Law for Trustees and the "Policy Governance" Model

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Ten years ago, John Carver and Miriam Mayhew published *A New Vision of Board Leadership* (Washington, DC: ACCT 1994) under the auspices of the Association of Community College Trustees. Carver had, for years previous, studied and written extensively on boards, commissions and similar governing bodies in both public and private sectors. Over the course of his study, Carver developed a board governance model he labeled "Policy Governance" (a term which he later registered as a service mark).

Carver's Policy Governance model envisions a board that deals only in general, policy-based matters. He urges that board members resist the temptation to deal in minutiae or pursue individual agendas. Instead, they should focus on the overall mission and vision of the organization they govern, and leave the day-to-day administration to the officers and executives.

The structure Carver and Mayhew advance for community college boards suggests that board members establish Board Values. These values are expressed in terms of Ends Policies (benefits intended to accrue through the operation of the organization), Executive Limitations Policies (guiding principles for use by the CEO and staff), Governance Process Policies (the process the board devises for itself in performing its governing role) and Board-Staff Linkage Policies (the manner in which the board will delegate authority to the CEO and staff). Carver and Mayhew urge trustees to "define and delegate" instead of "react and ratify." Too often, they assert, boards become "entangled in trivia" by approving matters that are presented to them by staff. The function by which the board approves college matters has the effect of denying the CEO the ability to make changes in an "agile manner."

The Policy Governance model, as tailored specifically for community college trustees, aspires that boards operate more efficiently. The model is clearly not intended to provide boards with a legal framework as well. Moreover, nothing in Carver and Mayhew's book for community college trustees suggests that trustees ignore the
limitations on their activities that the law might impose. Nevertheless, the admonitions Carver and Mayhew offer suggest some basic legal principles of which boards should be mindful as they implement a Policy Governance model. Ideally, those principles would complement, rather than frustrate, a board's efforts to follow Policy Governance.

I. Constitutional and Statutory Authority

Before an institution’s board of trustees may consider delegating its authority to a subordinate entity (such as administration or a separate committee), the board must be confident the law gives it that authority in the first place. Typically, a public community college exists pursuant to law contained in either state constitution or statute.

If a state constitution provides for a system of public community colleges, the constitutional provision usually does so in broad language. It is left to the state legislature to afford specific powers and duties to a particular college's governing body. Courts are in general agreement, however, that an institution’s authority extends only as far as the constitution and statutes allow, and no further. As creatures of state law, public postsecondary institutions have no implied authority, and courts are usually willing to halt an institution’s attempt at any undertaking not expressly allowed by law.

A typical illustration is Native American Heritage Commission v. Board of Trustees of the California State University, 51 Cal. App. 4th 675, 59 Cal. Rptr. 2d 402 (1996). There, university officials had begun plans to develop a portion of vacant property on the campus of California State University, Long Beach. The site (to which the Trustees held title on behalf of the university) also sat on ground that was sacred to several native American communities. Those communities complained to the Native American Heritage Commission, a state agency authorized by law to seek an injunction against construction on land deemed sacred by native American groups. The university then brought an action to enjoin the Commission from hearing the complaint. The California Court of Appeals held, however, that even though the Board of Trustees had general authority to commence an action in court, it had no authority under statute or constitution to bring such an action against another state agency. The court noted that its
“Board of Trustees is subject to full legislative control, and has ‘only such autonomy as the Legislature has seen fit to bestow.’” 59 Cal. Rptr. 2d at 408.

Likely more typical of the setting in which a court will limit institutional trustees to express statutory or constitutional authority is a political dispute. Board of Regents v. Board of Trustees for State Colleges and Universities, 491 So.2d 399 (La.App. 1986) was a battle between two constitutionally-created agencies: the state Board of Regents and the Board of Trustees for State Colleges and Universities. The Trustees—the governing body for the University of Southwestern Louisiana—voted to change the name of that institution to the “University of Louisiana.” The Board of Regents then sought a declaratory judgment that the Trustees’ action violated the state constitution. In its holding (which the opinion's author introduced by quoting Juliet’s speech asking, “What’s in a name?” from Act II of Shakespeare’s Romeo and Juliet), the court noted that, while the constitution had created both governing bodies, it had failed to vest in either the authority to change the name of an institution. Consequently, only the state legislature could effect such a change.

Even in the presence of a broad constitutional grant of authority to a governing body, that body still may not infringe on territory clearly reserved for the legislature. In Board of Regents of the University of Nevada System v. Oakley, 637 P.2d 1199 (Nev. 1981), the Regents possessed authority under the Nevada constitution “to control and manage the affairs of the University and the funds of the same under such regulations as may be provided by law.” Pursuant to that authority, the Board enacted a mandatory retirement policy, requiring that its tenured faculty retire from the Nevada system at the end of the contract year in which they reached 65. Nevada statute, however, prohibited any agency of the state from discharging or otherwise discriminating against any employee because of age. In invalidating the Regents’ policy, the Nevada Supreme Court rejected the Regents’ contention that university policies enacted pursuant to their grant of authority under state constitution was “equal in status and dignity to the legislative enactment.” 637 P.2d at 1200.

