

Discussion of Process to Remove a Committee Member

January 2011

Overview of this Report

This agenda item begins the discussion about a possible Commission policy and process with respect to the removal of a member of the Committee on Accreditation (COA), if it were ever to be necessary.

In December 2010, at the request of the Chair and Vice Chair of the Committee of Credentials (COC), the Commission took action to remove a member of the COC (see agenda item: <http://www.ctc.ca.gov/commission/agendas/2010-12/2010-12-7A.pdf>). In the absence of a precedent and policy, the Chair of the Commission and the Executive Director developed a procedure to handle the request.

The Commission is interested in considering the adoption of policies and procedures related to the removal of members of the COA and COC prior to the end of one's term, should there be a need to do so. The COA has been asked to consider this topic and to provide input on the development of a policy and a viable process for removal of a Committee member.

Staff Recommendation

This is an information item.

Background

The Committee on Accreditation and the Committee of Credentials (COC) are the only two Commission-appointed standing committees designated in California statutes. Education Code Section 44372 (d) provides the Commission with the responsibility of appointing members to the Committee on Accreditation. Section 44373 sets forth the membership, terms, and duties of the Committee on Accreditation. Section 44373 (b) states that the terms of members shall be set forth in the *Accreditation Framework*. Section 2 of the *Accreditation Framework* states the following:

4. The Commission appoints members of the Committee on Accreditation to four-year terms. A member may be re-nominated and re-appointed to a second term of four years. A member may serve a maximum of two terms on the Committee. Terms of appointment shall commence on July 1, or the date of the appointment, whichever is later, and shall expire on June 30.

While the terms of office for a member of the Committee on Accreditation are clear, there is no existing Commission policy or process for removal of a member of the Committee on Accreditation prior to the end of one's term. The only language related to removing a COA member is found in the COA Procedures Manual (Section 404) which allows for removal of a member due to missing, without sufficient cause, three consecutive meetings or four COA meetings in a calendar year,

Staff asks the COA to discuss several steps that could be taken to begin to address this issue. They include modification of the list of qualifications for COA membership, the development of rules of conduct for the COA, consideration of due process procedures, and modification of the *Commission's Policy Manual*.

Modification of List of Qualifications for COA Membership

The vacancies for COA were scheduled to be updated and available on the Commission's website in January 2011. Because of the need for the COA vacancies to be posted in January, staff modified the list of qualifications for membership on COA in all documentation announcing the vacancies. This modification includes language that is included in the list of qualifications for serving on the COC. These additions are:

- Maintain a fair and impartial attitude without bias or prejudice.
- Establish and maintain cooperative working relationships with other Committee members and staff.

These two qualifications have been added to the list of qualifications for COA membership as they are pertinent to the work of the COA. The COA may want to discuss any additional statements that should be added in the future to ensure individuals chosen for the COA have important attributes that are necessary to be effective, unbiased, and collaborative members of the COA.

Development of Rules of Conduct

One idea that has been suggested is that the COA develop and adopt general rules of conduct. This document would outline the general manner in which members should address issues and conduct business. Unlike formal parliamentary rules, these general rules of conduct would address such things as:

- Ensuring that each member of the COA represent the interest of education broadly and not their employing agency or institution
- The manner in which issues or concern with Committee processes, other Committee members, or staff are taken up – such as first within the Committee as a whole, then if not resolved, with the Chair of the COA and the Administrator of Accreditation. Then and only then if not resolved, with the Executive Director and/or Chair of the Commission.

Staff asks the COA to discuss the development of the rules of conduct at this meeting conceptually and to discuss examples of what should be contained in this document. This document would be nonbinding, however, would provide guidance to members of the COA on how to handle issues, particularly those of a sensitive or difficult nature. The rules of conduct could be incorporated into the *COA Procedures Manual*.

Due Process

Prior to its decision to remove a member of the COC in December 2010, the Commission requested information from the Commission's General Counsel regarding the Commission's authority with respect to removal of members of the COC and the important topic of due process. Although, as the appointing body, the Commission may remove any member of either Committee prior to the end of their term and due process is not a requirement, the Commission is interested in ensuring due process. Having a due process system in place will ensure a fair and

consistent system to address the possible removal of a Committee member. Appendix A includes the information provided to the Commission by the Commission's legal staff in December 2010. In addition to providing general information about due process, it also provides information about the due process procedures in place at several state agencies and governing bodies.

