



Board of Regents of The University of Wisconsin System

Office of the Secretary
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BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM

P U B L I C H E A R I N G

Proposed Amendments: Section UWS 17.06(2)
Wisconsin Administrative Code
Discriminatory harassment

May 7, 1992
10:00 a.m.

Room W-150, Fireside Lounge
UW-Milwaukee Student Union
2200 E. Kenwood Blvd.
Milwaukee, Wisconsin

The purpose of the public hearing is to take testimony on proposed amendments to Chapter UWS 17, *Wisconsin Administrative Code* (Student Nonacademic Disciplinary Procedures). The proposed amendment responds to constitutional problems with the existing rule found by the court in UW-M Post, Inc., et al., v. Board of Regents. The proposed language provides a more specific description of the type of expressive conduct meant to be prohibited, making "epithets" the only prohibited speech. The term "epithet" is defined to conform with the constitutional "fighting words" doctrine. The proposed language provides that, to be prohibited, epithets must be directed to specific individuals, must be intended to demean and to create a hostile environment, and must have the effect of making the environment hostile and of tending to provoke a violent response. The proposed rule requires that no disciplinary action shall be instituted unless a person designated by the UW System President determines that the conduct alleged to have occurred constitutes a violation. If disciplinary proceedings are thereafter instituted, and a violation is found, the proposed disciplinary sanction shall also be reviewed by the President's designee to assure that it is appropriate to the offense and comparable to sanctions that have been imposed for similar violations.

Copies of the proposed rule may be obtained at no charge from the Secretary of the Board of Regents, 1860 Van Hise Hall, 1220 Linden Drive, Madison, Wisconsin 53706.

Persons wishing to speak at the hearing are requested, but not required, to register in advance by contacting the Secretary of the Board. Speakers are asked to limit oral testimony to no more than five minutes. Written testimony may also be submitted. Those submitting written testimony are asked to provide it in advance of the hearing to the secretary of the Board of Regents.

Limited public parking is available in the ramps under the Union building and under Sandberg Hall on the UW-Milwaukee campus.

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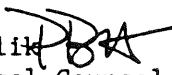
The University of Wisconsin System

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April 27, 1992

TO: ALL REGENTS

FROM: Patricia B. Hodulik 
Senior System Legal Counsel

RE: Revisions to UWS 17.06(2), Wisconsin Administrative Code
Discriminatory Harassment

In accordance with the resolution of the Board of Regents at its March, 1992 meeting, an administrative rule hearing on revisions to UWS 17.06(2), Wisconsin Administrative Code, is scheduled to be held on Thursday, May 7, 1992, at 10:00 a.m., at Room W 150, Fireside Lounge, UW-Milwaukee Student Union, 2200 E. Kenwood Boulevard, Milwaukee, Wisconsin. Attached are the proposed revisions, in the form prescribed by Chapter 227, Wisconsin Statutes, together with the Legislative Council Rules Clearinghouse Report on the proposed changes.

Existing UWS 17.06(2) prohibits discriminatory harassment by students. It was adopted by the Board of Regents as part of the implementation of Design for Diversity and became effective September 1, 1989. The rule provides that students may be disciplined for discriminatory "comments, epithets or other expressive behavior" that are directed at individuals and intended to demean and to create a hostile environment for education or other university-authorized activities. The constitutionality of this rule was challenged in UW-M Post, Inc., et al., v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991). In a decision issued October 11, 1991, the court held that the existing rule was, on its face, overbroad and vague, in violation of the First Amendment.

The proposed revisions to the rule respond to the constitutional problems identified by the court. The issue of overbreadth is addressed by a more specific description of the expressive conduct prohibited by the rule. The only type of speech prohibited under the revised rule is "epithets." The term "epithet" is narrowly defined to include only those words, phrases or symbols that "reasonable persons recognize to grievously insult or threaten" because of a protected characteristic, and which also have the effect of making the educational environment hostile and tend to provoke an immediate violent response on the part of members of the group insulted.

