

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM

COMMITTEE REGARDING FACULTY/ACADEMIC STAFF DISCIPLINARY
PROCESS

Minutes of the Meeting

October 30, 2006

12:25 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, and Regent President David Walsh

Unable to Attend: None

Regent Spector presiding

The minutes of the October 17, 2006 meeting were revised to change the word "hour" to "days" in the first sentence of the second paragraph on page 5. With that revision, the minutes were approved, upon motion by Regent Rosenzweig, seconded by Chancellor Markee.

Regent Spector referred to revised draft rules that had been prepared pursuant to discussion at the October 17th meeting. Comments by the Legislative Council Rules Clearinghouse were helpful, he noted, adding that many were incorporated in the revised draft.

Changes that had been made included the following:

- s. UWS 4.09 was created in order to conform chapter UWS 4 with UWS 7 provisions for suspension without pay in certain cases.
- The definition of serious criminal misconduct in s. UWS 7.02 was changed to remove being charged with, but not being convicted of or pleading guilty or no contest to, one of the enumerated felonies.
- Also removed from s. UWS 7.02 was the stand-alone criterion of seriously impairing the public trust in the university. Faculty felt strongly that this criterion was vague and overly subject to discretionary interpretation.
- Reporting responsibility in s. UWS 7.04 was changed to make the provision limited to felonies of the type listed in s. UWS 7.02(1)(a).
- s. UWS 7.05 (1)(b) was re-written to provide for opportunity to request that alternative investigators be disqualified on grounds of lack of impartiality.
- Provision for suspension without pay was retained in s. UWS 7.06(1)(a) for a faculty member charged with serious criminal misconduct if it is found that there is substantial likelihood that the person engaged in the conduct as alleged.

- Similar changes were made to ch. UWS 11, pertaining to academic staff holding indefinite appointments.

Regent President Walsh presiding

Regent President Walsh suggested that s. UWS 7.05(b) be revised to add “or other cause” to “lack of impartiality” as reasons for disqualification of an investigator.

Regent Rosenzweig moved that s. UWS 7.05(b) be revised accordingly, and the motion was seconded by Professor Dickey.

Professor Dickey moved that the third sentence declaration of policy in s. UWS 7.01 be revised, as suggested by David Musolf, secretary of the faculty at UW-Madison, to state that: “The university’s effectiveness, credibility, and ability to maintain public trust are undermined by criminal activity that poses a substantial risk to the safety of others, 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.” The motion was seconded by Ms. Brady.

Regent Spector commented that this change would maintain the words “public trust” in the policy statement of the rule, while addressing concerns that it was overly broad and too subject to interpretation to include among the criteria in s. UWS 7.02.

Regent Rosenzweig stated her agreement with that assessment.

The question was put on the two proposed amendments, and they were adopted on a unanimous voice vote.

Professor Dickey moved that provision be made that, if a faculty member were suspended without pay and dismissal proceedings were commenced under ch. UWS 4, the expedited dismissal process of ch. UWS 7 could be invoked if the person were convicted of or pled guilty or no contest to the crime.

The motion was seconded by Regent Rosenzweig and adopted on a unanimous voice vote.

Ms. Brady referred to the provision in the revised rules for mandatory back pay if the person is not dismissed. If the person were to receive a lesser punishment, it would be taken out of his or her pay prospectively.

Regent President Walsh noted the possibility that a person could be suspended without pay for a semester while a dismissal proceeding was under way. If a decision were made not to dismiss that person but instead to impose a suspension without pay for a semester, he or she could end up receiving back pay for the first semester of suspension and then be suspended without pay for another semester.

Professor Dickey added that this kind of result would penalize the university through loss of an additional semester of teaching.

Regent President Walsh asked if there were cases in which lesser punishments were imposed after dismissal was originally sought; and Ms. Brady replied in the affirmative, citing a recent case in which the faculty member was demoted, rather than dismissed.

Professor Dickey moved that s. UWS 7.06 be revised to provide that, if a lesser penalty than dismissal is imposed, any period of suspension without pay be offset by period of any suspension without pay already served by the faculty member.

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

At the request of Regent Spector, Ms. Brady discussed comments made by the Legislative Council Rules Clearinghouse, noting that all but seven items had been addressed.

In the definition of serious criminal misconduct, the clearinghouse recommended removal of “pleading guilty” to a one of the enumerated felonies, on the grounds it is unnecessary since a plea of guilty would necessarily result in a conviction, which is already included in the definition.

Professor Dickey noted the distinction between a guilty plea and a conviction, remarking that there would be a time lapse between a plea and entry of judgment.

Ms. Brady recommended that it be retained in the definition and there was agreement with that recommendation.

With regard to suspension without pay, Ms. Brady noted that one of the conditions under which that could occur is inability to report for work. The clearinghouse pointed out that conviction of a misdemeanor or other circumstance could also result in being unable to work and asked if that is the intent of the rule.

