

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM

COMMITTEE REGARDING FACULTY/ACADEMIC STAFF  
DISCIPLINARY PROCESS

Minutes of the Meeting

November 29, 2005

1:30 p.m.

Van Hise Hall, Room 1511

Madison, Wisconsin

Committee members present: Regent Michael Spector, Chair; General Counsel Pat Brady, Professor Walter Dickey, Chancellor David Markee, Regent Peggy Rosenzweig, and Regent Brent Smith

Committee members unable to attend: None

The minutes of the November 11, 2005 meeting of the Committee were approved as distributed upon motion Ms. Brady, seconded by Professor Dickey.

Ms. Brady distributed draft amendments to Chapter UWS 4, Wisconsin Administrative Code that she had prepared to reflect possible changes to procedures for dismissal of faculty, as discussed at the November 11<sup>th</sup> meeting.

The draft language would provide that a faculty member who is charged with or convicted of certain serious crimes may be suspended without pay after providing the faculty member with an opportunity to be heard regarding the matter. The language would also provide a reporting requirement and an expedited dismissal process for a faculty member charged with or convicted of those same crimes as identified in the following statutes: Ch. 940 (crimes against life and bodily security), s. 943.02 (arson), s.943.10 (burglary), s. 943.22 (1)(g) (taking a vehicle by force), and s. 943.32 (robbery).

In response to a question by Regent Spector, Ms. Brady indicated that the expedited process would follow the same steps required for other dismissal proceedings, but with expedited time lines.

The Committee then reviewed each section of the proposed amendments. With regard to the definition of “just cause” for dismissal, the question was raised as to whether conviction of the crime should be required in order to constitute “just cause”.

Pointing out that criminal charges sometimes are resolved without conviction, Professor Dickey suggested that the focus should be on the behavior rather than on conviction and that the standard should be an adequate level of confidence that the person had actually committed the crime. The person could be suspended without pay until that level of confidence was reached, at which time dismissal proceedings could take place. Certain crimes would be considered to warrant dismissal per se, without the need to show a nexus to just cause.

Regent Smith added that either conviction or the university’s own process could be used to meet the just cause standard.

Mary Matthias, Senior Staff Attorney for the Legislative Counsel, suggested that the statute could be amended to provide that a faculty member could be dismissed for conviction of those crimes without providing further process.

Turning to proposed amendments to UWS 4.09, concerning suspension from duties, Regent Spector asked if the reference in paragraph (1) to committees is plural in existing language, and Ms. Brady indicated that she would find out if that is the case.

With regard to the new language proposed in paragraph (2), Professor Richard Schauer, of the American Federation of Teachers, commented that a process requiring two hearings, one on suspension without pay and one for dismissal, would render the term “expedited” meaningless.

David Nack, Vice President of United Faculty and Staff, felt that “substantial likelihood” would set the standard for suspension too low. He commented a person should be considered innocent until proven guilty.

Regent Spector noted that, under the proposed language, the provost would make the decision on suspension without pay and that suspension would not trigger a property interest at the level that termination would.

Regent Smith added that there would not be a hearing prior to the suspension.

Regent Rosenzweig inquired about the meaning of the term “showing”, and Professor Dickey suggested that the words “upon a showing” be replaced with the words “if the provost finds”.

Regent Spector explained that the term “substantial likelihood” means that there is independent factual evidence beyond the charge itself that the person committed the crime. Professor Dickey added that, in criminal law, prosecutors use the standard of

substantial likelihood in deciding whether to proceed. He added that such a standard would benefit the faculty member.

Assistant Professor Nack commented that persons being suspended would have their livelihoods taken away without proof that they committed criminal acts.

Professor Schauer asked if the person under investigation would have the opportunity for discovery. Commenting that the standard for suspension without pay should be high, he noted that persons suspended would be deprived of resources needed for their defense.

In reviewing proposed s.4.09(b)(2), Regent Rosenzweig asked what would constitute the opportunity to be heard, and Professor Dickey indicated that, under current rules, the faculty member and his or her counsel have an interview with the provost.

Chancellor Markee suggested that the right to be represented by counsel be stated in the language of the paragraph, and Regent Spector agreed with adding such language.

Regent Smith asked if a time frame should be specified for holding the interview and Chancellor Markee suggested three working days. There was agreement with that suggestion.

With regard to proposed s.4.09(c) Assistant Professor Michael Childers, UW-Extension, commented that due process is important because charges can be found to be false. Suspension without pay deprives a person of his or her livelihood, as well as the ability to mount a defense. He felt that suspension without pay before a criminal conviction would be unfair.

Professor Dickey indicated that, in matters in which he had been involved, the persons being investigated did not speak and so could not incriminate themselves. Instead, counsel spoke on their behalf.

