

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM

COMMITTEE REGARDING FACULTY/ ACADEMIC STAFF DISCIPLINARY PROCESS

Minutes of the Meeting

October 17, 2006

12:15 p.m.

Van Hise Hall

19th Floor Conference Room

1220 Linden Drive

Madison, Wisconsin

Committee Members Participating: Regent Michael Spector, Chair; General Counsel Patricia Brady, Professor Walter Dickey, Chancellor David Markee, Regent Peggy Rosenzweig, Regent Brent Smith, and Regent President David Walsh

Committee Members Unable to Participate: None

Upon motion by Regent Rosenzweig, seconded by Professor Dickey, the minutes of the May 25, 2006 meeting were approved on a unanimous voice vote.

On behalf of the Committee, Regent Spector stated appreciation for the consideration given by governance groups to the proposed disciplinary process rules and for the comments that they submitted.

He listed commonalities among the comments, along with three issues raised by the Legislative Council Rules Clearinghouse, and suggested that they be considered at this meeting. Discussion of those issues would be followed by discussion of process issues and other Legislative Council recommendations. There was agreement by the committee with proceeding in this fashion.

“Charged With” Language

Governance groups recommended removing the words “charged with” a felony from the definition of serious criminal misconduct, so that the definition would then cover those who pled guilty or no contest to or were convicted of one of six listed felonies.

Regent Spector noted that the committee had good reasons for including that language and recommended that it not be changed.

Professor Dickey asked whether, if the change were adopted, the university would be able to proceed under UWS 4 against a person charged with, but not convicted of, a felony; and Ms. Brady replied in the affirmative. Professor Dickey pointed out that dismissal proceedings require fact finding, so that a person's right to due process would not be violated. To make the requested change, he noted, would put the university's proceedings at the mercy of the criminal justice system and all the delays that can occur in those processes.

Regent President Walsh pointed out that the public does not understand why the university cannot act promptly in cases of serious criminal misconduct.

Regent Spector observed that, even without a conviction, the university might wish to take disciplinary action.

Regent Smith supported retaining the current language, believing that it includes adequate safeguards for the accused.

Chancellor Markee agreed, adding that removal of the language would impair the university's ability to act promptly.

Substantial Risk and Impairment of Public Trust

It had been recommended by governance groups that the definition of serious criminal misconduct be modified to provide that the identified felony both "clearly poses a substantial risk to the safety of members of the university community or others and (instead of "or", as in the current draft) seriously impairs the public trust in the university" or one of three other identified factors.

Ms. Brady stated her preference for retaining the current language, which would allow the definition to include financial crimes which might not pose a threat to physical safety but which could impair the public trust or the ability of the university to perform its mission.

Other members of the committee expressed agreement with Ms. Brady.

Public Trust

Governance groups suggested deletion from the definition of serious criminal misconduct the criterion that the crime "seriously impairs the public trust in the university", on the basis that the language is too vague.

It was noted by Ms. Brady that a crime that would seriously impair the public trust in the university probably would also impact one of the other three elements in the definition by impairing the university's ability to perform its missions, impairing the

ability of the charged faculty member to perform his/her duties, or impairing the opportunity of students to learn, do research, or engage in public service.

Regent Spector indicated that, while the public trust element of the definition would be the most susceptible to interpretation, the Committee considered it important to be able to rely on that criterion in some cases.

Regent President Walsh recalled that impairment of the public trust in three recent cases is what caused formation of the Committee and that, as a public institution, the university can be harmed by criminal actions that impair that trust. Noting that the declaration of policy also refers to the public trust, he pointed out that a felony charge requires a finding of probable cause, which is a substantial safeguard, and that the felony involved must be of the nature set forth in the proposed rules.

Professor Dickey added that civil disobedience or unpopular research would not meet the definition of serious criminal misconduct.

While he thought that most of the listed felonies would also meet one of the other elements of proposed 7.02 [c], Regent Spector expressed his preference for retaining the public trust criterion, as well.

Back Pay

Governance groups asked that back pay be mandatory if the decision was made not to dismiss the person whose pay was suspended.

Regent Spector agreed that back pay should be mandatory unless the accused person was in jail or otherwise unable to work.

Professor Dickey agreed but noted that a discipline short of dismissal might be to withhold pay for a certain amount of time.

In response to a question by Regent President Walsh, Regent Spector indicated that, under the proposed rules, pay could be suspended pending a final decision.

If a charge were withdrawn, Professor Dickey indicated, UWS 7 no longer would apply and any further proceedings would need to be taken under UWS 4. Ms. Brady added that, under UWS 4, suspension with pay is permitted.

Regent President Walsh commented that it would be a problem to return money if the charge were dropped because of inability of a witness to testify.

