BEFORE THE BOARD OF GOVERNORS

CALIFORNIA COMMUNITY COLLEGES

In re Legal Challenge and Petition for Rulemaking to Amend Title 5, Sections 51023, 51200 and 51203 of the California Code of Regulations.	

LEGAL CHALLENGE AND PETITION FOR RULEMAKING

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Pursuant to California Education Code Section 70901.5(a)(7), California Competes: Higher Education for a Stronger Economy ("California Competes") hereby petitions the Board of Governors of the California Community Colleges ("BOG") to amend Sections 51023, 51200 and 51203 of Title 5 of the California Code of Regulations. Any interested party "may propose a new regulation or challenge any existing regulation" of the BOG, on any basis. (Cal. Ed. Code §70901.5 (a)(7)). Furthermore, the BOG's procedures authorize any interested party to challenge whether the BOG's regulations meet the requisite standards for promulgation of regulations.[1]

California Competes is a nonprofit initiative focused on improving educational outcomes through nonpartisan and financially pragmatic recommendations for policies and practices in California higher education. The project is guided by a Council composed of civic and business leaders. Neither the staff nor the Council members have any personal financial interest in the topic described in this petition. Their interests are solely as citizens of California who want a better future for the state and for its current and future residents. The project receives support from the College Access Foundation of California, the Rosalinde and Arthur Gilbert Foundation, the James Irvine Foundation, the William and Flora Hewlett Foundation, the Lumina Foundation, The Bill and Melinda Gates Foundation, and the Ford Foundation. California Competes is a fiscally sponsored project of Community Initiatives, Inc.

I. BACKGROUND AND SUMMARY

In 1988, legislation known as Assembly Bill 1725 ("AB 1725") enacted substantial reforms to the governance of the community colleges of the State of California including "clarifying and strengthening the respective roles of the BOG and the Chancellor of the California Community Colleges" in order to establish an "efficient and flexible" statewide system of governance. (1988 Cal. Stat. Ch.973 § 3, 3093).[2] The overarching purpose of AB 1725 is to establish a state-wide system of oversight to ensure minimum standards for academic achievement, breadth and depth of course offerings; effective and efficient decision-making processes with representation of all stakeholder views, and clear lines of accountability for governance of the community colleges. The Legislature

[1] *Procedures and Standing Orders of the Board of Governors*, January 2010, §212, available at http://extranet.cccco.edu/Portals/1/ExecutiveOffice/Board/2010_agendas/jan_10/Procedures_and_Standing_Orders_2010(1).pdf. The Chancellor is required to respond in writing to the challenge within 45 days.

[2] Excerpts of AB 1725 are contained in Exhibit 1.

determined that these measures were necessary to strengthen the colleges and meet the long-term educational and workforce training needs of the State of California.

The BOG promulgated regulations to implement AB 1725 in 1990. These regulations, which are codified in Title 5 of the California Code of Regulations ("Title 5") sections 53200, *et. seq.* (Exhibit 2), violate the plain meaning of AB 1725 as well as the intent of the Legislature in enacting the law. The regulations:

- are inconsistent with the plain language of AB 1725;
- unlawfully delegate local district decision making authority to the academic senates;
- disempower students, staff and the community;
- disenfranchise and silence many faculty members;
- fail to meet the legally imposed standards of consistency and clarity; and
- produce dysfunction and waste, undermining student access to a quality postsecondary education.

Petitioner seeks immediate action by the BOG to reform the dysfunctional community college decision-making process by amending Title 5 sections 51023, 53200 and 53203. The BOG should require community colleges to seek out and consider input from faculty, while clarifying ultimate accountability of the community college district governing boards to ensure that the colleges are operating responsibly and in the public interest.

II. DISCUSSION

A. Title 5 of the California Code of Regulations Sections 53200 and 53203 Conflicts with the Plain Language of AB 1725

AB 1725 requires the BOG to provide "leadership and direction" for the Community College Districts ("Districts") to ensure that the Community College system operates as an "integral and effective element" in the public higher education system. (Cal. Ed. Code §70901(a)). The BOG was directed to establish minimum standards to be used by the Districts' governing boards ("District Boards") in developing procedures to provide faculty, staff and students with:

> the right to participate effectively in district and college governance, and the opportunity to express their opinions at the campus level and to ensure that these opinions are given every reasonable consideration, and the right of academic senates to assume primary

> responsibility for making recommendations in the areas of curriculum and academic standards. (Cal. Ed. Code §70901(b)(1)(E)).

The Legislature mandated that faculty, staff and students be given the right to participate in governance and to have their opinions considered by the District Boards. The Legislature further mandated that the faculty senate recommendations on curriculum and academic standards be given more weight than the recommendations of the students or staff.

The Title 5 regulations adopted by the BOG venture far beyond the plain language of Section 70901(a)(E). Sections 53200 and 53203 require District Boards to "consult collegially" with the academic senate on certain "academic and professional matters." It can either "rely primarily" on the academic senate or reach "mutual agreement" with the senate on any "policy development or implementation matter" addressing the following topics: curriculum (including establishing prerequisites and placing courses within disciplines); degree and certificate requirements; grading policies; educational program development; standards or policies regarding student preparation and success; district and college governance structures, as related to faculty roles; faculty roles and involvement in accreditation processes, including self-study and annual reports; policies for faculty professional development activities; processes for program review; or processes for institutional planning and budget development. (Cal. Code. Regs. Tit. 5, §§53200, 53203).

If a District Board uses the "rely primarily" process, the regulations prohibit the District Board from taking any action other than that which is recommended by the academic senate. (*Id.*). If the "mutual agreement" process is utilized, the District Board may take action only with the written agreement of the academic senate. If the academic senate does not concur with a proposed action of the governing board,

> existing policy shall remain in effect unless continuing with such policy exposes the district to legal liability or causes substantial fiscal hardship. In cases where there is no existing policy, or in cases where the exposure to legal liability or substantial fiscal hardship requires existing policy to be changed, the governing board may act after a good faith effort to reach agreement, only for compelling legal, fiscal, or organizational reasons.[3]

Therefore, under the BOG's regulations, the District Board has two very limited options. It can either (1) agree to follow the recommendation of the academic senate or (2) it can attempt to reach

[3] (*Id.*). Note that this process is not required at the statewide level. While the state Chancellor has generally been reluctant to pursue paths not approved by his "consultation council," it is an advisory body and not a formal decision-making body.

mutual agreement with the senate. If it chooses the first option, the senate's recommendation must be accepted in all but "exceptional circumstances." (BOG Legal Opinion, M 97-20, October 23, 1997, question 6). If it chooses the second option and the senate disagrees with the District Board's proposal, no policy change is permitted and the status quo persists. Under this decision-making structure, the District Board has forfeited all decision-making power to the academic senate.

Interpretation of a statute is a question of law subject to *de novo* review, and therefore the BOG is not entitled to deference for its interpretation of the enabling statute. (*Yamaha Corp. of American v. State Bd. Of Equalization*, 19 Cal.4th 1, 11-13 (1998); *People v. Snook*, 16 Cal. 4th 1210, 1215 (1997)). In California, statutory interpretation is guided by settled rules, all of which are geared to ascertain the intent of the lawmakers and avoid an interpretation that would lead to absurd consequences. (*Cypress Semiconductor Corp. v. Superior Court*, 163 Cal.App.4th 575, 581 (2008)). The first step in statutory interpretation is to give the words their usual and ordinary meaning. *People v. Pieters, 52 Cal. 3d* 894, 898 (1991)). In determining the plain meaning of a statute, the statute is considered as a whole. "The meaning of a statute may not be determined from a single word or sentence…" (*Lakin v. Watkins Associated Industries*, 6 Cal. 4th 644, 659 (1993)). The correct interpretation must also "if possible, give effect and significance to every word and phrase of a statute." (*Garcia v. McCutchen*, 16 Cal.4th 469, 476 (1997)).

AB 1725 clearly states that faculty, staff and students not only have a legal right to express their perspective on governance issues, but that their input must be given weight by the District Boards. The Legislature guaranteed that the opinions of these constituencies would be given "every reasonable consideration" by the District Boards, but that the Board would serve as the ultimate decision-maker. The word "consideration" means "weighed or taken into account when formulating an opinion or plan." (Merriam-Webster Dictionary, 2012). "Consideration" does not mean "rely primarily", "accept in all but extraordinary circumstances", or "reach agreement under threat of inaction." The Title 5 regulations have no reasonable relationship to the plain language of AB 1725 and are void as a matter of law.

If the Legislature had intended to limit the District Board's power to those issues on which it could secure mutual agreement from the academic senate, it would have said so explicitly as it did in another provision of AB 1725. Education Code Section 87360 states 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." (Cal. Ed. Code §87360). As the Courts have explained, this provision prevents the governing board from acting on faculty hiring matters without mutual agreement with the academic senate, except under extreme circumstances (such as when the current policy would violate the law). (*Irvine Valley College Academic Senate v. Board of Trustees of the South Orange County Community College Dist.*, 129 Cal.App.4th 1482, 1491 (2005)). Reviewing the statute as a whole, section 87360 demonstrates that the Legislature intended mutual agreement only on faculty hiring matters, not on all matters that could impact curriculum, academic standards, program review, planning and budget development. (See, Cal. Code. Regs. tit. 5, §53200(c)).

When two provisions touch upon a common subject, the provisions are construed in reference to each other, so as to "harmonize the two in such a way that no part of either becomes surplusage." (*DeVita v. County of Napa*, 9 Cal.4th 763, 778–779 (1995)). "We must presume that the Legislature intended 'every word, phrase and provision…in a statute…to have meaning and to perform a useful function.'" (*Garcia v. McCutchen*, at 476, quoting *Clements v. T.R. Bechtel Co.*, 43 Cal.2d 227, 233 (1954)).

Applying the rule against surplusage, it is impossible that when the Legislature said that it wanted student, faculty, and staff opinions to receive "every reasonable consideration" under sections 70901 and 70902, it actually meant to grant the academic senate the same veto power it created in section 87360. Nevertheless, the BOG has interpreted these sections to mean the same thing, ignoring the clear difference in the language: that students, faculty and staff are guaranteed the right to have their opinions on "academic and professional matters" taken into consideration but agreement of the senate is only required for faculty hiring matters. If the Legislature had intended to grant academic senate approval rights over all academic and professional matters, it could simply have included the language of 87360 in sections 70901 and 70902.

This is not a novel interpretation of the legality of the BOG regulations under California legal precedent. In 1991, the Legislative Counsel of California,[4] which is the California Legislature's and the Governor's law firm for all legislative matters, issued a legal opinion which

[4] The Legislative Counsel is responsible for providing legal services including drafting of laws and ensuring that proposed legislation is constitutional and consistent with existing laws. The Legislative Counsel also prepares legal opinions which address the interpretation or constitutionality of provisions of existing law or of pending legislative proposals.

states, "Section 53203 of Title 5 of the California Code of Regulations is invalid insofar as it enlarges the scope of Section 70901 of the Education Code by requiring the governing boards of community college districts to 'consult collegially' with academic senates as defined by subsection (d) of Section 53200 of Title 5 of the California Code of Regulations." (Legislative Counsel Opinion #23296, April 24, 1991, 1); (See, Exhibit 3). The Opinion stated:

> It is our opinion that the Legislature intended that the academic senates retain their recommendatory character. "The word 'recommendation' in its common usage refers to an action which is advisory in nature rather than one having any binding effect" [citation]. If the Legislature had intended to enhance the role of the academic senate to the degree reflected in section 53203 of Title 5 of the California Code of Regulations, it would have done so expressly. . . . For example, in other sections of the Education Code added by Chapter 973 of the Statutes of 1988, the Legislature expressly requires joint agreement between the governing board and the academic senate in particular employment matters (see Secs. 87359, 87360, 87458, and 87615, Ed. C.). In contract to those sections, Sections 70901 of the Education Code speaks in terms of the academic senate merely "making recommendations" and not in terms of changing the role of the academic senate to the degree of equalizing its role with that of the governing board. (*Id*.).

The BOG's interpretation of AB 1725 violates the plain, unambiguous meaning of the text, impermissibly expands the scope of the legislation, and renders the "reasonable consideration" meaningless, and is therefore unlawful as a matter of law. (*People v. Snook*, at 1215).

B. Title 5 sections 53200 and 53203 Are Unlawful Because They Transfer Decision Making Power from Locally Elected District Boards to the Members of the Academic Senate

"Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco*, 38 Cal.4th 653, 668 (2006), quoting *California Assn. of Psychological Providers v. Rank*, 51 Cal.3d 1, 11-12 (1990); see also, *California School Boards Association v. State Board of Education*, 191 Cal.App.4th 530, 544 (2011) (an agency does not have the discretion to promulgate regulations that are inconsistent with the statue); *Littoral Development Co. v. San Francisco Bay Conservation Etc. Com.*, 24 Cal.App.4th 1050,1058 (1994) (court has a duty to strike down regulations that are inconsistent with the statute)). Courts have the final responsibility for the interpretation of the

statute and will conduct an independent examination of the regulation to determine if the agency "reasonably interpreted the legislative mandate." (*California School Boards Association v. State Board of Education*, 191 Cal.App.4th at 544, quoting *State Farm Mutual Automobile Ins. Co. v. Garamendi*, 32 Cal.4th 1029, 1040 (2004)).

The Title 5 regulations not only conflict with the plain language of section 70901, they upset the entire governing structure and balance of power established by the Legislature for the community college system. Section 70901(a) states that the work of the Board "shall at all times be directed to maintaining and continuing, to the maximum degree permissible, local authority and control in the administration of the California Community Colleges." The State of California has ensured local authority and control by establishing a structure in which members of the District Board are elected by popular vote of the voters in their respective community college districts and giving the District Boards the legal authority to make decisions and take actions necessary to operate the community colleges in accordance with the law and the wishes of the voters.