The COA has been asked to provide comment that will inform the development of the Commission's due process procedures for the removal of a Committee member.

Modification of Commission Policy Manual

At a Commission meeting later this spring, the Commission's Executive Committee will be discussing modifications to the Commission's Policy Manual. As more information is made available this spring, it will be provided to the COA.

Next Steps

Based on the COA discussion, staff will bring another agenda item on this topic to the COA March 2011 meeting for further discussion.

Memorandum

Date : December 2, 2010

From : Mary Armstrong
General Counsel

Subject : Legal Questions

1. **Does the Commission have the power to remove a COC member and, if so, is due process required when considering the removal of a member of the COC Credentials?**

Answer: The Commission clearly has the power to remove a COC member for cause. The power to appoint COC members is given by statute to the Commission as is the power of the Commission to supervise the COC (Education Code sections 44240, 44242). The only limitation placed on the Commission's power over the COC is found in section 44240 which prohibits the Commission from fixing the term of a COC member for longer than two years (although multiple terms are not prohibited). Although the Policy Manual is currently silent regarding the removal of a COC member at the request of the Chair of the COC, section 502 of the Policy Manual currently provides that an absence that causes undue hardship to the work of the Committee of Credentials *may be cause for removal* from the Committee by the Commission. Section 502 does not include a process if such a removal occurs. Pursuant to section 103 of the Policy Manual the Executive Committee can, at any time, recommend to the Commission that it enact, amend or repeal any provision of the policy manual at any regular meeting of the Commission. The Commission can enact and amend the Policy Manual by an affirmative vote of a majority of members. Thus, the lack of a current policy regarding removal of a COC member under other circumstances can be cured by action of the Commission at the same meeting where the removal is agendized.

Due Process is provided through statute, regulation, practice or policy. When none of these is available, we turn to due process as originally conceived in English Common Law and adopted in the United States Constitution for guidance. Simply put due

process is a fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property.

It is well settled that in order to have a right to procedural due process when a government action is being taken there must exist some entitlement or right to what is being taken. In the case of a volunteer, a person is performing services for civic, charitable, or humanitarian reasons. The volunteers are not paid a salary although they may receive expenses, reasonable benefits, a nominal fee or any combination of these without losing their volunteer status. An example of employees who are entitled to due process as compared to those who are not is the comparison between a newly hired teacher and a tenured teacher. Both work under a contract, however pursuant to the Education Code in most cases teachers in their first two years of employment are "at will" and may be terminated without due process through non-re-election. Teachers who have reached tenure are entitled to the statutory due process provided by the Education Code.

Due Process is not a legal requirement when removing a COC member because any person holding the position is a volunteer with no vested right to the position. Even so, in the instant matter a process was put in place that fully meets the requirements of common law due process. The process that has been followed has afforded Mr. Kauffman due process, as follows: (1) he was NOTIFIED of the charges against him; (2) he was given alternatives and provided an opportunity to RESIGN or RESPOND or both; and (3) if he chose not to resign he was offered an opportunity to be HEARD at a public meeting of the Executive Committee. Thus, although not required, the fundamental requirements of procedural due process have been met in this matter.

2. Do other similar Committees have a process for removal of members?

Answer: Staff surveyed several state agencies. Some agencies have a procedure in place, others refer to Robert's Rules of Order, and still others are governed by statutes specifically allowing removal for cause. Some of the agencies that have a procedure do not provide for due process in their procedure while others do. We recommend establishing a procedure in the Commission's policy manual which would clarify the process for removal of COC, COA and panel members appointed by the Commission in the future.

The following is a summary of the research that was done to reach the above answers:

DUE PROCESS

Excerpt from Legal Treatise on Due Process

The constitutional guarantee of due process of law, found in the Fifth and Fourteenth Amendments to the U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property. The Due Process clause of the Fifth Amendment, ratified in 1791, asserts that no person shall "be deprived of life, liberty, or property, without due process of law." This amendment restricts the powers of the federal government and applies only to actions by it. The Due Process Clause of the Fourteenth amendment ratified in 1868, declares, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" (§ 1). This clause limits the powers of the states, rather than those of the federal government.

The Due Process Clause of the Fourteenth Amendment has also been interpreted by the U.S. Supreme Court in the twentieth century to incorporate protections of the Bill of Rights, so that those protections apply to the states as well as to the federal government. Thus, the Due Process Clause serves as the means whereby the Bill of Rights has become binding on state governments as well as on the federal government.

