

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM

COMMITTEE ON FACULTY/ACADEMIC STAFF DISCIPLINARY PROCESS

Minutes of the Meeting

January 25, 2006
1:30 p.m.

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

Committee members unable to attend: None

Others in attendance: Mary Matthias, Senior Staff Attorney for the Legislative Council; Scott Sager, Legislative Audit Bureau, David Musolf, UW-Madison Secretary of the Faculty, Kevin Kniffin, American Federation of Teachers; David Nack, Vice President of the United Faculty and Academic Staff; Corliss Olson, UW-Extension School for Workers; Richard Schauer, American Federation of Teachers; Steve Lund, UW-Madison Director of Academic Personnel; and Bill Steffenhagen, Academic Staff Professionals Representation Organization

Upon motion by Regent Rosenzweig, seconded by Professor Dickey, the minutes of the December 15, 2005 meeting were approved as distributed.

Regent Spector noted that he had advised the Board of Regents in December that the committee would report at the February board meeting. The intent at this meeting was to consider proposed administrative rule language to present to the board, after which it would go to governance groups at each UW institution for input. He suggested that the committee's recommendations be forwarded to Regent President Walsh who would decide how to proceed once the matter was before the board.

Professor Schauer stated his objection to this manner of proceeding, expressing his belief that faculty views should be sought before sending the proposal to the board.

Ms. Brady noted that faculty would have the opportunity to comment after the proposal was presented to the board and she suggested that the committee might meet again after faculty comments were received and before the board would act on sending the proposed rule to the Legislature.

Professor Schauer commented that a proposal coming from the board already would have momentum and that it would be preferable to solicit faculty input first.

The committee then turned its attention to a document titled, "Proposed Chapter UWS 7, Wisconsin Administrative Code Procedures for Dismissal of Faculty in Special Cases." Ms. Brady explained that, pursuant to direction at the last meeting, she and Professor Dickey had prepared the draft, with assistance from Russ Whitesel, Senior Staff Attorney for the Legislative Council.

"Serious Criminal Misconduct", as defined in UWS 7.02, would trigger an expedited disciplinary process and procedures for suspension without pay and would constitute just cause for dismissal. Serious Criminal Misconduct also would need to meet one of the four conditions set forth in (a)-(d) in order to establish a nexus between the criminal act and its impact on the university.

Regent Spector indicated that the questions before the committee regarding this section were: 1) whether to use this definition rather than a list of enumerated felonies; 2) whether Serious Criminal Misconduct means conviction of a felony, being charged with a felony, or engaging in behavior that constitutes the commission of a felony; and 3) whether (a)-(d) should be used to provide a nexus to impact on the university.

Professor Dickey added that in UWS 7.06(a) it would be important to include a standard for "substantial likelihood" that the faculty member had engaged in the conduct.

Regent Rosenzweig inquired as to an example of a case in which a person might have engaged in commission of a felony but not charged with a felony. Professor Dickey explained that such occurrences as a plea agreement or turning state's evidence might lead to a decision not to file criminal charges, although there still could be a sufficient level of confidence that the person engaged in the criminal behavior.

Regent Smith and Regent President Walsh expressed their preference for using the words "engaging in behavior that constitutes the commission of a felony." Professor Dickey stated his agreement with that view on the basis that the question should be whether the person committed the act, rather than whether the criminal justice system decided to file charges.

In response to a question by Regent Spector, Professor Dickey indicated that the reporting responsibility set forth in UWS 7.04 would put the obligation on the faculty member to report being charged with or convicted of a felony; otherwise, the university would have no way of knowing of such occurrences.

Regent Spector asked who would decide if the behavior was felonious, to which Professor Dickey replied that the provost would need to make the determination that the behavior would amount to a felony; otherwise UWS 4 procedures could be employed.

Ms. Brady explained that factors (a)-(d) were drawn in part from professional codes of ethics, whether the behavior caused risk to the safety of the community, and whether it seriously impaired the university's ability to fulfill its mission or the faculty member's ability to fulfill his or her duties.

Regent Rosenzweig commented that factors (c) and (d) might be seen as incorporating factor (a).

Professor Dickey noted that the factors were connected to the declaration of policy in proposed UWS 7.01.