The revised language also clarifies the university's compelling interest in maintaining a safe, non-violent learning environment. The new language eliminates several ambiguities noted by the court in the existing language,

and further makes explicit that the use of epithets in statements addressed to a general audience--regardless of whether the epithets were intended to demean and to create a hostile environment--is not prohibited. Finally, the proposed language provides that no disciplinary action may be instituted under the rule unless a person designated by the UW System President has first determined that the conduct alleged to have occurred constitutes a violation.

The proposed revisions must be approved through the administrative rule-making process of Chapter 227, Wisconsin Statutes. The resolutions adopted by the Board at the March meeting initiated the rule-making process. The scheduled public hearing is the next step in this process. Following the hearing, the rules must be submitted to both houses of the legislature for action.

In conjunction with the public hearing, it is necessary to consider the recommendations of the Legislative Council Rules Clearinghouse on the proposed rules. All proposed administrative rules must be reviewed by the Clearinghouse to insure that there is statutory authority for their adoption, and for compliance with various technical drafting requirements. Clearinghouse recommendations are advisory, but agencies must respond to them at the time the rules are forwarded to the legislature.

The report of the Clearinghouse on the proposed revisions to UWS 17.06(2) is attached. The comments are in three categories: statutory authority; form, style and placement in Administrative Code; and clarity, grammar, punctuation and use of plain language. Most of the comments concern only the format of the revised rules, and are not substantive in nature. Such minor technical suggestions have been accepted and incorporated in the attached draft of the rule. Three comments, however, raise questions that require some response or explanation, as follows:

1. Statutory authority. Under this heading, the Clearinghouse Report discusses First Amendment concerns with the rule, concluding that, "Upon review, it is not possible to say with certainty that the rule would be found in violation of either the U.S. or Wisconsin Constitution." The comment goes on, however, to inquire why the rule prohibits epithets that would "tend to provoke an immediate violent response," rather than words that "tend to incite an immediate breach of the peace," a phrase used in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) to describe the "fighting words" doctrine. The comment suggests that this language variation might create uncertainty as to the intended scope of the phrase "immediate violent response."

While the Chaplinsky case does use the phrase "tend to incite an immediate breach of the peace," subsequent cases, including the UWM Post decision, use other, slightly different, phrases to describe the idea that "fighting words" are those that tend to precipitate violent reactions. The use of the phrase "immediate violent response" in the revised rule is similarly consistent with this concept and with the rationale of the "fighting words" doctrine. In this context, the use of the phrase is clear and unlikely to create uncertainty in application of the rule.

The statement, found in the agency analysis of the revised rule, that the re-draft is intended to bring the rule "more closely" into conformity with the "fighting words" doctrine has been changed to indicate that the rule as revised is consistent with the "fighting words" doctrine.

2. Clarity, grammar, punctuation and use of plain language. In this section of comments, under paragraph 5.b., the Clearinghouse Report raises a concern that incorporating substantive requirements of the rule in the definition of the term "epithets" may make the rule more difficult to apply consistently. While the rule is complex, the problem of consistent application is fully addressed by the provision requiring the UW System President's designee to review each alleged violation of the rule prior to the institution of any disciplinary action. Given this protection, the language as proposed should not prove problematic.

A further question raised in this section of the Report, under paragraph 5.c., goes to the role of the President's designee in reviewing disciplinary actions under the rule. The Report first inquires whether no action could be taken against a student until the President's designee had made a determination, or whether no disciplinary process could be instituted until the determination had been made. A question is then raised as to whether the rule should also contain additional provisions for referrals from the institutions, time lines for decisions and other due process protections.

With regard to the first issue, the language of the rule has been changed to provide that no disciplinary proceeding may be instituted until the President's designee has acted. This means, in effect, that no disciplinary process would be initiated against a student by the university until the alleged conduct had been reviewed and found to constitute a violation.

