

10-3-2012

Legal Authority

Michael Moore
Georgia Southern University

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Legal Authority

Submitted 10/3/2012

Michael Moore

Question:

What is the legal authority being used by the Associate Vice President for Legal Affairs at Georgia Southern and the BOR Legal Affairs Office behind the following response to the Faculty Senate question as to BOR Policy 2.5.2.

Also, what bodies exist in the University System that actually do act and must comply with BOR 2.5.2.

The Faculty Senate inquiry (paraphrased): In the aftermath of Senate motions being rejected by our president (See forthcoming Faculty Senate minutes from September 19, 2012), the Senate Executive Committee inquired whether the BOR policy 2.5.2 below had been followed and received the following response from Georgia Southern University Attorney Copeland:

“Since the Faculty Senate is advisory to the President, the Senate does not act; only the president does. Therefore, the president cannot be in a position to veto any action by the senate, because the senate does not take action, but only provides advices. The president follows or does not follow our advice, which is not formally a veto. Therefore this provision of BOR 2.5.2 currently does not apply on our campus.”

Additionally, in response to a separate inquiry, the BOR counsel indicated that he is not aware of any report to the Chancellor being made in recent memory by any institution of the system, under this provision.

Thus: What is the legal authority for this response?

BOR 2.5.2 Ex-Officio Faculty Chair

The president shall be the ex-officio chair of the faculty and may preside at meetings of the faculty. The president and/or the president's designee shall be a member of all

faculties and other academic bodies within the institution. He/she shall decide all questions of jurisdiction, not otherwise defined by the Chancellor, of the several councils, faculties, and officers.

The president shall have the right to call meetings of any council, faculty, or committee at his/her institution at any time. The president shall have the power to veto any act of any council, faculty, or committee of his/her institution but, in doing so, shall transmit to the proper officer a written statement of the reason for such veto. A copy of each veto statement shall be transmitted to the Chancellor.

Rationale:

The Faculty Senate has long assumed that BOR 2.5.2 applied to such governance bodies as our Faculty Senate. Since it doesn't, I would like to know who it does apply to and why it doesn't apply to approved faculty and or staff governance bodies.

SEC Response:

10/9/2012: The SEC approved this RFI and referred it to the office of Legal Affairs and the President's Office.

RFI Response from Maura Copeland: 11/27/2012

What is the legal authority being used by the Associate Vice President for Legal Affairs at Georgia Southern and the BOR Legal Affairs Office behind the following response to the Faculty Senate question as to BOR Policy 2.5.2.?

The Board of Regents' Policy Manual states that "[t]he Georgia Constitution grants to the Board of Regents the exclusive right to govern, control, and manage the University System of Georgia . . . The Board exercises and fulfills its constitutional obligations, in part, by promulgating rules and policies for the governance of the University System and its constituent units. . ."

"It is a well-established rule of statutory construction in Georgia that the interpretation of a statute or regulation by an administrative agency responsible for enforcement of the provision is entitled to great deference, unless clearly erroneous." E.g., *Hospital Auth. V. State Health Planning Agency*, 211 Ga. App. 407, 408, 438 S.E.2d 912 (1993), cert. denied (Ga.1994); *National Advertising Co. v. Department of Transp.*, 149 Ga.App. 334,

337, 254 S.E.2d 571, 573 (1979); *Mason v. Service Loan & Fin. Co.*, 128Ga. App. 828, 831, 198 S.E.2d 391, 394 (1973); *Belton v. Columbus Fin. & Thrift Co.*, 127 Ga. App. 770, 772, 195 S.E.2d 195, 197 (1972). *Sultenfuss v. Snow*, 35 F.3d 1494 (1994).

Also, what bodies exist in the University System that actually do act and must comply with BOR 2.5.2.

I am unable to answer this question, as I am not counsel for other units of the University System and do not have sufficient information regarding the powers of all of their various committees, task forces and other similar bodies.