AB 1725 states: "The board of governors shall provide general supervision over community college districts, and shall, in furtherance thereof… establish minimum standards as required by law, including, but not limited to… minimum standards governing procedures established by governing boards of community college districts to ensure faculty, staff, and students the right to participate effectively in district and college governance." (Cal. Ed. Code §70901(b)). It further states that the "governing board of each community college district *shall establish, maintain, operate, and govern* one or more community colleges" and in furtherance of this directive, "ensure faculty, staff, and students the opportunity to express their opinions at the campus level, to ensure that these opinions are given every reasonable consideration, to ensure the right to participate effectively in district and college governance." (Cal. Ed. Code §70902, emphasis added).

Thus, the District Board is vested with the authority and responsibility to govern. In its exercise of this authority, the District Board must consider the recommendations of faculty, student and staff and, on curriculum and academic standards, the District Board must give more weight to the recommendations of the academic senate than the recommendations of students or staff. Instead, the Title 5 regulations give the academic senate's recommendations more weight vis a vis the *District*

Board's decisions, completely disenfranchise students and staff in these areas, and expands the academic senate's role far beyond academic standards to issues such as budget and planning processes.

Section 70902(a) authorizes the District Boards to take action to establish, maintain, operate and govern the colleges in accordance with law. Section 70902(b) enumerates responsibilities of the District Boards:

> In furtherance of subdivision (a), the governing board *shall* do the following:
>
> (1) Establish policies for, and approve, current and long-range academic and facilities plans and programs, and promote orderly growth and development of the community colleges within the district. In so doing, the governing board shall, as required by law, establish policies for, develop, and approve, comprehensive plans. The governing board shall submit the comprehensive plans to the board of governors for review and approval.[5]
>
> (2) (A) Establish policies for and approve credit courses of instruction and educational programs. The educational programs shall be submitted to the board of governors for approval. A credit course of instruction that is not offered in an approved educational program may be offered without the approval of the board of governors only under conditions authorized by regulations adopted by the board of governors.
> (B) The governing board shall establish policies for, and approve, individual courses that are offered in approved educational programs, without referral to the board of governors.
>
> (3) Establish academic standards, probation, dismissal, and readmission policies, and graduation requirements not inconsistent with the minimum standards adopted by the board of governors.
> . . . .
> (7) Establish procedures not inconsistent with minimum standards established by the board of governors to ensure faculty, staff, and students the opportunity to express their opinions at the campus level, to ensure that these opinions are given every reasonable consideration, to ensure the right to participate effectively in district and college governance, and to ensure the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards.
> . . . .

The Legislature's use of the word "shall" indicates that the District Board's obligation is mandatory and not discretionary. (*In re Estate of Miramontes-Najera*, 118 Cal.App.4th 750, 758 (2004)). Again, the language of the statue cannot be clearer: the District Boards have a legal

[5] Under the BOG regulations, the powers granted to academic senates can undermine the BOG's own decision-making processes. Assume that the BOG does not approve a plan that relies primarily on the recommendations of the academic senate and orders the District Board to revise the plan. Presumably revision of the plan would require yet another round of collegial consultation. If the consultation process does not result in an agreement with the academic senate on a revised plan and the existing disapproved plan remains in effect despite the BOG decision.

obligation under the law to make decisions with regard to operation, maintenance and governance of the districts, including establishing curriculum and academic standards. The only manner in which the District Boards can delegate any of these responsibilities is to hold a vote to adopt a regulation providing for such delegation.[6] (Cal. Ed. Code §70902(d)). There is no statutory provision that given the BOG the right to delegate away the powers of the District Boards.

In the Legislative history of AB 1725, the Legislature drew a bright line distinction between the legal authority of the District Board and the specialized expertise of the faculty. In a discussion of hiring processes in Section 4(r)(2) of 1988 Stat. Chapter 973, the Legislature states:

> The governing board of a community college district derives its authority from its status as the entity holding the institution in trust for the benefit of the public. As a result, the governing board and the administrators it appoints have the principal legal and public responsibility for ensuring an effective hiring process.

In contrast, faculty "derive their authority from their expertise as teachers and subject matter specialists" and have a "professional responsibility" in the development of policies affecting hiring. The same distinction applies to all other aspects of community college governance. It is the District Board that has the "principal legal and public responsibility" for governance.

Title 5 sections 53200 and 53203 violate the clear and express language of the California Education Code by forcing the District Boards to cede control over responsibilities they are required by law to perform. The BOG has no legal authority to alter the basic governance structure of the community college districts and its actions are void as a matter of law. (See, *Turlock Irrigation Dist. v. Hetrick*, 71 Cal.App.4th 948, 951 (1999) (an action that exceeds the scope of the agency's statutory authority is *ultra vires* and the act is void)).

In its 1991 legal opinion, the Legislative Counsel explained:

> Other than in cases of exceptional circumstances and for compelling reasons, as set forth in paragraphs (1) and (2) of subsection (d) of Section 53203 of Title 5 of the California Code of Regulations, there is no alternative that would allow the governing board to act independently in these matters. The question is whether this requirement to consult collegially exceeds the authority conferred by Section 70901 of the Education Code. (Legislative Counsel Opinion #23296, 5-6).

[6] District Boards may not delegate duties that are nondelegable by statute. We do not address the issues of whether any of the duties discussed in this petition are delegable.

The Legislative Counsel concluded that by requiring that the governing board "consult collegially," as defined, the regulations go beyond ensuring that the academic senate has the right to assume primary responsibility for merely making recommendations regarding curriculum and academic standards. "*In our view, the regulations expand the role of the academic senate beyond that authorized by statute*. The regulations equalize the role of the academic senate with that of the governing board by requiring the governing board either to rely primarily on the advice of, or to reach mutual agreement with, the academic senate. *In effect, the regulations dilute the authority of the governing board to act independently*." (*Id.*, emphasis added). This clear statement of the law from an authoritative source can no longer be ignored. The BOG has required the District Boards to operate under an illegal and unlawful set of regulations for far too long.

Section 53203 not only moves decision-making authority away from the District Board in mission critical areas, it creates a system where there is no reciprocal duty of good faith consultation for the academic senate. The academic senate is not required to give reasonable consideration to the District Board's proposed decisions, or indeed allow the District Board to make any recommendation whatsoever. If the academic senate disagrees with the District Board, all it needs to do is refuse to consult, collegially or otherwise, and refuse to reach agreement with the District Board. This removal of the locus of power from the governing board to the academic senate is invalid and unlawful under AB 1725.

This is not merely a legal quibble – there are significant instances where academic senates have stopped important actions. For example, three trustees of the troubled City College of San Francisco (CCSF) developed a plan for narrowing gaps in achievement by some ethnic groups through strategies such as accelerated approaches to remediation. At a public meeting they shared their draft with the campus community, as "a starting point for a conversation."[7] Instead of having that important conversation, however, the academic senate responded with a resolution denouncing the trustees for treading on their territory. Confusing the BOG regulations as statutory provisions, the resolution declared inaccurately that "Assembly Bill 1725 and the state education code establishes that faculty

[7] Trustee meeting transcript, February 25, 2010, available at http://www.ccsf.edu/NEW/content/dam/Organizational_Assets/Department/BOT/BOT_Trans_2010/february_2010.txt.

have primacy in academic and professional matters."[8] The resolution demanded that 15 topics be excised from the draft plan, including several that are not academic topics: increase in lab aid budget, lab aid funded scholarships, expansion of a student ambassador program, scholarship and tuition reimbursement, space allocation and room assignments in campus facilities, and health education standards (i.e., TB testing).

It is entirely appropriate for trustees to initiate a discussion about ways that students could succeed at higher rates – in fact, it is an integral to their responsibility to the students, faculty and the general public. It is wholly inappropriate for the academic senate to respond to the trustee's request for collegial consultation on this vital issue by issuing demands in the form of a resolution and asserting legal authority which it most assuredly does not have. As this example demonstrates, BOG regulations §53200 and §53203 prevent not just rational decision-making but also any discussion of the educational issues. This dispute alone squandered hundreds of faculty hours, precious board time, and ultimately ended with no comprehensive plan to address on the serious problem of achievement gaps.

The District Boards are accountable to the electorate, to the BOG, and to the regional accreditation organizations for their actions and they derive their authority from "statute and [their] status as the entity holding the institution in trust for the benefit of the public" and have the principal legal and public responsibility to govern. (1988 Cal. Stat. Ch. 973, §4(r)(2)). The academic senates are not accountable to anyone but themselves and they do they derive any legal authority from Section 70901. Even if the regulations at issue in this Petition could be magically justified as a legal matter, they are, simply put, anti-democratic and bad public policy. As stated by the Community College League of California, "there is no principled public policy basis for having academic senates raised to co-governor status in areas where they have not the expertise and are not accountable to the public."[9]

[8] The Academic Senate, City College of San Francisco, *Resolution Responding to "Recommendations on the Achievement Gap and Equity Draft Board Resolution" co-sponsored by Trustees Jackson, Marks, and Ngo*, March 23, 2010, available at http://hills.ccsf.edu/~ksaginor/SpecialMeetingResolution.pdf.

[9] Amicus Curiae Brief of the Community College League of California, in Diablo Valley College Senate v. Contra Costa Community College District, California Court of Appeals, First Appellate District Case No. 108713. (Exhibit 4).

C. The Title 5 Regulations Are Unlawful Because They Disenfranchise Staff, Students and Faculty Who Are Not on the Academic Senate

AB 1725 gives students and staff, in addition to faculty, the "right to participate effectively in district and college governance." (Cal. Ed. Code §§70901(b), 70902). Sections 51023.5 and 51023.7 of the BOG regulations properly set forth minimum standards for ensuring that staff can participate in matters impacting staff, and students have the opportunity to participate in matters that impact them, including curriculum, academic standards and program development. Under sections 51023.5 and 51023.7, the District Board cannot act without giving "reasonable consideration" to the opinions of staff and students. (See, Exhibit 2). "Effective" is defined as "producing a decided, decisive, or desired effect." (Merriam-Webster Dictionary, 2012).

As stated in a BOG legal opinion, the District Board can only rely on student suggestions on academic matters that are contrary to the academic senate under "exceptional circumstances." (BOG Legal Opinion M 97-20, October 23, 1997, questions 7 and 28). Participation is not "effective" if it is structurally precluded from having any real impact on the final outcome. Opinions which are given voice but are not taken into account in determining the plan of action are not taken into "consideration." It is not possible to give a recommendation "reasonable consideration" if that recommendation can only be considered in extreme situations. In effect, these regulations put the District Board and student groups on an equal footing when it comes to decision-making on all "academic and professional matters", wherein their opinions only matter in exceptional circumstances. This is clearly not what the Legislature intended when it passed AB 1725. The BOG regulations sections 52300 and 52303 not only conflict with the state law, they are internally inconsistent and utterly fail to provide clear and meaningful guidance to the District Boards.

In addition, the regulations ignore the rights of faculty who do not serve on the academic senate.[10] The BOG regulations do not contain a provision for non-senate faculty that is parallel to the section 51023.5 and 51023.7 process guarantees for staff and students. Title 5 section 51023 merely states that the District Boards must implement sections 53200 to 53206 regarding the roles of academic senates without any mention of the rest of the faculty. The BOG

[10] The membership on academic senates varies from college to college. In most cases, only a select group of faculty serve on the academic senate.

regulations place the academic senate in the position of determining which faculty viewpoint prevails, and they silence the minority on a list of topics far beyond curriculum and academic standards.

In practice, if a governing board wants input from faculty who do not represent the academic senate perspective it may be prevented from doing so. For example, a provision in the shared governance agreement at Los Angeles Southwest College explicitly states, "If a faculty member is appointed to a committee without the approval of the Academic Senate President, the faculty member *shall be removed from the committee*."[11] A guide to shared governance jointly produced by the statewide Academic Senate and a coalition of trustees and administrators makes it clear that the L.A. Southwest rule is not an exception:

> 22. QUESTION: Can a CEO make faculty appointments to committees, task forces, or other groups dealing with academic and professional matters?
>
> No. Title 5 §53203(f) requires that appointments of faculty to groups dealing with academic and professional matters be made by the academic senate after consultation with the CEO or designee. Furthermore, consultation is required in establishing committees if the purpose of the committee is to develop policy or procedures related to an academic and professional matter or as part of the basic governance structures set forth in the board's policy on collegial consultation. (See, Chancellor's Office Legal Opinion M 97-20, October 23, 1997).[12]

It is important to point out, again, that the list of academic and professional matters goes far beyond the curriculum or grading standards.

If academic senates can always trump the perspectives of faculty, students and staff on the expansive list of academic and professional matters in Title 5 Section 53200(c), as is the case under the regulations, the non-senate faculty, students and staff are denied their right of effective participation guaranteed by the statute and their input is not accorded "every reasonable consideration." This impact is particularly harmful because, as discussed below, part-time faculty – including many vocational education faculty – are not assured representation on academic senates. In many districts, the Boards cannot take into account the opinions and input of the faculty members who

[11] LA Southwest Academic Senate, *Los Angeles Southwest College Shared Governance Agreement*, , 2008.
[12] The Academic Senate for California Community Colleges and The Community College League of California, *Participating Effectively in District and College Governance*, Fall 1998.

have the most relevant experience and expertise on vocational education.[13] The BOG regulations prevent the District Boards from considering and weighing the rich variety of faculty views. Instead, the Boards are forced to accede to the majority of the academic senate, even if they conclude that doing so is not in the best interest of the institution or the community, and even if many faculty, most students, and most staff disagree with the academic senate. The regulations do not give effect or meaning to the legal requirement that all faculty, students and staff recommendations be considered and are unlawful. (*Garcia v. McCutchen*, at 476, quoting *Clements v. T.R. Bechtel Co.*, 43 Cal.2d 227, 233 (1954)).

D. BOG Regulations §53200 and §53203 Do Not Comply with the Requirements of Clarity and Consistency.

In carrying out its authority under AB 1725, the BOG is required by statute to ensure that its regulations meet the standards of "necessity," "authority," "clarity," "consistency," "reference," and "nonduplication," as those terms are defined in the Government Code. (Cal. Ed. Code §70901.5(a)(3)). The BOG regulations §53200 and §53203 fail two of these required standards, and are therefore invalid as a matter of law.

