

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM

COMMITTEE REGARDING FACULTY/ACADEMIC STAFF
DISCIPLINARY PROCESS

Minutes of the Meeting

November 3, 2005
3:00 p.m.
Van Hise Hall
19th Floor Conference Room
1220 Linden Drive
Madison, Wisconsin

Committee Members Present: Regent Michael Spector, Chair, Regent Peggy Rosenzweig, Regent Brent Smith, General Counsel Pat Brady, Professor Walter Dickey, Chancellor David Markee, Regent President David Walsh

Committee Members Unable to Attend: None

The meeting began with introduction of the Committee members, including their particular qualifications for serving on this committee. Professor of Law Walter Dickey indicated that he had served as Chair of the UW-Madison Committee on Faculty Rights and Responsibilities, had served as investigator in a recent felony matter and had advised on others. He also had headed the State Department of Corrections.

Regent Smith, an attorney, noted that employment law is part of his practice. Regent Rosenzweig, who had served as a state senator and member of the Joint Committee on Finance, brought to the Committee her perspective as a former legislator. Chancellor Markee, of UW-Platteville, brought his experience in making decisions on employee discipline. General Counsel Brady brought 25 years of experience in handling UW employment issues. Regent Spector, an attorney, brought his experience in the area of K-12 disciplinary matters.

Noting that the Committee is very aware of the importance of the matters before it and of the urgency of identifying ways to make needed reforms in the process, Regent Spector called on Regent President Walsh to comment on the Committee's charge.

President Walsh noted that some egregious situations, which were not the norm, had occurred and that the university had lost credibility because of its process for dealing with them and the fact that this process is not well understood. The purposes of the committee are to:

- (1) Assure the public of good stewardship of funding and the safety of employees and students; and
- (2) Conduct an examination of the disciplinary process that will educate the public and everyone involved, maintaining a delicate balance between the need to safeguard employee rights and the need to assure campus safety and good stewardship.

The Committee is charged with making recommendations to the Board of Regents which, in turn, will engage the shared governance process, as appropriate. The Committee is to seek as much input as possible in its deliberations, through an open and transparent process.

General Counsel Brady then provided an overview of existing laws, regulations and practices related to employee discipline, noting that it is a complex system of balancing interests and involves several layers of law and policy. These include:

- 1) Fourteenth Amendment rights of due process for employees;
- 2) State law prohibiting discrimination based on a conviction record, unless it can be shown that the conviction is related to the position in question;
- 3) UW System policies set forth in the Administrative Code;
- 4) Institutional policies and procedures based on the Administrative Rules.

Noting that the Board has authority over faculty, academic staff and limited appointees, Ms. Brady distributed a summary of UWS 4, the Administrative Code chapter dealing with procedures for dismissal of faculty. There is a similar, but somewhat less protective, process for academic staff. Procedures for classified staff are governed by collective bargaining agreements and the Office of State Employment Relations. She pointed out that, while classified staff can engage in an appeal process after termination, the appeal process for faculty and academic staff takes place before termination, during which time they remain on the payroll. This procedure was derived from principles established by the American Association of University Professors as part of the effort to protect academic freedom.

Ms. Brady then turned to the particulars of UWS 4, which provides that a tenured faculty member may be dismissed only by the Board of Regents, and only for just cause, and only after due notice and hearing.

The bringing of charges is initiated when a chancellor receives a complaint. An investigation follows, after which the chancellor must offer to discuss the matter with the faculty member before deciding whether to file charges. If the chancellor decides to go forward, the faculty member must be provided with a statement of the charges.

Regent Spector asked if a chancellor can initiate a complaint, and Ms. Brady replied that the rules are ambiguous on that point. The rules could be changed to clarify that matter.

In response to a question by Regent Rosenzweig, Ms. Brady indicated that the requirement for just cause is statutory and that the administrative rules are an elaboration of that requirement. Because faculty have primary responsibility in this area, they must be consulted about any changes.