As to the question whether this rule should contain additional provisions to govern the review by the President's designee, this appears unnecessary. It is anticipated that the number of cases requiring review will be small, and the addition of special procedural provisions would be unnecessarily cumbersome under the circumstances.

In summary, those Clearinghouse comments related to technical drafting and formatting requirements have been incorporated in the attached draft of the rules. For the reasons discussed above, the additional comments and questions raised in the Report have resulted in minor textual modifications, as indicated.

I hope this information will be of assistance to you as you prepare for the public hearing on the revisions to UWS 17.06(2). If you have any questions, please feel free to contact me.

Attachments

cc: President Lyall
Acting Executive Vice President Bornstein
Vice Presidents
Secretary Temby

PROPOSED ORDER OF THE BOARD OF REGENTS OF
THE UNIVERSITY OF WISCONSIN SYSTEM
REPEALING AND RECREATING RULES

Agency contact persons: Patricia B. Hodulik (262-6497); Judith A. Temby (262-2324)

[INTRODUCTORY CLAUSE]

The Board of Regents of the University of Wisconsin System proposes an order to repeal and recreate s. UWS 17.06(2), Wisconsin Administrative Code, relating to student nonacademic misconduct and discriminatory harassment.

[PLAIN LANGUAGE ANALYSIS PREPARED BY THE UW SYSTEM]

Pursuant to ss. 36.35 and 227.11, Wisconsin Statutes, the Board of Regents of the University of Wisconsin System ("Board") is authorized to promulgate rules governing student conduct and procedures for the administration of violations. The Board's rules governing nonacademic misconduct are set forth in Chapter UWS 17, Wisconsin Administrative Code. In 1989, the Board created s. UWS 17.06(2), prohibiting certain types of expressive behavior directed at individuals and intended to demean and to create a hostile environment for education or other university-authorized activities. The constitutionality of this rule was challenged in UW-M Post, Inc., et al., v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991). In a decision issued October 11, 1991, the court sustained this challenge, holding that s. UWS 17.06(2) was, on its face, overbroad and vague, in violation of the First Amendment.

The court determined that the rule was unconstitutionally overbroad because it went beyond the "fighting words" doctrine. The "fighting words" doctrine holds that speech which tends to incite an immediate breach of the peace, or tends to provoke a violent reaction, is not protected under the First Amendment. The court found that s. UWS 17.06(2), by its terms, reached a "substantial number" of situations where no breach of the peace would be likely to result. Thus, the rule was unconstitutionally overbroad. In addition, because the rule covered speech beyond "fighting words," the court found that society's interest in free speech outweighed the university's interest in increasing minority participation in campus life and providing equal educational opportunity. The court also noted some ambiguity in the rule, since it did not make clear whether the speech prohibited must actually demean the listener and create a hostile environment, or whether the speaker must merely intend that the speech have this result.

The proposed language repealing and recreating s. UWS 17.06(2) responds to the constitutional problems identified by the court. The overbreadth problem is addressed with a more specific description of the expressive conduct prohibited by the rule. References to "discriminatory comments" and "other expressive behavior" have been deleted, leaving "epithets" as the only prohibited type of speech. The term "epithet" is, in turn, narrowly defined to include only those words, phrases or symbols that "reasonable persons recognize to grievously insult or threaten persons" because of a protected characteristic, and which--in addition--have the effect of making the educational environment hostile for the person to whom the epithet is

directed, and which tend to provoke an immediate violent response on the part of members of the group insulted. The definition also provides, however, that the tendency of an epithet to provoke a violent response is "without regard to the gender or physical characteristics of the individuals involved," so that a violation of the rule would not depend on whether the particular individual addressed was likely to respond violently to the particular speaker. These clarifications in the definition of the expressive conduct being restricted, make the rule consistent with the "fighting words" doctrine.