Consistency. All BOG regulations are required to meet a standard of "consistency," defined as "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (Cal. Gov. Code §33149(d); BOG Procedures and Standing Orders, §204). For the reasons explained above, the academic senate regulations adopted by BOG are in direct conflict with the requirements of AB1725, are internally inconsistent, and are therefore legally invalid.

Clarity. BOG regulations are required to be "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (BOG Procedures and Standing Orders, §204; Cal. Gov. Code §11349(c)). The regulations, however, are replete with vague terms and ambiguous directives.[14] First, the definition of "academic senate" is an organization

[13] As further discussed in Section E below, the underrepresentation of faculty members from career-technical fields on academic senates has stifled advancements in these curricula because non-senate faculty do not have any meaningful input on these academic matters.

[14] The definition of "consult collegially" also defies common sense. According to the Merriam-Webster Dictionary, "consult" means to "ask the advice or opinion of." It does not mean "to be obligated to reach agreement or risk deadlock that rivals anything inside the beltway."

"whose primary function . . . 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." (Cal. Code. Regs. tit. 5, § 53200(b)). However, in the same section the regulations abandon the notion that the senate makes recommendations to the governing board and "equalize[s] the role of the academic senate with that of the governing board." (Legislative Counsel Opinion #23296, 7).

Second, to determine the extent of academic senate authority, governing boards and presidents need to determine whether the topic they are considering is a "policy development or implementation matter," for which no definition is offered, and whether it fits within the provided list of "academic and professional matters." (Cal. Code. Regs. tit. 5, §§53200, 53203). Statewide guidelines jointly developed by the statewide academic senate and an association of trustees and administrators acknowledge that the list is "broad in scope" and that "[o]ften it is the context of the issue which determines if it is an academic and professional matter."[15] Because it is so vague, they recommend academic senates and governing boards "establish processes through which the status of any issue as an academic and professional matter is determined."[16]

The lack of clarity has created a great deal of confusion and often byzantine decision making processes, which has been noticed by outside observers, including the accreditation organizations. For example, one study of one community college's strategic planning process found that the disparate understanding of what shared governance meant, and the inability to form or define consensus, resulted in the process taking *nearly three years*. "[T]he dissimilar perceptions about shared governance far outweighed the benefits of inclusiveness and served to inhibit the planning process."[17]

Confusion also reigns on the question of which topics are on the list of academic and professional matters. At Diablo Valley College, the academic senate sued to reverse a reorganization of administrative staff, asserting that it was encompassed by the list of academic and professional matters requiring academic senate sign-off. (*Diablo Valley College v. Contra Costa Community College District,*148 Cal.App. 4th 1023 (2007)). The senate continued pursuing the lawsuit even after the state Chancellor's office ruled that the topic was out of bounds, and even after a trial court agreed

[15] The Academic Senate for California Community Colleges and the Community College League of California, *Participating Effectively in District and College Governance,* pg. 4, question 7 (1998).
[16] *Id at.* question 8.
[17] Antonia B. Ecung, *A California Community College District Planning Committee's Perceptions of the Effects of the Shared Governance Approach on the Strategic Planning Process*, a dissertation presented in partial fulfillment of the requirements for the Doctor of Philosophy degree, Capella University, March 2007.

with the Chancellor's office view. The academic senate ultimately lost, but governing boards across the state were effectively put on notice that failing to seek academic senate approval on virtually any item could lead to a costly and protracted court battle. This process took 6 years from the time of the district chancellor's initial decision (Spring 2001) to the date of the final appellate court decision ruling against the academic senate (March 2007).

The regulations require governing boards to engage in the existential task of determining whether the absence of an explicit policy on a topic is a policy choice or is no policy. This is important because the regulations declare that if agreement with the academic senate has not been reached, "existing policy shall remain in effect." But in cases where "there is no existing policy. . . the governing board may act. . . only for compelling legal, fiscal, or organizational reasons." Cal. Code. Regs. tit. 5, §53203(d)(2)).

One final point about clarity. The complex and ambiguous governance regulations have made it more difficult to recruit and retain leadership for California's community colleges. The state's Little Hoover Commission reports that high turnover of college leaders "particularly for administrators who come from another state, is partly attributable to the complexity of California's regulatory system for its community colleges."[18] According to one chancellor, to administrators in other states California's community colleges look like a foreign country. (*Id*.). The regulation themselves create dysfunction, but they also rob the colleges of the leadership they need, especially in the current climate of budget cuts.

E. The BOG Regulations are Bad Public Policy and Stifle the Success of California's Community Colleges

The California community college districts have two governing boards, one elected by the voters and another elected by the faculty. It is not surprising that no other states have adopted the version of shared governance invented by the Board of Governors of the California Community Colleges: *it doesn't work*. As a result, the colleges, the state's economy and ultimately the people of California are ill-served by this poor public policy.

[18] *Serving Students, Serving California: Updating the California Community Colleges to Meet Evolving Demands*, February 2012, page 44.

1. The BOG Regulations are Contrary to Professional Standards and Best Practices.

In any high-functioning college, the board of trustees and administrators involve students, staff, and faculty in helping to identify and solve problems. By seeking input, the leaders of the institution gain critical insights about the severity of a situation, the opportunities and challenges ahead, and the potential policy changes that could address the situation. The process leads to more fully considered actions and builds confidence across the institution that all perspectives are considered.

This approach – involving everyone, giving deference to the views of relevant faculty, and holding presidents and governing boards ultimately accountable – is the approach taken in AB 1725 and is consistent with the recommendations of the leading national professional faculty organization as well as with the agency that accredits California community colleges.

The American Association of University Professors (AAUP) is perhaps the nation's leading protector of academic freedom and advocate for a prominent faculty role in the governance of colleges and universities. Its stated mission is "to advance academic freedom and shared governance, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good."[19] More than any other national organization, AAUP owns the concept of "shared governance" by faculty. The AAUP's policy statement on shared governance provides that the faculty are the core of the institution and should be extensively involved in policy decisions made by administrators and governing boards.[20]

At the same time, the statement makes it clear that even under "shared governance", the governing boards should be the *ultimate* decision-makers. In planning, for example, the statement calls for "the broadest possible exchange of information and opinion," but emphasizes that "Distinction should be observed between the institutional system of communication and the system of responsibility for the making of decisions." For the latter, the governing board is "the final institutional authority." The AAUP statement is also clear that the president of an institution must be able to take actions, even on academic matters, which may be opposed by faculty:

> The president must at times, *with or without support*, infuse new life into a department; relatedly, the president may at times be required, working within the concept of tenure, to solve problems of obsolescence. The president will necessarily utilize the judgments of the faculty

[19] AAUP mission statement, available at http://www.aaup.org/aaup/about/.
[20] AAUP, *Statement on Governance of Colleges and Universities,* April 12, 2012.

but may also, in the interest of academic standards, seek outside evaluations by scholars of acknowledged competence. [21]

In California, community colleges seek accreditation from the Accrediting Commission for Community and Junior Colleges of the Western Association of Schools and Colleges (ACCJC). According to the ACCJC, its accreditation process, "provides assurance to the public that the accredited member colleges meet the [ACCJC] Standards; the education earned at the institutions is of value to the student who earned it; and employers, trade or profession-related licensing agencies, and other colleges and universities can accept a student's credential as legitimate."[22]

To achieve and to sustain accreditation, institutions are assessed against ACCJC's four categories of standards: Institutional Mission and Effectiveness, Student Learning Programs and Services, Resources, and Leadership and Governance. Under the governance category, the standards expect that institutions will have "systematic participative processes," including "a written policy providing for faculty, staff, administrator, and student participation in decision-making processes."[23] The standards further state that the college should rely on "faculty, its academic senate . . . and academic administrators for recommendations about student learning programs and services." However, the governing board is an "independent policy-making body that reflects the public interest and has the "ultimate responsibility for education quality, legal matters, and financial integrity." [24]

ACCJC's expectations are, like AAUP's, consistent with AB 1725. They call for the active participation of faculty – and other key constituencies – in important institutional decisions. The ACCJC expects governing boards to grant all faculty and administrators "a substantial voice in institutional policies, planning, and budget *that relate to their areas of responsibility and expertise*" (emphasis added), not just to the select few members of the academic senates who likely do not have expertise on the broad range of academic and vocational programs offered by the community colleges.[25] Faculty are to have an especially strong voice on issues of student learning, but not even the AAUP would have academic senates be the final decision maker on any matter, including academic issues.

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[21] *Id*., emphasis added.
[22] ACCJC welcome page, available at http://www.accjc.org/.
[23] ACCJC, *Accreditation Standards*, Standard IV.A.2. pg. 15, revised June 2012
[24] *Id*. at 17.
[25] *Id*. at 16.

2. BOG Regulations §53200 and §53203 Have Generated Dysfunction and Wasteful Disputes.

California's community colleges have become notorious for their inability to handle their affairs, and a major contributing factor is the byzantine and confusing management and decision-making processes. Nearly a quarter of the colleges currently are under sanction by the ACCJC,[26] and at least 20 of the 27 colleges under sanction were cited for problems with leadership, decision-making and clarity of roles. A prime example of how the blurring of responsibility has produced dysfunction is offered by an independent fiscal review of the crisis at CCSF:

> Past decisions have reduced the management team to spectators rather than organizational leaders. For example, determining how many classified employees are needed and what services are required should be a management function, but at CCSF these decisions are made by a committee. This has been costly to CCSF.

The report continues:

> Under this organizational and cultural model there is no responsibility or accountability because it is often unclear how or by whom decisions have been made. This has resulted in operational dysfunction, which in turn has contributed to fiscal deficiencies.[27]

While CCSF is the most recent and largest victim of the dysfunction bred by the BOG rules, it may not be the most dramatic. In placing Lassen College on warning five years ago, ACCJC's review created a picture of an internal war, with no one in charge:

> The team was gravely concerned with the general state of governance at the college and with the readily apparent power struggle that is going on between a group of faculty, staff, and mid-level management and the Board and the Superintendent, and other members of the college faculty and staff. . . The College is in a state of crisis and this conflict is at the heart of it.[28]

The problematic decision-making processes emerge not because the people involved are ill-willed or unreasonable. They emerge because when the locus of authority is unclear, administrators and faculty jockey for position in order to protect their turf. Rather than being flexible, making

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[26] Laurel Rosenthal, *Community Colleges Across California Face Accreditation Sanctions*, Sacramento Bee, August 15, 2012. Available at http://www.sacbee.com/2012/08/15/4726595/community-colleges-across-california.html.

[27] Fiscal Crisis and Management Assistance Team, *City College of San Francisco Fiscal Review*, September 14, 2012, available at http://www.ccsf.edu/BOT/Special%20Meeting%20Notices/2012/Sept_2012/Sep18/FCMAT%209_14_2012.pdf.

[28] As quoted by a grand jury, in a report in the appendix of Management Review of Lassen Community College District, California Community College Chancellor's Office, May 6, 2009.

substantive arguments, and seeking to reach agreement, their positions harden and they demand their procedural right to have their own way.

At many colleges the blurred authority results in disputes over process that waste precious resources. A study documenting the strategic planning process at one college found that confusion about state-mandated governance rules caused the process to drag on for nearly three years.[29] A current example of how the culture of authority diverts attention from solving important problems: the academic senate and the trustees at Pasadena City College are fighting over the start date for the spring semester. While it seems clear that such a decision should ultimately rest with the president or trustees, faculty leaders are asserting "[i]t is not an official, legal calendar."[30]

Diablo Valley College ended up in court not over any disagreement about how best to educate Californians but instead over whether the academic senate should be able to veto a reorganization of administrators. Yet the case ate up hundreds of thousands of dollars of taxpayer dollars in faculty time, legal fees, and court resources.

The resulting culture also makes it difficult to recruit and retain skilled administrators. At College of the Redwoods, for example:

> With four presidents in five years, as well as significant turnover among the other senior administrative positions . . . the college experienced a leadership vacuum, and among the employee constituency groups, the faculty assumed levels of autonomy for operational decisions that clearly tipped the scale of decision making to their control and preference. . .
>
> [T]rust and respect between the college president and faculty and classified employee groups is at a low ebb at College of the Redwoods because the stakeholders either do not accept or do not follow (or possibly understand) their defined roles and responsibilities.[31]

3. The BOG Regulations Have Contributed to the California Community Colleges' Failure to Receive Funding that they Desperately Need.

Developing strong applications for funds from foundations and from the federal government require effective leadership, rallying multiple constituencies to set aside their differences for a common purpose. It is impossible to know how California might have fared differently if its community colleges were not hobbled by a dysfunctional governance system. But one indicator is to examine the amount of federal funds the community colleges receive in competitive programs. Based

[29] Ecung, March 2007, *supra* note 17.
[30] As quoted by Nicholas Saul, *Two Sessions Planned for Summer Term*, Pasadena City College Courier, September 20, 2012.
[31] ACCJC Follow-up Evaluation Team Report, November 22, 2010.

on its student enrollment, California should receive more than 20 percent of any grant competition focused on community colleges.[32] However, California community colleges have been able to put together successful applications for less than 5 percent of the $1 billion distributed so far by the United States Department of Labor to help community colleges train workers displaced in the recession.[33] Our community colleges have also failed to help their students get the federal financial aid they are eligible for, leaving an estimated one-half billion dollars unclaimed.[34]

4. Regulations §53200 and §53203 Inhibit Advances in Career and Technical Education.

Under the California Master Plan for Higher Education, the community colleges have two primary missions: providing the first two years of a four-year college education, and preparing students for direct entry into the workforce through career-technical education. California's community colleges are particularly deficient in their attention to vocational education, which is one reason the colleges rank 48th among all states in terms of completions per enrolled student.

