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TO: Chancellors, Provosts, and Faculty Governance
FROM: Matt Cooper, General Counsel
RE: Role of Faculty in Decision-Making

This memorandum provides useful background information regarding the role of faculty governance in university decision-making. The information set out below is general in nature and this memorandum is not privileged.

Legal Authority and Responsibility for University Decision-Making

The Board of Regents, university president, and chancellors have broad legal authority, as well as ultimate legal responsibility, for governing and administering the university system.

- Pursuant to the constitution and law, the Board of Regents is authorized and required to govern the University system and its constituent institutions. The Board appoints the president, and establishes policy, provides oversight, and serves as the governing body for the System and each institution. (Constitution, Art VII, Sect. III;ⁱ AS 14.40.120; AS 14.40.170;ⁱⁱ Bylaw 3.)
- The president serves as the Board's executive officer, and is the chief executive of the University System, administering the University System through and consistent with authority and responsibilities delegated by statute, Board Bylaws, policy, and direction. (AS 14.40.210;ⁱⁱⁱ AS 14.40.220;^{iv} Bylaw 12.)
- The chancellors serve as the CEOs of the institutions they lead, implementing the policies and objectives of the Board and of the president of the University System, with authority and responsibility for the internal administration of each institution. (Regents' Policy 02.02.015; Bylaw 13.)

Accreditation Requirement Considerations

To maintain overall accreditation of its institutions, among other things the Board, System and each institution's planning and decision-making processes must comply with accreditation standards established by the Northwest Commission on Colleges and Universities (NWCCU).

Generally, NWCCU standards require that university planning and decision-making processes be inclusive, offer meaningful opportunity for input and comment, and "include provisions for the

consideration of the views of faculty, staff, administrators, and students on matters in which each has a direct and reasonable interest.” (See excerpts from NWCCU Standards.^v) While they impact decision-making processes, these NWCCU requirements do not affect ultimate authority for decision-making.

By contrast, NWCCU Standard 1.C.5 requires that each institution “recognize() the central role of faculty to establish curricula, assess student learning, and improve instructional programs.”^{vi} Thus faculty must retain significant authority with respect to content and instruction of individual academic programs.¹

UA’s Shared Governance Policies

The Board of Regents, through policy, has provided for shared governance, declaring that

The opportunity for faculty, staff and students to participate in the governance of the university is important to its effective operation. The board intends that faculty, staff and student participation in university governance be an integral part of the university community's culture.
(Regents' Policy 03.01.010.)

However, governance carries out its functions “subject to the authority of the board, the president and the chancellors.” Regents’ Policy 03.01.010.D. states:

- D. Governance organizations shall carry out their functions subject to the authority of the board and the president and chancellors. The organizations' purposes are to:
1. provide an effective opportunity for university faculty, staff and students to play a meaningful role in matters affecting their welfare;
 2. represent the viewpoints of university faculty, staff and students on regents’ policy, university regulation, and other matters affecting the interests of the university;
 3. address through legislative action other matters as described in their approved constitutions;
 4. advise the president and chancellors in a timely fashion and in a manner set forth in individual organizational constitutions; and
 5. communicate to faculty, staff and students information which is of interest and concern to the university.

Separation of Union and Governance Roles

Governance is part of the administration of the university. As such, governance does not have a role in the collective bargaining process or in asserting rights of represented employees under the Collective Bargaining agreement. In either case, governance participation in bargaining presents a conflict of interest as well as other legal issues as discussed below.

Unions are separate legal entities designated by law as the exclusive representative of bargaining unit members in collective bargaining. Unions by law must serve the interests of employees, not the employer. The university is both required and entitled to deal only with the union on terms

¹ Academic programs are approved by the Board after development by faculty and review by administration.

and conditions of employment. *See* AS 23.40.110(c). Conversely, unions are required to deal only with the university’s designated representatives. Governance actions affecting terms and conditions of employment addressed in the CBA or impacting bargaining potentially establish unfair labor practice claims.

As part of university administration, governance has access to university resources to perform specific functions on behalf of the university. Those resources may not be expended or used for other purposes, including support of external entities such as unions.

Moreover, governance has a fiduciary duty to the university to act in good faith in performing those duties, including establishing academic standards for curricula, student assessment, faculty qualifications and evaluations, etc. These standards impact substantive academic decisions underlying terms and conditions of employment for individual bargaining unit members, including workload, hire, tenure and promotion. Given this relationship, and the bargaining requirements noted above, Governance cannot both set academic standards on behalf of the employer and participate in bargaining the terms and conditions impacted by those standards.

In addition, participation by union leadership in governance roles would create a structural conflict of interest whenever governance matters affect union interests.² While union leaders are university employees, their union leadership role creates a fiduciary duty to the union that cannot be set aside.

Conversely, the union has no role in governance. The union must represent the interests of all employees with respect to terms and conditions of employment. It must bargain with the university’s designated representatives rather than using governance to further union interests.

