

SOUTH DAKOTA BOARD OF REGENTS

Budget and Finance

AGENDA ITEM: 6 – A (1)

DATE: August 4-5, 2020

SUBJECT

BOR Policy 4:1 – General Terms and Appointment (Second Reading)

CONTROLLING STATUTE, RULE, OR POLICY

[SDCL Chapter 3-6C](#)

BACKGROUND / DISCUSSION

Due to the elimination of collective bargaining for university faculty, effective July 1, 2020, there are certain elements of the COHE agreement that now need to be implemented into BOR policy. The attached policy revisions address faculty contracts that are currently addressed in the COHE agreement. The substantive changes are outlined below:

1. Updated the definition of faculty to be consistent with other policies.
2. Elimination of all references to “unit” and “non-unit” faculty.
3. Elimination of president, superintendent and executive director notification requirements when hiring an employee who has previously been terminated at an institution.
 - a. There are currently processes in place in the applicant tracking system to flag these individuals, and the campus HR offices have established processes on doing the appropriate reference checking with system institutions on these individuals.
4. Added Section 3.3 to specify the required reporting and payroll dates for faculty members.
5. Added language to specify that term contracts create no obligation of continuation of employment and that they may be non-renewed without cause.
6. Removed two sections that provide faculty on term contracts, who have been employed for eight (8) or more consecutive contracts, to request a hearing panel process to review a non-renewal of their contract.
 - a. This provision has not been used in recent history.
 - b. If utilized, this is a burdensome process that results in faculty panel recommendation on an administrative action, since a non-renewal is not an

DRAFT MOTION 20200804_6-A (1):

I move to approve the second and final reading of the proposed revisions to BOR Policy 4:1.

action which can be grieved this process serves a limited purpose.

- c. Faculty have other due process rights through BOR policies if they believe an employment action is being taken for discriminatory reasons.
7. Removed the section of policy on liquidated damages if a faculty member does not provide notice of their resignation to the at least thirty (30) days prior to the start of the contract.
 - a. This provision has not been used as the process of collection is often more time-consuming and costly than the limited amount of money that can be recouped.

The only revision since the first reading in June modifies Section 3.6 to provide the ability of the university to require faculty to provide course materials for online courses up to 30 days prior to the first day of classes to ensure compliance with institutional quality assurance review process. The former language limited this only to new faculty in their first term, however, the quality assurance process would apply to all online courses so the language needs to be expanded to ensure compliance.

IMPACT AND RECOMMENDATION:

Approve the second and final reading of the proposed changes to BOR Policy 4:1, as outlined in Attachment I.

ATTACHMENTS

Attachment I – Proposed revisions to BOR Policy 4:1.

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: General Terms & Appointments

NUMBER: 4:1

A. PURPOSE

To establish the general terms and appointment provisions for Civil Service Act employees and faculty members of the Board of Regents. No contract may obligate an institution to make payment in any future fiscal year without noting the limitations placed on the campus by the Legislature's appropriations process. Any contract that purports to extend to any future fiscal year must contain a clause that permits the institution to terminate the contract without default or liability of any kind in the event that the Legislature fails to appropriate moneys or expenditure authority needed to perform the contract.

B. DEFINITIONS

1. **Institution:** [Black Hills State University, Dakota State University, Northern State University, South Dakota School of Mines & Technology, South Dakota State University, South Dakota School for the Blind and the Visually Impaired, State School for the Deaf, University of South Dakota, and the Office of the Executive Director.](#)

C. POLICY

1. Types of Employment Classification

- 1.1. **Civil Service:** Civil Service Employees (CSA) are employees that are provided for under SDCL 3-6A-13, which applies to all positions in the executive branch of state government. All Civil Service employees are subject to Bureau of Human Resources Rules and Regulations as well as applicable BOR policies. Activities within the Civil Service System are also governed by SDCL § 3-6 and the Joint Powers Agreement between the Civil Service Commission and the South Dakota Board of Regents.
- 1.2. **Faculty:** [Employees in a faculty related position who are exempt from the Civil Service Act and perform instruction, research, service and/or other faculty duties. All faculty are subject to BOR policies, institutional policies, procedures, statutes, rules and regulations.](#)
 - ~~1.2.1. **Non Unit:** Non Unit Faculty are employees that are in faculty related positions who are exempt from the State Civil Service System and exempt from the bargaining unit (COHE) and perform research, instruction, and other~~

