

By E-Mail and U.S. Mail

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Senator Mark W. Koran
95 University Avenue W.
Minnesota Senate Bldg., Room 3101
St. Paul, MN 55155
sen.mark.koran@senate.mn

Representative Rick Hansen
407 State Office Building
St. Paul, MN 55155
rep.rick.hansen@house.mn

Senator Koran and Representative Hansen:

The University of Minnesota Board of Regents long ago adopted a very clear Code of Conduct that imposes standards on itself and the entire University of Minnesota community best summarized in one statement contained in that Code:

“Community members must be committed to the highest ethical standards of conduct and integrity.”

Leaders of higher education are expected to serve as national role models. This leadership includes, as a baseline, adherence to the laws of our state as well as the proper expectations of those we serve.

The undersigned are deeply concerned that recent actions by the Board of Regents are substantially out of compliance with its standard of ethics. Specifically, the Board is in violation of the founding Charter of the University of Minnesota as incorporated in the Constitution of the State of Minnesota as well as the Board’s own, clearly stated policy.

The empowering language in the original University Charter specifies that “[t]he government of this University shall be vested in a Board of twelve Regents who shall be elected by the Legislature as hereinafter provided.” As mentioned, this language from the Territorial Laws was incorporated in the Minnesota Constitution in 1958 when Minnesota became a state.

The designation of the twelve-person Board of Regents as the governing authority of the University of Minnesota remained intact for 171 years. However, in December 2021, the leadership of the Board of Regents presented and secured approval of an employment contract with current University of Minnesota President Joan Gabel that expressly gives the Board Chair the sole power over the President’s performance assessment, financial bonus, and the President’s goals and objectives without any approval by the remaining eleven regents.

Specifically, the language of the contract provides:

The [President's] bonus amount for each fiscal year will be determined by the Chair, in the Chair's discretion, within ninety (90) calendar days of the end of the fiscal year, after consultation with the Board's Presidential Performance Review (PPR) Committee.

While the Chair will consult with the members of the Presidential Performance Review Committee – typically consisting of only three regents including the Chair – the Chair solely decides the bonus amount.

It is axiomatic that “[t]he one who controls the purse, makes the rules.” Based on the *ultra vires* placement of exclusive control of the President's compensation in the hands of one regent, the governing power now rests not with the Board of Regents, but solely with the Chair of the Board.¹

More directly, to place with a single regent the authority to set the President's goals and objectives effectively places the government of the University of Minnesota in one regent's hands:

The bonus shall be based upon metrics, goals and objectives to be agreed upon annually between the President and the Chair of the Board.

If the goals and objectives of the CEO of the University of Minnesota are under the control of one regent, what do the other eleven regents meaningfully contribute?

We assert that neither the Board of Regents nor any contract it ratifies is permitted to violate the Minnesota Constitution. The Board of Regents cannot delegate its responsibilities of governance to one regent.

When the employment contract at issue was submitted to the full Board of Regents for approval, there was no accompanying legal opinion or any authoritative documentation relative to this unprecedented consolidation of power. Nor was there any clarification or expression of concern from President Gabel, who is also an attorney by training. The very leaders empowered to protect the Charter of the University of Minnesota appeared to unite in violating that same Charter. The Chair gained complete power and control while the President received a tremendous pay increase, with what little public evaluation of the President's performance that had remained being eliminated.

A principal element in good governance is the quality of the oversight function. Removing the public's review through the remaining eleven regents acting in a public meeting calls to mind the childhood lesson that “[w]hen the cat's away, the mice will play.” That is what is happening here, which is unacceptable at a public institution of the University's importance.

¹ Prior regents understood the proper operation of the Board of Regents when establishing the “Board Operations and Agenda Guidelines” policy in Section VII, Subd. 2. It provides that “[t]he compensation of the president shall be set by the Board at a public meeting.” It does not require that the Board will establish a “range” of compensation. Rather, consistent with the Minnesota Constitution, it establishes that the full Board – all regents – set the President's compensation.

