

**IN SUPPORT OF THE MOTION BY PROFESSOR BRUCE JONES (DISTRICT 1)
REGARDING THE FORMATION OF AN AD HOC EXTERNAL REVIEW COMMITTEE
OF THE ATHLETIC BOARD**

Submitted by:

Mary Anderson, senator, Geology and Geophysics

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Following discussion of the report submitted by the Athletic Board (Faculty Document 2114, "Role of the Athletic Board") during the 6 April 2009 Faculty Senate meeting, Professor Bruce Jones made a motion to form an ad hoc external committee to review the Athletic Board. The motion was made in response to concerns about the current operating procedures of the Athletic Board as discussed in Faculty Document 2114.

The Athletic Board is a "committee of the faculty" under Chapter 6 of *Faculty Policies and Procedures* and serves as the representative of the faculty and the Faculty Senate in the governance of intercollegiate athletics at UW-Madison. Faculty Document 2114, which was unanimously approved by the Athletic Board, concludes that the board does not have the authority of shared governance that is stipulated in FPP 6.26. Hence, the board's current operating procedures are not in accord with FPP 6.26. and, indeed, Faculty Document 2114 implies that they cannot be in accord with FPP. We find no evidence to support this conclusion. Furthermore, the board's surrender of its rights to shared governance, if approved by the Faculty Senate, would set a dangerous precedent that would seriously undermine the long and strong tradition of shared governance at UW-Madison.

We, therefore, reject Faculty Document 2114 and support the motion for an ad hoc external committee to review the operating procedures of the Athletic Board and bring them into accord with FPP 6.26.

Below we present the case for faculty authority over intercollegiate athletics at UW-Madison.

I. Chapter 6 of FPP

Chapter 6 deals with "Committees of the Faculty;" and Section 6.26. of FPP covers the Athletic Board (AB). Section 6.26.D. discusses the "Functions" of the Athletic Board. It says that the AB "exercises the authority of the faculty over intercollegiate athletics, subject to the review, direction and control of the Faculty Senate and of the faculty itself." The Athletic Board has the responsibility and authority to take all action appropriate to the supervision of the intercollegiate athletic program . . ." Section 6.26.D.6. further states that one of the board's functions is "participating actively in the search-and-screen process for head coaches and senior departmental administrators; approving the employment contracts of such persons. The board initiates personnel recommendations, which are subject to the approval of the chancellor and the Board of Regents; if such recommendations are disapproved, the authority to make further recommendations reverts to the Athletic Board." (Emphasis added)

II. Faculty Document 2114

The above language clearly gives the AB the authority to approve employment contracts of coaches and key department administrators. Faculty Document 2114 does not challenge this interpretation. Rather, it claims that intercollegiate athletics and university governance have evolved since the 1930s, when the original rules governing the AB were promulgated, and that FPP 6.26.D. is possibly inconsistent with state statutes. On this basis Faculty Document 2114 would limit the authority of the AB to an advisory,

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consultative capacity, except in matters directly relating to student academic matters. In justifying this position, Faculty Document 2114 points to practicalities, unspecified historical developments, and state statutes—in particular Wis. Stat. Sec. 36.09, which establishes the Board of Regents as the overall governor of the university:

The “authority of the faculty” referred to must be understood in the context of the chancellor being ultimately responsible for the institutional control of athletics. State law recognizes that chancellors are expected to consult with faculty in discharging their responsibilities¹³ and recognizes the role of the faculty in governance:

The faculty of each institution, subject to the responsibilities and powers of the board, the president and the chancellor of such institution, shall be vested with responsibility for the immediate governance of such institution and shall actively participate in institutional policy development. As such, the faculty shall have the primary responsibility for academic and educational activities and faculty personnel matters . . . § 36.09(4), Wis. Stats.

Institutional arrangements for the governance of athletics need to match authority with accountability. The chancellor and the athletic director are accountable for the athletics program. The chancellor is accountable, by virtue of the delegation of authority from the regents, and by conference and NCAA rules. The athletic director is accountable, by virtue of the delegation from the chancellor, for day-to-day leadership and management. (UW-Madison Fac Doc 2114 - 6 April 2009, p. 3)

The implication is that state statutes invest the authority over Athletic Department personnel decisions with the regents, who in turn have delegated this authority to the chancellor to apply in a manner that he or she believes is suited to institutional needs and responsibilities. (This application would typically include substantial deference to the athletic director.) But this interpretation of state law conflicts with FPP 6.26., as quoted above.

