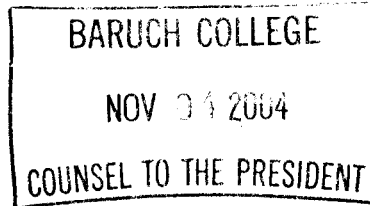


The City University of New York
Office of the General Counsel and Vice Chancellor for Legal Affairs
535 East 80th Street, New York, N.Y. 10021
Phone: (212) 794-5382
Fax: (212) 794-5426

Writer's direct phone: (212) 794-5506
Writer's e-mail: frederick.schaffer@mail.cuny.edu

Frederick P. Schaffer
General Counsel

Jane Sovern
Deputy General Counsel



Amy S. Bennett
Jane E. Davis
Marina B. Ho
Abby L. Jennis
Richard Malina
*Daphna H. Mitchell**
Linda Myles
Paul F. Occhiogrosso
Katherine Raymond
*Michael D. Solomon**
Jo-Anne Weissbart

**Associate General Counsel*

PERSONNEL ADVISORY MEMORANDUM

November 1, 2004

To: College Presidents

From: Frederick P. Schaffer 

Re: Personnel and Budget Committee Proceedings and Departmental Elections

The purpose of this memorandum is to set forth (1) the most significant requirements concerning Personnel and Budget Committee ("P&B") proceedings, and (2) the procedural requirements for departmental elections of chairpersons and P&B members. This memorandum also applies to colleges with department committees on appointments and promotions in lieu of the P&B committee.¹ These requirements emanate, for the most part, from Articles VIII and IX of the Bylaws of the Board of Trustees and may be modified in a college's Governance Plan that has been adopted by the Board of Trustees.²

A. PERSONNEL AND BUDGET COMMITTEE PROCEEDINGS

The primary role of departmental P&B committees is to review the candidacies of faculty members for appointment, reappointment, promotion, and tenure.

¹ Plan No. One, as described in Bylaw sections 9.1(c) and 9.8(a).

² See Bylaw sections 8.14 and 9.12.

1. Voting Requirements

A majority of the whole number of voting members of the P&B committee must be present, and a majority of the whole number of voting members must vote affirmatively to pass a positive recommendation of a departmental or college P&B committee (Bylaw sections 9.7(b) and 8.12).

Votes of P&B committees shall be by secret ballot (Bylaw sections 8.12 and 9.2).

In order to cast a vote, a faculty rank member must be physically present at the P&B committee meeting. There is no proxy or absentee voting permitted.

A P&B member who is on leave of absence or on sabbatical retains his/her voting rights in the department, unless the P&B member has otherwise agreed in advance of being granted the leave or sabbatical. As with all other faculty, he/she must be physically present to vote. A P&B member who has received notice of non-reappointment, submitted his/her resignation, or is on Travia (retirement) leave may not vote on the P&B.

A P&B member should not vote on matters in which he/she has a personal or pecuniary interest, e.g., his/her own promotion or the promotion of a spouse or domestic partner. If questions arise about whether a member has a pecuniary interest, the department chairperson should consult with the college's Labor Designee.

2. Minutes

In accordance with Bylaw sections 8.12 and 9.2, the minutes of P&B committee proceedings shall conform, insofar as practicable, to Robert's Rules of Order. The Board Resolution of June 5, 1967 concerning P&B procedures (known as the "Max-Kahn Memorandum") provides in relevant part:

Minutes. The minutes of a P&B Committee should conform to the canons set forth by Robert's Rules of Order, Revised: (page 248) "The secretary ... should keep a record of what was done and not what was said..." The action upon motions, and not the discussion which led to such actions, should be recorded, unless the P&B should order, by a majority vote, that the discussion be recorded. It is the duty of the Chairman of the P&B Committee to rule out of order random and irrelevant discussions of the candidate's merits, and to keep the discussions to the consideration of objective and relevant data, insofar as this is practicable. Voting should be by secret ballot. The minutes should be submitted for approval at the next succeeding meeting.