Noting that each institution provides a standing faculty committee charged with hearing faculty dismissal cases, Ms. Brady indicated that a faculty member under charges can request a hearing within 20 days of the notice of the statement of charges and that the hearing must be held within 20 days after the request, except that the time limit may be enlarged by mutual consent of the parties or by the committee. She pointed out that the process often is extended at this point because of the difficulty of bringing together a large committee to conduct the hearing.

Professor Dickey added that, if the chancellor at UW-Madison receives a complaint, the provost appoints an investigator to gather facts. The Committee on Faculty Rights and Responsibilities (CFRR) advises the provost on whether to proceed with charges and what discipline to seek. While that step is taken fairly quickly, the subject then has 10 days to object to the investigation. He felt that this is an area that could be streamlined. Noting that the CFRR has six to eight members, he agreed that scheduling is a problem.

With regard to initiating an investigation, he indicated that there is the question as to how a matter comes to the university's attention. One possibility might be to require that conviction of a felony be reported to the department chair. He pointed out that current policies place the chancellor in a judicial role to that he or she could not also be in the position of initiating a complaint. Ms. Brady added that, while UWS 4 provides for the chancellor to initiate an investigation, UW-Madison and UW-Milwaukee have delegated that role to the provost.

In response to a question by Regent Smith, Ms. Brady indicated that dismissal proceedings are rare and it is even rarer for a crime to be involved.

Regent Rosenzweig asked if a timeline for conclusion of a case can be required, and Ms. Brady replied in the affirmative, adding however that scheduling and other issues can cause conclusion of matters to be extended, as can the advent of summer when faculty are not on campus.

Ms. Brady then outlined the elements of due process to be provided to a faculty member under UWS 4, noting that hearings can be lengthy and involved. The hearing committee then prepares a report to the chancellor. Within 20 days of receiving the report, the chancellor must review it and afford the faculty member an opportunity to discuss it. Within 20 days after that, the chancellor must prepare a recommendation for the Board of Regents. If his/her decision differs substantially from that of the faculty committee, he first must consult with the committee and provide opportunity for a written response from the committee before forwarding a recommendation to the Board.

Regent Spector asked if the faculty committee, as well as the university and the faculty member, are represented by counsel; and Ms. Brady replied in the affirmative.

In response to a further question by Regent Spector, Ms. Brady indicated that, while UWS 4 provides that the hearing committee is not bound by common law or statutory rules of evidence, involvement of lawyers generally means that there will be motions made that will have to be ruled on, often after conferring with counsel.

Turning to the UWS 4 section on review by the Board of Regents, Ms. Brady noted that the Board's review is based on the record developed at the campus faculty level and that a new hearing is not afforded. If the Board decides to take action different than what is recommended by the chancellor or the faculty committee, it must consult with either the chancellor or committee, as appropriate, before taking final action.

In response to a question by Regent Smith, Ms. Brady indicated that Board review ordinarily occurs only in dismissal cases. If there is no intent of dismissal, any review of other discipline by the Board would be discretionary.

Regent Spector asked if the timeframe for a dismissal proceeding is about three to six months, to which Ms. Brady replied that conclusion of the proceeding could take a year or more, although it could be done in as little as three months if the process were moved forward as rapidly as possible. During this time, the employee usually is not relieved of his/her duties; but even if that occurred, pay would continue until the process concludes, as required by Administrative Rules.

In response to a question by Regent Rosenzweig, Ms. Brady explained that, in the hierarchy of rules, the statutes would come first, followed by the Administrative Rules, and then by the institutional policies and procedures. If there were a disharmony among them, the higher would prevail.

Regent Spector asked if there were any comments or questions from those in the audience.

Russ Whitesel, Senior Staff Attorney for the Legislative Council, suggested that, rather than adjusting the overall disciplinary process, there might be an expedited process for extraordinary cases. The Board could specify what would constitute extraordinary cases and maintain the more deliberative process for other cases.

Pam Matthews, assistant to Representative Jeskewitz, agreed, noting the legislative view that the crimes recently reported in the press are unconscionable and that those who committed them should not be teaching our students.