Senate Response:

Minutes: 9/19/2012: President Keel had already discussed this issue. Mynard noted, though, that because the 30 day rule had not been followed the President's responses not part of the record yet. He would post all of the written responses shortly after the present meeting. One thing he wanted to note was something that came up during follow-up on the denied motions. The Senate Executive Committee asked if the Board of Regents Policy 2.5.2 applied in the case of these motions; the part of 2.5.2 that is relevant for the discussion here reads as follows: "The president shall have the right to call meetings of any council, faculty, or committee at his/her institution at any time. The president shall have the power to veto any act of any council, faculty, or committee of his/her institution, but, in doing so, shall transmit to the proper officer a written statement of the reason for such veto. A copy of each veto statement shall be transmitted to the Chancellor." Associate Vice President for Legal Affairs Maura Copeland contacted the BOR office of Legal Affairs to discuss this rule. In the BOR interpretation, the key word in this policy is the word "act." Since the Faculty Senate is advisory to the President, the Senate does not act; only the president does. Therefore, the president cannot be in a position to veto any action by the senate, because the senate does not take action, but only provides advice. The president follows or does not follow our advice, which is not formally a veto. Therefore this provision of BOR 2.5.2 currently does not apply on our campus. Additionally, BOR counsel indicated that he is not aware of any report to the Chancellor being made in recent memory by any institution of the system, under this provision.

As a follow up, Mynard contacted BOR counsel to clarify the intent of a rule on presidential vetoes, if presidents are never in a position to veto anything. The rule exists because while there is no council on our campus that can take action, there is--or at

least there may be-- councils at other system institutions that can act. So this rule essentially does not apply to our campus.

Maura Copeland (Associate Vice President for Legal Affairs) confirmed that was right. Mynard then turned to four RFI's received for this meeting. Three were approved, and one denied. The three approved were points 7, 8, and 9 on the current agenda. The other (submitted by David Seaman re: Chick-fil-A's relationship with GSU) was considered inappropriately worded for an RFI, as which it had been submitted, and more appropriate in the form of a motion request; therefore, the RFI was not approved. Marc Cyr (CLASS) didn't know who to address this to, but wanted to know if the legal ruling re: the BOR policy meant that the BOR just did not want to know about any disagreement on a campus. No one could answer.

Robert Costomiris wondered if this meant the thirty day rule is inapplicable.

Mynard said that our colloquial use of the term "veto" is inapplicable, but there remains a time limit per written policies for the President to approve or disapprove a passed motion. He added that, of course, the implementation (or not) and the conditions of implementation, as he now understood the situation, are entirely up to the President. Minutes: 10/17/2012: The SEC approved this RFI and referred it to the office of Legal Affairs and the President's Office.

RFI: Legal authority

Filed by Michael Moore as a follow-up on an issue reported about at the September meeting: BOR Policy 2.5.2, which deals with Presidential vetoes. The question: "What is the legal authority being used by the Associate Vice President for Legal Affairs at Georgia Southern and the BOR Legal Affairs Office behind the . . . response to the Faculty Senate question as to BOR Policy 2.5.2?" Mynard recapped that the problem was with the word "act," and in legal terms, the interpretation was that only the President can act, and therefore, there is no act of the Senate to have vetoed, and therefore, legally, there is no veto to [report to the Chancellor]. The question is whether there can be further clarification on that from the state level.

President Keel said the question had been asked and answered by the Legal Affairs Office at the USG.

Moderator Mynard recognized Michael Moore from the gallery. Moore said he wasn't looking for an interpretation, but for why a policy exists that doesn't seem to apply to anything or to any institution that we know of, and no examples have been supplied as

to who it does apply to. When you read 2.5.2, it looks like it applies to faculty, but apparently we found out it doesn't. But that's an interpretation, and he wanted to know if this comes from the attorney general, or maybe the Board of Regents. He also said his RFI was part of a much bigger question: What does the Senate actually do? When he heard this interpretation of 2.5.2 at the last meeting, he had thought a good motion right then would be a motion to dissolve the Senate, and if faculty had anything to go to the President, we could just send him an email or write him a note. Because it made it seem faculty are putting in a lot of work for no apparent reason. This was different from how it had seemed before during all the years he had been here. When the President had to write a response back as to why he turned something down, faculty thought that this also went to the Chancellor. Now he had been told that the President acts and that's all there is to it. He could no longer see the relevance of the Faculty Senate.