In response to a question by Regent Rosenzweig, Regent Spector indicated that a court decision would not dictate university action; and Legal Counsel Chris Ashley added that pay could be returned if the decision were made not to dismiss the person.

Professor Dickey suggested that, if the university decided to invoke a lesser penalty than dismissal, pay could be returned and the penalty could be invoked going forward.

Regent President Walsh added that the person would need to have been ready, willing and able to work in order to qualify for back pay.

Reporting of Felonies

It was pointed out by the Legislative Council Rules Clearinghouse that, as written, reporting of any felony would be required, not only the six included in the definition of serious criminal misconduct.

Regent Spector noted that the Committee thought it reasonable for any felony to be reported to the chancellor and that proceeding under UWS 4 might or might not be appropriate.

In response to a question by Regent Rosenzweig, Regent Spector explained that the Committee would review the entire report by the Rules Clearinghouse.

Professor Dickey commented that, because the requirement is included in UWS 7, reporting could reasonably be limited to the crimes enumerated in that chapter.

Ms. Brady noted that being charged with or convicted of a felony is a factual matter that any employee would know, whereas deciding whether the felony fits into one of the enumerated categories may be a matter of judgment. If all felonies were to be reported, the university could determine whether the crimes met the UWS 7 criteria.

Regent Rosenzweig expressed her preference for having the requirement limited to the enumerated felonies.

Noting that such reporting is not required by employment law, Regent President Walsh commented that not all felonies should have to be reported; and Regent Smith expressed agreement as well.

It was the consensus of the Committee that the language of UWS 7.04 be changed to provide a requirement for reporting a charge or conviction of any of the six felonies set forth in the chapter.

Disqualification of Investigator

The Rules Clearinghouse asked if the faculty member may challenge the impartiality of a second investigator, if the first one were to be disqualified.

Regent Spector commented that there should be a process for doing so. In that event, Professor Dickey emphasized the importance of maintaining the limit of three working days for requesting disqualification.

Regent President Walsh suggested that a limit of a certain number of hours be incorporated as well.

Opportunity for Filing Exceptions and Oral Argument

It was pointed out that the opportunity to file exceptions and present oral argument before the Board is provided by UWS 4 but is discretionary in UWS 7.

Regent Rosenzweig commented that she saw no reason for providing less process to the accused for charges of serious criminal misconduct than would be provided for lesser charges.

Professor Dickey agreed that the accused should have the same opportunity to be heard, at least in writing.

Regent Spector stated his agreement that providing such opportunity is an important part of due process.

Comments by Others

Regent Spector then opened the floor for comments by those in the audience.

Professor Robert Mathieu, Chair of the UW-Madison University Committee, noted that the “charged with” language was a matter of concern to many faculty, primarily because a faculty member could be dismissed on the basis of the charge itself, without ever being found guilty of a crime.

He remarked that the main goals should be to: 1) Ensure the safety of the campus community; and 2) remove someone charged with serious criminal misconduct from the payroll. Both goals, he pointed out, could be accomplished by suspension without pay.

Therefore, he suggested that serious misconduct be defined as a plea of guilty or no contest to or conviction of a felony as defined in the rule, but that being charged with such a felony be retained in the portion of the rule that provides for suspension without pay.

While some would not agree because of their opposition to any suspension without pay, he said that most concern about the “charged with” language has to do with opposition to a charge by itself being used as just cause for dismissal.

While he recognized Professor Mathieu's point, Professor Dickey commented that behavior is the basis for dismissal and that, through the hearing process, findings could be made about whether that behavior occurred. He agreed that suspension without pay would address critical issues of safety and public trust.

Regent President Walsh asked if the university could proceed expeditiously with regard to suspension without pay, and Professor Mathieu replied in the affirmative, noting that the standards for suspension are substantial likelihood that the person committed the crime or inability to report to work due to incarceration, conditions of bail or similar cause. UW-Madison faculty would recommend that the suspension decision be made by the Committee on Faculty Rights and Responsibilities.

In reply to a question by Regent President Walsh, Regent Spector indicated that the standard for dismissal is clear and convincing evidence.

Professor Dickey added that prosecution of a dismissal action would be dependent on criminal proceedings because of witness and evidence issues.

It was noted by Regent Spector that the time limits for a dismissal proceeding could be enlarged, if necessary.

Regent President Walsh considered Professor Mathieu's proposal sensible and more like what happens in other employment settings.

Professor Mathieu said that UW-Madison would propose an expedited process for suspension and, if there should be a conviction, an expedited process for dismissal.

Professor Joe Hogan, Chair of the UW-Whitewater Faculty Senate, commented that, if a person were charged with a crime, proceedings should be under UWS 4. If the person were convicted, UWS 7 could be employed.