At the April 2009 senate meeting, the chair of the Athletic Board and the University Counsel stated that state law is ambiguous about the authority of the Athletic Board to assume the authority provided in FPP 6.26. Given the ambiguity, they articulated an interpretation that the regents delegated the sole authority over non-academic athletic matters to the chancellor and the athletic director.

III. Our Interpretation

There is clear evidence that the regents have delegated authority over intercollegiate athletics, including matters pertaining to athletic department personnel, to the faculty. We discuss this evidence below.

The Wisconsin Administrative Code and FPP

The Wisconsin Administrative Code is the law of the state of Wisconsin. UWS 2.02 of the Wisconsin Administrative Code is applicable to our issue. Its provision on delegation reads: “**UWS 2.02. Delegation.** Rules and procedures developed pursuant to chs. UWS 3, 4, 5, 6, 7, and 8 by the faculty of each institution [e.g., FPP at UW-Madison] shall be forwarded by the chancellor to the president [of the Board of Regents] and by the president to the board for its approval prior to their taking effect. Such policies and procedures, unless disapproved or altered by the regents, shall be in force and effect as rules of the regents.” (Emphasis added)

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A key question before us is whether FPP Chapter 6 (as well as other chapters of FPP) is best construed as having been promulgated pursuant to a delegation of authority by the Board of Regents (BOR) under UWS 2.02, just quoted. Sec. 36.09(1)(a) Wis. Stats. gives the BOR overall authority regarding all system matters. Accordingly, no one may assume authority over university matters unless this authority is delegated to them in some form by the regents, or by some other independent source of law.

There is no evidence that we know of that indicates the BOR has ever rejected parts of FPP, including section 6.26., which has been in existence since 1978, and the background history we provide below shows that it is consistent with institutional history. In addition, we find no independent legal authority that gives this authority to the chancellor or the athletic director as opposed to the Athletic Board.

If FPP is indeed based on a delegation of authority by the Board of Regents, the specific question then becomes whether the chancellor of each institution has statutory authority specifically, independently, and exclusively of BOR authority to approve and renew contracts of various employees of athletic departments. The general statutory authority and duties of chancellors is found in Sec. 36.09(3) Wis. Stats.:

The chancellors shall be the executive heads of their respective faculties and institutions and shall be vested with the responsibility of administering board policies under the coordinating direction of the president and be accountable and report to the president and the board on the operation and administration of their institutions. Subject to board policy, the chancellors of the institutions in consultation with their faculties shall be responsible for designing curricula and setting degree requirements; determining academic standards and establishing grading systems; defining and administering institutional standards for faculty peer evaluation and screening candidates for appointment, promotion and tenure; recommending individual merit increases; administering associated auxiliary services; and administering all funds, from whatever source, allocated, generated or intended for use of their institutions.

This provision gives no specific, independent, and exclusive authority to chancellors to approve and renew contracts of Athletic Department personnel.

Delegation of authority by the BOR is addressed in Sec. 36.09(1)(f) Wis. Stats.:

The board shall delegate to each chancellor the necessary authority for the administration and operation of the institution within the policies and guidelines established by the board. The board may also delegate or rescind other authority to chancellors, committees of the board, administrative officers, members of the faculty and students or such other groups as it deems appropriate.

Assuming that the BOR approved FPP 6.26. (an entirely reasonable assumption based on the process outlined in UWS 2.02, which deals with delegation from the BOR—see above), the bottom line is this: FPP 6.26. is neither inconsistent with nor ambiguous in relation to Section 36 of state law. In fact it constitutes a delegation of lawful authority by the BOR to the UW-Madison Athletic Board under Sec. 36.09(1)(f) Wis. Stats.—not to the chancellor—to approve and renew approval of contracts with Athletic Department staff. Nor does the rule grant any subsequent review authority to the chancellor. Therefore, in accordance with FPP 1.20.B., the final approval of personnel decisions lies with the Athletic Board. (FPP 1.20.B. says: “In cases where authority to act without subsequent review has been delegated by the Board of Regents to the faculty, that authority is exercised in accordance with these rules. In cases where the function of the faculty is to formulate recommendations to the chancellor or the Board of Regents, the authority referred to herein is for the formulation of such recommendations.”)