The revised language also clarifies the university's compelling interest in maintaining a safe, non-violent learning environment. It eliminates the ambiguities discussed in the court's decision by providing that, to be prohibited, the epithets must be both intended to demean and to create a hostile environment, and have the effect of making the environment hostile and provoking a violent response. Further, the revised rule makes explicit that the use of epithets in statements addressed to a general audience--regardless whether the epithets were intended to demean and to create a hostile environment--is not prohibited.

Finally, the proposed language provides that no disciplinary action may be invoked unless a "person designated by the President of the University of Wisconsin System" has first determined that conduct alleged to have occurred constitutes a violation. The purpose of this provision is to ensure that the rule is applied in a manner consistent with constitutional principles.

[TEXT OF THE RULE]

SECTION 1. UWS 17.06(2) is repealed and recreated to read:

(2)(a) For addressing directly to a specific member, or specific members, of the university of Wisconsin system student body an epithet, as defined in par. (b), that is:

1. Intended to demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the person addressed; and

2. Intended to make the environment at the university hostile or threatening for the person addressed because of his or her race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

(b) In this subsection, "epithet" means a word, phrase or symbol that reasonable persons recognize to grievously insult or threaten persons because of their race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age, and that:

1. Would make the educational environment hostile or threatening for a person to whom the word, phrase or symbol is directly addressed; and

2. Without regard to the gender or other physical characteristics of the individuals involved, would tend to provoke an immediate violent response when addressed directly to a person of average sensibility who is a member of the group that the word, phrase or symbol insults or threatens.

(c) The use of epithets in statements addressed to a general audience rather than directly to a specific individual, or specific individuals, shall not be a violation of this subsection even though the speaker's intent is to demean and create a hostile environment and even though a member or members of the group demeaned by the epithet constitute part of that audience.

(d) The intent of a person charged with violating this subsection shall be determined by consideration of all relevant circumstances.

(e) No disciplinary proceeding under this subsection shall be instituted unless a person designated by the president of the university of Wisconsin system has determined that the conduct alleged to have occurred constitutes a violation of this subsection. If disciplinary proceedings are thereafter instituted, and a violation is found, the proposed disciplinary sanction shall also be reviewed by the President's designee to assure that it is appropriate to the offense and comparable to sanctions that have been imposed for similar violations.

It is proposed that this rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22(2)(intro.), Stats., and applies only to conduct occurring after that date.

Dated: _____

Judith A. Temby
Secretary
Board of Regents of the
University of Wisconsin System

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WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC
FORM 1

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 92-50

AN ORDER to repeal and recreate UWS 17.06 (2), relating to student nonacademic misconduct and discriminatory harassment.

Submitted by UNIVERSITY OF WISCONSIN SYSTEM.

3-16-92. Received by Legislative Council.

4-13-92. Report sent to Agency.

RNS:RS:RW:jt;las

RECEIVED

APR 13 1992

UNIVERSITY OF WISCONSIN SYSTEM
OFFICE OF GENERAL COUNSEL

Clearinghouse Rule No. 92-50
Date 4/13/92

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached



YES



NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached



YES



NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached



YES



NO

**4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]**

Comment Attached



YES



NO

**5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE
[s. 227.15 (2) (f)]**

Comment Attached



YES



NO

**6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]**

Comment Attached



YES



NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached



YES



NO

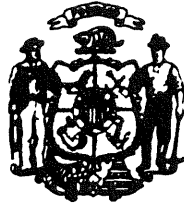
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CLEARINGHOUSE RULE 92-50

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council, dated November 1991.]

1. Statutory Authority

The agency indicates that the repeal and recreation of s. UWS 17.06 (2) is proposed to respond to constitutional problems found with the existing rule in UWM Post, Inc., et al. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991). The agency correctly points out that the previous rule, adopted in 1989, prohibited certain discriminatory comments and expressive behavior directed at individuals and intended to demean and create a hostile environment for education or other university-authorized activities. In the UWM Post case, the Court determined that the rule was unconstitutionally overbroad and vague. The agency indicates that the proposed repeal and recreation of the rule addresses those constitutional flaws.