The concept of due process originated in English Common Law. The rule that individuals shall not be deprived of life, liberty, or property without notice and an opportunity to defend themselves predates written constitutions and was widely accepted in England. The Magna Charta, an agreement signed in 1215 that defined the rights of English subjects against the king, is an early example of a constitutional guarantee of due process. That document includes a clause that declares, "No free man shall be seized, or imprisoned ... except by the lawful judgment of his peers, or by the law of the land" (ch. 39). This concept of the law of the land was later transformed into the phrase "due process of law." By the seventeenth century, England's North American colonies were using the phrase "due process of law" in their statutes.

The application of constitutional due process is traditionally divided into the two categories of Substantive Due Process and procedural due process. These categories are derived from a distinction that is made between two types of law. Substantive Law creates, defines, and regulates rights, whereas procedural law enforces those rights or seeks redress for their violation. Thus, in the United States, substantive due process is concerned with such issues as Freedom of Speech and privacy, whereas procedural due process is concerned with provisions such as the right to adequate notice of a lawsuit, the right to be present during testimony, and the right to an attorney.

The phrase "procedural due process" refers to the aspects of the Due Process Clause that apply to the procedure of arresting and trying persons who have been accused of crimes and to any other

government action that deprives an individual of life, liberty, or property. Procedural due process limits the exercise of power by the state and federal governments by requiring that they follow certain procedures in criminal and civil matters. In cases where an individual has claimed a violation of due process rights, courts must determine whether a citizen is being deprived of "life, liberty, or property," and what procedural protections are "due" to that individual.

The Bill of Rights contains provisions that are central to procedural due process. These protections give a person a number of rights and freedoms in criminal proceedings, including freedom from unreasonable SEARCHES AND SEIZURES; freedom from **double jeopardy**, or being tried more than once for the same crime; freedom from self incrimination, or testifying against oneself; the right to a speedy and public trial by an impartial jury; the right to be told of the crime being charged; the right to cross-examine witnesses; the right to be represented by an attorney; freedom from; cruel and unusual punishment and the right to demand that the state prove any charges beyond a reasonable doubt. In a series of U.S. Supreme Court cases during the twentieth century, all of these rights were applied to state proceedings.

Procedural due process also protects individuals from government actions in the civil, as opposed to criminal, sphere. These protections have been extended to include not only land and personal property, but also entitlements, including government-provided benefits, licenses, and positions. Court decisions regarding procedural due process have exerted a great deal of influence over government procedures in prisons, schools, civil suits, and public employment.

Education Code sections 44240 and 44242

44240. The commission shall appoint a Committee of Credentials, consisting of seven persons for terms fixed by the commission but not to exceed two years. The committee shall include:..

44242. The Committee of Credentials shall be under the direct supervision of the commission.

WHAT DO OTHER AGENCIES DO?

State Compensation Insurance Fund

Board of Directors (Appointed variously by the Governor, Speaker, and Senate Rules Committee)

By-Laws: Section 22. Removal. *Any committee member may be removed, with or without cause, by the Chairperson of the Board or by a majority of the appointed number of Voting Members*

General Provision of the Business and Professions Code regarding Board Members of the various Boards, Committees and Commission under the umbrella of the Department of Consumer Affairs

Business and Professions Code section 106. *The Governor has power to remove from office at any time, any member of any board appointed by him for continued neglect of duties required by law, or for incompetence, or unprofessional or dishonorable conduct. Nothing in this section shall be construed as a limitation or restriction on the power of the Governor, conferred on him by any other provision of law, to remove any member of any board.*

Dental Hygiene Committee of California Board of Dental Examiners

Business and Professions Code section 1903. (a) (1): The committee shall consist of nine members appointed by the Governor. Four shall be public members, one member shall be a practicing general or public health dentist who holds a current license in California, and four members shall be registered dental hygienists who hold current licenses in California. Of the registered dental hygienists members, one shall be licensed either in alternative practice or in extended functions, one shall be a dental hygiene educator, and two shall be registered dental hygienists. No public member shall have been licensed under this chapter within five years of the date of his or her appointment or have any current financial interest in a dental-related business....

- (b) Except for the initial term, members of the committee shall be appointed for a term of four years. All of the terms for the initial appointments shall expire on December 31, 2011.
- (c) The committee shall elect a president, a vice president, and a secretary from its membership.
- (d) No person shall serve as a member of the committee for more than two consecutive terms.
- (e) A vacancy in the committee shall be filled by appointment to the unexpired term.
- (f) Each member of the committee shall receive a per diem and expenses as provided in Section 103.