~~faculty duties. Departments that are exempted from the COHE collective bargaining unit are Medical School, Law School, Institute of Atmospheric Sciences, and 2010 Research Initiative. All non-unit employees are subject to the BOR as well as institutional policies, procedures, rules and regulations.~~

- ~~2. Unit: Unit Faculty are employees that are in faculty related position who are exempt from the State Civil Service System and perform research, instruction, and other faculty duties. These employees are members of the Council of Higher Education (COHE) which have a collective bargaining agreement (CBA) and are the recognized union representatives. All unit employees are subject to the collective bargaining agreement and those rules, regulations, policies, and procedures not governed by COHE~~

2.3. Institutional Appointment

All institutional personnel will be employed upon the recommendation of the president or superintendent of the institution and upon the approval of the Board of Regents. ~~Before a campus appoints a candidate who has been employed by a Board of Regents institution AND who has been either terminated or allowed to resign in lieu of being terminated, the institutional executive officer and the board office shall be advised of the circumstances surrounding the separation.~~ If a candidate is currently, or was formerly, employed by an institution and applies for another position in the system, the employee's institutional human resource office or academic affairs office, as appropriate, will share job-related information with the requesting academic or human resource office in the system.

- ~~2.1.3.1.~~ Faculty members shall receive written appointment notice, signed by the President, Superintendent, or Executive Director, for each year they are employed by the Board. Unless otherwise agreed or established, the faculty member shall have twenty calendar days to accept the employment offer, and the employment contract shall not become binding until the notice is executed by both the faculty member and the appointing authority and approved by the Board of Regents, if applicable.
- 3.2. The provisions of this Policy Manual, the institutional Policy Manual, the appointment notice, and applicable law become part of the terms and conditions of every appointment contract. Any understanding, promise, term, condition or representation not thereby contained or included in the contract is of no effect.

3.3. Faculty Contract Year

- 3.4. Faculty members will be required to report for assigned duties no earlier than five (5) working days prior to the first day of classes for each academic term within their annual contract.
- 3.5. Faculty unit members will be released from duties incidental to their assigned courses no later than five (5) working days after the last day of final examinations in the last academic term of their appointments.
- 3.6. Faculty members assigned to electronically delivered courses may be required to provide the necessary materials required to comply with the institutional quality assurance review process thirty (30) days prior to the first (1st) day of classes.

- 3.7. Faculty members who are required to report to work outside of the contract period reporting dates shall be compensated by either adjusting the required working days during the contract period by the number of days worked outside of the contract period, or by providing additional compensation for the days worked.
- 3.8. For payroll purposes, the nine-month individual appointment contract period for faculty members will extend from August 22 to May 21 (fall-spring), from May 22 to January 21 (summer-fall), or from December 22 to September 21 (spring-summer), inclusive. Given the variance in the academic calendar from year to year, the payroll dates applicable to the contract period and actual working days may differ, so long as the working days and payroll days are adequately offset, resulting in faculty members receiving full compensation for the days worked when considering the payroll days applicable to the contract period.
- 3.9. Faculty members who are asked to switch from fall-spring, spring-summer or summer-fall contracts will not be expected to go more than one (1) term without assigned responsibilities and commensurate income.
- 3.10. To the extent that the terms of any two (2) nine-month contracts may overlap, the term of the second contract will be deemed to begin on the day following the lapse of the first contract. This change will not affect reporting dates, evaluation dates or any other contractually specified timeline, all of which will be determined according to the negotiated timelines. Faculty unit members on a ten-month or eleven-month contract will be required to report for assigned duties as stated in their contract.