The proposed rule, as with its predecessor, has raised First Amendment freedom of expression concerns as it directly affects certain types of expressive behavior. Concerns have also been raised with regard to the proposed rule regarding the possible infringement of rights guaranteed under art. I, s. 3, Wis. Const. Upon review, it is not possible to say with certainty that the rule would be found in violation of either the U.S. or Wisconsin Constitution.

The language repealing and recreating s. UWS 17.06 (2) provides a more specific description of the type of expressive conduct meant to be prohibited than the former rule. The rule deletes references to "discriminatory comments" and "other expressive behavior," making use of "epithets" the only prohibited speech. The agency indicates that the term "epithets" is narrowly defined to bring the rule "more closely" into conformity with the constitutional "fighting words" doctrine. The "fighting words" doctrine was set out in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In that case, the U.S. Supreme Court utilized the theory that "fighting words," those words "which may their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected by the First Amendment [Chaplinsky, 315 U.S., at 572 (emphasis added)].

Although the revised rule is drafted to be substantially narrower than its predecessor, the “fighting words” test, which is found in s. UWS 17.06 (2) (b) 2, is not identical to the Chaplinsky test. The rule applies to epithets which would “tend to provoke an immediate violent response” when addressed directly to a person of average sensibility who is a member of a protected group. The analysis prepared by the agency indicates that this change is intended to bring the rule more closely into conformity with the “fighting words” doctrine. It is not clear why the agency chose to use the phrase “immediate violent response” in place of those words which “tend to incite an immediate breach of the peace.” The analysis conducted by the Court in the UWM Post case in finding the previous rule to be unconstitutional, clearly used the latter phrase from Chaplinsky as the standard by which a restriction on free speech would be assessed (although the UWM Post Court also used “direct tendency to cause acts of violence” and “tend to incite violent reaction”). The use of a slightly different phrase and the comments indicating that the use is intended to bring the rule “more closely” into conformity with this doctrine, leaves some uncertainty as to the intended scope of the phrase. In light of the likely scrutiny the rule and the terminology will receive, the agency may wish to review the use of the phrase and clarify its intended scope prior to promulgating the final rule.

2. Form, Style and Placement in Administrative Code

a. The phrase “or specific members” is used in two instances in the rule and shown in parentheses. It would be more appropriate drafting style to include the phrase offset by commas, rather than in parentheses. [See s. 1.01 (6), Manual.]

b. Section UWS 17.06 (2) (a) is drafted in the past tense. It would be more appropriate drafting style to use present tense (e.g., use of an epithet that “is” rather than one that “was”). [See s. 1.01 (1), Manual.]

c. In several provisions, reference is made to “this rule.” The appropriate reference is to “this subsection.” [See s. 1.07 (1) (a), Manual.]

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The clarity of the rule would be improved if the analysis included a description of the intended meaning of the phrase “Without regard to the gender or other physical characteristics of the individuals involved” in s. UWS 17.06 (2) (b) 2.

b. The construction of the rule, using the term “epithet” as a defined word and basis for regulation, may cause some uncertainty in the application of the rule. By placing substantive requirements in a definitional section, there may be some difficulty in applying the rule consistently. The agency may wish to place the effects of using an epithet in the prohibition section instead of in the section defining epithet.

c. The rule provides that no "disciplinary action" shall be instituted unless a person designated by the President of the University of Wisconsin System has determined that the conduct alleged to have occurred constitutes a violation of this rule. There may be a need to clarify what constitutes the "institution" of a "disciplinary action." Does this mean that no action may be taken against a student with regard to conduct or that no formal process of disciplinary action may be initiated? Is there a need for more specific provisions in this area with regard to such items as referrals from campuses, time lines for decisions, standards for review and other due process concerns? This should be clarified in the final draft of the rule.

d. Section UWS 17.06 (2) (a) (intro.) and (b) (intro.) should both end with colons.

e. The rule indicates it takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats. The rule should also specify that it applies only to conduct that occurs after the effective date of the rule.