Regent Rosenzweig suggested that the comment be answered by indicating that ch. UWS 4 could be employed in the case of a misdemeanor, and Professor Dickey added that the intent of ch. UWS 7 is not to cover misdemeanors.

In s. UWS 7.05, the clearinghouse suggested specifying the purpose of the investigation, defining the appropriate governance representatives and specifying minimal findings that must be made in order for the chancellor to proceed.

With regard to the first two suggestions, Ms. Brady indicated that these are matters that are understood and do not need specification. With regard to the third suggestion, she thought that it would not be wise to have the chancellor make such findings at the beginning of the process since he or she is the final decision maker. Rather, the findings should result from the faculty committee hearing.

While she agreed with the latter point, Regent Rosenzweig felt it might be beneficial to be more specific about the former points, particularly given the high level of scrutiny that this rule would receive.

Ms. Brady noted that governance representatives are formed on each campus and that not all groups have the same name.

Professor Dickey suggested that language be added to s. UWS 7.05(1)(a) to specify that the investigation will address whether to proceed with dismissal proceedings.

Regent Rosenzweig moved approval of that revision. The motion was seconded by Chancellor Markee and adopted on a unanimous voice vote.

Professor Robert Mathieu, Chair of the UW-Madison University Committee, indicated that, in s. UWS 7.06, the UW-Madison faculty preferred a standard of clear and convincing evidence, rather than substantial likelihood. He asked whether substantial likelihood is an adequate standard for the punitive action of suspension without pay and if there would be an investigation to provide a basis for the chancellor's decision on the question of suspension.

In response, Regent President Walsh indicated that substantial likelihood is a higher standard than the standard used in employment law. Professor Dickey added that, for dismissal, serious criminal misconduct must be found by clear and convincing evidence. For the preliminary decision of suspension without pay, substantial likelihood is a very high standard.

Regent President Walsh suggested that language be added to s. UWS 7.06 to incorporate the investigative report set forth in s. UWS 7.05 as the basis for the chancellor's decision.

Professor Richard Schauer, of The Association of UW Professionals, suggested that the words "charged with" be removed from the suspension without pay provision.

Professor Mark Evenson, President of The Association of UW Professionals said that the majority of faculty senates oppose suspension without pay. If the provision is retained, he suggested adding review of the investigative report with the faculty governance body and a determining role for faculty in deciding whether to take this punitive action. He also thought that the proposed rule caused the chancellor to be rushed into a decision on suspension without pay.

Regent President Walsh pointed out that there would be no time line requiring a decision on suspension without pay because needed evidence might not be available.

Speaking in support of retaining the suspension without pay provision, Professor Dickey pointed out that people are put in jail on the basis of probable cause, a lower standard than substantial likelihood.

Noting that existing rules did not work well in three recent cases, Regent President Walsh said that the public needs to have confidence that the university can move quickly and fairly when such cases arise.

Mr. Musolf asked if making a revision to ch. UWS 4 might be seen as opening the door to making other changes to that chapter.

Replying in the negative, Ms. Brady indicated that a cross reference in s. UWS 4.09 is needed.

Professor Dickey moved to revise the draft rules to provide that, before there can be suspension without pay, there must be completion of an investigative report pursuant to s. UWS 7.05 and a preliminary finding that the faculty member engaged in the criminal behavior as charged. The motion was seconded by Regent Rosenzweig and adopted on a unanimous voice vote.

The question was put on a motion by Regent Rosenzweig, seconded by Professor Dickey, to approve the proposed rules as amended; and the motion was adopted on a unanimous voice vote.

As to next steps, Regent Spector said that the proposed rules would be redrafted in accordance with the decisions made at this meeting; and a status report would be made to the Board of Regents at the November meeting. Later in the month, there would be a meeting with faculty, academic staff and student representatives to discuss the proposed rules further; which he hoped that this would help to achieve agreement on them. The rules would be returned to the board in December.

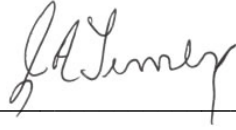
Professor Schauer suggested an additional meeting before the one involving faculty, academic staff, and student representatives to go over the draft rules as re-written.

Regent President Walsh said that the revised draft rules would be circulated as soon as possible to all who want to see them for written comments.

Professor Mathieu asked if the document would be returned again to the faculty senates, and Professor Schauer added that the faculty representatives are not a decision-making body. Professor Mathieu suggested that the chairs of the governing bodies could attend and take the draft rules back to their campus senates.

Regent President Walsh said that, while some might never agree with all provisions, the intention would be to get as much input as possible.

The discussion concluded and the meeting was adjourned at 2:40 p.m., upon motion by Regent Rosenzweig, seconded by Chancellor Markee.

A handwritten signature in cursive script, reading "J. A. Temby". The signature is positioned above a horizontal line that spans the width of the signature.

Judith A. Temby, Secretary