- (g) *The Governor shall have the power to remove any member from the committee for neglect of a duty required by law, for incompetence, or for unprofessional or dishonorable conduct.*
- (h) The committee, with the approval of the director, may appoint a person exempt from civil service who shall be designated as an executive officer and who shall exercise the powers and perform the duties delegated by the committee and vested in him or her by this article.

Commission on Judicial Nominees Evaluation of the State Bar

Membership and Terms: The Commission, its chair, and its vice-chair are appointed by the Board of Governors and serve at the pleasure of the Board...(Rule 7.2)

Removal of commissioners: *The Board may remove from office any commissioner whom the commission chair has identified in a report to the President of the Board as failing to perform assigned duties or regularly attend scheduled meetings. (Rule 7.4)*

Business Committee of the Rincon San Luiseno Band of Mission Indians Setting Forth Regulations, Policies and Procedures for Appointment and Removal of Delegates Ordinance No. 94-03

Section 11.6 REMOVAL OF MEMBERS AND VACANCY

All appointees serve at the pleasure of the Business Committee. All decisions of the business Committee regarding appointments and terminations shall be final. Any appointee's term of representation may be terminated by majority vote of the Business Committee. Termination of appointments and appointees may be with or without cause, and the appropriate advisory body shall be notified in writing of removal.

State Council on Developmental Disabilities (SCDD) By-Laws

Section 7. Removal from Office

Action to remove a member officer shall be in accordance with the following procedure:

- (a) *Written notification must be submitted by registered mail to the Executive Director from Council member(s) describing the specific cause for which removal is sought.*
- (b) The Executive Director shall notify the member officer charged by registered mail within two (2) working days of receiving the charges. Any member so notified shall

have ten (10) days to respond to the group or individual responsible for notification. Following this ten (10) day period, the responsible parties shall notify the Executive Director within ten (10) days as to whether or not they wish to request removal of the officer. If the responsible parties are satisfied by the officer's response that no sufficient cause exists, the matter will be closed with written notice to the Executive Director and the officer.

- (c) *If the group or individual requesting removal is not satisfied by the response of the officer or if the officer fails to respond in ten (10) days, the Executive Director shall put the issue on the agenda at the beginning of the next Council meeting and inform the Council members as to the purpose of the agenda item.*
- (d) Written charges shall be distributed and reviewed at the specified meeting of the Council.
- (e) A majority vote shall be required to remove a chairperson or vice-chairperson from office. If removal of the Chairperson is under consideration, the vice-chairperson shall preside.

Bylaws of the Academic Senate-University of California

1. Suspension and Removal (En 14 February 2007)

Elected officers of the Assembly may be suspended from office by action of the Assembly or of the Academic Council, and may subsequently be removed from office by action of the Assembly. In any emergency, regular, or special meeting of the Assembly or Academic Council for which the proposed action is noticed, any member may move to suspend an elected officer from office. The notice of the proposed action must state the proposed reasons for suspending the person from office. The discussion and action must be considered in a closed face-to-face session. The officer who is the subject of the suspension motion shall not preside during discussion of the motion. The suspension motion requires an affirmative vote of a majority of the members present to pass. If the suspension motion carries, the officer who is the subject of the motion is immediately suspended from office and relieved of all duties and responsibilities associated with the elected Senate office. The suspended officer is no longer empowered to represent the Senate in any way. At its next emergency, regular, or special meeting, which shall be held no later than 30 days following the action to suspend, the Assembly must decide whether to remove the suspended officer from office. This item must be noticed in the Assembly's agenda. Any officer so suspended shall have the right at this meeting of the Assembly to present his or her case against removal from office. For this purpose, the suspended officer shall be granted such time as agreed to with the presiding officer but not less than one hour. The suspended officer shall also have the right, at personal expense, to be aided or represented by another person during the proceedings concerning removal. Removal requires an affirmative vote of the majority of the Assembly members present. If the action to

remove the officer fails to carry, the person shall immediately return to office with all its duties and responsibilities.

CDE Advisory Commission on Charter Schools (ACCS)

No specific mention of removal however includes a statement under Governance that “Unless otherwise addressed in by-laws it may establish, the ACCS shall follow Robert’s Rules of Order (Newly Revised).

