

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM

COMMITTEE REGARDING FACULTY/ACADEMIC STAFF DISCIPLINARY PROCESS

Minutes of the Meeting

May 16, 2006
3:00 p.m.

PRESENT: Regent Michael Spector (Chair), General Counsel Pat Brady, Professor Walter Dicky, Chancellor David Markee, Regent Peggy Rosenzweig, Regent Brent Smith, and Regent President David Walsh

UNABLE TO ATTEND: None

Noting that the goal is to bring a recommendation to the Board of Regents at its June 9, 2006 meeting, Regent Spector referred to a memorandum prepared by General Counsel Brady regarding the administrative rules process and the timelines involved in rule promulgation.

Referring to submissions received on proposed UWS 7 from faculty and academic staff governance groups, Regent Spector asked the Committee to address conceptually the major issues raised in those submissions. The issues were summarized in a memorandum written by Ms. Brady.

The first issue was identified as “definition of the conduct that would trigger application of the expedited disciplinary process, including possible suspension without pay.” While the Committee had chosen to focus on behavior as the trigger for the process, Regent Spector thought that it might be appropriate to consider filing of a criminal charge as the trigger, as suggested in governance group comments.

Regent President Walsh noted that a plea would avoid filing of charges.

Expressing disagreement with making such a change, Professor Dickey did not think that a district attorney should have authority to trigger UWS 7. He also asked what would happen in a case in which the university wanted to dismiss a person, without having him or her criminally charged.

Regent Spector thought that for university officials to attempt to identify serious criminal misconduct in the absence of a criminal charge could lead to accusations of abuse of discretion.

While UWS 4 could be used to bring dismissal proceedings in cases without a criminal charge, Professor Dickey thought there could well be instances of uncharged behavior that should trigger the expedited disciplinary process. Stating his belief that the

behavior itself should be what triggers the process, he noted that the criminal justice system is not responsible for looking after the best interests of the university.

Ms. Brady asked if UWS 4 would offer an adequate process for cases in which there is no criminal charge or conviction.

Regent Rosenzweig pointed out that the cases that led to formation of the Committee all involved felony charges. She felt that a trigger based on such a charge would be more readily understood.

Chancellor Markee said that he was inclined to favor using UWS 4 more effectively and strengthening the process for mandatory reassignment. To trigger the expedited disciplinary process, he felt that there should be at least a criminal charge, admission of guilt, or conviction and that the crime should pose a serious danger to the university.

Professor Dickey noted that all three recent UW-Madison cases involved admissions of guilt that appeared in police reports. He cautioned that if a criminal charge were to be used as the trigger, UWS 4 should be reviewed to ensure that it would be adequate for other cases.

In response to a question by Regent President Walsh, Ms. Brady indicated that there is no definition of just cause in UWS 4. Regent President Walsh commented that, without such a definition, UWS 4 would not be adequate for cases of serious misconduct.

Regent President Walsh remarked that in the three recent cases, public trust was lost when no action was taken when the criminal charge was filed. Noting that most cases are pled down, he asked if it would be more beneficial to have the expedited process triggered by a provost or by a district attorney.

Regent Spector remarked that a provost would be in the difficult position of trying to determine what constitutes a felony. With the decision made by a third party, he felt that there might be better understanding on the part of the university community and the public.

In response to a question by Regent Spector, Chancellor Markee indicated that, under UWS 4, a person who posed a danger to the university could be suspended with pay.

Regent Smith expressed preference for the draft language as written, with the focus on the person's behavior.

Professor Dickey agreed, asking what would happen in a situation where there was credible evidence of assaultive behavior, but the victim wanted to move on without bringing a criminal charge, or if the university simply wanted to dismiss a person without a criminal charge.

Regent Spector remarked that a person often will resign when confronted with knowledge about his or her crime.

Regent Rosenzweig asked if the Committee has jurisdiction to tighten the language of UWS 4, and Ms. Brady replied in the affirmative. Regent Rosenzweig

suggested that the expedited disciplinary process be adopted in a new rule, with revision of UWS 4 to follow.

Chancellor Markee commented that UWS 4 could be strengthened to provide for suspension without pay in appropriate cases, with repayment if the person were later found innocent. The expedited process could be added to UWS 4 for use in those cases when a person had to be removed from campus because of a threat to safety.

In response to a question by Regent Spector, Chancellor Markee expressed his view that cases such as embezzlement could be adequately handled under UWS 4 as currently written.

Russ Whitesel, Senior Staff Attorney for the Legislative Council, pointed out that, even if there is a criminal charge, use of the expedited process would be discretionary and that it could be used even if the charge were later pled down.