It is the responsibility of the District Boards, representing the needs of the community as a whole – including employers – to determine what programs should be developed, eliminated, expanded or contracted. However, by granting the academic senates veto power over "educational program development" and the processes for program review, planning and budgeting, vocational programs are at a severe disadvantage because career-technical faculty tend not to be represented. In fact, in our review of academic senates at 54 colleges, we found only one where the vocational faculty outnumber the faculty from traditional academic disciplines. Unfortunately, academic faculty familiar with the needs in their own departments are often loath to support the allocation of resources to other programs, especially technical programs that are often more expensive to deliver because of the equipment or expertise that may be involved.

While stability may be a virtue in a history curriculum, in technical fields it is a recipe for failure. Vocational programs need to be nimble to address the constantly changing needs of the economy. Ensuring that career-technical programs are effective and up-to-date is one of the most important roles of institutional leaders. The Legislature found that vocational and technical education

[32] California enrolls about 23% of community college students nationally, as shown in table 230 available at http://nces.ed.gov/pubs2012/2012001.pdf.
[33] Trade Adjustment Assistance Community College and Career Training Grant Program, rounds 1 and 2, available at http://www.doleta.gov/taaccct/grantawards.cfm.
[34] Financial Aid Facts at California Community Colleges, available at http://ticas.org/files/pub/ccc_fact_sheet.pdf.

is a "primary mission" of the community colleges and stated that California needs an ongoing review of the "relevance and responsiveness" of vocational programs to keep pace with the changing economy. (Stats.1988, Ch.973 §2(d)). The statute requires colleges to review vocational programs every two years and to terminate any that (a) fail to meet a market demand, (b) unnecessarily duplicate other programs in the area, or (c) are not demonstrated effective through employment and completion data. (Cal. Ed. Code §§78015, 78016). Making these judgments requires independent acquisition and review of data, including in some cases interaction with employers.

However, the Title 5 regulations grant academic senates an ability to forestall change.[35] As a result, students considering enrolling at a community college are faced with a complex array of programs without any assurance that the programs are likely get them where they want to go. California community colleges have more than 12,000 career-technical programs, but have one of the worst records in the country in helping students to earn certificates and degrees. According to a recent study, "The vast array of programs . . . does not appear to reflect careful planning around which programs are most essential to meeting the needs of the economy and the interests of students in credentials with real value."[36]

The harm inflicted on the California economy and the people of California by the failure to provide adequate vocational training cannot be overstated: the economic distress created by the Great Recession, the disappearance of high-wage blue-collar jobs, the displacement of entire professions by an increasing reliance on automation and outsourcing, the skyrocketing costs of a four-year degree, and increases in the cost of living have made the role of community colleges vital to the long-term success of the California economy. Effective and accessible vocational training of new workers and retraining of displaced workers is essential to the continued vitality of the state's economy and the well-being of its citizens.

Dysfunction in the community colleges also threatens other important state-wide policies such as the state's renewable energy laws, energy efficiency goals, and Governor Brown's goal of 20,000

[35] See for example *The Ventura College Program Review System Handbook: Integrating Planning to Resource Allocation Using a Continuous Improvement System to Assess Performance*, revised and reaffirmed by the Academic Senate, September 15, 2011. Program review reports are developed by faculty, staff and managers in the program. The reports are used to determine potential areas that need additional resources, but the process is not designed in a way that it could even result in a recommendation that a program be eliminated.

[36] *Career Opportunities: Career Technical Education and the College Completion Agenda*, Institute for Higher Education Leadership and Policy, California State University, Sacramento, March 2012, pg. 5. The report also found that many programs with the same names had very different requirements at different colleges.

megawatts of distributed generation by 2020. It is not possible to transition to a green economy without a skilled work force, and the community college system is the only state-wide educational system that can provide the necessary training for the specialized skills required. For once, the problem is not lack of funding for workforce training or political will – the problem is an educational system in chaos.

5. BOG Regulations §53200 and §53203 will Prevent Adequate Implementation of the Recommendations of the Student Success Task Force.

The recommendations of the Chancellor's Student Success Task Force, adopted by the Board of Governors in 2012, have the potential to significantly improve student access and success in the coming years. Their effectiveness will depend on their implementation at the campus level. A number of the recommendations will be subject to the "consult collegially" process, which means that in addition to needing the approval of 72 district boards, the recommendations will need the consent of 112 academic senates. Academic senates will likely assert the lead role or veto power on recommendations including:

- Adoption of a centralized student assessment system.
- Requiring students who are assessed below the collegiate level to begin remediation in their first year.
- Review course offerings to ensure that they are advancing students' educational plans.
- To better prepare faculty, staff and administrators to respond to evolving student needs and measures of student success (professional development).
- Identifying student success goals and monitoring progress.
- Allow colleges to pilot innovative approaches for delivering basic skills instruction.

The statewide academic senate has already drawn a line in the sand on this issue, declaring in a resolution adopted last year that "Student success, specifically, and academic and professional matters more generally are areas in which primary responsibility has been granted to the local academic senate."[37] If the BOG is serious about implementing the Student Success Task Force recommendations, a first critical step is to repair the broken governance regulations.

[37] Resolution 13-08, *Responding to the Student Success Task Force Recommendations*, Academic Senate for California Community Colleges, Fall 2011, available at http://www.asccc.org/resolutions/responding-student-success-task-force-recommendations

III. PETITIONER'S PROPOSED AMENDMENTS WOULD REQUIRE GOVERNING BOARDS TO CONSULT WITH FACULTY, AND WOULD CLARIFY ACCOUNTABILITY.

Petitioners recommend that the BOG adopt the amendments set forth in Exhibit 5 to regulations §§51203 (effective participation for faculty), 53200 (academic senate definitions), and 53203 (powers of the academic senates). The current sections regarding student and staff input are not affected. The amendments conform the regulations to the requirements of AB 1725 and restore decision-making authority for curriculum and academic standards to the governing boards with appropriate input from academic senates, faculty, students and staff. Rather than seeking input on those items solely from the academic senate, however, a District Board would be expected to seek and consider input from faculty more broadly. The regulations would require governing boards and administrators to seek faculty input on the issues except in unforeseeable, emergency situations. Further, the academic senate would have, as required by AB 1725, the primary responsibility for making recommendations in the areas of curriculum and academic standards, and District Boards would be required to provide a written explanation for any deviance from the academic senate's recommendations.

IV. CONCLUSION

The BOG regulations illegally bestow decision-making authority upon academic senates and upset the entire governance structure for community colleges mandated by California law. Therefore, these regulations are automatically void as a matter of law. (*San Francisco Fire Fighters,* 38 Cal.4th 6 at 668). Petitioners seek immediate action by the Board of Governors to require community colleges to seek and consider input from faculty, while clarifying ultimate responsibility and accountability for establishing the policies that best serve the interests of students and the public.

Dated in San Francisco, California, on the 11th day of December 2012.

Respectfully submitted,

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Exhibits

Context and Text for
Proposed Amendments to
California Community College
Regulations

Exhibit 1:
Relevant Statutory Provisions

Consultation

California Education Code
Title 3, Division 7, Part 43
The California Community Colleges

[emphasis added]

70901. (a) The Board of Governors of the California Community Colleges shall provide leadership and direction in the continuing development of the California Community Colleges as an integral and effective element in the structure of public higher education in the state. The work of the board of governors shall at all times be directed to maintaining and continuing, to the maximum degree permissible, local authority and control in the administration of the California Community Colleges.

(b) Subject to, and in furtherance of, subdivision (a), and in consultation with community college districts and other interested parties as specified in subdivision (e), **the board of governors shall** provide general supervision over community college districts, and shall, in furtherance thereof, perform the following functions:

> (1) **Establish minimum standards as required by law, including, but not limited to**, the following:
> (A) Minimum standards to govern student academic standards relating to graduation requirements and probation, dismissal, and readmission policies.
> (B) Minimum standards for the employment of academic and administrative staff in community colleges.
> (C) Minimum standards for the formation of community colleges and districts.
> (D) Minimum standards for credit and noncredit classes.
> (E) **Minimum standards governing procedures established by governing boards of community college districts to ensure faculty, staff, and students the right to participate effectively in district and college governance, and the opportunity to express their opinions at the campus level and to ensure that these opinions are given every reasonable consideration, and the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards.**

70901.5(a) The board of governors shall establish procedures for the adoption of rules and regulations governing the California Community Colleges. Among other matters, the procedures shall implement the following requirements:

> (1) Written notice of a proposed action shall be provided to each community college district and to all other interested parties and individuals, including the educational policy

and fiscal committees of the Legislature and the Department of Finance, at least 45 days in advance of adoption. The regulations shall become effective no earlier than 30 days after adoption.

(2) The proposed regulations shall be accompanied by an estimate, prepared in accordance with instructions adopted by the Department of Finance, of the effect of the proposed regulations with regard to the costs or savings to any state agency, the cost of any state-mandated local program as governed by Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code, any other costs or savings of local agencies, and the costs or savings in federal funding provided to state agencies.

(3) The board of governors shall ensure that all proposed regulations of the board meet the standards of "necessity," "authority," "clarity," "consistency," "reference," and "nonduplication," as those terms are defined in Section 11349 of the Government Code. A district governing board or any other interested party may challenge any proposed regulatory action regarding the application of these standards.

(4) Prior to the adoption of regulations, the board of governors shall consider and respond to all written and oral comments received during the comment period.

(5) The effective date for a regulation shall be suspended if, within 30 days after adoption by the board of governors, at least two-thirds of all governing boards vote, in open session, to disapprove the regulation. With respect to any regulation so disapproved, the board of governors shall provide at least 45 additional days for review, comment, and hearing, including at least one hearing before the board itself. After the additional period of review, comment, and hearing, the board may do any of the following:

(A) Reject or withdraw the regulation.
(B) Substantially amend the regulation to address the concerns raised during the additional review period, and then adopt the revised regulation. The regulation shall be treated as a newly adopted regulation, and shall go into effect in accordance with those procedures.
(C) Readopt the regulation as originally adopted, or with those nonsubstantive, technical amendments deemed necessary to clarify the intent of the original regulation. If the board of governors decides to readopt a regulation, with or without technical amendments, it shall also adopt a written declaration and determination regarding the specific state interests it has found necessary to protect by means of the specific language or requirements of the regulation. A readopted regulation may then be challenged pursuant to existing law in a court of competent jurisdiction, and shall not be subject to any further appeal within the California Community Colleges.

(6) As to any regulation which the Department of Finance determines would create a state-mandated local program cost, the board of governors shall not adopt the regulation until the Department of Finance has certified to the board of governors and to the Legislature that a source of funds is available to reimburse that cost.

(7) Any district or other interested party may propose a new regulation or challenge any existing regulation.

(b) Except as expressly provided by this section, and except as provided by resolution of the board of governors, the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code shall not apply to regulations adopted by the board of governors.

70902. (a) (1) Every community college district shall be under the control of a board of trustees, which is referred to herein as the "governing board." The governing board of each community college district shall establish, maintain, operate, and govern one or more community colleges in accordance with law. In so doing, the governing board may initiate and carry on any program or activity, or may otherwise act, in any manner that is not in conflict with, inconsistent with, or preempted by, any law, and that is not in conflict with the purposes for which community college districts are established.

(2) The governing board of each community college district shall establish rules and regulations not inconsistent with the regulations of the board of governors and the laws of this state for the government and operation of one or more community colleges in the district.

(b) In furtherance of subdivision (a), the governing board of each community college district shall do all of the following:

(1) Establish policies for, and approve, current and long-range academic and facilities plans and programs, and promote orderly growth and development of the community colleges within the district.
In so doing, the governing board shall, as required by law, establish policies for, develop, and approve, comprehensive plans. The governing board shall submit the comprehensive plans to the board of governors for review and approval.

(2) (A) Establish policies for and approve credit courses of instruction and educational programs. The educational programs shall be submitted to the board of governors for approval. A credit course of instruction that is not offered in an approved educational program may be offered without the approval of the board of governors only under conditions authorized by regulations adopted by the board of governors.

(B) The governing board shall establish policies for, and approve, individual courses that are offered in approved educational programs, without referral to the board of governors.

(3) Establish academic standards, probation, dismissal, and readmission policies, and graduation requirements not inconsistent with the minimum standards adopted by the board of governors.

(4) Employ and assign all personnel not inconsistent with the minimum standards adopted by the board of governors, and establish employment practices, salaries, and benefits for all employees not inconsistent with the laws of this state.

(5) To the extent authorized by law, determine and control the district's operational and capital outlay budgets. The district governing board shall determine the need for elections for override tax levies and bond measures, and request that those elections be called.

(6) Manage and control district property. The governing board may contract for the procurement of goods and services as authorized by law.

(7) Establish procedures not inconsistent with minimum standards established by the board of governors to ensure faculty, staff, and students the opportunity to express their opinions at the campus level, to ensure that these opinions are given every reasonable consideration, to ensure the right to participate effectively in district and college governance, and to ensure the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards.

(8) Establish rules and regulations governing student conduct.

(9) Establish student fees as it is required to establish by law, and, in its discretion, fees as it is authorized to establish by law.

(10) In its discretion, receive and administer gifts, grants, and scholarships.

(11) Provide auxiliary services as deemed necessary to achieve the purposes of the community college.

(12) Within the framework provided by law, determine the district's academic calendar, including the holidays it will observe.

(13) Hold and convey property for the use and benefit of the district. The governing board may acquire, by eminent domain, any property necessary to carry out the powers or functions of the district.

(14) Participate in the consultation process established by the board of governors for the development and review of policy proposals.

(c) In carrying out the powers and duties specified in subdivision (b) or other provisions of statute, the governing board of each community college district shall have full authority to adopt rules and regulations, not inconsistent with the regulations of the board of governors and the laws of this state, that are necessary and proper to executing these prescribed functions.

