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MEMORANDUM

TO: Committee on Faculty and Academic Staff Disciplinary Process
FROM: Patricia A. Brady, General Counsel [Signature]
Christopher L. Ashley, Senior System Legal Counsel [Signature]
RE: Revision of Proposed Rule
DATE: October 27, 2006

At its meeting on October 17, the Committee on Faculty and Academic Staff Disciplinary Process (Committee) reviewed both the public comments received in response to the proposed rule and the Legislative Council Rules Clearinghouse (LC) report on the proposed rule. The Committee approved several substantive changes to the proposed rule in response to the public comments, and requested that a revised draft of the rule be prepared, along with revised responses to the LC. Attached to this memorandum is a red-lined version of the rule reflecting the changes approved by the Committee, and incorporating non-substantive drafting recommendations of the LC. We also highlight some points for further consideration and discussion in light of these changes.

Summary of Changes Made at the October 17 Meeting

Removal of "being charged with" a felony. At the meeting, the Committee was persuaded to remove "being charged with" a felony from the definition of "serious criminal misconduct." However, the Committee decided not to modify the rule's suspension without pay provisions, thus allowing a chancellor to suspend a faculty member without pay based upon a felony charge in the circumstances specified in proposed s. UWS 7.02(1)(a).

With this change, a faculty member could be suspended without pay upon being charged with a felony, but dismissal proceedings in such a case would follow existing ch. UWS 4, rather than the expedited process of proposed s. UWS 7.05. Because ch. UWS 4 currently provides only for suspension with pay during the pendency of a dismissal proceeding, it is necessary to amend that chapter to cross-reference proposed s. UWS 7.06, to clarify that there may be cases under ch. UWS 4 in which there will be a

suspension *without pay*. To address this issue, we recommend modifying s. UWS 4.09 as follows:

UWS 4.09 Suspension from duties. Pending the final decision as to his/her dismissal, the faculty member shall not normally be relieved of duties; but if, after consultation with appropriate faculty committees, the chancellor finds that substantial harm to the institution may result if the faculty member is continued in his/her position, the faculty member may be relieved immediately of his/her duties, but his/her ~~salary~~ pay shall continue until the board makes its decision as to dismissal, unless the chancellor also makes the determinations set forth in s. UWS 7.06(1) in which case the suspension from duties may be without pay and the procedures set forth in s. UWS 7.06 shall apply.

The removal of "being charged with" a felony from the definition of "serious criminal misconduct" also highlighted grammatical problems with the definition. The attached red-line version attempts to resolve those problems, while retaining as much of the original language as possible and remaining consistent with the underlying intent.

Removal of "public trust" criterion. The Committee also approved the removal of "impair[ing] the public trust" from the definition of "serious criminal misconduct." The consensus was that the public trust criterion would likely turn out to be redundant since it is difficult to conceive of a felony that would impair public trust in the university but would not also implicate the other criteria in s. UWS 7.02(1)(c). The public trust concept is also covered in the declaration of policy in s. UWS 7.01. We have therefore removed s. UWS 7.02(1)(c)1.¹

Mandatory Backpay. The Committee approved the recommendation that back pay to faculty or academic staff be mandatory in the event a faculty or academic staff member is suspended without pay but is not ultimately dismissed. We have modified sections UWS 7.06(3) and UWS 11.105(3) to reflect this change. We have, however, added language clarifying that mandatory back pay is not available for those periods during which a faculty or academic staff member was unwilling or unable to report for work.

Mandatory Opportunity for Exceptions and Oral Argument. The Committee approved a modification of s. UWS 7.05(6) to require the Board to offer the faculty member the opportunity to file exceptions to a chancellor's recommendation for dismissal and to present oral argument on the matter. With this change, s. UWS 7.05(6) now follows s. UWS 4.08.

¹ For all changes to ch. UWS 7 noted in this memo, we have made parallel changes to the academic staff rules in ch. UWS 11.

Questions for Further Discussion

As noted, eliminating being "charged with" felony from the definition of "serious criminal misconduct" effectively requires disciplinary action to proceed under current processes, rather than under the expedited process. This raises a question, though, as to what should happen if the person under charges pleads guilty or no contest, or is convicted while the non-expedited process is pending. Should such events trigger a shift to the expedited process?

- The Committee approved an amendment to the rule that would allow challenges to the impartiality of the second and subsequent investigators appointed by the chancellor. Should the rule specify an outside time limit for such challenges to avoid unnecessarily delaying the expedited process?

The Committee did not have the opportunity to discuss a suggestion from David Musolf of UW – Madison that we amend the language about "public trust" in the introductory paragraph, s. UWS 7.01. Query whether any change is needed, since "public trust" was removed from the definition of "serious criminal misconduct."

We look forward to our discussion of these comments at our meeting on October 30th. In the meantime, if you have any questions or concerns about this memorandum, please do not hesitate to contact either of us.

Attachment

cc: Regent President Walsh
President Reilly