Professor Dickey referred to the UW-Madison faculty submission, which listed as cause for initiation of suspension or dismissal proceedings a charge, no contest or guilty plea, or conviction of felonies based on conduct involving one of the following:

- Serious physical injury to another person
- Serious danger to the personal safety of another person
- Sexual assault
- Theft or criminal damage to property
- Stalking or harassment.

This listing, he pointed out, provides guidance and addresses concerns about use of discretion in determining applicability of UWS 7. He felt that use of UWS 7 could be more limited if UWS 4 were reviewed for adequacy in addressing other cases.

The Committee then turned to the second issue identified in Ms. Brady's memo: the requirement to self-report serious criminal misconduct.

Regent President Walsh indicated that he was troubled by this provision and asked if such reporting is required of other state employees, to which Mr. Whitesel replied in the negative.

Given the strong opposition by governance groups to a requirement for self-reporting, Professor Dickey did not believe that it would be worth keeping such a requirement in the proposed rule.

Regent Spector asked what the public would think if an employee had been convicted of a felony involving safety concerns that the university neither knew nor asked about.

Professor Lawrence Kahan explained that UW-Madison faculty had no problem with a requirement to report a charge or conviction of a felony, although they were concerned about a requirement to report behavior that did not involve a criminal charge. They recognized that many new hires come from other states, making it difficult to find out about a charge or conviction in the absence of self-reporting.

Regent Rosenzweig considered the requirement to be reasonable.

Regent Spector thought the proposed language might be amended to require self-reporting of being charged with or convicted of a felony.

Mr. Whitesel asked if the requirement would be prospective or retrospective, and Ms. Brady replied that the plan had been to make the rule prospective.

Regent Rosenzweig referred to legislation requiring criminal background checks for those having contact with children, and Ms. Brady added that this law affected existing employees.

In response to a question by Regent Spector, Mr. Scott Sager, of the Legislative Audit Bureau, explained that the recent audit on UW employees with felony convictions included those currently on probation and parole, using Wisconsin data. Persons with convictions in other states would not have been included.

Regent Spector stated the Committee's tentative agreement on self-reporting of felony charges or convictions. Regent President Walsh added that the self-reporting should be prospective.

The Committee next turned to the issue of suspension without pay. It was noted in Ms. Brady's memo that UWS 7 as proposed "would allow the provost, after consultation with governance groups, to suspend without pay in cases involving a charge of serious criminal misconduct ...where there is 'substantial likelihood' that the misconduct has occurred; or where an individual cannot report to work because of incarceration or terms of probation or parole; or where there has been a conviction of serious criminal misconduct."

It was noted by Ms. Brady that some governance groups felt suspension without pay should not be imposed at all, while others commented that there should be a fuller process provided before such a suspension could be imposed.

Chancellor Markee felt that suspension without pay would only be appropriate in cases where a person could not be reassigned or if the person were incarcerated or otherwise unable to work.

Regent President Walsh expressed concern that a reassignment could be interpreted as a "back up" appointment, which the Board had acted to prohibit..

Chancellor Markee said that the person would be assigned a work product and be required to produce it. If the expedited process were used, it would last for only 60 days.

Regent Rosenzweig noted the public outcry about lack of suspension without pay in the recent cases and stated her strong support for keeping provision for suspension without pay in the proposed rules.

Chancellor Markee asked if back pay would be mandatory in cases for which the decision was made not to dismiss the person who was suspended. Professor Dickey replied that he or she could be reinstated with some or all back pay and that a penalty short of dismissal might include forfeiture of some back pay.

In response to a question by Chancellor Markee, Regent Spector said that there might not be consultation with faculty on the question of suspension without pay but there could be consultation on the question of back pay.

Regent Rosenzweig added that the person involved could be harmed if such consultation took too long a time.

Professor Richard Schauer, of the American Federation of Teachers, commented that what hurts the university is the perception that there are convicted felons on the faculty. He felt that suspension without pay should not be invoked unless there is a conviction. As to who makes the decision, he noted that UW-Madison faculty recommended a hearing before a faculty committee. The administration, he pointed out, is the prosecutor in these cases.

UW-Madison Professor Robert Mathieu, a member of the University Committee, explained that faculty are concerned that, if a crime is claimed but not evident, the provost must then decide what to do without the benefit of much evidence. UW-Madison's suggestion for a very rapid suspension with pay would serve to protect the campus community, while there would be greater process provided for suspension without pay. He cautioned about creating a situation in which a severe penalty would be inflicted without adequate process.

Professor Dickey remarked that, without admission of guilt or considerable evidence, there would not be a finding of substantial likelihood that the person committed the crime.