(d) Wherever in this section or any other statute a power is vested in the governing board, the governing board of a community college district, by majority vote, may adopt a rule delegating

the power to the district's chief executive officer or any other employee or committee as the governing board may designate. However, the governing board shall not delegate any power that is expressly made nondelegable by statute. Any rule delegating authority shall prescribe the limits of the delegation.

(e) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

87360. (a) In establishing hiring criteria for faculty and administrators, district governing boards shall, no later than July 1, 1990, develop criteria that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students.

(b) No later than July 1, 1990, 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.

(c) Until a joint agreement is reached and approved pursuant to subdivision (b), the existing district process in existence on January 1, 1989, shall remain in effect.

Exhibit 2:

Relevant Regulations

Title 5 -- Education
Division 6 – California Community Colleges
Chapter 4 – Employees
Subchapter 2 – Certificated Positions
Article 2 – Academic Senates

§ 51023. Faculty.

The governing board of a community college district shall:

(a) adopt a policy statement on academic freedom which shall be made available to faculty;

(b) adopt procedures which are consistent with the provisions of sections 53200-53206, regarding the role of academic senates and faculty councils;

(c) substantially comply with district adopted policy and procedures adopted pursuant to subdivisions (a) and (b).

§ 51023.5. Staff.

(a) The governing board of a community college district shall adopt policies and procedures that provide district and college staff the opportunity to participate effectively in district and college governance. At minimum, these policies and procedures shall include the following:

(1) Definitions or categories of positions or groups of positions other than faculty that compose the staff of the district and its college(s) that, for the purposes of this section, the governing board is required by law to recognize or chooses to recognize pursuant to legal authority. In addition, for the purposes of this section, management and nonmangement positions or groups of positions shall be separately defined or categorized.

(2) Participation structures and procedures for the staff positions defined or categorized.

(3) In performing the requirements of subsections (a)(1) and (2), the governing board or its designees shall consult with the representatives of existing staff councils, committees, employee organizations, and other such bodies. Where no groups or structures for participation exist that provide representation for the purposes of this section for particular groups of staff, the governing board or its designees, shall broadly inform all staff of the policies and procedures being developed, invite the participation of staff, and provide opportunities for staff to express their views.

(4) Staff shall be provided with opportunities to participate in the formulation and development of district and college policies and procedures, and in those processes for jointly developing recommendations for action by the governing board, that the governing board reasonably determines, in consultation with staff, have or will have a significant effect on staff.

(5) Except in unforeseeable, emergency situations, the governing board shall not take action on matters significantly affecting staff until it has provided staff an opportunity to participate in the formulation and development of those matters through appropriate structures and procedures as determined by the governing board in accordance with the provisions of this Section.

(6) The policies and procedures of the governing board shall ensure that the recommendations and opinions of staff are given every reasonable consideration.

(7) When a college or district task force, committee, or other governance group, is used to consult with staff regarding implementation of this section or to deal with other issues which have been determined to significantly affect staff pursuant to subdivision (a)(4), the appointment of staff representatives shall be made as follows:

(A) The exclusive representative shall appoint representatives for the respective bargaining unit employees, unless the exclusive representative and the governing board mutually agree in a memorandum of understanding to an alternative appointment process.

(B) Where a group of employees is not represented by an exclusive agent, the appointment of a representative of such employees on any task force, committee or governance group shall be made by, or in consultation with, any other councils, committees, employee organizations, or other staff groups that the governing board has officially recognized in its policies and procedures for staff participation.

(C) When the task force, committee or governance group will deal with issues outside the scope of collective bargaining, any other council, committee or staff group, other than an exclusive agent, that the governing board has officially recognized in its policies and procedures for staff participation may be allowed to designate an additional representative. These organizations shall not receive release time, rights, or representation on such task forces, committees, or other governance groups exceeding that offered to the exclusive representative of classified employees.

(D) In all cases, representatives shall be selected from the category that they represent.

(b) In developing and carrying out policies and procedures pursuant to subsection (a), the district governing board shall ensure that its actions do not dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another. In addition, in order to comply with Government Code sections 3540, et seq., such procedures for staff participation shall not intrude on matters within the scope of representation under section 3543.2 of the Government Code. Governing boards shall not interfere with the exercise of employee rights to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Nothing in this section shall be construed to impinge upon

or detract from any negotiations or negotiated agreements between exclusive representatives and district governing boards. It is the intent of the Board of Governors to respect lawful agreements between staff and exclusive representatives as to how they will consult, collaborate, share, or delegate among themselves the responsibilities that are or may be delegated to staff pursuant to these regulations.

(c) Nothing in this section shall be construed to impinge upon the policies and procedures governing the participation rights of faculty and students pursuant to sections 53200-53204, and section 51023.7, respectively.

(d) The governing board of a community college district shall comply substantially with the provisions of this section.

§ 51023.7. Students.

(a) The governing board of a community college district shall adopt policies and procedures that provide students the opportunity to participate effectively in district and college governance. Among other matters, said policies and procedures shall include the following:

(1) Students shall be provided an opportunity to participate in formulation and development of district and college policies and procedures that have or will have a significant effect on students. This right includes the opportunity to participate in processes for jointly developing recommendations to the governing board regarding such policies and procedures.

(2) Except in unforeseeable, emergency situations, the governing board shall not take action on a matter having a significant effect on students until it has provided students with an opportunity to participate in the formulation of the policy or procedure or the joint development of recommendations regarding the action.

(3) Governing board procedures shall ensure that at the district and college levels, recommendations and positions developed by students are given every reasonable consideration.

(4) For the purpose of this Section, the governing board shall recognize each associated student organization or its equivalent within the district as provided by Education Code Section 76060, as the representative body of the students to offer opinions and to make recommendations to the administration of a college and to the governing board of a district with regard to district and college policies and procedures that have or will have a significant effect on students. The selection of student representatives to serve on college or district committees, task forces, or other governance groups shall be made, after consultation with designated parties, by the appropriate officially recognized associated student organization(s) within the district.

(b) For the purposes of this Section, district and college policies and procedures that have or will have a "significant effect on students" includes the following:

(1) grading policies;

(2) codes of student conduct;

(3) academic disciplinary policies;

(4) curriculum development;

(5) courses or programs which should be initiated or discontinued;

(6) processes for institutional planning and budget development;

(7) standards and policies regarding student preparation and success;

(8) student services planning and development;

(9) student fees within the authority of the district to adopt; and

(10) any other district and college policy, procedure, or related matter that the district governing board determines will have a significant effect on students.

(c) The governing board shall give reasonable consideration to recommendations and positions developed by students regarding district and college policies and procedures pertaining to the hiring and evaluation of faculty, administration, and staff.

(d) Nothing in this Section shall be construed to impinge upon the due process rights of faculty, nor to detract from any negotiations or negotiated agreements between collective bargaining agents and district governing boards. It is the intent of the Board of Governors to respect agreements between academic senates and collective bargaining agents as to how they will consult, collaborate, share or delegate among themselves the responsibilities that are or may be delegated to academic senates pursuant to the regulations on academic senates contained in Sections 53200-53206.

(e) The governing board of a community college district shall comply substantially with policies and procedures adopted in accordance with this Section.

*** * ***

EXHIBITS

Title 5 -- Education
Division 6 – California Community Colleges
Chapter 2 – Community College Standards
Subchapter 1 – Minimum Conditions

§ 53200. Definitions.

For the purpose of this Subchapter:

(a) "Faculty" means those employees of a community college district who are employed in positions that are not designated as supervisory or management for the purposes of Article 5 (commencing with Section 3540) of Chapter 10.7 of Division 4 of Title 1 of the Government Code, and for which minimum qualifications for hire are specified by the Board of Governors.

(b) "Academic senate," "faculty council," and "faculty senate" means an organization formed in accordance with the provisions of this Subchapter whose 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. For purposes of this Subchapter, reference to the term "academic senate" also constitutes reference to "faculty council" or "faculty senate."

(c) "Academic and professional matters" means the following policy development and implementation matters:

(1) curriculum, including establishing prerequisites and placing courses within disciplines;

(2) degree and certificate requirements;

(3) grading policies;

(4) educational program development;

(5) standards or policies regarding student preparation and success;

(6) district and college governance structures, as related to faculty roles;

(7) faculty roles and involvement in accreditation processes, including self-study and annual reports;

(8) policies for faculty professional development activities;

(9) processes for program review;

(10) processes for institutional planning and budget development; and

(11) other academic and professional matters as are mutually agreed upon between the governing board and the academic senate.

(d) "Consult collegially" means that the district governing board shall develop policies on academic and professional matters through either or both of the following methods, according to its own discretion:

(1) relying primarily upon the advice and judgment of the academic senate; or

(2) agreeing that the district governing board, or such representatives as it may designate, and the representatives of the academic senate shall have the obligation to reach mutual agreement by written resolution, regulation, or policy of the governing board effectuating such recommendations.

§ 53203. Powers.

(a) 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.

(b) In adopting the policies and procedures described in Subsection (a), the governing board or its designees shall consult collegially with representatives of the academic senate.

(c) While in the process of consulting collegially, the academic senate shall retain the right to meet with or to appear before the governing board with respect to the views, recommendations, or proposals of the senate. In addition, after consultation with the administration of the college and/or district, the academic senate may present its views and recommendations to the governing board.

(d) The governing board of a district shall adopt procedures for responding to recommendations of the academic senate that incorporate the following:

(1) in instances where the governing board elects to rely primarily upon the advice and judgment of the academic senate, the recommendations of the senate will normally be accepted, and only in exceptional circumstances and for compelling reasons will the recommendations not be accepted. If a recommendation is not accepted, the governing board or its designee, upon request of the academic senate, shall promptly communicate its reasons in writing to the academic senate.

(2) in instances where the governing board elects to provide for mutual agreement with the academic senate, and agreement has not been reached, existing policy shall remain in effect unless continuing with such policy exposes the district to legal liability or causes substantial fiscal hardship. In cases where there is no existing policy, or in cases where the exposure to legal liability or substantial fiscal hardship requires existing policy to be changed, the governing board may act, after a good faith effort to reach agreement, only for compelling legal, fiscal, or organizational reasons.

(e) An academic senate may assume such responsibilities and perform such functions as may be delegated to it by the governing board of the district pursuant to Subsection (a).

(f) The appointment of faculty members to serve on college or district committees, task forces, or other groups dealing with academic and professional matters, shall be made, after consultation with the chief executive officer or his or her designee, by the academic senate. Notwithstanding this Subsection, the collective bargaining representative may seek to appoint faculty members to committees, task forces, or other groups.

Exhibit 3:

Opinion of the Legislative Counsel, April 24, 1991.

Legislative Counsel of California

BION M. GREGORY

Sacramento, California
April 24, 1991

Honorable David Roberti
205 State Capitol

Community Colleges: Role of Academic Senates #23296

Dear Senator Roberti:

QUESTION

Is Section 53203 of Title 5 of the California Code of Regulations valid?

OPINION

Section 53203 of Title 5 of the California Code of Regulations is invalid insofar as it enlarges the scope of Section 70901 of the Education Code by requiring the governing boards of community college districts to "consult collegially" with academic senates, as defined by subsection (d) of Section 53200 of Title 5 of the California Code of Regulations.

ANALYSIS

Section 53203 of Title 5 of the California Code of Regulations provides as follows:

"53203. Powers.

"(a) The governing board of a community college district shall adopt policies for the 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 regulations contained in this part [Division 6].

"(b) In adopting the policies and procedures described in subsection (a), the governing board or its designees, shall consult collegially with representatives of the academic senate.

"(c) While in the process of consulting collegially, the academic senate shall retain the right to meet with or appear before the governing board with respect to the views, recommendations, or proposals of the senate. In addition, after consultation with the administration of the college and/or district, the academic senate may present its views and recommendations to the governing board.

"(d) The governing board of a district shall adopt procedures for responding to recommendations of the academic senate that incorporate the following:

"(1) In instances where the governing board elects to rely primarily upon the advice and judgment of the academic senate, the recommendations of the senate will normally be accepted, and only in exceptional circumstances and for compelling reasons will the recommendations not be accepted. If a recommendation is not accepted, the governing board or its designee, upon request of the academic senate, shall promptly communicate its reasons in writing to the academic senate.

"(2) In instances where the governing board elects to provide for mutual agreement with the academic senate, and agreement has not been reached, existing policy shall remain in effect unless continuing with such policy exposes the district to legal liability or causes substantial fiscal hardship. In cases where there is no existing policy, or in cases where the exposure to legal liability or substantial fiscal hardship requires existing policy to be changed, the governing board may act, after a good faith effort to reach agreement, only for compelling legal, fiscal, or organizational reasons.

"(e) An academic senate may assume such responsibilities and perform such functions as may be delegated to it by the governing board of the district pursuant to subsection (a) of this section.

"(f) The appointment of faculty members to serve on college or district committees, task forces, or other groups dealing with academic and professional matters, shall be made, after consultation with the chief executive officer or his or her designee, by the academic senate. Notwithstanding this subsection, the collective bargaining representative may seek to appoint faculty members to committees, task forces, or other groups."

The term "consult collegially" is defined in subsection (d) of Section 53200 of Title 5 of the California Code of Regulations as follows:

"(d) 'Consult collegially' means that the district governing board shall develop policies on academic and professional matters through either or both of the following methods, according to its own discretion:

"(1) Relying primarily upon the advice and judgment of the academic senate; or

"(2) That the district governing board, or such representatives as it may designate, and the representatives of the academic senate shall have the obligation to reach mutual agreement by written resolution, regulation, or policy of the governing board effectuating such recommendations."

As an initial matter, administrative rules and regulations are presumed to be reasonable, and the courts will not substitute their judgment for that of the administrative agency unless the regulation is so unreasonable as to be arbitrary, capricious, or in excess of the authority vested in the agency (Bess v. Park, 144 Cal. App. 2d 798, 804). Therefore, in examining the validity of administrative regulations, an initial determination must be made as to whether they are within the scope of authority granted by statute. Administrative regulations that alter or amend a statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to, strike down those regulations (Dyna-Med, Inc. v. Fair Employment and Housing Com., 43 Cal. 3d 1379, 1389).