Presumably, the trustees of the California and Louisiana institutions acted in good faith when they undertook the actions that their respective state courts later nullified. Cal. State-Long Beach was possessed of general authority to commence lawsuits, yet the
court held that suing another state agency on constitutional claims was not implicit in that authority. Likewise, the trustees of the University of Southwestern Louisiana no doubt felt safe in assuming that, in the presence of constitutional authority to oversee the “supervision and management” of the institution, they were empowered to effect a name change. Absent express authority—based in either constitution or statute—their actions were subsequently invalidated. Moreover, even in the presence of a seemingly broad grant of authority, a governing body may not act in a way where the legislature has clearly spoken otherwise. Before a board may begin the process of delegating authority as Carver and Mayhew suggest, it must first ensure that it indeed has the authority under law that it wishes to delegate.

II. Lawful delegation of authority

Once a board is grounded in its legal authority, and aware of the limitations thereon, it may proceed to the self-examination that Carver and Mayhew advocate in the Policy Governance model. Specifically, the board may determine the extent of its policy-making role, and decide which management functions it will leave to subordinate administrators.

Faced with this task, however, a board must still check its intentions with the law. Certain board functions and responsibilities cannot be delegated lawfully. Not only is a board precluded from making decisions without express authority for such under constitution or statute, but it likewise may not delegate responsibility for those decisions which the legislature has assigned to the board. The Colorado Supreme Court’s holding in University of Colorado v. Silverman, 555 P.2d 1155 (Colo. 1976) illustrates the point well. There, the court rejected a claim that an employment contract existed between herself and the university on the basis of an alleged tacit agreement by university president to renew her contract for an additional year. The board of regents, however, had never approved the employment.

Colorado statute provided that the “board of regents shall . . . appoint the requisite number of professors and tutors . . .” The president could not have approved---even tacitly---the employment since the law reserved that authority specifically for the
“[L]egislative or judicial powers, involving judgment and discretion on the part of the municipal body, which have been vested by statute in a municipal corporation may not be delegated unless such has been expressly authorized by the legislature. . . . Absent legislative authorization, the board of regents’ hiring authority cannot be delegated.” 555 P.2d at 1158.

Conversely, however, a board may indeed delegate functions it has not been expressly assigned by either constitution or statute, particularly if those functions do not involve "judgment or discretion." In *Kreith v. University of Colorado*, 689 P.2d 718 (Colo. App. 1984), following several months worth of exchange over a leave of absence, Kreith (a university professor) delivered written notification to his department chair of his decision to choose early retirement and request emeritus status. The dean of Kreith’s college at the university accepted his request. Later, however, Kreith sent a letter to a member of the board of regents purporting to withdraw his early retirement letter. The letter was virtually ignored, and subsequently the board (on recommendation by the university president) voted to grant Kreith both early retirement and emeritus status.

Kreith claimed that the previous acceptance by university administration of his early retirement request was not effective in that only the Board—and not an administrative subordinate—could effect a retirement. Therefore, his rescission request should have been honored since the previous granting of early retirement was of no effect. The Colorado Court of Appeals rejected Kreith’s claim, noting that the board of regents was authorized to “appoint the requisite number of professors” and determine their salaries; the statute did not address, however, departures from employment. “Resignation and retirement, however,” the court reasoned, “are distinguishable from appointment or hiring. Implicit in the hiring of faculty are decisions of educational policy concerning the future of the institution. Acceptance of offers of resignation or retirement do not have a similar impact upon institutional policy except as they necessitate the employment of replacement faculty.” 669 P.2d at 719.

A board may be more confident in its delegation authority in the presence of a statute such as that upon which the Utah Supreme Court based its decision in *Reece v. Board of Regents of the State of Utah*, 745 P.2d 457 (Utah 1987). In *Reece*, university administrators had unilaterally implemented a rent increase at a student-housing complex.
A university student claimed that the Board could not delegate to the university the authority to increase rent, pointing to a Utah statute which authorized the university to furnish buildings. The statute further provided that for the use of those buildings, “the board may impose and collect rents.” The court rejected the student’s claim, citing a statutory provision that not only reposed with the board the power to govern the university system but also the express authority “in its discretion to delegate certain powers to institutional councils.” 745 P.2d at 458.

Carver and Mayhew’s suggestion that a board delegate certain responsibilities supports their principal objective that the board not micro-manage the day-to-day operations of the community college. The judicious delegation of authority, however, must first entail a threshold examination of just how much of a board’s authority may indeed be lawfully delegated.