The minutes should generally contain the following:

- a) the name of the committee;
- b) the date, time, and place of the meeting;
- c) the names of those present at the meeting in the following categories: voting members and non-voting members;
- d) the fact that the regular chairperson and secretary were present or, in their absence, the names of the persons who substituted for them;
- e) whether the minutes of the previous meeting were read and approved (as read, or as corrected), together with the date of the previous meeting;
- f) the body of the minutes should indicate the action on each candidate and the number of those voting on each side and those voting to abstain or “present,” but should not indicate the substance of the discussion of the candidate’s merits. For the purposes of determining if a quorum is present, the minutes should indicate the names of all committee members present for each vote. This may be done by indicating those present at the beginning of the meeting and their arrivals and departures as they occur;
- g) the minutes should be signed by the secretary of the committee (who shall be a member of the committee), and may also be signed by the chairperson of the committee.

3. Confidentiality of P&B Proceedings

Within the University setting, discussions of candidates at P&B meetings are to be kept confidential. It is Board policy that it is professional misconduct for a member of a P&B committee to disclose the substance or even the nature of the discussion at a P&B meeting (Max-Kahn Memorandum). The vote counts are also confidential and should not be disclosed. In view of Board emphasis on the confidentiality of P&B proceedings for the purpose of obtaining the candid opinion of other professionals in the field on their colleagues, as well as the frank exchange of the views of the members of the committee, the deliberations of the committees should not be disclosed to non-members, including other members of the department and the candidate.

Since it is Board policy to maintain the confidentiality of P&B proceedings, this confidentiality should be respected throughout any grievance process arising from a P&B action, such as a non-reappointment. Thus, the College and all members of the P&B committee should take care throughout the grievance process, including arbitration, not to reveal the substance of any of the P&B’s discussions at its meetings.

The confidentiality of P&B proceedings is not absolute, however. In cases that result in litigation, such as a claim of discrimination made by a faculty member, the actions of the P&B committee may come under scrutiny, and a court may require that the substance of a P&B committee's deliberations be revealed. In such cases, the University, in conjunction with either the Attorney General's Office or the Corporation Counsel's Office, takes steps to limit disclosure of the P&B committee's deliberations by measures such as a confidentiality stipulation binding on all parties.

4. Materials That May Be Considered by P&B Committees

In order to satisfy concerns of procedural fairness, the P&B committees should generally consider only those documents and other materials that are a part of the candidate's personnel files. While the particular details of what is included in a faculty member's personnel files may vary from college to college, and department to department, the PSC/CUNY collective bargaining agreement (the "Agreement") provides certain parameters.

In accordance with Article 19 of the Agreement, there are two personnel files for each employee — the "personal file," and the "administration file." Both of these must be available to the P&B committee during its consideration of candidates.

Article 19.2 of the Agreement governs the personal file, which is available for examination by the employee at his or her request. That same provision enumerates a non-exhaustive list of the types of the materials to be included in the personal file, including annual evaluations, teaching observation reports, and personnel records generated by the college. The personal file will also contain copies of publications or other scholarly work submitted by the employee for consideration by the P&B. Sometimes the personal file will include one or more containers of books and other scholarly work. **No materials may be placed in the employee's personal personnel file until he/she has been given the opportunity to read the contents of such material and attach any comments he/she wishes.** Employees are strongly encouraged to examine their personal files each academic year. If an employee has questions about the presence of an item in his/her personal file, he/she should immediately contact the college Labor Designee.

Article 19.3 of the Agreement governs the administration file, and provides that it "shall contain only such materials requested by the unit of The City University or supplied by the employee in connection with the employee's employment, promotion or tenure." The Agreement further provides that the administration file "shall be available only to the committee and individuals responsible for the review and recommendation of the employee with respect to appointment, reappointment, promotion or tenure" — that is, the administration file shall *not* be available for review by the employee. The administration file generally contains such materials as confidential outside letters of recommendation sought by the department in connection with an employee's candidacy for appointment, reappointment with tenure, and promotion, as well as the chairperson's report. Not making such material available to the employee ensures outside evaluators' candor in their assessment of the employee's record.

Generally speaking, the P&B committee should not consider any materials outside of those contained in the employee's personal and administration files, as described above. If any member of the P&B committee becomes aware of any extraneous information or materials, such as a complaint about an employee not contained in the personnel file, he or she should immediately bring the matter to the attention of the department chairperson, who should contact the college's Labor Designee. The General Counsel's office is also available for consultation in connection with any such matter.