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The Faculty Senate and/or the Athletic Board possess this power unless it is “rescinded” by the BOR. If the AB, chancellor, athletic director, or anyone else dislikes or would eschew this authority, they should petition the BOR to rescind it. Of course, the Faculty Senate could also appear before the regents to oppose such rescission or similar action.

Conclusion Regarding the Law

FPP rules are, in effect, the rules of the BOR, as delegated according to the provisions of UWS 2.02 and Sec. 36.09(1)(f) Wis. Stats. The latter is a Wisconsin statute granting authority to the BOR to delegate that part of their authority that they deem appropriate to “members of the faculty.” Because the BOR received and approved the FPP language at issue (including FPP 6.26.D.2.), FPP has become, in essence, the literal word of the BOR themselves. Indeed, the language of FPP 6.26.D.2. specifically subordinates the power of the BOR and chancellor to the Athletic Board by actually naming both the BOR and the chancellor in the section. This language constitutes neither ambiguity nor a drafting error or oversight.

The language in FPP 6.26. is clear and unambiguous: “The Board initiates personnel recommendations, which are subject to the approval of the chancellor and the Board of Regents; if such recommendations are disapproved, the authority to make further recommendations reverts to the Athletic Board.” In other words, in the case of Athletic Department personnel, if the recommendation of the AB is rejected, or vetoed, the chancellor has no power to independently make his or her own choice. Personnel recommendations are the exclusive prerogative of the AB, subject only to chancellor veto.

Thus, the rules of FPP remain authoritative unless the BOR chooses to change them. Such action has not occurred, and Faculty Document 2114 provides no such examples. If the BOR wishes to change the rules that affect FPP, it is within its power to do so. But the Faculty Senate could fight such revision, if it so chooses. And we certainly do not believe that the senate should acquiesce in any *de facto* revision of FPP that falls short of constituting a formal action by the BOR, for the principle of shared governance should not be surrendered in this fashion.

Hence, state law is not ambiguous regarding the Board of Regent’s delegation of authority to the Athletic Board under UWS 2.02. But even if the law were ambiguous, such ambiguity should be decided in favor of the long tradition of AB authority that found its expression in FPP 6.26. This provision was not plucked out of the air but rather embodies the university’s long tradition of faculty shared governance. And, as we will now show, this tradition’s provenance extends to the very realm that is the subject of this debate.

IV. Some Pertinent Institutional History

1. The Formation of the Athletic Board in 1936.

Some pertinent history helps to illuminate the institutional reasoning behind FPP’s bestowal of authority on the Athletic Board. Faculty Document 2114 and its advocates at the April 2009 senate meeting maintained that the 1930s rules governing the Athletic Board were acceptable at that time because the coaches were faculty members—a status they no longer have. But the reason for the establishment of the Athletic Board had nothing to do with this issue; rather, the reforms were motivated over concern that the faculty retain its collective right to control all aspects of athletics on campus in order to protect the student athlete. The University Committee in the 1930s was concerned about erosion of faculty rights to governance and particularly worried over a proposal to replace the all-faculty Athletic Council with a board that included non-faculty members. A faculty-regents committee was formed to resolve issues about the membership and functions of the newly created Athletic Board. The resulting report was approved unanimously by the

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regents on March 10, 1936. The report states, in part, that the faculty has “primary jurisdiction . . . in respect to intercollegiate athletics.” Furthermore, “. . . in the administration of the affairs of the Department of Intercollegiate Athletics, including matters of budget and personnel, the power to initiate action is lodged in such Athletic Board.” (Emphasis added. See Chapter 9 “Intercollegiate Athletics (1928-1936)” pp. 81-82 in “Some Ferments at Wisconsin 1901-1947 Memories and Reflections” by G.C. Sellery, UW Press 1960.) On May 4, 1936, the full faculty of the university unanimously adopted a resolution affirming faculty control of athletics. The resolution, which is reproduced in full on p. 83 of Sellery’s book, states, in part, that “the faculty of the University of Wisconsin considers itself in control of the athletic affairs of this institution.” (Emphasis added). It is also worth quoting a summary of the controversy by John W. Jenkins, university historian:

During 1936 a long-standing conflict between the Board of Regents and the faculty over the control of intercollegiate athletics came to a head and found resolution. In the narrowest sense, the problem involved a power struggle within the Athletic Department between Drs. Spears and Meanwell, the athletic director and football coach, respectively. Charges and recriminations were rife and the regents finally decided to fire both of the men and hire fresh staff for the intercollegiate athletic program. The faculty-dominated Athletic Board—by Big Ten statute responsible for intercollegiate athletics—responded by tendering its resignation en masse, raising the genuine likelihood that Wisconsin would be ejected from the conference. It was not that the Athletic Board members disagreed with the regents about Spears and Meanwell; to the contrary, they apparently stood in virtual agreement. The issue had rather to do with traditional and appropriate faculty prerogatives at Wisconsin, and the time, after several years of inconclusive jousting between the regents and the faculty, had come to take a stand: the Athletic Board must recommend, while the regents will be limited to concurrence or rejection. And so along with his colleagues, Professor of Agricultural Economics Asher Hobson drew a line in the name of University Faculty integrity. Compromises ultimately emerged and resolutions passed, and at the heart of things was the affirmation by the regents of the faculty’s cherished rights and responsibilities.

(John W. Jenkins, *A Centennial History: A History of the College of Agriculture and Life Sciences at the University of Wisconsin-Madison*. College of Agricultural and Life Sciences, University of Wisconsin-Madison, 1991. pp. 114-5. See also E. David Cronon and John W. Jenkins, *The University of Wisconsin: A History, 1925-1945. Politics, Depression, and War*. Volume III. University of Wisconsin Press, 1994. pp. 253-69)

This historical precedent is significant because it shows the authoritative posture of the faculty at the time the AB was formed. In particular, this case provides background support for FPP 6.26.D.6., which states that the powers of the AB include “participating actively in the search-and-screen process for head coaches and senior departmental administrators; approving the employment contracts of such persons. The board initiates personnel recommendations, which are subject to the approval of the chancellor and the Board of Regents; if such recommendations are disapproved, the authority to make further recommendations reverts to the Athletic Board.” This section has a direct historical base of legal authority. Athletic Department hiring decisions are “initiated” by the AB. If the chancellor and/or the BOR do not approve, then the process starts over. Neither the chancellor nor the BOR has any independent right to make initial selections. These powers are solely the prerogative of the AB. One can speculate that FPP 6.26.D.6. was specifically drafted in response to the Spears-Meanwell incident of 1936 and in a fashion to make it crystal clear that the AB has the exclusive power to make initial selections, subject only to veto by the chancellor or the BOR.

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2. 1997 Faculty Senate Action Arising Over the Firing of the Soccer Coach

In 1997 the Faculty Senate faced issues similar to the issues before us today. Several faculty members were concerned about due process in the wake of the firing of UW-Madison's soccer coach after his team had won a national championship. In this case, the AB resisted what it considered undue senate oversight and interference in its decision making. In response to a motion passed by the Faculty Senate, the University Committee formed an ad hoc committee (the Fost Committee) to review the Athletic Board. In 1997, the AB did not question its own authority (as it does in Faculty Document 2114), but rather the nature and legitimacy of Faculty Senate oversight. The current situation is more serious because the AB has surrendered its rights to governance that are stipulated and granted by FPP 6.26. The 1997 case shows that the AB then asserted its institutional autonomy vis-à-vis other institutional bodies. Secondly, it shows that there is a recent precedent for the Faculty Senate to instruct the University Committee to form an ad hoc committee to review the operations of the AB.

V. NCAA Rules, Big Ten Policies, and FPP

Faculty Document 2114 also discusses NCAA Rules and Big Ten Policies. It interprets these provisions in a manner favorable to its conclusions about the secondary status of AB power and responsibility in controlling UW-Madison's participation in intercollegiate athletics. Page 3 of Faculty Document 2114 summarizes state law, NCAA rules and Big Ten policies. The summary concludes that all these sources "require institutional control and identify the chancellor as the party in whom the responsibility for control lies. Defining the role of the faculty in governing the Athletic Department must be done in the context of the chancellor's responsibility." But Faculty Document 2114's interpretation is inaccurate and incomplete, and it contradicts its own words regarding Big Ten Policies.