In this connection, the regulations at issue here were adopted pursuant to Sections 66700 and 70901 of the Education Code.

Section 66700 of the Education Code requires the Board of Governors of the California Community Colleges (hereafter the board of governors) to prescribe minimum standards for the formation and operation of public community colleges and to exercise general supervision over public community colleges. Section 70901 of the Education Code, more specifically, requires the board of governors to establish minimum standards governing procedures established by governing boards of community college districts to ensure the right of academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards. Section 70901 was added to the Education Code by Chapter 973 of the Statutes of 1988.

In enacting any law, the Legislature is presumed to have had knowledge of existing law and judicial decisions pertaining to the subject matter of that law (see Bailey v. Superior Court, 19 Cal. 3d 970, 977-978, fn. 10). Valid administrative regulations have the force and effect of law (Mission Ins. Group, Inc. v. Marco Construction Engineers, Inc., 147 Cal. App. 3d 1059, 1069). Thus, it is presumed that, when the Legislature enacted Chapter 973 of the Statutes of 1988, the Legislature was aware of the existing administrative regulations governing academic senates. On this point, Section 53200 of Title 5 of the California Code of Regulations, in its present form and as it existed at the time the Legislature enacted Chapter 973 of the Statutes of 1988, defines "academic senate" as "an organization ... whose primary function is, as the representative of the faculty, to make recommendations to the administration of a college and to the governing board of a district with respect to academic and professional matters" (emphasis added). Section 53203 of Title 5 of the California Code of Regulations, as it existed at the time the Legislature enacted Chapter 973 of the Statutes of 1988, authorized the academic senate to present its written views and recommendations to the governing board of a community college district after consultation with the administration of its community college.[1] That regulation also required the governing board to consider and respond to those views and recommendations.

Thus, when the Legislature enacted Chapter 973 of the Statutes of 1988, the role of the academic senate was to make recommendations to the administration of the college and to the governing board of the district regarding academic and professional matters. In enacting Section 70901 of the Education Code, the Legislature, in effect, required the academic senate to

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[1] A similar authorization is now embodied in subsection (c) of Section 53203 of Title 5 of the California Code of Regulations.

assume primary responsibility for making recommendations in the areas of curriculum and academic standards. Thus, the Legislature contemplated a role for the academic senate different from that which existed prior to the enactment of Chapter 973 of the Statutes of 1988; that is, a role different from a mere authorization for an academic senate to present its written views and recommendations to the governing board.

In response to Section 70901 of the Education Code, the board of governors adopted the regulations set forth above. As quoted above, Section 53203 of Title 5 of the California Code of Regulations requires the governing board of a community college district to adopt policies for the appropriate delegation of authority and responsibility to its college or district academic senate. The policies are required to mandate that the governing board or its designees "consult collegially" with the academic senate when adopting policies and procedures on academic and professional matters (5 Cal. Code Regs. 53203(a)).

Subsection (d) of Section 53200 of Title 5 of the California Code of Regulations, in defining "consult collegially," requires that the district governing board develop policies on academic and professional matters by either relying primarily upon the advice and judgment of the academic senate or by reaching mutual agreement with the academic senate, or both, according to the governing board's discretion. That provision further requires the governing board of a district to adopt procedures for responding to recommendations of the academic senate that require the recommendations of the academic senate normally to be accepted in instances where the governing board elects to rely primarily upon the advice and judgment of the academic senate. In instances where the governing board elects to provide for mutual agreement with the academic senate and agreement has not been reached, the existing policy is required to remain in effect unless continuing with that policy would expose the district to legal liability or would cause substantial fiscal hardship. If there is no existing policy, or if exposure to legal liability or substantial fiscal hardship would require existing policy to be changed, the governing board is authorized to act, after a good faith effort to reach agreement, only for compelling legal, fiscal, or organizational reasons (5 Cal. Code Regs. 53203(d)).

In summary, Section 53203 of Title 5 of the California Code of Regulations requires that the governing board not merely consider and respond to the recommendations of the academic senate with respect to academic and professional matters, but that it actually seek the advice of, and in some cases, compromise with, the academic senate. Other than in cases of exceptional circumstances and for compelling reasons, as set forth in paragraphs (1) and (2) of subsection (d) of Section 53203 of Title

5 of the California Code of Regulations, there is no alternative that would allow the governing board to act independently in these matters. The question is whether this requirement to consult collegially exceeds the authority conferred by Section 70901 of the Education Code.

By requiring that the governing board "consult collegially," as defined, the regulations go beyond ensuring that the academic senate has the right to assume primary responsibility for merely making recommendations regarding curriculum and academic standards. In our view, the regulations expand the role of the academic senate beyond that authorized by statute. The regulations equalize the role of the academic senate with that of the governing board by requiring the governing board either to rely primarily on the advice of, or to reach mutual agreement with, the academic senate. In effect, the regulations dilute the authority of the governing board to act independently.

It is our opinion that the Legislature intended that the academic senates retain their recommendatory character. "The word 'recommendation' in its common usage refers to an action which is advisory in nature rather than one having any binding effect" (People v. Gates, 41 Cal. App. 3d 590, 599). If the Legislature had intended to enhance the role of the academic senate to the degree reflected in Section 53203 of Title 5 of the California Code of Regulations, it would have done so expressly. In this regard, in contrast with the language of Section 70901 of the Education Code, which pertains to the responsibility of the academic senate to "make recommendations," other provisions of the Education Code expressly require that the governing board and the academic senate reach joint agreement, where that is the contemplated nature of the relationship. For example, in other sections of the Education Code added by Chapter 973 of the Statutes of 1988, the Legislature expressly requires joint agreement between the governing board and the academic senate in particular employment matters (see Secs. 87359, 87360, 87458, and 87615, Ed. C.). In contrast to those sections, Section 70901 of the Education Code speaks in terms of the academic senate merely "making recommendations" and not in terms of changing the role of the academic senate to the degree of equalizing its role with that of the governing board.

We are mindful that Section 61 of Chapter 973 of the Statutes of 1988 requires the board of governors, by January 1, 1990, to have developed policies and guidelines for strengthening the role of the academic senate with regard to the determination and administration of academic and professional standards, course approval and curricula, and other academic matters. However, we think it is possible to strengthen the role of the academic senate and to ensure its right to make recommendations to the governing

board consistent with the requirements set forth in Section 70901 of the Education Code and Section 61 of Chapter 973 of the Statutes of 1988 without equalizing the role of the academic senate with that of the governing board.

Based on the foregoing discussion, it is our opinion that Section 53203 of Title 5 of the California Code of Regulations is invalid insofar as it enlarges the scope of Section 70901 of the Education Code by requiring the governing boards of community college districts to "consult collegially" with the academic senate, as defined by subsection (d) of Section 53200 of Title 5 of the California Code of Regulations.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By
Jana T. Harrington
Deputy Legislative Counsel

JTH:kg

Exhibit 4:

Amicus Brief of the Community College League of California in Diablo Valley College v. Contra Costa Community College District,148 Cal. App. 4th 1023 (2007).

ORIGINAL

Case No. A108713

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

application
FILED
APR 12 2006
Court of Appeal - First App. Dist.
DIANA HERBERT
By _____ DEPUTY

DIABLO VALLEY COLLEGE FACULTY SENATE;

Petitioner and Appellant

v.

CONTRA COSTA COMMUNITY COLLEGE DISTRICT AND GOVERNING BOARD OF THE CONTRA COSTA COMMUNITY COLLEGE DISTRICT, CHANCELLOR OF THE CALIFORNIA COMMUNITY COLLEGES

Respondents

Brief
FILED
APR 19 2006
Court of Appeal - First App. Dist.
DIANA HERBERT
By _____ DEPUTY

APPLICATION OF THE COMMUNITY COLLEGE LEAGUE OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF

On appeal from the Contra Costa County Superior Court
The Honorable Steven K. Austin, Judge Presiding
Case No. N03-0005

Burke, Williams & Sorensen, LLP
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Case No. A108713

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DIABLO VALLEY COLLEGE FACULTY SENATE;

Petitioner and Appellant

v.

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TO THE HONORABLE WILLIAM R. MCGUINESS, ADMINISTRATIVE PRESIDING JUSTICE OF THIS COURT:

Pursuant to Rule 13(c) of the California Rules of Court, the Community College League of California ("CCLC") respectfully requests leave to file the accompanying amicus brief in this case in support of Respondents. Respondents are the Contra Costa Community College District, Governing Board of the Contra Costa Community College District, and Chancellor of the California Community Colleges.

Counsel for CCLC have reviewed the briefs filed below in this case and is familiar with the questions involved with the case and the scope of presentation. CCLC counsel is knowledgeable about Assembly Bill 1725 and the related provisions of California statutory law and the State and Federal Constitution, and relevant case decisions.

The CCLC is a statewide non-profit public benefit membership corporation. The goal of the CCLC is to advise community college districts on education programs, research and policy analysis, fiscal services programs, government regulations, communications, and governance of athletics. All 72 California community college districts are members of the CCLC.

The CCLC has a direct interest in the legal issues presented by this case and can present information and authorities directly bearing on these issues. The ability of a community college district to exercise its managerial prerogative is of critical importance. The issue presented in this case goes directly to a college district and its governing board's duty to govern and charter the direction and administration of the district. An elected governing board must be afforded the ability to improve its managerial structures and respond to changing circumstances quickly and without undue interference of an academic senate. Faculty members are protected from the impacts of administrative managerial decisions on their

work conditions by the safeguards provided by the community college districts obligations to bargain impacts on work conditions.

All of our community college district members have an interest in the laws governing the administration of community colleges. Requirements that elected governing boards consult and achieve consensus with an academic senate prior to implementing a managerial restructuring will impede a college district's ability to operate efficiently. Such a requirement would almost certainly affect both the time and money spent on making administrative decisions and result in a unjust limitation on the rights and responsibilities of elected governing boards to govern effectively. Community colleges must have the ability to implement managerial changes, such as the change from a chair to dean departmental system, without having to accede to an academic senates' demands. This case will have serious implications on the ability of community college districts to carry out their administrative duties in the best interests of their students, employees, and communities.

The amicus curiae brief will expand on, but not reargue, the arguments raised by Respondents in their brief regarding the lack of legal authority to support Appellants contention that an Academic Senate may override the community college's authority regarding managerial decisions.

Dated: April 11, 2006

RESPECTFULLY SUBMITTED,

BONIFACIO BONNY GARCIA
NITASHA K. SAWHNEY
BURKE, WILLIAMS & SORENSEN, LLP

By _____
Nitasha K. Sawhney
Attorneys for Amicus Curiae

Case No. A108713

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DIABLO VALLEY COLLEGE FACULTY SENATE;

Petitioner and Appellant

v.

CONTRA COSTA COMMUNITY COLLEGE DISTRICT AND GOVERNING BOARD OF THE CONTRA COSTA COMMUNITY COLLEGE DISTRICT, CHANCELLOR OF THE CALIFORNIA COMMUNITY COLLEGES

Respondents

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INTRODUCTION

The primary issue in this case is whether a community college district's decision to implement a managerial reorganization is subject to the approval or consent of an academic senate. This issue goes to the core of a district's managerial discretion and an elected board's ability to govern its district.

Appellant argues that legislatively mandated "collegiality" requires a governing board to reach agreement with the academic senate prior to implementing a managerial reorganization. Appellant's opening brief begins with a dictionary definition of "collegiality" as "the sharing of authority or power among colleagues." (Appellant's Opening Brief, p. 1.) This definition highlights the basis of Appellant's misstatement of a governing board's duty to collegially consult with an academic senate. Appellant further misreads AB 1725 to argue that an academic senate and an elected governing board are "full partners" in community college governance and are required to reach agreement even on core managerial issues. (Ibid.)

The law provides otherwise. AB 1725 explicitly defines the matters upon which "joint agreement" must be reached with an academic senate and *never* requires reaching agreement on matters of core managerial prerogative, such as a managerial reorganization. In fact, even on issues where joint agreement is required, AB 1725 reserves the power of final approval for the governing board. Moreover, AB 1725 itself emphasizes a governing board's discretion to act and manage a community college district in all ways not expressly prohibited by law. (Educ. Code § 70902(a).)

Appellant correctly argues that AB 1725 reformed "shared governance" in community colleges by enhancing the role of academic senates but ignores the fact that the legislation (and corresponding statutes)

specifically enumerated the areas in which "shared" requires reaching an agreement. Shared governance in the community college setting does not equate to collegial consultation on every issue of college governance, as argued by the Appellant. Instead, shared governance is a hallmark of community colleges that distinguishes them from the K-12 governance model, and requires the input and, in some cases, agreement of faculty members on issues in which they have *expertise* such as curriculum development, hiring, evaluations, and tenure. But shared governance does not require agreement or consultation with academic senates on issues of core managerial prerogative.

Appellant also misreads the regulations promulgated by the State Board of Governors pursuant to AB 1725. Appellant argues that the regulations require a district to consult or reach agreement with an academic senate prior to implementing a change from part-time division chairs to full time deans because Section 53200(b)(6) requires consultation on "college governance structures, as related to faculty roles." Appellant's argument is flawed because it fails to give meaning to each of the words of the section, especially the words "*as related to faculty roles.*" The change from part-time division chairs to full-time deans does not impact "faculty roles" because the duties of the chair, even when performed by a faculty member, are managerial duties. Respondent District's decision to change from chairs to deans only impacts management roles, not "faculty roles" because it only relates to management activity. That a faculty member performs a management role does not change the character of the work from a management role to a faculty role.

Furthermore, acceptance of Appellant's interpretation of the regulations will result in an improper transfer of power on management issues from elected and publicly accountable governing boards to inexpert and unaccountable academic senates that was not intended by the

Legislature in AB 1725. Such an interpretation will also render the regulations *ultra vires* and void. Fortunately, the lower court and State Chancellor have correctly interpreted the regulations so that "as applied" they are valid and consistent with AB 1725. As the lower court succinctly and correctly stated:

> To interpret the regulation more broadly would unduly limit the freedom of a college district to improve its own governance structures and response to perceived deficiencies or changing circumstances. (*Diablo Valley College v. Contra Costa Community College District* (N03-0005, Order, p. 5, review granted.))