5. Communicating the P&B Committee's Action to the Candidate

Under Bylaw section 9.2, the action of a departmental P&B committee shall be communicated to the candidate by the department chairperson, and under Bylaw section 8.12, the action of the college P&B committee shall be communicated to the candidate by the President or his/her designee. In neither case should any reason be given for a negative recommendation. Although the Bylaws do not so require, it is preferable that the committees' action be communicated to the candidate *in writing* so that there is a written record of each committee's actions.

While the result of the committee's vote must be communicated to the candidate, the vote count itself should never be disclosed, either to the candidate or to others.

6. Conveying the P&B Committee's Recommendations

The affirmative recommendations of the departmental P&B committee are made to the college-wide P&B committee by the department chairperson, after consultation with the President, as to appointments, reappointments, and reappointments with tenure (Bylaw sections 9.7 and 9.8). Under Bylaw section 9.8 (Plan No. Two), no final action of a departmental committee with regard to promotions shall be taken without consultation with the President. Under Bylaw sections 9.7 and 9.8, a minority of the departmental P&B committee may submit a minority recommendation to the college-wide P&B committee. There is no provision for the submission of a majority report. The recommendations of the college P&B committee are submitted to the President (Bylaw section 8.12).

B. DEPARTMENT ELECTIONS OF CHAIRPERSONS AND P&B MEMBERS

1. Eligibility to Vote

All members of the instructional staff who have faculty rank³ as of the date of the election are eligible to vote for department chairpersons and department P&B committee members. All persons who are employed full-time on an annual salary basis in titles on the permanent instructional staff, except college laboratory technicians, have faculty rank. Generally, those with faculty rank are in tenure-bearing lines in the titles of professor, associate professor, and assistant professor. At some colleges with nursing programs, there are also faculty in the tenure-bearing title of instructor (nursing science), who also have faculty rank.

In order to cast a vote, a faculty rank member must be physically present at the P&B committee meeting. There is no proxy or absentee voting permitted.

Instructional staff with faculty status⁴ do not have the right to vote in departmental elections. This means professors, associate professors, and assistant professors are generally the only ones entitled to vote. Thus, instructors, lecturers, college laboratory technicians, higher education officer (HEO) series employees, substitutes, and visiting titles are not eligible to vote

³ Bylaw section 8.1 (“Definition of Faculty Rank”) provides:

The presidents, vice presidents, deans, associate and assistant deans, the business managers and all persons who are employed full-time on an annual salary basis in titles on the permanent instructional staff, except college laboratory technicians, shall have faculty rank. All persons having faculty rank shall have the right to vote both in the faculty of which they are members and in their respective departments provided, however, that they have not received notice of non-reappointment, or submitted a resignation. A person with faculty rank who is retiring shall retain his/her voting rights during his/her last year of service....

⁴ Bylaw section 8.2 (“Definition of Faculty Status”) provides:

Persons employed in the titles of instructor or lecturer (full-time) who have been reappointed on an annual salary basis for a third or later year of continuous full-time service shall have faculty status. All persons having faculty status shall have such voting rights as they are entitled, provided, however, that they have not received notice of non-reappointment, or submitted a resignation. A person with faculty status who is retiring shall retain his/her voting rights during his/her last year of service.

in elections for department chairpersons or department P&B committee members. Even certificated lecturers are not entitled to vote, unless your college has a bylaw waiver or a governance plan provision so providing.

Faculty members who are on leave of absence or on sabbatical retain their voting rights in their department elections. As with all other faculty, they must be physically present to vote. A faculty member who has submitted notification of retirement shall be eligible to vote prior to beginning Travia (retirement) leave.

Individuals in the following titles or with the following status are not eligible to vote:

- a faculty rank member (professorial title) who has received notice of non-reappointment;
- a faculty rank member (professorial title) who has submitted a resignation;
- a faculty rank member who is on Travia (retirement) leave (although such faculty member does retain the right to vote during the last year of actual service, prior to commencing the Travia leave);
- a college president, vice-president, dean, associate dean, or assistant dean (Executive Compensation Plan employees are disenfranchised by Section F.3 of the Terms and Conditions of Employment for the Executive Compensation Plan, which also states they shall not be figured in the calculation of the number of votes required to be elected).