In response to a question by Professor Mathieu, Professor Dickey said that he was surprised by the amount of concern about exercise of discretion. While consultation with faculty would be beneficial, he did not believe that the decision should be made by a faculty committee.

Ms. Brady added that UWS 7.06 would require consultation with faculty governance, but some governance groups wanted a full-blown hearing.

Professor Mathieu said that the UW-Madison recommendation would be for consultation with a faculty committee, but not a hearing.

Professor Kahan commented that suspension without pay is a punitive act, requiring some due process. He felt it would be acceptable to impose such a suspension after admission of guilt or a conviction.

In response to a question by Regent President Walsh, Professor Kahan said that faculty need continuation of pay to be able to afford a defense against the charges.

Regent President Walsh noted that he had heard much criticism of paying a person who was not working.

Ms. Brady added that continuation of pay under such circumstances is unusual among employee groups. Others receive suspension without pay after minimal due process, but have the right to appeal that decision. She reminded the group that, under proposed UWS 7, suspension without pay would be discretionary.

Regent Spector stated that he was comfortable with giving administrative leaders discretion in these matters.

In response to a question by Professor Dickey, Professor Mathieu said that he was not against suspension without pay if there were involvement of the faculty governance system. If the Chancellor felt there was a danger to the campus community, a suspension with pay could be imposed. The University Committee would decide within 30 days whether a suspension without pay should be imposed.

Regent President Walsh noted that the chancellor and the faculty committee might disagree.

Professor Dickey said that he would opt for consultation with the faculty committee; but he felt that the provost, not the committee, should make the decision.

The Committee then turned to the issue of burden of proof. Under proposed UWS 7, the burden of proof of just cause would be preponderance of evidence.

It was noted by Regent Spector that many of the governance body submissions argued for use of clear and convincing evidence.

Professor Dickey indicated that he would favor a standard higher than preponderance of evidence, and agreement was expressed by other Committee members.

In response to a question by Regent Rosenzweig as to why preponderance of evidence had been chosen, Ms. Brady explained that the standard of preponderance of evidence is used by the courts in sexual harassment cases.

Regent Spector stated that there seemed to be a consensus to change the burden of proof to clear and convincing evidence.

As to the issue of enlargements of time, Regent Spector noted that proposed UWS 7 provided for enlargements of time, if needed, by the hearing committee with the approval of the provost. Some governance group submissions proposed that the enlargements be granted by the faculty committee, without approval by the provost.

Regent Spector commented that the expedited process is a key part of the Committee's proposal to have these matters handled in a manner that is both timely and fair.

There was agreement to retain the existing wording of proposed UWS 7.

As to the issue the provost's role, Ms. Brady's memo explained that the proposed UWS 7 would provide for the provost to make many of the initial decisions, preserving the chancellor's neutrality in making the final institutional decision. It was suggested by a number of governance groups that the institutions should have the option of assigning those duties to either the provost or the chancellor.

Mr. Whitesel raised the question as to whether the decision would be made on a case-by-case basis or if the same person would be assigned to all cases; and Ms. Brady replied that it could be done either way.

Professor Schauer pointed out that, under UWS 4 and UWS 6, the chancellor, not the provost, is charged with initiating the action. He thought that there should be consistency of these sections with UWS 7 and expressed his view that the authority should remain with the chancellor.

David Musolf, Secretary of the UW-Madison Faculty, remarked that the Board had approved the UW-Madison faculty rules that included having the provost initiate disciplinary action. Similarly, campuses could adopt their own rules, subject to Board approval, for implementing UWS 7.

Professor Ray Spoto, President of The Association of UW Professionals, commented that, in accordance with the Northrup decision, the Board and governance groups need to be in agreement in order to move forward with proposed rules. He asked that governance group suggestions be incorporated.

Professor Georges Cravins, of UW-La Crosse, felt that each institution should be able to decide its own process. He also expressed his hope that the proposed rules would be in accord with the presumption that a person is innocent until proven guilty.

Regent Spector suggested that the rule provide for the chancellor or provost to initiate the process, and Committee members concurred with that suggestion.

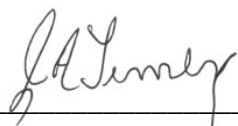
With regard to next steps, Regent Spector asked that the Committee meet again on May 25th. He also asked that Ms. Brady redraft the proposed rules to incorporate changes that had been agreed upon at this meeting and present options for remaining issues.

In response to a question by Ms. Brady, committee members expressed agreement with having the expedited disciplinary process triggered by bringing of a criminal charge, provided that UWS 4 is adequate for other cases.

It was agreed that the May 25th meeting would begin at 1:30 p.m.

The discussion concluded, the meeting was adjourned at 5:05 p.m.

Submitted by:



Judith A. Temby, Secretary