Professor Richard Schauer, of the Association of UW Professionals, agreed that the expedited dismissal process could be used once a conviction is obtained. He said that many faculty oppose suspension without pay and the expedited dismissal process for someone who is only charged with a crime. Because faculty do not agree with the rule as proposed, he said that the board and the several faculties would not be jointly promulgating the rule, as required by law.

Asked by Regent Spector if he would agree with Professor Mathieu's proposal, Professor Schauer replied in the negative, stating that he would not support suspension without pay in the absence of a conviction or guilty plea.

Professor Mark Evenson, President of the Association of UW Professionals, agreed that faculties would not accept punishment on the basis of a charge alone. He added that a person's ability to clear his or her name would be impeded by suspension of pay.

Professor Dickey stated that Professor Mathieu's proposal would be acceptable to him.

Regent Spector remarked that a charge of serious criminal misconduct would allow consideration of suspension without pay, but not the expedited process, leaving UWS 4 timelines in place.

Ms. Brady observed that an accused person could be suspended without pay for a considerable period of time.

Regent Rosenzweig noted that there had been a public outcry because of the slowness of the dismissal process in recent cases and that UWS 7 would set forth the university's intent to proceed more quickly. She questioned whether the proposed rules should be altered, particularly if there were not faculty support for Professor Mathieu's proposal.

Regent President Walsh thought that provision for suspension without pay would satisfy 99% of the public concern, and Chancellor Markee expressed agreement with that view. Regent Walsh cautioned that, if the proposal were accepted, it would be important to attend to the issue of back pay.

Professor Dickey added that a statement should be included that UWS 4 practices must be tightened so that proceedings do not take an overly long period of time.

Regent President Walsh asked if faculties would have any problem with using the expedited process if a person were convicted of serious criminal misconduct, and Professors Schauer and Evenson replied in the negative.

Regent Spector observed that, in the recent UW-Madison cases, it took a long time to dismiss the faculty involved, even after they were convicted. In the meantime, they continued to be paid.

Professor Dickey pointed out that a criminal charge would not, by itself, be enough to justify suspension without pay. There also would have to be a finding of substantial likelihood that the accused committed the crime.

Noting that many faculty do not see that as adequate protection, Regent Spector pointed out that it is a higher standard than probable cause. In the recent cases, he did not think the public would have been as concerned if those involved had been suspended without pay.

Regent Spector said that the draft rules would be re-written to take "charged with" out of the definition of serious criminal misconduct, but that it would be retained in the provision for suspension without pay. The Committee then could meet again before the November Board of Regents meeting to review the revised draft and also to review other suggestions made by the Legislative Council Rules Clearinghouse.

Regent President Walsh suggested that faculty representatives be invited to meet with the Committee. Regent Spector concurred, noting that he did not agree that faculty have veto power over the proposed rules.

Read Gilgen, Chair of the UW-Madison Academic Staff Executive Committee, asked if academic staff representatives also would be invited, and Regent Spector replied in the affirmative.

David Musolf, Secretary of the UW-Madison Faculty, noted that faculty expressed concern about inclusion of impairment of public trust in the definition of serious criminal misconduct. Therefore, he suggested that it be deleted from UWS 7.02, but retained in the UWS 7.01 declaration of policy and that the sentence beginning on the fourth line be revised to read: "The university's effectiveness, and credibility, and ability to maintain public trust are undermined by criminal activity that poses a substantial risk to the safety of others, that seriously impairs the university's ability to fulfill its missions, or seriously impairs the faculty member's fitness or ability to fulfill his or her duties."

Professor Schauer suggested that some authority be shifted so that the chancellor and faculty committee would need to agree on use of the expedited process or suspension without pay. Noting that many faculty are not on campus during the summer, he suggested that a panel to hear any particular case could be drawn from all tenured faculty in order to ensure that proceedings are conducted in a timely way.

Regent Spector asked that, for the next meeting, the current draft rules be annotated to show the proposed changes, including those suggested by the Legislative Council. He planned to work with General Counsel Brady on proposed language regarding back pay.

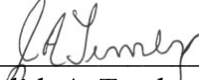
It was agreed that the next meeting of the committee would be on October 30, 2006, at 12:15 p.m.

Regent President Walsh said that the committee would meet with faculty representatives after the Board's November meetings.

Professor Evenson commented that the matter of process is just as important to faculty as the "charged with" language. While he supported the idea of having a meeting with faculty representatives, he said that such a meeting should not be considered a substitute for votes of faculty governance groups.

Regent President Walsh expressed the hope that governance groups would support the proposed rules as well.

The discussion concluded and the meeting was adjourned at 2:50 p.m.



Judith A. Temby, Secretary