Regent Rosenzweig noted that the crimes that prompted this review were serious and that continuing to pay those who committed them was difficult to defend. She asked what happens when such crimes are committed by employees in the private sector, and Professor Dickey replied that the perpetrators would be fired. Regent Rosenzweig noted that the university's process is more thorough and balanced than would likely be provided by other employers.

Assistant Professor Nack noted that action in the private sector would depend on whether there was a collective bargaining agreement and, if so, what the agreement provided.

In response to a question by Assistant Professor Nack, Professor Dickey explained that, in the criminal process, persons accused of crimes are incarcerated

pending trial based on the standard of probable cause, which is a lower standard than one of substantial likelihood.

Ms. Brady added that an accused person also would be suspended without pay if he or she could not report for work.

There were no comments on proposed s.4.09(d).

The Committee then turned to proposed s.4.11. With regard to paragraph (2), Criminal Misconduct, Professor Dickey related a conversation with Russ Whitesel, Senior Staff Attorney for the Legislative Council. While one possibility would be to enumerate all offenses that would permit suspension without pay and dismissal without nexus to just cause, Mr. Whitesel suggested a two-tier approach. The first tier would enumerate crimes that would warrant suspension without pay and dismissal per se. Crimes in the second tier also would permit suspension without pay and dismissal, but nexus to just cause would have to be found. Mr. Whitesel felt that, without the second tier, too many crimes would end up being placed in the first tier.

Regent Smith asked if crimes in the second tier would need to be enumerated, and Professor Dickey replied in the negative.

Commenting on the listing of crimes in paragraph (2), Pam Matthews, Assistant to Representative Sue Jeskewitz, commented that crimes against children should be included and that parents would be horrified if their children were being instructed by a sex offender.

Regent Rosenzweig agreed that some crimes against children should be placed in the per se category.

Ms. Brady thought it best to place the most egregious crimes in the per se category and to use the regular dismissal process for all others.

Ms. Matthias suggested using felony classifications instead of listing the crimes themselves. If that were done, Professor Dickey said that he would want to include Class A and B felonies, but that there also are serious crimes in classes C and D.

Ms. Matthias suggested that the second tier could be used for crimes that threaten harm to the university.

Regent Spector asked that both proposals be written in draft form for further consideration.

Professor Dickey explained that the crime of stalking would not warrant per se dismissal but that such behavior could warrant suspension without pay for public safety reasons. He also noted that domestic battery rarely is a felony offense.

Regent Spector said that he would prefer to use enumeration of crimes rather than felony classifications.

In response to a question by Ms. Brady, Professor Dickey said that behavior that poses risk to the welfare and safety of others in the community could be included in the second tier if it were not so egregious as to warrant inclusion in the first tier.

Turning to paragraph (3), Reporting Responsibility, Regent Spector inquired as to the penalty for not reporting a crime as required; and Professor Dickey replied that a person could be disciplined for failure to report. Ms. Brady added that the requirement would place the burden on those charged with or convicted of a crime to come forward and report that fact.

With regard to other aspects of the proposed amendments, Chancellor Markee suggested that working days be used throughout in establishing time lines, and there was agreement with that suggestion.

Regent Rosenzweig asked if the full Board should hear dismissal cases brought through the expedited process, rather than having them delegated to a committee. Ms. Brady explained that, under current procedure, the full Board must vote on dismissal actions and that the President of the Board may, but is not required to, refer such cases to the Personnel Matters Review Committee.

With regard to the process going forward, Regent Spector noted that the Committee had been asked to make final recommendations to the Board at the December meeting. Given that there was more work to be done, he intended to make a progress report and note that work is continuing. There was agreement by the Committee with that approach.

In response to a question by Regent Rosenzweig regarding the process for amending administrative rules, Ms. Brady indicated that, after obtaining input from governance groups, proposed amendments would go to the Board of Regents and then to the Legislative Council for review. The Board then would conduct a hearing, after which the proposed rules would be returned to the Legislature. Ms. Matthias added that the proposed amendments would be referred to the appropriate Senate and Assembly committees which could decide to conduct hearings. The committees then would work with the Board to obtain any modifications.

Noting that the Joint Audit Committee expected a report in December, Ms. Mathews suggested that the Chair communicate with the Joint Audit Committee regarding the status of this matter.

She also suggested employing the emergency rule process so that the rules could be put into effect without delay.

Professor Schauer noted that Chapter 36 defines personnel policy as a primary responsibility of faculty and commented that faculty may not agree with the proposed amendments.

It was decided that the secretary would communicate with committee members to find another meeting date in December, if possible.

The discussion concluded and the meeting was adjourned at 3:15 p.m.