1. NCAA Bylaws. As Faculty Document 2114 says, NCAA Bylaw 6.1.1. seems to require chancellor control of intercollegiate athletics. "6.1.1. President or Chancellor. A member institution's president or chancellor has ultimate responsibility and final authority for the conduct of the intercollegiate athletics program and the actions of any board in control of that program." This paragraph appears to give final authority over intercollegiate athletics to the chancellor, who may then delegate authority in an appropriate fashion.

However, NCAA Bylaw 6.01.1.—which immediately precedes 6.1.1., and which Faculty Document 2114 also quotes—says something quite different: "6.01.1. Institutional Control. The control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself and by the conference(s), if any, of which it is a member. Administrative control or faculty control, or a combination of the two, shall constitute institutional control." (Emphasis added)

How can these two paragraphs and bylaws be reconciled? Note that Faculty Document 2114 ignores this conflict, choosing to emphasize the language of 6.1.1. in the end. But these bylaws need to be reconciled. The simplest way to reconcile these two bylaws is to distinguish responsibility for control from having control. One can "have responsibility for control" while delegating "actual control" to others. This arrangement reflects the practice at the university, and it is consistent with NCAA rules as we reasonably interpret them here.

It is odd to think that the NCAA would have an objection to the Athletic Board having actual control over intercollegiate athletics, for at least two reasons. First, NCAA Bylaw 6.01.1. states explicitly that "Administrative control or faculty control, or a combination of the two, shall constitute institutional control." Second, why would the NCAA be opposed to a long-standing tradition of faculty control at a

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school like UW-Madison, especially when the NCAA is dedicated to the model of the student athlete? (“The Big Ten Guiding Principles recognize ‘the transcendent priority of a student athlete’s academic collegiate experience. It places its highest value upon high academic values. The student athlete is student first, athlete second.’” Faculty Document 2114, p. 4).

2. Big Ten Policies. On page 3, Faculty Document 2114 contradicts itself. First, it says that the Big Ten has no rules regarding who is to control intercollegiate athletics. “The Big Ten Conference does not have rules as such but does publish a Statement of Principles, Priorities and Guidelines. Those principles recognize ‘the imperative of institutional control over intercollegiate athletic programs’ and address how the conference itself is governed. They do not specify how an institution is to meet its control responsibilities.” (Emphasis added)

But in the next paragraph, Faculty Document 2114 says: “To summarize: state law, NCAA rules, and Big Ten policies all require institutional control and identify the chancellor as the party in whom the responsibility for control lies. Defining the role of the faculty in governing the Athletic Department must be done in the context of the chancellor’s responsibility.”

The summarizing paragraph here contradicts the exact quotation from the previous paragraph. Here there is no need to try to reconcile the tension, for the second paragraph is simply mistaken. Accordingly, Big Ten rules are simply agnostic about what form institutional control of intercollegiate athletics takes.

VI. Conclusion

On pages 6 and 7, Faculty Document 2114 quotes from FPP 6.26.D.6. and 7. concerning the AB’s “role and responsibilities regarding personnel.” The document then goes on to list in some detail how the AB presently functions. (E.g., “The chancellor [not the AB] evaluates the athletic director and, as a courtesy, generally consults with the board;” also: “As to hiring, head coaches are appointed by the chancellor on the recommendation of the athletic director [not the AB].”)

Given what we have discussed above, we can draw or propose some important conclusions from this section of Faculty Document 2114, as well as its broader posture regarding FPP. Perhaps the AB has not been vigilant enough over time in protecting the fiduciary responsibility assigned it by FPP and state law to oversee intercollegiate athletics. Or perhaps it has simply exercised sound judgment in letting those who possess more expertise in athletics call the shots.

Regardless, it is clear that the AB’s support of Faculty Document 2114 is both mistaken and misguided. Prudence in the exercise of power and authority is not the same thing as the surrender of that very power and authority. Because of our respect for the long-standing principle of faculty control over intercollegiate athletics—which is essential to the realization of the student athlete ideal—the Faculty Senate should reject Faculty Document 2114.