Accordingly, the interpretation of the State Chancellor and holding of the lower court should be affirmed on appeal.

STATEMENT OF RELEVANT FACTS

The Community College League of California ("CCLC") incorporates by reference Respondent Contra Costa Community College District's ("Respondent District") Statement of the Case and Statement of the Facts as set forth in Respondent's Brief as though fully set forth herein. The following facts are of particular relevance to CCLC's discussion of the issues presented in this amicus curiae brief.

Diablo Valley Community College is one of the three community colleges that comprise the Contra Costa Community College District. In 2001, Respondent District proposed a reorganization of all three colleges' management structures. The Respondent District's proposal would require that the colleges designate full-time deans. Prior to 2001, the colleges had used a part-time division-chair system.

While the change did not provoke a significant reaction at two of the colleges, the Diablo Valley College Faculty Senate ("Appellant") complained to the State Chancellor's Office ("Respondent Chancellor") that this change violated the Respondent District's duty to collegially consult with Appellant regarding this managerial reorganization. Respondent Chancellor's Office initially responded in a legal opinion that while the Chancellor's Office did not have sufficient information to make a definitive ruling regarding the Faculty Senate's complaint, the reorganization did not constitute "an academic and professional matter requiring collegial consultation." The Respondent Chancellor's Office reaffirmed its initial finding in two subsequent legal opinions.

Despite Respondent Chancellor's clear position on this issue, Appellant continued to press its case that the reorganization was subject to mandatory collegial consultation. The Chancellor's Office responded by conducting a thorough investigation of the Faculty Senate's complaint. Finally, on May 2, 2003, the Respondent Chancellor's Office issued a final, formal, written ruling that determined Respondent was under no legal obligation to collegially consult the District's reorganization. Before receiving the State Chancellor's ruling, Appellant filed a Petition for Writ of Mandate against Respondent District and State Chancellor.

The Writ moved forward and the trial court found in favor of Respondents. The trial court held that Respondent District's change in management structure, from faculty chairs to division deans, did not involve an academic or professional matter and did not trigger a duty to collegially consult with Appellant. The court further held "To interpret the regulation more broadly would unduly limit the freedom of a college district to improve its own governance structures in response to perceived deficiencies or changing circumstances." (*Diablo Valley College v. Contra*

Costa Community College District (N03-0005, Order, p. 5, review granted).)

ARGUMENT

I. The Plain Language Of California Education Code Section 70900 Et Seq. Does Not Require Collegial Consultation On Managerial Reorganizations

It is a well-settled canon of statutory construction that the plain language of a statute is controlling. It is only where the words of a statute are unclear or ambiguous that there is something to "interpret" or "construe". (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238-1239.) And it is only when the meaning of the word is unclear that a court must refer to the legislative history for guidance. (*Ibid.*)

It is also well-settled that the Legislature is presumed to know the existing law pertaining to an issue when it legislates on that issue. (*Viking Pools Inc. v. Maloney* (1989) 48 Cal.3d 602, 608 ("The Legislature is deemed to be aware of existing laws and judicial decisions construing the same statute in effect at the time legislation is enacted"); (*In re Estate of McDill* (1975) 14 Cal.3d 831, 898) (It is assumed that the Legislature has in mind existing laws when it passes a statute); (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7) ("we must assume that when passing a statute the Legislature is aware of existing related laws and intends to maintain a consistent body of rules".)

Here, the controlling legislation, Assembly Bill 1725 codified, in part, at California Education Code sections 70900 et seq. (Stats. 1988, Chapter 973) (hereafter "AB 1725") made numerous changes to the California Education Code sections governing community colleges. Some of the significant changes included: abolishing the teacher credentialing

system for community college faculty, shifting to a program-based funding model, and defining the role of an academic senate. (Stats. 1988, Ch. 973.)

AB 1725 changed the role and duties of academic senates in community colleges. Prior to enactment of AB 1725, an academic senate's role was to make written recommendations to the governing board of a district regarding academic and professional matters along with other constituent groups of the district. AB 1725 changed the duties of academic senates by requiring increased participation in the development and implementation of policies and procedures in four specific areas: hiring, peer review, evaluation and tenure, and curriculum design. AB 1725 highlighted the role of academic senates by requiring that governing boards ensure the "...right of academic senates to assume primary responsibility for making **recommendations** in the areas of curriculum and academic standards." (*Ibid.*)

While expressly increasing the role of academic senates in some areas, the Legislature did not to expand the role of academic senates in others. AB 1725 does not give academic senates any responsibility on issues related to managerial prerogatives. AB 1725 does not require joint agreement with academic senates on any core managerial decision. And AB 1725 definitely does not change the role of an academic senate such that they become co-equal partners with the board of trustees in community college governance. Indeed, one searches in vain for language in the statute or legislative history that would require an elected governing board to reach agreement with an academic senate on any clear matter of managerial prerogative.

Furthermore, the plain language of Education Code section 70902 makes clear that community college governing boards have the right to act on any issue or program not otherwise prohibited by law. Education Code section 70902(a) states that governing boards:

> "may initiate and carry on any program, activity, or may otherwise act **in any manner that is not in conflict with or inconsistent with, or preempted by, any law** and that is not in conflict with the purposes for which community college districts are established." (Emphasis added.)

Nowhere in AB 1725 is there a requirement to consult with academic senates on matters of managerial prerogative, in general and in reorganizing a college's administrative structure in particular.

Nor does any other statutory or case law purport to limit the governing board's discretion in reorganizing the administration of a community college. Had the Legislature sought to alter the subjects requiring collegial consultation, the Legislature would have implemented new legislation with language making collegial consultation mandatory prior to the reorganization of a community college's administration. It has not done so. Governing boards are thus free to direct the governance of college districts- including restructuring "chair" and "dean" systems- without reaching agreement with an academic senate.

II. Assembly Bill 1725 Does Not Increase Responsibilities Of Academic Senates In Areas of Core Managerial Prerogative, Such As Managerial Reorganizations, And The Legislature Did Not Otherwise Intend To Make Academic Senates Inexpert And Publicly Unaccountable Partners With Governing Boards

The conclusion that AB 1725, on its face does not require a governing board to consult with an academic senate before reorganizing its administration is confirmed by a review of its legislative history.

The legislative history of AB 1725 enumerates the following changes to the role of the academic senate:

* representatives of the governing board and the academic senate were to develop and jointly agree upon procedures, standards and criteria under which governing boards reached determinations regarding waivers of minimum qualifications. The agreement of the representative and academic

senate would need to be approved by the governing board. (Stats. 1988, Ch. 973, § 28, p. 2281,)

* representatives of the governing board and the academic senate must develop and jointly agree upon hiring criteria for faculty. The criteria must be approved by the governing board. (Stats. 1988, Ch. 973, § 28, p. 2282.)

* faculty was to be consulted to establish and develop standards for employing part-time temporary faculty under option-rollover contract (this was a 2 year pilot program to be piloted at 3 community college districts). (Stats. 1988, Ch. 973, § 65, p. 2289.)

* in districts where tenure evaluation procedures are collectively bargained, the union would be required to consult with the academic senate before negotiation of evaluation procedures. (Stats. 1988, Ch. 973, § 46. p. 2285.)

* representatives of the governing board and the academic senate must develop and jointly agree upon the process for granting waivers from degree requirements for faculty members seeking tenure. The process must be approved by the governing board. (Stats. 1988, Ch. 973, § 28, p. 2281.)

* more responsibility of faculty in the standards and procedures to evaluate granting permanent status.[1] The Legislature expressly required a "joint and cooperative exercise of responsibility" in the development and implementation of policies and procedures governing the hiring process, noting that faculty members have an expertise as teachers and subject matter specialists that give them an "inherent responsibility" to ensure an effective hiring process.[2]

Through this list the Legislature made clear it was expanding the responsibilities of academic senates in areas in which they had expertise.[3] With respect to hiring and affirmative action in community college districts, AB 1725 specifically notes that "faculty members derive their authority as teachers and expertise subject matter specialists and from their status as professionals" (Stats. 1988, Ch. 973, p. 2260.)

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[1] Legislature specifically noted that the increased responsibility of faculty members in evaluation of probationary periods and tenure would not make them managerial or supervisory employees.

[2] The Legislature also expressly noted, again, that governing boards and the administrators they appoint have "the principal legal and public responsibility for ensuring an effective hiring process." (Stats. 1988, Ch. 973, § 4 p. 2261.)

Even in the areas where it is recognized that an academic senate's expertise and required its participation, the Legislature expressly noted that elected governing boards hold the ultimate responsibility and must approve all policies and procedures proposed by an academic senate. It is therefore not surprising that AB 1725 is utterly silent on and does not change the law with respect to managerial reorganizations.

Community college district governance is the responsibility of elected boards. Governing boards are charged with administration and governance of the entire college district and are accountable to the public on all issues. It is rationale and good public policy for the Legislature to provide procedural guarantees for effective academic senate participation in areas where a community college would benefit from such expertise. Academic senates, however, do not have any particular expertise in management or administrative reorganizations. While it might be argued that officials elected from the public at large may not have any more expertise than members of the college community, governing board members are accountable to the voting public whereas academic senates are not. Indeed, there is no principled public policy basis for having academic senates raised to co-governor status in areas where they have not the expertise and are not accountable to the public.

III. The Plain Language Of The Regulations Does Not Require Collegial Consultation On Managerial Reorganizations Or On Any Other Core Managerial Prerogative

Pursuant to AB 1725 and Education Code section 70901, the State Board of Governors adopted the regulations set forth at Title 5 of the California Code of Regulations ("CCR") sections 53200 et seq.

CCR Section 53203(a) requires district governing boards to adopt policies to delegate authority and responsibility to academic senates and requires the governing boards or designees to "consult collegially" with

academic senates when adopting policies and procedures on "academic and professional matters." The regulation describes the two ways by which a district can "collegially consult" with academic senates as: 1) relying primarily on the advice and judgment of the academic senate and/or 2) reaching mutual agreement with the academic senate and maintaining the existing policy until agreement is reached unless there are other compelling reasons (i.e. fiscal hardship, legal liability, etc).[4] (Cal. Code Regs., tit. 5 § 53203(d)).

CCR Section 53200 defines many of the key terms in the regulations. Specifically, CCR Section 53200(b) defines an "academic senate" as an organization "whose 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." (Emphasis added) Subsection (c) defines "academic and professional matters" to include eleven items. They are:

1. curriculum, including establishing prerequisites and placing course within disciplines;
2. degree and certificate requirements;
3. grading policies;
4. educational program development;
5. standards or policies regarding student preparation and success;
6. district and college governance structures, *as related to faculty roles;*
7. faculty roles and involvement in accreditation processes, including self-study and annual reports;

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[4] Respondent, Contra Costa Community College District, adopted the

8. policies for faculty professional development activities;

9. processes for program review;

10. processes for institutional planning and budget development; and

11. other academic and professional matters as are mutually agreed upon between the governing board and the academic senate. (emphasis added.)

These 11 items are intended to define AB 1725 and Education Code section 70901's reference to "areas of curriculum and academic standards."

A. The Managerial Role Of A Faculty Chair Or Dean Is Not A "Faculty Role" And Therefore Does Not Trigger The Consultation Requirement

Although it can be argued that some of the enumerated items Regulation 53201 (c) go beyond areas of "curriculum and academic standards," the regulation has been interpreted and applied by the State Chancellor and the trial court in a manner that does not violate the language or intent of AB 1725 as codified at Education Code Section 70901.

Appellant argues that the plain language of CCR Section 53200 (b)(6) "district and college governance structures, as related to faculty roles; . . ." triggers Respondent District's duty to consult collegially with Appellant before implementing the managerial restructuring from part-time faculty chairs to non-faculty division deans. This argument attempts to extend the role of academic senates beyond the intent and plain language of the legislation and regulations to encroach on areas of core managerial prerogative. Appellant argues that because faculty members were chairs and will no longer serve in that capacity the academic senate must be consulted. The impact described by Appellant may give rise to the faculty

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"mutual agreement" process in Board Policy 1009.

union's right to negotiate impacts on work conditions of faculty members but it does not trigger the District's duty to collegially consult with Appellant.

This is because under the division chair management structure faculty members served as part time "chairs". Their duties as chairs are management roles, not faculty roles. Respondent District's decision to change from chairs to deans only impacts management roles, not "faculty roles" because it only relates to management activity. That a faculty member performs a management role does not change the character of the work from a management role to a faculty role. In addition, as found by the trial court, the language of CCR Section 53200 (d)(6) states "...as related to faculty roles" is a limitation on the types of structural changes that would trigger the duty to collegially consult with Appellant. The trial court correctly ruled that to incorporate the right to "collegial consultation" would "unduly limit the freedom of a college district to improve its own governance structures in response to perceived deficiencies or changing circumstances" (*Diablo Valley College v. Contra Costa Community College District* (N03-0005, p. 5, review granted).)

B. As Applied By The State Chancellor And The Trial Court, Regulation 53200 Is Consistent With AB 1725; Appellant's Interpretation Makes The Regulation A Vehicle For An *Ultra Vires* Transfer Of Authority Over Managerial Issues From Elected Governing Boards To Unaccountable Academic Senates

An administrative regulation is only valid insofar as it is authorized and consistent with the controlling statutes and legislative intent. (*Cooper v. Swoap* (1974)11 Cal.3d 856, 864.) A regulation that alters, enlarges, or impairs the scope of the controlling statute must be stricken by the courts. (*Id.* citing *Morris v. Williams* (1967) 67 Cal.2d 733, 748.) Here, CCR Sections 53200 et seq. have been interpreted and applied consistent with

AB 1725; in particular Education Code Section 70901 and 70902. To accept Appellant's argument or interpret the State Board of Governor's regulations such that there is a duty to "collegially consult" with Appellant on issues related to a managerial reorganization would impermissibly interface with powers reserved to governing boards and Education Code Section 70902(a).

