

Academic Senates Have Role In Designing Hiring Policies

Focus Column

Administrative Law

By Daniel Lee Jacobson

In the recent case of *Irvine Valley College Academic Senate v. Board of Trustees of the South Orange County Community College District*, 129 Cal.App.4th 1482 (2005), the 4th District Court of Appeal decided that the academic senates of the state's community colleges have "a role equal to the district's in developing and adopting faculty hiring policies."

Although this substantive conclusion is interesting and important, in order to reach that substantive conclusion the court had to decide a standing issue; the decision on that standing issue necessarily led the court to observations and conclusions as to the legal character of the senates. This article reveals that legal character through the lens of the *Irvine Valley College* case.

Education Code Section 87360 says in relevant part that "hiring criteria, policies, and procedures for new faculty members shall be developed and agreed upon jointly by representatives of the governing board, and the academic senate, and approved by the governing board." The "agreed upon jointly" language was the sticking point between the South Orange County Community College District's Board of Trustees and the academic senates at the two colleges that the district operates.

At a relatively early point in the trial-court proceedings, the court ruled that the board had adopted hiring policies that had not been "agreed upon jointly" by the board and the senates. The trial court blocked implementation of those hiring policies until the senates were afforded "a real and meaningful opportunity to participate" in the hiring policy adoption process.

The board and the senates then made what the trial court found to be a good-faith attempt to agree on revised hiring policies, but they remained at loggerheads on some key points. The trial court ruled that the Legislature did not intend to give academic senates what the trial court called "a de facto veto or [the] ability to frustrate reform."

The trial court decided that, so long as the senates were given a "meaningful opportunity to participate in the process," the statute was satisfied. The senates appealed, claiming that the statute required actual concurrence by the senates in the hiring policies adopted.

The district's first line of defense was an argument that called into question the existence of community college academic senates as entities separate from the districts that employ their members. The board argued that, without a separate identity, the senates lacked existence as a legal entity and thus lacked standing to sue.

The court began its standing analysis by noting that an essence of Code of Civil Procedure Section 369.5 is that "[a] body need not be formally organized to have standing; unincorporated associations may sue and be sued." The court observed that the Legislature has recognized the existence of community college senates by giving those senates specific responsibilities.

To prove its point, the court cited Education Code Section 87359, which is another statute giving local academic senates the right to "agree[] upon jointly" hiring policies in a situation different from that involved in *Irvine Valley College*, and Education Code Section 87358.

The court's reference to Section 87358 may not have been on the mark because, although that statute requires that "[t]he board of governors shall periodically designate a team of

community college faculty ... [and others] to review ... [the application of certain district policies]," the statute never explicitly says anything about academic senates as entities.

The court cited Code of Regulations Title 5, Section 53200 for the proposition that community college academic senates "represent the faculty with respect to academic and administrative matters." Section 53200 says that a community college's academic senate's "primary function, as the representative of the faculty, is to make recommendations to the administration of a college and to the governing board of a district with respect to academic and professional matters."

The court also cited Code of Regulations Title 5, Section 53203(a), which requires the following: "The governing board of a community college district shall adopt policies for appropriate delegation of authority and responsibility to its college and/or district academic senate. Among other matters, said policies, at a minimum, shall provide that the governing board or its designees will consult collegially with the academic senate when adopting policies and procedures on academic and professional matters. This requirement to consult collegially shall not limit other rights and responsibilities of the academic senate which are specifically provided in statute or other Board of Governors regulations."

Code of Regulations Title 5, Sections 53200 and 53203, in turn, rely for authority to a great degree on Education Code Sections 70901 and 70902. Section 7091 states at 70901(b)(1)(E) that the state Community College Board of Governors must establish standards to ensure "the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards."

Section 70902(b)(7) uses the exact quoted language but uses that language to impose on each local district board of trustees the obligation to vest such right in the local academic senate.

Note the last sentence of Code of Regulations Title 5, Section 53203(a): "This requirement to consult collegially shall not limit other rights and responsibilities of the academic senate which are specifically provided in statute or other Board of Governors regulations." Although this sentence could fairly be read to say that the "requirement to consult collegially" was not meant to cramp an academic senate's statutorily or otherwise bestowed authority, the *Irvine Valley College* court read the sentence as recognition of the fact that, "[i]n addition to consulting and advising, an academic senate may have other 'rights and responsibilities ... which are specifically provided in statute.'"

Although the court seemed to find the last sentence of Code of Regulations Title 5, Section 53203(a) to be a power base or the recognition of a power base that lends credibility to the idea that community college academic senates are separate legal entities, the court probably did not have to make such a finding.

The Legislature has plenary power to do whatever it wants to do, within constitutional constraints, which certainly would include the grant of power to academic senates. See Civil Code Section 22.2; *Lowman v. Stafford*, 226 Cal.App.2d 31 (1964); *People v. Hickman*, 204 Cal. 470 (1928).

If the court were to find, as the court eventually did, that the language of the statute over which the parties were arguing was embedded with the right for the academic senates to bring suit, then the statute itself would manifestly allow the senates' standing. The court seemed to have viewed the last sentence of Regulations Title 5, Section 53203(a) in the way that it did to counter the board's argument, "that the decision to consult with the Senates on hiring policy is a matter requiring the District's agreement or is otherwise beyond the scope of the Senates' legal authority."

Perhaps the court was somewhat insecure in the power of the words of the statute alone and wanted to bolster those words with observations and conclusions about the senates' separate legal existence. For whatever reason, *Irvine Valley College* has given an insight into the legal character of California community colleges' academic senates.

What conclusions can be drawn from that insight and from this author's independent research? Although the *Irvine Valley College* court never explicitly deemed the senates unincorporated associations, it recognized them as such when it observed that Code of Civil Procedure Section 369.5 allows that "[a] body need not be formally organized to have standing; unincorporated associations may sue and be sued."

This recognition and the other observations and conclusions made by the court support the

notion that the community college academic senates are unincorporated associations, which are explicitly recognized by the Legislature and which have specific tasks assigned to them by law.

Education Code Section 70902 mandates "the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards." In an interesting twist, Code of Regulations Title 5, Section 53200, which gets much of its authority from Section 70902, makes an academic senate's internal "primary function" "to make recommendations to the administration of a college and to the governing board of a district with respect to academic and professional matters."

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