~~2.2.~~

3.4. Faculty Appointment and Contract Evaluation

- ~~3.1.4.1.~~ An appointment extended to a member of the faculty at a higher education institution will be of one of the following types: term, tenure-track, or tenure.
- ~~3.2.4.2.~~ The University of South Dakota School of Medicine may also appoint to its academic faculty certain individuals who are retired, self-employed or employed by third parties. Individuals who receive such appointments shall not be employees of the School of Medicine, and they will not be eligible for tenure, though the School of Medicine may assign them academic rank or grant them promotions in keeping with its published standards for appointment and promotion, and subject to approval by the Board.
- 4.3. An appointment extended to a member of the research faculty at a higher education institution will be of one of the following types: a fixed term, probationary, or continuing; provided that in rare and exceptional circumstances, the Board may grant a tenure appointment to a research faculty member. (See BOR Policy 4.11 Rank and Promotion for a detailed listing of all faculty related positions).
- ~~3.3.4.4.~~ Faculty contracts may be terminated for cause, or as a part of a reduction in force in conformity with BOR policies and applicable law.
- 4.4.1. Term Appointments: A term contract may be either part-time or full-time and will be of a definite term, not to exceed one year, unless the extended contract is

approved by the Board. A term contract will terminate automatically at the end of the term unless the Board expressly renews the contract.

4.4.2. A term contract creates no obligation of the Institution for continued employment beyond the term of the contract and non-renewal of the contract is not an action which can be grieved under BOR or Institutional policy. Receipt of successive term contracts does not alter the nature of the term contract and in no way enhances or creates a future interest in, or expectation of, continued employment in subsequent years.

4.4.3. A Term contract may be non-renewed without cause by providing written notice of the non-renewal to the faculty member prior to the expiration of the current contract term.

~~3.3.1. —~~

~~3.3.1.1. The Board recognizes that faculty members who have received several consecutive full-time contracts will come subjectively to expect continued employment on the same basis. Under Board policy, in the absence of an award of tenure, such unilateral expectations, however natural they may be, can never become constitutionally protected property interests. Nevertheless, once a decision has been made not to reissue a subsequent term contract to such faculty Members, professional courtesy requires that they be accorded an opportunity to assure themselves that the rationale and factual basis for the decision have been reviewed formally by superior authorities and have been found satisfactory.~~

~~3.3.1.2. To give effect to this professional courtesy, the parties agree that a faculty member on a term contract who has received eight or more consecutive full-time contracts may obtain a review of the decision not to reissue a subsequent contract. The faculty member may challenge the decision through the procedures that govern the termination of employment, including, at the option of the faculty member, a hearing before an faculty hearing panel. The review provided hereunder will not constitute a grievance proceeding or a contested case, but the faculty member will be entitled to receive written responses when such would be required under grievance procedures, including findings and conclusions supporting the determination reached under completion of the review. The institution will not bear a burden of proof, except when required by law in a proper case to show that its decision gave effect to the faculty member's entitlements under the first amendment to the United States Constitution and under state and federal antidiscrimination statutes. The determination reached at step 3 will be final and not subject to appeal to the department of labor.~~

~~3.3.1.3. The right to review created hereunder shall not be interpreted to extend any limitation inherent in, or incidental to, a term contract as defined in this section. In particular, the right of review shall not give rise to an expectation of continued employment beyond the expiration of the term~~

~~contract; nor may the creation of the right of review be deemed to cloak a term contract with any of the characteristics or privileges of tenure track or tenure contracts.~~

~~3.3.2.4.4.4.~~ Fixed Term ~~Track~~ Contract for Research Faculty: A fixed term contract may be either part-time or full-time and will be of a definite term. Terms exceeding one year, shall be approved by the Board. A fixed term contract will terminate automatically at the end of its term unless the Board expressly renews the contract. A fixed term contract will terminate automatically prior to the end of its stated term if the grant funds used to support the contract lapse and the research faculty member has not secured a new funding source. A fixed term contract creates no obligation of the Institution for continued employment beyond the term of the contract and non-renewal of the contract is not an action which can be grieved under BOR or Institutional policy. Receipt of successive fixed term contracts does not alter the nature of the fixed term contract and in no way enhances or creates a future interest in, or expectation of, continued employment in subsequent years.

