decision within the 120 days, and, therefore President Peck is bound by the AFT decision and, thus, Dr. Zabłudowski has obtained tenure.

Among the unusual procedural circumstances of this case is that Dr. Zabłudowski did not appeal to the President as provided for in Section 3(g)(iii). The Regents' review of a tenure decision usually follows the President's decision on appeal. In this case, however, the AFT reviewed the matter and recommended that the denial of tenure should be reversed. The decision and recommendation were then forwarded to the President who reversed the AFT's decision and rejected the recommendation.

We must now interpret the Faculty Handbook and determine the effect of both the AFT decision and recommendation, and the President's action reversing the decision and rejecting the recommendation.

The Tenure Review process set forth in Section 3(g)(iii) is written to include an appeal to the President and

ultimately to the Regents. We consider the opportunity to appeal to the President to be an integral part of the Tenure Review process, and we require that the President shall have considered the matter and made a decision prior to the matter coming before the Regents.

We do not interpret the Faculty Handbook to permit a faculty member to obtain tenure merely upon the AFT's recommendation. The policy of the Regents is that the granting of tenure requires an affirmative act by the administration and cannot be obtained by default. The AFT appears to recognize this principle in the letter forwarding the AFT's decision and recommendation to the President which states that the Faculty Handbook "presumes review by the President before action, appropriate or relevant to our decision."

We also interpret the Faculty Handbook to provide that, until the President has made a decision under Section 3(g)(iii), it is premature to bring the tenure decision before the Regents. Only when the President has been a party to the AFT proceedings, such as in the case of the termination of a tenured faculty member, is it appropriate for the matter to come directly to the Regents from the AFT. Because President Peck had not participated in the Tenure Review process and was not a party to the AFT decision, we think this matter was properly before him for action.

Section 3(g)(iii) provides that VPAA's "[] final decision or indeed any administrative action," may be appealed to the President and the Regents. We deem the President's rejection of AFT's decision and recommendation and the implicit concurrence with Dr. Risser's final decision to be "administrative action" which may be appealed to the Regents. While Dr. Zabudowski did not bring an appeal to the President within 10 days as provided for under Section 3(g)(iii), neither did President Peck bring an appeal within 120 days of the AFT decision. Were we not to decide this matter because the time for appeal has elapsed as to all parties Dr. Zabudowski's tenure status would remain unresolved. The question of whether he has tenure because of the AFT decision or doesn't have tenure because of President Peck's action would remain. The parties are, therefore, equally prejudiced or not by our waiving the time limits provided in the respective provisions of the Faculty Handbook. We, therefore, waive the time limits and treat the matter as properly before us.

IV. Effect Of Procedural Irregularities

We address next the effect of the procedural irregularities which have been raised in this appeal.

We are troubled by the incomplete record which appears to exist in this case. We do not agree with AFT's conclusion that resolution of the question of whether the dean did or did not consider the department faculty letters is unnecessary. We think such evaluations are important to the Tenure Review process and should be considered by the dean and the other administrators who must consider the merits of a faculty member's fitness for tenure. In this case the original letters disappeared and were certainly not reviewed by the VPAA. Questions exist as to whether they were reviewed by the dean and the AVP.

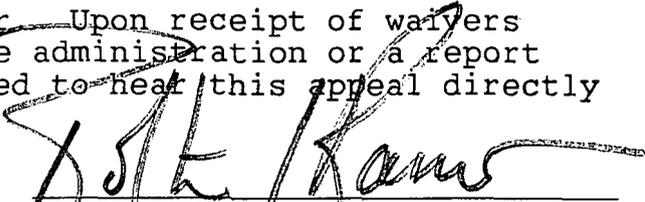
We do not agree that, if Dean Wildenthal did not consider the individual faculty evaluation letters in making his negative tenure decision, the remedy is to grant tenure; nor do we agree that, if he did consider them, the merits of the tenure decision must be favorable to Dr. Zabłudowski. The record as it stands now is inadequate to make a determination on the merits regarding Dr. Zabłudowski. It is not appropriate for tenure to be granted or denied based upon the lack of material data in the report which is to be reviewed by the respective administrators. The procedural errors found by the AFT do not unto themselves result in the automatic granting of tenure. Positive administrative action must be taken before tenure is granted, and ultimately under either of the two tenure review procedures, the Regents must make the final decision whether to grant or deny tenure.

V. CONCLUSION

Because ambiguities exist in the Faculty Handbook and procedural problems which are evident in the record before us are confusing and bothersome to us, we believe the appropriate remedy is to return this matter to the AFT in accordance with the Faculty Handbook.

In addition, Dr. Zabłudowski's counsel has asked that this matter be expedited in order to settle Dr. Zabłudowski's status as soon as possible. Therefore, Dr. Zabłudowski may at his option waive in writing within seven (7) days of this letter the provision in the Faculty Handbook providing for AFT to review and reconsider this matter. Likewise, the administration may waive the

provision in the same manner. Upon receipt of waivers from Dr. Zabudowski and the administration or a report from the AFT, we will proceed to hear this appeal directly and as soon as practicable.


ROBERTA COOPER RAMO, President
of the Board of Regents

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