Commenting that factor (a) seemed overbroad, Regent President Walsh asked how freedom of speech would be protected in implementing that factor.

Professor Dickey noted that offensive speech would not be considered a felony.

Regent Spector observed that it would be a judgment call as to whether a given conduct would constitute a felony.

Assistant Professor Olson expressed concern that the rule would make the accused person "guilty until proven innocent" and that a false accusation could destroy a person's life. She thought that the proposed rule could result in miscarriage of justice and that factor "a" could put a person who was simply out of favor at risk for losing his or her job. She concluded by noting that the university must defend the rights of people to due process.

Professor Schauer felt that the committee should not have accepted assistance from the Legislature in this matter and that the proposed rule would be an inappropriate response to legislative pressure. He noted that most dismissal cases are handled through negotiation and asserted that the board has incorrectly defined just cause in past cases by using the Safransky standard which has been opposed by all UW faculty senates.

While he could accept a list of serious felonies as constituting just cause, he did not agree with a standard short of conviction of the crime. In that regard, he noted that plagiarism also is considered cause for dismissal, even though it does not warrant a jail sentence. Finally, he asked about the recompense to a person wrongly accused and whether that person would receive damages or attorney's fees.

Assistant Professor Nack expressed concern that the right to representation was not set forth in the proposed rule.

Regent President Walsh pointed out that, in most employment situations, the employer has the right to terminate an employee, although the employee can later contest the decision. Referring

to a recent case at UW-Madison, he pointed out that the public could not understand why the disciplinary process was not even started until after the employee was convicted and put in prison. The proposed rules were intended to respond to such concern by expediting the process.

Dr. Olson suggested asking faculty to develop a solution in a way that would not impinge on the rights of the accused.

Professor Dickey replied that the proposed rule would protect a person's rights. In order to constitute just cause, there must be felonious behavior, plus one of the factors in (a) through (d). The expedited process would require that provosts consult with governance bodies and talk with the accused person. There would be an investigation and hearing on campus, with all due process protections afforded, and the matter would then come to the Board of Regents for decision.

Ms. Brady added that the proposed rule incorporated all the protections set forth in UWS 4, including the right to representation.

In response to Professor Schauer's comment about legislative pressure, Regent Rosenzweig remarked that that it is the board's responsibility to respond to public opinion and to make sure that the university's processes work effectively. She observed that the committee had done good and serious work and that people would have the opportunity to comment on the proposal.

Regent Spector added that, while the matter is a regent responsibility, the committee welcomed help and comment from legislative representatives, faculty representatives and others who have participated in the meetings. He found their comments to be helpful and appropriate.

Referring to proposed UWS 7.05(6), Regent President Walsh asked if the board review is to be made by the full board or by a committee.

In reply, Regent Rosenzweig expressed the view that the full board should review the matter because of the gravity of such situations. Regent Spector added that this process would only be employed in exceptional cases.

Ms. Brady explained that the language is like that in UWS 4. Even if the Personnel Matters Review Committee conducts the review, the decision is made by the full Board of Regents.

While he had been critical of the slow pace at which recent cases moved, Regent President Walsh expressed concern that the time frame in the expedited process might be too tight.

Ms. Brady explained that the effort was to have the process completed in 60 days and that proposed UWS 7.05(8) provides for enlargement of the time limits, if necessary.

Professor Schauer felt that the 10 day timetable for board review would be too short. In that regard, he noted that the hearing record from the campus must be obtained, followed by establishing a briefing schedule and conducting oral argument. He asked if all regents would be expected to analyze the full record.

Replying in the affirmative, Regent Spector remarked that such an expectation would not be unreasonable for these very serious cases. With regard to proposed UWS 7.05(8), he explained that the intention would be to honor the due process rights without providing a "back door" to slow down the process

Professor Dickey added that unavailability of witnesses or evidence might make it impossible to expedite the process.

Regent Smith asked who would decide whether to enlarge the time limits, to which Ms. Brady replied that the faculty committee could make that decision for the campus portion of the proceedings and that the president of the board would decide once the matter is before the board.

Regent Spector stated that he was comfortable with the time limits as proposed and with the language in (8) which stated as reason for enlarging the time limits inability to obtain testimony, evidence or records.