Robert’s Rules of Order

Discipline: Chapter 15 Section (Note: This procedure would violate Bagley-Keene)

Members can be censured for misconduct at meetings, violating confidentiality, moral misconduct outside the meeting, absenteeism, bribery, fraud, lying, disloyalty, working against the organization, conspiracy, and violating other values that an organization holds dear.

A motion to censure a member can occur in two circumstances. First, if the chair has named the person (as a result of that person's poor behavior), a member can make the motion to censure when the chair asks for a penalty. Second, if members know of another member's bad behavior and want to bring it to the attention of the assembly in the form of a motion to censure, that can be done under new business or under the part of the agenda called for the good of the order.

Censuring officers

Officers can be censured as well for behavior such as not performing duties, doing things beyond what the bylaws or organization has assigned the officer to do, and fraud.

A presiding officer can also be censured for not following parliamentary rules in meetings, and for denying members their basic rights to make motions, participate in debate, and vote.

In censuring a presiding officer, a member informs the chair that he or she is going to do so, and then turns to the vice president to make the motion. If the vice president refuses to entertain it or is not present, the member then presents the motion to the secretary. If the secretary declines or is absent, the member can present the motion to the assembly from where he or she stands on the floor. If the vice president or secretary conducts the censure, they do so from where they are in the assembly and not from the president's position. The president can speak in his or her defense but cannot vote on the censure.

If the president persists in the behavior, the next step is to remove him or her from office. Members must follow the bylaws for this procedure. If the bylaws contain a provision on how to remove someone from office, follow that procedure. If the bylaws state that someone is elected to office for ____ years or until their successor is elected, the members can then rescind the election. If the

bylaws state "elected to office for _____ years or "elected to office for _____ years and until the successor is elected," the members must have a trial. The difference between "or" and "and" in this part of the bylaws is substantial.

Holding a Trial

Because a trial is a serious event for any organization and should rarely be used, there are specific procedures to follow to protect the rights of the accused:

- A trial is held in executive session.
- The accused has a right to *due process* - to be notified of the charges, given time to prepare a defense, and allowed the right to appear and defend himself or herself.

Several steps must happen before a trial can take place. The first step when members hear of misconduct by another member is to choose a committee to investigate the validity of the reports and to see if charges should be made. The members of this committee should be chosen for their integrity and good judgment. To establish such a committee requires that a resolution be made, seconded, discussed, and voted on. This resolution should avoid as much detail as possible to protect the parties, who may be innocent.

In the second step, the committee should quietly conduct its investigation and make a sincere effort to get the facts.

Any information collected is confidential. The committee should also talk with the accused to hear his or her side of the story. If the committee members find that the reports of misconduct are untrue, they should prepare a report and resolution for clearing the accused. If they find substantial evidence that the report of misconduct is true, the next step is to report the findings and prefer charges.

Next, the investigating committee prepares several resolutions. The first resolution includes setting a date and time for the trial meeting. It states that member X is to appear to show why he or she should not be expelled from the organization; it also states the specific charges. A second resolution establishes the trial committee and its members. The trial committee should have different members than the investigating committee.

If the members adopt the resolutions to have a trial, the secretary immediately sends by registered mail a letter notifying the accused of the time, date, and place of the trial, as well as the charges against him or her. (The letter should include a copy of the exact charges.) At the trial, the secretary should have on-hand a copy of the letter that was sent to the accused and a signed return receipt to prove that he or she received the letter.

The trial is a hearing. Members of the organization appointed to present the evidence against the accused are called *managers*. They should not be thought of as prosecuting attorneys; their intent should be to get at the truth and see that the outcome is just. The accused has a right to be represented by counsel and to speak and present witnesses in his or her own defense. The defense counsel may be an attorney but must be a member of the organization, unless the organization agrees by a vote to allow a nonmember to represent the accused.

At the beginning of the trial, the charges are read and the accused is asked how he or she pleads. If the accused answers "guilty," there is no reason to proceed with the trial. If he or she pleads not guilty, the members proceed with opening statements by the managers and then by the accused. Next, witnesses are presented by the managers and then by the accused. Rebuttal of witnesses by the managers and then by the accused is followed by closing arguments on both sides.

After closing arguments, the accused leaves the room and the assembly discusses and takes a vote. Each charge is read, debated, and voted on. If the accused is found guilty, the next business in order is determining the penalty. Usually the managers propose the penalty, and the members can debate and amend that motion. One member can demand that the vote be taken by ballot. Removing the person on trial from membership requires a two-thirds vote. After the penalty is decided, the accused is brought back into the assembly and told the results.