As leaders of the Legislative Audit Commission, you recall the highly controversial actions of some members of the Board of Regents, including current and past Board Chairs, who provided substantial financial resources to a Political Action Committee, Maroon and Gold Rising, seeking the defeat of Regent Michael Hsu who sought re-election to the Board. Regent Hsu's offense was that he publicly questioned various Board policies and actions that were supported by the President and Board Chairs. His defeat sent a clear message to any regent or regent candidate intending to critically analyze or question proposals advanced by leadership. In essence, conformity was rewarded, and dissent punished.

The consolidation of all authority to direct and evaluate the University President in one regent is an even bolder step to eliminate public oversight of the University. This action is antithetical to the basics of good governance and even education itself. How can sound public policy be developed when autocratic constraints are placed on critical thought? Institutions of higher learning are fully charged with the responsibility of welcoming and protecting dissent, and that freedom to think independently has led to immeasurable advancements in our society.

By contrast, ethical reforms that protect and value the role of independent analysis and dissent have been removed and opposed by Board leadership. They appear to have been replaced by restraints on critical thought and rewards for unquestioning allies of Board leadership.

While a growing number of legislators have protested the efforts to diminish the role of the Board of Regents as the public guardians of Minnesota's Land Grant University, the success of Maroon and Gold Rising and Board leadership's strong control over a large majority of the regents has led to a greater concentration of control manifest in the President's 2021 Contract. The President has received an unprecedented increase in compensation of hundreds of thousands of dollars that includes potential annual bonuses of up to \$100,000 through language that grants exclusive powers to the Board Chair.

Unfortunately, this appears to fall into a pattern of increased authority for a limited number of regents, penalizing regents who take their role seriously and exercise independent thought on behalf of the Legislature and our public constituents, while rewarding those in Board leadership's close circle. Current media reports describe how David McMillan recently resigned from the Board after nearly 12 years as a regent to pursue appointment as Chancellor of the University of Minnesota, Duluth. He served as Board Chair during and was central to the hiring of President Gabel. The Chancellor position is only open due to the President's declaration of a failed search² for the Chancellor and a decision to stall the strategic advancement of UMD by appointing an "interim" Chancellor for two years.

McMillan has been a strong supporter of the current Board Chair, played a lead role in funding the Maroon and Gold PAC, and was pivotal in gaining Board approval of the President's 2021 Contract and raise. He and the President communicated about his candidacy for what appears a tailor-made position prior to his resignation from the Board and while he still served as one of the regents overseeing the President. A public campaign of support for McMillan's appointment is now underway despite his lack of academic or other relevant experience.

In summary, a few months after leading the effort for approval of a contract granting increased powers to the Board Chair and a generous pay increase for President Gabel, former regent McMillan now calls on the recipient of that generosity to grant him a chancellorship despite a lack of qualifications after dismissing candidates with impressive academic experience and a recommendation by the search firm

² The search was reported to cost \$166,000.00 and produced three academically experienced candidates.

retained by the President.³ McMillan has already provided the President the *quid*, and it remains to be seen whether the President and Board leadership reciprocate with the *quo*.⁴

The very integrity of the governance of the University of Minnesota is at stake. It is imperative that the Legislative Auditor, on behalf of the Legislature, commence an immediate and thorough audit of the issues raised in this transmission. Further, we send this correspondence to the Attorney General for the purpose of seeking a legal opinion on the consolidation of power in the Board Chair and the diminishment of the Board of Regents as a body. These actions are clearly contrary to the regent's policy, the University Charter, and the Minnesota Constitution.

Respectfully submitted,

/S/

Darrin Rosha
3rd Congressional District Regent
University of Minnesota

/S/

Arne H. Carlson
Governor of Minnesota, retired

/S/

Richard Painter
S. Walter Richey Professor of Law
University of Minnesota

/S/

Tom Berkelman
State Legislator, Duluth, retired
Graduate of University of Minnesota Duluth

³ The regents have received no explanation for the dismissal of the recommended and qualified candidates or an explanation for the decision to install a two-year interim Chancellor.

⁴ A brief review shows that in the past, people who previously served as regents stayed engaged with the University a number of years later. There is no evidence in the University's 171-year history of a sitting regent converting Board membership and a relationship with a current president into a paid position in University leadership.