Committee on Elections, Rules and Jurisdiction
Advice On the Appealability of Career Equity Reviews
December 13, 2006

Background and Current Policy

A member of the Division has inquired as to whether a Career Equity Review (CER) may be appealed.

The published policy for the "UC Davis Career Equity Review Process" states that

> The Oversight Subcommittee of the Committee on Academic Personnel [CAP] will serve as the Academic Senate committee providing advice to the Vice Provost-Academic Personnel on all Career Equity Reviews.
>
> Because requests for Career Equity Reviews are, in effect, appeals of past decisions, Career Equity Review decisions will not be subject to appeal.
> http://academicpersonnel.ucdavis.edu/career_equity_main.htm (rev 7/15/2004)

The Office of the Vice Provost's "Frequently Asked Questions Regarding Career Equity Reviews" states that the possible justification for a CER

> ...may include, but is not limited to, the following: 1) the cumulative record warrants an acceleration, even though no one review period did; 2) the rank/step was inappropriately low at the time of initial hiring; 3) work and contributions have been overlooked or undervalued by the department and/or other reviewing agencies.
> http://academicpersonnel.ucdavis.edu/cer_faqs_071504.doc (rev 7/15/2004)

Analysis of Relevant Bylaws

Senate Bylaws describe an appeal as follows:

> Appeal is appropriate when a Senate member believes that a personnel committee has failed to apply established standards of merit or has failed to follow established procedures. (DDB 45(A))

Some bases for a CER are clearly in the nature of an appeal. But others are not, including a claim that "the cumulative record warrants an acceleration, even though no one review period did."

In addition, the Bylaws specify that

> Appeals are considered by the Appellate Subcommittee of the Committee on Academic Personnel [CAPAC]. (DDB 45(A))

The CER, being conducted by CAP rather than by CAPAC, does not meet this criterion for appeals.

Instead, the Divisional Bylaws specify that *any* review by CAP is subject to appeal to CAPAC, which has the duty

> To provide advice independent of the Oversight Subcommittee to the Chief Campus Officer on any review of a personnel action beyond the original review conducted by the Oversight Subcommittee or the Faculty Personnel Committee subject to the requirements of Davis Division Bylaw 45. (DDB 42(C)(1))

For these reasons, the CER is subject to appeal to CAPAC and cannot itself be regarded as an appeal.

Comparison With Practices On Other Campuses

Most of the other Divisions do not allow appeals of CERs. But the Davis Division, acting within its authority under systemwide Bylaws, has bifurcated its Committee on Academic Personnel into two distinct, permanent subcommittees (CAP and CAPAC). And it has included specific Bylaw provisions defining appeals and stating that decisions by CAP are appealable to CAPAC. It is these Davis Division Bylaw provisions – which are unique among UC campuses – that require that the CER be appealable if it is heard by CAP or if it addresses matters beyond the failure to apply established standards or procedures. All other Divisions have Bylaws which are much less detailed and which do not establish a separate appellate committee.

Previous Consultation

We do understand that the Vice Provost consulted with CAP regarding the CER policy in 2003, and specifically asked about the issue of appealability. At that time CAP expressed the opinion that CERs should not be subject to appeal, and it followed proper procedures by duly reporting this position to the Representative Assembly in its 2002-2003 Annual Report.

Regretfully, we are now in the difficult position of pointing out that CAP's response – while properly reported and reasonable when viewed in isolation – is in violation of the applicable Senate Bylaws. And no Senate committee (including the Representative Assembly) has the authority to waive a Bylaw provision by which it is bound.

CERJ was informally consulted in 2003 regarding a conflict of the proposed CER procedures with ASB 55. But the two members of CERJ for 2005-2006 who were on the committee at that time have no records of consultation on the appeals issue. Both of these members were fully involved in drafting our current Advice.

Subsequently, then-Divisional Chair Dan Simmons advised on September 2, 2004 that

> Senate bylaw 42(c) provides for appeals to the appellate subcommittee of any decision in a personnel action taken by the oversight subcommittee. [See appended email.]

Applicability Of This Advice To Past, Pending and Future Cases

The process for appeals of previously-decided cases – including time limits – is specified by the Academic Personnel Manual (UCD-220 Section V), not by Senate legislation. CERJ does not

have jurisdiction to interpret the APM; instead, the Administration and CAP determine whether appeals are timely and whether time limits should be extended or waived.

We also note that everyone – including the Administration – has a right to rely on actions taken in good faith by CAP and the Senate. This Advice should therefore not be given retroactive effect. But CAP's process for appeals of pending and future cases must conform to the provisions of Senate Bylaws as described above.

Advice

To summarize, CERJ's Advice, applicable to pending and future cases, is that

The Career Equity Review as currently administered is not limited to claims that a committee "has failed to apply established standards of merit or has failed to follow established procedures," and it is not heard by the Committee on Academic Personnel Appellate Committee (CAPAC). Unless a Career Equity Review is limited to such claims and is heard by CAPAC, it is not itself an appeal within the meaning of Davis Division Bylaw 45(A).

Davis Division Bylaws 42(C)(A) and 45(A) provide for appeals to CAPAC of any personnel action considered by the Committee on Academic Personnel Oversight Subcommittee (CAP) or any other personnel committee. Therefore, the Career Equity Review as currently administered is subject to appeal to CAPAC, subject to normal time limits and procedures.

Comment: Possible Policy Responses

CAP, working with the Administration, could (1) adopt a uniform policy of having all CERs be heard by CAP, and appealable to CAPAC, consistent with the above advice. Alternatively, it could (2) set up a process under which those CERs which *are* limited to claims of failure to apply established standards or procedures are heard directly by CAPAC and are not subject to further appeal. Either approach would be consistent with current Bylaws.

But an approach of having all CERs (as currently defined) styled as appeals would require a fundamental change in the Bylaws. This is because some CERs do not satisfy the description of an appeal under the Bylaws.