Marc Cyr (CLASS) noted that if we could ask the BOR attorney, we would do so and not hassle our GSU administrators, but we're not allowed to contact the BOR; our own administrators are the only conduit that we have. Even when Moderator Mynard was invited by Provost Bartels to contact the BOR attorney, the BOR attorney bounced it straight back to Maura Copeland. So the question is really not directed at our own administrators, but as a request for them to get the information: What is the law? What is the basis that the lawyers are building this interpretation on? We are not trying to hassle our own administrators; we're forced to ask them to hassle the BOR for us. Provost Bartels said that the attorney at the Board of Regents level had told her that anyone who wanted to contact him should do so, and believed that Mynard had talked with him. Mynard noted that he sent an email to him, but the reply came from Maura Copeland because the BOR counsel indeed bounced it back to Legal Affairs here. Maura Copeland (Associate VP Legal Affairs) confirmed that Mynard's query had rebounded to her. What the BOR attorney had told her, though, was not that this rule never has any application – in fact, “he said that he believes that there are committees he knows of at USG that do have rulemaking or lawmaking power” – he just didn't know of an instance in recent memory where a President had vetoed an action and therefore reported it: “So it's not that those committees aren't doing what they are supposed to do, or doing those things, it is just that there has not been a veto that's been reported.” Cyr said he and everyone else, then, appears to have been under a misapprehension that we had been told that no one on any USG campus can legally act except a President.

Copeland said her email exchange with Mynard was that she is not aware of a faculty committee on this campus that has rulemaking authority, but there could be one; she may just not be aware of it. But she did share that the Board of Regents said that there are committees within the System that do act in that way.

President Keel said the Faculty Senate is not one of those committees. The Institutional Review Board might be because it is constituted federally, but he wasn't sure. To his knowledge, though, there is no committee on this campus that has that authority vested in it, though among the 34 campuses across the USG there might very well be one. Cyr requested that Copeland "find out where this unicorn is stabled" because the issue goes right to the heart of Moore's question, which is, "What is the legal basis? What is the legal authority? What the heck are we dealing with here?"

MM's November Comment:

I am speaking to this issue because it is central to the role of the faculty senate not only here but throughout the University System. It is fundamental as to whether or not our Senate is relevant or whether any faculty body is relevant. I think this is an important issue. It has become even more important since our President has vetoed six motions [closer to deferred 2, resolutions 3, did not approve 2] in less than three years while his predecessor vetoed two [more accurately 7] in ten. Also, curiously, passed motions have been referred to the dean's council. A body never previously thought of as a senate oversight committee. We all have thought BOR Policy 2.5.2 was a check and balance that maintained the relevance of the Senate.

At the Wednesday October 17, Senate meeting I asked whether there was any legal authority to support the University's position that BOR 2.5.2 is inapplicable on our campus. The President claimed this question had been answered. However, the Associate Vice President for Legal Affairs had offered an interpretation of the rule, but had failed to cite any legal authority (e.g., a statute, a case, an Attorney General opinion) that would support that interpretation. We finally received a response late this morning.

Here is my question: This was my original question. Does the Associate Vice President for Legal Affairs at Georgia Southern (and/or the BOR Legal Affairs Office) have any legal authority to support the position that BOR Policy 2.5.2 does not apply at Georgia Southern. If this rule does not apply on our campus, then what bodies exist in the University System that actually do act and must comply with BOR 2.5.2?