Mr. Musolf explained that, with regard to recent UW-Madison cases, delay occurred because the cases came forward at the beginning of summer when faculty on nine-month appointments were not on campus, while others were out of the state or country. In such circumstances moving the process forward presented a considerable challenge.

Regent President Walsh pointed out that, in one of these cases, the conviction occurred in April and the appointment still had not been terminated. The public, he said, expects expeditious action.

Regent Spector suggested that the faculty could make rules that would focus on ways to expedite the campus process.

Chancellor Markee suggested a two-layered approach to time limits, with a decision to enlarge the time limits made by the faculty hearing committee with approval by the provost or president of the board.

Mr. Musolf remarked that scheduling and completing the hearing process in 14 days would be difficult, noting that hearings can last for two or more days, after which a recommendation to the chancellor must be prepared.

Professor Dickey pointed out that suspension without pay would provide an incentive to move the process forward.

Turning to proposed UWS 7.02 and 7.03, Professor Dickey noted that the basis for dismissal would be just cause as defined

by commission of a felony plus one of four factors. Noting that the burden of proof should be defined, he suggested that "probable cause" would be too low a standard and "without reasonable doubt" would be too high. He asked if the standard should be "clear and convincing evidence".

Ms. Brady suggested that the standard be "preponderance of evidence", which is the standard for civil cases.

Regent Spector asked what would happen if a person were to be suspended without pay, but then not dismissed.

In reply, Ms. Brady indicated that previous litigation has established that the university would not be responsible for attorney's fees. However, there could be responsibility for back pay and reinstatement.

Professor Dickey added that, if a decision were made not to dismiss, an array of remedies could be employed, one of which could be reinstatement with back pay.

Summarizing the discussion, Regent Spector said his interpretation was that "preponderance of evidence" would be set forth as the standard; reinstatement with back pay would be a remedy; a two-layer approach for enlarging the time limits would be employed; review at the regent level would be by the full board; and "engaging in behavior that constitutes commission of a felony" would be the language used in proposed UWS 7.02.

In response to a question to Regent Spector about the process for legislative review of the rule, Ms. Matthias explained that the proposed rule would be referred to a legislative committee for passive review. If it wished, the committee could conduct a meeting about the rule and object to it or make changes.

In reply to an inquiry about the process for shared governance involvement in providing input on the proposed rule, Mr. Musolf noted that rule changes often are provided to chancellors for distribution to faculties. Ms. Brady added that the rule could be distributed through the chancellors or the elected faculty representatives, and Chancellor Markee expressed preference for distribution through the chancellors.

Professor Dickey suggested that a one or two page commentary be provided by the committee to accompany the proposed rules. The board then could distribute the rules and commentary to the campuses for shared governance input and could, if it wished, ask the committee to consider that input and forward a final draft to the board.

Regent President Walsh added that his intention would be for the board to discuss the proposed rules and then forward them to the campuses for review and input.

Regent Rosenzweig suggested that two months be allowed for faculty review, and Chancellor Markee agreed.

Regent Spector added that the committee then could meet to consider the faculty input in April and bring the matter back to the board in May. Ms. Brady added that the board would need to hold a hearing on the proposed rules.

Professor Schauer noted the faculty's statutory primary responsibility for faculty personnel rules, stating that this authority could not be overridden by the board.

In response, Regent Spector stated that the Regents would remain aware of the faculty role and proceed with the advice of counsel.

Regent Rosenzweig moved to approve the draft rules, subject to the following:

- o In 7.02(1), use the words "engaging in behavior that constitutes the commission of a felony" and capitalize the first letters of "Serious Criminal Misconduct"
- o In 7.05(6), indicate review by the full Board of Regents in the first and third lines.
- o Add a section to provide that the burden of proof will be preponderance of evidence.
- o In 7.05(8), provide for two layers of review of a decision to enlarge time limits.
- o Provide that the array of remedies in a case where a decision is made not to dismiss after suspension without pay will include reinstatement with back pay.
- o Include a narrative with the proposed rules.

The motion was seconded by Chancellor Markee and approved on a unanimous voice vote.

The meeting was adjourned at 3:50 p.m.