III. The board’s public responsibilities—public meetings

In their book, Carver and Mayhew admonish a community college board of trustees to "design its own process." They urge that board policy define "how the board will conduct itself and perform its own job."

As it executes its responsibilities and designs its processes, however, a board must be mindful of the extent to which the law itself defines those processes. It must adhere to state laws that are aimed at openness and integrity in government. Those laws usually detail conflict of interest disclosure requirements, nepotism prohibitions, and the like.

In defining its processes, likely the most important legal standard with which a board must always comply is its state law regarding public meetings. Open meetings laws emerged in the last half of the twentieth century in response to a general call for greater openness in government. As no common law right existed for the public to be privy to the conduct of government business, and no constitutionally premised right had emerged, the respective legislatures of all fifty states enacted open meetings and other so-called "sunshine" laws. Tribune Publishing Co. v. Curators of the University of Missouri, 661 S.W.2d 575 (Mo. App. 1983). Open meetings laws typically apply to public community college governing boards.
The specific requirements of the various open meetings laws vary, of course, among the states. Some generally common characteristics, however include the following:

• Any gathering of a majority of a board to discuss or vote on official matters must be conducted in a meeting that is open to the public.

• Such a meeting must be preceded by timely notice to the public. The notice usually should include a sufficiently detailed description of what the board will be doing at the meeting.

• A board may occasionally meet in private away from public view; however, such a meeting may take place only for a reason that is expressly allowed under statute.

Several recent cases out of the public higher education realm illustrate how a board can define its processes in ways not contemplated by open meetings law standards:

Social gatherings. In Board of Trustees of State Institutions of Higher Learning v. Mississippi Publishers Corporation, 478 So.2d 269 (Miss. 1985), a newspaper reporter had been denied access to a gathering of a majority of the trustees. The gathering was a luncheon with various student officers of the colleges and universities under the Board's jurisdiction. The Board defended the gathering as a social event, where no vote had been taken. The Mississippi Supreme Court, however, disagreed, and held that the Board's private meeting with the student officers violated the state's Open Meeting Act. While the Board indeed had not voted on any issue at the luncheon, it had prepared a written program for the event; the program listed items of business that were to be discussed by all in attendance. To guide the board, as well as other public bodies subject to the Act, the Mississippi court offered a list of factors "to consider in making a determination of whether an activity is business or social." The factors include the nature of the activity that takes place at the function, the "advance call or notice given the members," an agenda, and any claim for travel and other expense reimbursement. 478 So.2d at 278.

Polling. Del Papa v. Board of Regents, 956 P.2d 770 (Nev. 1998) involved a public war of words between one member of the Nevada Board of Regents and her fellow board members. After a series of public statements in which the dissident member denounced her colleagues to the press, the board chairman met with the University of
Nevada's public information officer. Between them, they drafted a proposed "media advisory" responding to the member's criticisms. The chairman then distributed the draft to the other members (except the dissident member). All but two of those ten other members discussed the text of the advisory separately via telephone with either the chair or the public information officer. Ultimately, the chair decided not to issue an advisory.

When she learned of the planned release, the dissident board member complained to the Nevada attorney general, who then commenced an action against the Board of Regents, alleging that their activity violated the Nevada Open Meeting Law. The Board denied any violation of the law, claiming that the actions were separate discussions which never involved a quorum. The Nevada Supreme Court rejected the argument, and determined that since the Board had "utilized University resources, because the advisory was drafted as an attempted statement of University policy, and because the Board took action on the draft," a quorum of the Board had indeed acted in an official capacity.

Sub-quorums. Booth Newspapers, Inc. v. University of Michigan Board of Regents, 444 Mich. 211, 507 N.W.2d 422 (1993) was a challenge by Detroit-area newspapers against the manner in which the University of Michigan's Board of Regents selected a president. The Board assigned to one of its members the task of reducing the first list of prospective candidates from 250 to 70. He made these cuts on the basis of various telephone calls to various non-regent advisory committees, as well as meetings with "informal sub-quorum groups of regents." A similar process of these meetings with sub-quorums was followed as further cuts were made. The Board chose such a process of meetings with sub-quorums with the express intent of circumventing the Michigan Open Meetings Act.

In finding a violation of the Act, the Michigan Supreme Court discounted the Board's characterization of the process as one of "consensus building." The court labeled the "alleged" distinction between consensus building and actual Board action a "distinction without a difference. Even members of the committee acknowledged that its 'round-the-horn' decisions and conferences achieved the same effect as if the entire board had met publicly, received candidate ballots, and 'formally' cast their votes." 507 N.W.2d at 430.
IV. Conclusion

Community college boards usually try to establish and adhere to some kind of governance structure. As creatures of state constitution and statute, however, boards must observe the parameters the law has laid down for them as they delegate functions and define processes. The governance structure is no doubt tailored to produce a more efficient board, but that structure inevitably yields to whatever limitations state law has provided.