The Rule: BOR 2.5.2 ExOfficio Faculty Chair The president shall be the exofficio chair of the faculty and may preside at meetings of the faculty. The president and/or the president's designee shall be a member of all faculties and other academic bodies within the institution. He/she shall decide all questions of jurisdiction, not otherwise defined by the Chancellor, of the several councils, faculties, and officers. The president

shall have the right to call meetings of any council, faculty, or committee at his/her institution at any time. The president shall have the power to veto any act of any council, faculty, or committee of his/her institution but, in doing so, shall transmit to the proper officer a written statement of the reason for such veto. A copy of each veto statement shall be transmitted to the Chancellor. Associate Vice President for Legal Affairs position: "Since the Faculty Senate is advisory to the President, the Senate does not act; only the president does. Therefore, the president cannot be in a position to veto any action by the senate, because the senate does not take action, but only provides advices. The president follows or does not follow our advice, which is not formally a veto. Therefore this provision of BOR 2.5.2 currently does not apply on our campus."

However, in my own research, I've found that In Georgia, the "golden rule" of statutory construction "requires us to follow the literal language of the statute unless it produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else." See *Telecom*usa, Inc. v. Collins*, 260 Ga. 362, 366 (1990).

I have my own interpretation of this policy. This is it: Complying with the unambiguous text of the rule would not be absurd. In fact, I believe the text of the rule compels the conclusion that it applies. Specifically, at Georgia Southern: (1) the President is the exofficio chair of the faculty; (2) the President presides at meetings of the faculty; (3) the Senate takes "action"; (4) the President as head of the Senate has the right to call meetings—which he exercises to call faculty meetings at the Convocation and in the spring term; and (5) the President has the power to veto acts of the Faculty Senate. Thus, the Senate as the elected body of the faculty does "act", the President takes these "acts", which are motions and resolutions, and does veto these. Not accepting an act of the Senate is a veto on his part because he is the head of the Senate.

The rule does not contain an explicit exceptions or guidance regarding when the rule is intended to be inapplicable. The Associate Vice President for Legal Affairs contends the rule is inapplicable, and the interpretation turns on what it means to "act"—contending the Senate does not act. The Associate Vice President in this morning's response states that BOR Policy 2.5.2 does not apply to Georgia Southern. Other than her opinion, she cited no Attorney General opinion, BOR policy statement, or any other authority that supports her interpretation. Put another way, her response is simply that she interpreted the language herself. Then, she copied and pasted generalized case citations that her interpretation is entitled to deference.

Why should that opinion receive any deference in light of the unequivocal, unambiguous text of the rule?

Let me give you an example: If a student turned in a paper and in it said, The Bible says or According to the Bible, I would ask for Book, Chapter and Verse. It wouldn't matter if the Pope had whispered it to the student in its original Greek. Show me where it says this. Basically, I am asking for chapter and verse from the BOR.

She goes on to say: The Board of Regents' Policy Manual states that "[t]he Georgia Constitution grants to the Board of Regents the exclusive right to govern, control, and manage the University System of Georgia . . . The Board exercises and fulfills its constitutional obligations, in part, by promulgating rules and policies for the governance of the University System and its constituent units. . . ." I don't see how this applies at all. We're all in agreement that the BOR can make rules—our question is what does this particular rule mean. She has given me authority that doesn't support her interpretation but gives her authority that says I have to defer to her. I am asking why she is right and she is saying, "I just am so obey." As to the second part of my rfi, the language of the policy doesn't say it is selectively applicable—it's a fair question whether this policy is universally ignored or just at Southern. It is still curious to me that we have a BOR policy that as far as I can determine doesn't apply to anyone according to the Associate VP and possibly never has. I am asking the Faculty Senate to take up this issue by referring this issue to the Chancellor for an interpretation. Personally, I'd rather hear from the Attorney General on the issue. I expect that the Associate Vice President would relish the opportunity as well.

The SEC approved this RFI and referred it to the office of Legal Affairs and the President's Office.

RFI Response from Maura Copeland: 11/27/2012

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