Summary

The Board and administration generally retain full authority and legal responsibility to govern and make decisions regarding the university and its operations. However, in exercising that authority the Board and administrators must ensure compliance with accreditation requirements, including ensuring that decision-making and planning processes are inclusive and consider the input of faculty, staff, administrators, and students.

I have attached an excerpt from an AGB Press publication, *Shared Governance in Times of Change, A Practical Guide for Universities and Colleges*, by Steven C. Bahls. In addition,

² All UA employees, including governance officers, are covered by the Alaska Executive Branch Ethics Act, AS 39.52.010-.965, and are defined therein as “public officers.” AS 39.52.120. Misuse of Official Position, provides in pertinent part:

“(a) A public officer may not use, or attempt to use, an official position for personal gain, and may not intentionally secure or grant unwarranted benefits or treatment for any person.

(b) A public officer may not

(1) seek other employment or contracts through the use or attempted use of official position;

...

(3) use state time, property, equipment, or other facilities to benefit personal or financial interests;

(4) take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest; . . .”

“Official action” is broadly defined in AS 39.52.960(14) to include advice, participation, or assistance.

AAUP's 1996 *Statement on Government of Colleges and Universities* is available at <https://www.aaup.org/report/statement-government-colleges-and-universities>

The AAUP is a faculty and educational policy advocacy organization as well as a national organization supporting faculty unions. While the AAUP's educational policy statements are instructive, it has no formal role in or authority over University governance. AAUP's local affiliate, United Academics, does play a legally mandated role in collective bargaining regarding faculty terms and conditions of employment, but has no role in setting educational policy^{vii} or shared governance.

Given the clear conflict of interest created by having a union participate in shared governance of the university, in my view there must be a clear understanding of and separation between union and governance roles for shared governance to be effective.

cc: Interim President Pitney, VP Layer, VP Rizk

Attachment

ⁱ **AK Const. Art. 7, § 3 Board of Regents** The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The board shall, in accordance with law, formulate policy and appoint the president of the university. He shall be the executive officer of the board.

ⁱⁱ **AS 14.40.170 Duties and powers of Board of Regents.**

(a) The Board of Regents shall

- (1) appoint the president of the university by a majority vote of the whole board, and the president may attend meetings of the board;
- (2) fix the compensation of the president of the university, all heads of departments, professors, teachers, instructors, and other officers;
- (3) confer such appropriate degrees as it may determine and prescribe;

...

(b) The Board of Regents may

- (1) adopt reasonable rules, orders, and plans with reasonable penalties for the good government of the university and for the regulation of the Board of Regents;
- (2) determine and regulate the course of instruction in the university with the advice of the president;
- (3) set student tuition and fees;
- (4) receive university receipts and, subject to legislative appropriation, expend university receipts in accordance with AS 37.07 (Executive Budget Act).

ⁱⁱⁱ **AS 14.40.210 Powers of president of the university; research and development.**

(a) The president of the University of Alaska may

- (1) give general direction to the work of the University of Alaska in all its departments subject to the approval of the Board of Regents;

(2) appoint the deans, heads of departments, professors, assistants, instructors, tutors, and other officers of the University of Alaska to the positions established by the Board of Regents;

...

iv AS 14.40.220 Duty of president to define duties and supervise appointees.

The president shall define the duties and supervise the performance of those persons who are appointed by the president to positions established by the Board of Regents.

Note: Positions established by the Board of Regents include the following. These positions have system-wide responsibilities:

- P02.02.015. Chancellors.
- P02.02.017. Chief Academic Officers.
- P02.02.020. Chief Finance Officer.
- P02.02.030. General Counsel.
- P02.02.040. Chief Human Resources Officer.
- P02.02.050. Chief University Relations Officer.
- P02.02.070. Chief Information Technology Officer.
- **Error! Main Document Only.**P02.02.080. Chief Planning and Budget Officer.
- P02.02.090. Chief Administrative Officer.

v Excerpts from NWCCU 2020 Standards:

1.B.3 The institution provides evidence that its planning process is inclusive and offers opportunities for comment by appropriate constituencies, allocates necessary resources, and leads to improvement of institutional effectiveness.

...

Standard Two - Governance, Resources, and Capacity

The institution articulates its commitment to a structure of governance that is inclusive in its planning and decision-making. Through its planning, operational activities, and allocation of resources, the institution demonstrates a commitment to student learning and achievement in an environment respectful of meaningful discourse.

Governance

2.A.4

The institution's decision-making structures and processes, which are documented and publicly available, must include provisions for the consideration of the views of faculty, staff, administrators, and students on matters in which each has a direct and reasonable interest.

vi 1.C.5 The institution engages in an effective system of assessment to evaluate the quality of learning in its programs. The institution recognizes the central role of faculty to establish curricula, assess student learning, and improve instructional programs.

vii The Alaska Public Employment Relations Act requires bargaining over terms and conditions of employment, but excludes “the general policies describing the function and purposes of a public employer.” AS 23.40.250(9).