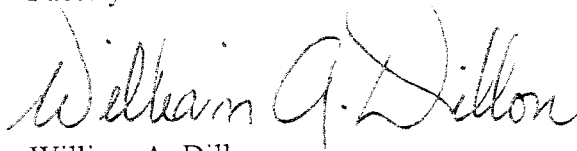


California State University, Sacramento
Department of Government
Memorandum

To: Faculty Senate



From: William A. Dillon
Professor of Government

Subj: Thoughts about proposed amendment of Sec. 6.06.D of University ARTP Policy
now before the Senate

Date: March 13, 2007

Before acting on the subject proposal, the Senate may wish to consider the following observations.

1. Notwithstanding the statement in 6.06.D.2.A of the proposal that the AA/EOR is not a compliance officer, the language of 6.06.D.2.G that requires the AA/EOR to sign or not a statement that the appointment committee has taken no inappropriate action that may cause discrimination makes him or her a compliance officer. What else is the core function of such an officer but to attest to the absence of actions that, if taken, would constitute non-compliance and to pay particular attention to, if not to supervise, for non-compliance in order to make the required attestation conscientiously?

2. The language that describes the AA/EOR as attesting or not to compliance vests the AA/EOR, a member of an elected faculty committee, with powers not vested in the other members. This provision thus violates the ideas of equality and collegiality which have historically defined the relation of committee members to one another and to the committee as a whole in the context of ARTP.

3. The description of the AA/EOR activities is silent as to the consequences of an AA/EOR's refusal to attest to the absence of discrimination in reaching a recommendation to appoint. Does a refusal suspend the process until the AA/EOR can be persuaded to sign or until the objection is disposed of after an investigation? Does the refusal have some other effect or any effect at all on the process? If, so what is it? The failure to specify consequences leaves to the unlimited choice of the participants in each case the consequences of a refusal to sign. To do so is to open the University to the possibility of liability for having acted arbitrarily in the case of an applicant adversely affected by the refusal and to bring on a debate between the University and an adversely affected applicant as to whether under the circumstances a particular choice was reasonable.

4. The language about the AA/EOR signing the Applicant Process Summary permits but does not require the AA/EOR to specify reasons for refusing to sign. This want of language requiring reasons leaves room for arbitrary refusals to sign or for refusals based on inappropriate yet undisclosed reasons such as disagreement with the substance of a decision to recommend or not for appointment. It may also violate an applicant's right to reasons. While that right clearly includes substantive reasons for adverse action taken on his or her job application, it may also be held in a subsequent lawsuit to include reasons for an intervention into a process on procedural grounds that results in action by the University adverse to an applicant. Inability or unwillingness on the part of the University to produce reasons for such an intervention might well result in the loss of the suit for having acted arbitrarily.

5. The language of Sec. 2 of the proposal is with the exception of sub-sections F and G neither directive nor permissive, notwithstanding that the rest of UARTP Policy is phrased to direct or permit. Instead, the proposed language is for the most part plainly descriptive. It therefore lacks the force and effect of a directive as well as the discretion defining effect of a statement of permission. Lacking these qualities, it does not obviously suggest any recourse from a failure to act in the ways described. CODE can

hardly have intended to write language that fails to direct activity or define discretion. Yet the proposed language of Sec. 2 fails in most instances to do either.

6. There seems to be no reason not to include the substance of Section 3.D of the proposal in the substance of Section 2.F wherever located in the proposal. They discuss the same duty.

Recommendations:

Either delete the language authorizing the AA/EOR to exercise a “pocket veto” or specify the consequences of an AA/EOR’s refusal to sign the Applicant Process Summary and require a statement of reasons whenever a signature is refused.

Substitute directive or permissive language for language that merely describes what AA/EORs do.

Combine Sec. 2.F and Sec. 3.D into one statement of the duty to contact assigned by the proposal to every member of an appointment committee and locate the statement more appropriately than in Sec. 3 which discusses training.

cc: David Wagner
Kent Porter
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WAD/mjd