**2. Determination of Number of Votes Needed to be Elected
As Department Chairperson or Member of the Department P&B Committee**

Elections of department chairpersons or members of department P&B committees are determined by a majority vote of all faculty rank members in the department. This means an affirmative vote of a majority of the whole number of faculty rank members, regardless of leaves of absence or abstentions. A majority is measured by one more than half of all department members holding faculty rank who are eligible to vote. However, faculty rank members who are in the Executive Compensation Plan should not be counted.

Voting should continue until someone is elected. If necessary, the elections meetings should be adjourned and continued at a subsequent date or time. Tie votes are resolved by action of the College President (Bylaw section 9.9).

Voting is conducted by secret ballot (Bylaw section 9.2).

Departmental elections are held during the first full week of May, and the winners take office on July 1st. The term of office is three years, and the elections should be on a staggered schedule over the three years. (Bylaw section 9.1(b).)

3. Eligibility to Serve as Chairperson

In order to be eligible to serve as department chairperson, one must be a tenured professor, associate professor, or assistant professor, except in departments less than seven years old. It is acceptable if the chairperson has been approved by the Board of Trustees for tenure effective the following September 1. (Bylaw section 9.1(b).)

4. Eligibility to Serve as a Member of the Department Personnel and Budget Committee

The department P&B committee is composed of five members, including the department chairperson. All five members, including the chairperson, must have faculty rank, if possible. Four of the members must be tenured, unless there are fewer than four tenured faculty members in the department. It is acceptable if the candidate has been approved by the Board of Trustees for faculty rank or tenure effective the following September 1. Therefore, all five members must have faculty rank, and four of the five must be tenured, unless there are insufficient numbers in the department. (Bylaw section 9.1(e).)

If the department has fewer than five faculty members with faculty rank, then department members with faculty status may be elected to serve on the department P&B committee. If the department does not have five members with faculty rank or faculty status, then the principle of having five faculty members on the department P&B committee should still be fulfilled. The remaining members may be elected from instructors or lecturers without faculty status. However, even if faculty status members, or members without faculty rank or status, are elected to serve on the departmental P&B, they are *not* eligible to vote in the elections. Only faculty rank members may vote in departmental elections. Eligibility to vote and eligibility to serve are different.

In the event that a department has fewer than four tenured faculty members, the college president, after consultation with the departmental faculty, shall appoint an ad hoc committee to make recommendations on tenure appointments in lieu of a departmental P&B committee (Bylaw section 9.1(e).)

If there are only five or fewer faculty rank members in a department or four or fewer tenured members, then those faculty rank and tenured members will automatically be placed on the P&B committee, but an election should still be held for the three-year term. If they do not receive a majority vote, they will serve anyway, but only until there are additional faculty rank or tenured members, in which case an election should be held for the remaining years of the term. This is consistent with the requirement that all five members have faculty rank and four have tenure, including the chairperson.

A faculty rank member who does not wish to serve is not required to serve on the department P&B committee, even if his or her failure to serve results in an insufficient number of faculty rank members to fill out the committee. The Bylaws provide for an election process, which implies that one must choose to run and serve. Since there is an element of voluntariness in this, a faculty rank member may not be required to serve. The declination to serve, however, should be in writing.

A department P&B committee member who takes a leave of absence or is on sabbatical leave may continue to serve as a member, unless the faculty member also takes a leave of absence from the committee. It would be advisable to ask department P&B members who apply for a leave of absence whether they intend to fulfill their duties on the department P&B committee while on a leave. If the college so desires, it may require as a condition of granting a permissible leave that the faculty member also agree to a leave of absence from committee membership, where it is reasonable to believe the faculty member will not be able to regularly attend P&B meetings (*e.g.*, out of town, illness, etc.). An interim member may then be elected.

Any member of a departmental P&B committee who receives notice of non-reappointment or who resigns loses his/her voting membership on the department P&B committee, and a new member should be elected as soon as possible to fill the unexpired portion of the term. Such faculty members, upon notification of non-reappointment or submission of a resignation, automatically lose their right to vote both in the faculty of which they are members and in their respective departments (Bylaw sections 8.1 and 8.2). Loss of voting rights in the department includes voting on departmental committees.

* * *

If you have any additional questions, please feel free to contact this office or the Office of Faculty and Staff Relations.

cc: Chancellor's Cabinet
Chief Academic Officers
Chief Administrative Officers
Chief Student Affairs Officers
Legal Affairs Designees
Labor Designees
Personnel Directors