Professor Richard Schauer, of the American Federation of Teachers, said that it is important to bear in mind that faculty serving on dismissal committees also have full time jobs doing teaching, research and service. He pointed out that it is not necessary to wait for completion of a criminal investigation in order to begin the campus investigative

process. He also commented that some local faculty policies and procedures are in need of revision.

Ms. Brady cautioned that, while a campus investigation can be initiated while a criminal investigation is proceeding, practical situations often intrude. Law enforcement officers do not want campuses to do anything that might interfere with their investigations and they may take evidence that the campus investigation would require.

Professor Dickey agreed, adding that it would be extremely difficult to move forward before completion of a criminal action. In that regard, he pointed out that a campus investigator must interview the subject, who would not agree to be interviewed if what was said could be used in a criminal case. He identified the following four issues to be addressed:

- 1) What should be the pay status of the person charged in the dismissal proceeding
- 2) What should be done to improve the efficiency of the disciplinary process
- 3) What behavior gives rise to the dismissal process. In that regard, he noted that, if it were decided that commission of a felony would initiate the process, there would be the incentive to plead guilty to misdemeanors instead.
- 4) Lack of clarity about the connection of behaviors to university responsibilities. While the connection with public safety is clear, he thought another connection should be undermining the legitimacy of the university so that it is inhibited from performing its mission.

Noting that these areas all present challenges, he pointed out that the rules as drafted did not contemplate the commission of crimes.

In that regard, Ms. Brady noted that statutory prohibition of discrimination on the basis of a criminal conviction, in the absence of a nexus to the person's position.

Regent Rosenzweig inquired about the prevalence of such statutes nationally, to which Professor Dickey replied that about half of the states have them.

Ms. Brady then passed out a number of hypothetical case studies of faculty members charged with felonies, which were discussed by the Committee.

With regard to the question of suspension without pay, Professor Dickey noted that currently there are no grounds for that to occur; and Regent President Walsh pointed out that this situation is a problem in the public eye.

Regent Walsh asked if a dismissal case could go forward on the basis of clear and convincing evidence if the criminal case is ongoing.

In response to a question by Regent Spector about use of preponderance of evidence, rather than clear and convincing evidence, Ms. Brady indicated that the

standard of clear and convincing evidence is specified in institutional faculty policies and procedures.

In response to a question by Regent President Walsh, Professor Dickey felt that clear and convincing evidence or preponderance of evidence could be found but that the nexus to university responsibilities could be difficult. In that regard, he felt that undermining the university's ability to perform its mission could be a basis for dismissal.

Regent Spector noted that words used in that regard would need to be precise in order to protect speech. He asked if there could be legislation requiring greater sharing of facts between the criminal justice system and the university.

Ms. Brady thought that might be difficult because of variation among individual cases. While there currently is cooperation with law enforcement authorities, it is highly case specific.

Regent Spector pointed out that the public sees a lack of legitimacy in waiting 10 or 12 months to discipline someone who has committed an egregious crime.

Ms. Brady suggested addressing the matter of suspension without pay, and Professor Dickey that there could be a preliminary hearing on suspension without pay pending final resolution of the matter. He added that suspension, even with pay, is a serious consequence for anyone's career.

Regent Smith asked for more information on alternative language in statutes barring discrimination on the basis of criminal conviction, and Mr. Whitesel said that such information could be obtained.

Brian Tanner, of United Council of UW Students, inquired about protections for students; and Ms. Brady replied that students, as well as others, are able to file complaints. Mr. Tanner felt that students might hesitate to do that for fear of faculty retaliation.

Noting that, in the area of sexual harassment, every university has an office to advise student on going forward with complaints, Ms. Brady added that it is difficult to get students to come forward in disciplinary matters. Often, their goal is simply to earn their degrees and move on.

Kevin Kniffin, of the American Federation of Teachers, commented that many states have collective bargaining for faculty and that collective bargaining procedures may work better in disciplinary situations.

Upon conclusion of the discussion, it was agreed that minutes would be circulated and that the Committee would meet again on November 11th, following the Board of Regents meeting.