~~3.3.2.1. The Board recognizes that research faculty members who have received several consecutive full-time annual contracts will come subjectively to expect continued employment on the same basis. Under Board policy, in the absence of an award of a continuing appointment, such unilateral expectations, however natural they may be, can never become constitutionally protected property interests. Nevertheless, once a decision has been made not to reissue a subsequent fixed term contract to such research faculty members, professional courtesy requires that they be accorded an opportunity to assure themselves that the rationale and factual basis for the decision have been reviewed formally by superior authorities and have been found satisfactory.~~

~~3.3.2.2. To give effect to this professional courtesy, the parties agree that a research faculty member on a fixed term contract who has been employed full-time on the research faculty for eight or more consecutive years may obtain a review of the decision not to reissue a subsequent contract. The research faculty member may obtain a review of the decision through the procedures that parallel those for termination of employment, including, at the option of the faculty member, a hearing before a research faculty hearing panel. The review provided hereunder will not constitute a grievance proceeding or a contested case, but the research faculty member will be entitled to receive written responses when such would be required under grievance procedures, including findings and conclusions supporting the determination reached under completion of the review. The institution will not bear a burden of proof, except when required by law in a proper case to show that its decision gave effect to the faculty member's entitlements under the first amendment to the United States Constitution and under state and federal antidiscrimination statutes. The determination reached at step 3 will be final and not subject to appeal to the department of labor.~~

~~3.3.2.3. The right to review created hereunder shall not be interpreted to extend any limitation inherent in, or incidental to, a fixed term contract as defined in this section. In particular, the right of review shall not give rise to an expectation of continued employment beyond the expiration of the fixed term contract; nor may the creation of the right of review be deemed to cloak a fixed term contract with any of the characteristics or privileges of probationary or continuing appointments.~~

~~3.3.3.~~4.4.5. Tenure Track Contract: A tenure track contract is a qualifying appointment offered to a full-time faculty member who may be considered for a tenure contract at a later time and will be of a definite term, not to exceed one year. A tenure track contract is renewable solely at the discretion of the Board, subject to procedures for non-renewal of tenure track contracts set forth in Board Policy 4:10, Tenure. If a faculty member is offered a tenure track contract, the number of years the faculty member has served under term contracts may be credited, at the discretion of the Board, toward fulfillment of the period necessary for consideration for a tenure appointment.

~~3.3.4.~~4.4.6. Probationary Contract for Research Faculty: A probationary contract is a qualifying appointment offered to a full-time research faculty member who may be considered for a continuing appointment at a later time and will be of a definite term, not to exceed three years. A probationary contract may be renewed for a second three-year term. A probationary contract is renewable solely at the discretion of the Board, subject to procedures for non-renewal of tenure track and probationary contracts set forth in Board Policy 4:10, Tenure and Continuing Appointments. If a research faculty member is offered a probationary contract, the number of years the research faculty member has served under fixed term contracts may be credited, at the discretion of the Board, toward fulfillment of the period necessary for consideration for a continuing appointment.

~~3.3.5.~~4.4.7. Tenure Appointments for Faculty and Continuing Appointments for Research Faculty: Tenure and continuing appointments are addressed in Board Policy 4:10, Tenure and Continuing appointments.

~~3.3.6.~~4.4.8. Joint Appointments to the Instructional and Research Faculty: Upon the specific recommendation of the institutional president, a faculty member may be jointly appointed to the research faculty and the faculty, provided that the instructional load is less than half-time.

~~3.4. Appointment Contract Fulfillment: Full-time faculty and research faculty members who, after their second year of employment, resign their individual contract for the purpose of receiving employment outside the Regental System without the consent of the Board thereby consent to liquidated damage compensation to the Board for the additional expense caused by said breach of contract. However, any faculty and research faculty member who so resigns and breaches this contract may request a waiver of the deduction of said liquidated damages, in lump sum, from any pay owed to the faculty and research faculty member by the Board. Upon good cause, the Board will not unreasonably withhold its waiver of said liquidated damages and~~

~~the deduction thereof from allowances owed. Consent to resignation and breach of an individual contract is given by the Board if written notice is given to the institution thirty (30) or more days prior to the first day of the individual contract.~~

~~3.4.1. When deemed by the Board to be appropriate, liquidated damages will accrue and be assessed at the rate of \$50.00 per day beginning on the 29th day prior to the first day of the individual contract, not to exceed \$1,500.00.~~

SOURCE: Current Policy Manual 6.1.1; 5.2.1; 5.2.2; 5.2.3; BOR May 1991; 5.2.4; 5.2.5; 5.2.6; BOR, May 1997; BOR, June 1998; BOR, March 2000; BOR, March 2004; BOR, August 2004; BOR, October 2005; BOR, March 2016, August 2019, [August 2020](#).