As applied and interpreted by the State Chancellor and trial court, the regulations are valid and have not done violence to the language or legislative intent of AB 1725. Where a regulation is applied in a manner consistent with the authorizing legislation and statutes, it is valid and should be upheld. A regulation can be valid "as applied" to one set of facts and invalid when applied to another set of facts. (*Cooper v. Swoap* (1974) 11 Cal.3d 856, 879); (*Yee v. City of Escondido* (1990) 224 Cal.App.3d 1349, 1359) (the validity of a regulation will depend on analyzing a challenge to the regulation as applied).

Here, the State Chancellor and the trial court have upheld application of the regulations in a manner that does not result in an *ultra vires* transfer of authority from an elected governing board to the academic senate. Appellant's interpretation of the regulations would force the court to conclude that the regulation, as applied by Appellant, is *ultra vires* and therefore unenforceable.

IV. Shared Governance In The Community College Setting Relates Specifically To Joint Governance In Areas In Which The Academic Senate Has Expertise And Which Are Explicitly Enumerated By The Legislature

Prior to the passage of AB 1725, community college districts were governed as K-12 districts are governed. The K-12 model almost completely lacks the input and contribution of faculty outside of the collective bargaining process. Unlike faculty members in community

colleges, K-12 teachers have limited involvement in the development of curriculum, and are not involved in developing hiring criteria, evaluations or the procedures related to tenure. Most of these areas are almost completely governed by statute. Under the K-12 model, faculty members have limited ways to effectively participate in the governance of the school district in any area. Generally decisions are made by governing boards and superintendents and passed down to all of the constituent groups including faculty, classified staff, and students.

Reforming this system for community colleges, AB 1725 implemented a "shared governance" process by specifically requiring the participation of academic senates in the development of some college and/or district policies and procedures. AB 1725 states that "faculty members derive their authority from their expertise as teachers and subject matter specialists and from their status as professionals..." (Stats. 1988, Ch. 973, p. 2260). The expertise that faculty members possess was specifically applied to the areas in which the Legislature wanted to formally expand shared governance through collegial consultation.

As a practical matter the Legislature has defined "shared governance" for community college districts and specifically denoted the issues on which agreement must be reached, i.e. "shared," within the four corners of AB 1725. Shared governance is no more and no less than what the legislature, through AB 1725, says it is. AB 1725 is utterly silent on the "sharing" of responsibility and authority over managerial issues and prerogatives. Indeed, the Legislature reconfirmed the retention of governing board authority in these areas through Education Code Section 70902(a).

This is why Appellant has been forced to resort, not to AB 1725, but to dictionaries and out of context citations from case law from other jurisdictions to support its own definition of "shared authority" as co-

authority between the governing board and academic senate. (Appellant's Opening Brief, pp. 1, 21, 22, 26.) But AB 1725 is clear and dispositive for California community colleges. "Shared governance" does ensure an academic senate's right to participate on many issues arising in a community college setting. But it does not require prior agreement with or approval of the academic senate on issues of core managerial prerogative; issues on which academic senates do not have expertise and would not be accountable to the public.

V. Public Policy Requires That Governing Boards Be Allowed To Address Issues Of Core Managerial Prerogative Without Reaching Prior Agreement With Academic Senates

It is well established under collective bargaining rules that reorganizations are a matter of managerial prerogative and, therefore, are excluded from the scope of bargaining. (*Fire Fighters Union v. City of Valejo* (1974) 12 Cal.3d 608, 621; *State Assn. of Real Property Agents v. State Personnel Board* (1978) 83 Cal.App.3d 206, 213; see also *Fireboard Paper Products v. National Labor Relations Board* (1964) 37 9 U.S. 203; *Dorsey Trailers, Inc. v. National Labor Relations Board* (3d. Cir. 1998) 134 F. 3d 125, 131.) The similarities between collective bargaining and collegial consultation are such that the rationale behind "managerial prerogative" in collective bargaining cases is instructive in the collegial consultation context. Shared governance in the community college districts triggers particular consultation duties regarding issues of faculty hiring, peer review, evaluation, tenure, and curriculum design. Academic senates have an expertise in these areas which is useful in formulating relevant rules and procedures. Furthermore, an academic senate, along with other district constituent groups, will always have a voice in the governing board's actions.

But as the courts have recognized limitations on a union's right to negotiate over certain areas of core managerial duties, so too there are limits on the academic senate's right to be consulted.

The California Supreme Court held that there is a core area of managerial control which is not subject to negotiation requirements under California labor law:

> Even when the action of an employer has a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees, the employer may yet be excepted from the duty to bargain under the 'merits, necessity, or organization' language of section 3504. If an action is taken pursuant to a fundamental managerial or policy decision, it is within the scope of representation only if the employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question. (*Building Material and Construction Teamsters Union v. Farrell* (1986) 41 Cal.3d 651, 660.)

Consequently, the law preserves the community college district governing boards' managerial prerogative in situations such as those currently before the court.

CONCLUSION

Requiring a district to reach agreement with an academic senate prior to implementing a managerial reorganization would result in an improper transfer of powers over managerial issues from elected and publicly accountable governing boards and to inexpert and unaccountable academic senates. Such a requirement would clearly violate the plain language of AB 1725 in general, and Education Code Section 70902 in particular. While AB 1725 did increase the role of academic senates dramatically and solidified the concept of "shared governance" in community colleges - a dramatic shift from the K-12 model- it did not give academic senates functional veto power over a governing board's exercise of its core managerial prerogatives. AB 1725 also specifically reinforced a

governing board's authority to act freely on all matters, such as managerial reorganizations, not expressly prohibited by law.

Thus there is no prohibition in law on implementing a managerial reorganization without prior agreement of an academic senate and it is well supported in the law that all core managerial matters are otherwise left to the discretion of elected governing boards. Accordingly, the interpretation of the State Chancellor and holding of the lower court should be affirmed on appeal.

DATED: April 11, 2006 RESPECTFULLY SUBMITTED,

BONIFACIO BONNY GARCIA
NITASHA K. SAWHNEY
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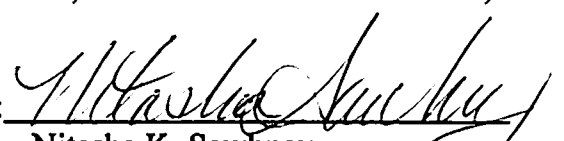
By: 
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 14(c)(1)

The text of this brief consists of 4,519 words as counted by the Microsoft Word, 2002 version word processing program used to generate the brief.

Dated: April 11, 2006

By: _____
Nitasha K. Sawhney
Counsel for Amicus Curiae

Exhibit 5:

Petitioner's Proposed Amendments To Title 5, Sections 51023, 53200 and 53203 of the California Code of Regulations

§ 51023. Faculty

The governing board of a community college district shall:

(a) adopt a policy statement on academic freedom which shall be made available to faculty;

(b) adopt policies and procedures that provide faculty members the opportunity to participate effectively in district and college governance. Among other matters, said policies and procedures shall include the following:

(1) Faculty members shall be provided an opportunity to participate in formulation and development of district and college policies and procedures that have or will have a significant effect on the faculty. This right includes the opportunity to participate in processes for jointly developing recommendations to the governing board regarding such policies and procedures.

(2) Except in unforeseeable, emergency situations, the governing board shall not take action on a matter having a significant effect on the faculty it has provided faculty with an opportunity to participate in the formulation of the policy or procedure or the joint development of recommendations regarding the action.

(3) Governing board procedures shall ensure that at the district and college levels, recommendations and positions developed by the faculty are given every reasonable consideration.

(c) For the purposes of this Section, district and college policies and procedures that have or will have a "significant effect on faculty" includes the following:

(1) grading policies;

(2) codes of student conduct;

(3) academic disciplinary policies;

(4) curriculum development;

(5) courses or programs which should be initiated or discontinued;

(6) institutional planning and budget development;

(7) standards and policies regarding student preparation and success;

(8) student services planning and development;

(9) accreditation processes;

(10) faculty professional development; and

(11) any other district and college policy, procedure, or related matter that the district governing board determines will have a significant effect on faculty.

(d) Nothing in this Section shall be construed to impinge upon the due process rights of faculty, nor to detract from any negotiations or negotiated agreements between collective bargaining agents and district governing boards. It is the intent of the Board of Governors to respect agreements between academic senates and collective bargaining agents as to how they will consult, collaborate, share or delegate among themselves the responsibilities that are or may be delegated to academic senates pursuant to the regulations on academic senates contained in Sections 53200-53206.

(e) ~~(b)~~ adopt procedures which are consistent with the provisions of sections 53200-53206, regarding the role of academic senates and faculty councils:

(f) ~~(c)~~ substantially comply with district adopted policy and procedures adopted pursuant to subdivisions (a), ~~and~~ (b) and (c).

§ 53200. Definitions.

For the purpose of this Subchapter:

(a) "Faculty" means those employees of a community college district who are employed in positions that are not designated as supervisory or management for the purposes of Article 5 (commencing with Section 3540) of Chapter 10.7 of Division 4 of Title 1 of the Government Code, and for which minimum qualifications for hire are specified by the Board of Governors.

(b) "Academic senate," "faculty council," and "faculty senate" means an organization formed in accordance with the provisions of this Subchapter whose 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. For purposes of this Subchapter, reference to the term "academic senate" also constitutes reference to "faculty council" or "faculty senate."

(c) "Curriculum and academic standards" includes course content, grading policies, requirements for conferring degrees and certificates, and related matters as are mutually agreed upon by the governing board and the academic senate.

~~(c) "Academic and professional matters" means the following policy development and implementation matters:~~

~~(1) curriculum, including establishing prerequisites and placing courses within disciplines;~~

~~(2) degree and certificate requirements;~~

~~(3) grading policies;~~

~~(4) educational program development;~~

~~(5) standards or policies regarding student preparation and success;~~

~~(6) district and college governance structures, as related to faculty roles;~~

~~(7) faculty roles and involvement in accreditation processes, including self-study and annual reports;~~
~~(8) policies for faculty professional development activities;~~

~~(9) processes for program review;~~

~~(10) processes for institutional planning and budget development; and~~

~~(11) other academic and professional matters as are mutually agreed upon between the governing board and the academic senate.~~

~~(d) "Consult collegially" means that the district governing board shall develop policies on academic and professional matters through either or both of the following methods, according to its own discretion:~~

~~(1) relying primarily upon the advice and judgment of the academic senate; or~~

~~(2) agreeing that the district governing board, or such representatives as it may designate, and the representatives of the academic senate shall have the obligation to reach mutual agreement by written resolution, regulation, or policy of the governing board effectuating such recommendations.~~

§ 53203. Recommendations on Curriculum and Academic Standards.

(a) The governing board of a community college district shall adopt policies that provide for the right of the academic senates to assume primary responsibility for making recommendations in the areas of curriculum and academic standards.

(b) The governing board may assign the responsibility for the development of proposals for actions affecting curriculum and academic standards to academic senates. Consistent with state law and regulations, including but not limited to section 51023, 51023.5 and 51023.7, the governing board shall retain the responsibility for decision-making in these areas.

(c) Except in unforeseeable, emergency situations, the governing board shall not take action on issues of curriculum and academic standards until it has provided the academic senate with the opportunity to participate in the formulation of the issue.

(d) If the governing board takes an action in the area of curriculum and academic standards that is not consistent with the recommendation of the academic senate, the governing board or its designee, upon request of the academic senate, shall promptly communicate its reasons in writing to the academic senate.

(e) The appointment of faculty members by the governing board to serve on college or district committees, task forces, or other groups dealing with curriculum and academic standards shall be made only after consultation with the academic senate.

~~(a) 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.~~

~~(b) In adopting the policies and procedures described in Subsection (a), the governing board or its designees shall consult collegially with representatives of the academic senate.~~

~~(c) While in the process of consulting collegially, the academic senate shall retain the right to meet with or to appear before the governing board with respect to the views, recommendations, or proposals of the senate. In addition, after consultation with the administration of the college and/or district, the academic senate may present its views and recommendations to the governing board.~~

~~(d) The governing board of a district shall adopt procedures for responding to recommendations of the academic senate that incorporate the following:~~

~~(1) in instances where the governing board elects to rely primarily upon the advice and judgment of the academic senate, the recommendations of the senate will normally be accepted, and only in exceptional circumstances and for compelling reasons will the recommendations not be accepted. If a recommendation is not accepted, the governing board or its designee, upon request of the academic senate, shall promptly communicate its reasons in writing to the academic senate.~~

~~(2) in instances where the governing board elects to provide for mutual agreement with the academic senate, and agreement has not been reached, existing policy shall remain in effect unless continuing with such policy exposes the district to legal liability or causes substantial fiscal hardship. In cases where there is no existing policy, or in cases where the exposure to legal liability or substantial fiscal hardship requires existing policy to be changed, the governing board may act, after a good faith effort to reach agreement, only for compelling legal, fiscal, or organizational reasons.~~

~~(e) An academic senate may assume such responsibilities and perform such functions as may be~~

~~(f) The appointment of faculty members to serve on college or district committees, task forces, or other groups dealing with academic and professional matters, shall be made, after consultation with the chief executive officer or his or her designee, by the academic senate. Notwithstanding this~~

~~Subsection, the collective bargaining representative may seek to appoint faculty members to committees, task forces, or other groups.~~

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a copy of the foregoing "**Legal Challenge and Petition for Rulemaking to Amend Title 5, Sections 51023, 51200 and 51203 of the California Code of Regulations**" to be served via UPS Overnight Delivery and addressed as follows:

Brice Harris, Chancellor
California Community Colleges Chancellor's Office
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Dated at San Francisco, California, this 11th day of December, 2012.

By: Margaret McIlhargie